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**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

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| SEAN HARTRANFT, on behalf of himself and all others similarly situated,<br><br>Plaintiff,<br><br>v.<br><br>TVI, Inc. d/b/a SAVERS, INC., APOGEE RETAIL, LLC,<br><br>Defendants. | Case No. 8:15-cv-01081-CJC-DFM<br><br>**CLASS ACTION**<br><br>**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND CERTIFICATION OF THE SETTLEMENT CLASS**<br><br>Judge: Hon. Cormac J. Carney<br>Hearing Date: October 21, 2019<br>Time: 1:30 p.m.<br>Courtroom: 7C |

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## I. INTRODUCTION

Plaintiff Sean Hartranft, individually, and on behalf of a proposed Settlement Class (hereinafter the "Settlement Class"), hereby moves the Court for an Order granting this Motion for Final Approval of Class Action Settlement and Certification of the Settlement Class. This motion is not opposed by Defendants TVI, Inc., dba Savers, Inc. and Apogee Retail, LLC ("Defendants"). Plaintiff moves for final approval on the grounds that the settlement is fair, adequate, and reasonable and otherwise satisfies the requirements for final approval, including Rule 23(e)(2).

After notice to the Settlement Class by direct mail and publication notice, and after comparing the list of cellphone numbers called with tens of thousands of cellphone numbers submitted with potential claims, it has been determined there are 11,438 approved claims submitted. Each of those approved claimants will receive a Certificate for $75.00 to purchase products at Defendants' stores, or in lieu of a Certificate, they can elect to receive a check for $25.00 (Claimants will have the opportunity to make their election after final approval is obtained and the Certificates are mailed and received by the claimants; as such, the number of persons making the choice between Certificates and cash is unknown at this time.). Most important, no objections have been received and only 34 valid requests for exclusion ("opt outs") submitted. *See* Declaration of Ani S. Sarich on Behalf of Claims Administrator with Respect to Motion for Final Approval ("Sarich Decl.") ¶ 21. The lack of objectors and minimal opt outs confirm the Settlement Class members believe the settlement is fair, reasonable and adequate.

As explained below, Rule 23's requirements have been satisfied and the Settlement Class members were given adequate notice of the Settlement. Therefore, the Court should deem the Settlement fair, adequate and reasonable. Because all requirements for final approval have been met, final approval should be granted.

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## II. THE SETTLEMENT CLASS SATISFIES THE APPLICABLE REQUIREMENTS OF RULE 23

### A. Notice has been provided to the Settlement Class, claims have been submitted and the Opt Out and Objection deadlines have passed.

On April 18, 2019, the Court preliminarily certified, for settlement purposes, the following Settlement Class:

> All persons and entities to which, between and including July 1, 2011, to September 30, 2015, Apogee Retail, LLC made or attempted to make one or more telephone calls to their cellular telephones regarding donation solicitation on behalf of Epilepsy Foundation of America.[1]

Dkt. 101 at 3.[2] A 24-hour toll-free telephone line was established to provide information and to allow specific questions of Settlement Class members to be answered. Sarich Decl., ¶ 6. A settlement website was established to post all case information and filings (www.DonationCallSettlement.com) and a case-specific email address was maintained. *Id.* ¶¶ 7-8. On May 17, 2019, the postcard-type Class Notices were mailed to 747,635 Settlement Class members. *Id.* ¶ 14. The Claims Administrator was able to skip-trace addresses of the 4,644 returned notices and re-mail 1,409 of those notices. *Id*. ¶¶ 16-17. Thus, out of the total amount of Class Notices mailed, more than 99% were delivered and only 3,235 remain undeliverable, or .43%. *Id.* ¶ 17. In addition, the Class Notice was published in USA Today on June 5, 2019. The deadline of July 16, 2019 to opt out or object has expired. *Id*. ¶ 20. No objections have been received. The final results are in and there are no objections and only 34 valid opt outs out of 747,635 known Settlement

[1] The Settlement Agreement also provides the following: "Excluded from the Settlement Class are Defendants and any of their affiliates or subsidiaries, and any entities in which any of such companies have a controlling interest, the judges presiding in the Action, and Class Counsel." Dkt. 99-1at 10.

[2] For citations to documents and other pleadings in the docket, Plaintiff cites to the page numbers electronically generated at the top of each page by the ECF docket management system.

Class members. *Id.* ¶ 21. There were 11,438 valid claims submitted. For the reasons stated below, the Court should give final approval to the Settlement and certify the above-defined Settlement Class.

**B. This Settlement meets Rule 23's requirements.**

Class actions are governed by Rule 23 of the Federal Rules of Civil Procedure. The threshold task in determining whether to certify a class for settlement purposes is to examine whether the four requirements of Rule 23(a) are met. *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 614 (1997); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). Additionally, parties seeking certification must show that the action satisfies at least one subsection of Rule 23(b). *Amchem*, 521 U.S. at 614; *Hanlon*, 150 F.3d at 1022. Many of the qualifying criteria in Rule 23(a) and (b) exist to protect the interests of absent class members and therefore deserve "undiluted, even heightened, attention" in the context of a settlement-only class certification. *Amchem*, at 620; *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 848–49 (1999) (explaining that when a district court "certifies for class action settlement only, the moment of certification requires 'heightene[d] attention' to the justifications for binding the class members" (quoting *Amchem*, at 620)).

Rule 23(a) provides that a district court may certify a class only if: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). That is, the class must satisfy the requirements of numerosity, commonality, typicality, and adequacy of representation to maintain a class action. *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012).

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If all four prerequisites of Rule 23(a) are satisfied, the action must also be maintainable under one of the three subsections of Rule 23(b). *Hanlon*, 150 F.3d at 1022. In the instant case, the Parties propose certification pursuant to Rule 23(b)(3). To qualify for certification under that subsection, common questions of law or fact must "predominate over any questions affecting only individual members" and class resolution must be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

It should be noted, however, that "[t]he criteria for class certification are applied differently in litigation classes and settlement classes." *In re Hyundai and Kia Fuel Economy Litigation*, 926 F.3d 539, 556 (9th Cir. 2019) (*en banc*). "In deciding whether to certify a litigation class, a district court must be concerned with manageability at trial." *Id*. But "such manageability is not a concern in certifying a settlement class where, by definition, there will be no trial." *Id*. at 556-57. What the district court "must give heightened attention to [in deciding whether to certify a settlement class is] the definition of the class or subclasses." *Id*. at 557. The purpose is "to protect absentees by blocking unwarranted or overbroad class definitions …" *Id*. at 557 (quoting *Amchem*, 521 U.S. at 620).

### C. Rule 23(a) requirements have been satisfied.

Rule 23(a) conditions class certification on fulfillment of four requirements: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. *Mazza*, 666 F.3d at 588.

#### 1. Numerosity

Pursuant to Rule 23(a)(1), the class must be "so numerous that joinder of all members is impracticable." Although there is no talismanic numerical cutoff for impracticability of joinder, a class size of 40 or more members usually is enough. *Corley v. Google, Inc*., 316 F.R.D. 277, 290 (N.D. Cal. 2016); *see also* 1 Newberg on Class Actions § 3:12 (5th ed. 2017). Here, the numerosity requirement is easily

met by the 747,635 known Settlement Class members. As the Court noted in the Preliminary Approval Order, the "The Settlement Class satisfies Fed. R. Civ. P. 23(a)(1) because the Settlement Class appears to be so numerous that joinder of all members is impracticable." Dkt. 101 at 3. The numerosity requirement is definitively satisfied.

**2. Commonality**

Rule 23(a)(2) states that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all members only if there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). This requirement has "been construed permissively, and all questions of fact and law need not be common to satisfy the rule." *Ellis v. Costco Wholesale Corp*., 657 F.3d 970, 981 (9th Cir. 2011) (citation, internal quotation marks, and alteration omitted). Indeed, "for purposes of Rule 23(a)(2)[,] even a single common question will do." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011) (citation, internal quotation marks, and alteration omitted); *Mazza*, 666 F.3d at 589 ("[C]ommonality only requires a single significant question of law or fact."). Thus, "[w]here the circumstances of each particular class member vary but retain a common core of factual or legal issues with the rest of the class, commonality exists." *Parsons v. Ryan*, 754 F.3d 657, 675 (9th Cir. 2014) (quoting *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1029 (9th Cir. 2012)).

Here, the Parties have presented a narrow legal issue that is susceptible to class-wide determination: whether Defendants allegedly violated the Telephone Consumer Protection Act, 47 U.S.C. Section 227, *et. seq.* ("TCPA") by calling Settlement Class members on their cellphones with an automatic telephone dialing system without their prior express consent and then soliciting Settlement Class members to make donations to the Epilepsy Foundation of America. *See* Settlement Agreement ("Agreement") at 1, Dkt. 99-2, Ex. 1 at 17. This common legal issue

"that is central to the validity of each one of the[ir] claims" can be determined for all Settlement Class members "in one stroke." *Dukes*, 564 U.S. at 350.

In addition, the common answer to this question is "apt to drive the resolution" of the legal issue in this Action. *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 957 (9th Cir. 2013) (quoting *Dukes*, 564 U.S. at 350). All Settlement Class members' claims are premised on Defendants calling them on their cellphones with an automatic telephone dialing system without their prior consent. Thus, the operative complaint contains a common contention capable of class-wide resolution—"one type of injury allegedly inflicted by one actor in violation of one legal norm." *Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1154 (9th Cir. 2016). Accordingly, commonality is satisfied.

**3. Typicality**

Under Rule 23(a)(3), a representative party must assert claims or defenses that are "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Typicality is satisfied "when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010) (citation omitted). This requirement is permissive and requires only that the representative's claims "are reasonably co-extensive with those of the absent class members; they need not be substantially identical." *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1042 (9th Cir. 2012) (quoting *Hanlon*, 150 F.3d at 1020). The purpose of the typicality requirement is to assure that "the interest of the named representative aligns with the interests of the class." *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1141 (9th Cir. 2016) (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)).

Here, typicality has been established. Plaintiff's and the Settlement Class members' claims stem from the same alleged course of conduct—Defendants

alleged to be calling them on their cellphones with an automatic telephone dialing system without their prior consent. As the Ninth Circuit has instructed, "it is sufficient for typicality if the plaintiff endured a course of conduct directed against the class." *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1118 (9th Cir. 2017). Accordingly, Plaintiff's claim is typical of the Settlement Class members' claims. *See Hanlon*, 150 F.3d at 1020.

**4. Adequacy**

Finally, Rule 23(a)(4) asks whether "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This inquiry seeks to uncover conflicts of interest between named parties and the class they seek to represent, thereby guarding the due-process right of absent class members not to be bound to a judgment without adequate representation by the parties participating in the litigation. *See Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 158 fn.13 (1982); *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940). Adequacy of representation turns upon resolution of two questions: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 943 (9th Cir. 2015) (citation omitted).

Here, there are no conflicts of interest between Plaintiff and Class Counsel, on the one hand, and the Settlement Class members, on the other. At the fundamental level, all Settlement Class members are potential victims of the same conduct: being called by Defendants on their cellphones with an automatic telephone dialing system without their prior consent. Thus, all Settlement Class members seek the same relief as a result of the alleged TCPA violations.

The second adequacy inquiry examines the vigor with which Plaintiff and Class Counsel pursued the common claim. Here, there is no doubt that Class

Counsel have vigorously pursued the litigation of this case. This case was filed in 2015, motion practice and discovery ensued, then the case was stayed, further motion practice and discovery occurred, then mediation proceeded with the Hon. Edward A. Infante, (Ret.) of JAMS, followed by many months of negotiating the settlement details. *See* Declaration of Douglas J. Campion in Support of Plaintiffs' Unopposed Motion for Preliminary Approval, Dkt. 99-2 at 3, ¶¶ 2-3. The actions by Plaintiff and Class Counsel were taken to advance the litigation. *See Hanlon*, 150 F.3d at 1021. The vigorous prosecution of this Action satisfies the Rule 23(a)(4) concerns.

In sum, the Settlement Class meets Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy of representation under the heightened scrutiny mandated in the settlement-only context.

**D. Rule 23(b)(3)'s requirements have been satisfied.**

Rule 23(b)(3) can be broken into two component pieces: (1) predominance, and (2) superiority. *Hanlon*, 150 F.3d at 1022. It is now settled in this Circuit that predominance "must be considered in light of the reason for which certification is sought—litigation or settlement—which 'is relevant to a class certification.'" *Hyundai*, 926 F.3d at 558 (quoting *Amchem*, 521 U.S. at 619). "As noted above, in deciding whether to certify a settlement-only class, 'a district court need not inquire whether the case, if tried, would present intractable management problems.'" *Id*. (quoting *Amchem*, at 620). "[T]he aspects of Rule 23(a) and (b) that are important to certifying a settlement class are 'those designed to protect absentees by blocking unwarranted or overbroad class definitions.'" *Id*. A class that may not be certifiable for litigation may be certifiable for settlement "if the settlement obviates the need to litigate individualized issues that would make a trial unmanageable." *Id*. (citing 2 William B. Rubenstein, *Newberg on Class Actions* § 4:63 (5th ed. 2018)). As explained below, both predominance and superiority are satisfied here.

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### 1. Predominance

Under Rule 23(b)(3), plaintiffs must show "that the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). The Rule 23(b)(3) predominance requirement is "even more demanding" than Rule 23(a)'s commonality counterpart. *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013). Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623 (citation omitted). The Ninth Circuit has held that "there is clear justification for handling the dispute on a representative rather than an individual basis" if "common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication." *Hanlon*, 150 F.3d at 1022. Before certifying a settlement-only class under Rule 23(b)(3), a district court must conduct a rigorous analysis of predominance. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). The predominance analysis focuses on "the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement." *Amchem*, 521 U.S. at 623. The ultimate question is whether "the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036, 1045 (2016).

As discussed in the commonality requirement, Plaintiff's case for liability depends on whether Defendants called Settlement Class members on their cellphones with an automatic telephone dialing system without their prior consent. Indeed, the claims of Plaintiff and the Settlement Class members rise or fall on the answer to this common legal question. And this liability question can be resolved using the same evidence for all Settlement Class members: Defendants' records showing they made those phone calls. Because the common legal and factual issues

turn on a common course of conduct by Defendants, "[a] common nucleus of facts and potential legal remedies dominates this litigation." *Hanlon*, 150 F.3d at 1022. Accordingly, Plaintiff has established Rule 23(b)(3) predominance.

**2. Superiority**

Rule 23(b)(3) provides four non-exhaustive factors for a court to consider in determining whether a class action is superior to other methods of adjudication. These factors are:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3). "[T]he purpose of the superiority requirement is to assure that the class action is the most efficient and effective means of resolving the controversy." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) (alteration in original) (citation omitted). Where plaintiffs cannot proceed individually because the disparity between litigation costs and the recovery sought is too high, the class-action device may be an effective means "to pool claims which would be uneconomical to litigate individually." *Local Joint Exec. Bd. of Culinary/Bartender Tr. Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163 (9th Cir. 2001) (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985)); *see also* 7AA Charles Alan Wright et al., Federal Practice and Procedure § 1779 (3d ed. 2018) ("[I]f a comparative evaluation of other procedures reveals no other realistic possibilities, [the superiority] portion of Rule 23(b)(3) has been satisfied."). Examining the applicable factors, Plaintiff has established superiority.

The first factor is each class member's interest in "individually controlling the prosecution or defense of separate actions." Fed. R. Civ. P. 23(b)(3)(A). "Where recovery on an individual basis would be dwarfed by the cost of litigating on an individual basis, this factor weighs in favor of class certification." *Wolin*, 617 F.3d

at 1175. Here, the amount at stake for individual Settlement Class members ($500 or $1,500 if the call was intentional) is too small to bear the risks and costs of litigating a separate action. To date, Class Counsel has incurred substantial litigation costs and attorneys' fees, which an individual plaintiff would likely not incur to pursue a claim. Moreover, Defendants have the resources to strongly contest an individual plaintiff's lawsuit. Because individual damages pale in comparison to the costs of litigation, this factor points toward certification.

The second factor is "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class." Fed. R. Civ. P. 23(b)(3)(B). Here, the Parties are not aware of any other cases brought "concerning the [same] controversy." *Id*. Consequently, this factor too weighs in favor of certification.

The third factor is "the desirability or undesirability of concentrating the litigation of the claims in the particular forum." Fed. R. Civ. P. 23(b)(3)(C). Here, there is no other litigation. This factor is irrelevant.

The fourth factor is manageability, which requires that courts consider "the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3)(D). However, as set forth above, when "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems." *Amchem*, 521 U.S. at 620. In fact, the Parties settled precisely to avoid going to trial. *Id*. In this context, the Court need not address the manageability factor.

In sum, the predominating legal issue in this Action is whether Defendants called Settlement Class members on their cellphones with an automatic telephone dialing system without their prior consent. This question can be resolved using the same evidence for all Settlement Class members. Because this legal issue can be resolved without subjecting the judicial process through thousands of individual trials, class treatment is the superior method of adjudicating this Action.

Accordingly, as all requirements of class certification under Rule 23 are met, the settlement should be given final approval and the Settlement Class certified.

## III. THE SETTLEMENT

### A. The Settlement is fair, adequate and reasonable.

The Court should begin its analysis with a presumption that the Agreement is fair and should be approved. *Garner v. State Farm Mut. Auto. Ins. Co.*, No. 08-1365, 2010 WL 1687832, at *13 (N.D. Cal., Apr. 22, 2010) ("[w]here a settlement is the product of arms-length negotiations conducted by capable and experienced counsel, the Court begins its analysis with a presumption that the settlement is fair and reasonable"). "A binding settlement must provide notice to the class in a 'reasonable manner' and otherwise be 'fair, reasonable, and adequate.'" *Hyundai*, 926 F.3d at 567 (quoting Fed. R. Civ. P. 23(e)(1), (2)); *see also In re Heritage Bond Litig.*, 546 F.3d 667, 674–75 (9th Cir. 2008) ("A district court may approve a proposed settlement in a class action only if the compromise is fundamentally fair, adequate, and reasonable."); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993) (same). This determination requires a balancing of several factors which may include, among others, some or all of the following:

> (1) the strength of the plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members of the proposed settlement.

*In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) (quoting *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)). When measured against these factors, the Settlement is fair, adequate, and reasonable.

### B. Relief obtained.

As explained in the Plaintiff's Memorandum of Points and Authorities in

Support of Unopposed Motion for Preliminary Approval of Class Action Settlement and Certification of Settlement Class, ("Prelim. App. Mtn."), Dkt. 99-1, every Settlement Class member that submits a claim will receive a Certificate redeemable for either $75 to purchase products at Defendants' stores or, at the claimant's option, $25 in cash. Thus, each claimant is guaranteed to receive one or the other, in that fixed amount which is not dependent on the number of claims. Any person with a Certificate may use it in any of Defendants' 145 U.S. Savers or Value Village stores, whose inventory of used goods is all priced below the $75 Certificate value. These 145 thrift stores owned by Defendants sell donated used clothing and household goods, and are located in the geographical areas in which the contested cellphone calls were made to allow the pickup of donated goods sought by the calls made. Therefore, it is believed most claimants will be able to readily use the Certificates to purchase goods, if they choose that option. Also, as explained in the Prelim. App. Mtn., these Certificates are not "coupons" under CAFA. See Dkt. 99-1 at 18, 19.

The certainty of the amount each claimant will receive--despite whatever number of claims that might have been submitted--favors approval. Anyone that submitted a claim will receive a guaranteed amount of either $75 in products or $25 in cash, at their option. Here there are 11,438 valid claims submitted by Settlement Class members. If all those claimants choose the $75 Certificate, the total value of the claims made is $857,850. Of course, if some claimants choose the Cash Award option, the total would vary accordingly. Either way, the relief obtained for the Settlement Class is fair, adequate and reasonable under Rule 23(e)(2)(c), especially when measured against the risks facing the Settlement Class members.

### C. The attorneys' fees and costs and service award sought are fair and reasonable in light of the relief obtained for the Settlement Class.

Class Counsel filed a motion seeking attorneys' fees of $885,665 and costs of $14,335 for a combined total of $900,000. Class Counsel are also seeking an

incentive payment to Plaintiff for the modest amount of $5,000.

### D. Settlement Class Members received adequate notice of the Settlement.

"Before the district court approves a class settlement under Rule 23(e), it is 'critical' that class members receive adequate notice." *Hyundai*, 926 F.3d at 567 (citing *Hanlon*, 150 F.3d at 1025). The district court must provide class members with "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). "To satisfy Rule 23(e)(1), settlement notices must 'present information about a proposed settlement neutrally, simply, and understandably.'" *Hyundai*, at 567 (quoting *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 962 (9th Cir. 2009)). "Notice is satisfactory if it 'generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard.'" *Id.* (quoting *Churchill*, 361 F.3d at 575).

Here, as detailed above, the direct mail postcards reached over 99% of the 747,635 Settlement Class members in the Notice database, a very high percentage. Sarich Decl. ¶ 18. In the Preliminary Approval Order, the Court found the means of providing Notice was "reasonable, that it constitutes due, adequate and sufficient notice to all persons entitled to receive notice, and that it meets the requirements of due process, Rule 23 of the Federal Rules of Civil Procedure, and any other applicable laws." Preliminary Approval Order, Dkt. 101 at 6. On May 17, 2019, the Class Notice postcards were mailed, via U.S. First Class Mail, to 747,635 Settlement Class members for whom Defendants had addresses. Sarich Decl. ¶ 14. As per the Agreement, Dkt. 99-2 at 32-33, a follow-up was completed by the Claims Administrator for returned mail. Of those, 4,644 were returned, and 1,409 re-mailed. *Id*. at ¶ 17. In addition, the Class Notice was published in USA Today on June 5, 2019, giving notice to those persons that might have been called by

Defendants for whom Defendants may not have had addresses for in their database. *Id*. ¶ 12; Agreement, Dkt. 99-2 at 34. Furthermore, the CAFA Notice was served on the Attorneys General as well. Sarich Decl. ¶ 4. Thus, the notice plan has been fully implemented and complies with both due process and Rule 23(c)(2)(B).

**E. The response to the notice and claims submitted.**

In total, 48,061 claims were submitted. Sarich Decl. ¶ 23. That equals a response rate of 6.4%. However, of those claims, 36,534 were deemed invalid because the cellphone numbers on those claims did not match the numbers on the called list.[3] *Id*. ¶ 29. Ultimately, 11,438 claims were approved by the Claims

[3] It should be noted that The number of potential claims submitted to the Claims Administrator was substantial, 48,061, with tens of thousands of persons who were not called and had not received a direct mail postcard notice submitted claims and attempted to determine if they were in the Settlement Class. Sarich Decl. ¶ 23. The claims of those persons were denied because the cellphone numbers they submitted did not match the cellphone numbers on the list of called numbers totaled 36,534. *Id*. ¶ 29. In an abundance of caution, the Parties chose to be over-inclusive and give potential Settlement Class members an opportunity to determine if their cellphone numbers had been called. As a result, the Parties decided to publish the Class Notice in addition to direct mailing to known addresses. That publication notice led to tens of thousands of persons submitting claims online to determine whether their cell number was on the list of cell numbers called. Only 4,876 of the 36,534 were on the list. With social media what it is today, it is no surprise that when there is such a publication notice, or other broadly distributed notice of a potential reward in a class action, many of those notices get republished on websites formed for the purpose of spreading the word on potential class action payouts, generating many calls from persons totally unrelated to the Action, but interested in obtaining a payout. For example, for a few of the sites reposting the settlement information, see https://www.hustlermoneyblog.com/savers-donation-class-action-lawsuit/; https://www.classactionsreporter.com/settlements/savers-and-apogee-donation-calls-settlement; https://topclassactions.com/lawsuit-settlements/closed-settlements/897149-savers-donation-call-class-action-settlement/; and https://www.classactionrebates.com/settlements/donation-call-settlement/. Those 36,534 submitted claims resulted in 31,658 rejected claims. *Id.*, ¶ 29.

Administrator. *Id*. ¶ 29.

As a percentage of the total number of Settlement Class members provided notice, the number of valid claims submitted is a relatively low percentage compared to other consumer class actions, approximately 1.5%. The "prevailing rule of thumb with respect to [claims rate in] consumer class actions is 3-5 percent." *Forcellati v. Hyland's, Inc.*, No. 12-1983, 2014 WL 1410264, at *6 (C.D. Cal. Apr. 9, 2014).

However, a lower than usual number of claims submitted is not a sufficient reason to not approve the settlement. As the court held in *Bellows v. NCO Financial Systems, Inc.*, "the fact that very few Class Members made a claim should not deter the Court from approving the settlement. Proper notice was given to the Class Members, a claim-procedure was implemented that liberally permitted the making of claims, and the procedure did not require anything to be submitted in writing in order to make a claim." No. 3:07-cv-01413 – W - AJB, 2008 WL 5458986, at *8 (S.D. Cal. Dec. 10, 2008). The *Bellows* court cited to *Beecher v. Able*, 441 F. Supp. 426, 429 (S.D. N.Y. 1977), where a much smaller number of claims were made in a class action than expected, "[i]n such circumstances, the settlement agreement should not lightly be set aside merely because subsequent developments have indicated that the bargain is more beneficial to one side than to the other." In that case the defendant urged the court to set aside the non-reversionary settlement agreement because the total settlement amounts would be paid not back to defendant but to a much smaller group of claimants than the parties expected. The court refused to set aside the agreement, especially since the parties had built contingencies into the agreement in the event of high or low number of claims, and thus any mistakes were only a matter of degree, not to the heart of the matter. *Id*. at 430; *see also Bernstein v. Brenner*, 320 F.Supp. 1080, 1086 (D.D.C. 1970) (wherein the court held that a settlement "cannot lightly be set aside merely because subsequent developments may indicate that the bargain proved more beneficial to

one party than the other").

Furthermore, the overall claims rate here of 6.46% and valid claims rate of 1.54% fall well within claim rates of comparable TCPA settlements that have received final approval by other district courts. In *Gragg v. Orange Cab Co.*, No. 2:12-cv-00576-RSL, Dkt. Nos. 211 at 3,4, 214, (W.D. Wash. 2017), the court granted final approval of a TCPA class settlement in which direct notice was successfully delivered to 48,452 class members, and 283 claims were submitted for a claims rate of 0.58%. Also, in *Rinky Dink v. World Business Lenders*, No. 2:14-cv-00268-JCC (W.D. Wash.), the court granted final approval of a TCPA class settlement [*Rinky Dink* Dkt. 92] in which direct notice was successfully delivered to 167,844 class members [*Rinky Dink* Dkt. 89 at 3], and 2,708 claims were submitted [*Id*. at 4] for a claim rate of 1.61%. The court in *Hetherington v. Omaha Steaks*, No. 3:13-cv-02152-SI (D. Or.), also granted final approval of a TCPA class settlement [*Hetherington* Dkt. 130] in which direct notice was sent to 1,353,771 class members [*Hetherington* Dkt. 122-1 at 3], and 16,816 valid claims were submitted [*Hetherington* Dkt. 133 at 2] for a claims rate of 1.24%. Lastly, in *Kwan v. Clearwire Corp*, 2:09-cv-01392-JLR (W.D. Wash.) the court granted final approval of a TCPA class settlement [*Kwan* Dkt. 201] in which direct notice was sent to 1,820,324 class members by email and to 557,356 by U.S. mail [*Kwan* Dkt. 190 at 5] for a total of 2,044,524 direct notices sent, and 16,182 claims were submitted [*Kwan* Dkt. 207 at 2] for a claims rate of 0.64%.

Thus, the fact that 11,438 submitted valid claims should not deter the Court from granting final approval.[4]

[4] Similarly, a lower number of claims than expected should not affect or reduce the requested attorneys' fees sought in the motion for attorneys' fees to be heard at the time of this final approval motion. *Williams v. MGM-Pathe Communications Co.,* 129 F.3d 1026 (9th Cir. 1997). Also, the fees were not reduced in *Gragg, Rinky Dink*, *Hetherington* and *Kwan* because of lower than expected claims rates, cited above.

## IV. EXAMINATION OF THE *CHURCHILL* FACTORS FAVOR FINAL APPROVAL

### A. Strength of Plaintiff's case.

Plaintiff acknowledges that Defendants assert a number of potentially case-dispositive defenses. For example, Defendants argue that Plaintiff would not be able to certify the class, that the class Plaintiff asserts in his complaint is unascertainable, and that individual issues predominate over common questions of law and fact. While Class Counsel are confident all their claims are certifiable and they would prevail on the merits, they would have faced vigorous opposition from Defendants. Plaintiff also faces the risk that Defendants may make a further offer of judgment under Rule 68 despite one having been previously rejected by Plaintiff, and then may argue that Plaintiff's claims consequently are mooted. Although that specific proposition was rejected in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), there remains the possibility that a more complete tender might moot Plaintiff's claims. Defendants could argue that an ATDS as defined was not in fact used here to make the calls or adopt the position that a "called party" under the TCPA refers to the intended recipient of a call, and not the person actually called. This position, if accepted, could undercut Plaintiff's request for relief. Plaintiff disputes each and every one of these defenses. But his likelihood of success in certifying a class and then at trial is far from certain. Accordingly, Plaintiff's decision to settle his claims, and the claims of Settlement Class members, is reasonable. *See e.g., Bennett*, 96 F.R.D. at 349-50 (noting that the plaintiffs faced a "myriad of factual and legal problems" that led to "great uncertainty as to the fact and amount of damage," which made it "unwise [for the plaintiffs] to risk the substantial benefits which the settlement confers . . . to the vagaries of a trial").

Finally, there is a risk of losing a jury trial or summary judgment or that, upon victory at trial, the ultimate recovery to the class may be reduced on Due Process grounds or the judgment reversed on appeal. *See, e.g.*, *Aliano v. Joe Caputo*

*& Sons—Algonquin, Inc.*, No. 09-910, 2011 WL 1706061, at *4 (N.D. Ill. May 5, 2011) (noting that FACTA statutory damages of $100 to $1000 per violation, "although authorized by statute, would be shocking, grossly excessive, and punitive in nature").

Courts have noted that legal uncertainty supports approval of a settlement. *See, e.g.*, *Browning v. Yahoo! Inc.*, No. 04-CV-01463-HRL, 2007 WL 4105971, at *10 (N.D. Cal. Nov. 16, 2007) ("[L]egal uncertainties at the time of settlement—particularly those which go to fundamental legal issues—favor approval."). Having been "exposed to the litigants, and their strategies, positions and proof," *Hanlon*, 150 F.3d at 1026 (quoting *Officers for Justice v. Civil Serv. Comm'n of City & Cty. of S.F.*, 688 F.2d 615, 626 (9th Cir. 1982)), this factor weighs in favor of granting final approval of the Settlement.

Thus, the Settlement provides substantial relief to Settlement Class Members without delay and is fair and adequate, particularly in light of the above risks that Settlement Class Members would face in litigation.

**B. Risk, expense, complexity, and likely duration of further litigation.**

There is no doubt the risks, expense, complexity, and likely duration of further litigation also support final approval of the Settlement. Continued litigation would involve extensive discovery and motion practice, including Plaintiff's motion for class certification and Defendants' likely motion for summary judgment. The parties would engage experts to analyze Defendants' call data. It is likely to be years before the case could proceed to trial and through appeal. Instead of facing the uncertainty of a potential award in their favor years from now, the Settlement allows Plaintiff and Settlement Class members to receive immediate and certain relief. The risks to both sides are magnified by the fact that the outcome of any appeal is uncertain. In addition, any potential appeals would have substantially delayed any recovery achieved for the Settlement Class. *See In re High-Tech*

*Employee Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 WL 5159441, at *2 (N.D. Cal. Sept. 2, 2015). Taken together, these circumstances suggest that further litigation would have been costly and uncertain and would have detrimentally delayed any potential relief for the Settlement Class. By contrast, the Settlement provides them with timely, certain, and meaningful recovery. This factor weighs in favor of final approval.

**C. Risk of maintaining class-action status throughout trial.**

There is a potential risk that Plaintiff would have not certified the class, let alone maintain class-action status throughout trial. Even if the Court granted class certification on all or some of the claims, Defendants could have moved for decertification or moved for summary judgment, knocking out all or a portion of Plaintiff's and the Settlement Class members' claims. Due to the inherent nature of litigation, Plaintiff risked losing certification, on all or a portion of his claims. These potential difficulties with certifying and maintaining class certification counsel in favor of finally approving the Settlement.

**D. Amount offered in settlement.**

The Settlement as detailed above provides for meaningful consideration. This is especially true because it must be remembered Defendants were facing serious economic difficulties at the time of the settlement and there simply were no funds available for a common fund settlement. *See* Prelim. App. Mtn., Dkt. 99-1 at 9,10, and fn. 1.

In addition, the amount offered in settlement, $75 in products or $25 in cash, is clearly within the range of other TCPA settlements, and is certainly adequate given the financial difficulties of Defendants, as explained above. *Id. at 26;* .; *see also In Re Jiffy Lube Int'l, Inc. Text Spam Litigation*, No. 3:11-MD-02261-JM-JMA, 2012 WL 4849617 at *2 (S.D. Cal. 2012) (approved certificate that provided for $20 in Defendant's goods or at option of claimant, $15 in cash; value "appears

to be within the range of reasonableness"); *In re Portfolio Recovery Associates, LLC Litigation*, No. 11-md-02295-JAH-BGS, (S.D. Cal. September 7, 2016) DKT. No. 426-1 at 3($30 in cash approved). Here the amount each claimant will receive is clearly within the range of reasonableness compared to other cases, and is certainly reasonable in light of the possibility of recovering nothing through either unsuccessful litigation or a bankrupt defendant. As the court held in *In re Capital One*, 80 F.Supp.3d at 789, in approving $34.60 in cash per claimant, the court found that amount was "not insignificant considering" the possibility of recovering nothing through continued litigation.

The benefits provided under the Settlement adequately takes into account the risks and delays involved in proceeding to a contested class certification motion, summary judgment, or trial. The Settlement provides the Settlement Class members with a timely, certain, and meaningful recovery. While further litigation may reap potential benefits, such a path would entail significant additional costs, and would substantially delay any recovery achieved. "[T]he very essence of a settlement is compromise, a yielding of absolutes and an abandoning of highest hopes." *Linney*, 151 F.3d at 1242 (quoting *Officers for Justice*, 688 F.2d at 624). "Estimates of what constitutes a fair settlement figure are tempered by factors such as the risk of losing at trial, the expense of litigating the case, and the expected delay in recovery (often measured in years)." *Browne v. Am. Honda Motor Co.*, No. 09-CV-06750-MMM, 2010 WL 9499072, at *12 (C.D. Cal. July 29, 2010). Thus, "[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Linney*, 151 F.3d at 1242 (internal quotation marks and citation omitted). Accordingly, this factor weighs in favor of final approval.

**E. Extent of discovery completed and stage of proceedings.**

Here the discovery completed and the stage of proceedings support approval

because "the parties certainly have a clear view of the strengths and weaknesses of their cases." *In re Warner Communications Sec. Litig.*, 618 F.Supp. 735, 745 (S.D.N.Y. 1985); *see also Linney*, 151 F.3d at 1239 ("Formal discovery is not a necessary ticket to the bargaining table where the parties have sufficient information to make an informed decision about settlement."). As set forth in the Prelim. App. Mtn., the primary issues in TCPA cases are the number of calls made to cellphones during the class period, to whom, whether consent was given and whether the calls were made with an automated telephone dialing system. Here, Plaintiff had all that information before the case was settled. Plaintiff served interrogatories and document requests very early in the proceedings and Plaintiff learned enough in both informal and formal discovery to be assured they are obtaining a fair settlement. He also conducted confirmatory discovery to determine the accuracy of the number and identities of the Settlement Class members. This factor weighs in favor of final approval.

**F. Experience and views of Class Counsel.**

Class Counsel are highly experienced trial and class-action attorneys who have successfully handled complex class actions in both state and federal court. *See* the prior declarations filed in support of Preliminary Approval: Declaration of Douglas J. Campion ,(Dkt. 99-2); Declaration of Brian D. Chase (Dkt. 99-3); and Declaration of Michael P. Sousa ("Sousa Decl.") (Dkt. 99-4). Class Counsel are thus capable of making educated assessments about the risks and possible recovery in this Action. "Great weight is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation." *Nat'l Rural Telecomms. Coop v. DIRECTV, Inc.*, 221 F.R.D.at 528 (C.D. Cal. 2004). Here, based upon the final numbers and the fact there are no objections and few opt outs, Class Counsel endorse the Settlement as fair, adequate, and reasonable in their declarations filed herewith. *See* Declarations of Brian D. Chase, Douglas J. Campion and Michael P. Sousa In Support of Plaintiff's Motion for Final Approval

of Class Action Settlement and Certification of Settlement Class. Campion Decl. ¶ 3; Chase Decl. ¶ 3; and Sousa Decl. ¶ 4. Thus, the views of Class Counsel weigh in favor of final approval.

**G. Reaction of Settlement Class members.**

The reaction of the Settlement Class members supports final approval of the Settlement—not a single member objected.[5] Campion Decl. ¶ 6. Furthermore, only 34 requested to be excluded. *Sarich* Decl. ¶¶ 21-22.[6] The lack of objectors and the minimal number of opt outs are "indicia of the approval [by] the class." *Hughes v. Microsoft Corp.*, No. 98-CV-01646, 2001 WL 34089697, at *1, *8 (W.D. Wash. Mar. 26, 2001) (finding indicia of approval where 9 out of 37,155 class members—or just over 0.02%—submitted objections and "less than 1%" opted out); *see also Churchill Vill.*, 361 F.3d at 577 (affirming district court's approval of settlement where 45 of 90,000 class members—or 0.05%—objected to the settlement and 500 class members—or 0.56%—opted out); *Sugarman v. Ducati N. Am., Inc.*, No. 10-CV-05246-JF, 2012 WL 113361, at *3 (N.D. Cal. Jan. 12, 2012) (noting that objections from 42 of 38,774 class members—0.1%—is a "positive response"). Both the lack of objectors and the very few opt outs weigh in favor of final approval.

**H. Evidence of collusion or conflict of interest.**

Rule 23(e)(2)(B) requires an arms'-length negotiation of the settlement.

[5] Plaintiff supports the settlement as fair and reasonable. *See* Declaration of Sean Hartranft, Dkt. 99-7 at ¶ 11.

[6] Furthermore, no objections have been received from the U.S. Attorney General or any Attorney Generals. The Claims administrator provided notice to the Attorney Generals and the U.S. Attorney General as required by CAFA, 28 U.S.C. § 1715(a). Sarich Dec., ¶ 4. "Although CAFA does not create an affirmative duty for either state or federal officials to take any action in response to a class action settlement, CAFA presumes that, once put on notice, state or federal officials will raise any concerns that they may have during the normal course of the class action settlement procedures." *In re Netflix Privacy Litig.*, No. 11-00379, 2013 WL 1120801, at *8 (N.D. Cal. Mar. 18, 2013) (citation, punctuation omitted).

Undoubtedly, there was no collusion in this Action, nor any conflicts of interest. This action has been hotly contested for over three years and was only settled with the assistance of an experienced mediator, Judge Edward A. Infante, Ret. of JAMS, followed by extensive negotiations between the Parties on their own as well. Agreement, § 1.04. As the Advisory Committee notes, "the involvement of a neutral or … facilitator in [settlement] negotiations may bear on whether th[ose] [negotiations] were conducted in a manner that would protect and further the class interests." *See also Sandoval v. Tharaldson Emp. Mgmt., Inc.*, No. EDCV 08-482, 2010 WL 2486346, at *6 (C.D. Cal. June 15, 2010) (approving settlement after a one-day mediation and noting that "the assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive.")

Accordingly, and in light of the relevant factors, the Settlement is fair, adequate, and reasonable within the meaning of Rule 23(e).

## V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests the Court to grant final approval of the Settlement and certify the Settlement Class.

Dated: October 7, 2019

Respectfully Submitted,

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