Beth E. Terrell, CSB #178181
Email: bterrell@terrellmarshall.com
Adrienne D. McEntee, *Admitted Pro Hac Vice*
Email: amcentee@terrellmarshall.com
TERRELL MARSHALL LAW GROUP PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
Telephone: (206) 816-6603

[Additional Counsel Appear on Signature Page]

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

CORY HORTON, on behalf of himself and all others similarly situated,

Plaintiff,

v.

CAVALRY PORTFOLIO SERVICES, LLC,

Defendant.

NO. 13-CV-00307-JAH (WVG)

NOTICE OF MOTION AND MOTION AND SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Complaint Filed: February 7, 2013

DEMAND FOR JURY TRIAL

Honorable John A. Houston

DATE: March 23, 2020
TIME: 2:30 p.m.
COURTROOM: 13B (13th Floor)

KEVIN KREJCI, on behalf of himself and all others similarly situated, Plaintiff, v. CAVALRY PORTFOLIO SERVICES, LLC, Defendant.	NO. 3:16-cv-00211-JAH-WVG

NOTICE OF MOTION

TO: THE CLERK OF THE COURT; and
TO: DEFENDANT CAVALRY PORTFOLIO SERVICES, LLC:

PLEASE TAKE NOTICE that on March 23, 2020, at 2:30 p.m. in Courtroom 13B of the United States District Court, Southern District of California, 333 West Broadway, San Diego, California 92101, Plaintiffs will move this Court for Preliminary Approval of Class Action Settlement.

This motion will be based on this notice of motion; the following memorandum of points and authorities; the accompanying declarations of Adrienne D. McEntee, Sergei Lemberg, Jennifer M. Keough, and the records and files in this action; and such other matters as may be presented before or at the hearing of the motion.

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I. INTRODUCTION

Plaintiffs Cory Horton and Kevin Krejci have reached a Settlement with Defendant Cavalry Portfolio Services, LLC (collectively "Cavalry") in this class action brought under the Telephone Consumer Protection Act. Cavalry has agreed provide Settlement Class Members with more than $24 million in settlement benefits, comprised of a Debt Relief Fund of up to $18,000,000 and a non-reversionary Cash Fund of $6,150,000.

Settlement Class Members with Open Accounts who submit valid claims for debt relief will receive their *pro rata* share of $18,000,000 in debt relief, up to $599 each. Settlement Class Members with Closed and Open Accounts who submit valid claims for cash will receive cash awards from the Cash Fund on a *pro rata* basis after payment of administrative costs, incentive awards, attorneys' fees, and litigation costs approved by the Court. Whether his or her account is Open or Closed, each Settlement Class Member is entitled to file one claim. The relief each claimant receives depends upon the number of valid claims submitted.

Plaintiffs will each request an incentive award of $10,000. Counsel will request an award of attorneys' fees of $2,000,000, and reimbursement of up to $100,000 in litigation costs. Class Administrator JND Legal Administration ("JND") has estimated it can administer the Settlement for $733,843. Counsel estimate that debt relief awards may be over $500[1] and cash awards may be $30.[2]

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[1] Counsel calculated these estimates based on the assumption that 5% of Settlement Class Members with Open Accounts will file claims for debt relief (674,760 Open Accounts x 5% = 33,738. $18,000,000 / 33,738 = $533).

[2] Counsel assumes that 10% of Settlement Class Members—1,035,232 x 10% = 103,523—whether Open or Closed Accounts, will submit claims for cash. 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).

However, these numbers could change, as the amount each claimant will receive depends upon the number and type (debt relief or cash) of claims submitted.

The Settlement is an excellent result for the Settlement Class and is fair, adequate, and reasonable. Plaintiffs respectfully request that the Court: (1) consolidate the *Horton* and *Krejci* cases; (2) provisionally certify the Settlement Class; (3) grant preliminary approval of the Settlement; (4) appoint Terrell Marshall Law Group PLLC and Lemberg Law, LLC as Class Counsel; (5) appoint Cory Horton and Kevin Krejci as Class Representatives; (6) approve the proposed notice plan; (7) appoint JND Legal Administration to serve as the Class Administrator; and (8) schedule the final fairness hearing and related dates.

II. BACKGROUND

A. Plaintiffs' complaints.

Plaintiff Cory Horton filed a class action complaint on February 7, 2013 alleging that Cavalry is liable under the TCPA for calls it made to his cell phone, and those of putative class members, using an automatic telephone dialing system ("ATDS") and a prerecorded voice, in violation of 47 U.S.C. § 227(b)(1)(A). Three years later, on January 27, 2016, Plaintiff Kevin Krejci brought a second class action against Cavalry. Like Mr. Horton, Mr. Krejci alleges that Cavalry called his cell phone using an ATDS. Together, they assert Cavalry called their cell phones without their prior express consent while attempting to collect debts.

B. The parties engaged in substantial discovery.

The parties engaged in substantial discovery during the litigation. Declaration of Sergei Lemberg in Support of Motion Preliminary Approval ("Lemberg Decl.") ¶ 12. They served written discovery requests and reviewed thousands of pages of documents, including the manuals for Cavalry's dialing systems, account records for Mr. Horton, account records for putative class members, agreements between Cavalry and third parties, and data regarding the

class. *Id*. Plaintiffs took three depositions of Cavalry's corporate representatives. *Id*. Plaintiff Horton was also deposed, and responded to interrogatories, requests for production, and requests for admission. Declaration of Adrienne D. McEntee in Support of Motion for Preliminary Approval ("McEntee Decl.") ¶ 9.

The parties also engaged in expert discovery. Lemberg Decl. ¶ 12. Plaintiffs retained Randall Snyder, who analyzed manuals Cavalry produced regarding the Aspect Ensemble Pro and Avaya Proactive Contact 5.0 systems Cavalry used to make calls and opined they are ATDSs. McEntee Decl. ¶ 10. Cavalry retained Kenneth Sponsler, who reached the opposite conclusion. *Id.* Both experts were deposed. Lemberg Dec. ¶ 12.

Plaintiffs also retained a second expert, Anya Verkhovskaya, who analyzed 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. McEntee Decl. ¶ 10. Ms. Verkhovskaya was also deposed. *Id*. 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. McEntee Decl. ¶¶ 14-15.

To describe the discovery process as contentious is an understatement. The docket is replete with the parties' formal motions and other requests for court intervention. *See, e.g.,* Dkt. 45, 52, 53, 60, 61, 62, 64, 72, 73, 77.

C. The parties engaged in extensive motions practice.

In addition to the extensive discovery and discovery motions, the parties engaged in extensive substantive motion practice. Lemberg Decl. ¶ 13. On October 9, 2014, Plaintiff Horton moved for class certification. Dkt. 90. On the same day, Cavalry moved for summary judgment, where it argued that it did not use an ATDS. Dkt. 87. Accompanying both motions, which have been fully

briefed, are motions by each party to strike the other's experts. Dkt. 95, 96. The Court did not issue rulings on these motions and ultimately removed the class certification motion from the Court's calendar. Dkt. 158.

While Cavalry's summary judgment motion was pending, the FCC released an order addressing several petitions for clarification, including what type of equipment qualifies as an autodialer. *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991* (2015 Order), 30 FCC Rcd. 7961 (2015). There, the FCC declared that the term "capacity" as used in the definition of an ATDS was not limited to the present ability of the equipment at issue but could also encompass its future functionality. *Id.* at 7974. ACA appealed the rulings to the D.C. Circuit, arguing the FCC's treatment of "capacity" was arbitrary, capricious, and an abuse of discretion, and that its determination that predictive dialers are autodialers exceeded the FCC's authority. Dkt. 178 at 5-6. As a result, Cavalry asked the Court to stay proceedings, and the Court granted Cavalry's request on February 5, 2016. Dkt. 202.

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. Dkt. 244. Those motions were fully briefed (Dkt. 245, 248) and on August 8, 2018, the Court took them under submission and entered an order vacating the hearing date. Dkt. 263.

In addition to the class certification briefing, the cross-motions for summary judgment and the cross-motions to strike experts (Dkt. 95, 96, 130, 133, 136, 139, 142, 149, 155), Mr. Horton successfully defended and won summary judgment on Cavalry's debt collection counterclaim (Dkt. 86, 103, 122, 164).

D. The settlement negotiations.

On June 8, 2015, while the first round of dispositive motions was pending, the parties participated in an unsuccessful full day mediation with Hon. Herbert B. Hoffman, Ret. Lemberg Decl. ¶ 14. 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 renewed settlement negotiations. Lemberg Decl. ¶ 17; McEntee Decl. ¶ 12. They participated in two full day mediations with Hon. Leo S. Papas, Ret., on June 7, 2019, and again on August 27, 2019. *Id*. The parties did not reach settlement during either session, but continued arm's length negotiations with Judge Papas's assistance. *Id.* The parties agreed to material settlement terms in November 2019 and executed the Settlement Agreement on February 20, 2020. *Id*.

All settlement negotiations have been non-collusive and at arm's length. McEntee Decl. ¶ 16. The parties have reached a class wide Settlement in this case that Plaintiffs and counsel believe is fair, adequate, reasonable, and in the best interests of the Settlement Class. *Id.; see also* Lemberg Decl. ¶¶ 18-19.

III. SETTLEMENT TERMS

The details of the Settlement are contained in the Settlement Agreement and Release of Claims. *See* McEntee Decl., Exh. 1 ("Agr."). The Settlement's terms are summarized below.

A. The proposed Settlement Class.

The proposed Settlement Class is defined as:

> All persons who were called on cell phones by Cavalry between February 8, 2009 and January 26, 2016 ("Settlement Class Period"), using the Aspect Ensemble Pro system, or the Avaya Proactive Contact 5.0 system, while attempting to collect debts on 1,035,232 Open and

> Closed Accounts (which will be contained in an electronic file that will be identified in the Settlement Agreement and filed under seal). Excluded from the Settlement Class are (i) individuals who are or were during the Settlement Class Period officers or directors of Cavalry or any of its Affiliates; (ii) any justice, judge or magistrate judge of the United States or any State, their spouses, and persons within the third degree of relationship to either of them, or the spouses of such persons; and (iii) all individuals who file a timely and proper request to be excluded from the Settlement Class.

Agr. § 3.1.

B. Settlement relief.

Cavalry will establish a Debt Relief Fund of up to $18,000,000 and a Cash Fund in the amount of $6,150,000. Agr. §§ 2.7, 2.21, 4.1, 4.2.

1. Debt Relief Awards to Settlement Class Members.

Cavalry will provide up to $18,000,000 in Debt Relief to 674,760 Settlement Class Members with Open Accounts as of January 2, 2020, who submit valid claims for their *pro rata* share of debt relief. Agr. §§ 4.1, 4.3. An Open Account is one with a balance owing, on which Cavalry was accepting payments as of January 2, 2020. *Id.* § 2.32. The amount of each Debt Relief Award will be equal to the Debt Relief Fund divided by the total number of Approved Debt Relief Claims, up to $599 per approved Claimant. *Id.* §§ 4.1, 4.3.

2. Cash Awards to Settlement Class Members.

A $6,150,000 Cash Fund will be available to pay Cash Awards to 674,760 Settlement Class Members with Open Accounts as of January 2, 2020 who choose cash awards over debt relief, and to 360,472 Settlement Class Members with Closed Accounts as of the same date, who submit valid claims for their *pro rata* share of cash. Agr. §§ 4.2.3, 4.3. A Closed Account is an account for which

Cavalry was no longer accepting payment as of January 2, 2020. *Id*. § 2.16. The amount of each Cash Award will be equal to the Cash Fund, divided by the total number of approved cash claims, after deducting for court-approved attorneys' fees, costs, notice and administration costs, and incentive awards. §§ 4.2.3, 4.3.

3. Settlement Class Members with Open Accounts must choose between Debt Relief or Cash Awards.

Each Settlement Class Member with an Open Account may submit one claim, for his or her *pro rata* share of either a Cash Award, or for a Debt Relief Award, but not for both. Agr. § 4.3. Each Settlement Class Member with a Closed Account may submit one claim for his or her pro rata share of a Cash Award. *Id*. No Settlement Class Member with a Closed Account is eligible for debt relief. *Id*.

4. Class administration fees and costs.

The Settlement Agreement provides that any class administration fees and costs will be paid from the Cash Fund. Agr. § 5.2. After soliciting and reviewing bids, counsel propose JND as the Class Administrator, subject to Court approval. JND estimates that it can carry out the Notice Plan for $733,843. McEntee Decl. ¶ 18. JND will be responsible for disseminating notice by mail, and by email to those Settlement Class Members for whom JND can located email addresses, following up on undelivered notices, establishing and maintaining a Settlement Website, establishing a toll-free number for Settlement Class Member inquiries, sending reminder emails, processing, logging, and reviewing claims, objections, and exclusion requests, administering the Debt Relief and Cash Funds, disbursing the attorneys' fee award, incentive awards, and litigation costs, and distributing Debt Relief and Cash Awards to Settlement Class Members. Agr. §§ 5.1, 6.

If, after payments to cash award Claimants have been made and the deadline for cashing checks has passed, funds remain in the Cash Fund sufficient

to make it feasible to make a second payment, a second distribution shall be made. Agr. § 4.2.5. If approved by the Court, any unclaimed funds after the second distribution will be disbursed to The Jump$tart Coalition for Personal Financial Literacy, a non-profit approved in this district in a TCPA class action. *Id*. § 4.2.5; *see In re Midland Credit Mgmt. Inc., Tel. Consumer Prot. Act Litig*., No. 10CV2261-MMA (MDD), 2018 WL 4927982, at *3 (S.D. Cal. Oct. 10, 2018) (finding a "substantial nexus to the interests of the class members").

5. Class Representatives' incentive awards.

Class Representatives Horton and Krejci will request incentive awards in the amount of $10,000 each in recognition of their service to the Settlement Class. Plaintiffs assisted in drafting the complaints and responded to written discovery. In addition, Plaintiff Horton sat for a deposition. Lemberg Decl. ¶ 12.

6. Attorneys' fees and litigation expenses.

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. McEntee Decl. ¶ 22. Counsel's current lodestar is well over $1 million, and counsel have incurred approximately $88,000 in out-of-pocket costs in prosecuting this action. *Id.*; Lemberg Decl. ¶ 19. Securing approval of the Settlement and making sure it is fairly administered and implemented will require additional time commitments. McEntee Decl. ¶ 23. 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. Agr. § 15.1. 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.

McEntee Decl. ¶ 23. In their motion, counsel will provide the Court with details of their time and out-of-pocket expenses. *Id.* The Settlement is not contingent on the amount of attorneys' fees or costs awarded. Agr. § 15.2.

C. Release.

The release is appropriately tailored to the claims made in the case. In exchange for the benefits provided by the Settlement, Settlement Class Members will release only legal claims that relate to or arise out of Cavalry's alleged use of the Aspect Ensemble Pro system or the Avaya Proactive Contact 5.0 system, from February 8, 2009 to January 26, 2016, to make, place, dial or initiate calls, including claims for violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227, as more fully set forth in Section 10 of the Settlement Agreement.

D. Notice Plan.

The parties propose a Notice Plan that includes mailed notice to Class Members using addresses from Cavalry's records, as updated by the National Change of Address database. Also, email notice will go to those Settlement Class Members for whom emails addresses are found, followed by a reminder email campaign midway through the notice period. The Notice Plan is described below.

IV. AUTHORITY AND ARGUMENT

The Court's role at preliminary approval is to determine whether it is appropriate to provide notice of the proposed Settlement to the class. First, Plaintiffs request that *Horton* and *Krejci* be consolidated. Second, they address certification of the Settlement Class. Third, Plaintiffs address the merits of the proposed Settlement. Finally, they discuss the proposed Notice Plan.

A. The *Horton* and *Krejci* cases should be consolidated.

Under Federal Rule of Civil Procedure 42(a), when separate actions before a court involve a common question of law or fact, a court is empowered to

consolidate the actions. *See* Fed. R. Civ. P. 42(a)(2). Horton's and Krejci's claims all arise from Cavalry's calls to cellular telephone numbers, in violation of the TCPA. And the legal questions that follow are similarly indistinguishable. For settlement purposes, *Horton* and *Krejci* are "one case split into two," the consolidation of which will "avoid an unnecessary duplication of labor and expense, and possibly conflicting results." *Hutchens v. Alameda Cty. Soc. Servs. Agency*, No. C 06-06870 SBA, 2008 WL 927899, at *2 (N.D. Cal. Apr. 4, 2008).

Indeed, courts routinely consolidate actions for purposes of settlement. *See Kelen v. World Fin. Network Nat'l Bank*, 302 F.R.D. 56, 63 (S.D.N.Y. 2014) (consolidating class actions involving the same defendant and same legal issues to "allow a more expeditious settlement"); *Burton v. Am. Cyanamid*, No. 07-CV-0303, 2014 WL 5818396, at *1 (E.D. Wis. Nov. 10, 2014) (finding that a collective settlement with the same defendant justifies consolidation); *Brumley v. Camin Cargo Control, Inc.*, No. CIV.A. 08-1798 JLL, 2012 WL 1019337, at *9 (D.N.J. Mar. 26, 2012) ("the Settlement Agreement … resolves all three actions on a common basis, thus streamlining and economizing the proceedings ….").

Finally, Cavalry does not oppose consolidation. McEntee Decl. ¶ 24. Thus, consolidation of *Horton* and *Krejci* for settlement purposes is appropriate.

B. The Settlement Class should be preliminarily certified.

The Settlement Class satisfies the requirements of Rule 23(a) and (b)(3). The Rule 23(a) requirements are numerosity, commonality, typicality and adequacy. Rule 23(b)(3) requires Plaintiffs to establish "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." The Ninth Circuit recently provided guidance to courts in evaluating whether settlement classes should be

certified, stating "the 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.'" *In re Hyundai and Kia Fuel Econ. Litig.*, 926 F.3d 539, 558 (9th Cir. 2019) (citation omitted). "The focus is 'on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives." *Id.* (citation omitted).

1. The Settlement Class satisfies the requirements of Rule 23(a).

The proposed Settlement Class has 1,035,232 members, which satisfies the numerosity requirement. *See Celano v. Marriott Int'l Inc.*, 242 F.R.D. 544, 548-49 (N.D. Cal. 2007) (numerosity is satisfied when a class has 40 members).

The Settlement Class also satisfies commonality, which requires that class members' claims "depend upon a common contention," of such a nature that "determination of its truth or falsity will resolve an issue that is central to the validity of each [claim] in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). There are several common questions here, including whether Cavalry called cellular telephone numbers while attempting to collect debts, and whether Cavalry used an ATDS. The answers to these questions turn on common evidence and can be resolved for all class members at once. *See, e.g., Whitaker v. Bennett Law, PLLC,* No. 13-3145, 2014 WL 5454398, at *5 (S.D. Cal. Oct. 27, 2014) (finding commonality satisfied where the central issue was whether the defendant used an ATDS or prerecorded or artificial voice to make calls).

Typicality is satisfied because Plaintiffs' claims are "reasonably coextensive with those of the absent class members." Fed. R. Civ. P. 23(a)(3). Plaintiffs' claims are typical of the claims of Settlement Class Members because they arise from the same course of alleged conduct: Cavalry's collection calls to cell phones. *See, e.g.*, *Whitaker*, 2014 WL 5454398, at *5 (finding typicality

satisfied because each class member's claim "revolves exclusively around [the defendant's] conduct as it specifically relates to the alleged violations of the TCPA"); *Agne v. Papa John's Int'l, Inc.*, 286 F.R.D. 559, 569 (W.D. Wash. 2012) (finding typicality satisfied where the plaintiff's claims, "like all class members' claims, arise from text marketing campaigns commissioned by Papa John's franchisees and executed by the same marketing vendor ….").

Finally, the adequacy requirement is satisfied when the class representatives will "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). To make this determination, "courts must resolve 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 Hyundai and Kia Fuel Econ. Litig.*, 926 F.3d at 566 (citation omitted). Plaintiffs have no conflicts of interest with the other proposed class members and have demonstrated their commitment by actively participating in the litigation. They and their counsel will continue to vigorously represent the Settlement Class.

2. The requirements of Rule 23(b)(3) are satisfied.

Class certification is appropriate under Rule 23(b)(3) when "questions of law or fact common to the members of the class predominate over any question affecting only individual members, and … a class action is superior to other available methods for the fair and efficient adjudication of the controversy." The Ninth Circuit recently held, in the context of a certification of a settlement class, that predominance was "readily met" where "class members were exposed to uniform . . . misrepresentations and suffered identical injuries within only a small range of damages." *See In re Hyundai and Kia Fuel Econ. Litig.*, 926 F.3d at 559.

Predominance is satisfied because the common and overarching question in this case is whether Cavalry used an ATDS to place collection calls to the cell phones of Settlement Class Members. This question can be resolved using the same evidence for all class members and is exactly the kind of predominant common issue that makes class certification appropriate. *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) ("When 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) ….'" (citation omitted)).

Superiority is also satisfied because resolution of thousands of the relatively small-value claims in this one action is far preferable to a multitude of individual lawsuits and promotes consistency and efficiency of adjudication. Fed. R. Civ. P. 23(b)(3). Classwide resolution is the only practical method of addressing the alleged TCPA violations at issue in this case. There are a million Settlement Class Members with modest individual claims, most of whom likely lack the resources necessary to seek individual legal redress. *See Local Joint Exec. Bd. of Culinary/ Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163 (9th Cir. 2001) (cases involving "multiple claims for relatively small individual sums" are particularly well suited to class treatment); *see also Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) ("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.").

C. The proposed Settlement should be preliminarily approved.

The court's role at the preliminary approval stage is to ensure that "the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Hanlon v. Chrysler Corp.*, 150 F.3d

1011, 1027 (9th Cir. 1998) (citation omitted); *see also In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 944 (9th Cir. 2015).

The Ninth Circuit has used these factors to assess a proposed settlement as fair, reasonable, and adequate: (1) the strength of Plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status through 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 to the proposed settlement. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) (quoting *Churchill Village, LLC v. General Electric*, 362 F.3d 566, 575 (9th Cir. 2004)).

Rule 23(e)(2) provides additional guidance for approval. Recent revisions require parties to provide courts with sufficient information to determine that it will likely be able to approve the settlement as fair, reasonable and adequate. The considerations are whether (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided by the settlement is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief including the method of processing class-member claims, if required; (iii) the terms of any proposed award of attorneys' fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3) made in connection with the proposed settlement; and (D) the proposal treats class members equitably relative to each other.

Plaintiffs address both sets of factors, many of which overlap.

1. Arm's-length, non-collusive negotiations let to the Settlement.

This case has been hard fought. The parties were at all times adversarial,

including during settlement discussions. "An initial presumption of fairness is usually involved if the settlement is recommended by class counsel after arm's-length bargaining." *Harris v. Vector Mktg. Corp.*, No. C-08-5198 EMC, 2011 WL 1627973, at *8 (N.D. Cal. Apr. 29, 2011) (citation omitted); *see also Rodriguez v. W. Publishing*, 563 F.3d 948, 965 (9th Cir. 2009) ("We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution."). 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 completed extensive discovery and fulsome briefing on class certification and summary judgment.

The negotiations were conducted with the assistance of the Honorable Leo Papas, and included two full days of mediation. *See Ruch v. AM Retail Group, Inc.*, No. 14-cv-05352-MEJ, 2016 WL 1161453, at *11 (N.D. Cal. Mar. 24, 2016) (holding the "process by which the parties reached their settlement," which included "formal mediation … weigh[ed] in favor of preliminary approval"); Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018 amendment ("the involvement of a neutral or court-affiliated mediator or facilitator in [settlement] negotiations may bear on whether they were conducted in a manner that would protect and further the class interests").

Counsel negotiated the Settlement with the benefit of many years of prior experience and a solid understanding of the facts and law of this case. Lemberg Decl. ¶¶ 18-19; McEntee Decl. ¶¶ 2-4, 9-16. Counsel have extensive experience litigating and settling class actions, and TCPA class actions in particular. Lemberg Decl. ¶ 6; McEntee Decl. ¶¶ 2-4. They believe the Settlement is fair, reasonable, adequate, and in the best interest of the Class as a whole. Lemberg Decl. ¶ 18; McEntee Decl. ¶ 16. The recommendation of experienced counsel weighs in favor of granting approval and creates a presumption of reasonableness.

See Bellinghausen v. Tractor Supply Co., 306 F.R.D. 245, 257 (N.D. Cal. 2015) ("The trial court is entitled to, and should, rely upon the judgment of experienced counsel for the parties." (citation omitted)); *Knight v. Red Door Salons, Inc.*, No. 08-01520 SC, 2009 WL 248367, at *4 (N.D. Cal. Feb. 2, 2009) (citing counsel's experience and recommendation as weighing in favor of approval). The fact that qualified and well-informed counsel endorse the Settlement as fair, reasonable, and adequate weighs heavily in favor of preliminary approval.

The Ninth Circuit has identified "red flags" that may suggest that plaintiffs' counsel allowed pursuit of their own self-interest to infect settlement negotiations, including when counsel receive a disproportionate portion of the settlement, the parties agree to a "clear sailing" arrangement providing for the payment of attorneys' fees separate and apart from class funds, or the parties agree that any fees not awarded will revert to defendants rather than be added to the class fund. *In re Hyundai and Kia Fuel Econ. Litig.*, 926 F.3d at 569. None is present in this Settlement. Because counsel will be paid from the same Cash Fund as Settlement Class Members, they were incentivized to negotiate the largest amount of relief possible. The Court will, of course, have ultimate discretion over the amount of the attorneys' fee award after reviewing counsel's motion. None of the Cash Fund will revert to Cavalry; any requested fees, costs, or incentive awards not approved by the Court will be distributed to the Settlement Class.

2. The relief provided is adequate considering the strength of Plaintiffs' case, the risk of maintaining a class action through trial, and the risk, cost, and delay of trial and appeal.

Cavalry has agreed to settlement relief worth more than $24 million to settle Plaintiffs' and Settlement Class Members' TCPA claims, including up to $18 million in a Debt Relief Fund and $6,150,000 in a Cash Fund. The Cash Fund will also be used to pay the costs of notice and settlement administration,

attorneys' fees, costs and expenses, and incentive awards to the Plaintiffs. These terms are more than adequate given the risks and delay of continued litigation.

Plaintiffs believe they have a case for liability. McEntee Decl. ¶ 25. 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 Plaintiffs maintain are automatic telephone dialing systems, as discussed at length in the parties' cross-motions for summary judgment. *Id*. But success on this score was certainly not guaranteed. *Id*. Cavalry denies liability for Plaintiffs' claims. *Id*. And the Court had not yet ruled on the parties' cross-motions for summary judgment on this very issue. *Id*. If the Court agreed with Cavalry that its systems are not ATDSs, Plaintiffs would lose on the merits. *Id.*

This risk is not unfounded. McEntee Decl. ¶ 26. 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* and some have interpreted it to preclude the systems that have traditionally been considered autodialers. *See Gadelhak v. AT&T Servs., Inc.,* No. 19-1738, 2020 WL 808270, at *8 (7th Cir. Feb. 19, 2020) (holding system did not qualify as an ATDS because it lacked the capacity to generate random or sequential numbers); *Glasser v. Hilton Grand Vacations Co., LLC,* 948 F.3d 1301, 1304–05 (11th Cir. 2020) (same). 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. McEntee Decl. ¶ 26.

Plaintiffs had additional hurdles to clear before they could recover any damages. Cavalry maintains that class members are not entitled to recover because they consented to be called on their cell phones by providing their

numbers to Cavalry or to the original creditor. *See* Dkt. 101. Consent is an affirmative defense for which Cavalry carries the burden of proof. *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1044 (9th Cir. 2017) ("We think it plain from the statutory language that prior express consent is an affirmative defense, not an element of a TCPA claim…."). Plaintiffs dispute that Cavalry could meet this burden at trial; but if the trier of fact disagreed with Plaintiffs on this legal issue, the Settlement Class would receive nothing. McEntee Decl. ¶ 27.

Cavalry's consent defense also created the risk that Plaintiffs' motion to certify under Rule 23(b)(3) would not succeed. McEntee Decl. ¶ 28. Courts have reached different results on consent's application to class certification. *Compare, e.g., Blair v. CBE Grp., Inc.*, 309 F.R.D. 621, 631 (S.D. Cal. 2015) (denying certification where "extensive individual factual inquiries" were required "to determine whether a particular class member provided express consent"), *with Abdeljalil v. Gen. Elec. Capital Corp.*, 306 F.R.D. 303, 311 (S.D. Cal. 2015) (granting certification where questions of fact and law predominate over individualized issues). Thus, Plaintiffs faced the risk that the Court would find Cavalry's consent evidence precluded class certification.

Finally, even if Plaintiffs prevailed on summary judgment and class certification, they would still need to convince a jury at trial. McEntee Decl. ¶ 29. Next, they would have to retain any favorable judgment through the appellate process. *Id*. Litigating this case to trial and through any appeals would be expensive and time-consuming and would present risk to both parties. *Id*. The Settlement, by contrast, provides prompt and certain relief. *See Nat'l Rural Telecommc'ns Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004) ("The Court shall consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief

in the future, after protracted and expensive litigation.").

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. McEntee Decl. ¶ 30. 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.[3] *Id*. Cavalry would certainly appeal any adverse verdict, which would delay any relief to class members. *Id*. 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. *Id*. Securing $24 million in benefits now, with certainty, will provide significant relief to Settlement Class Members who submit valid claims.

3. Counsel are well informed of the strengths and weaknesses of the claims and defenses and support the Settlement.

"A key inquiry is whether the parties had enough information to make an informed decision about the strength of their cases and the wisdom of settlement." *Rinky Dink, Inc. v. World Business Lenders*, Case No. C14-0268-JCC, 2016 WL 3087073, at *3 (W.D. Wash. May 31, 2016); *see also In re Mego Fin. Corp. Sec. Litig*., 213 F.3d 454, 459 (9th Cir. 2000). By the time they reached the Settlement, the parties had been in litigation for more than six years. McEntee Decl. ¶ 16. They understood the strengths and weaknesses of their evidence, witnesses, and legal positions. They had briefed class certification and cross-motions for summary judgment. They engaged in comprehensive class, merits, expert, and third-party discovery. They had more than sufficient information to make an informed decision. It is with this foundation that counsel, who have substantial experience in litigating TCPA class actions, endorse the Settlement. The

[3] Calculated as a single violation for each telephone number (1,035,232 x $500).

recommendation of experienced counsel weighs in favor of granting final approval and creates a presumption of reasonableness. *See Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 257 (N.D. Cal. 2015) ("The trial court is entitled to, and should, rely upon the judgment of experienced counsel for the parties." (citation omitted)).

4. Awards will be fairly distributed to the Settlement Class.

The method for distributing the Cash Fund to Settlement Class Members is simple, straightforward, and equitable. To obtain settlement relief, a Settlement Class Member need only complete a simple claim form with his or her name, contact information, the telephone number on which he or she received the allegedly unlawful calls, and an affirmation that he or she received the allegedly unlawful calls at the designated telephone number.

A Settlement Class Member with an Open Account will receive a claim form that offers a choice between debt relief or cash. A Settlement Class Member with a Closed Account will receive a claim form for cash only. Settlement Class Members may also submit claims online through the Settlement Website. There, a class member with an Open Account may enter his or her identifying information to determine the amount of outstanding debt associated with her account or accounts so they can make an informed decision about whether to choose debt relief or cash. The claim process is necessary to deter fraud and ensure that claimants are in fact Settlement Class Members. Claim forms will be processed by the Class Administrator in accordance with the Settlement Agreement.

Settlement Class Members will be treated equitably relative to each other. Each class member who submits a valid claim for debt relief will receive an equal share of up to $599 of $18 million in debt relief. Each class member who submits a valid claim for cash will receive an equal share of the Cash Fund after approved deductions for administrative costs, attorneys' fees, costs, and incentive awards.

The two Plaintiffs intend to request Court approval of incentive awards of $10,000 each. The Ninth Circuit has explained that incentive awards are "intended to compensate class representatives for work undertaken on behalf of a class 'are fairly typical in class action cases.'" *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 943 (9th Cir. 2015) (quoting *Rodriguez*, 563 F.3d at 958-59). The factors courts consider include the class representative's actions to protect the interests of the class, the degree to which the class has benefitted from those actions, the time and effort the class representative expended in pursuing the litigation, and any risk the class representative assumed. *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003). Plaintiffs devoted significant time assisting counsel in this case over the past several years, including assisting with development of the case, responding to discovery, and being deposed. McEntee Dec. ¶ 9. Incentive Awards of $10,000 are reasonable and in line with awards approved by federal courts in California and elsewhere. *See, e.g., In re Nat'l Collegiate Athletic Ass'n*, No. 4:14-md-2541-CW, 2017 WL 6040065, at *11 (N.D. Cal. Dec. 6, 2017) (awarding $20,000 incentive awards to each of four class representatives and collecting cases approving similar awards); *Pelletz v. Weyerhaeuser Co.*, 592 F. Supp. 2d 1322, 1329-30 & n.9 (W.D. Wash. 2009) (collecting cases approving awards ranging from $5,000 to $40,000).

No agreements have been made in connection with the proposed Settlement other than the Settlement Agreement. *See* Fed. R. Civ. P. 23(e)(3).

5. Counsel will request approval of a fair and reasonable fee.

Counsel intend to request an award of $2,000,000 to compensate them for the work performed on behalf of the Class, and for reimbursement of up to $100,000 for out-of-pocket expenses they have incurred in prosecuting this action. The attorneys' fees and costs counsel seek are reasonable under the

circumstances of this case. *See In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011) (requiring that any attorneys' fee awarded be reasonable). The Ninth Circuit has recognized that the percentage-of-the-fund method is the appropriate method for calculating fees when counsel's effort has created a common fund. *See, e.g., In re Bluetooth*, 654 F.3d at 942. The Ninth Circuit benchmark for attorneys' fees in class action settlements is 25% of the settlement fund. *In re Hyundai and Kia Fuel Econ. Litig.*, 926 F.3d at 570-71.

Courts in the Ninth Circuit and elsewhere "have recognized the value of debt relief and included it as part of the settlement fund." *Bottoni v. Sallie Mae, Inc.*, No. C 10-03602 LB, 2013 WL 12312794, at *7 (N.D. Cal. Nov. 21, 2013); *see also Smith v. CRST Van Expedited, Inc.*, 10-CV-1116-IEG WMC, 2013 WL 163293 (S.D. Cal. Jan. 14, 2013) (including $9 million in debt relief in measuring the total value of settlement for purposes of calculating class counsel's fee award under the percentage-of-recovery method); *Cosgrove v. Citizens Auto. Fin., Inc.*, CIV.A. 09-1095, 2011 WL 3740809 (E.D. Pa. Aug. 25, 2011) (finding debt forgiveness provides a valuable award to class members that, unlike a non-monetary award such as a coupon, does not require careful scrutiny to ensure it has value to the class); *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 147 (E.D. Pa. 2000) (including $1.3 million in delinquent loan forgiveness in the value of settlement fund for purposes of calculating class counsel's fee award under the percentage-of-recovery method). Counsel's request for $2,000,000 in attorneys' fees amounts to approximately 8% of the estimated $24 million value of the Settlement, which is well below the 25% benchmark.

As of this filing, counsel have devoted well over 2,000 hours and incurred over $1 million in fees and approximately $88,000 in litigation expenses. Lemberg Decl. ¶ 19; McEntee Decl. ¶ 22. Finalizing the Settlement and overseeing notice and distribution of settlement awards will require additional

time commitment. Counsel will file a fee petition detailing their work and the basis for the fee request thirty days before the claim deadline. Agr. § 2.19.2.

6. The reaction of Settlement Class Members to the Settlement.

Settlement Class Members have not yet had an opportunity to react to the proposed Settlement because notice has not yet gone out. Plaintiffs will provide the Court with information about Settlement Class Members' reaction in their motion for final approval of the Settlement.

D. The Notice Plan complies with Rule 23(e) and due process.

Rule 23(e)(1) requires the Court to "direct notice in a reasonable manner to all class members who would be bound by" a proposed settlement. Fed. R. Civ. P. 23(e)(1). Class members are entitled to the "best notice that is practicable under the circumstances" of any proposed settlement before it is finally approved by the Court. Fed. R. Civ. P. 23(c)(2)(B). Under Rule 23(c)(2)(B) "notice may be by one or more of the following: United States mail, electronic means, or other appropriate means." To comply with due process, notice must be "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997). The notice must state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3). Fed. R. Civ. P. 23(c)(2)(B); *In re Hyundai and Kia Fuel Econ. Litig.*, 926 F.3d at 567 ("settlement notices must 'present information about a proposed settlement neutrally, simply, and understandably'") (citation omitted).

The parties have developed a Notice Plan that will include direct mail notice to Settlement Class Members using address information from Cavalry's records. Declaration of Jennifer M. Keough Regarding Proposed Notice Program ("Keough Decl.") ¶¶ 12-13. JND will send the postcard notice to Settlement Class Members directly through first class mail using the most recent address information available based on Cavalry's records and the United States Postal Service's National Change of Address database. *Id*. ¶ 15. JND will also conduct a sophisticated email append process to determine email addresses for Settlement Class Members; JND estimates they will locate email addresses for two thirds of the Settlement Class. *Id*. ¶ 16. JND will also establish and maintain a Settlement Website which will display the notices, Settlement Agreement, and other important case-related documents, and allows Settlement Class Members to see whether their accounts are Open or Closed, and if Open, the current amount of debt. *Id*. ¶¶ 18-19. JND will also establish a toll-free number that Settlement Class Members can call for more information. *Id*. ¶ 21.

The notices, attached as Exhibits A, B, & C to the Settlement Agreement, are drafted in plain English so they will be easy to understand. They include key information about the Settlement, including the deadline to file a claim, the deadline to request exclusion or object, and the date of the Final Approval Hearing (and that the hearing date may change without further notice). They state the amount of the attorneys' fees and costs counsel will request, the amount of the incentive awards Plaintiffs will request, and provide an estimate of the cash payment Settlement Class Members will receive if they do not request exclusion. The longform notice discloses that, by participating in the Settlement, class members give up the right to sue for between $500 and $1,500 per call. The notices direct Settlement Class Members to the Settlement Website for further information, where the notices, Settlement Agreement, and Settlement-related

motions and orders will be posted. Agr. § 6, Exh. A, B, & C. The longform notice also provides contact information for counsel. *Id*., Exh. C.

Settlement Class Members will have sixty (60) days from the Notice Deadline to submit claims, opt out, or submit objections. Agr. §§ 2.19.3, 2.19.4, 2.19.5. After final approval, JND will mail settlement awards to all valid claimants. The proposed Notice Plan complies with Rule 23 and due process.

E. The schedule for final approval.

The next steps are to schedule a final approval hearing, notify Settlement Class Members of the Settlement and hearing, and provide class members with the opportunity to exclude themselves from, or object to, the Settlement. The parties propose the following schedule for final approval of the Settlement:

ACTION	DATE
Deadline for Mailing Class Notice ("Notice Deadline")	45 days after entry of Preliminary Approval Order
Counsel's Fee Motion Submitted	30 days after Notice Deadline
Exclusion/Objection Deadline	60 days after Notice Deadline
Final Approval Brief and Response to Objections Due	90 days after the Notice Deadline
Final Approval Hearing / Noting Date	No earlier than 118 days after entry of the Preliminary Approval Order
Final Approval Order Entered	At the Court's discretion

V. CONCLUSION

Plaintiffs respectfully request that the Court (1) consolidate the *Horton* and *Krejci* cases; (2) certify the Settlement Class; (3) preliminarily approve the Settlement; (4) appoint Terrell Marshall Law Group PLLC and Lemberg Law,

LLC as Class Counsel; (5) appoint Cory Horton and Kevin Krejci as Class Representatives; (6) approve the proposed notice plan; (7) appoint JND Legal Administration as the Class Administrator; and (8) schedule the fairness hearing.

TERRELL MARSHALL LAW GROUP PLLC

By: /s/ Adrienne D. McEntee, *Pro Hac Vice*

Beth E. Terrell, CSB #178181
Email: bterrell@terrellmarshall.com
Adrienne D. McEntee, *Admitted Pro Hac Vice*
Email: amcentee@terrellmarshall.com
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
Telephone: (206) 816-6603
Facsimile: (206) 319-5450

James C. Shah
Email: jshah@sfmslaw.com
SHEPHERD, FINKELMAN, MILLER & SHAH, LLP
1845 Walnut Street, Suite 806
Philadelphia, Pennsylvania 19103
Telephone: (610) 891-9880
Facsimile: (866) 300-7367

Chiharu Sekino, SBN #306589
Email: csekino@sfmslaw.com
SHEPHERD, FINKELMAN, MILLER & SHAH, LLP
1230 Columbia Street, Suite 1140
San Diego, California 92101
Telephone: (619) 235-2416
Facsimile: (866) 300-7367

Attorneys for Plaintiff Cory Horton

LEMBERG LAW, LLC

By: /s/ Trinette G. Kent, SBN#222020

Trinette G. Kent, SBN #222020
E-mail: tkent@lemberglaw.com
3219 East Camelback Road, Suite 588
Phoenix, Arizona 85018
Telephone: (480) 247-9644
Facsimile: (480) 717-4781
E-mail: tkent@lemberglaw.com

Sergei Lemberg, *Admitted Pro Hac Vice*
E-mail: slemberg@lemberglaw.com
43 Danbury Road
Wilton, Connecticut 06897
Telephone: (480) 247-9644
Facsimile: (203) 653-3424

Attorneys for Kevin Krejci

CERTIFICATE OF SERVICE

I, Adrienne D. McEntee, hereby certify that on February 21, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Tomio B. Narita, CSB #156576
Email: tnarita@snllp.com
Jeffrey A. Topor, CSB #195545
Email: jtopor@snllp.com
SIMMONDS & NARITA LLP
44 Montgomery Street, Suite 3010
San Francisco, California 94104-4816
Telephone: (415) 283-1000
Facsimile: (415) 352-2625

Attorneys for Defendant

DATED this 21st day of February, 2020.

TERRELL MARSHALL LAW GROUP PLLC

By: /s/ Adrienne D. McEntee, *Pro Hac Vice*
Adrienne D. McEntee, *Pro Hac Vice*
Email: amcentee@terrellmarshall.com
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
Telephone: (206) 816-6603
Facsimile: (206) 319-5450

Attorneys for Plaintiff