

Edgar Fierro v. Can't Live Without It, LLC d/b/a S'well Bottle, et al.

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN JOAQUIN
CASE NO: STK-CV-UMC-2018-0012053**

YOU MAY BE ENTITLED TO RECEIVE MONEY FROM A SETTLEMENT

A California court authorized this Notice.

This is not a solicitation from a lawyer. You are not being sued.

PURPOSE OF THIS NOTICE

The San Joaquin County Superior Court ordered this Notice to be sent to you. A settlement has been reached between the Parties in the above-entitled lawsuit on behalf of all individuals who, while residing or located in California, placed a call to Defendant Can't Live Without It, LLC's ("S'well") toll-free telephone numbers at any time during the period from March 16, 2017 through February 13, 2018, inclusive (the "Class Period"), and spoke with a representative without having been first informed or without having first consented to recordation of such call ("Settlement Class"). Members of the Settlement Class are referred to herein individually as a "Class Member" and collectively as "Class Members." You are receiving this Notice because the records of S'well and its call center provider, First Call Resolution, LLC (together, the "Defendants") indicate you are or may be a member of the Settlement Class. This Notice is designed to advise you of the proposed settlement, your rights with respect to the proposed settlement and how to obtain more information about it.

Your legal rights are affected whether you act or do not act. Read this notice carefully.

ABOUT THE LAWSUIT

On September 25, 2018, Plaintiff Edgar Fierro ("Plaintiff") filed this lawsuit. Plaintiff alleges that the Defendants violated California privacy laws, including California Penal Code sections 630 *et seq.*, as to individuals who placed calls to S'well's toll-free phone numbers while residing or located in California. Plaintiff contends that Defendants unlawfully recorded telephone calls without Class Members' prior consent. The lawsuit seeks recovery of statutory penalties, attorneys' fees and costs. Defendants deny Plaintiffs' claims and deny all liability and wrongdoing of any kind. The Court has not decided the merits of these claims; however, because of the expense and uncertainty of litigation, the parties have mutually proposed to settle this matter. The Parties have since entered into a Settlement Agreement, which the Court has preliminarily approved.

The lawyers for the Parties are:

Plaintiff's Attorneys

Daniel F. Gaines, Esq.
Alex P. Katofsky, Esq.
GAINES & GAINES, APLC
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Calabasas, CA 91301
Phone: (866) 550-0855

Defendants' Attorneys

Craig J. Mariam, Esq.
GORDON REES SCULLY MANSUKHANI LLP
633 West Fifth St., 52nd Floor
Los Angeles, CA 90071
Phone: (213) 576-5000

SUMMARY OF THE SETTLEMENT

A. Monetary Settlement

In settlement of all claims alleged, Defendants will cause to be paid to a fund \$2,300,000 (the “Maximum Settlement Amount”). The following sums will be paid from the Maximum Settlement Amount: (1) Class Counsel’s attorneys’ fees in an amount set by the Court not to exceed \$805,000 and Class Counsel’s documented litigation costs in an amount set by the Court not to exceed \$15,000; (3) a service payment to the Class Representative set by the court, not to exceed \$10,000 for his service in the Action (“Service Payment”); and (4) a reasonable amount set by the Court to the settlement administrator for administering the settlement. The amount of the Maximum Settlement Amount remaining after deductions for items (1) through (4) above is the “Net Settlement Proceeds.”

B. Release

Upon the Effective Date and subject to Defendants’ full payment of all sums required by this Settlement Agreement, the Class Representative and all Class Members who do not submit a timely and valid request for exclusion from the Settlement Class hereby release Defendants and the Released Parties (which are Defendants Can’t Live Without It, LLC d/b/a S’well Bottle and First Call Resolution, LLC, and any of their past, present, and future subsidiaries, parent companies, their predecessors in interest and/or ownership, successors in interest and/or ownership, partners, licensees, assignees, insurers, including claims under any and all insurance policies, estates, and other affiliates and/or related entities, and each of the foregoing’s respective past, present, and future officers, directors, attorneys, shareholders, indemnitees, predecessors, successors, trusts, trustees, partners, associates, principals, divisions, employees, insurers, members, agents, representatives, brokers, consultants, heirs, and assigns) from all claims that were or reasonably could have been asserted based on the factual allegations contained in the Action and which arose during the Class Period (March 16, 2017 through February 13, 2018, inclusive), including claims for violation of Penal Code Sections 632, 632.7 or 637.2 or any other State or Federal law, statute, regulation or ordinance imposing liability and/or obligations related to the recording of telephone calls.

The released claims are specifically limited to the claims set forth above and as more fully described in the Settlement Agreement.

C. Individual Payment Amount

Each Class Member who does not opt out of the Settlement and submits a valid and timely Claim Form shall receive an Individual Payment Amount. Each such Class Member shall be paid an equal share of the Net Settlement Proceeds, subject to a maximum payment of \$5,000 per Class Member if less than 100% of the Net Settlement Proceeds is claimed.

There are an estimated 2,136 individuals (measured based on unique phone numbers) who are members of the Settlement Class. By example only, were all such individuals to submit valid claims, and if final administration expenses are \$100,000, then the Net Settlement Proceeds would total \$1,370,000 and each claiming Class Member would be paid an equal share, or \$641.38 each. Your final Individual Settlement Amount is subject to change based on Class Member participation rate and the final ruling of the Court.

For tax purposes, one hundred percent (100%) of each Individual Payment Amount shall be taxable as penalties, for which an IRS Form 1099 shall be issued and no withholdings shall be made. Class Members will be solely liable for any and all tax-related obligations related to Individual Payment Amounts.

All of the payments described in this Notice will be made if and only if the Court grants final approval of the settlement. The Court may adjust the amounts of some of those payments.

YOUR RIGHTS AND OPTIONS

YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT:	
Submit A Claim Form	To participate in the Settlement Class and receive a settlement payment, you must timely submit the enclosed Claim Form to the Settlement Administrator. (See Option 1 below)
Do Nothing	If you do nothing in response to this Notice, you will receive no settlement payment, but you will be bound by the release of claims in favor of the Released Parties as further described in this Notice. (See Option 2 below)
Exclude Yourself (Opt-Out)	If you do not wish to participate in the Settlement Class, you may exclude yourself (“opt-out”). This is the only option that allows you to ever be part of any other lawsuit against the Defendants about the legal claims that were brought in this case. (See Option 3 below)
Object	Write to the Court about why you don’t like the settlement. (See Option 4 below)

• **OPTION 1 – SUBMIT A CLAIM FORM AND RECEIVE A SETTLEMENT PAYMENT**

IF YOU WISH TO RECEIVE A SETTLEMENT PAYMENT, YOU MUST COMPLETELY FILL OUT AND TIMELY SUBMIT THE ENCLOSED CLAIM FORM, POSTMARKED TO THE SETTLEMENT ADMINISTRATOR OR SUBMITTED ONLINE THROUGH THE SETTLEMENT WEBSITE NO LATER THAN FEBRUARY 16, 2019. YOU ARE NEVER REQUIRED TO GO TO COURT OR PAY ANYTHING TO THE LAWYERS IN THIS CASE. If you move, you must update your address with the Settlement Administrator. The Settlement Administrator’s address is P.O. Box 2031 Tustin, CA 92780 and the settlement website is www.CaliforniaSwellCallRecording.com.

• **OPTION 2 – DO NOTHING**

If you take no action in response to this Notice, you will not receive a settlement payment, but you will give up all rights against Defendants which are detailed in Section B above. Whether you elect to participate or not, Defendants will still fund the full amount of the settlement and no monies will revert to Defendants. Your share of the Net Settlement Proceeds may be donated to a third-party non-profit organization not affiliated with either Plaintiff or Defendants.

• **OPTION 3 – EXCLUDE YOURSELF FROM THE SETTLEMENT**

You have a right to exclude yourself (“opt out”) from the Settlement Class, but if you choose to do so, you will not receive any benefits from the proposed settlement. You will not be bound by the Settlement Agreement in this case and you will have the right to file your own lawsuit against the Defendants and pursue your own claims in a separate suit. You can opt out of the Settlement Class by mailing a written request for exclusion to the Settlement Administrator at the above-stated address. The written request must be postmarked no later than February 16, 2019. Late requests for exclusion will not be considered. To be valid, a request for exclusion must (1) state your name and last four digits of your social security number, (2) state your address and telephone number, (3) include a statement that you request exclusion from the Settlement, and (4) be signed by you.

If you exclude yourself from the settlement, your share of the Net Settlement Proceeds may be donated to a third-party non-profit organization not affiliated with either Plaintiff or Defendants. Whether you elect to participate or not, Defendants will still fund the full amount of the settlement and no monies will revert to Defendants.

• **OPTION 4 – OBJECT TO THE SETTLEMENT**

If you wish to remain a member of the Settlement Class, but you object to the proposed settlement (or any of its terms) and wish the Court to consider your objection at the Final Settlement Hearing, you may object to the proposed settlement in writing. If you object in writing, you may also appear at the Final Approval Hearing, either in person or through an attorney at your own expense. All written objections, supporting papers, and/or notices of intent to appear at the Final Approval Hearing must clearly identify the case name and number and be mailed to the Settlement Administrator at P.O Box 2031 Tustin, CA 92780. Objections must be postmarked no later than February 16, 2019. Late objections will not be considered. If the Court approves the Settlement despite your objection, you will still be bound by the Settlement. If you request exclusion from the Settlement, you cannot also object to it.

THE SETTLEMENT HEARING

The Court will conduct a final fairness hearing regarding the proposed settlement (the “Final Settlement Hearing”) on March 14, 2019, at 9:00 am, in Department 11B of the San Joaquin County Superior Court, located at 180 E. Weber Ave., Stockton, California 95202. The Court will determine: (i) whether the lawsuit should finally be certified as a class action for settlement purposes; (ii) whether the Settlement Agreement should be given the Court’s final approval as fair, reasonable, adequate and in the best interests of the Class Members; (iii) whether the Class Members should be bound by the terms of the Settlement Agreement; (iv) the amount of the attorneys’ fees and costs to be awarded to Plaintiff’s Attorneys; and (v) the amount that should be awarded to Plaintiff as a Service Payment and to the Settlement Administrator for its fees incurred to administer the Settlement. At the Final Settlement Hearing, the Court will hear all properly filed objections, as well as arguments for and against the proposed settlement. You have a right to attend this hearing, but you are not required to do so. You also have the right to hire an attorney to represent you, or to enter an appearance and represent yourself.

MORE DETAILS ABOUT THE SETTLEMENT

The above is a summary of the basic terms of the settlement. For the precise terms and conditions of the settlement, you should review the detailed “Settlement Agreement and Release of Claims” which is on file with the Clerk of the Court, available by contacting the Settlement Administrator at P.O Box 2031 Tustin, CA 92780, (888) 250-6810, and available on the settlement website at www.CaliforniaSwellCallRecording.com. The pleadings and other records in the lawsuit may be examined at any time during regular business hours at the Office of the Clerk of the San Joaquin County Superior Court, located at 180 E. Weber Ave., Stockton, California 95202, or on the settlement website.

IF YOU NEED MORE INFORMATION OR HAVE ANY QUESTIONS, you may contact the Settlement Administrator at P.O Box 2031 Tustin, CA 92780, (888) 250-6810, visit the settlement website at www.CaliforniaSwellCallRecording.com, or contact Class Counsel at (866) 550-0855. Please refer to the S’well Class Action Settlement.

PLEASE DO NOT TELEPHONE THE COURT FOR INFORMATION ABOUT THIS SETTLEMENT OR THE CLAIMS PROCESS.

DATED: December 18, 2018

SAN JOAQUIN COUNTY SUPERIOR
COURT JUDGE