

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

**DANIEL BERMAN, STEPHANIE HERNANDEZ,
AND ERICA RUSSELL,**

Plaintiffs,

vs.

**FREEDOM FINANCIAL NETWORK, LLC;
FREEDOM DEBT RELIEF, LLC; FLUENT,
INC., AND LEAD SCIENCE, LLC,**

Defendants.

CASE NO. 4:18-cv-01060-YGR

**ORDER GRANTING PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT AND SETTING DEADLINES
FOR NOTICE, OBJECTION, EXCLUSION, AND
FINAL FAIRNESS HEARING**

Re: Dkt. No. 332

On May 10, 2023, the Court held a hearing on the unopposed motion of plaintiffs Daniel Berman, Stephanie Hernandez, and Erica Russell (collectively, "Plaintiffs") for conditional certification of a settlement class in this action; preliminary approval of the parties' proposed settlement; approval of the Class Notice Packet; appointing Class Representatives, Class Counsel, and the proposed Settlement Administrator; and setting a date for the hearing on final approval of the settlement.¹ (Dkt. No. 332, Plaintiff's Motion for Preliminary Approval ("Motion").) Beth Terrell appeared for plaintiffs; and Jay Ramsey appeared for defendants Freedom Financial Network, LLC and Freedom Debt Relief, LLC (collectively, "Freedom"); Fluent, Inc. ("Fluent"), and Lead Science, LLC (collectively, "Defendants").

Having considered the motion briefing, the arguments of counsel, the relevant law, the terms of the settlement agreement and the class notice, as well as the record in this case, and based

¹ At the May 10, 2023 hearing, the Court questioned parties regarding the proposed settlement and identified necessary revisions. Parties were directed to submit a supplemental brief addressing the issues raised by the Court, which they did shortly thereafter. *See* Dkt. No. 349, Supplemental Brief in Support of Plaintiffs' Motion for Preliminary Approval ("Supplemental Brief"). Plaintiffs submitted a revised proposed settlement agreement in connection with their Supplemental Brief, which the Court treats as operative and discusses herein. *See* Dkt. No. 352, Corrected Exhibit 1 to Decl. of Beth Terrell in Support of Plaintiffs' Supplemental Brief in Support of Plaintiffs' Motion for Preliminary Approval, Amended Proposed Class Action Settlement ("Settlement Agreement").

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1 on the reasons and terms set forth herein, the Court **GRANTS** plaintiffs' motion for preliminary
2 approval of class action settlement.

3 **I. BACKGROUND**

4 Plaintiffs filed their putative class action complaint on February 19, 2018. They subsequently
5 amended their complaint several times. The Fourth Amended Complaint ("FAC") was filed on June
6 10, 2022 and alleges defendants violated two provisions of the Telephone Consumer Protection Act
7 ("TCPA"): 47 U.S.C. § 227(b)(1) & (c).

8 The parties reached a settlement on December 13, 2022, prior to class certification, with the
9 assistance of an experienced mediator Robert A. Meyer.

10 **B. Terms of the Settlement Agreement**

11 Under the terms of the Settlement Agreement, defendant will pay \$9,750,000 into a common
12 settlement fund, without admitting liability. This amount includes attorneys' fees and costs, the cost
13 of class notice and settlement administration, and the class representatives' service awards.

14 **1. Attorneys' Fees and Costs**

15 Under the Settlement Agreement, Plaintiffs' counsel agrees to seek up to one third of the
16 Settlement Fund (\$3,250,000), plus out-of-pocket costs and expenses incurred by class counsel,
17 which are currently estimated to be approximately \$200,000. The Settlement Agreement also
18 includes a provision for settlement administration costs to be paid out of the Settlement Fund.
19 Parties' selected Settlement Administrator, A.B. Data, estimates its costs will be \$475,000. Lastly,
20 the Settlement Agreement provides for service awards of \$5,000 each to be paid to the class
21 representatives to recognize their efforts and risks in prosecuting this litigation on behalf of the
22 settlement class.

23 **2. Class Relief**

24 After deductions from the common fund for fees, costs, and service awards, approximately
25 \$5,810,000 will remain to be distributed on a *pro rata* basis among settlement class members who
26 timely submit a valid claim, except that settlement class members who have both a prerecorded call
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1 claim and a National Do-Not-Call claim² will receive a *double* settlement share. So, if 10 percent of
2 settlement class members timely submit a valid claim, the per-claim recovery for members with only a
3 prerecorded message claim would be approximately \$82, whereas the recovery for a claimant with
4 both a National Do-Not-Call and prerecorded call claim would be approximately \$164. On this basis,
5 plaintiffs estimate that each settlement class member who timely submits a valid claim will receive
6 between \$60 and \$170.

7 The Agreement does not provide for the reversion of settlement funds to defendant, absent
8 the Agreement being terminated, the Court withholding approval, or an order approving the
9 proposed settlement being reversed on appeal.³

10 Separately, the Agreement also provides for injunctive relief. Defendant Fluent agrees to
11 implement changes to its business practices, including as to: record retention, consent authentication,
12 and TCPA compliance. (*See* Settlement Agreement at §§ 2.4.1-2.4.3; 2.4.4; & 2.4.7-2.4.8.) Further,
13 Fluent will: (i) “not initiate, cause others to initiate, or assist others in initiating any outbound
14 telephone call that plays or delivers a prerecorded message,” and (ii) “ensure that those consumers
15 who Fluent asserts ha[ve] previously consented to receive calls or texts selling Freedom’s services as
16 it relates to this lawsuit will not receive any further telemarketing text messages or prerecorded calls
17 based on that consent.” (*See id.* at §§ 2.4.5-2.4.6.)

18 3. *Cy Pres/Remainder*

19 To the extent any checks sent to settlement class members during the first settlement fund
20 distribution remain uncashed (or any electronic payments unaccepted) after the void date, the

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22 ² The Settlement Agreement explains that National Do-Not-Call Claims are claims arising
23 under the TCPA’s National Do-Not-Call Regulations. *See* Settlement Agreement at § 2.3(b).
24 “National Do-Not-Call claims are not limited to calls sent using a prerecorded message or artificial
voice, but instead include any telemarketing calls or texts.” Supplemental Brief at 14:15-16
(citation omitted).

25 ³ If the Settlement Agreement “is terminated or is not approved by the Court or an order
26 approving the Agreement is reversed on appeal, the [p]arties shall be restored to their respective
27 positions as of the date of the signing of this Agreement.” Settlement Agreement at § 10.2.
28 Further, the Settlement Agreement states that, “If the termination or failure to be approved occurs
after the Initial notice Deposit has been made to the Settlement Administrator and charges have
been incurred, then any sums not necessary for incurred expenses, or already expended upon
notice at the time of the termination or failure to be approved shall be returned to [d]efendants.”
Id.

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1 Settlement Administrator shall distribute those remaining funds, if it is administratively feasible, in a
2 second distribution pursuant to the same formula described above. *See, supra*, Part I.B.2. Any funds
3 that remain after the second distribution (or to the extent a second distribution is not administratively
4 feasible), will be distributed as a *cy pres* award to the Public Justice Foundation.

5 **II. PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

6 **A. Legal Standard**

7 A court may approve a proposed class action settlement of a certified class only “after a
8 hearing and on finding that it is fair, reasonable, and adequate,” and that it meets the requirements
9 for class certification. Fed. R. Civ. P. 23(e)(2). In reviewing the proposed settlement, a court need
10 not address whether the settlement is ideal or the best outcome, but only whether the settlement is
11 fair, free of collusion, and consistent with plaintiff’s fiduciary obligations to the class. *See Hanlon v.*
12 *Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998), *overruled on other grounds by Wal-Mart*
13 *Stories, Inc. v. Dukes*, 564 U.S. 338 (2011). The *Hanlon* court identified the following factors
14 relevant to assessing a settlement proposal: (1) the strength of the plaintiff’s case; (2) the risk,
15 expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action
16 status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery
17 completed and the stage of the proceeding; (6) the experience and views of counsel; (7) the presence
18 of a government participant; and (8) the reaction of class members to the proposed settlement. *Id.* at
19 1026 (citation omitted); *see also Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir.
20 2004).

21 Settlements that occur before formal class certification also “require a higher standard of
22 fairness.” *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000) (citation omitted). In
23 reviewing such settlements, in addition to considering the above factors, a court also must ensure
24 that “the settlement is not the product of collusion among the negotiating parties.” *In re Bluetooth*
25 *Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011) (citation omitted) (cleaned up).

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1 area and therefore adequate to represent the Settlement Class.

2 The Settlement Class further satisfies Rule 23(b)(3) in that common issues predominate and
3 “a class action is superior to other available methods for fairly and efficiently adjudicating” the
4 claims here. To that end, members of the Settlement Class who timely submit a valid claim are
5 entitled to relief, which is estimated to be between \$60 to \$170.

6 Based on the foregoing, the proposed class is conditionally certified pursuant to Rule
7 23(c).

8 **C. Settlement Agreement Appears Fair and Reasonable**

9 The Settlement Agreement is granted preliminary approval pursuant to Rule 23(e)(2).
10 Based upon the information before the Court, the Settlement Agreement falls within the range of
11 possible approval as fair, adequate, and reasonable, and there is a sufficient basis for notifying the
12 Class and for setting a Fairness and Final Approval Hearing.

13 As to the *Hanlon* factors, the Court finds that they indicate the settlement here is fair and
14 reasonable. Proceeding to trial would have been costly; recovery was not guaranteed; and there
15 was the possibility of protracted appeals. This is particularly true in light of the potentially
16 individualized consent issues which could have been implicated. The amount offered in settlement
17 compares favorably to other TCPA settlements approved in California and around the county. The
18 settlement occurred only after extensive litigation over five years, including four amendments of
19 plaintiffs’ pleadings; thorough discovery, including the production of thousands of documents; the
20 retention of consulting and testifying experts; multiple motions for class certification; a motion
21 from defendants to compel arbitration, which was appealed to the Ninth Circuit; as well as several
22 dispositive motions. Counsel for both parties are highly experienced. The record does not indicate
23 collusion or self-dealing. *See In re Bluetooth*, 654 F.3d at 947.

24 The Settlement Agreement appears to have been the product of arm’s length and informed
25 negotiations. The relief provided for the Class appears to be adequate, taking into account:

26 (i) the costs, risks, and delay of trial and appeal;

27 (ii) the effectiveness of any proposed method of distributing relief to the class, including the
28 method of processing class-member claims;

- 1 (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
2 (iv) no agreements are required to be identified under Rule 23(e)(3).

3 Moreover, the Settlement Agreement appears to treat Class members equitably relative to
4 each other.

5 As discussed during the May 10, 2023 hearing and July 18, 2023 Zoom conference, the
6 Court has two concerns which it will evaluate in connection with the Final Approval Hearing.

7 *First*, the Court will scrutinize the Settlement Agreement at the final approval stage to
8 ensure individuals who have Do Not Call claims solely by virtue of having received a
9 telemarketing text message from or on behalf of defendant Freedom, but who are not members of
10 the Settlement Class, do not waive claims under the Agreement. *See, supra*, note 4. The parties
11 apparently agree with this assessment and any Final Order will make this explicitly clear.

12 *Second*, the Court will revisit plaintiffs' approach to monetizing the Settlement
13 Agreement's injunctive relief. Plaintiffs invite the Court to adopt a novel formula used in *Chintz*
14 *v. Intero Real Estate Servs.*, 2022 WL 16528137 (N.D. Cal. Oct. 28, 2022) to estimate the value of
15 the injunctive relief at \$3.3 million without explaining why the formula is sound (apart from the
16 fact that it was once used by Judge Labson Freeman in this District). This is an especially salient
17 point since Fluent, the only defendant required by the Settlement Agreement to make practice
18 changes, has estimated the cost of implementing such changes as \$1.5 million, less than half the
19 valuation plaintiffs reach using the *Chintz* formula.

20 Based on the foregoing, the Court conditionally certifies the class and provisionally
21 appoints Broderick Law, P.C., Terrell Marshall Law Group PLLC, The Law Offices of Matthew
22 P. McCue, and Paronich Law, P.C. as Class Counsel and plaintiffs Daniel Berman, Stephanie
23 Hernandez, and Erica Russell as class representatives.

24 **III. PLAN OF NOTICE, ALLOCATION, AND ADMINISTRATION**

25 **A. Notice Plan**

26 A court must "direct notice [of a proposed class settlement] in a reasonable manner to all
27 class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). "The class must be
28 notified of a proposed settlement in a manner that does not systematically leave any group without

1 notice.” *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 624 (9th Cir. 1982). Adequate
 2 notice requires: (i) the best notice practicable; (ii) reasonably calculated, under the circumstances, to
 3 apprise the Class members of the proposed settlement and of their right to object or to exclude
 4 themselves as provided in the settlement agreement; (iii) reasonable and constitute due, adequate,
 5 and sufficient notice to all persons entitled to receive notice; and (iv) meet all applicable
 6 requirements of due process and any other applicable requirements under federal law. *Phillips*
 7 *Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). Due process requires “notice reasonably
 8 calculated, under all the circumstances, to apprise interested parties of the pendency of the action
 9 and afford them an opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Tr.*
 10 *Co.*, 339 U.S. 306, 314 (1950).

11 The parties’ proposed notice plan appears to be constitutionally sound in that plaintiffs
 12 have made a sufficient showing that it is: (i) the best notice practicable; (ii) reasonably calculated,
 13 under the circumstances, to apprise the Class members of the proposed settlement and of their
 14 right to object or to exclude themselves as provided in the settlement agreement; (iii) reasonable
 15 and constitute due, adequate, and sufficient notice to all persons entitled to receive notice; and (iv)
 16 meet all applicable requirements of due process and any other applicable requirements under
 17 federal law.

18 The Court approves form of the following notices: (i) the Postcard Notice attached as
 19 **Exhibit B**; (ii) Email Notice attached as **Exhibit C**; and (iii) long-form notice of Proposed Class
 20 Action Settlement attached as **Exhibit D**. Taken together these notices are sufficient to inform
 21 Class members of the terms of the Settlement Agreement, their rights under the Settlement
 22 Agreement, their rights to object to or comment on the Settlement Agreement, their right to
 23 receive a payment or opt out of the Settlement Agreement, the process for doing so, and the date
 24 and location of the Fairness and Final Approval Hearing. The forms of plan of notice are therefore
 25 **APPROVED.**

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1 **B. Plan of Allocation**

2 The Court preliminarily approves the proposed plan of allocation set forth in the Motion
3 and the class notices. In connection therewith, the Court approves the Proof of Claim form,
4 attached hereto as **Exhibit E**.

5 **C. Settlement Administrator**

6 A.B. Data is appointed to act as the Settlement Administrator, pursuant to the terms set
7 forth in the Settlement Agreement.

8 The Settlement Administrator shall distribute the Class Notice according to the notice plan
9 described in the Settlement Agreement and substantially in the form approved herein, no later than
10 **September 26, 2023** (“Notice Date”). Proof of distribution of the Class Notice shall be filed by
11 the parties in conjunction with the motion for final approval.

12 Plaintiff is directed to provide to the Settlement Administrator the Class members’ contact
13 data no later than **August 11, 2023**.

14 **D. Exclusion/Opt-Out**

15 Any Class Member shall have the right to be excluded from the Class by mailing a request
16 for exclusion to the Settlement Administrator no later than **November 25, 2023**. Requests for
17 exclusion must be in writing and set forth the name of this action, the Settlement Class member’s
18 full name and address, a telephone number where they may be contacted, the telephone number(s)
19 which they maintain they were called, and a statement that the Settlement Class member
20 submitting the request wishes to be excluded from the Settlement of this litigation. The request
21 must be signed by the Settlement Class member and sent by First-Class Mail. No later than
22 **January 29, 2024**, Class Counsel shall file with the Court a list of all persons or entities who have
23 timely requested exclusion from the Class.

24 Any Class Member who does not request exclusion from the settlement class as provided
25 above shall be bound by the terms and provisions of the Settlement Agreement upon its final
26 approval, including but not limited to the releases, waivers, and covenants described in the
27 Settlement Agreement, whether or not such person or entity objected to the Settlement Agreement
28 and whether or not such person or entity makes a claim upon the settlement funds.

1 **E. Objections**

2 Any Class Member who has not submitted a timely request for exclusion from the
3 Settlement Agreement shall have the right to object to (1) the Settlement Agreement, (2) the plan
4 of allocation; and/or Class Counsel’s motion for attorneys’ fees and Class Representative Awards
5 by mailing to the Court a written objection. All written objections must clearly identify the case
6 name and number, include the objector’s name, telephone number, address, and the telephone
7 number on which the objector received the telemarketing communications at issue, and state the
8 grounds for and extent of the objection, and state whether they intend to appear at the Fairness
9 Hearing, as set forth in the Class Notice, no later than **November 25, 2023**. Failure to submit a
10 timely written objection will preclude consideration of the Class Member’s later objection at the
11 time of the Fairness Hearing.

12 **F. Attorneys’ Fees and Class Representative Awards**

13 Plaintiff(s) and their counsel shall file their motion for attorneys’ fees and for Class
14 Representative awards no later than **October 21, 2023**. Each settlement class member shall have
15 the right to object to the motion for attorneys’ fees and Class Representative awards by filing a
16 written objection with the Court no later than **November 25, 2023**, as stated above.

17 Plaintiffs shall file a reply brief responding to any timely objection no later than **December**
18 **18, 2023**.

19 **G. Fairness and Final Approval Hearing**

20 All briefs, memoranda, and papers in support of final approval of the settlement shall be
21 filed no later than **January 29, 2024**.

22 The Court will conduct a Fairness and Final Approval Hearing on **Tuesday, February 20,**
23 **2024, at 2:00 p.m.**, to determine whether the Settlement Agreement should be granted final
24 approval as fair, reasonable, and adequate as to the Class. The Court will hear all evidence and
25 argument necessary to evaluate the Settlement Agreement and will consider Class Counsel’s
26 motion for attorneys’ fees and for Class Representative awards.

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1 Class members may appear, by counsel or on their own behalf, to be heard in support of or
2 opposition to the Settlement Agreement and Class Counsel’s Motion for attorneys’ fees and Class
3 Representative awards by filing a Notice of Intention to Appear no later than **November 25, 2023**.

4 The Court reserves the right to continue the date of the final approval hearing without
5 further notice to Class members.

6 The Court retains jurisdiction to consider all further applications arising out of or in
7 connection with the Settlement.

8 **H. Post-Distribution Accounting**

9 If final approval is granted, the parties will be required to file a Post-Distribution
10 Accounting in accordance with this District’s Procedural Guidance for Class Action Settlements
11 and at a date set by the Court at the time of the final approval hearing. Counsel should prepare
12 accordingly.

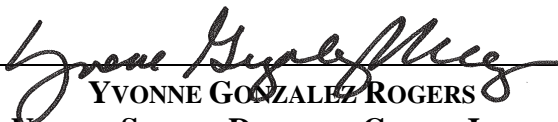
Summary of Key Dates	
Event	Date
Class data to be provided to Settlement Administrator	August 11, 2023
Class Notice to be sent by	September 26, 2023
Class Counsel to file their motion for fees and costs and Class Representative awards	October 21, 2023
Postmark deadline to submit objection or request for exclusion	November 25, 2023
Class counsel and settlement administrator to submit supplemental statements regarding status of notice program, objections, opt-outs; deadline for Motion for Final Approval to be filed	January 29, 2024
Fairness and Final Approval Hearing	February 20, 2024
	NOTE: Subject to change without further notice to the Class.

26 **IT IS SO ORDERED.**

27 This terminates Docket No. 332.

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1 Dated: July 28, 2023


YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE

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