

## **SETTLEMENT AGREEMENT AND RELEASE OF CLAIMS**

This Class Action Settlement Agreement and Release of Claims (“Settlement Agreement”) is made and entered into by and between Plaintiff Edgar Fierro (“Plaintiff” or “Class Representative”), individually and on behalf of all others similarly situated, on the one hand, and Defendants Can’t Live Without It, LLC d/b/a S’well Bottle (“CLWI”) and First Call Resolution, LLC (together, “Defendants”) on the other hand, subject to the terms and conditions herein and on the condition the Court grants approval of the settlement provided for in this Settlement Agreement.

**A. Definitions.** The definitions contained herein shall apply only to this Settlement Agreement and shall not apply to any other agreement, including, without limitation, any other settlement agreement, nor shall they be used as evidence, except with respect to this Settlement Agreement, of the meaning of any term. Furthermore, each defined term stated in a singular form shall include the plural form, and each defined term stated in a plural form shall include the singular form. As used in this Settlement Agreement, in addition to any definitions elsewhere in this Settlement Agreement, the following terms shall have the meanings set forth below:

1. The “Parties” means Plaintiff, the Settlement Class (as defined below) and Defendants collectively.

2. “Class Counsel” shall be the firm of Gaines & Gaines, APLC for purposes of this settlement only. Daniel F. Gaines, Kenneth S. Gaines, and Alex P. Katofsky of Gaines & Gaines, APLC are counsel of record for Plaintiff.

3. The “Action” means the case entitled “*EDGAR FIERRO, on behalf of himself and all other similarly situated, Plaintiffs, v. CAN’T LIVE WITHOUT IT, LLC, a Delaware limited liability company; FIRST CALL RESOLUTION, LLC, an Oregon limited liability company; and DOES 1 through 10, inclusive, Defendants.*” Case No. STK-CV-UMC-2018-0012053, pending before the Superior Court of the State of California for the County of San Joaquin.

4. The “Settlement Class” shall be defined as “All persons who, while residing or located in California, placed a call to Defendant Can’t Live Without It, LLC’s 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.” Defendants estimate that the class consists of approximately 2,136 individuals measured by unique phone numbers who made no more than approximately 3,600 telephone calls from California. Members of the Settlement Class are referred to herein individually as a “Class Member” and collectively as “Class Members.” Any Class Member who files a timely and valid request for exclusion, as detailed below, will be excluded from the Settlement Class. Excluded from the Settlement Class are the settling parties, their parents, subsidiaries, affiliates, officers and directors, any entity in which any Released Party has a controlling interest, all customers who make a timely election to be excluded and all judges assigned to this litigation and their immediate family members.

5. The “Effective Date” of this Settlement is the date of the later of (a) if no objections to the settlement are filed, or any objections filed are withdrawn, entry of the final approval order and judgment by the court; or (b) if there are objections to the settlement which are not withdrawn, and if an appeal, review or writ is not sought from the final approval order and judgment, the sixty-fifth (65th) day after entry of the final approval order and judgment; or (c) if objections to the settlement are filed and not withdrawn, and an appeal to the final order and judgment is filed, the date after the dismissal or denial of any appeal, review or writ, if the final approval order and judgment is no longer subject to further judicial review. The Parties acknowledge that any Class Member who fails to file a timely and valid objection lacks standing to appeal from any judgment entered pursuant to the Settlement Agreement.

6. “Released Parties” shall refer to 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.

**B. Recitals.**

1. On or about February 5, 2018, Plaintiff sent a demand letter to Defendants, alerting them of the alleged violations at issue in this Action.

2. On or about April 3, 2018, the Parties entered into an Agreement to Toll the Statute of Limitations on Plaintiff's claims so the Parties could explore whether a settlement could be reached.

3. Thereafter, the Parties engaged in targeted discovery regarding Plaintiff's claims, including the scope and potential value of those claims and Defendants' defenses to the claims. The Parties participated in mediation with Lynn Frank, Esq. on September 6, 2018, at the conclusion of which the Parties agreed to the terms of the resolution encompassed herein.

4. Thereafter, Plaintiff filed this Action, alleging claims under the California Invasion of Privacy Act, Cal. Penal Code §§ 631 *et seq.* stemming from Defendants' alleged failure to disclose to California callers to CLWI's toll-free telephone numbers that their phone calls may be recorded.

5. The Class Representative contends that Defendants violated the relevant provisions of the California Penal Code and that this case is appropriate for class certification.

6. Defendants do not admit, and expressly deny, that they have breached any duty, obligation, or agreement; that they have engaged in any illegal, tortious, or wrongful

activity; that they are liable to the Class members or any other Person; and/or, that any damages have been sustained by any Class member or by any other Person in any way arising out of or relating to the conduct alleged in the Action. Defendants further deny that the Action is appropriate for class treatment for any purpose other than this Settlement Agreement. Defendants contend that they have complied at all times with the California Penal Code and other applicable laws relating to consumer telephone privacy. It is Defendants' position that, if this case were to be litigated, class certification would be inappropriate because Plaintiff is not an adequate Class Representative, Plaintiff's claims are not typical of putative class members, the class is not ascertainable, and individual issues predominate over class issues. The Action, the negotiation and execution of this Settlement Agreement, and all acts performed or documents executed pursuant to or in furtherance of this Settlement Agreement (i) shall not be used as an admission or evidence of wrongdoing on behalf of Defendants; (ii) shall not be an admission or evidence of fault on behalf of Defendants in any action before a civil, criminal, or administrative agency; and (iii) shall not be deemed to be, and may not be used as, an admission or evidence of the appropriateness of these or similar claims for class certification in the Action or with respect to any other proceeding. The Defendants expressly reserve all rights, in the event that this Settlement Agreement shall be deemed null and void *ab initio* and shall be of no force and effect whatsoever to challenge Plaintiff's claims on all factual and procedural grounds, including but not limited to the assertion of any and all defenses

7. Class Counsel represent they have conducted a thorough investigation into the facts and law during the prosecution of the Action, including the exchange of informal discovery and the review and verification of statistical data and other facts and information provided by Defendants. Counsel for the Parties also represent they have investigated the applicable law as applied to the facts discovered regarding the alleged claims of Plaintiff and potential defenses thereto, and the damages claimed by Plaintiff.

8. It is the desire of the Parties to fully, finally, and forever settle, compromise, waive, and discharge all disputes and claims alleged in this Action.

9. Based on their own independent investigation and evaluation, Class Counsel are of the opinion (and will so represent to the Court) that settlement for the consideration, and on the terms, set forth in this Settlement Agreement is fair, reasonable, and adequate and is in the best interest of the Settlement Class in light of all known facts and circumstances, including the risk of significant delay, the risk the Settlement Class will not be certified by the Court, and the defenses asserted by Defendants. Defendants and their counsel also agree (and will so represent to the Court) that this settlement is fair and in the best interest of the Settlement Class.

10. The Parties agree that the Settlement Class may be certified for settlement purposes only and that any motion for preliminary approval seeking, *inter alia*, certification of the class is for purposes of the settlement only. If for any reason this Settlement Agreement is not approved, the certification will have no force or effect and will immediately and automatically be revoked. The Parties further agree that certification for purposes of settlement is in no way an admission that class certification is proper under Section 382 of the California Code of Civil Procedure, or any other class or representative action statute or rule. This Settlement Agreement shall not prejudice any rights: (a) to oppose class certification in this Action; or (b) to oppose class certification in any other action or proceeding. No reference shall be made to this Settlement Agreement by any Party or their respective counsel, nor shall they make any argument concerning this Settlement Agreement, in any contested proceeding to certify or decertify a class in the Action or any related proceedings. For the purposes of settlement and the proceedings contemplated herein for effectuating settlement *only*, the Parties stipulate and agree that the Class Representative shall represent the Settlement Class for settlement purposes and shall be the settlement class representative, and that Class Counsel shall be appointed as counsel for the Settlement Class.

**C. Terms of Settlement.**

1. The financial terms of the settlement are as follows:

(a) **Maximum Settlement Amount:** The Parties agree to settle this Action for total payment of Two Million Three Hundred Thousand U.S. Dollars (\$2,300,000.00) (“Maximum Settlement Amount”), without reversion or discount. Defendants shall cause their insurers to pay the Maximum Settlement Amount. The Maximum Settlement Amount includes (1) attorneys’ fees of Class Counsel, (2) litigation costs and expenses of Class Counsel (which includes, without limitation, all such fees and costs incurred to date, as well as such fees and costs to be incurred in documenting the settlement, securing Court approval of this Settlement Agreement, and obtaining judgment in the Action), (3) the Service Payment to the Class Representative, as approved by the Court, and (4) all costs of administration, including, without limitation, settlement administration fees and expenses, all amounts due to the Settlement Administrator, etc. There shall be no further monetary payment from Defendants or any Released Party, and the Maximum Settlement Amount is inclusive of any payments or disbursements ordered by the Court.

(b) **Net Settlement Proceeds:** “Net Settlement Proceeds” is defined as the Maximum Settlement Amount less the amounts approved and awarded by the Court for (1) attorneys’ fees of Class Counsel, (2) litigation costs and expenses of Class Counsel (which includes, without limitation, all such fees and costs incurred to date, as well as such fees and costs to be incurred in documenting the settlement, securing Court approval of this Settlement Agreement, and obtaining judgment in the Action), (3) the Service Payment to the Class Representative, as approved by the Court, and (4) all costs of administration, including, without limitation, settlement administration fees and expenses, all amounts due to the Settlement Administrator, etc.

(c) **Calculation of the Individual Payment Amounts:** “Individual Payment Amount” means the portion of the Net Settlement Proceeds distributable to each

Class Member who participates in the Settlement Class (i.e., who timely submits a valid Claim Form and who does not submit a timely and valid request for exclusion). 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.

i. For tax purposes, 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.

(d) **Service Payment to Class Representative:** The amount awarded to the Class Representative for his time and participation in this Action will be set by the Court in its discretion, not to exceed Ten Thousand Dollars (\$10,000) (“Service Payment”). This shall be provided in exchange for a general release of all claims and Civil Code Section 1542 waiver. This amount will be deducted from the Maximum Settlement Amount. An IRS Form 1099 will be issued to the Class Representative for his Service Payment. Defendants agree not to dispute or otherwise object to the Service Payment if Plaintiff requests \$10,000 or less.

(e) **Attorneys’ Fees:** An award to Class Counsel of attorneys’ fees will be subtracted from the Maximum Settlement Amount in an amount to be set by the Court taking into account the settlement award that has been made available for the Settlement Class by the efforts of Class Counsel. The amount awarded shall not exceed Eight Hundred Five Thousand Dollars (\$805,000) (i.e., 35% of the Maximum Settlement Amount). An IRS Form 1099 will be issued to Class Counsel with respect to its award of attorneys’ fees. Defendants agree not to dispute or otherwise object to the attorneys’ fee award requested by Class Counsel so long as the request does not exceed \$805,000.

(f) **Attorneys’ Costs and Expenses:** Class Counsel will be reimbursed from the Maximum Settlement Amount in an amount to be set by the Court for documented out-of-pocket litigation costs and expenses, not to exceed Fifteen Thousand

Dollars (\$15,000). An IRS Form 1099 will be issued to Class Counsel with respect to its award of costs and expenses. Defendants agree not to dispute or otherwise object to the attorneys' cost award requested by Class Counsel so long as the request does not exceed \$15,000.

(g) **Settlement Administration Costs:** The fees and other charges of the Settlement Administrator to administer the Settlement will be paid from the Maximum Settlement Amount. These fees shall include any costs associated with the required tax reporting on any Individual Payment Amount, and the issuing of any 1099 forms. Subject to approval of the Court, the Parties have agreed that ILYM Group, Inc. will serve as a neutral third-party claims administrator ("Settlement Administrator") to perform all acts related to providing notice to the Settlement Class. Settlement Administrator shall be responsible for (a) printing and distributing the Class Notice and Claim Forms to all Class Members; (b) processing claims and exclusions; (c) distributing the Maximum Settlement Amount as directed by the Court and set forth herein; (d) administering the Net Settlement Proceeds distributable to each Class Member who submits a timely and valid Claim Form; (e) tax reporting; (f) providing necessary weekly status reports; (g) creating and maintaining the settlement website; and (h) other duties and responsibilities set forth herein or as requested by the Parties.

**D. Release by Class Members.**

1. 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 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, 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.

2. It is the Class Representative's intention that this Agreement shall be a full and final release of all matters, claims, and charges which he may have individually against the Released Parties. The Class Representative acknowledges familiarity with the terms of Section 1542 of the California Civil Code, which provides:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

The Class Representative waives any right or benefit that he has or may have under Civil Code Section 1542 to the full extent he may lawfully waive all such rights and benefits pertaining to the subject matter of this Agreement. The Class Representative acknowledges that he is aware that he may hereafter discover facts in addition to or different from those he now knows or believes to be true with respect to the subject matter of this Agreement, and that it is his intention to fully and forever settle and release all matters, disputes and differences, known or unknown, suspected or unsuspected, which do now exist, may exist or heretofore has existed and that in furtherance of such intention the release herein given shall be and remain in effect as a full and complete general release, notwithstanding the discovery or existence of any such additional or different facts.

**E. Notice, Claims, and Exclusion Process.**

1. Within twenty (20) calendar days after entry of the order granting preliminary approval, Defendants shall provide to the Settlement Administrator a list of last known addresses, telephone numbers, and email addresses for members of the Class, if available ("Settlement Class Information") in accordance with Defendants' records. It is presumed that for most (if not all) potential Class Members, only a telephone number will be available from Defendants' records, and the Settlement Administrator shall utilize

available sources to obtain from those telephone numbers additional Settlement Class Information for members of the Settlement Class. The Settlement Class Information will only be disclosed to the Settlement Administrator and not to Plaintiff's Counsel. All information provided to the Settlement Administrator will be marked STRICTLY CONFIDENTIAL. This information shall be kept confidential and shall not be disclosed, either in writing or orally, by the Settlement Administrator. Settlement Class Information shall only be used for the limited purpose to contact Class Members to inform them of the proposed settlement. The Settlement Administrator shall use due care with respect to the storage, custody, use, and/or dissemination of the Settlement Class Information. Such information must be stored in a secure fashion and all persons who access the data must agree to keep it confidential.

2. A notice of pendency of class action, proposed settlement and hearing date for Court approval ("Class Notice") in the form attached hereto as Exhibit 1, and "Claim Form," in the form attached hereto as Exhibit 2, as approved by the Court, shall be sent by the Settlement Administrator to the Class Members, by first class mail, within forty (40) calendar days after entry of the order granting preliminary approval of this Settlement Agreement. Concurrently, the Settlement Administrator shall publish a settlement website at [www.CaliforniaSwellCallRecording.com](http://www.CaliforniaSwellCallRecording.com) (or similar) which includes the all relevant settlement documents, the approval motions, the Class Notice, and the Claim Form, including a means by which Claims Forms may be submitted online.

3. The Settlement Administrator will make reasonable efforts to ensure that the Class Notice and Claim Form are sent to all Class Members. It will conclusively be presumed that if an envelope has not been returned within thirty (30) calendar days of the initial mailing that the Class Member received the Class Notice and it shall be deemed to have been sent to a valid address even if it is thereafter returned. In the event of returned or non-deliverable notices within thirty (30) calendar days after the initial mailing, the Settlement Administrator will search for additional addresses on returned mail and will re-

mail the Class Notice and Claim Form to an updated address (if any) within ten (10) calendar days of receipt of the returned mail marked undeliverable. It is the intent of the Parties that reasonable, but not extraordinary, efforts be used to locate Class Members. If the initial Class Notice and Claim Form are returned, the Settlement Administrator will search for a more current address. If no address is found within ten (10) calendar days, no further action is required by the Settlement Administrator.

4. The Class Notice will inform the Class Members of the Court-established deadlines for submitting objections, Claim Forms, and requests for exclusion.

5. If non-material information on the Class Notice or Claim Form is disputed (e.g., minor misspelling of Class Member's name), the Class Member shall note the same in his/her Claim Form. The Class Notice will also set forth IRS W-9 information.

6. In order to elect to participate in the Settlement Class, a Class Member must sign a Claim Form, and mail the form to the Settlement Administrator no later than sixty (60) calendar days after the initial mailing of the Class Notice and Claim Form to Class Members, unless the Court requires a longer period, in which case the Court ordered time period will apply. Claim Forms may also be submitted online on the settlement website. The date of the postmark or online submission shall be deemed the date of submission. If the 60th day falls on a Sunday or federal holiday, the time to submit a Claim Form will be extended to the next day on which the U.S. Postal Service is open. Only Class Members who submit timely and valid Claims Forms shall be issued an Individual Payment Amount. In the event a Claim Form is not completed fully and properly, the Settlement Administrator shall attempt to communicate with the Class Member by mail and phone to have necessary corrections made. Only a missing signature or a failure to attest membership in the Settlement Class will render a Claim Form deficient; other missing information will not invalidate a Claim Form. Plaintiff will automatically be deemed a claiming Class Member and need not submit a Claim Form to be issued an Individual Payment Amount.

7. In order to elect not to participate in the Settlement, a Class Member must timely request exclusion by sending a written request to the Settlement Administrator no later than sixty (60) calendar days after the initial mailing of the Class Notice to Class Members, unless the Court requires a longer period, in which case the Court ordered exclusion period will apply. The timeliness of submitted requests for exclusion will be determined by valid postmark. If the 60th day falls on a Sunday or federal holiday, the time to request exclusion will be extended to the next day on which the U.S. Postal Service is open. To be valid, a request for exclusion must (1) state the Class Member's name and last four digits of his/her social security number, (2) state the Class Members' address and telephone number, (3) include a statement that the Class Member requests exclusion from the Settlement, and (4) be signed by the Class Member. All Settlement Class members who do not timely opt out in accordance with this section will be deemed Settlement Class members for all purposes under this Settlement Agreement and will be irrevocably bound by this Settlement Agreement. Any Person who timely and properly opts out shall not be entitled to any individual relief under this Agreement.

8. In order to object to the settlement, a Class Member must mail his or her objection to the Settlement Administrator no later than sixty (60) calendar days after the mailing of the Class Notice to Class Members, unless the Court requires a longer period, in which case the Court ordered time period will apply. If the 60th day falls on a Sunday or federal holiday, the time to object to the settlement will be extended to the next day on which the U.S. Postal Service is open.

9. The Settlement Administrator will notify the Parties of the total number of valid Claim Forms, requests for exclusion and objections within ten (10) calendar days after the deadlines for receipt of Claim Forms, requests for exclusion and objections.

10. The Settlement Administrator shall provide to the Parties, at least twelve (12) calendar days prior to the final approval hearing, or as otherwise ordered by the Court, a declaration of due diligence and proof of mailing with regard to the mailing of the Class

Notice, and Claim Forms. The Settlement Administrator will also provide to the Parties, at least twelve (12) calendar days prior to the final approval hearing, a report listing the amount of all payments to be made to each Class Member without names or personal identifying information.

11. Defendants shall deposit a portion of the Maximum Settlement Amount to be used for settlement administration expenses with the Settlement Administrator no later than thirty (30) calendar days after entry of the Order granting preliminary approval of the Settlement, after which the Settlement Administrator may use the deposited funds to pay for the preparation of and mailing of the Class Notice and Claim Form and settlement website. Defendants shall deposit the remainder of the Maximum Settlement Amount with the Settlement Administrator no later than thirty (30) calendar days after the Effective Date. The Settlement Administrator shall disburse the Maximum Settlement Amount to Class Members, Class Counsel, the Class Representative, and itself no later than forty-five (45) business days after the Effective Date.

**F. Duties of the Parties Prior to Court Approval.**

1. Promptly after execution of this Settlement Agreement, Plaintiff shall move the Court for preliminary approval of this Settlement Agreement and entry of an order accomplishing the following:

(a) scheduling a fairness hearing on the question of whether the proposed settlement should be finally approved as fair, reasonable and adequate as to the Class Members;

(b) approving as to form and content the proposed Class Notice and Claim Form;

(c) preliminarily certifying the Settlement Class for purposes of settlement;

(d) preliminarily setting attorneys' fees and costs payable to Class Counsel;

(e) preliminarily setting the Service Payment payable to the Class Representative; and

(f) preliminarily approving ILYM Group, Inc. as the Settlement Administrator and its estimated fees and costs up to \$30,000.

**G. Duties of the Parties in Connection with and Following Final Court Approval.**

1. In connection with the hearing on final approval of the settlement provided for in this Settlement Agreement, the Parties will submit a proposed final order no later than ten (10) calendar days prior to the scheduled date of the hearing on final approval:

(a) approving the settlement provided for in this Settlement Agreement, adjudging the terms thereof to be fair, reasonable and adequate, and directing consummation of its terms and provisions;

(b) approving Class Counsel's application for an award of attorneys' fees and reimbursement of documented litigation costs and expenses, the Service Payment to the Class Representative, and the costs of administering the settlement; and

(c) Entering judgment in this Action, pursuant to Cal. Rules of Court, Rule 3.769(h).

2. Class Counsel shall file an application for attorneys' fees and reimbursement of costs and expenses ten (10) calendar days prior to the scheduled date of the hearing on final approval.

**H. Miscellaneous Provisions:**

**1. Voiding the Agreement.**

A failure of the Court to approve any condition of this Settlement Agreement or if the settlement provided for in this Settlement Agreement is reversed or materially modified on appellate review, shall render the entire Settlement Agreement voidable and unenforceable as to all Parties herein at the option of any Party. In such event, the Parties agree that this Settlement Agreement, and any and all negotiations, documents, discussions

associated with them, shall be without prejudice to the rights of any Party, and shall not be deemed or construed to be an admission or evidence of any violation of any statute, law or regulation or of any liability or wrongdoing by the Released Parties.

2. **Right to Rescission.**

If more than 5% of the Class Members request exclusion from the Settlement Class (i.e., opt-out), Defendants shall have the right, in their sole discretion, to rescind and void this Settlement Agreement before final approval by the Court. To rescind, Defendants must provide notice to Class Counsel no later than five (5) calendar days prior to the final approval hearing.

3. **Distribution of Unclaimed Funds and Uncashed Checks.**

Any portion of the Net Settlement Proceeds which is unclaimed (due to the \$5,000 maximum payment per claiming Class Member), and any Individual Payment Amount checks which are uncashed more than 180 days after issuance, shall be paid ] in accordance with California Code of Civil Procedure section 384, as follows: 50% to the designees required by C.C.P sections 384(b)(3)(A) and (B), and 50% to the Center for Responsible Business at the University of California, Berkeley's Haas School of Business, subject to the approval of the Court.

4. **Parties' Authority.**

The signatories hereto represent that they are fully authorized to enter into this Settlement Agreement and bind the Parties hereto to the terms and conditions hereof.

5. **Mutual Full Cooperation.**

The Parties agree to fully cooperate with each other to accomplish the terms of this Settlement Agreement, including but not limited to, execution of such documents and such other action as may reasonably be necessary to implement the terms of this Settlement Agreement. The Parties to this Settlement Agreement shall use their best efforts, including all efforts contemplated by this Settlement Agreement and any other efforts that may

become necessary by order of the Court, or otherwise, to effectuate this Settlement Agreement and the terms set forth herein. As soon as practicable after execution of this Settlement Agreement, Class Counsel shall, with the assistance and cooperation of Defendants and their counsel, take all necessary steps to secure the Court's preliminary and final approval of this Settlement Agreement.

**6. No Prior Assignments.**

The Parties hereto represent, covenant, and warrant that they have not directly or indirectly, assigned, transferred, encumbered, or purported to assign, transfer, or encumber to any person or entity any portion of any liability, claim, demand, action, cause of action or rights released and discharged by this Settlement Agreement.

**7. No Admission.**

Nothing contained herein, nor the consummation of this Settlement Agreement, is to be construed or deemed an admission of liability, culpability, negligence, or wrongdoing on the part of Defendants. Each of the Parties hereto has entered into this Settlement Agreement with the intention of avoiding further disputes and litigation with the attendant inconvenience and expenses. This Settlement Agreement is a settlement document and shall, pursuant to California Evidence Code Section 1152 and/or Federal Rule of Evidence 408 and/or any other similar law, be inadmissible in evidence in any proceeding, except an action or proceeding to approve the settlement, and/or interpret or enforce this Settlement Agreement.

**8. Notices.**

Unless otherwise specifically provided herein, all notices, demands or other communications given hereunder shall be in writing and shall be deemed to have been duly given as of the third business day after mailing by United States registered or certified mail, return receipt requested, addressed:

**To Plaintiff and the Settlement Class:**

Daniel F. Gaines, Esq.  
Alex P. Katofsky, Esq.  
GAINES & GAINES, APLC  
27200 Agoura Road, Suite 101  
Calabasas, CA 91301

**To Defendants:**

Craig J. Mariam, Esq.  
GORDON REES SCULLY MANSUKHANI LLP  
633 West Fifth St., 52<sup>nd</sup> Floor  
Los Angeles, CA 90071

**9. Construction.**

The Parties hereto agree that the terms and conditions of this Settlement Agreement are the result of lengthy, intensive arms' length negotiations between the Parties and that this Settlement Agreement shall not be construed in favor of or against any Party by reason of the extent to which any Party or his or its counsel participated in the drafting of this Settlement Agreement.

**10. Captions and Interpretations.**

Paragraph titles or captions contained herein are inserted as a matter of convenience and for reference, and in no way define, limit, extend, or describe the scope of this Settlement Agreement or any provision hereof. Each term of this Settlement Agreement is contractual and not merely a recital.

**11. Modification.**

This Settlement Agreement may not be changed, altered, or modified, except in writing and signed by the Parties hereto, and approved by the Court.

**12. Integration Clause.**

This Settlement Agreement contains the entire agreement between the Parties relating to the settlement and transactions contemplated hereby, and all prior or contemporaneous agreements, understandings, representations, and statements, whether

oral or written and whether by a Party or such Party's legal counsel, are merged herein. No rights hereunder may be waived except in writing.

13. **Binding On Assigns.**

This Settlement Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective heirs, trustees, executors, administrators, successors and assigns.

14. **Governing Law; Parties to Bear Own Attorneys' Fees and Costs.**

All terms of this Settlement Agreement and its exhibit shall be governed by and interpreted according to the laws of the State of California, without giving effect to any conflict of law principles or choice of law principles. Except as provided herein, all Parties shall bear their own attorneys' fees and costs in connection with the litigation and settlement of the Action.

15. **Signatures of All Class Members Unnecessary to be Binding.**

It is agreed that, because the members of the Settlement Class are numerous, it is impossible or impractical to have each Class Member execute this Settlement Agreement. The Class Notice, attached hereto as Exhibit 1, will advise all Class Members of the binding nature of the release provided herein and such shall have the same force and effect as if this Settlement Agreement was executed by each Class Member.

16. **Counterparts.**

This Settlement Agreement may be executed in counterparts, and when each Party has signed and delivered at least one such counterpart, each counterpart shall be deemed an original, and when taken together with other signed counterparts, shall constitute one fully-signed Settlement Agreement, which shall be binding upon and effective as to all Parties.

17. **Fair, Adequate, and Reasonable Settlement.**

The Parties believe this Settlement is fair, adequate, and reasonable, and the Parties arrived at this Settlement in arms-length negotiations, taking into account all relevant

factors, present and potential.

**18. Change of Time Periods.**

The time periods and/or dates described in this Agreement with respect to the giving of notices and notices of hearings are subject to approval and change by the Court or by the written agreement of counsel for the Parties, without notice to the Class.

**19. Real Parties in Interest.**

In executing this Agreement, the Parties warrant and represent that they, including Class Representative in his representative capacity on behalf of the Class, are the only persons having any interest in any of the claims that are described or referred to herein, or in any of the pleadings, records, and papers in the Action, and, except as provided herein, neither said claims nor any part thereof have been assigned, granted, or transferred in any way to any other person, firm, or entity.

**20. Voluntary Agreement.**

This Agreement is executed voluntarily and without duress or undue influence on the part of or on behalf of the Parties, or of any other person, firm, or entity.

**21. Parties Represented by Counsel.**

The Parties hereby acknowledge that they have been represented in negotiations for and in the preparation of this Agreement by independent counsel of their own choosing, that they have read this Agreement and have had it fully explained to them by such counsel, and that they are fully aware of the contents of this Agreement and of its legal effect.

**22. Authorization.**

Each Party warrants and represents that there are no liens or claims of lien or assignments in law or equity or otherwise of or against any of the claims or causes of action released herein and, further, that each Party is fully entitled and duly authorized to give this complete and final release and discharge.

**23. Further Assurances.**

Each of the Parties hereto shall execute and deliver any and all additional papers,

documents, and other assurances and shall do any and all acts or things reasonably necessary in connection with the performance of his or her or its obligations hereunder to carry out the express intent of the Parties hereto.

**24. Agreement Constitutes a Complete Defense.**

To the extent permitted by law this Agreement may be pleaded as a full and complete defense to, and may be used as the basis for an injunction against, any action, suit, or other proceeding that may be instituted, prosecuted, or attempted in breach of or contrary to this Agreement.

**25. Continuing Jurisdiction.**

Pursuant to Code of Civil Procedure section 664.6, the parties hereby agree that the Court has, and shall continue to have, jurisdiction to make any orders as may be appropriate to approve awards of attorneys' fees and costs pursuant hereto, and to supervise the administration of and the distribution of money funded pursuant to this Agreement.

**26. Resolution of Disputes.**

The Parties shall cooperate in good faith in the administration of this Settlement. Any unresolved dispute regarding the administration of this Agreement shall be decided by the Court.

**27. Severability.**

Should any paragraph, sentence, clause or provision of this Agreement be held invalid or unenforceable, such provision shall be ineffective to the extent of such invalidity or unenforceability, without invalidating the remainder of such provision or the remaining portions of the Agreement.

Dated: October \_\_, 2018  
10/3/2018 11:35:38 AM PDT

By: <sup>DocuSigned by:</sup> EDGAR FIERRO  
EDGAR FIERRO  
Plaintiff and Class Representative

Dated: October \_\_, 2018

CAN'T LIVE WITHOUT IT, LLC

By: \_\_\_\_\_

Its: \_\_\_\_\_

Dated: October \_\_, 2018

FIRST CALL RESOLUTION, LLC

By: \_\_\_\_\_

Its: \_\_\_\_\_

Dated: October \_\_, 2018

By:

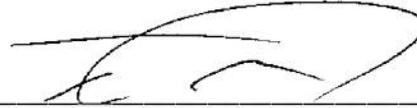
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EDGAR FIERRO  
Plaintiff and Class Representative

Dated: October 9, 2018

CAN'T LIVE WITHOUT IT, LLC

By:



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Its: Jeff Peck, President

Dated: October \_\_, 2018

FIRST CALL RESOLUTION, LLC

By:

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Its:

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Dated: October \_\_, 2018

By:

\_\_\_\_\_  
EDGAR FIERRO  
Plaintiff and Class Representative

Dated: October \_\_, 2018

CAN'T LIVE WITHOUT IT, LLC

By:

\_\_\_\_\_

Its:

\_\_\_\_\_

Dated: October 8, 2018

FIRST CALL RESOLUTION, LLC

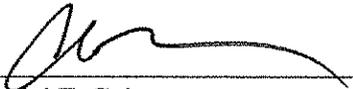
By: *[Signature]*

Its: *Chief Financial Officer*

**APPROVED AS TO FORM AND CONTENT:**

Dated: October \_\_, 2018

GAINES & GAINES, APLC

By:   
Daniel F. Gaines  
Alex P. Katofsky  
Counsel for Plaintiff and Class  
Representative

Dated: October 10, 2018

GORDON & REES, LLP

By:   
Craig J. Mariam  
Counsel for Defendants

# **EXHIBIT 1**

**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  
27200 Agoura Road, Suite 101  
Calabasas, CA 91301  
Phone: (866) 550-0855

**Defendants' Attorneys**

Craig J. Mariam, Esq.  
GORDON REES SCULLY MANSUKHANI LLP  
633 West Fifth St., 52<sup>nd</sup> 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**

<b>YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT:</b>	
<b>Submit A Claim Form</b>	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)
<b>Do Nothing</b>	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)
<b>Exclude Yourself (Opt-Out)</b>	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)
<b>Object</b>	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 [60 days after mailing]. 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 [Settlement Administrator address] and the settlement website is [www.CaliforniaSwellCallRecording.com](http://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 \_\_\_\_\_ [60 days after mailing]. 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 [Settlement Administrator address]. Objections must be postmarked no later than \_\_\_\_\_ [60 days after mailing]. 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 \_\_\_\_\_, 2019, at \_\_\_\_\_am, in Department \_\_\_ 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 [address], [phone], and available on the settlement website at [www.CaliforniaSwellCallRecording.com](http://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 [Settlement Administrator address], [Settlement Administrator telephone number], visit the settlement website at [www.CaliforniaSwellCallRecording.com](http://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: \_\_\_\_\_

\_\_\_\_\_  
SAN JOAQUIN COUNTY SUPERIOR  
COURT JUDGE

# **EXHIBIT 2**

[PRINTED ON YELLOW PAPER]

**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**

**CLAIM FORM**

**IN ORDER TO BE ELIGIBLE TO RECEIVE MONEY FROM THE CLASS ACTION SETTLEMENT OF THE LAWSUIT IDENTIFIED ABOVE, YOU MUST COMPLETE IN FULL, SIGN, DATE, AND MAIL OR SUBMIT ONLINE THIS CLAIM FORM ON OR BEFORE \_\_\_\_\_, 2018, ADDRESSED AS FOLLOWS:**

<p><b>S'WELL BOTTLE CLASS ACTION SETTLEMENT</b></p> <p>c/o ILYM Group, Inc.</p> <p>_____</p> <p>_____</p> <p>Phone: _____</p>
---

**INCOMPLETE AND/OR UNTIMELY CLAIM FORMS WILL BE REJECTED!**

**I. INSTRUCTIONS:**

1. To be eligible to participate in this settlement and receive a monetary recovery, you must have, while residing or located in California, placed a phone call to Can't Live Without It, LLC's ("S'well") toll-free telephone numbers at some time between March 16, 2017 and February 13, 2018 and spoke with a representative without having been first informed or without having first consented to recordation of such call.
2. Your completed Claim Form must be postmarked or submitted online on or before \_\_\_\_\_, 2018 or it will be rejected. Your Claim Form must be filled out completely and signed, or it will be rejected. If you move, please send the Settlement Administrator your new address. It is your responsibility to keep a current address on file with the Settlement Administrator.
3. For additional details and information, please read the Notice of Class Action Settlement ("Notice") and visit the settlement website at [www.CaliforniaSwellCallRecording.com](http://www.CaliforniaSwellCallRecording.com).

**II. PERSONAL INFORMATION**

Please legibly print the following information using black or blue ink (not pencil or red or green ink):

Name (first, middle and last): \_\_\_\_\_

Home Street Address: \_\_\_\_\_

City, State, Zip Code: \_\_\_\_\_

Home Telephone Number: (\_\_\_\_) \_\_\_\_\_-\_\_\_\_\_

Telephone Number from which you called S'well: (\_\_\_\_) \_\_\_\_\_

Social Security Number (which will be used for tax reporting purposes only): \_\_\_\_\_

**IV. RELEASE OF CLAIMS**

I have received the Notice. I submit this Claim Form under the terms of the Settlement Agreement, including the release of claims which are described in the Notice. I also submit to the jurisdiction of the Superior Court of the State of California for the County of San Joaquin with respect to my claim as a Class Member and for purposes of enforcing the release of claims provided by the Settlement Agreement. I attest that I am a member of the Settlement Class as defined in the Notice.

I declare under penalty of perjury under the laws of the State of California that everything I have written on this Claim Form is true and correct, and that it was signed on the date set forth below.

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
Date

\_\_\_\_\_  
(Print name)

# **EXHIBIT 1**

**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**

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*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  
27200 Agoura Road, Suite 101  
Calabasas, CA 91301  
Phone: (866) 550-0855

**Defendants' Attorneys**

Craig J. Mariam, Esq.  
GORDON REES SCULLY MANSUKHANI LLP  
633 West Fifth St., 52<sup>nd</sup> 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**

<b>YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT:</b>	
<b>Submit Claim Form</b>	<b>A</b> 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)
<b>Do Nothing</b>	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)
<b>Exclude Yourself (Opt-Out)</b>	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)
<b>Object</b>	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 [60 days after mailing]. 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 [Settlement Administrator address] and the settlement website is [www.CaliforniaSwellCallRecording.com](http://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 [redacted] [60 days after mailing]. 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 [Settlement Administrator address]. Objections must be postmarked no later than [redacted] [60 days after mailing]. 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 [redacted], 2019, at [redacted] am, in Department \_\_ 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 [address], [phone], and available on the settlement website at [www.CaliforniaSwellCallRecording.com](http://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 [Settlement Administrator address], [Settlement Administrator telephone number], visit the settlement website at [www.CaliforniaSwellCallRecording.com](http://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: \_\_\_\_\_

---

SAN JOAQUIN COUNTY SUPERIOR  
COURT JUDGE

# **EXHIBIT 2**

[PRINTED ON YELLOW PAPER]

**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**

**CLAIM FORM**

**IN ORDER TO BE ELIGIBLE TO RECEIVE MONEY FROM THE CLASS ACTION SETTLEMENT OF THE LAWSUIT IDENTIFIED ABOVE, YOU MUST COMPLETE IN FULL, SIGN, DATE, AND MAIL OR SUBMIT ONLINE THIS CLAIM FORM ON OR BEFORE [REDACTED], 2018, ADDRESSED AS FOLLOWS:**

<p><b>S'WELL BOTTLE CLASS ACTION SETTLEMENT</b> c/o ILYM Group, Inc.</p> <p>_____</p> <p>_____</p> <p>Phone: _____</p>
--

**INCOMPLETE AND/OR UNTIMELY CLAIM FORMS WILL BE REJECTED!**

**I. INSTRUCTIONS:**

1. To be eligible to participate in this settlement and receive a monetary recovery, you must have, while residing or located in California, placed a phone call to Can't Live Without It, LLC's ("S'well") toll-free telephone numbers at some time between March 16, 2017 and February 13, 2018 and spoke with a representative without having been first informed or without having first consented to recordation of such call.
2. Your completed Claim Form must be postmarked or submitted online on or before [REDACTED], 2018 or it will be rejected. Your Claim Form must be filled out completely and signed, or it will be rejected. If you move, please send the Settlement Administrator your new address. It is your responsibility to keep a current address on file with the Settlement Administrator.
3. For additional details and information, please read the Notice of Class Action Settlement ("Notice") and visit the settlement website at [www.CaliforniaSwellCallRecording.com](http://www.CaliforniaSwellCallRecording.com).

**II. PERSONAL INFORMATION**

Please legibly print the following information using black or blue ink (not pencil or red or green ink):

Name (first, middle and last): \_\_\_\_\_

Home Street Address: \_\_\_\_\_

City, State, Zip Code: \_\_\_\_\_

Home Telephone Number: ( \_\_\_ \_\_\_ ) \_\_\_ \_\_\_ - \_\_\_ \_\_\_

Telephone Number from which you called S'well: ( \_ \_ \_ ) \_ \_ \_ - \_ \_ \_ \_

Social Security Number (which will be used for tax reporting purposes only): \_ \_ \_ - \_ \_ - \_ \_ \_ \_

**IV. RELEASE OF CLAIMS**

I have received the Notice. I submit this Claim Form under the terms of the Settlement Agreement, including the release of claims which are described in the Notice. I also submit to the jurisdiction of the Superior Court of the State of California for the County of San Joaquin with respect to my claim as a Class Member and for purposes of enforcing the release of claims provided by the Settlement Agreement. I attest that I am a member of the Settlement Class as defined in the Notice.

I declare under penalty of perjury under the laws of the State of California that everything I have written on this Claim Form is true and correct, and that it was signed on the date set forth below.

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
Date

\_\_\_\_\_  
(Print name)