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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

**JAYSON SWIGART,
INDIVIDUALLY AND ON
BEHALF OF ALL OTHERS
SIMILARLY SITUATED,**

Plaintiff,

v.

PARCEL PENDING, INC.,

Defendant.

Case No.: 18-cv-2238 BEN (WVG)

**PLAINTIFF JAYSON SWIGART'S
MOTION FOR PRELIMINARY OF
APPROVAL OF CLASS ACTION
SETTLEMENT**

DATE: May 28, 2019

TIME: 10:30 a.m.

COURTROOM: 5A

HONORABLE ROGER T. BENITEZ

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1 **I. INTRODUCTION**

2 Plaintiff JAYSON SWIGART (“Swigart”) submits this unopposed motion
3 for preliminary approval of a proposed class action settlement of this matter (the
4 “Action”) against Defendant PARCEL PENDING, INC. (“Parcel Pending”). The
5 terms of the proposed class action settlement are set forth in the Settlement
6 Agreement and Release (“Agr.”), attached as Exhibit 1 to the Declaration of
7 Matthew M. Loker (“Loker Decl.”).

8 As detailed below, there are approximately 2,609 persons in the Settlement
9 Class, covering a period between February 1, 2018 through October 3, 2018, who
10 received a telephonic communication from Parcel Pending without a call
11 recording disclosure. [See Agr., ¶ 1]. Under the Agreement, Parcel Pending shall
12 pay \$400,000 into a non-reversionary Common Fund, which is made up of
13 \$300,000 in cash and \$100,000 in non-cash consideration detailed below, to settle
14 the Action and obtain a release of all Released Claims in favor of Released
15 Parties. [Agr., ¶¶ 3-4]. The Common Fund will be used to send a settlement check
16 to Authorized Claimants, after payment of notice and claims administration
17 expenses, attorneys’ fees and litigation costs, and any service award to Swigart
18 (“Net Settlement Amount”). [Agr., ¶¶ 3-7].

19 While Swigart is confident of a favorable determination on the merits,
20 Swigart and his counsel have determined that the proposed settlement provides
21 significant benefits to the Settlement Class Members and is in the best interests of
22 the Settlement Class. [Agr., ¶ G]. Swigart believes that the settlement is
23 appropriate given the contested issues involved, the risks, uncertainty and costs of
24 further prosecution of this litigation. [Id.]. Parcel Pending has denied the
25 allegations by Swigart, and believe they have meritorious defenses to Swigart’s
26 claims. [Agr., ¶ F]. However, Parcel Pending agree that it is desirable to settle

1 the Action on the terms in the Agreement.

2 Accordingly, Swigart moves the Court for an order certifying the class action
3 pursuant to Fed. R. Civ. P. 23(b)(3) for settlement purposes only; preliminarily
4 approving the proposed settlement; appointing First Class, Inc. as the Settlement
5 Administrator; directing dissemination of class notice; appointing Swigart as the
6 Class Representative; approving Swigart's attorneys as Class Counsel; and
7 scheduling a Final Approval Hearing.

8 **II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

9 Parcel Pending is a company that provides secured storage units for its
10 customers offering various packages that they order whether it be at a school,
11 residential, or commercial location. Parcel Pending engaged in both inbound and
12 outbound telephonic communications with its customers; however, Parcel Pending
13 failed to provide call recording disclosures on these outbound calls.

14 On July 27, 2018, Swigart received one such call on his cellular telephone;
15 however, Swigart was not informed that the call was being recorded by Parcel
16 Pending. Moreover, Swigart had no reason to believe that the call was being
17 recorded and the very nature of the conversation was private. At the end of the
18 conversation Swigart was informed for the first time that the current call along
19 with all other telephonic communications with Defendant are recorded.

20 In response to Parcel Pending's recording practices, Swigart brought the present
21 action, on behalf of himself and all others similarly situated in California, alleging
22 violations of California Penal Code § 632.7 ("CIPA").

23 After litigating this case since 2018, conducting informal discovery, and
24 exchanging relevant information, the Parties participated in a full day mediation
25 before Bruce Friedman, Esq. of JAMS. Based upon the investigation and with the
26 assistance of Mr. Friedman, the Parties have agreed to settle the claims in this
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1 action on a California state-wide basis under the terms and conditions
2 memorialized in the Agreement.

3 **III. THE SETTLEMENT**

4 Swigart provides the following description of the proposed settlement’s
5 material terms, including: (A) the Settlement Class; (B) the relief offered as a
6 result of the proposed Settlement; (C) the proposed notice plan; (D) the claims
7 process; (E) scope of the release; (F) notice costs; (G) incentive award; and, (H)
8 attorneys’ fees and litigation costs.

9 **A. THE SETTLEMENT CLASS**

10 The Settlement Class is defined as:

11 All Parcel Pending registered users who received one or fewer
12 disclosures of Parcel Pending’s recorded call policy between
13 February 1, 2018 to October 3, 2018 prior to receiving an
14 outbound customer service call.

15 [Agr. ¶ 1].

16 According to Parcel Pending, the Class consists of approximately 2,609
17 persons. [Agr., ¶ 1.2].

18 **B. SETTLEMENT RELIEF**

19 Parcel Pending has agreed to pay an all-in, non-reversionary fund worth
20 \$400,000.00, of which \$300,000.00 is cash as full and complete consideration for
21 the Settlement. There is also \$100,000.00 in non-cash consideration for each class
22 member which includes but is not limited to a 1) \$20 registration voucher, 2) \$9
23 late fee voucher, 3) and training costs incurred by Parcel to implement customer
24 service training in compliance with CIPA. [Agr., ¶ 4]. The Common Fund shall
25 also be used to pay: (i) settlement checks, (ii) a service award to Swigart, (iii) the
26 Attorneys’ fees and litigation costs, (iv) and, administrative costs. [*Id.* at ¶¶ 3-7].
The amounts remaining thereafter shall be used to pay valid claims submitted by
the Class Members. [*Id.*].

1 Settlement Class Members who submit a valid claim form shall receive a *pro*
 2 *rata* distribution. [Agr., ¶ 4]. In the highly unlikely event that all 2,609 Settlement
 3 Class Members were to submit a claim, their estimated recovery would be
 4 approximately \$110.53; and if 3% were to submit a claim, a more common claims
 5 rate, their estimated recovery would be approximately \$3,650.25. Additionally, in
 6 response to the lawsuit, Parcel Pending will instruct and implement training
 7 procedures to its customer service representatives to inform consumers at the
 8 outset of their phone calls that they are recorded and provide various non-cash
 9 credits up to a value of \$100,000.00. [Agr., ¶ 4].

10 If any amounts remain in the Net Settlement Fund as a result of returned or
 11 uncashed checks, the Parties will first examine whether a second distribution is
 12 economically feasible. [Agr., ¶ 13.2]. If not feasible, the Parties will seek
 13 approval of a *cy pres* recipient. [*Id.*].

14 C. CLASS NOTICE

15 Notice to the Settlement Class Members will be provided by direct e-mail
 16 notice. Subject to Court approval, the Parties propose that First Class, Inc. serve as
 17 the Claims Administrator. [*Id.*, ¶ 7.2]. The Settlement Administrator's duties shall
 18 include but are not limited to: (i) setting up a toll-free number for receiving calls
 19 related to the Settlement, (ii) implementing Class Notice, (iii) distributing the
 20 settlement awards, (iv) maintaining proper records of the settlement administration,
 21 and (v) providing information to Counsel. [*Id.*, ¶ 7].

22 1. Direct E-Mail Notice

23 After the entry of the Court Order granting the Preliminary Approval on or
 24 before the date directed by the Court, Parcel Pending shall provide a list to the
 25 Settlement Administrator of all available e-mail addresses for individuals within
 26 the Settlement Class definition. [*Id.*, ¶ 8].

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1 Within 30 days after entry of the Preliminary Approval Order, the
2 Settlement Administrator shall e-mail the direct notice (in the form attached hereto
3 as Exhibit 2) to the identified Class Members’ last known e-mail addresses. [*Id.*].

4 In the event that a Class Notice is returned as undeliverable, the Settlement
5 Administrator will conduct an investigation in an effort to ascertain an updated
6 address. [*Id.*].

7 **2. CAFA Notice**

8 Parcel Pending shall be responsible for timely serving the Class Action
9 Fairness Act (“CAFA”) notice required by 28 U.S.C. § 1715.

10 **D. SETTLEMENT CLAIMS PROCESS**

11 To make a claim for monetary compensation, Settlement Class Members
12 must submit a valid Claim. [*Id.*, ¶ 9]. To file a valid Claim, a Class Member must:
13 (i) complete a Claim Form by providing all of the requisite information and (ii)
14 mail the completed form to the Claim Administrator. [*Id.*].

15 **E. OPPORTUNITY TO OPT OUT AND OBJECT**

16 Settlement Class Members will have the right to opt out of the Settlement or
17 to object to its terms. [*Id.*, ¶ 10]. The deadline for doing both is 60 days after entry
18 of the Preliminary Approval Order. [*Id.*].

19 Settlement Class Members who wish to opt out of the Settlement may do so by
20 mailing a letter by U.S. mail, personally signed, and stating unequivocally that
21 he/she wishes to be excluded from this class action settlement. [*Id.*]. Such request
22 must be made in accordance with the terms in the Class Notice.

23 Further, any Settlement Class Member, who is not seeking to opt out, may
24 object to the Settlement by mailing his or her objections to the Settlement
25 Administrator. [*Id.*, ¶ 10.2]. If the objection is overruled, the objecting Settlement
26 Class Member will be bound by the Judgment. [*Id.*].

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F. SCOPE OF RELEASE

In exchange for the relief described above, all Settlement Class Members, other than those who exclude themselves from the Settlement, relinquish all class claims against the Released Parties and arising out of this action, or are related to the claims asserted in the Action, including any and all claims relating to the intercepting, monitoring and/or recording of telephone calls or other communications, and any and all claims for violation of the California Invasion of Privacy Act and any and all claims for statutory damages under Cal. Penal Code § 637.2. [*Id.*, ¶ 14.1]. Class Members also waive the provisions of Section 1542 of the Cal. Civil Code. [*Id.*, ¶ 14.2]

H. PAYMENT OF NOTICE AND ADMINISTRATIVE COSTS

The Agreement provides that all costs of the Notice Program and Claims Program, which are estimated to be \$10,000 to be paid out of the Common Fund. [*Id.*, ¶ 7]

I. CLASS REPRESENTATIVES' APPLICATION FOR SERVICE AWARD

The Agreement contemplates that Class Counsel will request a service award not to exceed \$2,500 for Swigart. [*Id.*, ¶ 6]

J. CLASS COUNSEL'S APPLICATION OF ATTORNEYS' FEES AND COSTS

The Agreement contemplates that Class Counsel shall be entitled to apply to the Court for an award of attorneys' fees and litigation costs to be paid from the Common Fund. [*Id.*, ¶ 5]. Swigart's counsel will not request more than 25% of the Common Fund as attorneys' fees and costs combined. [*Id.*].

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1 **IV. THE COURT SHOULD CERTIFY THE PROPOSED**
 2 **SETTLEMENT CLASS FOR PURPOSES OF IMPLEMENTING**
 3 **THE SETTLEMENT**

4 “Parties may settle a class action before class certification and stipulate that
 5 a defined class be conditionally certified for settlement purposes.” *In re Wireless*
 6 *Facilities, Inc. Sec. Litig. II*, 253 F.R.D. 607, 610 (S.D. Cal. 2008); *see, e.g.,*
 7 *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003). Like any other class certification
 8 decision, certification of a class for settlement purposes requires a determination
 9 that the requirements of Rule 23(a) and at least of the subsections of Rule 23(b) are
 10 met. *Id.* Fed. Judicial Ctr., Manual for Complex Litigation (“Manual”), § 21.633.
 11 The action here meets the requirements of Rule 23(a) and Rule 23(b)(3).

12 **A. NUMEROSITY**

13 Class certification under Rule 23(a)(1) is appropriate where a class is so
 14 “numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23; *see*
 15 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. Cal. 1998).
 16 “Impracticability does not mean ‘impossibility,’ but only the difficulty or
 17 inconvenience of joining all members of the class.” *Harris v. Palm Springs*
 18 *Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964) (citation omitted). Here,
 19 numerosity is satisfied. Based upon Parcel Pending’s records, the Parties agree that
 20 there are approximately 2,609 Settlement Class Members. [Agr., ¶ 1.2]. Thus, the
 21 potential members of the Class are so numerous that joinder of all the members of the
 22 Class is impracticable.

23 **B. COMMONALITY**

24 A class has sufficient commonality “if there are questions of fact and law
 25 which are common to the class.” Fed. R. Civ. P. 23(a)(2); *see also Hanlon*, 150
 26 F.3d at 1019. (“The existence of shared legal issues with divergent legal factual
 27 predicates is sufficient, as is a common core of salient facts coupled with disparate
 28

1 legal remedies within the class.”); *Amchem Products, Inc. v. Windsor*, 521 U.S.
2 591, 623 (1997). “Commonality requires the plaintiff to demonstrate that the class
3 members have suffered the same injury.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S.
4 Ct. 2541, 2551 (2011). This means that the class members’ claims “must depend
5 on a common contention . . . of such a nature that it is capable of classwide
6 resolution – which means that determination of its truth or falsity will resolve an
7 issue that is central to the validity of each one of the claims in one stroke.” *Id.* This
8 requirement is also satisfied here.

9 There are questions of law and fact common to Swigart and to the Class that
10 predominate over any questions affecting only individual members of the Class.
11 These common questions of law and fact include: (i) whether Parcel Pending
12 unlawfully audio-recorded incoming and/or outgoing to the putative class members
13 on their cellular telephones; (ii) assigned to a California area code; and (iii)
14 whether Parcel Pending failed to provide a call recording disclosure at the outset of
15 the calls. Under these circumstances, the commonality requirement is satisfied for
16 purposes of certifying a settlement class. *See Ades v. Omni Hotels Mgmt. Corp.*,
17 No. 2:13-cv-02468, 2014 U.S. Dist. LEXIS 129689, *35 (C.D. Cal. Sep. 8, 2014)
18 (finding commonality present and stating, “there is no indication that individual
19 consent issues will overwhelm issues plaintiffs have shown to be resolvable
20 through class-wide proof.”).

21 C. TYPICALITY

22 Courts consistently find that the typicality prerequisite is met if the claims
23 arise from a common course of conduct, though “they need not be substantially
24 identical.” *Hanlon*, 150 F.3d at 1020; *see also Parsons v. Ryan*, 754 F.3d 657, 685
25 (9th Cir. 2014); *see also Cal. Rural Legal Assistance, Inc. v. Legal Servs. Corp.*
26 917 F.2d 1171, 1175 (9th Cir. 1990) (citation omitted), *amended* 937 F.2d 465 (9th
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1 Cir. 1991) (holding that typicality is shown where claims “share common issue of
2 law or fact . . . and are ‘sufficiently parallel to insure a vigorous and full
3 presentation of all claims for relief.’”).

4 In this case, Swigart’s claims are typical of the claims of the Settlement Class
5 Members, as they arise from a nearly identical factual basis. Swigart, like members
6 of the proposed Class, received a telephone call on his cellular telephone numbers
7 from a representative of Parcel Pending. This telephonic communication was
8 recorded without Parcel Pending providing any disclosure of the recording at the
9 outset of the call or none at all. Thus, Swigart is advancing the same claims and legal
10 theories on behalf of himself and all absent Settlement Class Members. Swigart’s
11 claims are therefore typical of the claims of the Settlement Class. *See Ades*, 2014
12 U.S. Dist. LEXIS 129689 at *26.

13 **D. ADEQUACY OF REPRESENTATION**

14 Adequacy of representation is met when “the representative parties will
15 fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). In
16 order to adequately protect the interest of the class the named plaintiffs and their
17 counsel must: (1) not have any conflicts of interest with other class members and
18 (2) prosecute the action vigorously on behalf of the class. *Id.*; *see also In re*
19 *Wireless Facilities*, 253 F.R.D. at 611 (quoting *Staton v. Boeing Co.*, 327 F.3d 938,
20 958 (9th Cir. 2003)). Here, Swigart and counsel do not have any known conflicts of
21 interest with other Settlement Class Members. [See Declarations of Counsel; and,
22 Swigart filed concurrently herewith].

23 Further, Swigart and his counsel have been vigorously litigating this matter
24 since it was filed. Moreover, Class Counsel are experienced in prosecuting
25 consumer actions, including consumer class actions. [*Id.*]. Swigart and his counsel
26 will adequately represent the interest of the Settlement Class.

1 **E. COMMON QUESTIONS SUFFICIENTLY PREDOMINATE**

2 Class certification under Rule 23(b)(3) is appropriate where “questions of
3 law or fact common to class members predominate over any questions affecting
4 only individual members.” Fed. R. Civ. P. 23(b)(3). The inquiry focuses on
5 whether the class is “sufficiently cohesive to warrant adjudication by
6 representation.” *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las*
7 *Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001). Central to this question is
8 “the notion that the adjudication of common issues will help achieve judicial
9 economy.” *Zincser v. Accufix Research Institute, Inc.*, 253 F.3d 1188, 1189 (9th
10 Cir. 2001) (citation omitted), amended, 273 F. 3d 1266 (9th Cir. 2001).

11 Here, the central inquiry is whether Parcel Pending advised consumers
12 receiving outgoing calls of its call recording. “When common questions present a
13 significant aspect of the case and they can be resolved for all members of the class
14 in a single adjudication, there is clear justification for handling the dispute on a
15 representative rather than on an individual basis.” *Hanlon*, 150 F.3d at 1022. *See*
16 *Reyes v. Educ. Credit Mgmt. Corp.*, 322 F.R.D. 552, 560 (S.D. Cal. 2017)
17 (Common questions: “whether ECMC's recording practice violated CIPA, whether
18 ECMC's pre-recorded message was transmitted to potential class members,
19 whether the message and/or other disclosures were sufficient to establish
20 awareness of recording for all subsequent calls, and whether a caller's hold time
21 can serve as a proxy for notice and consent—predominate in this case.”).
22 Therefore, the court should certify the class for settlement purposes because
23 common questions predominate.

1 **F. SUPERIORITY OF CLASS ACTION**

2 Resolution of the dispute under the class action mechanism of redress for
 3 settlement purposes makes sense because it is superior to all other available means
 4 for the fair and efficient adjudication of this controversy involving persons called in
 5 California. *See Culinary/Bartenders Trust Fund*, 244 F.3d at 1163 (find that “if a
 6 comparable evaluation of other procedures reveals no other realistic possibilities,
 7 [the] superiority portion of Rule 23(b)(3) has been satisfied.”); *see also Valentino*
 8 *v. Carter-Wallace*, 97 F.3d 1227, 1235-36 (9th Cir. 1996) (“a class action is a
 9 superior method for managing litigation if no realistic alternative exists”). As
 10 explained in *Hanlon*, 150 F.3d at 1023, the Ninth Circuit held that superiority
 11 prong was met because “[f]rom either a judicial or litigant viewpoint, there is no
 12 advantage in individual members controlling the prosecution of separate actions.”
 13 *Id.* In fact, pursuing individual settlements would provide “less litigation or
 14 settlement leverage, significantly reduce[] resources [providing] no greater
 15 prospect for recovery.” *Id.*

16 In the present case, individualized litigation would create the danger of
 17 inconsistent or contradictory judgments arising from the same set of facts regarding
 18 the calling practices and conduct of Parcel Pending. Individualized litigation would
 19 also cause significant delay and expense to the parties and overwhelming waste of
 20 already limited judicial resources by the actions brought by thousands of individual
 21 consumers. Furthermore, the damages or other financial detriment suffered by
 22 individual Settlement Class Members may be relatively small compared to the
 23 burden and expense that would be entailed by individual litigation. Resolution of the
 24 dispute under the class action mechanism of redress here is superior to potentially
 25 thousands of individual actions for statutory damages where there is no provision of
 26 recovery of attorneys’ fees in the statute.

1 By contrast, the class action device presents far fewer management difficulties,
 2 and provides the benefits of single adjudication, economy of scale, and
 3 comprehensive supervision by a single court, resolving the claims against both
 4 named Parcel Pending, and providing vindication to the class members who were not
 5 aware of having claims against Parcel Pending for call recording without a call
 6 recording advisement. A class action here is therefore superior for settlement
 7 purposes.

8 **G. STANDARD FOR PRELIMINARY APPROVAL OF CLASS ACTION**
 9 **SETTLEMENT**

10 A class action may not be dismissed, compromised or settled without the
 11 approval of the Court. Fed. R. Civ. Proc. 23(e). To preliminarily approve a class
 12 action settlement, the Court must simply determine whether the class settlement is
 13 within the “range of reasonableness,” and hence whether disseminating notice to
 14 the class and scheduling a formal fairness hearing are merited. *See* 4 Herbert B.
 15 Newberg, *Newberg on Class Actions* § 11.25 *et seq.*, and § 13.64 (4th ed. 2002 and
 16 Supp. 2004). The Court is not required to make an in-depth and final determination
 17 that a settlement is fair, reasonable, and adequate; instead, the “judge must make a
 18 preliminary determination on the fairness, reasonableness, and adequacy of the
 19 settlement terms.” *Manual for Complex Litigation (Fourth)* (Fed. Judicial Center
 20 2004) (“Manual”) § 21.632.

21 **1. Public Policy Favors Settlement**

22 There is an overriding public interest in settling class action lawsuits, and a
 23 strong judicial policy favoring such settlements. *Franklin v. Kaypro Corp.*, 884
 24 F.2d 1222, 1229 (9th Cir. 1989) (citing *Van Bronkhorst v. Safeco Corp.* 529 F.2d
 25 943, 950 (9th Cir. 1976)); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276
 26 (9th Cir. 1992). The law favors settlement, particularly in class actions and other

1 complex cases where substantial resources can be conserved by avoiding the time,
2 expenses, and rigors of prolonged litigation. *Van Bronkhorst*, 529 F.2d at 950.
3 Accordingly, courts should exercise their discretion to approve settlements “in
4 recognition of the policy encouraging settlement of disputed claims.” *In re*
5 *Prudential Sec. Inc. Ltd. Partnerships Litig.*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995).

6 **2. Conclusion of Fact and Law Are Not Necessary at This Stage**

7 At the preliminary approval stage, the Court need not reach any ultimate
8 conclusions on the issues of fact and law, which underlie the merits of the dispute,
9 *West Va. v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1086 (2d Cir. 1971), and need not
10 engage in a trial on the merits, *Officers for Justice v. Civil Serv. Comm’n of the*
11 *City and City of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). Preliminary
12 approval is merely a prerequisite to giving notice so that “the proposed settlement
13 ... may be submitted to members of the prospective class for their acceptance or
14 rejection.” *Philadelphia Hous. Auth. v. Am. Radiator & Standard Sanitary Corp.*,
15 323 F. Supp. 364, 372 (E.D. Pa. 1970).

16 **3. Counsel’s Judgment Should Hold Considerable Weight**

17 Although the decision to approve or reject a proposed settlement “is
18 committed to the sound discretion of the trial judge” (*see Hanlon*, 150 F.3d at
19 1026), the opinion of experienced counsel supporting the settlement is entitled to
20 hold considerable weight (*see, e.g., Kirkorian v. Borelli*, 695 F. Supp. 446 (N.D.
21 Cal. 1988) (opinion of experienced counsel carries significant weight in the court’s
22 determination of the reasonableness of the settlement); *Boyd v. Bechtel Corp.*, 485
23 F. Supp. 610, 622 (N.D. Cal. 1979) (recommendations of plaintiffs’ counsel should
24 be given a presumption of reasonableness). Swigart’s counsel believe that the
25 settlement is a fair compromise that avoid the risks of further litigation and trial,
26 while providing a significant monetary recovery to the Settlement Class as well as

1 bringing about changed business practices of Parcel Pending.

2 **4. The Court Should Preliminarily Approve the Settlement**

3 **i. *The Agreement is entitled to a presumption of fairness***

4 A presumption of fairness exists where: (1) the settlement is reached through
5 arm's-length bargaining; (2) investigation and discovery are sufficient to allow
6 counsel and the court to act intelligently; (3) counsel is experienced in similar
7 litigation; and (4) the percentage of objectors is small. Newberg & Conte, Newberg
8 on Class Actions *supra*, § 11.41; *see also Dunk v. Ford Motor Co.* 48 Cal.App.4th
9 1794, 1802 (1996). The proposed settlement here satisfies the above three
10 requirements, and the number of expected objections is small, if any.

11 This Settlement was reached after the parties (i) investigated and researched their
12 respective claims and defenses, (ii) engaged through an extensive discovery process,
13 (iii) exchanged relevant documents during discovery, which, among other things,
14 determined the putative class and appropriate notice, (iv) participated in arm's length
15 negotiations, in the form of a full-day mediation with one of the most respected and
16 experienced mediators in California, Bruce Friedman, Esq., and, (v) continued
17 discussions, including a confirmatory deposition of Parcel Pending, in an attempt to
18 finalize the settlement, including determining the approximate class size and the
19 appropriate notice. The Settlement of this Action is the result of non-collusive, arms-
20 length and informed negotiations.

21 **ii. *The Settlement should be preliminarily approved, as it***
22 ***is within the range of reasonableness based on the***
23 ***relevant factors***

24 In making the fairness determination for final approval purposes (i.e., not
25 preliminary approval, like here), courts consider a number of factors, including the
26 strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of
27 further litigation; the risk of maintaining a class action status throughout the trial;

1 the amount offered in settlement; the extent of discovery completed and the stage
 2 of the proceedings; the experience and views of counsel; ... and the reaction of the
 3 class members to the proposed settlement. *In re Mego Fin. Corp. Sec. Litig.*, 213
 4 F.3d 454, 458 (9th Cir. 2000) (quoting *Hanlon*, 150 F.3d at 1026). However, “[n]ot
 5 all factors will apply ... [and], [u]nder certain circumstances, one factor alone
 6 may prove determinative in finding sufficient grounds for court approval.” *Nat’l*
 7 *Rural Telcoms. Coop. v. Directv, Inc.*, 2003 U.S. Dist. LEXIS 25375, at *6
 8 (C.D.Cal. Jan. 5, 2003); *see, e.g., Torrissi v. Tucson Elec. Power Co.*, 8 F.3d 1370,
 9 1376 (9th Cir. 1993). While the Court need not and should not at this stage
 10 determine whether the proposed settlement is fair and adequate for purposes of
 11 final approval, there is ample evidence that it falls well “within the range” of
 12 fairness and adequacy for preliminary approval.

13 **iii. *The strength of Swigart’s claims.***

14 Liability is highly contested. After investigating Swigart’s claims and
 15 discussing said claims with Parcel Pending, Swigart’s counsel believe this is a strong
 16 case, which would prevail at trial but the outcome of the case is by no means certain
 17 absent a settlement. It is the opinion of Swigart’s counsel that the settlement of
 18 \$400,000.00 is in part due to the strength of Swigart’s claims. On the other hand,
 19 Parcel Pending deny all of Swigart’s allegations, and maintains that its policies and
 20 procedures were and are in compliance with all applicable laws. Parcel Pending
 21 believe that they have meritorious defenses to all of the claims asserted in the
 22 Action., including a complaint recording warning on inbound calls. This settlement
 23 avoids risks and continued expense to both sides in continuing the Action.
 24
 25
 26
 27

1 may not have been in California at the time of the calls, even though they had a
2 California area code, and would thus not have standing to bring a claim for violation
3 of this California statute. A precise ascertainable number of class members would
4 have been litigated extensively. But settlement avoid these risks to both sides.

5 Moreover, to fully prosecute this case through trial, the Parties would need to:
6 (1) engage in contentious discovery; and, (2) undertake the arduous task of certifying
7 or opposing a class action, which could significantly impact both Parties (i.e., the
8 class may not be certified thereby eliminating any class relief, or the class may be
9 certified thereby significantly increasing Parcel Pending's liability). Lastly, any
10 decision on the merits is likely to be appealed, resulting in further delays,
11 uncertainties, and great expense.

12 In considering the Settlement, Swigart, Class Counsel and Parcel Pending
13 carefully balanced the risks of continuing to engage in protracted and contentious
14 litigation against the benefits to the Class, including the significant settlement and
15 payout laid out by the Agreement. The Agreement avoids these risks for both sides.

16 ***v. The benefits conferred by Settlement***

17 The benefits conferred by the Settlement for the Class are substantial and
18 clearly outweigh the potential benefits and risks of proceeding with the class action.
19 They include both a monetary payment, non-monetary vouchers for certain fees, and
20 the Action has resulted in changes in business practices. Courts have stated that the
21 fact that a proposed settlement may only amount to a fraction of the potential
22 recovery does not, in and of itself, mean that the proposed settlement is grossly
23 inadequate and should be disapproved." *Linney v. Cellular Alaska P'ship*, 151 F.3d
24 1234, 1242 (9th Cir. 1998).

25 Here, each Settlement Class Members will receive a *pro rata* share of the Net
26 Settlement Amount. In Swigart's counsel's experience in settling claims of this
27 type, a claims rate above 10% is unlikely. *See Forcellati v. Hyland's Inc.*, No. 12-

1 cv-1983, 2014 U.S. Dist. LEXIS 50600, *17 (C.D. Cal. Apr. 9, 2014) (“[T]he
 2 prevailing rule of thumb with respect to consumer class actions is [a claims rate of]
 3 3-5 percent.”); *Mount v. Wells Fargo Bank, N.A.*, BC395959 (Cal. Super. Ct. Aug.
 4 13, 2014) granting final approval of a CIPA class action settlement with a 4.2%
 5 claiming rate)

6 Assuming a 3% claims rate, the estimated payout here is \$3,650.25 per
 7 claimant. This is an excellent result considering the maximum amount available
 8 pursuant to CIPA is \$5,000 with no separate recovery for attorneys’ fees or costs.
 9 This is an excellent result for the Settlement Class Members, as (1) the value
 10 offered is a compromise of the maximum statutory damages each class member
 11 could receive in this matter, which would otherwise be highly contested and require
 12 vigorous litigation efforts, and (2) the value offered is substantially better when
 13 compared to other similarly approved settlements, some of which only offer a
 14 recovery varying from \$1.58 to \$64.47.¹ Thus, the Settlement provides for a
 15 significant monetary payment that is much higher than many other settlements under
 16 CIPA, without the risks and inherent delays of an adverse jury verdict, trial decision,

17 _____
 18 ¹ See *Nader v. Capital One Bank, N.A.*, No 12-cv-01265 DSF, 2014 WL 1258442,
 19 Dkt. 145 (C.D. Cal. Nov. 17, 2014) (\$3 million settlement for approximately
 20 1,896,044 potential class members, or \$1.58 per person); *Cohorst v. BRE*
 21 *Properties, Inc.*, No. 10-cv-2666 JM, 2012 WL 153754, Docket Nos. 101, 109
 22 (S.D. Cal. 2012) (\$5.5 million settlement for approximately 1,170,584 potential
 23 class members, or \$4.70 per person); *Miller v. Hitachi Am.*, No. CIV 526430, 2014
 24 Cal. Super. LEXIS 1686 (San Mateo Oct. 17, 2014) (granting preliminary approval
 25 of CIPA class action settlement with different settlement classes receiving \$20 or
 26 \$145 per class member); *McCabe v. Six Continents Hotels, Inc.*, No. 12-cv-04818,
 27 2015 U.S. Dist. LEXIS 85084, *27-29 (N.D. Cal. June 30, 2015) (collecting cases
 28 approving CIPA settlements of \$1-\$7.50 per class member); *Mirkarimi v. Nev.*
Prop. 1, LLC, No. 12-CV-2160, 2015 U.S. Dist. LEXIS 112680, *10-11 (S.D. Cal.
 Aug. 24, 2015) (granting preliminary approval of CIPA settlement with estimated
pro rata award of \$64.47).

1 or potential appeal.

2 **vi. *The extent of discovery completed and the state of the***
3 *proceedings*

4 “A settlement following sufficient discovery and genuine arms-length
 5 negotiation is presumed fair.” *Natl’ rural Telecoms Corp. v. DirectTV, Inc.* 221
 6 F.R.D. 523, 528 (C.D. Cal. 2004) (citation omitted). “Absent evidence of fraud or
 7 collusion, courts also should accord ‘great weight’ to the recommendations of
 8 counsel.” *Medeiros v. HSBC Card Servs.*, No. CV 15-09093 JVS (AFMx)) 2017 U.S.
 9 Dist. LEXIS 178484, at *16. (C.D. Cal. Oct. 23, 2017) (citing *Nat’l Rural*
 10 *Telecomms.*, 221 F.R.D. at 528).

11 The parties diligently litigated this action followed by an informal exchange
 12 of documents and information to facilitate a speedy resolution. The Parties then
 13 decided to attend an arm’s length negotiations in the form of a full-day mediation
 14 before Bruce Friedman. Although the Parties agreed to a resolution with the
 15 guidance of Bruce Friedman, Esq. of JAMS, the details of the Agreement were
 16 discussed and ultimately finalized over a period of several months. The Parties are
 17 fully aware of the risks and benefits of continued litigation.

18 **vii. *The experience and views of Counsel***

19 “Parties represented by competent counsel are better positioned than courts to
 20 produce a settlement that fairly reflects each party’s expected outcome in litigation.”
 21 *In re Pac Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995).

22 Here, Class Counsel are qualified and highly experienced in litigating
 23 complex consumer class actions. [See Declarations of Counsel filed concurrently
 24 herewith]. Given Class Counsel’s extensive experience in litigating similar type
 25 cases, the Class Counsel are well positioned to assess the risks of continued
 26 litigation and benefits obtained by the settlement.

1 Class Counsel have also actively researched and litigated for several months
 2 prior to reaching settlement. Counsel for each side are fully aware of the potential
 3 benefits of settlement and substantial risks of proceeding with litigation and have
 4 determined settlement to be the in the best interest of the Class. *See Vasquez*, 266
 5 F.R.D. at 490 (“Here, class counsel understood the complex risks and benefits of any
 6 settlement and concluded that the proposed Settlement was a just, fair, and certain
 7 result. This factor weighs in favor of approval.”)

8 **viii. *The anticipated reaction of Class Members to the***
 9 ***proposed Settlement***

10 Class Counsel are confident that the Settlement Class Members will be
 11 satisfied with the proposed Settlement. This benefit offered by the settlement is a
 12 substantial portion of the maximum award possible, but without the risks and delay
 13 of further litigation and trial. Settlement Class Members need only submit a claim
 14 form by mail in order to receive the settlement payment. Further, any dissenting
 15 Settlement Class Member will be permitted to object to the proposed settlement
 16 and be heard at the Final Approval Hearing before this Court. Consequently, the
 17 Court will have an opportunity to judge the class members’ reaction to the
 18 settlement before granting final approval.

19 **ix. *The proposed notice is appropriate***

20 Rule 23(c)(2)(B) provides that, in any case certified under Rule 23(b)(3), the
 21 court must direct to class members the “best notice practicable” under the
 22 circumstances. Rule 23(c)(2)(B) does not require “actual notice” or that a notice
 23 be “actually received.” *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994).
 24 Notice need only be given in a manner “reasonably calculated, under all the
 25 circumstances, to apprise interested parties of the pendency of the action and afford
 26 them an opportunity to present their objections.” *Mullane v. Central Hanover*

1 *Bank & Trust Co.*, 339 U.S. 306, 314 (1950). “Adequate notice is critical to court
2 approval of a class settlement under Rule 23(e).” *Hanlon*, 150 F.3d at 1025.

3 Pursuant to the Fed. R. Civ. P. 23(e)(1)(B), “[t]he court must direct notice in
4 a reasonable manner to all class members who would be bound by the proposal.”
5 The notice must concisely and clearly state in plain, easily understood language: (i)
6 the nature of the action; (ii) the definition of the class; (iii) the class claims, issues,
7 or defenses; (iv) that class member may enter an appearance through counsel if the
8 member so desires; (v) that the court will exclude from the class any member who
9 requests exclusion, stating when and how members may elect to be excluded; (vi)
10 the time and manner for requesting exclusion; and (vii) the binding effect of a class
11 judgment on class members under Rule 23(c)(3). Fed. R. Civ. P. 23(c)(2)(B).

12 Here, Notice will be provided directly through the e-mail; by establishing a
13 Settlement Website; by posting the settlement documents on Class Counsel’s
14 website; and, by a toll-free number. The notice plan also provides the Settlement
15 Administrator will also investigate any returned e-mails. Thus, the notice plan
16 fulfills the requirements of adequate notice for Due Process purposes and should
17 be preliminarily approved.

18 ***x. Class Representatives and Class Counsels should be***
19 ***appointed as requested***

20 The adequacy of representation requirement is satisfied here, and there are no
21 known conflicts of interest as noted above. For settlement purposes, Swigart
22 requests that he be confirmed as the Class Representatives. Similarly, Swigart
23 requests that Abbas Kazerounian; Matthew M. Loker; and, Elizabeth A. Wagner to
24 be appointed as Class Counsel.

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xi. First Class should be appointed as Settlement Administrator

The Parties have agreed upon and propose that the Court appoint First Class, Inc. to serve as the Settlement Administrator. First Class, Inc. provides administrative services in class action litigation and has extensive experience in administering consumer protection and privacy settlements.

xii. The Final Approval Hearing should be scheduled

If preliminary approval is granted, Swigart will then file Swigart’s Motion for Final Approval 90 days thereafter. Swigart requests this Court set a Final Approval hearing now so that Swigart can provide notice to potential class members of this hearing as soon as possible.

V. CONCLUSION

In sum, Swigart respectfully requests that the Court enter an order: i) preliminarily approving the proposed Settlement, ii) providing for notice to the Settlement class, iii) appointing First Class, Inc. as the settlement administrator, iv) appointing Swigart as the Class Representatives, v) appointing Abbas Kazerounian; Matthew M. Loker; and, Elizabeth A. Wagner as Class Counsel; and vi) setting a fairness hearing.

Dated: April 17, 2019

KAZEROUNI LAW GROUP, APC

By: /s/ Matthew M. Loker
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