1 2 3 4 5 6 7	Beth E. Terrell, CSB #178181 Email: bterrell@terrellmarshall.com Adrienne D. McEntee, Admitted Pro Hac Email: amcentee@terrellmarshall.com TERRELL MARSHALL LAW GROUP P 936 North 34th Street, Suite 300 Seattle, Washington 98103-8869 Telephone: (206) 816-6603 Facsimile: (206) 319-5450 [Additional Counsel Appear on Signature]	PLLC
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9	Attorneys for Plaintiff Cory Horton	
10	UNITED STATES DISTRICT COURT	
11	FOR THE SOUTHERN DISTRICT OF CALIFORNIA	
12	CORY HORTON, on behalf of himself and all others similarly situated,	NO. 3:16-cv-00211-JAH-WVG
1314	Plaintiff,	DECLARATION OF ADRIENNE D. McENTEE IN SUPPORT OF
15	V.	PLAINTIFFS' MOTION FOR
16		PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT
17	CAVALRY PORTFOLIO SERVICES, LLC,	
18		Complaint Filed: February 7, 2013
19	Defendant.	DEMAND FOR JURY TRIAL
20		Honorable John A. Houston
21		DATE: March 23, 2020
22		TIME: 2:30 p.m.
23		COURTROOM: 13B (13th Floor)
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28	DECLARATION OF ADRIENNE D. McENTEE IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT - 1 - 13-CV-00307-JAH (WVG)	

KEVIN KREJCI, on behalf of himself 1 and all others similarly situated, NO. 3:16-cv-00211-JAH-WVG 2 Plaintiff, 3 4 v. 5 CAVALRY PORTFOLIO SERVICES, 6 LLC, 7 Defendant. 8 9 10 I, Adrienne D. McEntee, hereby declare as follows: 11 1. I am a member of the law firm of Terrell Marshall Law Group PLLC 12 ("TMLG"), counsel of record for Plaintiffs in this matter. I am admitted to 13 practice before this Court and am a member in good standing of the bar of the 14 state of Washington. I respectfully submit this declaration in support of Plaintiffs' 15 Motion for Preliminary Approval of Class Action Settlement. Except as otherwise 16 noted, I have personal knowledge of the facts set forth in this declaration and could testify competently to them if called upon to do so. 17 TMLG is a law firm in Seattle, Washington, that focuses on complex 18 2. 19 civil and commercial litigation with an emphasis on consumer protection, product 20 defect, civil rights, and wage and hour cases. TMLG has been appointed lead or 21 co-lead counsel representing multi-state and nationwide classes in state and 22 federal court in Washington and throughout the United States. Founded in 2008, 23 the attorneys at TMLG have represented scores of classes, tried class actions in 24 state and federal court, and obtained hundreds of millions of dollars in monetary 25 relief for workers, consumers, and other individuals. 26 27 DECLARATION OF ADRIENNE D. McENTEE IN SUPPORT OF 28 PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS

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3. I am the lead attorney from TMLG in the instant litigation. I graduated from the University of Washington School of Law in 2003, where I was a member of the Pacific Rim Law and Policy Journal and Moot Court Honor Board. Prior to joining TMLG, I was a member of Tousley Brain Stephens PLLC, where I practiced for five years. Before entering private practice, I worked with the King County Prosecuting Attorney's Office, where I prosecuted a broad range of crimes. I have tried approximately fifty cases and has briefed, argued, and won cases before the Washington State Court of Appeals. Since my admission to the bar, I have been an active member of the Washington State Bar Association and Washington Women Lawyers, as a member of the Judicial Evaluation Committee. I was named to the Washington Super Lawyers list in 2018 and 2019.

Other Cases Litigated by TMLG

- 4. TMLG is litigating or has recently settled the following TCPA class actions:
 - Abante Rooter and Plumbing, Inc., et al. v. Alarm.com Incorporated, et al.—Filed in 2015 on behalf of consumers who received solicitation telephone calls on their cellular and residential telephones without their prior express consent within the meaning of the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq. The Northern District of California granted final approval of the \$28 million settlement on August 15, 2019.
 - In re Capital One Telephone Consumer Protection Act Litigation—Filed in 2012 on behalf of consumers who received automated, prerecorded collection telephone calls on their cellular telephones without their prior express consent within the meaning of the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq. TMLG served as co-lead lead counsel in the multidistrict litigation. The

Northern District of Illinois granted final approval the \$75 million settlement on February 23, 2015.

- Borecki v. Raymours Furniture Co., Inc.—Filed in 2017 on behalf of consumers who received spam text messages on their cellular telephones without their prior express consent within the meaning of the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq. The Southern District of New York granted final approval of the \$4.25 million settlement on September 10, 2019.
- Snyder v. Ocwen Loan Servicing, LLC—Filed in 2014 on behalf of consumers who received automated collection telephone calls on their cellular telephones without their prior express consent within the meaning of the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq. The Northern District of Illinois granted final approval of the \$21.5 million settlement on May 14, 2019.
- Melito, et al. v. American Eagle Outfitters, Inc., et al.— Filed in 2014 on behalf of consumers who received spam text messages on their cellular telephones without their prior express consent within the meaning of the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq. The Southern District of New York granted final approval to the \$14.5 million settlement on September 11, 2017, which the United States Court of Appeals for the Second Circuit affirmed on April 30, 2019.
- In re Monitronics International, Inc. Telephone Consumer Protection Act Litigation—Filed in 2011 on behalf consumers who received automated, prerecorded solicitation telephone calls on their residential and business telephones without their prior express consent within the meaning of the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq., the Washington Automatic Dialing and Announcing Device statute, RCW 80.36.400, and the Washington Consumer Protection Act, RCW 19.86 et seq. TMLG served as co-lead counsel in the multidistrict litigation. The Northern District of West Virginia granted

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final approval of the \$28 million settlement on June 12, 1 2018. 2

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- Abante Rooter and Plumbing, Inc. v. Pivotal Payments *Inc.*— Filed in 2016 on behalf of small businesses that received automated solicitation telephone calls to their cell phones without their prior express consent within the meaning of the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq. The Northern District of California granted final approval of the \$9 million settlement on October 15, 2018.
- Wilkins, et al. v. HSBC Bank Nevada, N.A., et al.—Filed in 2014 on behalf of individuals who received prerecorded calls using an automatic dialing system without their prior consent within the meaning of the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq. The Northern District of Illinois granted final approval of the \$39.975 million settlement on March 17, 2015.
- Additional information about class actions litigated by TMLG is 5. available on our website www.terrellmarshall.com.

Qualifications of Other TMLG Attorneys

Beth E. Terrell is a founding member of TMLG who practices 6. complex litigation, including the prosecution of consumer, defective product, and wage and hour class actions. Ms. Terrell has served as co-lead counsel on numerous multi-state and nationwide class actions. Ms. Terrell received a B.A., magna cum laude, from Gonzaga University in 1990. In 1995, Ms. Terrell received her J.D. from the University of California, Davis School of Law, Order of the Coif. Prior to forming TMLG in May 2008, Ms. Terrell was a member of Tousley Brain Stephens PLLC. Ms. Terrell is a frequent speaker at legal conferences on a wide variety of topics including consumer class actions, electronic discovery, ethics, and gender equity in the legal profession. Ms. Terrell

has been awarded an "AV" rating in Martindale Hubble by her peers. Ms. Terrell has been repeatedly named to the annual Washington Super Lawyers list. She has also been named to the Top 100 Washington Super Lawyers list and the Top 50 Women Super Lawyers list.

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- Jennifer Rust Murray is a founding member of TMLG. Ms. Murray graduated from the University of Washington School of Law in 2005 where she was a member of the Washington Law Review. Ms. Murray's law review article entitled "Proving Cause in Fact under Washington's Consumer Protection Act: The Case for a Rebuttable Presumption of Reliance" won the Carkeek prize for best submission by a student author. Prior to law school, Ms. Murray earned a Ph.D. in Philosophy from Emory University. Ms. Murray has been an active member of the Washington State Bar Association since her admission to the bar in 2005. In 2010, Ms. Murray was admitted to the Oregon State Bar. In 2011, 2012, 2013, 2014, and 2015, Ms. Murray was named a Washington "Rising Star" by SuperLawyer Magazine. Ms. Murray focuses her practice on complex commercial litigation with an emphasis on consumer and employment issues. She has been involved in nearly every class action prosecuted by the firm.
- 8. Elizabeth A. Adams is a 2012 graduate of the UCLA School of Law, where she received the Order of the Coif and served as a Comments Editor for the UCLA Law Review. Ms. Adams has been an associate with TMLG since early 2015, and she concentrates her practice in complex litigation, including consumer protection and civil rights class actions. Before joining TMLG, Ms. Adams served as a law clerk to the Honorable Dean D. Pregerson, the Honorable George Wu, and the Honorable John A. Kronstadt, all of the United States District Court for the Central District of California.

Our Work in the Litigation

Plaintiff Cory Horton retained TMLG in December 2015. Prior to 9. our representation, Mr. Horton responded to interrogatories, requests for production, and requests for admission. He was also deposed. Plaintiffs devoted significant time assisting counsel in this case over the past several years, including assisting with development of the case.

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- 10. In addition, the parties engaged in substantial expert discovery. Plaintiffs retained Randall Snyder, who analyzed manuals and guides Cavalry produced regarding the Aspect Ensemble Pro and Avaya Proactive Contact 5.0 systems Cavalry used to make calls and opined they are ATDSs. Cavalry, in turn, retained Kenneth Sponsler, who reached the opposite conclusion. Plaintiffs also retained a second expert, Anya Verkhovskaya, who analyzed the calling data Cavalry produced in order to determine the number of calls Cavalry made to unique telephone numbers, and what percentage of those numbers were mobile telephone numbers. All of the experts were deposed.
- 11. On February 5, 2016, the Court granted Cavalry's request to stay proceedings following the appeal of the FCC ruling, In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991 (2015 Order), 30 FCC Rcd. 7961 (2015). The appeal challenged the FCC's treatment of "capacity" as arbitrary, capricious, and an abuse of discretion, and argued that its determination that predictive dialers are autodialers exceeded the FCC's authority. Two years later, on March 16, 2018, the D.C. Circuit issued its decision in ACA Int'l v. FCC, 885 F.3d 687, 693 (D.C. Cir. 2018). On May 7, 2018, the Court lifted the stay and ordered the parties to file cross motions for summary judgment on whether Cavalry's systems are ATDSs. Those motions were fully briefed and on August 8, 2018, the Court took them under submission and entered an order vacating the hearing date.

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- 12. After the cases had been stayed for a long period of time and the parties had fully briefed cross-motions for partial summary judgment on whether Cavalry's systems are ATDSs, the parties returned to settlement negotiations. We participated in two full day mediations with Hon. Leo S. Papas, Ret., on June 7, 2019, and again on August 27, 2019. The parties did not reach settlement during either session, but continued arm's length negotiations with Judge Papas's assistance.
- 13. In November 2019, the parties reached agreement regarding material settlement terms, subject to confirmatory discovery.
- 14. On December 12, 2019, Plaintiffs served Cavalry with the written confirmatory discovery. On January 10, 2020, Plaintiffs served Cavalry with a Rule 30(b)(6) deposition for the purpose of confirmatory discovery. On January 24th, I deposed Cavalry's corporate representative, Marc Perry, regarding the number of affected accounts, the number of cell phones called on the affected accounts, the number of affected accounts that Cavalry considers Closed, the number of affected accounts that Cavalry considers Open, Cavalry's process for characterizing accounts as Open or Closed, and the quality of Cavalry's contact information for Settlement Class Members.
- 15. Through confirmatory discovery, Plaintiffs determined that Cavalry called 1,157,483 cell phones associated with 1,035,232 affected accounts between February 8, 2009 and January 26, 2016. As of January 2, 2020, 674,760 of the accounts were Open – they had balances for which Cavalry was accepting payments. As of January 2, 2020, 360,472 accounts were Closed - Cavalry was no longer accepting payments.
- 16. The parties began the settlement talks that led to this agreement after litigation had been pending for more than six years and only after they had

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completed extensive discovery and fulsome briefing on class certification and summary judgment. All settlement negotiations have been non-collusive and at arm's length. Based on my experience with TCPA class actions, I strongly believe the Settlement is fair, adequate, reasonable, and in the best interests of the Settlement Class.

The parties finalized the terms of the Settlement Agreement on 17. February 20, 2020. A true and correct copy of the fully executed Settlement Agreement is attached here as Exhibit 1.

Notice and Estimated Awards

- 18. After soliciting and reviewing bids, counsel propose to retain JND as the Class Administrator, subject to Court approval. JND estimates that it can carry out the Notice Plan for \$733,843.
- 19. Counsel estimates that Settlement Class Members with Open Accounts who submit valid claims for debt relief may receive debt relief awards of over \$500. This estimate is based on the assumption that 5% of 674,760 Settlement Class Members with Open Accounts will file claims for debt relief, as follows: 674,760 Open Accounts x 5% = 33,738. \$18,000,000 / 33,738 = \$533.
- Counsel estimates that Settlement Class Members who submit valid 20. claims for cash will receive approximately \$30. This is based on the assumption that 10% of all Settlement Class Members, whether they have Open or Closed Accounts, will submit claims for cash. Ten percent of 1,035,232 Settlement Class Members is 103,523. The estimated cash award is calculated as follows: \$6,150,000 Cash Fund - \$2,000,000 Proposed Fees - \$100,000 Total Possible Costs - \$20,000 Proposed Incentive Awards - \$733,843 Estimated Administration = \$3,296,157 Net Fund. The \$3,296,157 Net Fund / 103,523 Claims = \$31.84.

21. The amount each claimant will receive depends upon the number and type (debt relief or cash) of claims submitted. Therefore, these estimates may change.

Attorneys' Fees, and Costs

- 22. Counsel will request that the Court approve from the Cash Fund an award of attorneys' fees of up to \$2,000,000 and litigation expenses of up to \$100,000. TMLG's current lodestar is currently over \$200,000 and our out-ofpocket costs are approximately \$16,000.
- 23. Securing approval of the Settlement and making sure it is fairly administered and implemented will require additional time commitment. Counsel will file a motion requesting approval of an attorneys' fee and cost award to compensate and reimburse them for the work already performed in this case and the work remaining to be performed in connection with the settlement. In accordance with In re Mercury Interactive Corp. Sec. Litig., 618 F.3d 988, 994 (9th Cir. 2010), counsel will file their motion 30 days before the deadline for Class Members to object and ensure it is timely posted to the Settlement Website. In their motion, counsel will provide the Court with details of their time and outof-pocket expenses.

Consolidation

Counsel for Cavalry has advised Plaintiffs they do not oppose 24. Plaintiffs' request to consolidate the *Horton* and *Krejci* cases for purposes of settlement.

The Risks Involved with Continued Litigation

25. Plaintiffs believe they have a case for liability. The evidence supports Cavalry's liability for the calls it placed to cell phones using the Aspect Ensemble Pro system, or the Avaya Proactive Contact 5.0 system, which

ATDSs, Plaintiffs would lose on the merits.

- 26. This risk is not unfounded. In *ACA Int'l*, 885 F.3d at 695 & 706, the D.C. Circuit vacated the 2015 FCC Order addressing, among other things, the definition of an "automatic telephone dialing system" under the statute. Courts are still dealing with the aftermath of *ACA Int'l*. Recently, the Seventh and Eleventh Circuits have interpreted it to preclude the systems that have traditionally been considered autodialers. While Plaintiffs believe their position should prevail under *Marks v. Crunch San Diego*, *LLC*, 904 F.3d 1041, 1052 (9th Cir. 2018), the question remains unanswered as to Cavalry's specific systems.
- 27. Plaintiffs had additional hurdles to clear before they would ever recover any damages. Cavalry maintains that Settlement Class Members are not entitled to recover because they consented to be contacted on their cell phones by providing their numbers to Cavalry or to the original creditor. Consent is an affirmative defense for which Cavalry carries the burden of proof. Plaintiffs dispute that Cavalry could meet this burden at trial; however, if the trier of fact disagreed with Plaintiffs on this legal issue, the Settlement Class would receive nothing.
- 28. Cavalry's consent defense also created the risk that Plaintiffs' motion to certify under Rule 23(b)(3) would not succeed. Courts in this district have reached different results on consent's application to class certification.

Plaintiffs faced the risk that the Court would find Cavalry's consent evidence precluded class certification.

- 29. Even if Plaintiffs prevailed on summary judgment and class certification, they would still need to convince a jury at trial. Next, they would have to retain any favorable judgment through the appellate process. Litigating this case to trial and through any appeals would be expensive and timeconsuming and would present risk to both parties. The Settlement, by contrast, provides prompt and certain relief.
- 30. Even if Plaintiffs prevailed at trial and on any appeal, the damages available under the TCPA in a class action with more than a million class members are so significant that they make it hard for any company to bond an appeal and satisfy the judgment. A judgment on behalf of the 1,035,232 Settlement Class Members identified from Cavalry's records would total more than \$500 million, which could then be subject to trebling up to \$1.5 billion. Cavalry would certainly appeal any adverse verdict, which would delay any relief to class members. Thus, in addition to the risk of a loss at trial, even a verdict for Plaintiffs posed a substantial risk that the judgment would never be paid. Securing \$24 million in benefits now, with certainty, will provide significant relief to Settlement Class Members who submit valid claims.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

EXECUTED in Seattle, Washington, this 21st day of February, 2020.

/s/ Adrienne D. McEntee, Pro Hac Vice Adrienne D. McEntee, Admitted Pro Hac Vice

CERTIFICATE OF SERVICE 1 2 I, Adrienne D. McEntee, hereby certify that on February 21, 2020, I 3 electronically filed the foregoing with the Clerk of the Court using the CM/ECF 4 5 system which will send notification of such filing to the following: 6 Tomio B. Narita, CSB #156576 7 Email: tnarita@snllp.com Jeffrey A. Topor, CSB #195545 8 Email: jtopor@snllp.com 9 SIMMONDS & NARITA LLP 44 Montgomery Street, Suite 3010 10 San Francisco, California 94104-4816 11 Telephone: (415) 283-1000 Facsimile: (415) 352-2625 12 13 Attorneys for Defendant 14 DATED this 21st day of February, 2020. 15 16 TERRELL MARSHALL LAW GROUP PLLC 17 18 By: /s/ Adrienne D. McEntee, Pro Hac Vice Adrienne D. McEntee, Admitted Pro Hac Vice 19 Email: amcentee@terrellmarshall.com 20 936 North 34th Street, Suite 300 Seattle, Washington 98103-8869 21 Telephone: (206) 816-6603 22 Facsimile: (206) 319-5450 23 Attorneys for Plaintiff Cory Horton 24 25 26 27 DECLARATION OF ADRIENNE D. McENTEE IN SUPPORT OF 28 PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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