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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GREGORY FRANKLIN, individually and on behalf of all others similarly situated,

Plaintiff,

v.

OCWEN LOAN SERVICING, LLC,

Defendant.

Case No.: 3:18-cv-03333-SI

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

Date: August 26, 2022
Time: 10 a.m.
Courtroom: 1, 17th Floor
Judge: Hon. Susan Illston

Complaint Filed: June 5, 2018
FAC Filed: August 17, 2018

[Filed concurrently with Declaration of Abbas Kazerounian; Declaration of Jason A. Ibey; Declaration of Ryan L. McBride; Declaration of Gregory Franklin; Declaration of Amy Lechner; Proposed Order]

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I. INTRODUCTION

Plaintiff Gregory Franklin ("Mr. Franklin" or "Plaintiff") seeks final approval of the proposed class action settlement with Defendant Ocwen Loan Servicing, LLC ("Ocwen" or "Defendant") memorialized in the Settlement Agreement ("Agreement" or "Agr.") and its Addendum. Plaintiff submits this Memorandum in Support of Motion for Final Approval of Class Action Settlement ("Final Approval Motion"), the Declaration of Gregory Franklin ("Franklin Decl."), the Declaration of Amy Lechner ("Admin. Decl."), and the accompanying declarations of Class Counsel—i.e., Declaration of Abbas Kazerounian ("Kazeronian Decl."), Declaration of Jason A. Ibey ("Ibey Decl."), and Declaration of Ryan L. McBride ("McBride Decl.")—in support thereof.

This settlement is the culmination of over four years of litigation and provides for significant monetary relief. The Settlement Agreement (filed at Dkt. No. 154-3,[2] and the Addendum filed at Dkt. No. 154-4, Exhibit 2), reached after two separate mediation sessions before Hunter R. Hughes of Hunter ADR and a mediator's proposal, calls for a $1,500,000.00 common settlement fund (the "Settlement Fund") that will provide significant financial benefits to estimated 37,031 Settlement Class Members in California whose cellular telephone conversations on at least one outgoing call from Defendant was recorded by Defendant and/or its agent(s), allegedly without consent within the applicable Class Period (i.e., November 1, 2015 and November 30, 2015), in purported violation of California's Invasion of Privacy Act, Cal. Pen. Code § 630, *et seq.* ("CIPA").

The Settlement Fund is an all-in, non-reversionary fund (*see* Agr. §§ 4.1, 4.1.6), with the Settlement Class receiving a monetary payment on a *pro rata* basis (*id.* § 4.1.4). The Settlement Class Members were afforded a reasonable opportunity to submit a Claim Form online through the Settlement Website (www.FranklinRecordingSettlement.com[3]) or by mail to the Administrator. *Id.* § 7.1(a)-(b). The approximately 37,031 Settlement Class Members were

[2] Defined terms are used as defined in the Settlement Agreement.

[3] The Parties previously addressed the Court's inquiry concerning two letters received by the Court from anonymous individuals concerning the Settlement Website. Dkt. No. 163.

informed of the Settlement by Mail Notice, Publication Notice, and detailed notice posted on the Settlement Website, after the Administrator received Settlement Class Members' last known addresses from Defendant (*id.* § 6.1) and performed a search on the National Change of Address database ("NCOA") to ensure that the most current addresses were being used (*id.* § 6.1.1).

As of July 15, 2022, after subtracting the requested combined award of attorneys' fees and costs (i.e., $499,995), the requested Service Award to Plaintiff (i.e., $3,000), and the estimated notice and administrative expenses from the Settlement Fund (i.e., $47,797.11), each of the currently 3,518 valid claims will be entitled to a settlement check of approximately $269.81. As the claim form review process is ongoing, Plaintiff intends to provide updated figures at the time of the Fairness Hearing. Also, as of July 15, 2022, no Settlement Class Member requested exclusion from the Settlement, and there are no objections to the Settlement.

As explained more thoroughly below, this settlement is fair, reasonable and adequate. Therefore, the settlement should be given final approval.

II. BRIEF PROCEDURAL HISTORY SINCE PRELIMINARY APPROVAL

The Court granted preliminary approval of the proposed class action settlement on March 9, 2022. Dkt. No. 157 (the "Preliminary Approval Order"). Class Notice was subsequently provided to all Settlement Class Members on April 15, 2022. Admin Decl., ¶ 7. Settlement Class Members were afforded until June 14, 2022, to submit a Claim Form (Dkt. No. 157, ¶ 19) and until June 24, 2022, to submit any objections or requests for exclusion from the Settlement (*id.*). Admin Decl., ¶ 13.

On May 25, 2022, Plaintiff timely filed the Motion for Attorneys' Fees, Costs and Service Award (the "Fee Brief"), pursuant to the terms of the Settlement Agreement (Agr. § 3.3.1.6) and the Court's Preliminary Approval Order (Dkt. No. 157, ¶ 19). The Fee Brief was promptly posted on the Settlement Website the same day it was filed by Plaintiff. Admin Decl. ¶ 12.

Plaintiff now submits this timely Motion for Final Approval of Class Action Settlement. Pursuant to Fed. R. Civ. P. 23(e), Plaintiff seeks final certification and approval of the proposed class action settlement. Plaintiff specifically requests that the Court enter the proposed Final Approval Order as well as proposed Final Judgment pursuant to Fed. R. Civ. P. 58(a), submitted

herewith.

III. THE INVASION OF PRIVACY ACT AND CLASS ALLEGATIONS

The California State Legislature passed the California Invasion of Privacy Act ("CIPA") in 1967 to protect the privacy of Californians, replacing prior laws which permitted the recording of telephone conversations with the consent of one party to the conversation. Cal. Pen. Code § 632.7 was added to CIPA in 1992 due to specific privacy concerns over the increased use of cellular and cordless telephones. Section 632.7 prohibited intentionally recording all communications involving cellular and cordless telephones, without regard to whether they constitute confidential communications. Plaintiff alleges that Defendant violated CIPA, specifically Cal. Pen. Code § 632.7, by contacting Plaintiff and the Settlement Class on their cellular telephones and audio recording the conversations without their knowledge or consent. *See* First Amended Complaint ("FAC"), Dkt. No. 18, ¶ 33. In compensation for these alleged violations of CIPA, Plaintiff sought statutory damages of $5,000.00 for each violation, pursuant to Cal. Pen. Code § 632.7(a). FAC, ¶¶ 58, Prayer for Relief.

IV. SETTLEMENT

In an earnest attempt to settle this action and avoid the delays and risks inherent in proceeding to trial, the Parties discussed settlement on several occasions. As noted in the Preliminary Approval Motion, the Settlement Agreement resulted from extensive arm's length negotiations, including two separate private mediation sessions before Hunter R. Hughes of Hunter ADR, on August 27, 2019, and September 7, 2021, respectively; follow-up negotiations; and a mediator's proposal. [Dkt. No. 154-1, pp. 11-12; Kazerounian Decl., ¶ 7.] The Parties also conducted substantial discovery, including multiple rounds of formal written discovery (e.g., five sets of requests for production of documents and four sets of special interrogatories), Plaintiff's deposition, seven separate depositions of Defendant's personnel, two subpoenas, and confirmatory discovery following the Parties' September 7, 2021, mediation session (i.e., Defendant's confirmatory declaration as to the class size and the process used to identify Settlement Class Members). [Ibey Decl., ¶ 7.] Additionally, as noted in the Preliminary Approval Motion, Class Counsel have vigorously litigated this matter since its inception, overcoming, in

part, a motion to dismiss, motion for judgment on the pleadings, and filing and arguing an opposed motion for class certification. Dkt. No. 154-1, pp. 23-24.

The significant time and effort spent on litigation, discovery, and settlement negotiations, as well as the time spent in mediation with an experienced mediator, militate in favor of final approval of the proposed settlement, as such factors indicate that there was no collusion among the Parties. This action has been ongoing since June 5, 2018, and the efforts of Class Counsel to reach a compromise in the form of a proposed class settlement proved fruitful, resulting in a mutual understanding, the terms of which are memorialized in the Agreement and the later Addendum thereto.

A. The Final Approval Hearing

At the Final Approval Hearing scheduled for August 26, 2022, the Court will consider the Fee Brief (Dkt. No. 158-1) and determine whether to finally approve the Settlement. Agr. § 2.21; Dkt. No. 157, ¶ 7.

B. Attorneys' Fees, Costs, and Service Award

As explained in the Fee Brief, Class Counsel seek $499,995.00 in combined attorneys' fees and expenses ($55,018.45 in costs and $444,976.55 in attorneys' fees), representing approximately 33% of the $1,500,000.00 Settlement Fund. Dkt. No. 158-1, pp. 21, 37; Agr. § 14.1. Class Counsel also seek a Service Award for Plaintiff of $3,000.00 from the Settlement Fund. Dkt. No. 158-1, pp. 36-37; Agr. § 14.3. Plaintiff, therefore, respectfully requests that the Court enter the proposed Final Approval Order submitted herewith, which includes a provision for the requested attorneys' fees, costs, Service Award, and notice as well as reasonable settlement notice and administration expenses.

C. The Terms of the Settlement Agreement

This action has been preliminarily certified, for settlement purposes only, as a California class action, providing for a $1,500,000.00 Settlement Fund. *See* Dkt. No. 157.

1. Preliminary Certification of a Rule 23(b)(3) Settlement Class

The Settlement Class is defined as:

All persons whose cellular telephone conversation on at least one

> outgoing call from Defendant was recorded by Defendant and/or its agent/s without that person's consent within the Class Period [beginning November 1, 2015 and ending November 30, 2015, inclusive].
>
> Excluded from the Class are: (1) individuals who are or were during the Class Period officers or directors of Defendant in the Litigation or any of its respective Affiliates; (ii) the District Judge and any Magistrate Judge assigned to this case, their spouses, and persons within the third degree of relationship to either of them, or the spouses of such persons; and (iii) all persons who file a timely and proper request to be excluded from the class.

Agr. §§ 3.1(a), 3.2.

2. The $1.5 Million Settlement Fund

The Settlement Agreement establishes a $1,500,000.00 Settlement Fund paid by Defendant to resolve the claims at issue in this action. *See* Agr. § 4.1. Payments from the Settlement Fund are in the form of a *pro rata* settlement check, which will be mailed to each of the Settlement Class Members who made a valid and timely claim. *Id.* § 4.1.4. The Administrator will then send the settlement checks by mail no later than thirty (30) days after the Effective Date. *Id.* § 7.5.

One hundred and eighty (180) days after the checks are issued, the Administrator will void any outstanding checks, calculate the amount remaining in the Settlement fund and, after reserving an amount for anticipated remaining settlement administration fees or costs, make a second *pro rata* distribution by check for the remaining amount of the Settlement Fund to those Claimants who have already cashed their initial settlement checks. *Id.* §§ 4.1.5, 4.1.6. The second round of distributions will be made until administratively infeasible. *Id.* § 4.1.6. If any amount is to remain in the Settlement Fund after the second round of distribution, the Administrator is to further distribute that amount to a *cy pres* recipient(s). *Id.* Plaintiff recommends that the National Consumer Law Center and New Media Rights be approved by the Court as the contingent *cy pres* recipients to receive equal shares of any amount left in the Settlement fund after redistribution. *Id.*

V. SETTLEMENT ADMINISTRATION

The Administrator's compliance with the Agreement and the Preliminary Approval Order is described below.

A. CAFA Notice

On January 7, 2022, Defendant mailed out CAFA notice, in compliance with 28 U.S.C. § 1715(b). Agr. § 3.3.1; Dkt. No. 147-1.

B. Mail Notice

The Administrator complied with the notice procedures set forth in the Preliminary Approval Order (Dkt. No. 157) and Settlement Agreement (Agr. § 6). After having received a class list from Defendant, the Administrator utilized the NCOA to update the addresses on that list before mailing out 35,174 mail notices to Settlement Class Members on April 15, 2022. Admin Decl. ¶ 7. The mailed notices that were sent out by the Administrator informed Settlement Class Members of the Settlement Website address where they were able to obtain further information about the settlement and make a claim online. *Id.* ¶ 4-5; *see also*, Dkt. No. 163-1 (Exhibit A thereto). The same Mail Notice informed Settlement Class Members that they could call the Settlement Administrator's toll-free telephone number to obtain information about the settlement. *Id.* ¶ 13. Since notice was mailed out on April 15, 2022, the Administrator has recorded 5,123 mail notices as returned (*Id.* ¶ 15). The Class Administrator is still gathering information as to the number of claims that were remailed and returned undeliverable and this information will be supplemented in a subsequent filing shortly. McBride Decl. ¶ 16.

C. Publication Notice

On April 14, 2022, the Administrator ran an advertisement on USA Today providing additional notice to the Settlement Class. *Id.* ¶ 9; *see also*, Dkt. No. 163-1 (Exhibit B thereto).

D. Detailed Notice on Settlement Website

The Administrator posted full and detailed notice on the Settlement Website, which explained the case, the proposed settlement, and Class Members' options regarding the proposed settlement. *Id.* ¶ 11. Among other things, the Settlement Website contains a copy of the Settlement Agreement, the Preliminary Approval Order, a downloadable claim form, and the Fee Brief. *Id.* ¶ 12; Kazerounian Decl. ¶ 11; Exhibit A thereto. The Settlement Website therefore provided notice of the proposed settlement and other aspects of the settlement class notice program to Settlement

Class Members. As of July 22, 2022, there were 4,369 unique visits to the Settlement Website with 11,238 page views. Admin Decl. ¶ 11.

E. Toll-Free Phone Number

On April 4, 2022, the Administrator established a toll-free telephone number Settlement Class Members were able to call to ask a live operator questions about the settlement. Admin. Decl. ¶ 13.

F. Claims Procedure, Including Expenses, and Claims Received

The Administrator prepared a class list based on records obtained from Defendant. *Id.* ¶¶ 6-7. Settlement Class members were then given sixty (60) days after Class Notice ("Claim Deadline") was sent to make a claim for a settlement check. *Id.* ¶ 18; Agr. § 2.7.

The procedure for submitting a claim was made as easy as possible. A Claim Form could be submitted either by U.S. Mail or online via the Settlement Website. Agr. § 7.1(a)-(b). All that the Settlement Class Members were required to provide in submitting a valid claim was their full name, current address, the cellular telephone number on which they received a call from Defendant during the Class period, and a signature certifying that they are part of the Settlement Class. *Id.*; Exhibit C to Admin Decl.

As of July 22, 2022, the Administrator received approximately a total of 5,123 claims form (of which 1,478 were submitted by mail and 3,666 were submitted online). Admin. Decl. ¶ 15. Of those claims, 3,518 are timely and valid. *Id.* ¶ 18. Additionally, 49 claims were late; and 1,448 have been determined to be ineligible due to a deficiency, illegibility or a blank submission. *Id.* ¶ 16. The 1,445 claims identified as deficient were sent a cure letter and afforded 15 days to respond. *Id.* ¶ 17; *see also*, Agr. § 7.3. Of the 1,445 deficient claim forms, 288 have been cured, and there are now 1,212 deficient claims remaining that will be deemed invalid. Admin Decl., ¶ 17. Given that the claim form review process is ongoing, Plaintiff will provide updated figures at the time of the Fairness Hearing.

Within thirty (30) days of the Effective Date, the Administrator is to remit the appropriate Settlement Relief amounts by check to valid Claimants. Agr. § 7.5. The settlement checks will eventually expire one hundred and eighty (180) days after the date of issuance. *Id.* § 4.1.5.

1. No Objections; and No Requests for Exclusion

Settlement Class Members were permitted to opt-out or submit an objection to the Settlement. *See* Agr. at §§ 11-12; Admin. Decl. ¶ 13. As of July 19, 2022, the Administrator has received zero requests for exclusion and zero objections to the Settlement. *Id*. at ¶ 14. Further, there is no record on the Court's docket of any objections or requests for exclusion mailed to the Court. The deadline to submit a request for exclusion or object was June 24, 2022. *Id.* The fact that there were no objections nor requests for exclusion out of the approximately 37,031 Settlement Class Members is highly supportive of the proposed settlement's adequacy. *See, e.g., Garibaldi v. Bank of Am.*, No. 3:13-CV-02223-SI, 2015 U.S. Dist. LEXIS 182910, at *4 (N.D. Cal. Aug. 28, 2015) (granting final approval when, of 38,243 eligible Class members, only 21 individuals requested for exclusion and 2 individuals objected) (Illston, J.); *In re Diamond Foods, Inc.*, No. C 11-05386 WHA, 2014 U.S. Dist. LEXIS 3252, at *9 (N.D. Cal. Jan. 10, 2014) ("Also supporting approval is the reaction of class members to the proposed class settlement. After 67,727 notices were sent to potential class members, there have been only 29 requests to opt out of the class and no objection to the settlement or the requested attorney's fees and expenses.").

2. Settlement Checks

The net settlement amount available to pay Settlement Class members is estimated to be approximately $949,207.89, which was determined by subtracting from the Settlement Fund the anticipated Service Award of $3,000.00, Class Counsel's requested combined attorneys' fees and costs of $499,995.00[4] (approximately 33% of the total Settlement Fund), and estimated Notice and Administrative Costs of $47,797.01. *See* Admin. Decl. ¶ 19. Based on the net settlement amount and current valid claims totaling 3,518, each of those valid Claimant would receive a check for approximately $269.81[5] from the Settlement Fund.

[4] Section 14.1 of the Agreement provides in part: "Plaintiff may apply to the Court for an award of Attorneys' Fees and Expenses from the Settlement Fund." This is not a clear sailing provision.

[5] This is calculated as the total Settlement Fund ($1,500,000.00) minus i) attorneys' fees and costs ($499,995.00); ii) estimated Notice and Administration Costs ($47,797.11), and iii) a Service Award ($3,000.00), all divided by the total number of valid Claims (3,518).

Due to the risks of individually suing for statutory damages of $5,000.00 under California Penal Code § 632.7, no Settlement Class Member would likely be able to obtain such recovery on their own. *See Ades v. Omni Hotels Mgmt. Corp.*, No. 2:13-cv-02468-CAS (MANx), 2014 U.S. Dist. LEXIS 129689, at *43 (C.D. Cal. Sep. 8, 2014) ("[T]he Court is not persuaded that $5,000 in damages is so clearly sufficient to motivate individual litigation involving complex factual and legal issues as to weigh against class certification.").

VI. THE SETTLEMENT SHOULD BE FINALLY APPROVED BECAUSE IT IS FUNDAMENTALLY FAIR, REASONABLE, AND ADEQUATE

The relevant settlement factors demonstrate that the proposed settlement should be finally approved as fair, reasonable, and adequate.

A. The Settlement Satisfies the Requirements of Fed. R. Civ. P. 23

The Court has preliminarily determined that the proposed settlement satisfies Rule 23's requirements. Dkt. No. 157, ¶ 4. Plaintiff analyzed and applied the relevant Rule 23(a) and (b) factors to the class in his Motion for Preliminary Approval. *See* Dkt. No. 154-1, pp. 22-25. There is no reason such findings should be disturbed. Since preliminary approval, Plaintiff has continued to serve as an adequate Class Representative by reviewing documents and submitting declarations in support of the Fee Brief and the Final Approval Motion. [*See* Kazerounian Decl., ¶ 8; Franklin Decl., ¶ 4.] Class Counsel have also continued to adequately represent the interests of the Settlement Class Members and the named Plaintiff, having, among other things, timely filed the Fee Brief on May 25, 2022 (Dkt. Nos. 158, 158-1), filing a joint response to the Court's July 8th Order (Dkt. No. 163), and otherwise assisting with settlement administration (Ibey Decl., ¶ 5; McBride Decl., ¶ 6). Further, the Class Notice was provided as required in the Preliminary Approval Order. Admin Decl., ¶ 4.

B. The Settlement Should be Finally Approved by the Court

"Unlike the settlement of most private civil actions, class actions may be settled only with the approval of the district court." *Officers for Justice v. Civil Serv. Com.*, 688 F.2d 615, 623 (9th Cir. 1982). "[T]he court may approve [a class settlement] only after a hearing and only on finding that it is fair, reasonable, and adequate . . .." Fed. R. Civ. P. 23(e)(2). The Court has broad discretion

to grant such approval and should do so where the proposed settlement is "fair, adequate, reasonable, and not a product of collusion." *Spence-Ruper v. Scientiae*, No. 8:19-cv-01709-DOC-ADS, 2021 U.S. Dist. LEXIS 204242, at *4 (C.D. Cal. Sep. 24, 2021) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)).

"To determine whether a settlement agreement meets these standards, a district court must consider a number of factors[.]" *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003). These factors include:

> the strength of 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.

Id.; Nwabueze v. AT&T Inc., No. C 09-01529 SI, 2013 U.S. Dist. LEXIS 169270, at *9 (N.D. Cal. Nov. 27, 2013) (Illston, J.) (quoting *Churchill Vill., L.L.C. v. GE*, 361 F.3d 566, 575 (9th Cir. 2004)). "The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claims advanced, the types of relief sough, and the unique facts and circumstances presented by each individual case." *Officers for Justice*, 688 F.2d at 625. The Court must balance against the continuing risk of litigation and the immediacy and certainty of a substantial recovery. *Bellows v. NCO Fin. Sys.*, No. 3:07-cv-01413-W-AJB, 2008 U.S. Dist. LEXIS 103525, at *17 (S.D. Cal. Dec. 2, 2008).

The Ninth Circuit has long supported settlement reached by capable opponents in arm's-length negotiations. In *Rodriguez v. West Publishing Corp.*, the Ninth Circuit expressed the opinion that courts should defer to the "private consensual decision of the [settling] parties." 563 F.3d 948, 965 (9th Cir. 2009) (citing *Hanlon*, 150 F.3d at 1027). The district court must exercise "sound discretion" in approving a settlement. *See Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *Chavez v. Converse, Inc.*, No. 15-cv-03746-NC, 2020 U.S. Dist. LEXIS 257679, at *13 (N.D. Cal. Nov. 25, 2020). However, "where, as here, a proposed class settlement has been reached after meaningful discovery, after arm's length negotiation conducted by capable counsel,

it is presumptively fair." *M. Berenson Co. v. Faneuil Hall Marketplace*, 671 F. Supp. 819, 822 (D. Mass. 1987), *cited approvingly in Create-A-Card, Inc. v. INTUIT, Inc.*, No. CV-07-6452 WHA, 2009 U.S. Dist. LEXIS 93989, at *14-15 (N.D. Cal. Sep. 22, 2009); *see also In re Ferrero Litig.*, No. 11-CV-00205-H (CAB), 2012 U.S. Dist. LEXIS 15174, at *6 (S.D. Cal. Jan. 23, 2012) ("Settlements that follow sufficient discovery and genuine arms-length negotiation are presumed fair.") (citing *Nat'l Rural Telecoms. Coop. v. Directv, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004)).

Applying the relevant factors here confirms that the Settlement should be finally approved, as it was reached only after the Parties had spent over four (4) years litigating this action; participated in two (2) separate mediation sessions before an experienced mediator, Hunter R. Hughes of Hunter ADR[6]; the Parties conducted extensive formal and informal discovery; and finally, after all of that, the Parties independently accepted a mediator's proposal. Based on the facts of this case, the extensive time and effort spent in litigating this case, and the likely risks of continuing to litigate this case, Plaintiff and Class Counsel agree that this Settlement is fair, adequate and reasonable. *See* Kazerounian Decl., ¶ 9; Ibey Decl., ¶ 13; McBride Decl., ¶ 14; Franklin Decl., ¶ 5.

1. The Strength of the Lawsuit and the Risk, Expense, Complexity, and Likely Duration of Further Litigation

Defendant has raised several challenges to Plaintiff's claims and putative class claims. This included several affirmative defenses (Dkt. No. 77, ¶¶ 63-68), a motion to dismiss (Dkt. No. 20), a motion for judgment on the pleadings (Dkt. Nos. 95, 96), and an opposition to class certification (Dkt. No. 123). *See also,* Agr. §§ 1.3, 1.6, 1.8, 1.15. As demonstrated by the above filings, Defendant vigorously defended the case and believes that its defenses have merit. Plaintiff is similarly confident that his putative class claims have merit. Nevertheless, the Parties are aware that further litigation can pose substantial risks and expense to everyone involved. As such, the Parties agree that this settlement eliminates any further risk and expense that would inevitably

[6] *See Jaffe v. Morgan Stanley & Co.*, No. C 06-3903 TEH, 2008 U.S. Dist. LEXIS 12208, at *52 (N.D. Cal. Feb. 7, 2008) ("This Settlement was reached under the supervision of experienced mediator Hunter Hughes, Esq. Counsel for the parties are experienced class action lawyers who retained Mr. Hughes for his expertise in mediating many complex class actions . . .."); ********hunteradr.com/cv.html (last visited July 12, 2022).

result from further litigating this action. *Id.* §§ 1.14, 1.16.

The Settlement here is fair, reasonable, and adequate considering the potential risks and expenses associated with continued litigation, the probability of appeals by either party, the certainty of delay, and the ultimate uncertainty of recovery through continued litigation. As the Ninth Circuit has opined, the very essence of a settlement agreement is compromise, "a yielding of absolutes and an abandoning of highest hopes." *Officers for Justice*, 688 F.2d at 624 (internal quotation marks omitted). "Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of costs and elimination of risk, the parties each give up something they might have won had they proceeded with litigation . . .." *Id.* (quoting *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971)) (internal quotation marks omitted).

While Class Counsel believe strongly in the merits of the claims brought on behalf of the proposed Class, they also recognize that any case involves risk and that settlements of contested cases are preferred in this circuit. Indeed, some courts in this circuit have denied motion for class certification of CIPA actions, *see, e.g., Romero v. Securus Techs., Inc.*, No. 16cv1283 JM (MDD), 2018 U.S. Dist. LEXIS 63084 (S.D. Cal. Apr. 12, 2018), while others have granted class certification of CIPA claims on contested motions, *see, e.g., Ades*, 2014 U.S. Dist. LEXIS 129689. Risks would remain regardless of whether Plaintiff were to prevail at trial. *See, e.g., Alvarado v. Fed. Express Corp.*, 384 F. App'x 585, 590 (9th Cir. 2010) (reversing and remanding for a new trial on punitive liability and damages after the plaintiff was awarded $300,000 in punitive damages); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 623 (2d Cir. 1979) (reversing $87 million judgment after trial).

The risks in this action were explained in depth in the Preliminary Approval Motion (Dkt. No. 154-1, pp. 29-30) and Fee Brief (Dkt. No. 158-1, pp. 24-25). In short, if the action were to proceed without settlement, Plaintiff anticipates that Defendant would continue to challenge Plaintiff's claims through class certification and trial. *See* Agr. § 1.15. This is evidenced by the extensive motion practice discussed above. *See, supra,* p. 11:1-4. It is also evidenced, in part, by Defendant's opposition to class certification (prior to settlement), where Defendant challenged the putative class's commonality and predominance as well as Plaintiff's likelihood of satisfying the

typicality, adequacy, and superiority requirements of Rule 23 prior to class settlement. *See* Dkt. No. 123. That contested motion for class certification was held in abeyance while the Parties revisited mediation in an effort to resolve the dispute. Without a class settlement, and should the withdrawn and contested class certification motion have been granted, the Parties would then need to move toward spending additional time and expense—in an action that has already spanned over four (4) years—preparing for trial. Finally, any decision on the merits is also likely to be appealed, resulting in. further delay, uncertainty, and expense.

The possibility of losing on a motion for class certification on a contested motion and losing at trial further makes this settlement an acceptable compromise. *See Amadeck v. Capital One Fin. Corp. (In re Capital One Tel. Consumer Prot. Act. Litig.)*, 80 F. Supp. 3d 781, 791 (N.D. Cal. Feb. 12, 2015) (approving class settlement despite "serious obstacles to class certification").

2. The Amount Offered in Settlement

As mentioned above, the Settlement Agreement would require the Defendant to pay into an all-in, non-reversionary Settlement Fund of $1,500,00.00. Agr. § 4.1. Each valid and approved Claim is entitled to a *pro rata* share of the Settlement Fund, after Administrative Costs, a Service Award to the Class Representative, and attorneys' fees and costs are deducted. *Id.* § 4.1.4.

As there are 3,518 claims determined to be valid, the individual recovery to Settlement Class Members is approximately $270. *See* McBride Decl. ¶ 15. This estimated payment is a significant result for Class Members, who only had to take a few minutes to submit a Claim either online or by mail. *See, supra,* pp. 6-7; Agr. § 7.1(a)-(b). Based on the law of the case (*see* Dkt. Noz. 44, 45), at most the Plaintiff and absent class members here could receive an award of $5,000.00 for a violation regardless of the number of recorded calls (Cal. Pen. Code § 637.2), with no express provision for recovery of attorneys' fees. *Ronquillo-Griffin v. Telus Communs., Inc.*, No. 17cv129 JM (BLM), 2017 U.S. Dist. LEXIS 99577, at *20 (S.D. Cal. June 27, 2017) (recognizing that CIPA provides for statutory damages of $5,000.00 per violation). Attorneys' fees would have to be sought under Cal. Civ. Proc. Code § 1021.5, if successful in bringing an action which has resulted in the enforcement of an important right affecting the public interest, among other requirements.

The relief afforded to Settlement Class Members here exceeds the relief afforded in many other CIPA class action settlements. *See, e.g., Miller v. Hitachi Am.*, No. CIV 526430, 2014 Cal. Super. LEXIS 1686 (San Mateo Oct. 17, 2014) (granting preliminary approval of CIPA class action settlement with different settlement classes receiving $20 or $145 per class member)[7]; *Couser v. Dish One Satellite, LLC*, No. RIC 1603185 (Sup. Ct. Riverside May 3, 2019) (finally approved CIPA class action settlements involving 360 settlement class members where the estimated recovery at a 100% claims rate was $211; and the actual recovery was $276 per valid claimant) [Dkt. No. 158-1, 10:18-21].[8] Also, Class Counsel have prepared a non-exhaustive matrix of several other CIPA settlements which further demonstrate that appropriateness and adequacy of the individual Settlement Class Member recovery here of approximately $270 per valid claimant. *See* Exhibit B to Declaration of Abbas Kazerounian (reflecting individual claimant recoveries between $10.82 and 3,703.64).

As was mentioned by the Parties during the preliminary approval hearing, that this Settlement essentially involves instances of alleged mistakes[9] by Defendant in terms of not providing a class recording disclosures some of the time during the Class Period, which distinguishes the facts from some CIPA class action settlements where no recording disclosure was given at all (e.g., *Ronquillo-Griffin v. TransUnion Rental Screening Solutions, Inc.*) [Dkt. No. 158-1, p. 10]. The Settlement here is more akin to the facts in *Couser v. Dish One Satellite*, where a technical glitch cause an automated recording disclosure not to play on incoming calls for a 3-

[7] The two sub-classes received anywhere from $126.21 to $1,254.26 per class member after final approval.

[8] It is worth noting that the estimated individual recovery at the time of preliminary approval at an 100% claims rate was approximately $25.63 (Dkt. No. 154-1, 5:19-20). This is much higher than in several other CIPA cases. *See e.g.*, *Cohorst v. BRE Properties, Inc.*, No. 10-cv-2666 JM, 2012 WL 153754, Dkt. Nos. 101, 109 (S.D. Cal. 2012) ($5.5 million settlement for approximately 1,170,584 potential class members, or $4.70 per person); *McCabe v. Six Continents Hotels, Inc.*, No. 12-cv-04818, 2015 U.S. Dist. LEXIS 85084, at *27-29 (N.D. Cal. June 30, 2015) (collecting cases approving CIPA settlements of $1-$7.50 per class member).

[9] As argued in Plaintiff's motion for class certification before it was withdrawn due to settlement, Defendant did not provide a call recording disclosure approximately 10.7% of the time as it concerned calls on November 23, 2015. Dkt. No. 118-1, p. 2.

month period, as explained in the Fee Brief at pp. 10-11. The size of the settlement class has also frequently influenced the amount of individual class member recovery, wherein settlements with a larger class size tend to have smaller individual recoveries. Thus, the estimated recovery provided by this settlement here is much greater than in many other finally approved CIPA class action settlements and is fair and adequate based on the risks and facts of the present case.

It is also well-settled that a proposed settlement may be accepted where the recovery represents a fraction of the maximum potential recovery. *See Nat'l Rural Telecoms. Coop.*, 221 F.R.D. at 528 ("well settled law that a proposed settlement may be accepted even though it amounts to only a fraction of the potential recovery"); *See Jaffe*, 2008 U.S. Dist. LEXIS 12208, at *29 ("The settlement amount could undoubtedly be greater, but it is not obviously deficient, and a sizeable discount is to be expected in exchange for avoiding the uncertainties, risks, and costs that come with litigating a case to trial.").

Such settlement results may also benefit the general public from a potential deterrent effect on potential future CIPA violations. *See* David R. Hodas, *Enforcement of Environmental Law in A Triangular Federal System: Can Three Not Be A Crowd When Enforcement Authority Is Shared by the United States, the States, and Their Citizens?*, 54 Md. L. Rev. 1552, 1598 n.188 (1995) ("[A]llowing a violator to benefit from noncompliance punishes those who have complied by placing them at a competitive disadvantage. This creates a disincentive for compliance.").

3. Class Members were Provided with the Best Notice Practicable, Affording Them an Opportunity to Determine Whether to Participate in the Settlement

Rule 23(c)(2)(B) provides that, in any case certified under Rule 23(b)(3) the court must direct to class members the "best notice that is practicable under the circumstances[.]" Rule 23(c)(2)(B) does not require "actual notice" or that notice be "actually received[.]" *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994).

According to the Administrator, there was a direct mail notice reach of approximately 94.9% of the estimated 37,031 Settlement Class Members who were mailed Class Notice (noticed was mailed to 35,174 persons on the Settlement Class Member list), after updating records based on the NCOA database (*see* Admin. Decl. ¶ 7), which easily satisfies due process. *See Romero v.*

Producers Dairy Foods, Inc., 235 F.R.D. 474, 492-93 (E.D. Cal. 2006) ("First class mail is ordinarily sufficient to notify class members who have been identified"); *Morey v. Louis Vuitton N. Am. Inc.*, No. 11cv1517 WQH (BLM), 2014 U.S. Dist. LEXIS 3331, at *11-12 (S.D. Cal. Jan. 9, 2014) (finding that mail and email notice "fully complied with due process principles"); *Spears v. First Am. Eappraseit*, No. 5-08-CV-00868, 2015 U.S. Dist. LEXIS 58530, at *32-34 (N.D. Cal. Apr. 27, 2015) (finally approving settlement which provided for class notice via direct mail after updated addresses through the NCOA database, a settlement website and IVR phone line). However, if that were not enough, notice was also provided through print publication and detailed notice on the Settlement Website with a notice reach of at least 70% for the publication notice alone. *See* Admin. Decl. ¶ 8.

There is typically a 3-5% claims rate in consumer class actions, including those involving CIPA claims. *See, e.g., Ferrington v. McAfee, Inc.*, 2012 U.S. Dist. LEXIS 49160, at *13 (N.D. Cal. Apr. 6, 2012) ("[T]he prevailing rule of thumb with respect to consumer class actions is [a claims rate of] 3-5 percent."); *Forcellati v. Hyland's Inc.*, No.12-cv-1983, 2014 U.S. Dist. LEXIS 50600, at *17 (C.D. Cal. Apr. 9, 2014) (same); *Mount v. Wells Fargo Bank, N.A.*, BC395959 (Cal. Super. Ct. Aug. 13, 2014) (granting final approval of a CIPA class action settlement with a 4.2% claims rate); *Zaw v. Nelnet Business Solutions, Inc.*, No. 3:12-cv-05788-RS, Dkt. No. 39 (N.D. Cal. Dec. 1, 2014) (granting final approval of CIPA class settlement with a 1.8% claims rate). Here, the valid claims rate of approximately 9.50% (3,518 divided by 37,031), is a strong indication of general approval of the Settlement by the Settlement Class Members. It is also in line with the up to 10% claims rate estimate given by Plaintiff's counsel.

4. The Extent of Discovery Completed

The Parties conducted substantial discovery, including multiple rounds of formal written discovery (e.g., five sets of requests for production of documents and four sets of special interrogatories), Plaintiff's deposition, seven separate depositions of Defendant's personnel, two subpoenas, and confirmatory discovery following the Parties' September 7, 2021, mediation session (i.e., Defendant's confirmatory declaration as to the class size and the process used to identify Settlement Class Members). [Ibey Decl., ¶ 7.] With all this discovery completed, the

litigation has reached a point where both parties had "a clear view of the strengths and weaknesses of their cases." *Schuchardt v. Law Office of Rory W. Clark*, 314 F.R.D. 673, 685 (N.D. Cal. 2016) (internal quotation marks omitted). Thus, the Parties have exchanged more than enough information to make an informed decision about settlement. *See Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir. 1988) ("In the context of class action settlements, 'formal discovery is not a necessary ticket to the bargaining table where the parties have sufficient information to make an informed decision about settlement.'").

5. The Experience and Views of Counsel

While the Court should not blindly follow counsel's recommendations, "[t]he recommendations of plaintiff's counsel should be given a presumption of reasonableness." *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979). The presumption of reasonableness in this action is fully warranted because the settlement was the product of arm's-length negotiations by capable, experienced counsel who have "an intimate familiarity with [the] lawsuit after spending years in litigation[.]" *Id.*; *see also Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980) ("that experienced counsel involved in the case approved the settlement after hard-fought negotiations is entitled to considerable weight"); 2 Newberg on Class Actions § 11.24 (4th Ed. & Supp. 2002); Manual for Complex Lit., Fourth § 30.42.

It is the judgment of Class Counsel experienced in CIPA class action litigation that this settlement is fair, reasonable, and adequate, benefiting all Settlement Class Members who submitted valid Claims. *See* Kazerounian Decl., ¶¶ 9-10; Ibey Decl., ¶ 13; McBride Decl., ¶ 14. Indeed, as demonstrated by their accompanying declarations, Class Counsel are highly experienced consumer class action lawyers who have been recognized for their knowledge and experience in complex consumer class action litigation. *See, e.g.,* Dkt. Nos. 154-2, ¶¶ 74-75; 158-2, ¶¶ 26-27. Thus, Class Counsel now unequivocally assert that the Settlement should be finally approved by this Court. Kazerounian Decl., ¶ 10; Ibey Decl., ¶ 13; McBride Decl., ¶ 14.

6. Positive Reaction of Settlement Class Members

"It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are

favorable to the class members." *Nat'l Rural Telecoms. Coop.*, 221 F.R.D. at 529 (citations omitted). The absence of any objections or requests for exclusion here (Admin. Decl. ¶ 14) is an important factor in evaluating the fairness, reasonableness, and adequacy of settlement; it also supports approval of the settlement here. *See Couser v. Comenity Bank*, 125 F. Supp. 3d 1034, 1044 (S.D. Cal. 2015) ("Upon considering the high rate of Class Member claims and the relatively low number of requests for exclusion, the Court finds the reaction of the Class to the Settlement favors approval of . . . Settlement."); *Medieros v. HSBC Card Servs.*, No. CV 15-09093 JVS (AFMx), 2017 U.S. Dist. LEXIS 178484, at *6 (C.D. Cal. Oct. 23, 2017) (granting final approval of a CIPA settlement where there were only 7 opt-outs and 1 objection). The fact that there has been no resistance to the Settlement, the high *valid* claims rate of over 10% for a consumer class action case, and the Class Representative supports the final approval of the settlement (Franklin Decl., ¶ 5), further supports final approval of this settlement.

VII. POTENTIAL CY PRES RECIPIENTS OF UNCLAIMS FUNDS

Consistent with the Settlement Agreement's terms, Plaintiff requests that funds remaining in the Settlement Fund after any subsequent distributions (as administratively feasible) be awarded to the proposed *cy pres* recipients, the National Consumer Law Center and New Media Rights, equally. Agr. § 4.1.6.

The National Consumer Law Center, founded in 1969, is a nonprofit organization that works for consumer justice and economic security for low-income and disadvantaged individuals, including the elderly.[10] [*See* Exhibit C to Kazerounian Decl., ¶ 13.] New Media Rights, founded in 2006, is a program of the California Western School of Law offering pro bono preventative privacy related legal services for consumers, nonprofits, technology entrepreneurs, and creators.[11]

Class Counsel believe that the proposed *cy pres* recipients are appropriate considering the nature of this suit, the objectives underlying the CIPA, and the interests of absent class members, including their geographic diversity. *See Nachshin v. AOL, LLC*, 663 F.3d 1034, 1040 (9th Cir. 2011). Should a *cy pres* distribution be needed, Class Counsel intend file a formal motion with the

[10] https://www.nclc.org/about-us/about-us.html (last visited July 13, 2022).
[11] https://www.newmediarights.org/about_us (last visited July 13, 2022).

Court indicating the amount to be distributed and discussing, in more depth, the proposed *cy pres* recipients' respective qualifications to receive such distribution.

VIII. CONCLUSION

In conclusion, the Parties have reached this Settlement following good and contentious negotiations, with the assistance of an experienced mediator. The settlement is fair, reasonable, and adequate for Settlement Class Members who were afforded notice that complies with the requirements of Rule 23 and due process.

For the foregoing reasons, Plaintiff respectfully requests the Court:

- Grant final approval of the proposed settlement;
- Order payment from the Settlement Fund in compliance with the Court's Preliminary Approval order and the Agreement;
- Grant the Motion for Attorneys' Fees, Costs and Service Award;
- Enter the proposed final approval order submitted herewith;
- Enter the proposed Final Judgment submitted herewith; and
- Retain continuing jurisdiction over the implementation, interpretation, administration, and consummation of the settlement.

Dated: July 25, 2022

Respectfully Submitted,

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