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17 UNITED STATES DISTRICT COURT
18 FOR THE NORTHERN DISTRICT OF CALIFORNIA
19 OAKLAND DIVISION

20 DANIEL BERMAN, STEPHANIE
21 HERNANDEZ, and ERICA RUSSELL,

22 Plaintiffs,

23 v.

24 FREEDOM FINANCIAL NETWORK, LLC,
25 FREEDOM DEBT RELIEF, LLC, FLUENT,
26 INC., and LEAD SCIENCE, LLC,

Defendants.

Case No. 4:18-cv-01060-YGR

**NOTICE OF MOTION AND
MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

DATE: April 25, 2023
TIME: 2:00 p.m.
LOCATION: Oakland Courthouse
Courtroom 1 - 4th Floor

1 TO: THE CLERK OF THE COURT; and

2 TO: DEFENDANTS FREEDOM FINANCIAL NETWORK, LLC, FREEDOM DEBT
3 RELIEF, LLC, FLUENT, INC., AND LEAD SCIENCE, LLC:

4 PLEASE TAKE NOTICE that on April 25, 2023, at 2:00 p.m., in Courtroom 1, 4th Floor,
5 of the Oakland Courthouse for the U.S. District Court for the Northern District of California,
6 1301 Clay Street, Oakland, California, 94612, Plaintiffs will move for preliminary approval of a
7 class action settlement.

8 This motion will be based on: this Notice of Motion, the Memorandum of Points and
9 Authorities, the Declarations of Beth Terrell, Edward Broderick, Matthew P. McCue, Anthony
10 Paronich, Eric Schachter, Daniel Berman, Stephanie Hernandez, and Erica Russell, the records
11 and file in this action, and on such other matter as may be presented before or at the hearing of
12 the motion.

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I. INTRODUCTION

1
2 Plaintiffs Daniel Berman, Stephanie Hernandez, and Erica Russell have reached a
3 Settlement with Defendants Freedom Financial Network, LLC and Freedom Debt Relief, LLC
4 (together, “Freedom”), Fluent, Inc., and Lead Science, LLC (with Freedom, “Defendants”) in
5 this class action brought under the Telephone Consumer Protection Act. Defendants have agreed
6 to pay \$9,750,000 to establish a non-reversionary Settlement Fund for the benefit of Plaintiffs
7 and proposed Settlement Class Members.¹ Defendant Fluent, Inc. will also make changes to its
8 practices that will benefit all members of the Settlement Class regardless of whether they submit
9 a claim. Among other things, Fluent will not initiate, cause others to initiate, or assist in initiating
10 any outbound telephone call that plays or delivers a prerecorded message. Fluent also will
11 maintain evidence of the consent it receives to conduct telemarketing and require its affiliated
12 companies to provide it, upon request, with calling records and evidence of telemarketing
13 consent.

14 The proposed Settlement Class is broader than the classes pled in the Fourth Amended
15 Complaint and that Plaintiffs sought to certify in their class certification motion in that it
16 includes people who received calls or texts using an artificial or prerecorded voice to their
17 landlines in addition to individuals who received prerecorded calls to their cellular telephone
18 numbers. As this litigation involved calls placed using an artificial or prerecorded voice, the
19 proposed Settlement Class is tightly tied to the allegations at issue and reasonable to both the
20 Settlement Class and Defendants. To avoid confusion to Settlement Class members, the proposed
21 Settlement Class definition does not distinguish between individuals who visited Fluent’s
22 website and those who did not visit Fluent’s website or between Settlement Class members who
23 have claims under the TCPA’s National-Do-Not-Call provision and those under the robocall
24 provisions. All are treated equally for Settlement purposes and will receive relief so long as they
25 received a call or text that was placed using an artificial or prerecorded voice.

26
27 ¹ Capitalized terms have the same definitions as in the Settlement Agreement. Terrell Decl.,
Ex. 1.

1 liable under the TCPA for calls made promoting their products: (1) to cell phones using an
2 automated telephone dialing system or an artificial or prerecorded voice, in violation of 47
3 U.S.C. § 227(b)(1)(A); and (2) to numbers on the National Do Not Call list, in violation of §
4 227(c)(5). Plaintiff amended his complaint to add Fluent, Inc. and Lead Science, LLC a few
5 months later and filed a second amended complaint that added calls Plaintiff Berman had
6 received from Defendants. *See* ECF Nos. 30, 66-3.

7 After the Court denied Plaintiff Berman's motion for class certification without prejudice,
8 Plaintiffs filed a third amended complaint that added Stephanie Hernandez and Erica Russell as
9 named Plaintiffs. ECF No. 220. Plaintiffs Hernandez and Russell do not dispute that they visited
10 a Fluent website. Plaintiffs amended their complaint again after the United States Supreme Court
11 provided guidance in *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021) on the type of equipment
12 that qualifies to be an automatic telephone dialing system (ATDS) under the TCPA. In light of
13 *Facebook*, Plaintiffs limited their claims under section 227(b)(1) of the TCPA to the prerecorded
14 voice calls that Plaintiffs received and to eliminate from their proposed class definitions any
15 reference to an ATDS or to automated text messages. *See* ECF No. 292 (Fourth Amended Compl).

16 **B. Plaintiffs engaged in discovery and worked with experts to analyze calling data.**

17 The parties served and responded to written discovery requests and produced and
18 reviewed thousands of pages of documents. Plaintiffs took seven depositions of Defendants'
19 managers and Defendants deposed the three Plaintiffs. Terrell Decl. ¶ 5. Plaintiffs retained
20 consulting and testifying experts (1) to evaluate the technology that Defendants used to generate
21 leads and place telemarketing calls to consumers, and (2) to process and analyze the calling
22 records to identify potential TCPA violations. *Id.* ¶ 6. Plaintiffs' counsel also conducted its own
23 research and analysis, scouring the Internet Archives for screenshots of Fluent's webpages and
24 scrubbing the data to identify prerecorded calls. *Id.* ¶ 7. Defendants aggressively contested the
25 scope of discovery, requiring multiple discovery conferences with then Magistrate Judge
26 Jacqueline Corley. *Id.* ¶ 8.

1 **C. The Court denied Plaintiff Berman’s initial class certification motion without**
2 **prejudice and denied Defendants’ motion to compel arbitration, which the Ninth**
3 **Circuit affirmed.**

4 Plaintiff Berman moved for class certification on February 8, 2019. ECF No. 139.
5 Following a hearing, the Court denied Plaintiff Berman’s motion because he is not subject to the
6 affirmative defenses of express consent and mandatory arbitration that Defendants assert against
7 class members who visited Fluent’s websites. The Court concluded that Plaintiff Berman was not
8 a typical or adequate representative of those class members and noted that Plaintiff had not
9 proposed subclasses or added a class representative to address this concern.. ECF No. 198 at 30.

10 Following the Court’s decision, Plaintiff Berman added two class representatives,
11 Plaintiffs Hernandez and Russell. Terrell Decl. ¶ 9. Defendants promptly moved to compel
12 arbitration, arguing that Plaintiffs Russell and Hernandez agreed to arbitrate their claims when
13 they visited Fluent’s websites. The Court denied Defendants’ motion and denied Defendants’
14 motion for reconsideration. ECF Nos. 266, 280. The Ninth Circuit affirmed the Court’s decisions
15 in a published opinion. *See Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849 (9th Cir. 2022).

16 **D. The Court has denied multiple dispositive motions and has denied, in part, motions**
17 **to strike experts.**

18 Defendants filed multiple dispositive motions over the course of this five-year litigation.
19 Defendants moved to dismiss Plaintiff Berman’s Second Amended Complaint on November 14,
20 2018 (ECF No. 96) and then moved for summary judgment a few months later (ECF No. 156).
21 After the Ninth Circuit affirmed the Court’s denial of Defendants’ motion to compel arbitration
22 Lead Science separately filed a motion to dismiss, arguing that it was a common carrier exempt
23 from the TCPA. ECF No. 295. The Court denied all of three motions. ECF Nos. 147, 198, 315.

24 Defendants also moved to limit the supplemental expert report that Plaintiff Berman’s
25 expert submitted in support of class certification. ECF No. 153. The Court granted Defendants’
26 motion in part and denied it in part. ECF No. 198.

1 **E. Plaintiffs’ renewed motion for class certification and settlement negotiations.**

2 Plaintiffs filed a renewed motion for class certification on July 1, 2022. ECF No. 298.
 3 That motion was fully briefed when the parties commenced settlement negotiations. Terrell Decl.
 4 ¶ 11. The parties mediated with experienced JAMS mediator Robert A. Meyer on December 13,
 5 2022. *Id.* Although the matter did not settle during that mediation, the parties continued to
 6 negotiate over the course of the next month. *Id.* The parties reached agreement on material
 7 settlement terms on February 3, 2023 just days before oral argument on Plaintiffs’ motion for
 8 class certification was scheduled to take place. *Id.*

9 **III. SETTLEMENT TERMS**

10 The terms of the Settlement are memorialized in the parties’ Class Action Settlement
 11 Agreement, referred to as the “Settlement” and attached as Exhibit 1 to the Terrell Declaration.

12 **A. The proposed Settlement Class.**

13 The proposed Settlement Class is defined as:

14 Every person in the United States (1) to whom Defendants placed a
 15 call or sent a text message, (2) to a telephone number listed in
 16 LEADSCIENCE_677, (3) using an artificial or prerecorded voice,
 17 (4) in order to sell Freedom’s products, and (5) between May 17,
 2017, and April 17, 2018.

18 Settlement § 1.29. The proposed Settlement Class is broader than the classes proposed in the
 19 Fourth Amended Complaint and in Plaintiffs’ motion for class certification because it includes
 20 both landline and cellular telephone numbers that received calls using an artificial or prerecorded
 21 voice. The proposed Settlement Class does not distinguish between Settlement Class Members
 22 who “visited” a Fluent website and those who did not. It also does not distinguish between
 23 Settlement Class members who have claims under the TCPA’s National-Do-Not-Call provision
 24 and those under the robocall provisions. All of these groups are treated equally under the
 25 Settlement. *Id.* at 1.28.

26 Plaintiffs, with their expert’s assistance, have identified approximately 675,377
 27 Settlement Class Members from the calling data produced in discovery. Terrell Decl. ¶ 12.

1 **B. Monetary relief.**

2 The proposed Settlement requires Defendants to pay \$9,750,000 into a “Settlement
3 Fund.” Subject to Court approval, the Settlement Fund will be used to make payments to all
4 Settlement Class Members who submit timely and valid claims; pay the Settlement
5 Administrator the costs of notice and Settlement Administration Expenses in an amount
6 estimated to be at \$475,000; pay Service Awards in the amount of \$5,000 to each Class
7 Representative; and pay Class Counsel’s attorneys’ fees in an amount not to exceed \$3,250,000
8 and litigation costs and expenses of approximately \$200,000. Settlement §§ 2.1, 8.

9 The Settlement Fund is non-reversionary. If any amounts remain in the Settlement Fund
10 after the deadline for cashing checks, the Settlement Administrator will make a second
11 distribution of funds if it is administratively feasible to do so. Settlement § 2.3(d). If any amounts
12 remain in the Settlement Fund after distribution is complete, including any second distribution,
13 the parties request that the Court direct those funds to be disbursed *cy pres* to the Public Justice
14 Foundation (Public Justice). *Id.* Public Justice is a non-profit organization dedicated to protecting
15 consumers, including consumers harassed by unlawful telemarketing calls. Terrell Decl. ¶ 13.

16 1. Payments to Settlement Class Members.

17 After payment of Court-approved administrative expenses, attorneys’ fees and expenses,
18 and service awards, the Settlement Fund will be distributed to Settlement Class Members who
19 submit timely and valid claims. Settlement §§ 2.3(b) & 5.3. To participate, each Settlement Class
20 Member will only have to complete a simple Claim Form with his or her name, contact
21 information, the telephone number that received the allegedly unlawful calls, and an affirmation
22 that he or she received the allegedly unlawful calls at the designated telephone number.
23 Settlement, Ex. 1.

24 The amount that each claimant will receive depends on the number of Settlement Class
25 Members who submit claims. The formula for determining the Settlement Class Member’s
26 individual award is: Net Settlement Fund divided by the total number of timely and valid Claim
27 Forms. For example, if the Net Settlement Fund is \$5,860,325 and 67,500 Settlement Class

1 Members submit claims, each Settlement Class Member will receive approximately \$87.00
2 (\$5,860,325/67,500 = \$86.82).

3 2. Settlement Administration Expenses.

4 The Settlement Agreement provides that any Settlement Administration Expenses will be
5 paid from the Settlement Fund. Settlement § 2.1. The parties propose to retain A.B. Data as the
6 Settlement Administrator, subject to Court approval. A.B. Data has substantial experience in
7 administering class settlements, including developing and executing notice plans and processing
8 claims. Schachter Decl. ¶¶ 3-4. A.B. Data developed the proposed Notice Plan and will be
9 responsible for disseminating notice by mail and email as well as the proposed media campaign.
10 A.B. Data will also be responsible for following up on undelivered notices, establishing and
11 maintaining a Settlement Website and a toll-free number and responding to Settlement Class
12 Member inquiries; processing, logging, and reviewing exclusion requests for deficiencies; and
13 addressing deficiencies with those requesting exclusion and providing them with an opportunity
14 to cure; processing, logging, and reviewing claims for deficiencies and/or fraud, and addressing
15 deficiencies with claimants providing them with an opportunity to cure; preparing and delivering
16 the Class Action Fairness Act notice to the appropriate federal and state officials, administering
17 the Settlement Fund, disbursing the attorneys' Fee Award and Service Awards, and distributing
18 the Settlement Fund to Settlement Class Members who file timely and valid Claim Forms.
19 Settlement §§ 6.1-6.5. A.B. Data estimates its costs will be \$475,000. Schachter Decl. ¶ 21.

20 The parties chose to retain A.B. Data after a competitive bidding process where two other
21 experienced and competent administrators submitted bids. A.B. Data's bid was comparable in
22 price to the other two bids and A.B. Data has robust procedures in place for handling class
23 member data. Schachter Decl. ¶¶ 5-6. Plaintiffs' counsel have worked with A.B. Data in
24 connection with six other cases within the last two years. Terrell Decl. ¶ 28.

25 3. Service Awards and attorneys' fees and costs.

26 Plaintiffs will request Service Awards in the amount of \$5,000 each in recognition of
27 their service to the Settlement Class. Settlement § 8.4.

1 The Settlement Agreement provides that Class Counsel may request that the Court
2 approve an award of attorneys' fees and litigation expenses. Settlement § 8.1. Class Counsel will
3 file a motion requesting an attorneys' fee award not to exceed one-third of the Settlement Fund
4 and reimbursement of approximately \$200,000 in out-of-pocket costs. The Settlement
5 Agreement is not contingent on the amount of attorneys' fees or costs awarded.

6 **C. Prospective relief.**

7 Fluent has agreed it will not initiate, cause others to initiate, or assist others in initiating
8 any outbound telephone calls that plays or delivers a prerecorded message. Settlement § 2.4.5.
9 Fluent also has agreed to implement procedures designed to identify telephone numbers
10 associated with invalid names or addresses and processes to ensure that those numbers are not
11 called. *Id.* § 2.4.4. Fluent also agrees to maintain evidence of telemarketing consent and to
12 require its affiliates to maintain, and provide to Fluent upon request, evidence of telemarketing
13 consent. *Id.* §§ 2.4.1, 2.4.2. Fluent also will require its affiliated companies to maintain and
14 provide Fluent, upon request, with call records. *Id.* § 2.4.3. This prospective relief, which is
15 separate and apart from the monetary relief, will benefit Settlement Class Members because it
16 will help promote TCPA compliance.

17 **D. Release.**

18 In exchange for the Settlement benefits, Settlement Class Members will release claims
19 against Defendants, which include Defendants' present, former, and future parents, subsidiaries,
20 divisions, partnerships, joint ventures, unincorporated entities, affiliates, and any entities directly
21 or indirectly under their respective control in the past or present, and each of their respective
22 assignors, predecessors, successors and assigns, officers, directors, shareholders, employees,
23 members, contractors, subcontractors, vendors, administrators, agents, insurers, attorneys,
24 accountants, and representatives, heirs, and the estates of any and all of the foregoing. Settlement
25 §§ 1.23, 1.24, 3.1. The release is tailored to the claims at issue in this case—that is, claims that
26 arise out of or relate to telemarketing calls or text messages that one or more of Defendants
27 placed between May 17, 2017 and April 17, 2018 using an artificial or prerecorded voice in order

1 to sell Freedom's products and services and could have been alleged in Plaintiffs' Fourth
2 Amended Complaint.

3 **E. Notice Plan.**

4 The parties propose a Notice Plan including direct notice by email or mail to Settlement
5 Class Members who can be identified and an online notice program that will reach at least 80%
6 of Settlement Class members. Settlement § 4.2. The Notice Plan is described below.

7 **IV. AUTHORITY AND ARGUMENT**

8 The Court's role at preliminary approval is to determine whether it is appropriate to
9 provide notice of the proposed settlement to the class. Because the parties agreed to the
10 Settlement before the Court certified a class, Plaintiffs first address certification of the Settlement
11 Class. Plaintiffs then address the merits of the proposed Settlement. Finally, Plaintiffs discuss the
12 proposed Notice Plan.

13 **A. The Settlement Class should be preliminarily certified.**

14 The Settlement Class satisfies the requirements of Rule 23(a) and (b)(3).² The Rule 23(a)
15 requirements are numerosity, commonality, typicality and adequacy. Rule 23(b)(3) requires
16 plaintiffs to establish "that the questions of law or fact common to class members predominate
17 over any questions affecting only individual members, and that a class action is superior to other
18 available methods for fairly and efficiently adjudicating the controversy."

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

20 The proposed Settlement Class has at least 675,377 members, which satisfies the
21 numerosity requirement. *See Celano v. Marriott Int'l Inc.*, 242 F.R.D. 544, 548-49 (N.D. Cal.
22 2007) (numerosity is generally satisfied when a class has at least 40 members).

23 The Settlement Class also satisfies the commonality requirement, which requires that
24 class members' claims "depend upon a common contention," of such a nature that
25 "determination of its truth or falsity will resolve an issue that is central to the validity of each

26 _____
27 ² For settlement purposes only, Defendants do not dispute this characterization. If the proposed
28 Settlement is not approved, Defendants reserve their right to contest class certification.

1 [claim] in one stroke.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). There are
2 several common questions in this case, including whether Freedom is vicariously liable for the
3 calls it hired Fluent to make, whether Fluent’s webpages comply with the “signature” and “clear
4 and conspicuous disclosure” requirements under the TCPA, and whether Fluent and Drips used
5 an artificial prerecorded voice to call class members. The answers to these questions turn on
6 common evidence and can be fairly resolved for all class members at once. *See, e.g., Williams v.*
7 *PillPack LLC*, 343 F.R.D. 201, 211(W.D. Wash. 2022) (finding that questions of vicarious
8 liability satisfied commonality); *Whitaker v. Bennett Law, PLLC*, 2014 WL 5454398, at *5 (S.D.
9 Cal. Oct. 27, 2014) (finding commonality satisfied where the central issue was whether the
10 defendant used an ATDS or prerecorded or artificial voice to make calls); *See McMillion v. Rash*
11 *Curtis & Assocs.*, 2017 WL 3895764, at *5 (N.D. Cal. Sept. 6, 2017) (where the “Defendant
12 engaged in the same practice with respect to all class members, ... whether that practice was
13 performed without prior express consent is common to the classes”).

14 Typicality is satisfied if “the claims or defenses of the representative parties are typical of
15 the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). Plaintiffs’ claims are typical of the
16 claims of Settlement Class members because they arise from the same course of alleged conduct:
17 calls placed using an artificial or prerecorded voice promoting Freedom’s goods and services.
18 *See Bennett v. GoDaddy.com*, 2019 WL 1552911, at *5 (D. Ariz. Apr. 8, 2019) (“Plaintiff and all
19 putative class members suffered the same injury based on the same conduct by Defendant in the
20 form of unauthorized calls to their cellular telephone lines.”).

21 Finally, the adequacy requirement is satisfied when the class representatives will “fairly
22 and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). To make this
23 determination, “courts must resolve two questions: ‘(1) do the named plaintiffs and their counsel
24 have any conflicts of interest with other class members and (2) will the named plaintiffs and their
25 counsel prosecute the action vigorously on behalf of the class?’” *Ellis v. Costco Wholesale*
26 *Corp.*, 657 F.3d 970, 985 (9th Cir. 2011) (citation omitted). None of the Plaintiffs has an
27 antagonistic or conflicting interest with the members of the Settlement Class. Plaintiffs have

1 demonstrated their commitment to the class by actively participating in the litigation. *See*
2 Berman Decl. ¶¶ 9-14; Hernandez Decl. ¶¶ 6-9; Russell Decl. ¶¶ 8-11. Each of the Plaintiffs has
3 worked with counsel to develop the class claims, respond to discovery, and prepare for their
4 depositions. *Id.* Plaintiffs’ counsel have substantial experience in litigating class action lawsuits
5 asserting TCPA claims, and have all been appointed to serve as class counsel in similar cases.
6 Terrell Decl. ¶¶ 15-20; Broderick Decl. ¶¶ 7-13; Paronich Decl. ¶¶ 6-10; McCue Decl. ¶¶ 7-13.

7 2. The Settlement Class satisfies the requirements of Rule 23(b)(3).

8 Class certification is appropriate under Rule 23(b)(3) when “questions of law or fact
9 common to the members of the class predominate over any question affecting only individual
10 members, and ... a class action is superior to other available methods for the fair and efficient
11 adjudication of the controversy.” Both requirements are satisfied here.

12 Common questions predominate over any questions affecting only individual members.
13 The question common to all Settlement Class members is whether Freedom is vicariously liable
14 for the calls placed on its behalf. The issue of vicarious liability “turns on the federal common
15 law of agency and can arise from actual authority, apparent authority, or ratification.” *Kristensen*
16 *v. Credit Payment Servs.*, 12 F. Supp. 3d 1292, 1306 (D. Nev. Mar. 26, 2014); *see also Abante*
17 *Rooter & Plumbing, Inc. v. Alarm.com Inc.*, 2018 WL 3707283, at *3 (N.D. Cal. Aug. 3, 2018).
18 These agency theories turn on the relationship between the defendants, “without concern for any
19 conduct by the class members,” and therefore will be decided with common evidence.
20 *Kristensen*, 12 F. Supp. 3d at 1306. Because this question can be resolved using the same
21 evidence for all class members and is exactly the kind of predominant common issue that makes
22 class certification appropriate. *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045
23 (2016) (“When ‘one or more of the central issues in the action are common to the class and can
24 be said to predominate, the action may be considered proper under Rule 23(b)(3)’” (citation
25 omitted)).

26 The parties disagree regarding the commonality and scope of questions of individual
27 consumers’ consent to receive the calls at issue. Plaintiffs contend that consent issues are not

1 sufficiently individualized to preclude class certification, and that the only Settlement Class
2 Members who could have consented to the telemarketing calls are those who entered their
3 numbers on one of Fluent’s websites. Defendants contend that issues of consent will be highly
4 individualized between proposed class members, depending on the paths each consumer took
5 through Fluent’s websites and what each consumer understood during those processes.

6 Relatedly, Plaintiffs contend the disclosures on Fluent’s webpages do not comply with the
7 TCPA. Defendants disagree.

8 In addition to these disputed issues of consent, Freedom asserts an independent defense
9 that it cannot be held vicariously liable in any capacity for any calls at issue in this action.

10 Freedom did not initiate any of the calls and contends that there is no evidence that Freedom
11 actually or apparently authorized these calls, and that it did not ratify any of the other
12 Defendants’ conduct. Plaintiffs disagree, but understand that this would be a contested issue
13 should the litigation proceed.

14 Class certification is also “superior to other available methods for fair and efficient
15 adjudication of the controversy.” Fed. R. Civ. P. 23(b)(3). Classwide resolution is the only
16 practical method of addressing the alleged telemarketing violations at issue in this case. There
17 are hundreds of thousands of class members with modest individual claims, most of whom likely
18 lack the resources necessary to seek individual legal redress. *See Local Joint Exec. Bd. of*
19 *Culinary/ Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1163 (9th Cir. 2001)
20 (cases involving “multiple claims for relatively small individual sums” are particularly well
21 suited to class treatment); *see also Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168,
22 1175 (9th Cir. 2010) (“Where recovery on an individual basis would be dwarfed by the cost of
23 litigating on an individual basis, this factor weighs in favor of class certification.”). The parties
24 are unaware of any pending litigation against Defendants regarding the prerecorded voice calls
25 placed in this case. Terrell Dec. ¶ 29.

1 **B. The proposed Settlement should be preliminarily approved.**

2 Rule 23(e)(2) provides that “the court may approve [a proposed class action settlement]
3 only after a hearing and on finding that it is fair, reasonable, and adequate.” Under Rule 23(e)(2),
4 a district court considers whether (A) the class representatives and their counsel have adequately
5 represented the class; (B) the proposal was negotiated at arm’s length; (C) the relief provided by
6 the settlement is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal;
7 (ii) the effectiveness of any proposed method of distributing relief including the method of
8 processing class-member claims, if required; (iii) the terms of any proposed award of attorneys’
9 fees, including timing of payment; (iv) any agreement required to be identified under Rule
10 23(e)(3) made in connection with the proposed settlement; and (v) the proposal treats class
11 members equitably relative to each other. Fed. R. Civ. P. 23(e)(2).

12 These factors are similar to those previously identified by the Ninth Circuit, including:
13 (1) the strength of plaintiffs’ case; (2) the risk, expense, complexity, and likely duration of
14 further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the
15 amount offered in settlement; (5) the extent of discovery completed and the stage of the
16 proceedings; and (6) the experience and views of counsel. *See In re Bluetooth Headset Prods.*
17 *Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011); *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d
18 566, 575 (9th Cir. 2004). The balance of these factors readily establishes that the Settlement
19 should be preliminarily approved.

20 1. The Settlement is the result of arm’s-length, non-collusive negotiations.

21 “When [a class action] settlement takes place before formal class certification, as it has in
22 this instance, settlement approval requires a higher standard of fairness.” *Lane v. Facebook, Inc.*,
23 696 F.3d 811, 818 (9th Cir. 2012). This standard of review requires courts to apply “an even
24 higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily
25 required under Rule 23(e).” *Roes, I-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1043 (9th Cir.
26 2019). This case has been hard fought since the beginning. The parties were at all times
27 adversarial, including during settlement discussions. The parties commenced the settlement

1 discussions that led to this agreement after nearly five years of litigation, after the Ninth Circuit
2 had ruled on a crucial arbitration issue, after multiple dispositive motions had been briefed and
3 denied, after class certification had been initially denied, and after the parties had fully briefed a
4 second class certification motion. The parties were well-informed about the legal issues and the
5 risks of proceeding with litigation when they settled with the assistance of an experienced
6 mediator. Terrell Decl. ¶ 14.

7 The Ninth Circuit has identified “red flags” that it says may suggest that plaintiffs’
8 counsel allowed pursuit of their own self-interest to infect settlement negotiations, including
9 when counsel receive a disproportionate portion of the settlement, the parties agree to a “clear
10 sailing” arrangement providing for the payment of attorneys’ fees separate and apart from class
11 funds, or the parties agree that any fees not awarded will revert to defendants rather than be
12 added to the class fund. *In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d at 947. None is
13 present in this settlement. Because Class Counsel will be paid from the same Settlement Fund as
14 Settlement Class Members, they were incentivized to negotiate the largest fund possible. The
15 Court will, of course, have ultimate discretion over the amount of the attorneys’ fee award after
16 reviewing Class Counsel’s motion. None of the Settlement Fund will revert to Defendants; any
17 requested fees or Service Awards not approved by the Court will be distributed to Settlement
18 Class Members who submit valid Claim Forms. Settlement § 8.1.

19 2. The relief provided by the Settlement is adequate taking into account the strength
20 of Plaintiffs’ case and the risk, cost, and delay of trial and appeal.

21 Defendants have agreed to pay \$9,750,000 million to settle Plaintiffs’ and Settlement
22 Class Members’ TCPA claims. The Settlement Fund will be used to pay the costs of notice and
23 settlement administration, attorneys’ fees, costs and expenses, and Service Awards to the
24 Plaintiffs. Once those amounts are paid, the remainder of the Settlement Fund—approximately
25 \$5,860,325—will be distributed to Settlement Class Members who timely file a claim form.

26 Plaintiffs believe they have a case for liability. They believe the evidence supports
27 Freedom’s vicarious liability for the prerecorded calls placed by Fluent and Lead Science.

1 Plaintiffs also believe Defendants will not prevail on their defense that they had prior express
2 written consent to place the calls because Defendants did not produce evidence of consent during
3 discovery and, even if they had evidence, the disclosures do not comply with the TCPA.

4 But success on this score was certainly not guaranteed. Interpretations of the TCPA are
5 ever-evolving and notoriously unpredictable, further injecting uncertainty into the outcome.
6 Defendants deny liability for Plaintiffs' claims. Settlement, Recitals § K. Freedom continues to
7 deny that it can be held vicariously liable for Defendants' alleged telemarketing violations and
8 Fluent continues to insist that the disclosures on its webpages satisfy the TCPA. Proving
9 vicarious liability can be challenging in TCPA cases. *See Kristensen v. Credit Payment Servs.*
10 *Inc.*, 879 F.3d 1010, 1014-15 (9th Cir. 2018) (affirming summary judgment of TCPA claims
11 where plaintiff failed to provide sufficient evidence of vicarious liability); *Jones v. Royal Admin.*
12 *Servs., Inc.*, 887 F.3d 443, 453 (9th Cir. 2018) (same); *Thomas v. Taco Bell Corp.*, 879 F. Supp.
13 2d 1079, 1086 (C.D. Cal. 2012) (dismissing TCPA claims because the plaintiff failed to show the
14 defendant-controlled franchisee's telemarketing activity), *aff'd*, 879 F. App'x 678 (9th Cir.
15 2014). And, as Defendants point out in their opposition to class certification, some courts have
16 found that similar webpages that require a user to check a box on an online form to "consent" to
17 robocalls comply with the TCPA. *See* ECF No. 320 (Defs' Class Cert Opp.) at 15:3-27. Plaintiffs
18 believe that the webpages at issue in this case are distinguishable, but the Court or a jury may
19 disagree.

20 Plaintiffs had additional hurdles to clear before they would ever recover any damages.
21 They would not only have to prevail at trial, but also retain any favorable judgment through the
22 appellate process. Litigating this case to trial and through any appeals would be expensive and
23 time-consuming and would present risk to both parties. Some members of Class Counsel tried a
24 TCPA case in *Krakauer v. Dish Network, L.L.C.*, M.D.N.C. Civil Action No. 1:14-CV-333, and
25 can attest to the time and cost involved; among other things, the case involved more than 45
26 motions between class certification, trial, and an appeal. This Settlement, by contrast, provides
27 prompt and certain relief. *See Nat'l Rural Telecommc'ns Coop. v. DIRECTV, Inc.*, 221 F.R.D.

28 NOTICE OF MOTION AND MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION
FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT - 15

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1 523, 526 (C.D. Cal. 2004) (“The Court shall consider the vagaries of litigation and compare the
2 significance of immediate recovery by way of the compromise to the mere possibility of relief in
3 the future, after protracted and expensive litigation.”).

4 Even if Plaintiffs prevailed at trial and on any appeal, the damages available under the
5 TCPA in a class action with more than 675,000 class members are so significant that they make
6 it hard for any company to bond an appeal and satisfy the judgment. A judgment on behalf of the
7 approximately 675,377 Settlement Class Members whose telephone numbers have been
8 identified from calling data would total \$337,688,500, which could then be subject to trebling up
9 to \$1,013,066,000. Given its size, Defendants likely also would have challenged the
10 constitutionality of the judgment. *See Wakefield v. ViSalus, Inc.*, 51 F.4th 1109, 1125 (9th Cir.
11 2022) (vacating “the district court’s denial of the defendant’s post-trial motion challenging the
12 constitutionality of the statutory damages award to permit reassessment of that question guided
13 by the applicable factors.”). Thus, in addition to the risk of a loss at trial, even a verdict for
14 Plaintiffs posed a substantial risk that the judgment would never be paid. At the same time, the
15 Settlement Fund is a very significant payment for Defendants. Terrell Decl. ¶ 26. Thus, securing
16 a \$9,750,000 million settlement now with certainty of payment will provide significant relief to
17 Settlement Class Members who submit claims and exacts a significant payment from
18 Defendants’ perspective.

19 3. The Settlement compares favorably to other TCPA class settlements.

20 The estimated per-claim payment of \$87 is comparable to payments in other TCPA
21 settlements approved in California and across the country. *Steinfeld v. Discover Fin. Servs.*, No.
22 C 12-01118, Dkt. No. 96 at ¶ 6 (N.D. Cal. Mar. 10, 2014) (claimants received \$46.98); *Adams v.*
23 *AllianceOne Receivables Mgmt., Inc.*, No. 3:08-cv-00248-JAH-WVG, Dkt. No. 137 (S.D. Cal.
24 Sept. 28, 2012) (claimants received \$40); *Kramer v. Autobytel, Inc., et al.*, No. 10-cv-2722, Dkt.
25 148 (N.D. Cal. 2012) (approving TCPA settlement providing for a cash payment of \$100 to each
26 class member); *Estrada v. iYogi, Inc.*, No. 2:13-01989 WBS CKD, 2015 WL 5895942, at *7
27 (E.D. Cal. Oct. 6, 2015) (granting preliminary approval to TCPA settlement where class

1 members estimated to receive \$40); *Malta v. Fed. Home Loan Mortg. Corp.*, 10–CV–1290–BEN
2 (S.D. Cal.) (after final approval, each of the 120,547 claimants that made a timely and valid
3 claim as well as the 103 claimants that made a late claim received the sum of \$84.82); *Kramer v.*
4 *B2Mobile*, 10–CV2722–CW (N.D. Cal.) (in TCPA settlement each claimant was to be paid
5 \$100), *Rose v. Bank of Am. Corp.*, 2014 WL 4273358, at *10 (N.D. Cal., 2014) (approving
6 TCPA settlement where claimants were estimated to receive \$20 to \$40); *Desai v. ADT Sec.*
7 *Servs., Inc.*, Case No. 1:11-cv-01925, Dkt. No. 229 (N.D. Ill. Feb. 14, 2013) (estimating
8 payments between \$50 and \$100); *Rinky Dinky v. Elec. Merchant Sys.*, No. C13-1347-JCC, Dkt.
9 No. 151 (W.D. Wash. Apr. 19, 2016) (\$97 payments); *In re Capital One Tel. Consumer Prot. Act*
10 *Litig. (In re Capital One)*, 80 F. Supp. 3d 781, 787 (N.D. Ill. 2015) (approving settlement where
11 each class member received \$34.60 per claimant).

12 The Settlement also includes valuable prospective relief that will benefit all Settlement
13 Class Members, even those who do not make a claim. Most significantly, Fluent has agreed to
14 stop using prerecorded messages—or assisting others in using prerecorded message—to place
15 telemarketing calls. Settlement § 2.4. Fluent also has agreed to implement procedures designed
16 to identify numbers associated with invalid names or addresses and procedures to ensure that
17 they are not called. And Fluent has agreed to maintain evidence of consent, ensure its affiliated
18 entities maintain evidence of consent, ensure the TCPA consent language on its websites
19 complies with the law, and to not place additional telemarketing calls to a number based on its
20 purported consent to place calls to the number on behalf of Freedom.

21 4. Counsel are well informed of the strengths and weaknesses of the claims and
22 defenses and support the Settlement.

23 This Settlement was negotiated after five years of litigation, multiple dispositive motions,
24 multiple motions to compel arbitration, a Ninth Circuit appeal, and two motions for class
25 certification. The parties understood the strengths and weaknesses of their evidence, witnesses,
26 and legal positions. They engaged in comprehensive class, merits, and expert discovery. Terrell
27

1 Decl. ¶¶ 3-12. It is with this foundation that Class Counsel, who have substantial experience in
2 litigating TCPA class actions (including trial), endorse the Settlement.

3 5. The Settlement will be fairly distributed to Settlement Class Members.

4 The method for distributing the Settlement Fund to Settlement Class Members is simple,
5 straightforward, and equitable. To obtain a payment, a Settlement Class Member will only have
6 to complete a simple claim form with his or her name, contact information, the telephone number
7 on which he or she received the allegedly unlawful calls, and an affirmation that he or she
8 received the allegedly unlawful calls at the designated telephone number. Schachter Decl. ¶¶ 19-
9 20. The claims process is consumer friendly, since the claim can be filed using paper or
10 electronically. *See id.* Claim forms will be processed by the Settlement Administrator in
11 accordance with the Settlement Agreement. *See id.* ¶ 20.

12 Settlement Class Members will be treated equitably relative to each other. Settlement
13 Class Members will receive a pro rata share of the Settlement Fund after Court-approved
14 deductions for administrative costs, attorneys' fees, costs, and Service Awards. On the
15 Settlement Website, Settlement Class Members whose names appear in the calling data will be
16 able to learn the number of calls the data shows they received so they can make an informed
17 decision about whether to opt out and pursue individual claims.

18 The three Plaintiffs intend to request Court approval of Service Awards of \$5,000 each.
19 The Ninth Circuit has explained that service awards that are "intended to compensate class
20 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*
21 *v. West Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009)). The factors courts consider include
22 the class representative's actions to protect the interests of the class, the degree to which the class
23 has benefitted from those actions, the time and effort the class representative expended in
24 pursuing the litigation, and any risk the class representative assumed. *Staton v. Boeing Co.*, 327
25 F.3d 938, 977 (9th Cir. 2003). Plaintiffs devoted significant time assisting Class Counsel in this
26 case over the past three years, including assisting with development of the case, responding to
27

1 discovery, and being deposed. *See* Declarations of Daniel Berman, Stephanie Hernandez, and
2 Erica Russell. Service Awards of \$5,000 are reasonable and in line with awards approved by
3 federal courts in California and elsewhere. *See, e.g., In re Nat'l Collegiate Athletic Ass'n*, No.
4 4:14-md-2541-CW, 2017 WL 6040065, at *11 (N.D. Cal. Dec. 6, 2017) (awarding \$20,000
5 incentive awards to each of four class representatives and collecting cases approving similar
6 awards); *Pelletz v. Weyerhaeuser Co.*, 592 F. Supp. 2d 1322, 1329-30 & n.9 (W.D. Wash. 2009)
7 (collecting cases approving awards ranging from \$5,000 to \$40,000).

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

10 6. Class Counsel will request approval of a fair and reasonable fee.

11 Class Counsel intend to request an award of up to one-third of the Settlement Fund, or
12 \$3,250,000, in reasonable attorneys' fees, as well as reimbursement for the approximately
13 \$200,000 in out-of-pocket costs they incurred. The Ninth Circuit has recognized that the
14 percentage-of-the-fund method is the appropriate method for calculating fees when counsel's
15 effort has created a common fund. *See, e.g., In re Bluetooth*, 654 F.3d at 942. The Ninth Circuit
16 benchmark is 25%, but courts will depart from the benchmark where appropriate. Factors
17 bearing on the reasonableness of the award, and any departure from the benchmark include (1)
18 the results achieved, (2) the risk of litigation, (3) the skill required and quality of work, and (4)
19 the contingent nature of the fee and the financial burden carried by the plaintiffs. *Vizcaino v.*
20 *Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th Cir. 2002). "Like this case, where recovery is
21 uncertain, an award of one-third of the common fund as attorneys' fees has been found to be
22 appropriate." *See Barbosa v. Cargill Meat Solutions Corp.*, 297 F.R.D. 431, 449 (E.D. Cal.
23 2013). Class Counsel's lodestar may also be considered in evaluating the reasonableness of a
24 percentage award. *Vizcaino*, 290 F.3d at 1050-51.

25 As of this filing, Class Counsel have devoted over 3,733 hours and incurred over
26 \$2,415,380 million in lodestar. Class Counsel will file a motion for attorneys' fees, costs, and
27 expenses addressing the factors courts consider when awarding attorneys' fees in class action

1 cases and explaining why an upward adjustment from the benchmark is warranted in this case. In
2 connection with their motion, Class Counsel will provide the Court with their detailed time
3 records. The motion will also detail the approximately \$200,000 in costs incurred, which include
4 the approximately \$110,000 that Class Counsel paid to their experts to analyze the calling data,
5 and general litigation expenses such as travel to depositions, transcript costs, and mediation
6 expenses. The Settlement Administrator will pay the Court-approved fee award to Class Counsel
7 from the Settlement Fund within 30 days after the Effective Date. Settlement § 2.3.

8 **C. The Notice Plan complies with Rule 23(e) and due process.**

9 Rule 23(e)(1) states that “[t]he court must direct notice in a reasonable manner to all class
10 members who would be bound by” a proposed settlement, voluntary dismissal, or compromise.
11 Class members are entitled to the “best notice that is practicable under the circumstances” of any
12 proposed settlement before it is finally approved by the Court. Fed. R. Civ. P. 23(c)(2)(B).
13 “Notice may be by one or more of the following: United States mail, electronic means, or other
14 appropriate means.” *See id.* To comply with due process, notice must be “the best notice
15 practicable under the circumstances, including individual notice to all members who can be
16 identified through reasonable effort.” *Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997). The
17 notice must state in plain, easily understood language: (i) the nature of the action; (ii) the
18 definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member
19 may enter an appearance through an attorney if the member so desires; (v) that the court will
20 exclude from the class any member who requests exclusion; (vi) the time and manner for
21 requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule
22 23(c)(3). Fed. R. Civ. P. 23(c)(2)(B).

23 The parties have developed a Notice Plan with Settlement Administrator A.B. Data’s
24 assistance that will include direct mail or email notice to Settlement Class Members with known
25 addresses supplemented by Publication Notice designed to reach 80% of Settlement Class
26 members. *See* Schachter Decl. ¶¶ 8-14. Class Counsel will provide A.B. Data with the list of
27 telephone numbers associated with potential Settlement Class Members as well as any names,

1 postal addresses and email addresses they obtained for those numbers. The media campaign will
2 include banner and newsfeed advertisements targeting adults 18 to 64 years of age placed on
3 Google Display Networks, YouTube, Facebook, Instagram, and through Google AdWords.
4 Schachter Decl. ¶ 14. In addition, A.B. Data will maintain a Settlement Website with detailed
5 information about the Settlement, and a toll-free number that Settlement Class Members can call
6 to obtain more information. *Id.* ¶¶ 15-17.

7 All of the notices, attached as Exhibits 1, 2, 4, and 5 to the Settlement Agreement, are
8 drafted in plain English so they will be easy to understand. They include key information about
9 the Settlement, including the deadline to file a claim, the deadline to request exclusion or object
10 to the Settlement, and the date of the Final Approval Hearing (and that the hearing date may
11 change without further notice). The notices state the amount of the fee and cost award Class
12 Counsel will request, the amount of the Service Awards Plaintiffs will request, and the maximum
13 Administrative Expenses, and provide an estimate of the cash payment Settlement Class
14 Members will receive if they do not request exclusion. The notices disclose that, by participating
15 in the Settlement, Settlement Class Members give up the right to sue to receive between \$500
16 and \$1,500 per call. The notices direct Settlement Class Members to the Settlement Website for
17 further information, where copies of the notices, the Settlement Agreement, the complaint and
18 answer, and motions and orders relating to the Settlement will be posted. Settlement § 4.2(e).
19 The notices provide contact information for Class Counsel to answer questions and instructions
20 on how to access the case docket via PACER or in person at any of the court's locations.

21 Settlement Class Members will have 60 days from the date A.B. Data commences
22 dissemination of notice by sending emails and postcards and publishing the online notices to
23 submit a claim, object to the Settlement, or request exclusion from the Settlement. Settlement
24 §§ 1.18, 1.2. A.B. Data will post Class Counsel's motion for attorneys' fees on the Settlement
25 Website at least thirty-five days before the deadline to object in accordance with *In re Mercury*
26 *Interactive Corp. Securities Litigation*, 618 F.3d 988 (9th Cir. 2010). Settlement § 8.2. In
27

1 accordance with the amendments to Rule 23, Settlement Class Members who previously had an
2 opportunity to exclude themselves will have a new opportunity to request exclusion.

3 The manner and content of the proposed Notice Plan complies with Rule 23 and due
4 process, as well as the District's Procedural Guidance for Class Action Settlements. Similar
5 notice plans are commonly used in class actions like this one and constitute the best notice
6 practicable under the circumstances. *See, e.g., Spann v. J.C. Penney Corp.*, 314 F.R.D. 312, 330
7 (C.D. Cal. 2016) (approving a settlement notice program of emails and postcards to class
8 members with known addresses as well as publication in magazines and on the internet); *In re*
9 *Cathode Ray Tube (Crt) Antitrust Litig.*, No. C-07-05944 JST, 2015 WL 6871439, at *1-2 (N.D.
10 Cal. Nov. 9, 2015) (approving notice plan of mailing to class members identified by defendants,
11 publication in two newspapers, and posting on the internet); *see also* 3 Newberg on Class
12 Actions § 8:29 (5th ed. June 2018) ("While notice by mail is generally preferred for class
13 members who have been identified, notice by publication has traditionally served an important
14 supplemental role.").

15 **D. The schedule for final approval.**

16 The next steps in the settlement approval process are to schedule a Final Approval
17 Hearing, notify Settlement Class Members of the Settlement and hearing, and provide Settlement
18 Class Members with the opportunity to submit Claim Forms and object, opt out, or comment on
19 the Settlement. The parties propose the following schedule:

EVENT	DATE
Notice to be disseminated	60 days after entry of preliminary approval order
Class Counsel to file motion for attorneys' fees	30 days before objection/exclusion deadline
Deadline for Settlement Class Members to file claims, object, and request exclusion	60 days after notice is sent

EVENT	DATE
Class Counsel to file motion for final approval and response to objections	125 days after notice is sent
Final Approval Hearing	not less than 205 days after entry of preliminary approval order

V. CONCLUSION

Plaintiffs request that the Court enter an order that: (1) certifies the proposed Settlement Class for settlement purposes only; (2) grants preliminary approval of the proposed Settlement; (3) directs notice to be disseminated to Settlement Class Members in the form and manner proposed by the parties; (4) appoints A.B. Data to serve as the Settlement Administrator; and (5) sets a schedule and hearing date for final approval of the Settlement and related deadlines

SIGNATURE ATTESTATION

The CM/ECF user filing this paper attests that concurrence in its filing has been obtained from its other signatories.

RESPECTFULLY SUBMITTED AND DATED this 17th day of March, 2023.

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NOTICE OF MOTION AND MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT - 23

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