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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JUAN ROMERO, FRANK TISCARENO, and KENNETH ELLIOTT on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

SECURUS TECHNOLOGIES, INC.,

Defendant.

Case No. 16-CV-1283-JM-MDD

CLASS ACTION

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Date: June 5, 2020
Time: 8:30 a.m.
Ctrm.: 5D
Judge: Hon. Jeffrey T. Miller

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Kenneth Elliott, Juan Romero, and Frank Tiscareno (collectively, "Plaintiffs"), on behalf of themselves and the Class they represent, respectfully move for preliminary approval of a proposed class action settlement ("Settlement" or "Settlement Agreement") reached with Defendant Securus Technologies, Inc. ("Securus").[1] *See* Settlement Agreement, attached as Exhibit 1 to the Declaration of Robert L. Teel.

Plaintiffs have diligently and zealously litigated this case over the past four years. Following extensive discovery and motion practice, and multiple rounds of settlement negotiations, Plaintiffs and Securus reached the Settlement whereby Securus has agreed to implement substantial business changes to ensure that there is no inadvertent recording of detainee-attorney calls and safeguard the constitutional, statutory, and common law privacy rights of the Class. The proposed injunctive relief requires Securus: (1) provide a "Private Call" option that allows callers who intend to make private calls to make this designation at the commencement of the call (at no additional charge or cost from Securus); (2) provide additional message prompts advising users about call monitoring and recording so that both attorney and detainee clients can clearly ascertain whether the call is on a private line or not; (3) post information that will facilitate the designation of private numbers on Securus's website(s); and (4) submit a declaration to Class Counsel and the Court every six months for the next five years to ensure compliance with the requirements of the Settlement Agreement.

Securing injunctive relief to preserve and secure the Constitutional and statutory privacy rights of the Class is important and valuable to the Class. Plaintiffs' determination that it is in the best interests of the Class to forego seeking class-wide

[1] Capitalized terms shall have the same meaning as set forth in the Settlement Agreement attached as Exhibit 1, hereto, unless otherwise noted.

monetary relief in order to ensure the confidentiality of attorney-detainee phone calls is based in part on a recognition that the Ninth Circuit's grant of Securus's Rule 23(f) petition for interlocutory review of this Court's order certifying a class jeopardizes the prospect for *any* class-wide relief. Plaintiffs similarly determined that this Court's Order denying their motion for partial summary judgment on whether intent is a required element of their principal statutory claim—and the Ninth Circuit's refusal to grant interlocutory review of that order—creates a meaningful risk that Plaintiffs would be unable to recover class-wide damages. Based on, *inter alia*, the foregoing, the Settlement is fair, adequate, and reasonable.

The Settlement is the product of extensive arms-length negotiations that took place over several months with the assistance of an experienced mediator. The Settlement was negotiated by lawyers with a depth of experience in alleged data privacy breaches and in class action litigation more broadly, and was reached only after the parties were well-informed of all relevant facts and the strengths and weaknesses of Plaintiffs' case—and of Securus's defenses—and after Plaintiffs' counsel could be reasonably certain that the deal represents the best possible result for the Class given the circumstances of this case. Consequently, the Settlement satisfies the criteria for preliminary approval.

II. OVERVIEW OF THE LITIGATION

A. Substantial Early Motion Practice Challenged The Pleadings

On May 27, 2016, Juan Romero and Frank Tiscareno, two former inmates of the San Diego County Central Jail, initiated a putative class action against Securus, alleging that it had intentionally eavesdropped on and recorded detainee-attorney phone calls despite advertising the security and privacy of those calls. [D.E. 1]. The initial Complaint asserted claims for injunctive relief, common law negligence, and violation of Section 636 of the California Invasion of Privacy Act ("CIPA"). *Id.*

In response to a motion to dismiss [D.E. 4], Plaintiffs filed a First Amended Complaint, adding Kenneth Elliott, a criminal defense lawyer as an additional

plaintiff who would serve as the representative of a putative subclass of attorneys. [D.E. 8]. The First Amended Complaint also added new claims for conversion, unfair competition, unjust enrichment, fraudulent concealment, fraud and intentional misrepresentation. *Id*. Securus once again moved to dismiss. [D.E. 11]. After full briefing, the Court granted Securus's motion in part, dismissing with prejudice Plaintiffs' conversion claim, and dismissing without prejudice their claims of fraud and intentional misrepresentation. [D.E. 21]. Plaintiffs filed a Second Amended Complaint, which Securus again moved to dismiss, and the Court once again granted Securus's motion in part and denied it in part. [D.E. 29].

On February 8, 2017, Plaintiffs filed the operative Third Amended Complaint, which alleges claims for a violation of CIPA, unfair competition, violation of Business and Professions Code Sections 17200, *et seq.*, concealment, fraud, negligence, and unjust enrichment. [D.E. 30]. Securus answered the Third Amended Complaint, and with the pleadings settled, the litigation proceeded to discovery.

B. Discovery

Extensive discovery ensued, including the exchange of multiple sets of written interrogatories and requests for admission, the production of thousands of documents, and the issuance of a number of third-party subpoenas. The Parties filed several motions to resolve discovery disputes that arose over the course of the litigation, including Plaintiffs' request to expedite discovery [D.E. 32, 33, 38, 39], Plaintiffs' motion to compel additional responses to certain interrogatories, requests for production, and requests for admission [D.E. 59], Securus's motion for relief from the discovery order of Magistrate Judge Mitchell D. Dembin [D.E. 70, 81], Plaintiffs' *ex parte* application regarding Securus's interrogatory responses and the existence and/or production of audio recordings [D.E. 85], and the Parties' joint motion to resolve whether Securus must respond to outstanding discovery while its motion to stay proceedings was pending [D.E. 161].

C. Plaintiffs' Summary Judgment And Class Certification Motions

Plaintiffs first moved for class certification on October 10, 2017, seeking both Rule 23(b)(2) and 23(b)(3) classes. [D.E. 62]. As evidence of numerosity, Plaintiffs submitted a spreadsheet prepared by their counsel—based on other evidence—that purported to identify calls made by San Diego inmates to certain phone numbers designated for privacy. [D.E. 62-4 at 33-63; D.E. 62-5 at 2-5; D.E. 63 through D.E. 63-7; and D.E. 74-2 at 20-31]. Plaintiffs maintained that the underlying evidence disclosed at least 123 potential class members in San Diego, and even more statewide. [D.E. 62-1 at 8-10]. Plaintiffs argued that the commonality and typicality requirements for class certification were met by, without limitation, a common contention capable of class-wide resolution, namely whether Securus recorded phone conversations between attorneys and detainees recorded without permission. [D.E. 62-1 at 11]. Plaintiffs supported their adequacy argument with declarations from Plaintiffs and counsel attesting to, without limitation, Plaintiffs' commitment to the Class and counsels' experience in prosecuting complex litigation cases and unlawful recording class actions." [D.E. 62-1 at 14-16].

On April 12, 2018, the Court denied Plaintiffs' motion for class certification without prejudice, explaining that Plaintiffs had "fail[ed] to present sufficient evidence . . . that there is an administratively feasible manner to determine whether a class action is the superior method for prosecuting Plaintiffs' claims." [D.E. 93 at 5]. The Court found that, given Plaintiffs' submissions, the Class could be as small as 22 members or as large as thousands and numbers at the low end might not produce efficiencies from class litigation. *Id.* at 5-6. The Court allowed Plaintiffs to renew their motion within 90 days notwithstanding Securus' position that it had completed its production and that the deadline for discovery on class certification issues had passed. *Id.* at 6.

Plaintiffs thereafter moved for partial summary judgment, asking the Court to hold that CIPA § 636 requires no proof of intent to trigger its civil liability. [D.E.

101]. On July 11, 2018, Plaintiffs also filed a renewed motion for class certification. [D.E. 122-1]. On November 21, 2018, the Court issued an order resolving both motions. [D.E. 141]. First, the Court denied Plaintiffs' motion for partial summary judgment, concluding that CIPA § 636 does not create a strict liability offense, and that Plaintiffs motion failed to establish there is no genuine dispute of material fact as to whether Securus had the intent necessary to violate CIPA. *Id.* at 19. Second, the Court granted in part Plaintiffs' renewed motion for class certification. *Id.* at 33-34. The Court certified a Rule 23(b)(2) and Rule 23(b)(3) class for Plaintiffs' CIPA claim, and denied class certification for each of Plaintiffs' other claims. *Id.* The Court also appointed as class counsel the Law Office of Robert L. Teel, the Law Offices of Ronald A. Marron, APLC, and Foley & Lardner, LLP. *Id.* at 34

D. Both Sides Seek Interlocutory Appellate Review

On December 3, 2018, Plaintiffs filed an interlocutory request to appeal the denial of their motion for partial summary judgment. [D.E. 143]. The Ninth Circuit denied this request on January 16, 2019. [D.E. 149]. Both Plaintiffs and Securus petitioned the Ninth Circuit for review of the Court's class certification order pursuant to Federal Rule of Civil Procedure 23(f). [D.E. 144, 145]. Plaintiffs sought review of the Court's denial of class certification as to all claims other than CIPA, arguing that they were based on the same central question and common proof. [D.E. 144]. Securus sought review of three questions: (1) whether the Court could certify class claims under § 636(a) without any evidence that Securus had a common, class-wide intention about recording, (2) whether class litigation was superior to other forms of litigation in this case, and (3) whether the Court had the authority to grant Plaintiffs' motion for class certification after having denied Plaintiffs' first motion for class certification. [D.E. 145]. Securus also argued that this Court had erred because the Court misapplied the law governing allegations of improperly recorded calls after 2014. *Id.* On February 27, 2019, the Ninth Circuit denied

Plaintiffs' Rule 23(f) petition, but granted Securus's petition. [D.E. 155, 156]. On April 17, 2019, the Court stayed the action pending Securus's appeal. [D.E. 168].

E. Settlement Negotiations

The parties participated in two all day mediation sessions with the Honorable Leo S. Papas (Retired), first on October 3, 2018 and again on August 16, 2019. While the mediations did not result in an immediate settlement, the parties made significant progress and continued to engage in direct settlement negotiations following the conclusion of the second mediation. Ninth Circuit Mediator Sasha M. Cummings was appointed as a mediator following the Ninth Circuit's grant of review for Securus's Rule 23(f) petition. Ms. Cummings encouraged the parties to continue their negotiations during periodic status calls and an agreement was eventually reached, the terms of which are memorialized in the Settlement Agreement dated April 17, 2020. At all times, the settlement negotiations were adversarial, non-collusive, and conducted at arms-length.

III. THE TERMS OF THE SETTLEMENT AGREEMENT

A. Class Definition

The Class consists of:

> Every person who was a party to any portion of a conversation between a person who was in the physical custody of a law enforcement officer or other public officer in California, and that person's attorney, on a telephone number designated or requested not to be recorded, any portion of which was eavesdropped on or recorded by Defendant Securus Technologies, Inc. by means of an electronic device during the period July 10, 2008 through whichever occurs first: (1) the date on which the court grants preliminary approval of the settlement; or (2) June 16, 2020.

B. Injunctive Relief

The proposed Settlement Agreement provides injunctive relief designed to eliminate virtually all risk of an inadvertent recording of attorney-detainee phone calls. Specifically, the injunctive relief provides:

1. **Verification and No Recording of Approved Numbers.**[2] Within six (6) months of the date the Court enters judgment granting final approval of the settlement, Securus will make available to its current and future California facility customers a "Private Call" option that allows persons who intend to make calls to what they believe to be an Approved Number to make this indication at the commencement of the call. If the dialed number is in fact an Approved Number, the call will be connected and will not be recorded. If the dialed number is not an Approved Number, the call will not be completed, and the calling party will have the option of calling the same number via other non-Private Call options. Securus will not unilaterally impose any additional charge or cost for the use of this "Private Call" option.

2. **Message Prompts.** Within six (6) months of the date the Court enters judgment granting final approval of the settlement, Securus will make available to its current and future California customers the following message prompts as alternatives to its standard message prompts:

- For all calls to non-Approved Numbers, a prompt advising that the call will be recorded and may be monitored, along with basic instructions to contact the facility and request Approved Number treatment; and
- For all calls to Approved Numbers, a prompt advising that the call will not be recorded and cannot be monitored.

3. **Designation of Approved Numbers.** Within six (6) months of the date the Court enters judgment granting final approval of the settlement, Securus will post on its public facing website(s), in a reasonably conspicuous manner, information that will facilitate the designation of a telephone number as an Approved Number. This includes, but is not limited to, a description of the availability of private lines for an

[2] An "Approved Number" is a telephone number approved by a Securus customer for entry into Securus's Call Platform so that calls to that number may be completed without being recorded.

Approved Number and contact information for those who can assist in the privatization process.

4. **Compliance Reporting.** Within twelve (12) months of the date the Court enters judgment granting final approval of the settlement and within each six-month period thereafter for the next five years, Securus will serve Class Counsel and file with the Court a declaration executed under penalty of perjury describing Securus's compliance with the requirements of the Settlement Agreement. Each declaration shall, without limitation, identify the number of California customers and facilities to which it has offered the "Private Call" option and the number of customers and facilities that have and have not agreed to offer the "Private Call" option to its detainees and/or attorneys.

C. Service Award to Plaintiffs

In recognition of Plaintiffs' time and effort as class representatives and the release of their claims, the Parties agree that Securus will pay each Plaintiff a service award not to exceed twenty thousand dollars ($20,000.00), subject to Court approval.

D. Attorneys' Fees and Costs

The Parties agree that Securus will pay attorneys' fees and costs to Plaintiffs' counsel in an amount of eight hundred and forty thousand dollars ($840,000), subject to Court approval as further set forth in the Settlement Agreement. Plaintiffs' counsel will submit a fee petition and proposed order prior to the final approval hearing.

E. Release

Under the terms of the Settlement Agreement, the named Plaintiffs release their claims for injunctive relief *and* for damages. The Settlement Agreement also waives the protections of Civil Code Section 1542 as to the named Plaintiffs.

F. Notice

The parties agreed that upon issuance of the preliminary approval order, Securus will engage a third-party administrator, ILYM Group, Inc., to provide the Notice attached to the Settlement Agreement. Teel Declaration, Exhibit 1, p. 20-21.

(Exhibit A to the Settlement Agreement). The Notice will include the date and time of the final approval hearing, how to object to the settlement, information about important dates and deadlines associated with the settlement, and relevant contact information.

All persons who used Securus' phone system found in Securus' database of customers with either an address in California shall receive an email from the settlement administrator with the Notice and containing a link to a webpage maintained by the settlement administrator setting forth the Notice, the Settlement Agreement, and any other information required under the Settlement Agreement. In the event of invalid email addresses, the Settlement Administrator will directly mail hardcopies of the Notice to the addresses listed in Securus's database.

IV. APPLICABLE LEGAL STANDARDS

The Ninth Circuit maintains a "strong judicial policy" that favors the settlement of class actions. *Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). Nonetheless, the Court must first "determine whether a proposed settlement is "fundamentally fair, adequate and reasonable" pursuant to Rule 23(e). *Dalton v. Lee Publ'ns, Inc*., No. 08-CV-1072-GPC-NLS, 2015 WL 11582842, at *2 (S.D. Cal. March 6, 2015) (Curiel, J., presiding) (quoting *Stanton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003). The initial decision to approve or reject a settlement lies in the sound and broad discretion of the trial judge. *Seattle*, *supra* at 1276.

The *Manual for Complex Litigation* describes a three-step process for approving a class action settlement: (1) preliminary approval of the proposed settlement; (2) dissemination of notice of the settlement to class members; and (3) a final approval hearing. *Manual for Complex Litigation* § 21.63 (4th ed. 2004). At the preliminary approval stage, the Court must determine whether the settlement falls "within the range of possible approval". *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007). The proposed settlement should be "taken as a whole, rather than the individual component parts" in determining overall

fairness. *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1026 (9th Cir. 1998), *overruled on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). Courts are not permitted to "'delete, modify, or substitute certain provisions'". *Id*. (quoting *Officers for Justice v. Civil Serv. Comm'n of San Francisco*, 688 F.2d 615, 630 (9th Cir. 1982)). The settlement "must stand or fall in its entirety." *Id.*.

Plaintiffs' request the Court complete the first two steps of the settlement approval process by granting preliminary approval of the settlement and ordering the dissemination of the Notice to the Class Members.

V. ARGUMENT

A. The Court Should Certify the Class for the Settlement.

The Parties request for purposes of settlement only, that the Court amend its November 21, 2018 class certification order so that it consists of only a Rule 23(b)(2) class for injunctive and declaratory relief. *See* Fed. R. Civ. P. 23(c)(1)(C) ("An order that grants or denies class certification may be altered or amended before final judgment."); *See also In re MDC Holdings Sec. Litig.*, 754 F. Supp. 785, 801 (S.D. Cal. 1990) ("Throughout the trial, the district court retains the authority to amend the certification order as may be appropriate as the case develops.").

The requested amendment does not materially change the analysis for class certification pursuant to Rule 23(a) and Rule 23(b)(2). As discussed below, and consistent with the Court's November 21, 2018 class certification order, the Parties stipulate for purposes of the Settlement Agreement only that the Class meets the requirements of Rule 23(a) as well as the requirements to certify an injunctive relief class under Rule 23(b)(2).

1. The Class is Sufficiently Numerous.

Rule 23(a)'s first requirement—numerosity—is satisfied where "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). The numerosity requirement is relaxed if the representative plaintiff is seeking an injunction or a declaratory judgment because certifying a class would avoid

duplicative suits brought by other class members. *Reynoso v. RBC Bearings, Inc.,* No. SACV 16-01037 JVS(JCGx), 2017 WL 6888305, at *5 (C.D. Cal. Oct. 5, 2017), *decertified on other grounds by Reynoso v. All Power Mfg. Co.,* No. SACV 16-01037 JVS(JCGx), 2018 WL 5906645, at *6 (C.D. Cal. Apr. 30, 2018) (citing *Sueoka v. United States,* 101 F. App'x 649, 653 (9th Cir. 2004)). "[C]ourts generally find that the numerosity factor is satisfied if the class comprises 40 or more members, and will find that it has not been satisfied when the class comprises 21 or fewer." *In re Facebook, Inc., PPC Advert. Litig.,* 282 F.R.D. 446, 452 (N.D. Cal. 2012), *aff'd sub nom. Fox Test Prep v. Facebook, Inc.,* 588 F. App'x 733 (9th Cir. 2014); *see also Campbell v. Facebook Inc.,* 315 F.R.D. 250, 261 (N.D. Cal. 2016). In its order granting class certification, the Court noted that Plaintiffs identified 246 potential class members and held that joinder of this many plaintiffs would be impracticable. [D.E. 141 at 31]. Accordingly, numerosity is satisfied.

2. Class Members Share Common Questions of Law and Fact.

The second requirement of class certification asks whether there are "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Commonality is construed permissively and is demonstrated when the claims of all class members "depend upon a common contention" that is "capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes, et al.*, 564 U.S. 338, 350 (2011); *See also Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1019 (9th Cir. 1998).

The Court previously held that "a single common question can satisfy the commonality requirement of Rule 23(a)(2)" and that "common issues dominate this litigation." [D.E. 141 at 31]. The Court identified the following two class-wide questions that may be answered by common proof: (1) "[w]hether Securus recorded calls between detainees and attorneys without their permission," and (2) "[h]ow and why Securus recorded detainee-attorney calls" [D.E. 141 at 24].

3. Plaintiffs' Claims are Typical of the Class Members' Claims.

The third element of Rule 23(a)—typicality—directs courts to focus on whether the plaintiff's claims or defenses "are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The test of typicality is "whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Ambrosia v. Cogent Commun., Inc.,* 312 F.R.D. 544, 554 (N.D. Cal. 2016) (citations omitted). Representative claims are typical "if they are *reasonably coextensive* with those of absent class members; they need not be substantially identical." *Id.* (citation omitted). Ultimately, this requirement ensures that "the interest of the named representative aligns with the interests of the class." *Wolin v. Jaguar Land Rover N Am. LLC,* 617 F.3d 1168, 1175 (9th Cir. 2010) (citation omitted).

Plaintiffs' claims are typical of those of the Class. The Court previously held that "[l]ike all class members, Plaintiffs' confidential calls were recorded by Securus without their permission." [D.E. 141 at 31]. As such, the injunctive and declaratory relief achieved by the Settlement would apply to Plaintiffs and other members of the Class equally.

4. Plaintiffs and Class Counsel Adequately Represent the Class.

Rule 23(a)(4) permits class certification if the "representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This factor requires (1) that the representative plaintiffs do not have conflicts of interest with the class, and (2) that plaintiffs are represented by qualified and competent counsel. *Hanlon,* 150 F.3d at 1020. The Court already determined when it previously certified the Class that Plaintiffs and Class Counsel will fairly and adequately protect the Class Members' interests, and nothing has changed in that regard. [D.E. 141 at 32-33].

Plaintiffs share the same interest as the other members of the Class, and there is no evidence of any conflict of interest between Plaintiffs and counsel with other absent class members. Plaintiffs are also represented by qualified counsel who have been committed to the prosecution of this case from the outset. Class Counsel are experienced in complex litigation and class actions of similar size, scope, and complexity to this class action and have the resources necessary to see this litigation through to its conclusion. *See* Teel Declaration, ¶ 3, pg. 1. Moreover, Class Counsel have vigorously litigated this action in order to protect the interests of the Class and to maximize the relief obtained for all Class Members, as evidenced by, *inter alia*, their substantial motion practice and discovery requests. *See Kanawi v. Bechtel Corp.,* 254 F.R.D. 102, 111 (N.D. Cal. 2008) (finding adequacy met where plaintiffs "demonstrated their commitment to th[e] action" and their attorneys were "qualified to represent the class").

In granting class certification of the CIPA claims, the Court determined that the "named Plaintiffs and class counsel will fairly and adequately protect the interests of the class" because "Plaintiffs' claims are typical of the class" and Class Counsel submitted "declarations detailing their qualifications and experience with class actions." [D.E. 141 at 32]. Since the Court's order granting class certification, Class Counsel have continued to vigorously litigate this action before this Court and the Ninth Circuit and have engaged in extensive settlement negotiations, further evidencing that Rule 23(a)'s adequacy requirements remain satisfied.

5. The Proposed Class Satisfies Rule 23(b)(2).

In addition to the four requirements for certification under Rule 23(a), the Class also satisfies the additional requirement imposed under Rule 23(b)(2), that Defendant has "acted or refused to act on grounds that apply generally to the class," thereby making injunctive relief appropriate. Fed. R. Civ. P. 23(b)(2).

The "key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be

enjoined or declared unlawful only as to all of the class members or as to none of them.'" *Dukes,* 564 U.S. at 360 (citation omitted).

In the instant matter, the Court has determined that "a single injunction or declaratory judgment would provide relief to each member of the class." [D.E. 141 at 30 (quoting *Dukes*, 564 U.S. at 360)]. The Court specifically found that "[a]n injunction prohibiting Securus from eavesdropping on, listening to, recording, disclosing, or using communications between detainees and their attorneys without their permission would prevent an issue similar to the one presented here from recurring," and that such a ruling "would benefit all members of the class." [D.E. 141 at 29].

B. <u>The Court Should Approve Plaintiffs' Counsel As Class Counsel.</u>

When certifying a class, the Court must also consider the appointment of class counsel. The relevant factors in deciding whether to approve class counsel are: (1) the work counsel has done in identifying or investigating potential claims in the action; (2) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (3) counsel's knowledge of the applicable law; and (4) the resources that counsel will commit to representing the class. *See* Fed. R. Civ. P. 23(g)(1)(A).

As set forth above, the Court has previously found Class Counsel adequate to fairly protect the interests of the Class. [D.E. 141 at 32-2]. Plaintiffs now ask the Court to reconfirm the appointment of Foley & Lardner LLP, the Law Offices of Ronald A. Marron, APLC, and the Law Office of Robert L. Teel as Class Counsel for the Settlement. Class Counsel satisfy the criteria of Rule 23(g). First, they have devoted—and will continue to devote—a significant amount of time and effort to this litigation, including through their substantive motion practice, pursuit of discovery, and settlement discussions. *See* Teel Declaration, ¶¶ 3, 4, 10, 13, 14, and 21 . Second, Class Counsel have extensive experience in complex litigation and class actions and

have been appointed class counsel or have worked on numerous consumer class actions throughout the country. *See* Teel Declaration, ¶¶ 13 and 17.

In short, Class Counsel have the resources necessary to conduct litigation of this nature, have already diligently investigated the claims at issue in this action and dedicated substantial resources to the case, and will continue to do so throughout its conclusion. Accordingly, Foley & Lardner LLP, the Law Offices of Ronald A. Marron, APLC, and the Law Office of Robert L. Teel meet the adequacy requirements of Rule 23, and should be reconfirmed and appointed Class Counsel for the Settlement.

C. The Proposed Settlement Merits Preliminary Approval.

Rule 23(e) requires judicial approval of a proposed class action settlement based on a finding that the agreement is "fair, reasonable, and adequate." *See Lane v. Facebook, Inc.,* 696 F.3d 811, 818 (9th Cir. 2012). "In assessing a settlement proposal, a district court is required to balance a number of factors, namely:

> the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement.

Lopez v. Mgmt. & Training Corp., No. 17cv1624 JM(RBM), 2019 WL 6829250, at *5 (S.D. Cal. Dec. 13, 2019) (Miller, J.) (quoting *Hanlon*, 150 F.3d at 1026). Preliminary approval of a settlement is appropriate "'[i]f the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval.'" *Tableware*, *supra* at 1079 (quoting *Manual for Complex Litigation* § 30.44 (2nd ed. 1985)). The proposed settlement need not be ideal, but it must be fair and free of collusion, consistent with counsel's fiduciary obligations to the class.

Hanlon, supra at 1027; *See also Churchill Vill., L.L.C. v. GE*, 361 F.3d 566, 575-76 (9th Cir. 2004).

A full fairness analysis is unnecessary at the preliminary approval stage because some of these factors may not able fully assessed until the Court conducts a final fairness hearing. *Dalton*, 2015 WL 11582842, at *6. "At this preliminary approval stage, the court again need only 'determine whether proposed settlement is within the range of possible approval'" and thus, whether the notice to the class and the scheduling of a formal fairness hearing is appropriate. *Alberto v. GMR, Inc*., 252 F.R.D. 652, 666-67 (E.D. Cal. 2008) (citation omitted).

The court's primary concern "is the protection of those class members, including the named Plaintiffs, whose rights may not have been given due regard by the negotiating parties." *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. Of S.F.*, 688 F.2d 615, 624 (9th Cir. 1982) (citation omitted). "In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004).

As explained by the Supreme Court, "[n]aturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation." *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971). Here, the Settlement Agreement represents a fair, adequate, and reasonable result for Class Members because they: (1) will receive notice of the litigation and the changes in Securus' privacy practices; (2) will be given an opportunity to object; and (3) are not bound to release any rights they may have to seek and obtain monetary damages or other relief.

The proposed Settlement satisfies the standard for preliminary approval because it: (1) falls within the range of possible approval; (2) is the product of serious, informed, non-collusive negotiations; (3) has no obvious deficiencies; and (4) does

not improperly grant preferential treatment to class representatives or segments of the class. *Lopez v. Mgmt. & Training Corp.*, 2019 WL 6829250, at *5; *see also Sierra v. Kaiser Found. Hosps.*, No. 3:18-cv-00780-KSC, 2019 WL 5864170, at *9 (S.D. Cal. Nov. 7, 2019).

1. The Settlement Is Within the Range of Possible Approval.

The Settlement is a desirable result for the Class, and well within the range of possible approval. To determine whether the Settlement is within the range of possible approval, "courts primarily consider plaintiffs' expected recovery balanced against the value of the settlement offer." *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007). This requires the Court to evaluate the strength of Plaintiff's case. *Id.*

The proposed Settlement provides significant and meaningful injunctive relief that is designed to eliminate virtually all risk of an inadvertent recording of attorney-detainee phone calls, thereby protecting not only the state and federal constitutional rights of the Class, but also of the public. *See* Section III, B, *supra*.

In contrast to the tangible, immediate benefits of the Settlement, the outcome of continued litigation, trial, and appeal is uncertain and could add years to this litigation. Securus has vigorously denied—and continues to deny—any wrongdoing, and absent settlement, Securus would surely continue to defend this action aggressively, with the opportunity to prevail at multiple different procedural opportunities. Indeed, although Plaintiffs and their counsel believe in the merits of their case, they recognize the numerous hurdles they could face should they continue to litigate the action. For instance, with the Ninth Circuit's order granting Securus's Rule 23(f) petition for review of the order granting class certification (and the Ninth Circuit's denial of Plaintiffs' petition for interlocutory review of the order), Plaintiffs faced the distinct possibility (whatever probabilities one might assign to it) that the Ninth Circuit could reverse this Court's order granting class certification.

In addition, because the Court rejected Plaintiffs' theory of strict liability on summary judgment (and the Ninth Circuit denied Plaintiffs' petition for interlocutory review of this order), to recover any damages at trial Plaintiffs and other Class Members would need to go beyond strict liability and prove some level of scienter. This could be a challenging burden of proof as Securus has consistently maintained that any call recordings that occurred were random and inadvertent, and resulted from a software glitch. [*See* D.E. 32-1 ¶ 7; D.E. 62-1 at 9 n.5]. In short, there is a genuine risk that absent settlement, Securus could prevail in motion practice, at trial, or on appeal, resulting in no relief to Plaintiffs or the class. *See Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 966 (9th Cir. 2009) (noting that the elimination of "[r]isk, expense, complexity, and likely duration of further litigation" are factors that weigh in favor of approval of settlement); *see also Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972) ("[I]n any case there is a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.").

Considering the substantial risk of further litigation and the meaningful relief provided under the Settlement, the Settlement falls well within the range of possible approval. *See McDonald v. CP OpCo, LLC*, No. 17-cv-04915-HSG, 2019 WL 2088421, at *4 (N.D. Cal. Jan. 28, 2019) ("Additionally, difficulties and risks in litigation weigh in favor of approving a class settlement."); *See also Schofield v. Delta Air Lines, Inc.*, No. 18-cv-00382-EMC, 2019 WL 955288, at *5-*6 (N.D. Cal. Feb. 27, 2019) (noting "the potential vulnerabilities in Plaintiff's case" and finding the settlement consideration adequate for preliminary approval despite being a "very large discount on a possible recovery . . . based on statutory damages").

While Plaintiffs are confident in the strength of their Class claims, Defendant is equally confident in its defenses, and based on the foregoing Plaintiffs acknowledge there is risk they could be unable to obtain a jury verdict against

Defendant. Even if they prevailed, Plaintiffs face the risk of lengthy appeals after the proceedings were completed. Finally, there is a possibility that following the appellate proceedings, the Court could decide to decertify the Class in whole or part, presenting further risks and delays.

Accordingly, "Plaintiffs' strong claims are balanced by the risk, expense, and complexity of their case, as well as the likely duration of further litigation." *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, MDL No. 2672 CRB (JSC), 2016 U.S. Dist. LEXIS 148374, at *748 (N.D. Cal. Oct. 25, 2016). "Settlement is favored in cases [such as this one] that are complex, expensive, and lengthy to try." *Id.* (citing *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 966 (9th Cir. 2009)). Thus, these risk and delay factors support approval of the Settlement.

2. The Settlement Is the Product of Arms-Length Negotiations.

Settlements that are the result of hard-fought litigation and arms-length negotiations among experienced counsel, such as this one, are entitled to an initial presumption of fairness. *See Rodriguez v. W. Publ'g Corp.*, 563 F.3d at 965 ("We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution.").

The proposed Settlement is the product of informed arms-length negotiations because it was preceded by four years of adversarial litigation involving substantial discovery, including the exchange of multiple sets of written discovery and hundreds of documents, and extensive motion practice, including various discovery motions, a motion for partial summary judgment, two motions for class certification, and three petitions for interlocutory review. *See Ruch v. Am Retail Grp., Inc.*, No. 14-cv-05352-MEJ, 2016 WL 5462451, at *2-*8 (N.D. Cal. Mar. 24, 2016) (holding that the process by which the parties reached their settlement, which included "extensive pre-mediation exchanges of information" and "another several weeks negotiating the long form settlement agreement, with back and forth on the details of the settlement . . . weigh[ed] in favor of preliminary approval"); *See also Harris v. Vector Mktg.*

Corp., No. C-08-5198 EMC, 2011 WL 1627973, at *8 (N.D. Cal. Apr. 29, 2011) (settlement negotiations were not collusive where "the parties arrived at the settlement after engaging in extensive discovery and after fully briefing their respective motions for summary judgment"). At the time of Settlement, Plaintiffs and Class Counsel had a full understanding of the strengths and weaknesses of Plaintiffs' claims and Defendant's defenses and were able to assess whether the change in business practices and injunctive relief would adequately benefit the class when weighed against the risks of continuing litigation. *See Harris*, 2011 WL 1627973, at *8.

Moreover, the Settlement was reached only after the parties participated in two in-person mediation sessions with an experienced mediator, and several months of continued settlement negotiations supervised by the Ninth Circuit Mediator—all of which "further suggests that the parties reached the settlement in a procedurally sound manner and that it was not the result of collusion or bad faith by the parties or counsel." *Id.; See also Manouchehri v. Styles for Less, Inc.*, No. 14cv2521 NLS, 2016 WL 3387473, at *5 (S.D. Cal. June 20, 2016) ("A mediator's involvement during the course of settling a class action is evidence of arms-length, non-collusive negotiations"). Accordingly, the proposed Settlement is the product of serious, informed, non-collusive negotiations and merits an initial presumption of fairness.

The recommendation of experienced counsel in favor of settlement also carries a "great deal of weight" in a court's determination of the reasonableness of a settlement. *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1174 (S.D. Cal. 2007). "The weight accorded to the recommendation of counsel is dependent on a variety of factors; namely, length of involvement in litigation, competence, experience in the particular type of litigation, and the amount of discovery completed." 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* §11:47 (4th ed. 2002).

Plaintiffs and Class Members are represented by a leading Am Law 200 law firm (Foley & Lardner LLP) and other counsel with extensive experience in complex litigation and class actions (the Law Offices of Ronald A, Marron, APLC and the Law Office of Robert L. Teel). Class Counsel believe that the settlement provides a fair, adequate, and reasonable recovery for Class Members. As Class Counsel are experienced attorneys in this field, their opinion that the Settlement is fair, adequate, and reasonable for Class Members also weighs in favor of approval of the Settlement.

Where, as here, extensive discovery was taken, the parties thoroughly litigated the various issues (including the Court ruling on two motions for class certification and a motion for summary adjudication), and trial is approaching, these factors "weigh[] in favor of the proposed settlement." *Cervantez v. Celestica Corp.*, No. EDCV 07-729-VAP (OPx), 2010 WL 2712267, at *5 (C.D. Cal. July 6, 2010). The Parties took extensive discovery.

3. The Settlement Has No Deficiencies.

The Settlement is also free of any defects. A court is likely to find a settlement free from obvious deficiencies when it provides a real, immediate benefit to the class despite numerous risks. *See In re Tableware,* 484 F. Supp. 2d. at 1080.

As noted above, the injunctive relief afforded is significant in light of the serious risks Plaintiffs face in obtaining relief for the Class. With Securus' appeal pending, Plaintiffs face the imminent risk that the Ninth Circuit could reverse class certification or that they would face evidentiary hurdles in establishing that any recordings were made with any requisite amount of scienter. Under the Settlement Agreement, Class Members receive immediate, meaningful injunctive relief that fully remedies Securus's alleged recording of detainee-attorney calls. *See Stathakos v. Columbia Sportswear Co.*, No. 4:15-cv-04543-YGR, 2018 WL 582564, at *5 (N.D. Cal. Jan. 25, 2018) (approving injunctive settlement where "continued litigation could not result in any greater injunctive relief to the Class and would only deprive the class of immediate relief"). "Based on th[e] risk and the anticipated

expense and complexity of further litigation, the [C]ourt cannot say that the proposed settlement is obviously deficient." *In re Tableware,* 484 F. Supp. 2d at 1080.

4. The Settlement Does Not Provide Preferential Treatment.

The Settlement does not give preferential treatment to any Class Member, and provides injunctive relief that applies equally to every Class Member. While the Settlement Agreement does authorize Plaintiffs to seek a service award for their role as named plaintiffs in this lawsuit, "the Ninth Circuit has recognized that service awards to named plaintiffs in a class action are permissible and do not render a settlement unfair or unreasonable." *Harris,* 2011 WL 1627973, at *9 (citing *Stanton v. Boeing Co.,* 327 F.3d 938, 977 (9th Cir. 2003)). Additionally, although this Court will ultimately determine whether Plaintiffs are entitled to such an award and the reasonableness of the amount requested, the proposed award is not outside the range of reasonableness. *See e.g.*, *Beck-Ellman v. Kaz USA, Inc.*, No. 3:10-CV-02134-H-DHB, 2013 WL 10102326, at *7 (S.D. Cal. June 11, 2013) (approving $20,000 incentive award); *Fulford v. Logitech, Inc.*, No. 08-CV-02041, 2010 WL 807448, at *3 n.1 (N.D. Cal. 2010) (collecting cases awarding service payments ranging from $5,000 to $40,000). Thus, the absence of any preferential treatment supports preliminary approval of the Settlement Agreement.

5. The Settlement Provides the Best Notice Practicable.

The second step of the approval process is to disseminate notice about the Settlement to the Class. *See Manual for Complex Litigation*, *supra*, at §21.63. Class members are entitled to receive the best notice practicable about the settlement. Fed. R. Civ. P. 23(c)(2). Notice should be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). "[T]he mechanics of the notice process are left to the discretion of the court subject only to the broad 'reasonableness' standards

imposed by due process." *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 120 (8th Cir. 1975).

Here, the Settlement Administrator will be provided with the most current list of names, email addresses, and physical addresses of Class Members based on Defendant's records. The settlement administrator will then email (and if necessary, mail) the Notice to all known Class Members. The Notice directs Class Members to the Settlement website, where they can find Settlement-related documents, including the Settlement Agreement, the Notice, and other pertinent information.

Further, the proposed Class Notice is plain, easily understood, consistent with the guidelines set forth by the Federal Judicial Center. *See* Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide, Federal Judicial Center (January 1, 2020), https://www.fjc.gov/content/judges-class-action-notice-and-claims-process-checklist-and-plain-language-guide-0. [Last visited May 17, 2020.] The Class Notice provides neutral, objective, and accurate information about the nature of the litigation and the Settlement. The Class Notice describes the claims, the Class Members, the relief provided under the Settlement, and Class Member's rights and option to appear at the Final Approval Hearing personally or through counsel. The Parties submit that the Class Notice provides the best notice practicable under the circumstances and will be highly effective in reaching the Class Members.

6. Rule 23(b)(2) Does Not Afford an Opportunity to Opt Out.

As set forth in the Settlement Agreement and Notice, Class Members will have an opportunity to object to the Settlement. *See* Teel Declaration, ¶15. While Class Members must be given an opportunity to *object* to the Settlement, because the opportunity to request exclusion from a proposed settlement is limited to members of a (b)(3) class, there is no opportunity to opt out. Fed. R. Civ. Proc. 23 Advisory Committee Notes – 2003 Amendment. Unlike the named Plaintiffs, Class Members are not being bound under Fed. R. Civ. Proc. 23(e)(1)(B) and 23(e)(2) by the release, and there is therefore nothing to opt out from.

Class Members' rights are protected by the mechanisms provided under Rule 23 for a Rule 23(b)(2) class, namely approval by the Court after notice to the Class and a fairness hearing at which dissenters can voice their objections, and the availability of review on appeal. The Notice provides Class Members with individual notice of the litigation and Settlement, ample opportunity to object, and an explicit warning that their rights are being affected. Nothing more is required.

VI. THE PROPOSED SCHEDULE OF EVENTS

The last step in the settlement process is to hold a final approval hearing at which the Court will make a final decision about whether to approve the Settlement pursuant to Rule 23(e)(3). *See Manual for Complex Litigation*, *supra*, at § 21.63.

Plaintiff has submitted a proposed order concurrently with this motion, pursuant to Local Civil Rule 7.2(c), setting forth the proposed schedule of events from here through final approval. Plaintiffs believe the Court may enter the proposed order without the need for a hearing, unless the Court has questions, given that the Court will hold a final approval hearing once Class Members have been given notice and an opportunity to weigh in. Specifically, Plaintiffs propose the following schedule at the Court's convenience:

Deadline for emailing the Notice and publishing the Notice webpage	15 calendar days after entry of the proposed order
Deadline for filing a final approval motion and application for attorney fees and costs and service awards	45 calendar days after entry of the proposed order
Deadline for Class Members to object to the Settlement	75 calendar days after entry of the proposed order
Deadline for filing a reply in support of final approval and attorney fees and costs and service awards	7 calendar days before final approval hearing

Final Approval Hearing	Approximately 100 calendar days after entry of the proposed order, at the Court's convenience

Plaintiffs respectfully submit that this proposed schedule complies with Rule 23 and the Class Action Fairness Act while securing timely relief for Class Members.

VII. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this Court grant their motion for preliminary approval and enter an order substantially in the form of their proposed order filed concurrently herewith: (1) certifying the Class for purposes of the Settlement; (2) appointing Juan Romero, Frank Tiscareno, and Kenneth Elliott as class representatives; (3) appointing Foley & Lardner LLP, the Law Offices of Ronald A. Marron, APLC, and the Law Office of Robert L. Teel as class counsel; (4) granting preliminary approval of the proposed Settlement Agreement; (5) and scheduling the final approval hearing.

Dated: May 18, 2020

Respectfully submitted,

By: *s/ Robert L. Teel*
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