

THE HONORABLE BARBARA J. ROTHSTEIN

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

COOPER MOORE and ANDREW  
GILLETTE, on their own behalf and on  
behalf of all others similarly situated,

Plaintiffs,

v.

ROBINHOOD FINANCIAL LLC, a  
Delaware limited liability company,

Defendant.

Case No. 2:21-cv-01571-BJR

**PLAINTIFFS' UNOPPOSED  
MOTION FOR PRELIMINARY  
APPROVAL OF CLASS ACTION  
SETTLEMENT AND CONDITIONAL  
CLASS CERTIFICATION**

PLAINTIFFS' UNOPPOSED MOTION FOR  
PRELIMINARY APPROVAL OF CLASS ACTION  
SETTLEMENT AND CONDITIONAL CLASS  
CERTIFICATION

Case No. 2:21-cv-01571-BJR

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1 **I. INTRODUCTION**

2 Plaintiffs Cooper Moore and Andrew Gillette and Defendant Robinhood Financial LLC  
3 have reached a class action settlement to resolve all claims in this class action lawsuit. The  
4 proposed settlement provides a \$9,000,000 Settlement Fund<sup>1</sup> for the Settlement Class in  
5 exchange for Settlement Class Members' release of claims related to text messages regarding the  
6 Robinhood referral program that were or could have been brought in this action. This represents  
7 an excellent result for the Settlement Class.

8 The proposed settlement was reached only after extensive and hard-fought litigation. This  
9 action was initiated more than two years ago and the parties had briefed several motions and  
10 nearly completed class certification discovery by the time they reached a settlement. The  
11 settlement was reached with the assistance of a neutral mediator, Robert Meyer, Esq., with whom  
12 the parties participated in an in-person mediation on October 30, 2023, and continued arms-  
13 length negotiations over the following months. The settlement is a fair and reasonable resolution  
14 of the claims and should be approved. For the reasons outlined below, Plaintiffs respectfully  
15 request that the Court preliminarily approve the settlement, conditionally certify the Settlement  
16 Class, order that notice be sent, and schedule a Final Approval Hearing.

17 **II. PROCEDURAL HISTORY**

18 On August 9, 2021, Plaintiff Moore filed a class action complaint in the United States  
19 District Court for the Northern District of California, alleging that Defendant violated the  
20 Washington Commercial Electronic Mail Act, RCW 19.190, *et seq.* ("CEMA") and the  
21 Washington Consumer Protection Act, RCW 19.86, *et seq.* ("CPA") by assisting its users to send  
22 unsolicited advertising text messages to Washington residents through the Robinhood referral  
23 program. (*See generally* ECF 1.) On September 16, 2021, Defendant moved to dismiss for failure  
24 to state a claim (ECF 21) and moved to transfer the action to the Western District of Washington  
25 (ECF 22). Both motions were fully briefed and argued on October 21, 2021 (ECF 27, 30, 31, 32,  
26

27 <sup>1</sup> Unless otherwise defined, all capitalized terms have the same meanings as described in the parties' Settlement Agreement ("SA" or "Settlement"), attached to the Declaration of E. Michelle Drake ("Drake Decl.") as Exhibit 1.

1 33). The court declined to reach the motion to dismiss and transferred the case to this Court.  
2 (ECF 33.)

3 On February 9, 2022, Plaintiffs filed the First Amended Complaint (“FAC”), adding  
4 Plaintiff Gillette. (ECF 54.) On February 22, 2022, Defendant moved to dismiss the FAC. (ECF  
5 55.) The motion was fully briefed (ECF 56, 57), and the Court entered its order denying the  
6 motion in full on August 3, 2022 (ECF 63). Defendant filed its Answer on August 17, 2022.  
7 (ECF 64.)

8 The parties completed extensive discovery. Both sides propounded and responded to  
9 multiple sets of written discovery requests and provided supplemental responses. Both sides  
10 produced documents and Defendant produced extensive sample data related to the referral  
11 program. Plaintiffs took two depositions of Defendant’s representatives and both Plaintiffs were  
12 deposed. Plaintiffs retained an expert who provided an opening report related to class  
13 certification and responded to a subpoena related to his work. Throughout the discovery process,  
14 the parties held multiple telephonic and written meet and confers and negotiated the scope of  
15 responses and productions necessary to advance their positions.

16 The parties also engaged in extensive third-party discovery. Defendant deposed the two  
17 individuals that sent Plaintiffs the refer-a-friend text messages. Defendant also issued a subpoena  
18 to the operator of classaction.org seeking documents related to the initiation of Plaintiffs’  
19 retainment of their counsel, which Plaintiffs and their counsel successfully moved to quash. *See*  
20 *Moore, et al. v. Robinhood Fin. LLC*, No. 23-mc-76, ECF No. 24 (S.D.N.Y. April 26, 2023).  
21 Plaintiffs subpoenaed one of Defendant’s vendors for relevant data. The parties also issued  
22 subpoenas to several cell providers for data and documents.

23 On October 30, 2023, the parties attended a full-day in-person mediation with Robert A.  
24 Meyer, Esq. of JAMS in Los Angeles and exchanged detailed mediation statements beforehand.  
25 While settlement was not reached at the mediation, the parties made significant progress towards  
26 resolution and continued subsequent arms-length negotiations with the assistance of Mr. Meyer.

27  
PLAINTIFFS’ UNOPPOSED MOTION FOR  
PRELIMINARY APPROVAL OF CLASS ACTION  
SETTLEMENT AND CONDITIONAL CLASS  
CERTIFICATION - 2

Case No. 2:21-cv-01571-BJR

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1 On November 30, 2023, the parties executed a Settlement Terms Sheet. The parties then worked  
 2 to formalize the settlement in the Settlement Agreement, which is brought before the Court here  
 3 for preliminary approval.

### 4 III. THE SETTLEMENT AGREEMENT

5 The Settlement Agreement provides that Defendant will pay \$9,000,000 as a non-  
 6 reversionary common fund for the Settlement Class (SA ¶ 1.20) and, in exchange, Settlement  
 7 Class Members will release all claims related to text messages regarding the Robinhood referral  
 8 program that were or could have been brought in this action (*id.* ¶ 1.13). The Settlement Class is  
 9 defined as:

10 All persons or entities who received a Robinhood referral program text message, and  
 11 who were Washington residents at the time of the receipt of such text message,  
 12 between and including August 9, 2017 and the date of Preliminary Approval. Persons and entities who clearly and affirmatively consented in advance to receive  
 13 Robinhood referral program text messages are excluded from the class.

14 (*Id.* ¶ 1.08.) Based on Defendant's data, Plaintiffs' Counsel estimates that at least one million  
 15 consumers with phone numbers containing Washington area codes received Robinhood refer-a-  
 16 friend text messages. (Drake Decl. ¶ 6.)

17 The Settlement Fund will be used to make payments to the Settlement Class, cover the  
 18 costs of administering the settlement, and pay any amounts approved by the Court for attorneys'  
 19 fees, costs, and expenses, and service awards for the Class Representatives. Each eligible  
 20 Settlement Class Member that submits a timely and valid Claim Form will receive an equal *pro*  
 21 *rata* distribution from the fund should the Court grant final approval. (SA ¶ 4.06.)

#### 22 A. Notice

23 The parties have agreed to request that JND Legal Administration ("JND") be appointed  
 24 as Settlement Administrator. The Settlement Administrator will be responsible for implementing  
 25 the Notice Plan as outlined in the Settlement Agreement and otherwise administering the  
 26 settlement. (SA ¶¶ 1.18, f1.19.) Notice to the Settlement Class will be achieved via email and  
 27 postcards, a settlement website and IVR phone line, and an online publication campaign. Class

1 Members that have not filed claims by thirty days before the deadline to do so will be sent up to  
2 two reminder emails or postcards. The Notices will be in substantially the same form as attached  
3 to the Agreement as Exhibits A-F. The Notices contain detailed information about the settlement,  
4 including the information required by Fed. R. Civ. P. 23(c)(2)(B).

5 To facilitate individual notice to all Class Members who can be identified through  
6 reasonable efforts, the Settlement Agreement requires Defendant to provide to the Settlement  
7 Administrator (a) all telephone numbers with Washington area codes to which a referral text  
8 message was initiated as reflected in Robinhood's data; and (b) email and last known mailing  
9 address for Robinhood users who (i) provided a Washington address at signup, and (ii) provided  
10 to Robinhood a telephone number that is also present in Robinhood's data regarding potential  
11 recipients of referral text messages. (SA ¶ 2.03.) The Settlement Administrator will use standard  
12 industry practices to locate additional contact information for these individuals where necessary  
13 to effectuate the Notice Plan. (*Id.* ¶ 3.03.01.)

14 Individual notice will be sent via email and, if unavailable, postcard by U.S. mail, to all  
15 identifiable Settlement Class Members in the data produced by Defendant. (*Id.* ¶ 3.03.) The  
16 Settlement Administrator will also conduct an online publication notice campaign aimed to reach  
17 potential Settlement Class Members that cannot be identified through reasonable efforts. This  
18 portion of the Settlement Class could include, for example, recipients of Robinhood referral text  
19 messages that live in Washington but have a phone number with an area code from a different  
20 state. The online publication notice campaign will be targeted to current and former Washington  
21 residents using available advertising tools. (*Id.* ¶ 3.03.06; Declaration of Gina Intrepido-Bowden  
22 Regarding Settlement Notice Program ("Admin Decl.") ¶¶ 13, 14, 32-38) The online publication  
23 notice campaign will be designed to reach enough viewers to satisfy due process requirements.  
24 (*Id.* ¶ 52.)

25 The Settlement Administrator will establish and administer the Settlement Website,  
26 which will contain the Long Form Notice (Ex. A) and copies of filings and orders concerning the  
27

1 settlement. (SA ¶ 3.03.02.) Class Members will be able to fill out and submit the Claim Form on  
2 the Settlement Website, fill out and mail the tear-off Claim Form provided on the Postcard  
3 Notice, or print out a Claim Form from the Website and mail it to the Administrator. (*Id.* ¶ 4.03;  
4 Ex. D; Ex. G.) The Claim Form will allow Settlement Class Members to select how they would  
5 like to receive payment, including via check or electronic transfer (e.g., Venmo or PayPal). The  
6 Settlement Administrator will also establish a toll-free IVR telephone line for Class Members to  
7 call for answers to FAQs. (*Id.* ¶ 3.03.03.) And Class Counsel’s contact information will be  
8 provided to Class Members for live assistance. (*Id.*)

9 **B. Distribution of the Settlement Fund**

10 The Settlement Fund will be used to cover the costs of administering the settlement, and  
11 pay any amounts approved by the Court for attorneys’ fees, costs, and expenses, and service  
12 awards for the Class Representatives, and *pro rata* payments to Class Members that file valid  
13 claims. (SA § IV.) If any checks remain uncashed after the first distribution, the remaining  
14 amounts will be redistributed on a *pro rata* basis to those Settlement Class Members who  
15 successfully received their payments, if feasible. (*Id.* ¶ 4.06.) Any amounts remaining after that  
16 will be sent to the parties’ agreed *cy pres* recipient: the Legal Foundation of Washington. (*Id.*)

17 To be eligible for a settlement payment, Settlement Class Members must submit a valid  
18 and timely Claim Form via the Settlement Website or mail. (*Id.* ¶ 4.03.) The Claim Form  
19 requires a straightforward attestation that the Class Member (1) received one or more refer-a-  
20 friend program text messages regarding Robinhood on a telephone number to be provided on the  
21 Claim Form, (2) owns or regularly uses that same telephone number, (3) was a Washington  
22 resident at the time they received the text message, and (4) did not clearly and affirmatively  
23 consent in advance to receive the text message. (*Id.* ¶ 4.03.01.)

24 Claimants that provide a unique claims code found on the Email and Postcard Notices  
25 and a phone number that is contained in the data, will not be required to submit any additional  
26 documentation. (*Id.* ¶ 4.03.02.) Claimants that do not have a claims code but provide a phone  
27



1 number that is contained in the data, will be required to provide the Washington address where  
2 they resided when they received the text message. (*Id.* ¶ 4.03.03.) Claimants that provide a phone  
3 number that is not contained in the data will be required to (i) provide the Washington address  
4 where they resided when they received the text message, and (ii) submit an image of the text  
5 message they received, with their Claim Form. (*Id.* ¶ 4.03.04.) The Settlement Administrator will  
6 be responsible for reviewing and determining the validity of Claim Forms and has the discretion  
7 to use industry standard practices to verify addresses and, if necessary, to request additional  
8 proof of residence, such as a Washington license. (*Id.* ¶¶ 4.04, 4.03.03, 4.03.04.) Claimants will  
9 be provided fourteen calendar days to cure any defects in their claim. (*Id.* ¶ 4.05.)

10 As will be detailed in a separate motion, the two named Plaintiffs, Mr. Cooper and Mr.  
11 Gillette, will request up to \$10,000 each from the Settlement Fund as Class Representative  
12 service awards. (*Id.* ¶ 1.17.) Class Counsel will also request that the Court approve for  
13 distribution from the Settlement Fund reasonable attorneys' fees of up to 25% of the Settlement  
14 Fund for Plaintiffs' Counsel and reimbursement for documented out-of-pocket expenses,  
15 currently estimated to be around \$151,000.00. (Drake Decl. ¶ 7.) Plaintiffs' motion for attorneys'  
16 fees and costs and service awards will be filed at least thirty days before the deadline for claims,  
17 opt outs, and objections, and the papers will be posted to the Settlement Website for Class  
18 Members to review within 24 hours of filing. (SA ¶¶ 2.04, 3.03.02.) Approval of the Settlement  
19 Agreement does not depend on the full amount of any requested fees, costs, or service awards  
20 being approved, and there is no clear sailing agreement.

21 The parties will also request the expenses of the Settlement Administrator be reimbursed  
22 from the common fund. (*Id.* ¶ 2.02.) Currently, those expenses are estimated to be \$670,000.  
23 (Admin. Decl. ¶ 53.)

#### 24 **C. Opt-Outs and Objections**

25 The proposed Notices inform Settlement Class Members of their right to opt-out of or  
26 object to the settlement, instructions on how to do so, and associated deadlines. (SA, Exs. A-F.)

1 Settlement Class Members who choose to opt-out or object must, by the Opt-Out and Objection  
 2 Deadline, submit an appropriate written statement to the Settlement Administrator. (*Id.* ¶ 3.04.)  
 3 Any objections must specifically state the basis for the objection and, if the objecting the  
 4 Settlement Class Member is represented by counsel, counsel’s contact information, whether they  
 5 intend to appear at the hearing, and if they intend to request fees. (*Id.* ¶ 3.04.02.)

#### 6 IV. ARGUMENT

##### 7 A. The Settlement Class Should be Certified for Settlement Purposes

8 The Settlement Class satisfies the requirements of Federal Rule of Civil Procedure 23 for  
 9 settlement purposes. Rule 23(a) requires a proposed class meet thresholds of numerosity,  
 10 commonality, typicality, and adequacy. Rule 23(b)(3) requires Plaintiffs to establish “that the  
 11 questions of law or fact common to class members predominate over any questions affecting  
 12 only individual members, and that a class action is superior to other available methods for fairly  
 13 and efficiently adjudicating the controversy.” “[T]he aspects of Rule 23(a) and (b) that are  
 14 important to certifying a settlement class are ‘those designed to protect absentees by blocking  
 15 unwarranted or overbroad class definitions.’” *In re Hyundai and Kia Fuel Econ. Litig.*, 926 F.3d  
 16 539, 558 (9th Cir. 2019) (citation omitted). “The focus is ‘on whether a proposed class has  
 17 sufficient unity so that absent members can fairly be bound by decisions of class  
 18 representatives.’” *Id.* (citation omitted).

##### 19 1. Numerosity

20 “[G]enerally, courts will find that the numerosity requirement has been satisfied when the  
 21 class comprises 40 or more members.” *McCluskey v. Trs. Of Red Dot Corp. Emp. Stock*  
 22 *Ownership Plan & Trust*, 268 F.R.D. 670, 674 (W.D. Wash. 2010). Based on Defendant’s data,  
 23 Plaintiffs’ Counsel estimate that at least one million consumers with phone numbers containing  
 24 Washington area codes received Robinhood referral text messages. (Drake Decl. ¶ 6.)  
 25 Numerosity is easily met.

1           2.     Commonality

2           The Settlement Class also satisfies the commonality requirement, which requires that  
3 class members' claims "depend upon a common contention," of such a nature that  
4 "determination of its truth or falsity will resolve an issue that is central to the validity of each  
5 [claim] in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Here, there are  
6 several questions of law and fact common to the Settlement Class Members, including, for  
7 example, whether Defendant assisted in the transmission of the unsolicited text messages in  
8 relation to the Robinhood referral program and whether that assistance established the elements  
9 of a claim under the CEMA. Common questions such as these are often certified in consumer  
10 class actions. *See, e.g., Booth v. Appstack, Inc.*, No. 13-1533, 2015 WL 1466247, \*8 (W.D.  
11 Wash. Mar. 30, 2015) (commonality in TCPA case satisfied where defendant used the same  
12 mechanism to play messages for class members); *Ikuseghan v. Multicare Health Sys.*, No. 14-  
13 5539, 2015 WL 4600818, \*6 (W.D. Wash. July 29, 2015) (commonality found in TCPA case  
14 where automated dialing system used by defendant was the same for all class members);  
15 *Kristensen v. Credit Payment Servs.*, 12 F. Supp. 3d 1292, 1306 (D. Nev. 2014) (questions of  
16 TCPA liability satisfied commonality).

17           3.     Typicality

18           "[R]epresentative claims are typical if they are reasonably co-extensive with those of  
19 absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp.*, 150  
20 F.3d 1011, 1020 (9th Cir. 1998); *see also Hansen v. Ticket Track, Inc.*, 213 F.R.D. 412, 415  
21 (W.D. Wash. 2003). "Typicality refers to the nature of the claim or defense of the class  
22 representative, and not to the specific facts from which it arose or the relief sought." *Hanon v.*  
23 *Dataprods. Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). Plaintiffs' claims are typical of the  
24 Settlement Class as they arise from the same course of alleged conduct: Defendant's processes  
25 and procedures for encouraging and enabling Robinhood users to send unsolicited text messages  
26 to Washington residents in the Robinhood App. *See, e.g., Agne v. Papa John's Int'l, Inc.*, 286  
27

1 F.R.D. 559, 569 (W.D. Wash. 2012) (finding typicality satisfied where the plaintiff’s claims,  
2 “like all class members’ claims, arise from text marketing campaigns commissioned by Papa  
3 John’s franchisees and executed by the same marketing vendor”); *Whitaker v. Bennett Law,*  
4 *PLLC*, No. 13-3145, 2014 WL 5454398, \*5 (S.D. Cal. Oct. 27, 2014) (typicality satisfied where  
5 each class member’s claim “revolves exclusively around [the defendant’s] conduct as it  
6 specifically relates to the alleged violations of the TCPA”).

7 4. Adequacy

8 Adequacy requires the representative of a class to provide fair and adequate  
9 representation of the class. Fed. R. Civ. P. 23(a)(4). “To determine whether named plaintiffs will  
10 adequately represent a class, courts must resolve two questions: ‘(1) do the named plaintiffs and  
11 their counsel have any conflicts of interest with other class members and (2) will the named  
12 plaintiffs and their counsel prosecute the action vigorously on behalf of the class?’” *Ellis v.*  
13 *Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011) (quoting *Hanlon*, 150 F.3d at 1020).

14 Plaintiffs have retained counsel with significant expertise in complex consumer class  
15 actions. (Drake Decl. ¶¶ 11-19; Declaration of Beth E. Terrell (“Terrell Decl.”) ¶¶ 1-8.)  
16 Moreover, the Plaintiffs have no conflicts with the Settlement Class, as they have the same  
17 interest as all other Settlement Class Members in receiving a *pro rata* payment from the  
18 Settlement Fund. Plaintiffs have adequately represented the Settlement Class by being engaged  
19 in this litigation for more than two years, communicating with Plaintiffs’ Counsel throughout,  
20 actively participating in discovery (including by being deposed), reviewing and approving the  
21 Settlement Agreement, and continuously putting the interests of the Settlement Class first,  
22 including by rejecting individual settlement offers in favor of pursuing class-wide relief. (Drake  
23 Decl. ¶ 8.) Plaintiffs and Plaintiffs’ Counsel also vigorously opposed Robinhood’s subpoena to  
24 the operator of classaction.org, which sought absent class member communications with  
25 Plaintiffs’ Counsel, by hiring outside counsel for the operator and filing motions to quash in the  
26 Southern District of New York. (*Id.* ¶ 5.) Accordingly, Plaintiffs and their Counsel are adequate.

1           5.       Predominance

2           In addition to the Rule 23(a) considerations, Rule 23(b)(3) looks at predominance of  
3 common questions of law and fact over individual questions. In analyzing this factor, the inquiry  
4 is “whether proposed classes are sufficiently cohesive to warrant adjudication by representation.”  
5 *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 622 (1997). The focus is “on the relationship  
6 between the common and individual issues. When common questions present a significant aspect  
7 of the case and they can be resolved for all members of the class in a single adjudication, there is  
8 clear justification for handling the dispute on a representative rather than on an individual basis.”  
9 *Hanlon*, 150 F.3d at 1022 (citations and quotations omitted). In the context of certification of a  
10 settlement class in particular, predominance is “readily met” where “class members were  
11 exposed to uniform...misrepresentations and suffered identical injuries within only a small range  
12 of damages.” *In re Hyundai and Kia Fuel Econ. Litig.*, 926 F.3d at 559.

13           Common questions of law and fact predominate here, as Plaintiffs allege Settlement  
14 Class Members were all damaged by Defendant’s uniform alleged conduct throughout the class  
15 period and the damages available to Settlement Class Members are set by the CEMA and CPA.  
16 The issues arising from this conduct can be resolved with class-wide evidence and predominance  
17 is therefore satisfied.

18           6.       Superiority

19           Rule 23(b)(3) also looks at whether a “class action is superior to other available methods  
20 for the fair and efficient adjudication of the controversy.” Because the claims are being certified  
21 for purposes of settlement, there are no issues with manageability. *Amchem*, 521 U.S. at 620  
22 (“Confronted with a request for settlement-only certification, a district court need not inquire  
23 whether the case, if tried, would present intractable management problems ... for the proposal is  
24 that there be no trial.”). Additionally, resolution of thousands of claims in one action is far  
25 superior to individual lawsuits and promotes consistency and efficiency of adjudication. *See id.*  
26 at 617 (noting the “policy at the very core of the class action mechanism is to overcome the  
27

1 problem that small recoveries do not provide the incentive for any individual to bring a solo  
2 action prosecuting his or her rights”). If Settlement Class Members do prefer an individual  
3 action, the settlement provides them the right to opt-out. Certification for purposes of settlement  
4 is appropriate.

5 **B. The Settlement Should Be Preliminarily Approved**

6 The court’s role at the preliminary approval stage is to ensure that “the agreement is not  
7 the product of fraud or overreaching by, or collusion between, the negotiating parties, and that  
8 the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” *Hanlon*, 150  
9 F.3d at 1027 (citation omitted); *see also In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934,  
10 944 (9th Cir. 2015).

11 Under Federal Rule of Civil Procedure 23(e)(2), a district court considers whether (A) the  
12 class representatives and their counsel have adequately represented the class; (B) the proposal  
13 was negotiated at arm’s length; (C) the relief provided by the settlement is adequate, taking into  
14 account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed  
15 method of distributing relief including the method of processing class member claims, if  
16 required; (iii) the terms of any proposed award of attorneys’ fees, including timing of payment;  
17 (iv) any agreement required to be identified under Rule 23(e)(3) made in connection with the  
18 proposed settlement; and (v) the proposal treats class members equitably relative to each other.  
19 Fed. R. Civ. P. 23(e)(2). These factors are similar to those previously identified by the Ninth  
20 Circuit, including: (1) the strength of plaintiff’s case; (2) the risk, expense, complexity, and  
21 likely duration of further litigation; (3) the risk of maintaining class action status through trial;  
22 (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the  
23 proceedings; (6) the experience and views of counsel; (7) the presence of a governmental  
24 participant; and (8) the reaction of the class members to the proposed settlement. *See In re*  
25 *Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011).

1 Plaintiffs will address the factors outlined by Rule 23(e)(2) and the Ninth Circuit, many  
2 of which overlap.<sup>2</sup>

3 1. The Settlement is the Result of Arms-Length Informed Negotiations

4 Where, as here, a settlement is reached before class certification, settlement agreements  
5 “must withstand an even higher level of scrutiny for evidence of collusion or other conflicts of  
6 interest than is ordinarily required under Rule 23(e), because at this stage “there is an even  
7 greater potential for a breach of fiduciary duty owed the class during settlement.” *In re*  
8 *Bluetooth*, 654 F.3d at 946. That test “requires the court to look for and scrutinize any subtle  
9 signs that class counsel have allowed pursuit of their own self-interests to infect the  
10 negotiations.” *In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 782 (9th Cir. 2022)  
11 (cleaned up).

12 No such “subtle signs” are present here. The parties negotiated the settlement following a  
13 full day, in-person mediation with a third-party neutral mediator, Robert Meyer of JAMS, that  
14 facilitated subsequent arms-length discussions through highly experienced counsel. *See* Fed. R.  
15 Civ. P. 23(e)(2) advisory committee’s note to 2018 amendment (“the involvement of a neutral or  
16 court-affiliated mediator or facilitator in [settlement] negotiations may bear on whether they  
17 were conducted in a manner that would protect and further the class interests”).

18 Moreover, the parties had conducted extensive factual investigation, motion practice, and  
19 adversarial discovery, including bringing a discovery dispute to the Court for resolution,  
20 completing multiple depositions and an expert report, and briefing motions to quash in the  
21 Southern District of New York, all prior to settlement. Additionally, they exchanged detailed  
22 mediation statements before mediation and shared additional information as discussions  
23 continued. Consequently, the parties were able to adequately assess the strengths and weaknesses  
24 of their positions and balance the benefits of settlement against the risks of further litigation.

25  
26  
27 <sup>2</sup> The reaction of the Class will not be known until after notice has been distributed. Plaintiffs will provide the Court with information about Class Members’ reaction in the motion for final approval.

1 The parties were represented by competent counsel throughout litigation and settlement  
2 negotiations. Counsel’s years of experience in the realm of complex consumer class actions,  
3 combined with the solid understanding of the facts and law of the case, support the approval of  
4 the settlement reached. *See Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 257 (N.D. Cal.  
5 2015) (“The trial court is entitled to, and should, rely upon the judgment of experienced counsel  
6 for the parties.”) (citation omitted); *Romero v. Securus Tech., Inc.*, No. 16-1283, 2020 WL  
7 3250599, \*6 (S.D. Cal. June 16, 2020) (finding class counsel’s “extensive experience in complex  
8 litigation and class actions” to support preliminary approval).

9 The Settlement Agreement itself contains none of the provisions often considered to be  
10 “red flags” suggesting that Plaintiffs’ Counsel allowed their own self-interest to influence  
11 settlement negotiations—such as (1) counsel receiving a disproportionate distribution of the  
12 settlement; (2) the parties negotiating a “clear sailing” arrangement; or (3) the parties creating a  
13 reverter that returns unclaimed funds to the defendant. *See In re Hyundai and Kia Fuel Econ.*  
14 *Litig.*, 926 F.3d at 569 (discussing typical signs of collusion that arise in class settlements).  
15 Indeed, because Counsel will be paid from the same Settlement Fund as Settlement Class  
16 Members, they were incentivized to negotiate the largest fund possible, and the Court has  
17 ultimate discretion over the amount of the attorneys’ fee award after reviewing Counsel’s  
18 motion.

19 2. The Relief Is Appropriate Considering the Strengths of Plaintiffs’ Case and the  
20 Risks of Further Litigation

21 Plaintiffs achieved an excellent result on behalf of the Settlement Class by obtaining a  
22 \$9,000,000 agreement from Defendant to settle Plaintiffs’ and Settlement Class Members’  
23 claims against it. The Settlement Fund will be used to pay the costs of notice and settlement  
24 administration (estimated to be just under \$670,000), attorneys’ fees (\$2,250,000), out-of-pocket  
25 litigation costs (\$151,215), and service awards to the Plaintiffs (\$20,000). Should the requested  
26 amounts be approved by the Court, the remainder of the Fund (approximately \$5,908,785) will  
27 be distributed *pro rata* to Settlement Class Members who timely file a Claim Form. Assuming



1 the requested amounts are awarded and a claims rate of 5-10%,<sup>3</sup> the per claimant payment would  
 2 be \$45–\$90 or 9-18% of the \$500 statutory damages Settlement Class Members each had alleged  
 3 claims for, excluding the possibility of treble damages. This result compares favorably to other  
 4 settlements involving claims for allegedly unwanted telemarketing texts and calls. *See, e.g.,*  
 5 *Schneider v. Chipotle Mexican Grill, Inc.*, 336 F.R.D. 588, 597-8 (N.D. Cal. 2020) (amount of  
 6 settlement providing \$4 per claimant, or “7.4% of estimated damages,” weighed in favor of  
 7 approval); *Estrada v. iYogi, Inc.*, No. 13-1989, 2015 WL 5895942, at \*7 (E.D. Cal. Oct. 6, 2015)  
 8 (granting preliminary approval to TCPA settlement where class members estimated to receive  
 9 \$40); *In re LinkedIn User Privacy Litig.*, 309 F.R.D. 573, 588 (N.D. Cal. 2015) (approving  
 10 settlement of state consumer law claims providing for \$14.81 per claimant, finding it “represents  
 11 a significant portion of the recovery that class members could expect if they were to achieve total  
 12 victory at trial.”); *Rose v. Bank of Am. Corp.*, No. 11-2390, 2014 WL 4273358, at \*10 (N.D. Cal.  
 13 2014) (approving TCPA settlement where claimants were estimated to receive \$20 to \$40);  
 14 *Dennings v. Clearwire Corp.*, No. 10-1859, 2013 WL 1858797, at \*\*2-3 (W.D. Wash. May 3,  
 15 2013) (average claim payment of \$16.02 in settlement of Washington CPA claims).

16 While Plaintiffs are confident in the strength of their case, they are also pragmatic about  
 17 the risks inherent in the remaining phases of litigation. At the time of settlement, there remained  
 18 Plaintiffs’ motion for class certification, additional expert discovery, summary judgment, trial,  
 19 and likely appeals. Litigating this case to trial and through any appeals would be expensive,  
 20 time-consuming, and risky. The settlement, by contrast, provides prompt and certain relief for  
 21 Settlement Class Members. *See Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 966 (9th Cir.  
 22 2009); *Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004)  
 23 (“The Court shall consider the vagaries of litigation and compare the significance of immediate  
 24

25 <sup>3</sup> Claims rates are notoriously difficult to estimate. While the parties have agreed to a notice plan designed to result in  
 26 a robust claims rate, the actual claims rate in this case may be on the lower end of the range (or even lower). That is  
 27 because the estimated rate is based on a potential class size of 1.3 million people. Some of those people may ultimately  
 not be Class Members because they did not receive the text messages, consented to receive the text messages, or  
 because they resided outside of Washington when they received them.

1 recovery by way of the compromise to the mere possibility of relief in the future, after protracted  
2 and expensive litigation.”) (citation omitted); *see also Noll v. eBay, Inc.*, 309 F.R.D. 593, 606  
3 (N.D. Cal. 2015) (“Immediate receipt of money through settlement, even if lower than what  
4 could potentially be achieved through ultimate success on the merits, has value to a class,  
5 especially when compared to risky and costly continued litigation.”).

6 3. The Settlement Will Be Fairly Distributed

7 The method for distributing the Settlement Fund on a *pro rata* basis to Class Members  
8 that submit timely and valid Claim Forms is reasonable and equitable. First, the parties have  
9 agreed to a notice program that is designed to maximize the claims rate by sending individual  
10 notice where possible and sending two reminder notices before the end of the claims period.  
11 Second, to file a claim, most Settlement Class Members with Washington area codes need only  
12 complete a Claim Form attesting to the factors of class membership and providing the phone  
13 number at which the unsolicited text message(s) was received. Other Settlement Class Members  
14 without claims codes or verifiable phone numbers must provide a Washington address at which  
15 they resided because Washington residency is an essential element of the claims at issue. It is  
16 also not too onerous to require these Settlement Class Members to provide an image of the text  
17 message and proof of Washington residency. Unlike many claims concerning spam text  
18 messages where the senders are unknown to the recipients, here Settlement Class Members are  
19 more likely to have retained the Robinhood refer-a-friend text messages because they were  
20 typically sent by a friend or family member. Third, the requirements for claims are necessary to  
21 limit fraudulent claims to the benefit of the Settlement Class. (*See* Admin. Decl. ¶¶ 49-51  
22 (explaining the tools it will use to prevent fraud and ensure settlement payments are received by  
23 actual settlement class members).)

24 The process described above is appropriate based on the available data, which reflects the  
25 phone numbers of the majority of Settlement Class Members, but cannot be used to verify all  
26 claims. *See, e.g., Fitzhenry-Russell v. Coca-Cola Co.*, No. 17-603, 2019 WL 11557486, \*7 (N.D.  
27

1 Cal. Oct. 3, 2019) (“the Court concludes that the distribution method and claims process is  
2 reasonable. Class Members who seek benefits under the Settlement must only submit a relatively  
3 simple claim form with basic questions about class membership. The process would be no  
4 different than that required after trial, as Defendant [ ] has no means of directly identifying [ ]  
5 class members.”); *see also In re WorldCom, Inc. Sec. Litig.*, No. 02-3288, 2004 WL 2591402,  
6 \*12 (S.D.N.Y. Nov. 12, 2004) (requiring claim form was “important in helping to insure that the  
7 settlement fund is distributed to class members who deserve to recover from the fund”).

8 Plaintiffs intend to request Court approval of service awards of \$10,000 each. The Ninth  
9 Circuit views these types of awards as “intended to compensate class representatives for work  
10 undertaken on behalf of a class” and “are fairly typical in class action cases.” *In re Online DVD-*  
11 *Rental Antitrust Litig.*, 779 F.3d at 943 (internal quotation omitted). The factors courts consider  
12 include the class representatives’ actions to protect the interests of the class, the degree to which  
13 the class has benefitted from those actions, the time and effort the class representatives expended  
14 in pursuing the litigation, and any risk the class representatives assumed. *Staton v. Boeing Co.*,  
15 327 F.3d 938, 977 (9th Cir. 2003). Plaintiffs here dedicated significant time assisting Counsel in  
16 this case including by providing written discovery responses, locating and producing documents,  
17 and participating in in-person depositions in Seattle. Plaintiffs also assisted in the settlement  
18 process by authorizing the settlement in principle and reviewing and executing the Settlement  
19 Agreement. Perhaps most importantly, Plaintiffs both rejected individual settlement offers so that  
20 they could pursue a result that benefited Class Members and not just themselves. Awards of  
21 \$10,000 are reasonable and in line with awards approved by courts in this District. *See, e.g.*,  
22 *Pelletz v. Weyerhaeuser Co.*, 592 F. Supp. 2d 1322, 1329-30 & n.9 (W.D. Wash. 2009)  
23 (collecting cases approving awards ranging from \$5,000 to \$40,000). Plaintiffs will provide  
24 further support for their request in the forthcoming motion for attorneys’ fees, costs, and service  
25 awards, but note here that the awards are subject to the Court’s approval and the settlement is not  
26 contingent upon the awards being approved.

27  
PLAINTIFFS’ UNOPPOSED MOTION FOR  
PRELIMINARY APPROVAL OF CLASS ACTION  
SETTLEMENT AND CONDITIONAL CLASS  
CERTIFICATION - 16

Case No. 2:21-cv-01571-BJR

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1 No agreements have been made in connection with the proposed settlement other than the  
2 Settlement Agreement and the Settlement Terms Sheet outlining the essential settlement terms  
3 on which the Settlement Agreement was based. *See* Fed. R. Civ. P. 23(e)(3).

4 4. The Settlement Has No Obvious Deficiencies

5 There are no obvious deficiencies in the Settlement Agreement. *See In re Bluetooth*, 654  
6 F.3d at 947. The only contemplated deductions from the Settlement Fund are the Plaintiffs'  
7 service awards, 25% for attorneys' fees, and reimbursement of documented out-of-pocket  
8 expenses of Class Counsel and the Settlement Administrator. All of these contemplated requests  
9 will require judicial approval and the settlement does not depend on approval of the requested  
10 amounts. The totality of the Settlement Fund will then be paid out to eligible Settlement Class  
11 Members in equal shares, and there is no reversion of any funds to the Defendant. These  
12 circumstances support approval here. *Moorer v. StemGenex Med. Grp., Inc.*, No. 16-2816, 2021  
13 WL 4993054, \*5 (S.D. Cal. Oct. 26, 2021) (finding no deficiencies in settlement where common  
14 fund would be used to pay the administrator, service awards, class counsel's fees and costs, and  
15 then equal shares to class members).

16 Plaintiffs' Counsel will file a motion for attorneys' fees, costs, and expenses addressing  
17 the factors courts consider when awarding attorneys' fees in class action cases. The motion will  
18 also detail the costs incurred. The motion will be filed at least thirty days before the deadline for  
19 opt-outs and objections and will be posted on the Settlement Website. Fed. R. Civ. P. 23(h); *In re*  
20 *Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994 (9th Cir. 2010).

21 Additionally, the scope of the Settlement Class Members' release of claims is  
22 appropriately tailored to the receipt of text messages related to the Robinhood referral program  
23 and is thus not overly broad and is on point with the claims asserted on behalf of the Class in the  
24 litigation.

1 **C. The Notice Plan Complies with Fed. R. Civ. P. 23(e) and Due Process**

2 Rule 23(e)(1) requires the Court to “direct notice in a reasonable manner to all class  
3 members who would be bound by” a proposed settlement. Fed. R. Civ. P. 23(e)(1). Class  
4 members are entitled to the “best notice that is practicable under the circumstances” of any  
5 proposed settlement before it is finally approved by the court. Fed. R. Civ. P. 23(c)(2)(B). Under  
6 Rule 23(c)(2)(B) “notice may be by one or more of the following: United States mail, electronic  
7 means, or other appropriate means.” To comply with due process, notice must be “the best notice  
8 practicable under the circumstances, including individual notice to all members who can be  
9 identified through reasonable effort.” *Amchem*, 521 U.S. at 617. The notice must state in plain,  
10 easily understood language: (i) the nature of the action; (ii) the definition of the class certified;  
11 (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance  
12 through an attorney if the member so desires; (v) that the court will exclude from the class any  
13 member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the  
14 binding effect of a class judgment on members under Rule 23(c)(3). Fed. R. Civ. P. 23(c)(2)(B);  
15 *see also In re Hyundai and Kia Fuel Econ. Litig.*, 926 F.3d at 567 (“settlement notices must  
16 ‘present information about a proposed settlement neutrally, simply, and understandably’”)  
17 (citation omitted).

18 The proposed Notices meet all the requirements of Rule 23(c)(2)(B) by advising  
19 Settlement Class Members of the nature of the claims involved in the case; the essential terms of  
20 the settlement, including the definition of the Settlement Class, the rights of Settlement Class  
21 Members to participate in the settlement, to request exclusion from the Settlement Class or to  
22 object to the settlement, and the associated deadlines for exercising these rights, as well as the  
23 procedural requirements for opting out, objecting, and for making an appearance at the Final  
24 Fairness Hearing; and the time and place of the Final Fairness Hearing. (SA, Exs. A-F.) The  
25 Notices provide details as well on what is required for a valid claim and direct Class Members to  
26 the Settlement Website where they can submit a claim online. (*Id.* ¶ 4.03.) Thus, the Notices  
27

1 provide the necessary information for Settlement Class Members to make an informed decision  
2 regarding the proposed settlement.

3         The parties have also developed a plan for best notice that is practicable under the  
4 circumstances. Direct notice will be sent to roughly one million potential Settlement Class  
5 Members with phone numbers containing Washington area codes in Defendant's data. (SA ¶  
6 3.03.) Email and mail address information will be obtained by the Settlement Administrator for  
7 direct notice based on the telephone numbers in Defendant's data. In addition to locating  
8 additional contact information for these Settlement Class Members as needed to send direct  
9 notice, the Settlement Administrator will use social media to target advertisements to users  
10 associated with the phone numbers in the data. (Admin. Decl. ¶ 38.) An online publication  
11 campaign will provide broader notice to potential Settlement Class Members that do not have  
12 phone numbers in the data. (*Id.* ¶¶ 32-37.) While the parties lack data to accurately estimate the  
13 total number of potential Settlement Class Members that do not have phone numbers in the data,  
14 Plaintiffs' Counsel estimates that there are roughly 300,000 such potential Settlement Class  
15 Members. (Drake Decl. ¶ 6.) The online publication campaign will use advertising tools to target  
16 these individuals. (Admin. Decl. ¶¶ 32-38.)

17         This Notice Plan and the forms of Notice are reasonably calculated to provide the  
18 Settlement Class Members with adequate notice as required by Fed. R. Civ. P. 23. *See, e.g.,*  
19 *Arthur v. Allie Mae, Inc.*, No. 10-198, 2010 WL 11575129, \*\*2-3 (W.D. Wash. Sept. 14, 2010)  
20 (approving notice plan as "best practicable notice" where the administrator would provide direct  
21 notice via email or mail depending on the defendant's records, post notice via a settlement  
22 website, and provide publication notice via print); *Ohring v. UniSea, Inc.*, No. 21-0359, 2023  
23 WL 7413046, \*5 (W.D. Wash. Nov. 9, 2023) (approving notice plan where class members would  
24 receive notice via mail and/or email, or by text message depending on contact information  
25 available); *In re Wash. Mut. Mortg. Backed Secs. Litig.*, No. 09-37, 2013 WL 12155026, \*1  
26  
27

1 (W.D. Wash. Jan. 11, 2013) (finding notice to be “due and adequate” where it was distributed via  
2 mail, publication, and settlement website).

3 **V. CONCLUSION**

4 For all the foregoing reasons, Plaintiffs respectfully request that the Court enter an order,  
5 substantially in the form of the proposed Preliminary Approval Order: (i) conditionally certifying  
6 the Settlement Class, appointing Plaintiffs as Class Representatives, and Plaintiffs’ Counsel as  
7 Class Counsel; (ii) preliminarily approving the proposed settlement as fair, reasonable, and  
8 adequate; (iii) approving the form and manner of notice and directing that notice of the proposed  
9 settlement be given to members of the Settlement Class; and (iv) scheduling a hearing before the  
10 Court to determine whether the settlement should be finally approved.

11 RESPECTFULLY SUBMITTED AND DATED this 8th day of February, 2024.

12 TERRELL MARSHALL LAW GROUP

13 *I certify that this memorandum contains 6759*  
14 *words, in compliance with the Court’s Order*  
15 *Granting Plaintiffs leave to file an overlength brief.*

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