

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION**

CHRISTOPHER MORGAN, *on behalf of himself
and a class of others similarly situated*

Plaintiff

v.

ON DECK CAPITAL, INC.,

Defendant.

CASE NO. 3:17-cv-00045

ORDER

JUDGE NORMAN K. MOON

Before the Court is Plaintiff’s Motion for Preliminary Approval of Settlement Agreement, wherein Plaintiff moves for preliminary approval of a proposed class settlement which would resolve Plaintiff’s class-action claims brought under the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* Dkt. 100. Upon consideration of the motion, the Settlement Agreement,¹ Dkt. 100-1, and the exhibits thereto, the Court **GRANTS** preliminary approval of the Settlement, finding specifically as follows:

Jurisdiction

1. The Court preliminarily finds that it has jurisdiction over the subject matter of this action and personal jurisdiction over the parties and the members of the Settlement Class defined herein.

Certification of Settlement Class

2. Under Rule 23 of the Federal Rules of Civil Procedure, the Court preliminarily certifies the Settlement Class, which is defined as “all persons within the United States (a) to whom

¹ Unless otherwise defined herein, all terms used in this Order that are defined terms in the Settlement Agreement have the same meaning as set forth in the Settlement Agreement.

Defendant initiated a telephone call, (b) to a telephone number Defendant received through its purchased leads channel, (c) using a telephone manufactured by Five9, (d) at any time between July 10, 2013 and the date of preliminary approval of the settlement.” *See* Settlement Agreement.

Class Representative and Class Counsel

3. Under Rule 23(g) of the Federal Rules of Civil Procedure, the following attorneys and firm are preliminarily appointed as Class Counsel:

Michael B. Hissam
Ryan M. Donovan
Andrew C. Robey
HISSAM FORMAN DONOVAN RITCHIE PLLC
P.O. Box 3983
Charleston, WV 25339

4. The Court preliminarily appoints Plaintiff Christopher Morgan as Class Representative.

Rule 23 Requirements

5. The Court preliminarily finds that the prerequisites for a class action under Federal Rules of Civil Procedure 23(a) have been satisfied in that: (a) the number of Settlement Class Members is so numerous that joinder of all members thereof is impracticable; (b) there are questions of law and fact common to the Settlement Class; (c) the claims of the Class Representative are typical of the claims of the Settlement Class Members; (d) the Class Representative and Class Counsel will fairly and adequately represent the interests of the Settlement Class Members.

6. The Court further finds that the prerequisites for class certification under Rule 23(b)(3) have been satisfied in that: (a) questions of law and fact common to the Settlement Class Members predominate over any questions affecting only individual Settlement Class Members;

and (b) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Preliminary Approval of Settlement

7. Pursuant to the Settlement Agreement, Defendant has agreed to pay \$3,090,000 to create the Settlement Fund. Amounts awarded to Class Counsel and the Class Representative will be paid from the Settlement Fund. Class Members will receive a *pro rata* share of the Settlement Fund after deducting the amount of the Fee Award, any Incentive Award to the Class Representative, Settlement Administration Expenses, and such other expenditures as may be authorized by the Court. The Court recognizes that, pursuant to the Settlement Agreement, Defendant will not have any payment obligations that exceed the \$3,090,000 referenced above.

8. Having considered the motion for preliminary approval, the Settlement Agreement, and the exhibits thereto, the Court preliminarily finds that the Settlement is fair, adequate, reasonable, and in the best interests of the Settlement Class. This finding is supported by, among other things, the legal and factual posture of this case, the risk and expense of protracted litigation, and the fact that the Settlement is the result of arm's length negotiations presided over by a neutral mediator.

Notice and Administration

9. The Court appoints American Legal Claim Services, LLC to perform the functions and duties of the Settlement Administrator, as set forth in the Settlement Agreement, and to provide such other administration services as are reasonably necessary to effectuate the Settlement.

10. The Court has carefully considered the Notice Plan set forth in the Settlement Agreement. The Court finds that the Notice Plan constitutes the best notice practicable under the

circumstances, and fully satisfies the requirements of Rule 23(c)(2) and Constitutional Due Process.

11. The Court thus approves the Notice Plan and the form, content, and requirements of the Notice described in and attached as exhibits to the Settlement Agreement. The Settlement Administrator shall cause the tasks in the Notice Plan described in Paragraph 4(a) of the Settlement Agreement to be completed by the Notice Deadline. Class Counsel shall, prior to the Final Approval Hearing, file with the Court a declaration executed by the Settlement Administrator attesting to the timely completion of the Notice Plan.

12. All costs associated with providing notice to the Settlement Class, processing Claim Forms, and administering distributions from the Settlement Fund shall be paid out of the Settlement Fund, as provided by the Settlement Agreement.

Exclusions and “Opt-Outs”

13. Each and every member of the Settlement Class shall be bound by all determinations and orders pertaining to the Settlement, including the release of all claims to the extent set forth in the Settlement Agreement, unless such persons request exclusion from the Settlement in a timely and proper manner, as hereinafter provided.

14. A member of the Settlement Class wishing to request exclusion (or “opt-out”) from the Settlement shall mail the request in written form, by first class mail, to the Settlement Administrator at the address specified in the Notice and must be postmarked no later than 90 days after the Notice Deadline. In the written request for exclusion, the member of the Settlement Class must state his or her full name, address, and telephone number where he or she may be contacted, the telephone number(s) which he or she maintains was called, and a statement that the member

of the Settlement Class submitting the request wishes to be excluded from the Settlement of this litigation, and personally signed by the member of the Settlement Class submitting the request. The request for exclusion shall not be effective unless it provides the required information and is made within the time stated above, or the exclusion is otherwise accepted by the Court. No member of the Settlement Class, or any person acting on behalf of or in concert or in participation with a member of the Settlement Class, may request exclusion of any other member of the Settlement Class from the Settlement. If a member of the Settlement Class submits both a Claim Form and a request for exclusion, the former shall govern and any request for exclusion will be treated as having been withdrawn.

15. Members of the Settlement Class who timely request exclusion from the Settlement will relinquish their rights to benefits under the Settlement and will not release any claims against Defendant or any of the other Released Parties.

16. All Settlement Class Members who do not timely and validly request exclusion shall be so bound by all terms of the Settlement Agreement and by the Final Approval Order and Judgment even if they have previously initiated or subsequently initiate individual litigation or other proceedings against Defendant or any of the other Released Parties.

17. The Settlement Administrator will promptly provide all Parties with copies of any exclusion requests, and Class Counsel shall file a list of all persons who have validly opted-out of the Settlement with the Court prior to the Final Approval Hearing.

Objections

18. Any Settlement Class Member who does not file a timely request for exclusion, but who wishes to object to approval of the proposed Settlement, to the award of attorneys' fees and

expenses, or to the Class Representative's Incentive Award, must file with the Court and, at the same time, mail to the Settlement Administrator, a written statement that includes: his or her full name; address; the telephone number where he or she may be contacted; the telephone number(s) that he or she maintains were called; all grounds for the objection, with factual and legal support for each stated ground; the identity of any witnesses he or she may call to testify; copies of any exhibits that he or she intends to introduce into evidence at the Final Approval Hearing; the identity of any attorney will be representing the individual with respect to any objection; a statement of whether he or she intends to appear at the Final Approval Hearing with or without counsel; and a statement as to whether the objection applies only to the objector, a specific subset of the Settlement Class, or the entire Settlement Class. Such objection must be filed with the Court and sent to the Settlement Administrator with a postmark date on or before the Objection/Exclusion Deadline. The Settlement Administrator shall forward any objections received to counsel for the Parties within three business days of receipt.

19. The Court will consider objections to the Settlement, to the award of attorneys' fees and expenses, or to the compensation award to the Class Representative only if, no later than 90 days after the Notice Deadline, such objections and any supporting papers are filed in writing with the Clerk of this Court and served on the Settlement Administrator as set forth herein.

20. A Settlement Class Member who has timely filed a written objection as set forth above may appear at the Final Approval Hearing in person or through counsel to be heard orally regarding their objection. It is not necessary, however, for a Settlement Class Member who has filed a timely objection to appear at the Final Approval Hearing. No Settlement Class Member wishing to be heard orally in opposition to the approval of the Settlement or the request for attorneys' fees and expenses or the request for a compensation award to the Class Representative

will be heard unless that person has filed a timely written objection as set forth above. No non-party, including members of the Settlement Class who have timely opted-out of the Settlement, will be heard at the Final Approval Hearing.

21. Any member of the Settlement Class who does not opt out or make an objection to the Settlement in the manner provided herein shall be deemed to have waived any such objection by appeal, collateral attack, or otherwise, and shall be bound by the Settlement Agreement, the releases contained therein, and all aspects of the Final Approval Order and Judgment.

Final Approval Hearing

22. A Final Approval Hearing will be held before the Court no earlier than 150 days after this Order, on a date to be set by the Court with agreement of the parties for the following purposes:

- a. to finally determine whether the requirements of Federal Rules of Civil Procedure 23(a) and (b) are satisfied;
- b. to determine whether the Settlement is fair, reasonable, and adequate, and should be approved by the Court;
- c. to determine whether the judgment as provided under the Settlement Agreement should be entered, including an order prohibiting Settlement Class Members from further pursuing claims released in the Settlement Agreement;
- d. to consider the application for an award of attorneys' fees and expenses of Class Counsel;
- e. to consider the application for an Incentive Award to the Class Representative;

- f. to consider the distribution of the Settlement Fund under the terms of the Settlement Agreement; and
 - g. to rule upon such other matters as the Court may deem appropriate.
23. Fourteen (14) days before the Final Approval Hearing, Class Counsel shall file and serve (i) a motion for final approval and (ii) any application for an Incentive Award to the Class Representative.
24. Class Counsel shall file their motion for attorneys' fees and expenses thirty (30) days before the Objection/Exclusion deadline. Class Counsel shall post their fee petition to the Settlement Website within twenty-four hours of filing the fee petition with the Court.
25. The Final Approval Hearing may be postponed, adjourned, transferred or continued by order of the Court without further notice to the Settlement Class. At, or following, the Final Approval Hearing, the Court may enter a Final Approval Order and Judgment in accordance with the Settlement Agreement that will adjudicate the rights of all Settlement Class Members.
26. Consistent with the Settlement Agreement, the deadlines the Parties shall adhere to are as follows:

Class Notice Mailed by:	30 days following the entry of this preliminary approval order
Opt-Out/Claim/Objection Deadline:	90 days after Class Notice is sent
Claim Deadline:	90 days after Class Notice is sent
Final Approval Submissions:	14 days before Final Approval Hearing
Final Approval Hearing:	To be determined

27. Settlement Class Members do not need to appear at the Final Approval Hearing or take any other action to indicate their approval.

Additional Matters

28. All discovery and other pretrial proceedings in this case are stayed and suspended until further order of the Court except such actions as may be necessary to implement the Settlement Agreement and this Order.

29. The findings in this Order are only for the purposes of preliminary approval of the parties' settlement and, therefore, are limited to that context. In the event that the Settlement Agreement is terminated under the terms of the Settlement Agreement, or for any reason whatsoever the approval of it does not become final and is no longer subject to appeal, then: (i) the Settlement Agreement shall be null and void, including any provisions related to the award of attorneys' fees and expenses, and shall have no further force and effect with respect to any party in this case, and shall not be used in this case or in any other proceeding for any purpose; (ii) all negotiations, proceedings, documents prepared, and statements made in connection therewith shall be without prejudice to any person or party hereto, shall not be deemed or construed to be an admission by any party of any act, matter, or proposition, and shall not be used in any manner of or any purpose in any subsequent proceeding in this case or in any other action in any court or other proceeding, provided, however, that the termination of the Settlement Agreement shall not shield from subsequent discovery any factual information provided in connection with the negotiation of this Settlement Agreement that would ordinarily be discoverable but for the attempted settlement; (iii) this Order shall be vacated; and (iv) any party may elect to move the Court to implement the provisions of this paragraph, and none of the non-moving parties (or their counsel) shall oppose any such motion.

30. Counsel are authorized to use all reasonable procedures in connection with approval and administration of the Settlement that are not materially inconsistent with this Order or the Settlement Agreement, including making, without further approval of the Court, minor changes to the form or content of the Notices and Claim Form, and other exhibits that they jointly agree are reasonable and necessary. The Court reserves the right to approve the Agreement with such modifications, if any, as may be agreed to by the parties without further notice to the members of the Settlement Class.

31. The Court retains jurisdiction to consider all further matters arising out of or connected with the Settlement.

It is so **ORDERED**

The Clerk of the Court is hereby directed to send a certified copy of this order to counsel of record.

Entered this ____ day of April, 2020.



NORMAN K. MOON
SENIOR UNITED STATES DISTRICT JUDGE