

1 Todd M. Friedman (SBN 216752)
Adrian R. Bacon (SBN 280332)
2 Meghan E. George (SBN 274525)
Thomas E. Wheeler (SBN 308789)
3 LAW OFFICES OF TODD M. FRIEDMAN, P.C.
21031 Ventura Blvd, Suite 340
4 Woodland Hills, CA 91364
5 Phone: 323-306-4234
6 Fax: 866-633-0228
tfriedman@toddfllaw.com
7 abacon@toddfllaw.com
mgeorge@toddfllaw.com
8 twheeler@toddfllaw.com
Attorneys for Plaintiff

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF LOS ANGELES**

12 TERRY FABRICANT, individually and on)
13 behalf of all others similarly situated,)
14 Plaintiff,)

15 vs.)

16 TOP FLITE FINANCIAL, INC.; DOES 1)
17 -100, and each of them,)
18 Defendants.)
19)

CASE NO.: 20STCV13837

) **PLAINTIFF’S NOTICE OF MOTION**
) **AND MOTION FOR PRELIMINARY**
) **APPROVAL OF CLASS ACTION**
) **SETTLEMENT; MEMORANDUM OF**
) **POINTS AND AUTHORITIES IN**
) **SUPPORT**

) **Hearing Date: December 6, 2022**

) **Hearing Time: 10:00 am**

) **Dept.: SS7**

) [Filed concurrently with Declaration of Adrian
) R. Bacon; Declaration of Terry Fabricant;
) Declaration of Matt Cornett; Declaration of
) Bradley Madden; and [Proposed] Order]

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

2 **PLEASE TAKE NOTICE** that on December 6, 2022 at 10:00 a.m. in Department
3 SS7 of the above-captioned Court, located at 312 North Spring Street, Los Angeles, CA
4 90012, Plaintiff Terry Fabricant (“Plaintiff”) will and hereby does move for an order: (1)
5 granting class certification of the below-defined Class for settlement purposes only
6 pursuant to Code of Civil Procedure § 382; (2) preliminarily approving the Class Action
7 Settlement Agreement and Release (the “Settlement”) between Plaintiff and TOP FLITE
8 FINANCIAL, INC. (“Defendant” or “TF”); (3) appointing Adrian R. Bacon, Todd M.
9 Friedman, and Thomas E. Wheeler of the Law Offices of Todd M. Friedman as Class
10 Counsel; (4) appointing Plaintiff as the Class Representatives; (5) approving the use of the
11 proposed notice procedure and related forms; (6) directing that the Class Notice be mailed
12 to the Class; and (7) scheduling a hearing date for a final approval hearing.

13 This is a settlement of a class action on behalf of a class defined as including “all
14 California residents who, between April 8, 2019 and June 7, 2019, had a call with
15 Defendant that lasted more than nine (9) seconds and whose call was recorded” (the
16 “Settlement Class”).

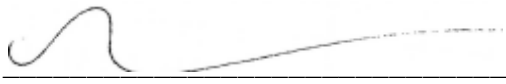
17 This Motion is made on the following grounds: 1) all requirements for class
18 certification, for settlement purposes only, are met pursuant to Code of Civil Procedure §
19 382; 2) Plaintiff and his counsel are adequate to represent the Class; 3) the Settlement is a
20 fair, adequate, and reasonable compromise of the disputed wage and hour claims in this
21 case; and 4) the proposed notice procedure meets all due process requirements. The
22 Settlement is made by Plaintiff, individually and on behalf of the Class Members, and
23 Defendant. In view of the foregoing, the Settlement should be preliminarily approved,
24 notice should be disseminated to Class Members, a Final Fairness Hearing should be
25 scheduled, and the [Proposed] Order Granting Preliminary Approval of Class Action
26 Settlement should be entered.

27 This Motion is based on this Notice of Motion and Motion, the attached
28 Memorandum of Points and Authorities, the Declaration of Adrian Bacon in support

1 thereof, including all exhibits thereto, the Declaration of Terry Fabricant, the Declaration
2 of Matt Cornett, the Declaration of Bradley Madden, all papers and pleadings on file with
3 the Court in this action, all matters judicially noticeable, and such oral and documentary
4 evidence as may be presented in connection with the hearing on the Motion.

5
6 Dated: September 16, 2022

LAW OFFICES OF TODD M. FRIEDMAN, P.C.

7
8 By:  _____

9 Todd M. Friedman
10 Attorneys for Plaintiff

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TABLE OF CONTENTS

1

2 **I. INTRODUCTION1**

3

4 **II. MOVING PAPERS3**

5 **A. Introductory Information3**

6 **B. Dunk/Kullar Analysis4**

7 **C. Class Certification6**

8 1. Numerosity and Ascertainability7

9 2. Community of Interest.....7

10 3. Adequacy9

11 **D. Claim Requirement10**

12 **E. Miscellaneous11**

13

14 **III. SETTLEMENT AGREEMENT12**

15 **A. The Basics12**

16 **B. Release of Claims13**

17 **C. Monetary Terms of Settlement14**

18 **D. Notice Administration15**

19 **E. Responses to Notice.....17**

20 **F. Cy Pres Distribution17**

21 **G. Miscellaneous18**

22

23

24 **IV. CONCLUSION18**

25

26

27

28

Table of Authorities

Cases

Air Line Stewards, etc., Local 550 v. Am. Airlines, Inc. (7th Cir. 1972) 455 F.2d 101 4

Bell v. Farmers Ins. Exch., (2004) 115 Cal. App. 4th 715 12

Bellinghausen v. Tractor Supply Co. (N.D. Cal. 2015) 306 F.R.D. 245 12

Bowles v. Superior Court (1955) 44 Cal.2d 57 7

Clark v. Am. Residential Servs. LLC, 175 Cal.App.4th 785 (2009) 4

Duran v. U.S. Bank Nat'l Assn. (2014) 59 Cal. 4th 1 8

Hanon v. Dataproducts Corp. (9th Cir. 1992) 976 F.2d 497 8

Kullar v. Foot Locker Retail Inc., 168 Cal.App.4th 116 (2008) 4

Linder v. Thrifty Oil Co. (2000) 23 Cal.4th 429 8

Ridgeway v. Wal-Mart Stores Inc. (N.D. Cal. 2017) 269 F. Supp. 3d 975 12

Rose v. City of Hayward (1981) 126 Cal.App.3d 926 7

Sav-On Drug Stores, Inc. v. Superior Court (2004) ¶ 7 7, 8

Seastrom v. Neways, Inc. (2007) 149 Cal. App. 4th 1496 8

Smith v. LoanMe, Inc., (Cal. S.Ct. 2021) 11 Cal.5th 183 9

Van Vranken v. Atl. Richfield Co. (N.D. Cal. 1995) 901 F. Supp. 294 12

Wershba v. Apple Computer, Inc. (2001) 91 Cal. App. 4th 224 4

Wilson v. La Jolla Grp. (2021) 276 Cal. Rptr. 3d 118 8

Statutes

Cal. Pen. C. § 632.7 3

California Code of Civil Procedure §382 3, 6, 10

Invasion of Privacy Act, Cal. Pen. C. § 630 et. seq. 3

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Terry Fabricant (hereinafter “Plaintiff”, “Fabricant” or “Class
4 Representative”), individually and on behalf of the “Settlement Class” (as defined below),
5 hereby submits this motion for preliminary approval of a proposed settlement of this action (the
6 “Litigation”) and of certification of the proposed settlement class. Top Flite Financial, Inc.
7 (hereinafter referred to as “TF” or “Defendant”) do not oppose Plaintiff’s motion (Plaintiff and
8 Defendants shall collectively be referred to as the “Parties”). The terms of the Settlement are
9 set forth in the Settlement Agreement and Release (hereinafter the “Settlement”).¹ See
10 *Declaration of Todd M. Friedman (“Friedman Decl.”), ¶ 11, Ex. A.*

11 The proposed Settlement resulted from the Parties’ participation in an all-day mediation
12 sessions before the Honorable Joe Hilberman (Ret.) of JAMS. The Settlement provides for a
13 substantial financial benefit to the Settlement Class Members. The Settlement Class consists of
14 “all California residents who, between April 8, 2019 and June 7, 2019, had a call with
15 Defendant that lasted more than nine (9) seconds² and whose call was recorded.”³ The
16 Settlement Class comprises 8,511 individuals.

17 The compromise Settlement reached with the guidance of Judge Hilberman will create a
18 Settlement Fund to be established by Defendant in the amount of \$275,000. The amount of the
19 Settlement Fund shall not be reduced as a result of any member(s) of the Settlement Class
20 electing to opt out or be excluded from the Settlement or for any other reason. The Settlement
21 Fund will pay for a Settlement Administrator, Postlethwaite & Netterville. (“P&N”), which will
22 be responsible for providing notice to the Settlement Class, providing and disbursing settlement
23 checks to Class Members who submit a claim form and who do not opt-out, creating and
24

25 _____
26 ¹ Unless otherwise specified, capitalized terms used in this memorandum are intended to
27 have the same meaning ascribed to those terms in the Agreement.

28 ² Nine (9) seconds was selected to exclude calls in which a person immediately hung up.

³ The end of the Class Period is June 7, 2019 because Defendant stopped its recording practices
at that time.

1 maintaining a Settlement Website, maintaining a toll-free telephone number, preparing an Opt-
2 Out List, preparing a list of persons submitting objections to the settlement, and acting as a
3 liaison between Settlement Class Members and the Parties regarding the settlement. Settlement
4 members who submit a timely and valid Claim Form and do not opt-out will receive a pro rata
5 share of the Settlement Fund in the form of a check (after any attorneys' fees and costs awarded
6 by the Court, any Service Award to Class Representative, and any costs of claims
7 administration are deducted from the Settlement Fund). Plaintiff will receive a Service Award
8 of \$5,000.00 (subject to Court approval) for bringing and litigating this action. Class Counsel
9 will request an attorneys' fee award of \$91,666, (i.e., approximately 33.33% of the total
10 settlement amount), and costs of up to \$10,000 subject to Court approval, to be paid out of the
11 Settlement Fund. Any unclaimed funds from uncashed settlement checks, including settlement
12 checks to Class Members who submit valid claim forms but whose current valid address could
13 not be determined, shall be delivered to the State Controller's Office for Unclaimed Property in
14 the name of the Settlement Class Members who made a claim and did not cash their checks.

15 In consideration for the Settlement Fund, Plaintiff, on behalf of the proposed Settlement
16 Class, will unconditionally release and discharge Defendants and other Released Parties from
17 the Released Claims as set forth below in exchange for judgment.

18 While Plaintiff is confident of a favorable determination on the merits, he has
19 determined that the proposed Settlement provides significant benefits to the Settlement Class
20 and is in the best interests of the Settlement Class. Plaintiff also believes that the Settlement is
21 appropriate because Plaintiff recognizes the expense and amount of time required to continue to
22 pursue the Litigation, as well as the uncertainty, risk, and difficulties of proof inherent in
23 prosecuting such claims. Similarly, as evidenced by the Settlement, TF believes that it has
24 substantial and meritorious defenses to Plaintiff's claims, but has determined that it is desirable
25 to settle the Litigation on the terms set forth in the Settlement.

26 Plaintiff believes that the proposed Settlement satisfies all of the criteria for preliminary
27 approval. Accordingly, Plaintiff moves this Court for an order preliminarily approving the
28

proposed Settlement, provisionally certifying the Settlement for settlement purposes under California Code of Civil Procedure Section 382, directing dissemination of Class Notice, and scheduling a Final Approval Hearing.⁴

II. MOVING PAPERS

A. **Introductory Information**

Plaintiff⁵ filed the initial class action complaint (“Complaint”) on April 8, 2020. In the Complaint, Plaintiff alleged causes of action for unintentional and intentional violations of the Invasion of Privacy Act, Cal. Pen. C. § 630 et. seq. (“IPA”), and in particular, Cal. Pen. C. § 632.7. In particular, Plaintiff alleged that TF called him on his cellular telephone ending in - 1083 and made a recording of the call without advising Plaintiff that the call was recorded. FAC at ¶¶ 11, 13. Pursuant to Cal. Pen. C. § 632.7, a party may not intentionally record a communication between a cellphone and any other phone without the consent of all parties to the communication. *Id.* at ¶ 38. Per Cal. Pen. C. § 637.2, a party that violates Cal. Pen. C. § 632.7 may be sued by an injured party for the greater of \$5,000 per violation or three times the actual amount of damages sustained. *Id.* at ¶ 46. Plaintiff’s claims were brought on behalf of a class of individuals who allegedly participated in calls to and from their mobile phones where they were recorded without consent. *Id.* at ¶ 24. Based on those allegations, Plaintiff sought \$5,000 per violation per Class Member, as well as injunctive relief.

Plaintiff’s original complaint named LMB Mortgage Services, Inc. d/b/a LOWERMYBILLS.COM, INC.. Friedman Decl. ¶ 5. After discussing with LMB, Plaintiff determined that this was the incorrect entity and the correct entity was actually TOP FLITE FINANCIAL, INC., and requested leave to file a First Amended Complaint and thereafter filing a First Amended Complaint (the “FAC”) naming Defendant TF on September 8, 2020. *Id.*

Thereafter, on December 2, 2020, the Parties stipulated and the Court entered a stay of this action pending the Supreme Court’s decision in Jeremiah Smith v. LoanMe, Inc., Supreme Court Case No. S260391. On May 12, 2021, Plaintiff advised the Court that the stay could be

⁴ The remainder of the Motion is specifically structured in accordance with the Los Angeles Superior Court, Complex Civil Department Checklist For Preliminary Approval of Class Action Settlement.

⁵ An additional Plaintiff, Mariano Benitez, was dismissed previously.

1 lifted, and the Court did so. The Parties agreed to attend mediation. *Id.* at ¶ 7. At mediation, the
2 Parties reached a settlement as discussed in the subsequent section. Plaintiff now moves for
3 preliminary approval.

3 **B. Dunk/Kullar Analysis**

4 Plaintiff conducted a comprehensive analysis of the class data, relevant recordings and
5 script, and other factors concerning risks to obtaining relief for the Settlement Class in this
6 matter and, with the assistance of Judge Joe Hilberman (ret.), agreed to a Settlement which
7 provides meaningful relief now for Settlement Class Members.

8 “In the context of a settlement agreement, the test is not the maximum amount plaintiffs
9 might have obtained at trial on the complaint, but rather whether the settlement is reasonable
10 under all of the circumstances.” *Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224,
11 250, *disapproved of on other grounds by Hernandez v. Restoration Hardware, Inc.*, 4 Cal. 5th
12 260 (2018) (citation omitted). Settlements result from compromise, and “the public interest may
13 indeed be served by a voluntary settlement in which each side gives ground in the interest of
14 avoiding litigation.” *Id.* (quoting *Air Line Stewards, etc., Local 550 v. Am. Airlines, Inc.* (7th
15 Cir. 1972) 455 F.2d 101, 109). Nevertheless, the parties must provide the court with “a
16 meaningful and substantiated explanation of the manner in which the factual and legal issues
17 have been evaluated.” *Kullar v. Foot Locker Retail Inc.*, 168 Cal.App.4th 116, 118 (2008).
18 Courts thus review the information obtained by the parties during their negotiations to assess
19 whether the claims were sufficiently developed before agreeing to the settlement. *Id.* at 129-
20 131. “Sufficient” in this context means enough information to provide the court “an
21 understanding of the amount that is in controversy and the realistic range of outcomes of the
22 litigation.” *Clark v. Am. Residential Servs. LLC*, 175 Cal.App.4th 785, 801 (2009).
23 Accordingly, settlements can be reasonable even where they provide substantially narrower
24 relief than could potentially be awarded, if the class were certified and if the plaintiff were to
25 prevail at trial.

26 As noted above, the case arises out of TF’s practice of recording Settlement Class
27 Members, including Plaintiff, without obtaining the consent of all parties to the call, which
28 allegedly violated Cal. Pen. C. § 632.7. FAC at ¶¶ 11, 13, & 38. The Parties agreed to settle all
calls, including both cellphone calls (as alleged in the FAC) and landline calls for which calls
would arguably violate Cal. Pen. C. § 632 if the calls included “confidential information.”

1 Friedman Decl. at ¶ 15; FAC at ¶ 39 (noting this distinction); Agreement at 15.1. Calls that
2 violate Cal. Pen. C. § 632 have the same damages and enforcement mechanism as Cal. Pen. C.
3 § 632.7 through Cal. Pen. C. § 637.2.

4 Ahead of the mediation, Defendant provided the sample script which was read to
5 callers, the call recordings with Plaintiff, the service agreement and order form for the company
6 that provided call services (including call recording) to Defendant, and the call log for all calls
7 during the relevant time period from April 8, 2019 to June 7, 2019. Friedman Decl. at ¶ 7;
8 Declaration of Matt Cornett (“Cornett Decl.”) at ¶ 4. The sample script and call recordings
9 confirmed that Defendant did not have a practice of disclosing that its calls were being
10 recorded despite recording the calls. Friedman Decl. at ¶ 8. The call log contained the time and
11 date of all calls April 8, 2019 to June 7, 2019, including call length and the phone number
12 called from. *Id.*; Cornett Decl. at ¶ 7. Plaintiff’s counsel processed the call logs to identify only
13 calls for unique phone numbers with California area codes for calls that lasted more than 9
14 seconds, determining that there were 8,511 such phone numbers. Friedman Decl. at ¶ 8. The
15 records reflect that Defendant ceased call recording on June 8, 2019. *Id.*

16 The Parties did not engage in settlement negotiations prior to mediation. *Id.* at ¶ 9. On
17 February 15, 2022, the Parties attended an all-day mediation with well-respected mediator Hon.
18 Joe Hilberman (Ret.). *Id.* With the assistance of Judge Hilberman (ret.), who assisted the
19 Parties in determining the burdens, uncertainty, and risks inherent in the Action, the Parties
20 reached an agreement to settle the matter. *Id.* The Parties concluded that further prosecution
21 and defense of the Action could be protracted, unduly burdensome, and expensive, and that it is
22 desirable, fair, and beneficial that the Action now be fully and finally compromised, settled and
23 terminated in the manner and upon the terms and conditions set forth in the Settlement
24 Agreement. *Id.*

25 Taking into account the burdens, uncertainty and risks inherent in this litigation, Class
26 Counsel concluded that further prosecution of this action could be protracted, unduly
27 burdensome, and expensive, and that it is desirable, fair, and beneficial to the class that the
28 action now be fully and finally compromised, settled and terminated in the manner and upon
the terms and conditions set forth in the Settlement Agreement. *Id.* at ¶ 37. In particular, had
this matter not resolved at mediation, Plaintiff would have had to engage in further formal
discovery, including depositions and subpoena discovery against the dialer provider, which

would have been costly and time consuming. *Id.* at ¶ 38. After discovery was completed, Plaintiff would have had to move for Class Certification, which would have taken multiple months to be briefed and heard. *Id.* While Plaintiff was confident in the merits of this matter, Class Certification would have posed a significant risk because it is at the discretion of the Court and Defendant would have been able to raise multiple defenses, including that the IPA only applies to California residents and California phone area codes do not inherently indicate someone was a California resident at the time of the call and that there was no effective way to determine whether someone actually spoke on a call and thus was recorded. *Id.* Plaintiff would have responded that the first issue is an “opt out” issue where class members could affirm they were California residents and the latter could be handled by sorting by call length. *Id.* Regardless, Plaintiff’s counsel acknowledged that these presented significant risks to both obtaining class action status and maintaining it. *Id.*

To the extent Plaintiff were to prevail on certifying the broadest class possible and overcome all merits challenges, the maximum exposure would be \$42.5 million (8,511 * \$5,000). *Id.* at ¶ 40. A judgment of \$42.5 million would be financially ruinous to almost any small business, including Defendant. *Id.*; Cornett Decl. at ¶ 3. Defendant, who is a mortgage lender, has been experiencing a downward trend in revenue due to rising mortgage rates. Cornett Decl. at ¶ 3. The Settlement Fund is being funded solely by TF and was the most that could be contributed without jeopardizing business operations. *Id.* This amount is also inclusive of all telephone numbers and thus claims under both Cal. Pen. C. §§ 632 & 632.7. Cal. Pen. C. § 632 has unique defenses because it only applies to confidential communications—and thus requires an analysis of whether the communications were confidential which can defeat both class certification and the merits. Given these significant ongoing risks to both certification and merits, and the reality that even if Plaintiff prevailed, the Class would never collect, Plaintiff determined that it was advantageous to settle on the terms memorialized in the Agreement. *Id.* at ¶ 41.

C. Class Certification

Plaintiff contends that the proposed settlements meet all of the requirements for class certification under California Code of Civil Procedure §382 as demonstrated below, and therefore, the Court may appropriately approve the Class as defined in the Settlement

1 Agreement.⁶ This Court should conditionally certify the Class for settlement purposes only,
2 defined as follows:

3 “All California residents who, between April 8, 2019 and June 7, 2019, had a call with
4 Defendant that lasted more than nine (9) seconds and whose call was recorded.”

5 Settlement Agreement § 2.1. The California Supreme Court has summarized the
6 standard for determining whether class certification is appropriate as follows:

7 Code of Civil Procedure Section 382 authorizes class actions “when the
8 question is one of a common or general interest, of many persons, or when the
9 parties are numerous, and it is impracticable to bring them all before the
10 court...” The party seeking certification has the burden to establish the existence
11 of both an ascertainable class and a well-defined community of interest among
12 class members, (*citations omitted*). The “community of interest” requirement
13 embodies three factors: (1) predominant common questions of law or fact; (2)
14 class representatives with claims or defenses typical of the class; and (3) class
15 representatives who can adequately represent the class.

16 *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal. 4th 319, 326 . While Defendant
17 reserves all rights to dispute that the Plaintiff can satisfy any of these requirements, the Parties
18 agree that Defendant will not dispute that these requirements may be satisfied in this case for
19 purposes of settlement and therefore, the Class should be certified for purposes of settlement.

20 1. Numerosity and Ascertainability

21 As noted above, there are 8,511 unique phone numbers (and thus individuals associated
22 with those phone numbers) who comprise the Settlement Class. Friedman Decl. at ¶ 8. *See*
23 *Bowles v. Superior Court* (1955) 44 Cal.2d 574 (class with 10 members sufficiently numerous);
24 *Rose v. City of Hayward* (1981) 126 Cal.App.3d 926, 934 (class of 48 members satisfies
25 numerosity requirement.). The members of the Settlement Class may be specifically identified
26 by using these phone numbers in combination with valid mailing addresses in the possession of
27 Defendant or through a skip trace/reverse lookup process to be performed by P&N as part of
28 claims administration. *Id.* at ¶¶ 18-19. Thus, the class is ascertainable.

2. Community of Interest

⁶ Defendant strongly disputes that a litigation class would meet the standard for certification in this case but has agreed to certification for purposes of resolution of this case.

1 Plaintiff, like all Settlement Class Members, was recorded by Defendant without his
2 consent using a common script between April 8, 2019 and June 7, 2019 such that there is
3 clearly a community of interest between Plaintiff and the Settlement Class. Friedman Decl. at
4 ¶¶ 7-8. “The community of interest requirement involves three factors: ‘(1) predominant
5 common questions of law or fact; (2) class representatives with claims or defenses typical of
6 the class; and (3) class representatives who can adequately represent the class.’” (*Linder v.*
7 *Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) Whether Plaintiff is likely to prevail on their
8 theory of recovery is irrelevant at the certification stage since the question is “essentially a
9 procedural one that does not ask whether an action is legally or factually meritorious.” *Id.* at
10 439-40.

11 The common question of law about whether Defendant’s calling practices resulted in
12 the recording of phone calls with Settlement Class Members without their consent and whether
13 such practice violates IPA is the predominant question in this litigation. Predominance “hinges
14 on ‘whether the theory of recovery advanced by the proponents of certification is, as an
15 analytical matter, likely to prove amenable to class treatment.” *Wilson v. La Jolla Grp.* (2021)
16 276 Cal. Rptr. 3d 118, 125 (quoting *Duran v. U.S. Bank Nat’l Assn.* (2014) 59 Cal. 4th 1, 28).
17 Moreover, predominance “is a comparative concept, and ‘the necessity for class members to
18 individually establish eligibility and damages does not mean individual fact questions
19 predominate.’” *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 334. The
20 theory of recovery advanced by Plaintiff is amenable to class treatment because it arises out of
21 the same course and conduct for the same violations of IPA. Thus, the claims predominate.

22 The typicality requirement requires the Plaintiff to demonstrate that the members
23 of the class have the same or similar claims as the Plaintiff. The inquiry turns on the
24 nature of the class representative’s claim or defense, not “the specific facts from which it
25 arose or the relief sought.” *Seastrom v. Neways, Inc.* (2007) 149 Cal. App. 4th 1496, 1502
26 (quoting *Hanon v. Dataproducts Corp.* (9th Cir. 1992) 976 F.2d 497, 508). Typicality is
27 “to assure that the interest of the named representative aligns with the interests of the
28

1 class.” *Id.* Accordingly, “[t]he test of typicality is whether other members have the same
2 or similar injury, whether the action is based on conduct which is not unique to the named
3 plaintiffs, and whether other class members have been injured by the same course of
4 conduct.” *Id.* (internal quotations and citations omitted).

5 There is typicality here for the same reason that the claims predominate. Plaintiff,
6 like all Settlement Class Members, was recorded by Defendant without his consent using
7 a common script on April 15, 2019 and April 18, 2019, which are between April 8, 2019
8 and June 7, 2019. Friedman Decl. at ¶¶ 7-8; Cornett Decl. at ¶¶ 4-7. Thus, Plaintiff has
9 the same IPA claims at the Settlement Class and is typical of those claims.

10 3. Adequacy

11 Plaintiff has agreed to act as a class representative and understands his responsibilities
12 and has retained one of the preeminent California Invasion of Privacy Act law firms to
13 represent him in this case, thus satisfying adequacy. Mr. Fabricant understands his
14 responsibilities and has considered the interests of the Settlement Class above his own in
15 litigating this action. Declaration of Terry Fabricant (“Fabricant Decl.”) at ¶¶ 5-6. The Law
16 Offices of Todd M. Friedman P.C. have extensive experience in class action litigation in
17 California and throughout the country, specifically in consumer protection litigation, including
18 the prosecution of class actions seeking to protect consumer rights, including IPA actions.
19 Friedman Decl. at ¶¶ 43-52. The Law Offices of Todd M. Friedman P.C. has achieved over
20 \$300,000,000 in class-wide relief for consumers and employees in previous actions. *Id.* at ¶ 51.
21 The Law Offices of Todd M. Friedman, P.C. also specifically argued and obtained a reversal
22 upholding Cal. Pen. C. § 632.7 in front of the California Supreme Court in *Smith v. LoanMe,*
23 *Inc.*, (Cal. S.Ct. 2021) 11 Cal.5th 183. *Id.* at ¶ 47. Thus, Class Counsel is qualified and able to
24 conduct this Litigation. There is no antagonism or conflict between the interests of the
25 Plaintiff, his counsel, and those of the Settlement Class. Friedman Decl. at ¶ 50; Fabricant
26 Decl. at ¶ 6. Thus, Plaintiff and his Counsel are adequate. Having satisfied all the requirements
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of California Code of Civil Procedure §382, the Settlement Class should be conditionally certified.

D. Claim Requirement

Settlement Class Members will be required to submit claims in order to receive *pro rata* shares of the Settlement Fund. Friedman Decl. at ¶ 34. A claims process is necessary because the Parties do not have current, full contact information for every Settlement Class Member, instead having a combination of telephone numbers, dates of calls, and names. *Id.*; Cornett Decl. at ¶ 7. Accordingly, claims forms will be sent to individuals associated with the telephone numbers on the dates of the calls (or the lead information for those calls which may include names and addresses) and those individuals may confirm that they were the users of those phone numbers and received the calls at issue. *Id.*

As examples of potential claims rates, in *Sheena Raffin v. Mediacredit, Inc.*, Case No. 2:15-cv-04912-MWF (C.D. Cal.), there was a 8.5% claims rate (944 claims / 11,048 class members). *Id.* In *Jonathan Lizama v. Medical Data Systems, Inc.*, Case no. 34-2017-00210986-CU-NP-GDS (Sacramento Super. Ct.), there was a 6.63% claims rate (5,116 claims / 77,189 class members). *Id.* Plaintiff's counsel would anticipate a similar claims rate here given the nature of the data and recency of the calls. *Id.* The Claims Administrator similarly provided its estimate based off an expected 7.5% claims rate. Madden Decl. at ¶ 6.

The Notice process is setup to attempt to specifically identify and contact Settlement Class Members. Settlement Class Members for whom address information is known will be sent a direct mail postcard notice explaining they are entitled to receive settlement benefits. Friedman Decl. at ¶ 19. For Settlement Class Members for whom Defendant does not have a valid mail address, a reverse lookup and/or skip trace will be conducted by P&N to determine a valid address, and then they will be sent a direct mail postcard. *Id.* Defendant has detailed potential information from leads including name and phone number for most Settlement Class Members. *Id.* at ¶ 21; Madden Decl. at ¶ 6. P&N will also be verifying mailing addresses using reverse lookups where needed. *Id.* In Plaintiff's counsel's experience, direct targeting of notice

1 in this manner is the best way of notifying the class and class counsel will not be taking other
2 actions to encourage claim submission other than having drafted this claims process which
3 makes submission as simple as possible for Settlement Class Members. Friedman Decl. at
4 Madden Decl. at ¶21.

5 The claims process is not burdensome because Settlement Class Members may submit
6 claims either through the Settlement Website (for free) or by mail, either by using the pre-
7 printed claim form on the notice letter or by printing and mailing the form available at the
8 Settlement Website. *Id.* at ¶ 21; Ex. B. The Class Notice also includes a specific ClaimID
9 which a Settlement Class Member may enter into the Settlement Website to have fields pre-
10 populated. *Id.* at Ex. B. Thus, the process has been made to impose as little burden as possible
11 while still satisfying the requirement of confirming that the people contacted are Settlement
12 Class Members.

13 **E. Miscellaneous**

14 Plaintiff turns to addressing the remaining miscellaneous factors the Court requests
15 opining on. The Settlement Class includes California residents who had a call with Defendant
16 and includes both cellphones and landlines—where the FAC only includes cellphones.
17 Friedman Decl. at ¶ 16. While the Settlement Class could have in theory been narrowed to just
18 cellphones through a scrub, Plaintiff considered it advantageous to include this broader group
19 of people for a larger Settlement Fund, particularly as these additional individuals have claims
20 that arise out of the same IPA—just out of § 632 instead of § 632.7. *Id.* This is also why the
21 release includes both violations of § 632 and 632.7. Agreement at 15.1

22 Notice is given only in English because the calls placed by TF were only in English.
23 Cornett Decl. at ¶ 6. The only affirmative obligation present in the Settlement is the claims
24 process as discussed above. There is a fee splitting agreement with Heidarpour Law Firm,
25 PLLC which provides for them to receive 25% of the attorney’s fees earned after costs are
26 deducted. Friedman Decl. at ¶ 53. This agreement is specifically documented in the retainer
27 signed by Plaintiff. *Id.* There is no injunctive relief in the Agreement.
28

1 Plaintiff seeks an enhancement of \$5,000 for his services provided to the
2 Settlement Class in obtaining this Settlement. Courts routinely approve incentive or
3 service awards, often in amounts much higher than the award sought here, to compensate
4 named the plaintiffs for their service on behalf of absent class members, including by
5 assuming the risks inherent in complex litigation. *See, e.g., Bell v. Farmers Ins. Exch.*,
6 (2004) 115 Cal. App. 4th 715, 726, *as modified on denial of reh'g* (Mar. 9, 2004)
7 (upholding the award of “‘service payments’ to the five named plaintiffs compensating
8 them for their efforts in bringing the action.”); *Van Vranken v. Atl. Richfield Co.* (N.D.
9 Cal. 1995) 901 F. Supp. 294, 299-300 (approving \$50,000 incentive award); *Ridgeway v.*
10 *Wal-Mart Stores Inc.* (N.D. Cal. 2017) 269 F. Supp. 3d 975, 1003 (“Incentive awards are
11 particularly appropriate in wage-and-hour actions where plaintiffs undertake a significant
12 ‘reputational risk’ by bringing suit against their former employers.”) (quoting
13 *Bellinghausen v. Tractor Supply Co.* (N.D. Cal. 2015) 306 F.R.D. 245, 267 (“Incentive
14 awards typically range from \$2,000 to \$10,000.”)).

15 As is consistent with the jurisprudence, Plaintiff and his counsel assert that a modest
16 \$5,000 enhancement payment is appropriate to compensate Plaintiff for his efforts in bringing
17 this action and for his efforts as set forth in his declaration and the broader release he has
18 agreed to. Fabricant Decl. at ¶¶ 5-9. The Court may in its discretion approve, deny, or reduce
19 this request, however such decision shall be when Plaintiff moves for attorney’s fees, costs, and
20 incentive award at a later point.

21 **III. SETTLEMENT AGREEMENT**

22 **A. The Basics**

23 The “Settlement Class” is defined in the Agreement as follows:

24 *“All California residents who, between April 8, 2019 and June 7,*
25 *2019, had a call with Defendant that lasted more than nine (9)*
26 *seconds and whose call was recorded.”*

1 (Agreement § 2.1). The Class and Release period do not extend beyond the date of
preliminary approval.

2 **B. Release of Claims**

3 Plaintiff and Settlement Class Members who do not request exclusion will release the
4 Released Parties from any and all Released Claims. (Agreement § 3.4(f); 15.1). The full scope
5 of the release is:

6 All Settlement Class Members, (other than those persons who
7 have timely and properly filed a Valid Exclusion Request), on
8 behalf of themselves and their agents, administrators, servants,
9 employees, representatives, assigns, heirs, executors, trustees,
10 joint venturers, partners, successors, predecessors and attorneys,
11 and each of them (collectively the “Releasing Persons”), hereby
12 jointly and severally release and discharge Defendant and all of
13 its respective former, present and future direct and indirect
14 parents, affiliates, subsidiaries, successors and predecessors and
15 all of their respective former, present and future officers,
16 directors, shareholders, indemnitees, employees, servants,
17 attorneys, representatives, independent contractors, vendors,
18 (including, but not limited to, LowerMyBills.com, Velocify),
19 successors, trusts, trustees, partners, associates, principals,
20 divisions, insurers, members, representatives, brokers,
21 consultants, heirs, and assigns (collectively the “Released
22 Parties”) from any and all actions, causes of action, obligations,
23 costs, expenses, damages, losses, claims, liabilities, and demands
24 to the date hereof, arising out of, relating to, or in connection
25 with the recording of calls by Defendant as alleged in the
26 Complaint, including any claims for violation of Sections 632
27 and Section 632.7 of the IPA and any other federal, state or local
28 statute, regulation, or common law relating to the recording of
telephone calls. This release will become effective on the date the
Defendant has rendered full payment in this matter to the class
action administrator.

23 Agreement § 15.1. The Released Claims includes all claims relating to the recording of
24 calls by Defendant as alleged in the Complaint and thus is specifically tethered to the facts
25 alleged in the operative complaint even if the specific claims released are broader than the
26 specific claims alleged. The Settlement Class does not agree to a Cal. Civ. C. § 1542 release,
27 though Plaintiff does individually agree to such a release. *Id.* at § 15.1 & 15.2. The release
28

1 does not become effective until Defendant has rendered full payment to the class action
2 administrator (Agreement § 15.1), which is within thirty (30) days following Final Judgment.
3 (Agreement § 4.1). The Class data will be provided directly to the Claims Administrator by
4 Defendant, but the confidentiality provision does not impede Class Counsel's ability to
5 discharge fiduciary duties, including in communicating with Settlement Class Members.
6 (Agreement § 9.1 & 19).

7 **C. Monetary Terms of Settlement**

8 Defendant agrees to establish a Settlement Fund in the amount of \$275,000. (Agreement
9 § 4.1) in order to fund the following: (1) providing notice to Settlement Class Members; (2)
10 paying a pro rata share to Settlement Class Members who submit a Valid Claim Form; (3)
11 creating and maintaining the Settlement Website; (4) all other claims administration steps,
12 including a toll-free telephone number, with estimated administration costs of approximately
13 \$60,000; (5) litigation expenses of up to \$10,000.00; (6) paying the proposed \$5,000 Service
14 Award to the Plaintiff; (7) payment of the proposed Attorneys' Fees of \$91,666. (33.33% of the
15 Settlement Fund) (Agreement § 5-8). *See* Friedman Decl. ¶¶ 24-31. The amount of the
16 Settlement Fund shall not be reduced as a result of any member(s) of the Settlement Class
17 electing to opt out or be excluded from the Settlement or for any other reason. (Agreement §
18 4.4). All payments shall be made within forty-five (45) days of Final Judgment. (Agreement §
19 14). If the maximum amount were to be expended on each category, there will be
20 approximately there will be approximately \$108,334 to be distributed pro rata to the Settlement
21 Class. (Friedman Decl. ¶ 26). At a 100% claims rate, this would be approximately \$12.73 per
22 Settlement Class Member. *Id.* At a 10% claims rate, this would be \$127.28 per Settlement
23 Class Member. *Id.*

24 The attorney's fees are calculated as a percentage of the fund (1/3rd) with a lodestar
25 cross-check to be performed when Plaintiff moves for attorney's fees and costs. *Id.* at ¶ 29;
26 Agreement § 6).

27 The Settlement does not include wages. There is no reversion or and the amount of the
28

1 Settlement Fund shall not be reduced as a result of any member(s) of the Settlement Class
2 electing to opt out or be excluded from the Settlement or for any other reason. (Agreement §
3 4.4). As set forth above, if the maximum amount were to be expended on each category, there
4 will be approximately there will be approximately \$108,334 to be distributed pro rata to the
5 Settlement Class. (Friedman Decl. ¶ 26). At a 100% claims rate, this would be approximately
6 \$12.73 per Settlement Class Member. *Id.* At a 10% claims rate, this would be \$127.28 per
7 Settlement Class Member. *Id.* Payment will be made within forty-five (45) days of Final
8 Judgment. (Agreement § 14). There is no tax allocation of settlement. There is no injunctive
9 relief.

10 **D. Notice Administration**

11 The Parties propose that Postlethwaite & Netterville (“P&N”) be appointed as claims
12 administrator. (Friedman Decl. ¶ 26). P&N specializes in providing administrative services in
13 class action litigation, and has extensive experience in administering consumer protection and
14 privacy class action settlements. (*Id.*). P&N has administered other classes similar to this one in
15 which reverse look-ups are necessary. (*Id.*). The bid made by P&N was in line with bids
16 Plaintiff’s Counsel have received in other similar cases on a per class member basis and thus
17 was fair. (*Id.*). P&N’s qualifications and data security practices are further set forth in its
18 declaration. *See, e.g.*, Madden Decl.. P&N also confirmed that its pricing is competitive. *Id.* at ¶
19 7.

20 P&N will be provided the class list by Defendant within twenty-one (21) days of
21 Preliminary Approval. (Agreement § 9.1). P&N will update the address information provided
22 by Defendant through the National Change of Address database prior to initial mailing. (*Id.* §
23 9.1.2). Initial Mail Notice will be sent out within thirty (30) days from Preliminary Approval.
24 (*Id.* 9.1.4.).

25 The proposed Mail Notice complies with the requirements of Cal. R. Ct. 3.766(d). It
26 explains that the lawsuit involved allegations that Defendant “recorded phone calls placed by or
27 to Defendant, without consent in violation of the Invasion of Privacy Act” and that “Defendant
28

1 denies any wrongdoing.” (Friedman Decl. Ex. B; Agreement Ex. A). It notes that “[i]f you do
2 not want to be legally bound by the Settlement, you must exclude yourself from the Settlement
3 Class by submitting an Opt-Out Form, which can be accessed at the Settlement Website
4 address below” and provides the date by which exclusion must be requested. (*Id.*). It notes that
5 “[i]f you file a claim or do nothing, and the Court approves the Settlement, you will be bound
6 by all the Court’s orders and judgments.” (*Id.*). It also notes that “[y]ou may also hire an
7 attorney at your own expense to appear or speak for you at the hearing.” (*Id.*). Thus, the Mail
8 Notice complies with Cal. R. Ct. 3.766(d).

9 The Mail Notice also notes that “If you choose to appear in person at the approval
10 hearing, please be sure to follow the Court’s social distancing procedures:
11 https://www.lacourt.org/newsmedia/uploads/142021615133918NR_June15_Masks.pdf.” All
12 payments shall be made within forty-five (45) days of Final Judgment. (Agreement § 14). Any
13 Mail Notice returned to the Claims Administrator with a new forwarding address will be re-
14 mailed to the Settlement Class Member at the new forwarding address. (Agreement § 9.1.2).
15 The Claims Administrator will perform a reverse telephone number lookup for the Settlement
16 Class Members, if any, for whom Defendant does not have address information. (Agreement §
17 9.1.3). The address information obtained through a reverse phone number lookup will be used
18 to facilitate Mail Notice to the Settlement Class Members. (*Id.*). Re-mailed notices will not
19 result in an extension of deadlines, but the Opt-Out and Objection deadline is sixty (60) days
20 from the initial date Mail Notice is sent, such that there should be adequate time for action after
21 re-mailing. (Agreement § 1.17).

22 A Settlement Website will be established and maintained and any changes of date or
23 location of the final approval hearing will be given on the Settlement Website. (Agreement §
24 1.30; 9.2). The Settlement Website will be located at www.tfrecordingsettlement.com.
25 (Friedman Decl. at ¶ 22). There is no publication notice. Notice of the entry of judgment shall
26 be given by posting the notice on the Settlement Website when it is filed with the Court.
27 (Agreement § 9.4). The Settlement Website shall be maintained for at least one hundred and
28 eighty (180) days from the date of Final Approval. (*Id.* § 9.2.2).

E. Responses to Notice

1 Claims may be submitted either electronically or by mail within sixty (60) days of the
2 Mailing of the Class Notice. (Agreement § 10.2.1; Ex. A). Requests for exclusion may be
3 submitted by mail to the Claims Administrator by the Opt-Out and Objection deadline which is
4 sixty (60) days from the initial date Mail Notice is sent. (Agreement § 1.17; 11.1). The request
5 for exclusion must (1) be in writing; (2) include the name and number of this case, as well as
6 the Settlement Class Member's name, address, and cellular telephone number at which the
7 Settlement Class Member was called by Defendant and (3) be signed by the Settlement Class
8 Member. (Agreement § 11.2). Objections may be submitted by mail to the Claims
9 Administrator by the Opt-Out and Objection deadline which is sixty (60) days from the initial
10 date Mail Notice is sent. (Agreement § 1.17; 12.1). Any Objection must set forth the name and
11 case number of this matter, the objecting Settlement Class Member's name, address, telephone
12 number with which he or she had a call with TP and all arguments, and citations and evidence
13 supporting the Objection. (Agreement § 12.2). The proposed deadlines are reasonable and give
14 adequate time for Settlement Class Members to choose how to react to the Settlement—even if
15 they receive remailed notice.

16 The Agreement and Notices indicate that “[a]ny Class Member shall be permitted to
17 object to this Settlement Agreement at the Final Approval Hearing without filing anything by
18 appearing at the hearing and requesting to be heard” and “[y]ou may appear and speak at the
19 hearing, but are not required to.” (Agreement § 12.3; Ex. A).

F. Cy Pres Distribution

21 There is no *cy pres* distribution. Settlement checks sent to Settlement Class Members
22 shall state on their face that the check will expire and become void if not cashed within ninety
23 (90) days of the date of the check. (Agreement § 14.3). After the expiration of the validity of
24 checks sent pursuant to Sections 14.3 through 14.4, any remaining funds from uncashed
25 settlement checks, including settlement checks to Settlement Class Members who submitted
26 Valid Claim Forms but whose current Valid Address could not ultimately be determined, shall
27
28

1 be delivered to the State Controller's Office for Unclaimed Property in the name of the
2 Settlement Class Members who made a claim and did not cash their checks. (*Id.* § 14.5).

3 **G. Miscellaneous**

4 The Parties have reviewed this Motion, the Settlement Agreement, and Exhibits for
5 consistency. As set forth in the proposed Final Approval Order and Judgment, the final
6 outcome in this matter is judgment not dismissal. (Agreement Ex. D).

7 **IV. CONCLUSION**

8 Plaintiff respectfully requests that the Court preliminarily approve the proposed
9 settlement and sign the proposed Preliminary Approval Order, which is submitted herewith,
10 and schedule the Final Approval Hearing.

11
12 Dated: September 16, 2022

LAW OFFICES OF TODD M. FRIEDMAN, P.C.

13
14
15 By:



TODD M. FRIEDMAN

ADRIAN R. BACON

Attorneys for Plaintiff and the Settlement Class

PROOF OF SERVICE

1 I am employed in the County of Los Angeles, State of California. I am over the age of
2 18 and not a party to the within action. My Business Address is 21031 Ventura Blvd, Suite 340
3 Woodland Hills, CA 91364.

4 On September 16, 2022, I served the following document(s) described as: **MOTION**
5 **FOR PRELIMINARY APPROVAL AND RELATED DOCUMENTS**, on all interested
6 parties in this action by placing:

- 7 a true copy
8 the original thereof enclosed in sealed envelope(s) addressed as follows:

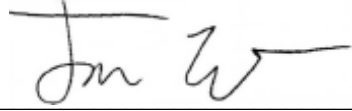
9 **WOOD, SMITH, HENNING & BERMAN,**
10 **LLP**

11 Frances O’Meara, Esq. (SBN 140600)
12 Mindy S. Bae, Esq. (SBN 301769)
13 10960 Wilshire Blvd., 18th Floor,
14 Los Angeles, California 90024
15 E-mail: fomeara@wshblaw.com
16 mbae@wshblaw.com

17 Attorneys for Defendant

- 18 BY ELECTRONIC SERVICE THROUGH CASE ANYWHERE
19 STATE – I declare under penalty of perjury under the laws of the State of
20 California that the above is true and correct.

21 Executed on September 16, 2022, at Los Angeles, California.

22 By: 
23 _____
24 Thomas Wheeler
25
26
27
28