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11
12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

15 WINIFRED CABINESS, individually and on
16 behalf of all others similarly situated,

17 Plaintiff,

18 v.

19 EDUCATIONAL FINANCIAL SOLUTIONS,
20 LLC dba CAMPUS DEBT SOLUTIONS, BETA
INVESTMENT GROUP, INC.; EQUITY
21 ACQUISITIONS, LLC; VENTURETECH
SOLUTIONS, LLC; DEBT.COM, LLC; and
22 HOWARD DVORKIN

23 Defendants.

Case No. 3:16-cv-01109-JST

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

Date: March 22, 2018

Time: 2:00 p.m.

Courtroom 9, 19th Floor

Judge: Hon. Jon S. Tigar

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1 **TO THE COURT AND TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on March 22, 2018, at 2:00 pm, or as soon thereafter as
3 the matter may be heard in the courtroom of the Honorable Jon S. Tigar, in Courtroom 9, 19th
4 Floor of the United States District Court for the Northern District of California, located at 450
5 Golden Gate Avenue, San Francisco, California, Plaintiffs will and hereby does move for an
6 order granting preliminary approval of the class action settlement agreement, setting a final
7 approval hearing, and for certification of a settlement class.

8 Plaintiff moves for an order: (1) granting preliminary approval of the proposed
9 Settlement Agreement; (2) certifying a Class for settlement purposes; (3) appointing Winifred
10 Cabiness as the Class Representative for the Settlement Class; (4) appointing Kemnitzer, Barron,
11 & Krieg, LLP and East Bay Community Law Center as Class Counsel; (5) appointing Heffler
12 Claims Group as the Settlement Administrator specified in the Settlement Agreement; (6)
13 approving the form, content, and method of distribution of the Notice and notice plan; (7)
14 directing that notice of the proposed Settlement be disseminated to the Class; (8) setting and
15 approving the procedures for Class Members to exclude themselves from the Settlement or
16 object to the Settlement; and (9) setting a schedule regarding the further proceedings for the final
17 approval hearing and for certification of a settlement class.

18 This motion is brought pursuant to Federal Rules of Civil Procedure, Rules 23(b)(2),
19 23(b)(3) and 23(e), on the grounds that the settlement agreement is fair and reasonable, and that
20 all requirements for class certification have been met. This motion is based on this Notice, the
21 supporting Memorandum of Points and Authorities, the Declaration of Elliot Conn and exhibits
22 attached thereto, the Declaration of Nancy Barron and exhibits attached thereto, all pleadings and
23 records filed herein, and such oral and documentary evidence as may be presented at the hearing
24 of this motion.

25 Dated: January 26, 2018

KEMNITZER, BARRON, & KRIEG, LLP

26
27 By: /s/ Elliot Conn
ELLIOT CONN

MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

Plaintiff Winifred Cabiness (“Plaintiff” or “Class Representative”), individually and on behalf of the Settlement Class (defined below), hereby submits this Motion and Memorandum of Points and Authorities in Support of a Motion for Preliminary Approval of Class Action Settlement.

The class action suit brought by Plaintiff alleged that Defendants Educational Financial Solutions, LLC dba Campus Debt Solutions (“CDS”) and its allegedly related entities Beta Investment Group, Inc., Equity Acquisitions, LLC, Venturetech Solutions, LLC, Debt.com, LLC, and Howard Dvorkin (collectively “Defendants”) violated the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227, *et seq.*, by placing telemarketing calls advertising CDS’ student loan consolidation and loan forgiveness services, using an automated telephone dialing system (“ATDS”), or artificial or prerecorded voice, without first obtaining the required prior express written consent to place those calls. (*see* ECF. No. 88, Second Amended Complaint).

This Settlement is the result of nearly two years of litigation, extensive motion practice, thorough discovery including multiple depositions, and the Parties’ participation in an all-day mediation session before the Honorable Peter D. Lichtman (Ret.) of JAMS and subsequent discussions. The Settlement provides for substantial financial benefits to an ascertainable class (as defined in the Settlement at § 1.52).¹ The Settlement Class of approximately 30,572 individuals, consists of all persons in the United States and its Territories who received a call promoting CDS’s student loan consolidation and loan forgiveness services, made by or on behalf of CDS, during the period of time beginning on October 16, 2013 and continuing through the date of the Preliminary Approval Order.² (§§ 1.12, 1.52)

The Settlement reached with the guidance of Judge Lichtman creates a Settlement Fund

¹ Unless otherwise noted, all section (“§”) and exhibit references refer to the Class Action Settlement Agreement attached as Exhibit A to the Declaration of Elliot Conn in Support of Plaintiff’s Motion for Preliminary Approval of Class Action Settlement (“Conn Decl.”)

² CDS wound down its operations and is no longer soliciting or accepting new customers. Conn Decl., ¶7.

1 in the amount of \$1,100,000. From the Settlement Fund, each of the following will be paid: (i)
2 each of the 30,572 Settlement Class Members, for whom a mailing address is obtained
3 (estimated at 81.6% to 96.55% of Settlement Class Members) will receive a check in the amount
4 of at least \$20.00 via direct distribution without any required claims process (§5.3(b)); (ii) the
5 Settlement Administrator, Heffler Claims Group, has agreed to cap settlement administration
6 costs at \$125,000.00 (§8.1); (iii) Plaintiff will seek a service award of up \$10,000, subject to the
7 approval of the Court at the time of the Final Approval Hearing (§14.1); and (iv) Class Counsel
8 will seek reimbursement of up to \$20,000 for out-of-pocket costs and expenses and Attorneys'
9 Fees in the amount of \$330,000 (30% of the Settlement Fund), subject to the approval of the
10 Court at the time of the Final Approval Hearing (§15). Any residue from uncashed checks will
11 be distributed as *cy-pres* to the National Consumer Law Center. (§§5.4, 5.5) No monies will
12 revert to Defendants. (*Id.*) Defendants have also agreed to be bound by an injunction under the
13 terms set forth in the Settlement Agreement that shall enjoin Defendants from using an ATDS to
14 place telemarketing calls on behalf of CDS without obtaining prior express written consent.
15 (§5.7).

16 The proposed Settlement Class meets the requirements of Federal Rules of Civil
17 Procedure, Rules 23(a) and 23(b)(3) as well as the criteria for preliminary approval and should
18 be approved. Accordingly, Plaintiff moves this Court for an order preliminary approving the
19 proposed Settlement, provisionally certifying the Settlement Class pursuant to Federal Rule of
20 Civil Procedure 23(b)(3) for settlement purposes, directing Notice (as defined in §7) to the
21 Settlement class, and scheduling a Final Approval Hearing.

22 **II. STATEMENT OF THE CASE**

23 **A. SUMMARY OF ALLEGATIONS**

24 As alleged in Plaintiff's Second Amended Complaint, in mid-May 2015, Plaintiff called
25 (800) 848-0979, a telephone number allegedly listed on the top of a United States Department of
26 Education account statement that she had received, in an attempt to reach the Department of
27 Education. (ECF No. 88, ¶ 48). But rather than reach the Department of Education, Plaintiff was
28

1 forwarded to CDS. (*Id.*) During her phone call with the CDS representative, Plaintiff alleges that
2 she believed she was speaking to the Department of Education, and provided, among other
3 information, her social security number and full name. (*Id.* ¶ 50) Plaintiff alleges that when the
4 representative asked for Plaintiff’s bank account information, Plaintiff informed the
5 representative that she did not have the necessary information with her and that she would call
6 back the next day. (*Id.*)

7 The next day, Plaintiff alleges she called back what she alleges she believed to be the
8 Department of Education. (*Id.* ¶ 51). However, she alleges she was connected to a message
9 system that identified the company as “Campus Debt Solutions” and not the Department of
10 Education. (*Id.*) Plaintiff alleges she immediately hung up and did not call back again. (*Id.*)
11 Plaintiff alleges she never provided prior express written consent to receive these calls.

12 Plaintiff further alleges that over the next several days and months, she received phone
13 calls to her cellular telephone soliciting CDS’s loan consolidation and loan forgiveness
14 programs. (*Id.* ¶ 52). Plaintiff sent an email, addressed to DBenitez@campusdebt.com, asking
15 for the calls to stop. (*Id.* ¶ 53) Plaintiff alleges the calls continued. (¶¶ 54, 55).

16 The operative Complaint alleges that Defendants violated the TCPA by placing telephone
17 solicitation calls to Plaintiff’s cellular telephone and the cellular telephones of the over 30,000
18 unnamed Settlement Class Members, advertising CDS’s student loan consolidation and loan
19 forgiveness services, without first obtaining adequate prior express written consent to place
20 telemarketing calls. Defendants deny and continue to deny any fault, wrongdoing, or liability
21 whatsoever to Plaintiff and/or the Settlement Class Members and deny the allegations in the
22 Complaint.

23 **B. PERTINENT PROCEDURAL HISTORY**

24 On March 4, 2016, Plaintiff filed an individual complaint against CDS, alleging that CDS
25 had violated the TCPA. (ECF No. 1). On June 6, 2016, CDS filed a motion dismiss and a
26 motion to stay the action. (ECF No. 24). The motions were denied on September 1, 2016. (ECF
27 No. 50).

28

1 Following limited discovery, on September 23, 2016, Plaintiff filed a First Amended
2 Complaint, as a class action, alleging TCPA violations against CDS. (ECF No. 59). On October
3 24, 2016, CDS filed a motion to dismiss the amended complaint and a motion to stay the action.
4 (ECF No. 60) These motions were denied on January 17, 2017. (ECF No. 73).

5 CDS answered the First Amended Complaint on January 31, 2017. (ECF No. 77).
6 Following extensive discovery practice and two days of depositions in Fort Lauderdale, Florida,
7 on March 24, 2017, Plaintiff filed a Second Amended Complaint seeking to add Beta Investment
8 Group, Inc., Equity Acquisitions, LLC, VentureTech Solutions, LLC, Debt.com, LLC, and
9 Howard Dvorkin as Defendants to the action. (ECF No. 88).

10 On June 5, 2017, the Parties attended a full-day mediation at JAMS in Los Angeles,
11 California, before the Honorable Peter D. Lichtman (Ret.). (Conn Decl., ¶24). At the mediation,
12 the Parties agreed to a Memorandum of Understanding of Settlement. However, following the
13 mediation, challenges arose regarding determining the size of the settlement class. (*See e.g.* ECF
14 No. 104).

15 The Parties have been able to resolve these disputes, and Plaintiff now respectfully
16 requests that the Court find that the Settlement reached is fair, adequate, and reasonable, that
17 notice to the Class regarding the proposed settlement terms be issued, and the Settlement, the
18 terms of which are laid out in detail below, be approved.

19 **III. SUMMARY OF SETTLEMENT TERMS**

20 **A. CLASS DEFINITION**

21 The Settlement Class is defined as all persons in the United States and its Territories:

- 22 (a) who received one or more telephone solicitation calls on their
23 cellular telephone advertising CDS' student loan consolidation and
loan forgiveness services, made by or on behalf of CDS;
- 24 (b) using an automated telephone dialing system, or artificial or
25 prerecorded voice;
- 26 (c) without providing prior express written consent to receive such
phone calls;
- 27 (d) since October 16, 2013.

1 Excluded from the Settlement Class are the following: (i) any trial judge that may preside
2 over this Action; (ii) any of the Defendants; (iii) any of the Released Parties; (iv) Class Counsel
3 and their employees; (v) the immediate family of any of the foregoing persons; and (vi) any
4 person who has previously given a valid release of the claims asserted in the Action. (§1.52).

5 **B. CLASS RELIEF**

6 **1. Settlement Fund**

7 Defendants have agreed to establish a Settlement Fund in the amount of \$1,100,000.00
8 (§1.55) that will be used for cash payments to Settlement Class Members (§5), the costs of notice
9 and settlement administration (capped at \$125,000) (§§1.50, 8.1), a Court-approved Service
10 Award (§14.1), and Court-approved Attorneys' Fees and Costs (§15). The Settlement Fund
11 constitutes the entire monetary consideration to be paid by or on behalf of the Defendants in
12 connection with the Settlement and resolution of this action and will be used to fund the
13 following: (1) Compensation to Settlement Class Members in the amount of \$615,000; (2)
14 Settlement Administration Costs of up to \$125,000; (3) a Service Award of up to \$10,000 to
15 Plaintiff; and (4) Attorneys' Fees to Class Counsel of \$330,000 and reimbursement of up to
16 \$20,000 of out-of-pocket Costs.

17 **2. Pro Rata Direct Distribution of the Distributable Settlement Fund**
18 **With no Required Claims Process**

19 As set forth in section III.C below, Class Counsel estimates that the Settlement
20 Administrator will be able to obtain mailing addresses for between 81.6% and 96.55% of the
21 Settlement Class. The Settlement provides that each Settlement Class Member, for whom the
22 Settlement Administrator is able to obtain a valid mailing address, will receive a check, via direct
23 distribution, in the amount of at least \$20.00. (§5.3(b)). Checks will be disseminated directly to
24 Settlement Class Members following Final Approval, without any requirement that Settlement
25 Class Members submit a claim form. (§§ 5.2, 5.3). However, Settlement Class Members will
26 have the option of providing an updated mailing address via the Settlement website. (§§ 5.3(b),
27 7.2(h)).

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1 **3. Injunctive Relief**

2 In addition to providing the monetary relief described above, Defendants further agree to
3 be bound by an injunction under the terms set forth in the Settlement Agreement (§ 5.7), to be
4 entered by the Court, prohibiting them from using an ATDS to place telemarketing calls on
5 behalf of CDS without obtaining prior express written consent.

6 **4. Payment of a Service Award to the Class Representative**

7 At Final Approval, Plaintiff will ask the Court to approve a Service Award of up to
8 \$10,000, to be paid out of the Settlement Fund, to compensate Plaintiff Winifred Cabiness for
9 her time and effort serving as class representative, subject to the approval of the Court. (§14). As
10 will be set forth in detail in the Fee, Cost, and Service Award Application, Plaintiff sacrificed
11 significant monetary benefits and delay in exchange for representing this class. (*see also* Conn
12 Decl., ¶¶28-31).

13 **5. Payment of Attorneys' Fees, Costs, and Expenses**

14 At Final Approval, Class Counsel will move the Court for an award of Attorneys' Fees of
15 \$330,000.00 (i.e., thirty percent of the Settlement Fund), and for reimbursement of out-of-pocket
16 Costs, in an amount not to exceed \$20,000.00, to be paid out of the Settlement Fund, subject to
17 the approval of the Court. (§15) (*see also*, Conn Decl., ¶12).

18 **6. Any Residue will be Distributed as *Cy Pres* to the National Consumer
19 Law Center**

20 After the above sums have been paid out, any amount remaining in the Settlement Fund
21 from uncashed checks after 90 days will be distributed as *cy-pres* to the National Consumer Law
22 Center ("NCLC"). There shall be no reversion to Defendants. (§§1.16, 5.4, 5.5) NCLC, a
23 nationwide organization, has a long track record of working to strengthen and defend the
24 essential consumer protections of the TCPA. (Conn Decl., ¶, Exhibit B).

25 **C. IDENTIFICATION OF SETTLEMENT CLASS MEMBERS**

26 As part of discovery, CDS provided Plaintiff with the .csv format results of queries of
27 CDS' phone records and customer relationship management ("CRM") software that contain a list
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1 of numbers, and time and dates of each call, for calls made by, or on behalf of CDS, advertising
2 CDS' student loan consolidation and loan forgiveness services, and, to such extent the
3 information was available, the related names, addresses, and email addresses. ("Call Records").
4 Plaintiff's technology expert, Jeffrey Hansen, has been able to extract the list of numbers from
5 the queries and compare the list against the "Wireless Blocked Identifier List," to identify the
6 30,572 unique cellular telephone numbers that belong to the Settlement Class Members. (*See*
7 Conn Decl., ¶¶14-16, for further detail regarding Hansen's methodology).

8 The Call Records contain mailing addresses for approximately 20.1% of the Settlement
9 Class Members and contain email addresses for approximately 85.4%. The Settlement
10 Administrator will use a reverse lookup process through Lexis Nexis to attempt to obtain the
11 name and address associated with each cellular telephone number during the period that the
12 number was dialed. (§7.3, Conn Decl., ¶18). Based off of past success, this will lead to the
13 identification of valid mailing addresses for approximately 77% of the telephone numbers that do
14 not already have associated mailing addresses and will result in mailing addresses for 81.6% of
15 all of the numbers. (Conn Decl., ¶¶ 18-21).

16 **D. DISSEMINATION OF NOTICE TO THE CLASS**

17 The Notice Plan is the best practicable notice possible and will result in notice reaching
18 between 81.6% and 96.6% of the class. (§7.2).

19 **1. Mailed Postcard Notice**

20 Based on the above estimates, the Settlement Administrator, Heffler Claims Group, will
21 send, via U.S. mail, a "Postcard Notice" that summarizes the terms of the Settlement Agreement
22 and directs Settlement Class Members to the Settlement Website. (§§ 1.41, 7.2(c), Exhibit 2). If
23 a Settlement Class Member receives the Postcard Notice, they not need do anything to receive a
24 Benefit Check, however, they have the option of providing an updated mailing address on the
25 Settlement Website. (§§ 2.4, 2.5, 5.3(b), 7.2(c)).

26 **2. Email Notice**

27 A supplemental Long Form Notice, will be sent, via email, to the 85% of Settlement
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1 Class Members with identified email addresses. (§§ 7.2(d), Exhibit 3). The Email Notice will
2 direct Settlement Class Members to the Settlement Website to allow those members to provide
3 mailing addresses so they can receive Benefit Checks. (§§ 2.4, 2.5, 7.2(f), 8.4(d)).

4 **3. Settlement Website**

5 The Settlement Administrator shall create a Settlement Website,
6 www.CDSphonecallsettlement.com from which Settlement Class Members can access copies of
7 the Complaint, the Settlement Agreement, the Notices, the Preliminary Approval Order,
8 Plaintiff's motion for preliminary approval of the Agreement, Plaintiff's motion seeking the
9 Final Approval Order and Judgment, the Fee, Cost and Service Award Application, and other
10 pertinent documents, materials, and information about the Settlement. In addition, Settlement
11 Class Members will be able to provide and update mailing addresses on the Settlement Website.
12 (§8.4(d)). Settlement Class Members will be able to contact the Settlement Administrator and
13 Class Counsel with any questions.

14 Defendants, through the Settlement Administrator, shall be responsible for timely
15 compliance with all CAFA notice requirements. (§§ 7.2(g),8.4(b)).

16 **E. SETTLEMENT ADMINISTRATION**

17 Heffler has agreed to cap the costs of settlement administration at \$125,000.00. (§8.1)
18 The estimated fees and costs are \$109,937.00. (Conn Decl., ¶18). The Settlement
19 Administrator's duties will include expenses relating to identifying the members of the
20 Settlement Class, providing Notice, and mailing settlement payments, as well as any others
21 expenses reasonably incurred. (§8.4). Plaintiff requests that the Court appoint Heffler to serve as
22 the Settlement Administrator.

23 **F. NARROWLY TAILORED RELEASE**

24 If, the Court grants Final Approval of the Settlement Agreement, the Settlement Class
25 will be deemed to have released Defendants from all claims, known or unknown, arising out of
26 or relating to any telemarketing, solicitation, or other marketing or dissemination that was made
27 by and/or on behalf of any of the Defendants and/or promoting Defendants' products or services.
28

1 (§6.1). In addition, the Settlement Class will be enjoined from bringing, joining, or continuing to
2 prosecute any of the Released Claims. (§11.3(l)).

3 **G. OPT-OUT PROCEDURE AND OPPORTUNITY TO OBJECT**

4 All Settlement Class Members will have the right to request exclusion from the
5 Settlement or object to its terms. (§§ 12, 13). Each Settlement Class Member who wishes to
6 exclude him or herself from the Settlement must submit a Request for Exclusion no later than 45
7 days after the date of Notice or such other date specified in the Court’s Preliminary Approval
8 Order by sending a written Request for Exclusion to the Settlement Administrator postmarked on
9 or before the Objection/Exclusion Deadline. (§12.1) The Request for Exclusion must (1) state
10 the Class Member’s full name and current address; (2) provide the cellular telephone number on
11 which he or she allegedly received a call from CDS; and (3) specifically state his or her desire to
12 be excluded from the Settlement Agreement and from the Settlement Class. (*Id.*).

13 The Settlement Agreement provides that any Settlement Class Member may object by
14 providing to the Settlement Administrator the following information: (1) full name, current
15 address, and current telephone number; (2) provide the cellular telephone number on which he or
16 she allegedly received a call from CDS; (3) a statement of the position(s) the objector wishes to
17 assert, including the factual and legal grounds for the position; and (4) provide copies of any
18 other documents that the objector wishes to submit in support of his/her position. (§13.1).

19 The Notices will set forth the exclusion/objection procedures set by the Court at
20 preliminary approval.

21 **H. THE COURT RETAINS JURISDICTION**

22 The Settlement Agreement provides that the Court will retain jurisdiction as to all matters
23 relating to administration, consummation, enforcement, and interpretation of the Settlement
24 Agreement. (§§11.3(k), 16.10).

25 //

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1 **IV. LEGAL ARGUMENT**

2 **A. STANDARDS FOR PRELIMINARY APPROVAL OF CLASS**
3 **SETTLEMENT**

4 The law favors settlement, particularly in class actions where substantial resources can be
5 conserved by avoiding the time, cost, and rigors of formal litigation. See *Class Plaintiff v. City*
6 *of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). Generally, “unless the settlement is clearly
7 inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with
8 uncertain results.” *Nat’l Rural Telecoms Coop. v DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal.
9 2004) (quoting 4 Newberg. §11.50 at 155 (4th Ed. 220)).

10 Even so, where the parties reach settlement prior to class certification, “courts must
11 peruse the proposed compromise to ratify both the propriety of the certification and the fairness
12 of the settlement.” *Staton v Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003). Parties seeking class
13 certification for settlement purposes must satisfy the requirements of Federal Rule of Civil
14 Procedure 23. *Amchem Prods., Inc. v Windsor*, 521 U.S. 591, 620 (1997). To protect the rights
15 of absent class members, due process requires that all class members receive adequate notice and
16 representation by the class representative. *Phillips Petroleum Co. v Shutts*, 472 U.S. 797, 812
17 (1985); *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,
18 1020 (9th Cir. 1998); Fed. R. Civ. Proc. 23(e).

19 Preliminary Approval does not require the Court to make a final determination that the
20 settlement is fair, reasonable, and adequate. Rather, Judicial proceedings under Rule 23 involve
21 a two-stage process. “First, the judge reviews the proposal to determine whether it is sufficient to
22 warrant public notice and a hearing. If so, the final decision on approval is made after hearing.”
23 *Manual for Complex Litigation, Fourth* (Fed. Judicial Center 2004) (“MCL”) §13.14, pp 172-
24 173; §§21.632-21.634, pp. 320-322. These procedures safeguard class members’ due process
25 rights and enable the Court to fulfill its role as the guardian of class interests. Newberg §11.22,
26 et seq.

27 The preliminary evaluation of the fairness of class action settlements is governed by the
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1 factors laid out in *Hanlon*, namely, the strength of the plaintiffs' case; the risk, expense,
2 complexity, and likely duration of further litigation; the risk of maintaining a class action status
3 throughout the trial; the amount offered in settlement; the extent of discovery completed and the
4 stage of the proceedings; the experience and views of counsel; the presences of a governmental
5 participant; and the reaction of the class members to the proposed settlement. *Hanlon, supra*, 150
6 F.3d at 1026; *see also In Re Bluetooth Headset Products Liability Litigation*, 654 F.3d 935, 946
7 (9th Cir. 2011).

8 The court looks at the overall settlement, not isolated provisions, to determine only
9 whether the proposed settlement is within the range of reasonableness, and thus whether notice
10 to the class is worthwhile. 4 Newberg §13.15. The Court need find only that the settlement falls
11 within the range of possible final approval, viewing the likelihood of success on the merits and
12 the range of possible recovery and outcomes. *Rodriguez v West. Publishing Corp.*, 563 F.3d 948,
13 964-965 (9th Cir. 2009). Recognizing that every settlement is a compromise, the MCL advises,
14 "[T]he settlement must be fair, reasonable, and adequate," and lists a number of criteria for the
15 court's consideration. §§ 21.61-62, pp. 308-18. Among these, the Court is to evaluate "the
16 advantages of the proposed settlement versus the probable outcome of a trial on the merits of
17 liability and damages as to the claims, issues, or defenses of the class and individual class
18 members." *Id.* at §21.62, pp. 316-17. The Court may compare the settlement to the maximum
19 theory of damages, but a settlement that offers a lesser amount of the potential recovery does not
20 mean the settlement is not fair, particularly where monetary relief is just one form of remedy
21 obtained by the compromise. *Hanlon*, 150 F.3d at 1027; *see also Officers for Justice v Civil*
22 *Service Commission of San Francisco*, 688 F.2d 615, 628 (9th Cir. 1982).

23 Furthermore, courts must give "proper deference to the private consensual decision of the
24 parties," since "the court's intrusion upon what is otherwise a private consensual agreement
25 negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a
26 reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion
27 between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and
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1 adequate to all concerned." *Id.* at 1027.

2 The decision to approve or reject a proposed settlement "is committed to the sound
3 discretion of the trial judge". *See Hanlon*, 150 F.3d at 1026. This discretion is to be exercised "in
4 light of the strong judicial policy that favors settlements, particularly where a complex class
5 action is concerned," which minimizes substantial Action expenses for both sides and conserves
6 judicial resources. *See Linney v. Cellular Alaska P 'ship*, 151 F.3d 1234, 1238 (9th Cir. 1998).

7 Based on these standards, Plaintiff respectfully submits that, for the reasons detailed
8 below, the Court should preliminarily approve the proposed Settlement and fair, reasonable and
9 adequate.

10 **B. CONDITIONAL CERTIFICATION OF THE CLASS IS APPROPRIATE**

11 Plaintiff requests that the Court conditionally certify the proposed Settlement Class,
12 defined in accordance with Federal Rules of Civil Procedure, Rules 23(b)(3) and 23(e). The
13 purpose of the preliminary fairness review and conditional class certification is to facilitate
14 distribution to all Settlement Class members of notice of the terms of the proposed Settlement
15 and the date and time of the final approval hearing. *See*, MCL (4th), §§13.14, 21.632-21.633.
16 Conditional class certification of the Settlement Class is appropriate at the preliminary approval
17 stage where, as here, the proposed Settlement Class as defined in the parties' Settlement
18 Agreement has not previously been certified by the Court. 4 *Newberg* §11.22.

19 The proposed class should meet all the criteria of for obtaining class certification:
20 numerosity, typicality of the class representative's claims, adequacy of representation,
21 predominance of common issues, and superiority. Fed. R. Civ. Proc., Rule 23(a); *Hanlon v.*
22 *Chrysler, supra*, at 1019. All elements required for class certification were verified through
23 discovery and investigation. This proposed Settlement Class meets all of the requirements of
24 certification for settlement purposes, as described more fully in the following discussion.

25 **1. Class Members are So Numerous as to Render Joinder Impracticable.**

26 The proposed Settlement Class meets Rule 23(a)'s requirement of numerosity because
27 the number of class members is great enough to render joinder of all members unfeasible. "The
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1 prerequisite of numerosity is discharged if ‘the class is so large that joinder of all members is
2 impracticable.’” *Hanlon*, 150 F.3d at 1019 (quoting Fed. R. Civ. P. 23(a)(1)). Here, the
3 Settlement Class consists of an estimated 30,572 persons. Joinder of all class members is
4 impracticable because members are numerous and geographically diverse. *See McCluskey v. Trs.*
5 *of Red Dot Corp. Emp. Stock Ownership Plan & Trust*, 268 F.R.D. 670, 674 (W.D. Wash. 2010)
6 (noting that, to satisfy the requirement, joinder need not be “impossible,” but rather difficult and
7 inconvenient). The impracticality of allowing all class members to be joined and to proceed on
8 an individual basis weighs in favor of class approval.

9 **2. The Representative’s Claims are Typical of Those Shared by Class
Members.**

10 The proposed Settlement Class meets Rule 23(a)’s requirement of typicality because the
11 nature of class claims is common to all class members. “[R]epresentative claims are ‘typical’ if
12 they are reasonably co-extensive with those of absent class members; they need not be
13 substantially identical.” *Hanlon*, 150 F.3d at 1020. “Typicality refers to the nature of the claim or
14 defense of the class representative, and not to the specific facts from which it arose or the relief
15 sought.” *Hanon v. Dataprods. Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (quoting *Weinberger v.*
16 *Thornton*, 114 F.R.D. 599, 603 (S.D. Cal. 1986)). Like those of all class members, Ms.
17 Cabiness’s claims arise from the alleged receipt, without adequate prior express written consent,
18 of automatically-dialed telemarketing calls. Though the specific facts surrounding the receipt of
19 these alleged calls may vary from class member to class member, the operative facts of the claim
20 are reasonably co-extensive. Therefore, Ms. Cabiness’s claims are “typical” within the meaning
21 of Rule 23(a).

22 **3. Common Questions of Law and Fact “Predominate” Over Individual
Questions.**

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24 Rule 23(a)(2) requires “questions of law or fact common to the class;” for classes
25 certified pursuant to Rule 23(b)(3), such questions must “predominate.” To meet the relatively
26 low bar of Rule 23(a)(2) commonality, plaintiffs need show only “a single common question”
27 *Parsons v. Ryan*, 754 F.3d 657, 674-75 (9th Cir. 2014) (citing *Wal-Mart Stores, Inc. v. Dukes*,

1 564 U.S. 338 (2011)). Rule 23(b)(3) imposes a higher bar; there, the test is whether the proposed
2 class is sufficiently cohesive to warrant adjudication by representation. *Hanlon v. Chrysler*
3 *Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998).

4 Here, common questions of law and fact predominate because all class claims arise from
5 a common factual scenario—the alleged receipt of automated calls without prior express written
6 consent. They also involve a common legal argument: that such calls are alleged to violate the
7 TCPA. Several courts have found common issues predominant where class claims under the
8 TCPA were based on alleged use of an ATDS. *See Agne v. Papa John’s Int’l, Inc.*, 286 F.R.D.
9 559, 570-71 (W.D. Wash. 2012) (finding predominance, where claims under the TCPA arose
10 from use of ATDS to send automatic text messages); *Booth v. Appstack, Inc.*, No. C13–1533JLR,
11 2015 WL 1466247, at *10 (W.D. Wash. Mar. 30, 2015) (“the TCPA elements of whether
12 Defendants (1) made a call to class members’ cellular telephone numbers (2) using an automatic
13 telephone dialing system or prerecorded voice can both be satisfied by common proof. . .
14 .Plaintiffs’ expert has already identified the cellular telephone numbers dialed by or on behalf of
15 Defendants and there is evidence that the same message was played for all calls.”); *Ikuseghan v.*
16 *Multicare Health Sys.*, No. C14-5539 BHS, 2015 WL 4600818, at *6 (W.D. Wash. July 29,
17 2015) (finding common issues predominant, where class members all signed a standardized form
18 and “received automated calls. . . . Ikuseghan and the class members will either prevail or lose
19 together on their TCPA claims.”). Here, for settlement purposes only, the parties have resolved
20 any dispute as to whether class members consented to the calls. In the absence of such a dispute,
21 common questions predominate over individual questions; therefore, the commonality
22 requirement of both Rule 23(a)(2) and the predominance requirement of Rule 23(b)(3) are met.

23 **4. Ms. Cabiness and Class Counsel Will Provide Adequate**
24 **Representation.**

25 Class certification requires that the class representative be “adequate.” Fed. R. Civ. Proc.
26 23(a)(4). “To determine whether named plaintiffs will adequately represent a class, courts must
27 resolve two questions: ‘(1) do the named plaintiffs and their counsel have any conflicts of
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1 interest with other class members and (2) will the named plaintiffs and their counsel prosecute
2 the action vigorously on behalf of the class?” *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985
3 (9th Cir. 2011) (quoting *Hanlon*, 150 F.3d at 1020). In the context of a class settlement,
4 examination of potential conflicts of interest “is especially critical.” *In re Online DVD*, 779 F.3d
5 934, 942 (internal marks and quotation omitted). That said, courts will not deny class
6 certification on the basis of ‘speculative’ or ‘trivial’ conflict. *See id.* (finding class
7 representatives adequate and overruling objection that proposed \$5,000 incentive award created a
8 conflict of interest).

9 As class representative, Ms. Cabiness provides fair and adequate representation of the
10 proposed Settlement Class as required by Rule 23(a)(4). Ms. Cabiness has no interests which are
11 in conflict with those of other members of the Settlement Class and, through her counsel, will
12 vigorously prosecute their common claims. Like other class members, she allegedly received
13 calls in violation of the TCPA. Ms. Cabiness therefore shares with all class members an interest
14 in pursuing legal remedies for those alleged calls.

15 Moreover, Ms. Cabiness’ counsel have substantial experience in consumer law and class
16 action litigation. Declaration of Nancy Barron in Support of Plaintiff’s Motion for Preliminary
17 Approval of Class Action Settlement., ¶¶4-19, Conn Decl., ¶¶32-36. “Parties represented by
18 competent counsel are better positioned than courts to produce a settlement that fairly reflects
19 each party’s expected outcome in the litigation.” *In re Pacific. Enterprises Securities. Litigation*,
20 47 F.3d 373, 378 (9th Cir. 1995). The adequacy requirement is amply met.

21 5. Superiority

22 Rule 23(b)(3) further requires that a class action be “superior to other available methods
23 for fairly and efficiently adjudicating the controversy.” The rule requires consideration of four
24 factors: “(A) the class members’ interests in individually controlling the prosecution or defense
25 of separate actions; (B) the extent and nature of any litigation concerning the controversy already
26 begun by or against class members; (C) the desirability or undesirability of concentrating the
27 litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class
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1 action.” Fed. R. Civ. P. 23(b)(3). Superiority is to be assessed through a “comparative evaluation
2 of alternative mechanisms of dispute resolution.” *Hanlon*, 150 F.3d at 1023.

3 In light of the Rule 23(b)(3) factors and, in comparison with the alternative, the class
4 action is superior to any other available method for litigating class members’ claims against
5 CDS. Here, as in *Hanlon*, the alternative methods of resolution are individual claims for a
6 relatively small amount of damages. Class certification is particularly appropriate since resolving
7 class members’ claims en masse will ensure an efficient and fair distribution of the settlement
8 fund. Individual claims would “prove uneconomic for a potential plaintiff,” because “litigation
9 costs would dwarf potential recovery.” *Hanlon*, 150 F.3d at 1023. Given the Defendants’
10 financial situation and CDS’s “wind down” status, many Class Members would likely be unable
11 to obtain any relief. Therefore, Class Members’ interest in individual litigation is low and
12 concentration of litigation is particularly desirable. To the parties’ knowledge, there is no
13 pending litigation of these claims by any Class Member. For these reasons, in this case, as in
14 *Hanlon*, a class action settlement is the preferred method of resolution.

15 **C. THE SETTLEMENT FALLS WITHIN THE RANGE OF POSSIBLE**
16 **APPROVAL**

17 **1. Liability is Highly Contested, Both Sides Face Significant Challenges**
18 **in Litigating this Action, and Post-Judgment Collection May Be**
19 **Difficult.**

20 Because liability is highly contested, both sides will face significant time, expenses, and
21 risk if this Action continues. The Defendants deny the allegations of Plaintiff, individually and
22 on behalf of the putative class asserted in the Complaint, and further deny any and all liability to
23 anyone, including, but not limited to, Plaintiff, the Settlement Class, or any Settlement Class
24 Member, based upon, arising out of, relating to, or otherwise in connection with the allegations
25 asserted in the Complaint, including but not limited to that Defendants violated the TCPA or
26 committed any other wrongful act or violation of any law. The Defendants maintain that they
27 complied with the TCPA and all applicable laws to the extent they made or on whose behalf
28 were made any telephone calls at issue in the Action. Defendants further maintain that if this

1 Action were to be litigated, the Court would find that Defendants are not part of a single business
2 enterprise, that Defendants do not have an agency relationship, that Defendants are not jointly
3 and severally liable to Plaintiff, the Settlement Class and/or any Settlement Class Members and
4 that the Action would not be appropriate for class treatment.

5 Plaintiff and Class Counsel believe that the alleged violations of the TCPA asserted in the
6 Action have merit, and that she would have ultimately succeeded in obtaining certification of the
7 proposed Settlement Class under Federal Rule of Civil Procedure 23, and in prevailing on the
8 merits at summary judgment or at trial. Nonetheless, Plaintiff and Class Counsel recognize that
9 Defendants have raised factual and legal defenses in the Action that present a risk that Plaintiff
10 may not prevail, that a class might not be certified for trial, that the claims of one or more class
11 members may be defeated, and/or that Plaintiff and the Class may not be able to collect on a
12 judgment, given that CDS is in “wind down” mode. Plaintiff and Class Counsel also have taken
13 into account the uncertainty and risks inherent in any litigation, especially in complex class
14 action litigation.

15 In considering the Settlement, Plaintiff and Class Counsel carefully balanced the risks of
16 continuing to engage in protracted and contentious litigation as well as the challenges in
17 collecting a large judgment against one or more of the Defendants against the benefits to the
18 Settlement Class. Based on their evaluation, which they have confirmed by consulting with their
19 own expert(s) and investigators, and by performing confirmatory discovery, Plaintiff and Class
20 Counsel have concluded that the terms and conditions of the Settlement Agreement are fair,
21 reasonable, and adequate for the Settlement Class, and that it is in the best interests of the
22 Settlement Class to settle the Released Claims pursuant to the terms and provisions of the
23 Settlement Agreement. As a result, Class Counsel and Plaintiff support the Settlement and seek
24 its preliminary approval. *See* Barron Decl. ¶¶ 2-3, Conn Decl., ¶¶ 22-27.

25 **2. The Settlement Provides and Fair and Substantial Value to the Class.**

26 As set forth above, Defendants have agreed to a Settlement Fund of \$1,100,000, which
27 includes notice and settlement administration costs, a service award to Plaintiff, and attorneys’
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1 fees and costs.

2 Critically and quite unique in TCPA class litigation, the Settlement provides for a direct
3 monetary benefit to each Settlement Class Member, *with no mandatory claims process*. Each
4 Settlement Class Member with an obtained mailing address (estimated at between 81.6% and
5 96.6% of the class members) will be directly issued a check for at least \$20.00.

6 Courts have routinely approved such settlement. *See Shames v. Hertz Corp.*, 2012 WL
7 5392159 at *13 (S.D. Cal. Nov. 5, 2012) (settlement was fair where the parties “negotiated a
8 settlement that provide[d] direct payment to class members”; *Hopson v. Hanesbrands Inc.*, 2009
9 WL 928133 at *11 (N.D. Cal. Apr. 3, 2009) (“the benefits can be accurately traced because they
10 are payments directly to Class Members”); *Briggs v. United State*, 2010 WL 1759457 (N.D. Cal.
11 Apr. 30, 2010) (settlement was fair where it did not require class members to file claim forms).

12 The benefit each Settlement Class Member will receive is fair, appropriate, and
13 reasonable given the purposes of the TCPA and in light of the anticipated risk, expense, and
14 uncertainty of continuing the Action. Although the TCPA provides for statutory damages of
15 \$500 per violation, it is well-settled that a percentage of the potential recovery that might be
16 available to the class members at trial may be acceptable. *See e.g., National Rural Tele. Coop. v.*
17 *DIRECTV, Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004) (“well settled law that a proposed
18 settlement may be acceptable even though it amounts to only a fraction of the potential
19 recovery”); *In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436,460 (E.D. Pa. 2000)
20 (“the fact that a proposed settlement constitutes a relatively small percentage of the most
21 optimistic estimate does not, in itself, weigh against the settlement; rather, the percentage should
22 be considered in light of the strength of the claims”).

23 The Settlement in this case is comparable with other TCPA class settlements that have
24 been approved by the Courts with similar monetary relief based on a claims-made process. *See*
25 *Malta v. Fed. Home Loan Mortgage Corp.*, 2013 WL 444619, at *7 (S.D. Cal. Feb. 5, 2013)
26 (granting preliminary approval of TCPA class action settlement where, if all eligible claimants
27 filed claims, they would receive approximately \$2 each); *Spillman v. RPM Pizza, LLC*, 2013 WL

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1 2286076, *4 (M.D. La. May 23, 2013) (granting final approval of TCPA settlement where class
2 members received less than \$20 each). The Settlement is able to provide similar recovery, via
3 direct distribution.

4 Thus, the Settlement provides a substantial benefit to Settlement Class Members, as they
5 will receive meaningful recovery with no burden and no expense.

6 **3. The Settlement Was Reached as the Result of Arms-Length**
7 **Negotiation, Without Collusion, With the Assistance of a Mediator.**

8 The proposed settlement is the result of intensive arms-length negotiations, including an
9 all-day mediation before the Honorable Peter D. Lichtman (Ret.) of JAMS. Class Counsel is
10 satisfied that the information provided about the number of individuals in the Settlement Class is
11 accurate. The time and effort spent doing discovery, consulting with experts, and examining and
12 investigating the claims support preliminary approval of the Settlement, as the process indicates
13 that there is no collusion. *In re Wireless Facilities, Inc. Sec. Litig. II*, 253 F.R.D. 607, 610 (S.D.
14 Cal. 2008) (“Settlements that follow sufficient discovery and genuine arms-length negotiation
15 are presumed fair.”)

16 **D. THE PROPOSED FORM AND METHODS OF NOTICE IS THE BEST**
17 **NOTICE PRACTICABLE AND SHOULD BE APPROVED**

18 The Class Notice satisfies Fed. R. Civ. Proc. 23(c)(2)(B), which requires the “best notice
19 practicable under the circumstances.” The notice should “concisely and clearly state in plain,
20 easily understood language” all of the following: the nature of the action, class definition, a
21 general statement of the class claims and issues, that a class member may enter an appearance
22 through counsel if desired, the right and manner of exclusion or objection, and the binding effect
23 of class judgment (release). *Id.* The notice should provide “absent class members ... with the
24 opportunity to opt-out and individually pursue any state law remedies that might provide a better
25 opportunity for recovery.” *Churchill Village, L.L.C. v. General Electric*, 361 F.3d 566, 575 (9th
26 Cir. 2004), quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1025 (9th Cir. 1998). Notice is
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1 satisfactory if it “generally describes the terms of the settlement in sufficient detail to alert those
2 with adverse viewpoints to investigate and to come forward and be heard.” *Mendoza v. Tucson*
3 *School Dist. No. 1*, 623 F.2d 1338, 1352 (9th Cir. 1980) disapproved on other grounds by *Evans*
4 *v. Jeff D.*, 475 U.S. 717, 725 (1986).

5 As set forth above, the Notice Plan is designed so Notice reaches between 81.6% and
6 96.6% of the Settlement Class. The Notices are drafted in clear, concise, everyday language,
7 with a minimum of legalese, explaining how to tell whether a consumer is a class member, the
8 total amount and nature of relief, how further information can be obtained, attorney
9 compensation, nature of claims and defenses, proposed distribution, and opt out/exclusion
10 procedures.

11 **V. PROPOSED SCHEDULE FOR REMAINING PROCEDURES**

12 A final approval hearing is necessary so that the Court can determine whether to enter a
13 Final Order approving the terms of the Settlement Agreement as fair, reasonable and adequate.
14 The Class Notice contemplates and affords an opportunity for Class Members to opt-out or
15 object. The parties proposed schedule of remaining procedures is detailed in the Declaration of
16 Elliot Conn, ¶ 37.

17 At the Final Approval hearing, Class Counsel will request implementation of the
18 settlement terms and provisions, a finding that the notice given to the class members satisfies the
19 requirements of due process and Federal Rules of Civil Procedure, Rule 23, an award of
20 attorneys’ fees and costs, a service award, designation of *cy pres* recipient to be awarded at the
21 end of the distribution process, and an order that this Court retain jurisdiction to enforce the
22 provisions of the Settlement Agreement should the need for further court involvement arise.

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1 **VI. CONCLUSION**

2 Plaintiff requests that the Court conditionally certify the proposed Settlement Class
3 pursuant to Federal Rules of Civil Procedure, Rule 23(b)(3), grant preliminary approval of the
4 proposed Class Settlement Agreement, approve and order distribution of the proposed Class
5 Notice, and schedule a Final Approval Hearing.

6 Dated: January 26, 2018

Respectfully submitted,

7 KEMNITZER, BARRON, & KRIEG, LLP

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9 By: /s/ Elliot Conn
10 ELLIOT CONN

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