UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

In re Collecto, Inc. Telephone Consumer Protection Act (TCPA) Litigation	Master No. 1:14-md-2513-RGS Individual Case No. 1:14-cv-10478-RGS This Document Relates To: All Member Actions

PLAINTIFFS' MEMORANDUM SUPPORTING
MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Plaintiffs John Lofton, Robert Pegg, Ralph Davenport and Richard Davenport (collectively, "Plaintiffs") hereby submit their memorandum in support of their motion for final approval of class action settlement.

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I. INTRODUCTION

Plaintiffs John Lofton, Robert Pegg, Ralph Davenport and Richard Davenport (collectively, "Plaintiffs"), by and through Class Counsel, respectfully move this Court pursuant to Federal Rule of Civil Procedure 23 for an order (1) confirming certification of the Settlement Class, the appointment of Class Counsel, and the appointment of the Class Representatives; (2) granting final approval of the Parties' Settlement Agreement; and (3) approving the proposed *cy pres* recipient.[1] (A motion for approval of attorney's fees, costs and incentive awards for Plaintiffs is also pending before this court.)

Through mediation with Rodney Max, Plaintiffs reached a settlement with Collecto, Inc. ("Collecto" or "Defendant") resolving their Telephone Consumer Protection Act ("TCPA") claims. On August 10, the Court granted preliminary approval of the parties' settlement agreement. (ECF No. 109.) The Settlement Administrator has successfully provided notice to the class and time for filing objections or requesting to be excluded has passed. No one has objected to the Settlement Agreement and only one person has opted out of the settlement.

The lack of any objections to the class is of little surprise given the settlement represents a significant recovery for the Settlement Class and, if approved, will provide those Class Members submitting approved claims with significant compensation.

The Settlement Agreement provides for a non-reversionary $3.2 million common fund to be distributed, after deduction of administration costs, attorney fees and costs, and incentive awards, on a proportionate basis to members of the Settlement Class, depending on the number of calls received, who submitted valid claim forms; that number is 4,205. Molina Decl., ¶10. If the Court grants final approval to the Settlement and awards the fees, costs, incentive awards and

[1] Unless otherwise stated herein, capitalized terms shall have the same meaning as set forth in the Parties' Settlement Agreement and Release of Claims, attached as Exhibit 1 to the Parisi declaration.

claims administration costs as requested, class members will receive on average $381 per class member, with the precise amount awarded to any class member depending on the number of calls received. Parisi Decl., ¶18.

For these reasons and as described further below, Plaintiffs respectfully request that this Court find the Settlement to be fair, reasonable and adequate, and grant it final approval.

II. SUMMARY OF THE SETTLEMENT

The Agreement is attached as Exhibit 1 to the Declaration of David C. Parisi in support of this Motion.

A. Class Definition and Identification and Benefits to Class Members

For settlement purposes only, the parties have stipulated to the certification of a class (the "Settlement Class" or "Class") defined as follows:

> (a) all natural persons residing in the United States; (b) who received one or more telephone calls from an automatic telephone dialing system operated by Defendant to their cellular telephone number; (c) between July 23, 2009 and June 30, 2014; where (d) the person never had an agreement with the creditor for whom Collecto sought to collect.

Parisi Decl., Ex. 1, ¶1.17. The following are excluded from the Class: "Defendant, any entity that has a controlling interest in Defendant, and Defendant's current or former directors, officers, counsel, and their immediate families. The Settlement Class also does not include any persons who validly request exclusion from the Class." *Id*.

B. Common Fund and Payments

The Agreement establishes a common fund of $3.2 million. Parisi Decl., Ex. 1, ¶1.19 Under the Agreement, the Settlement Administrator will deduct settlement administration costs (including notice and claims processing) from the fund, as well as costs, attorneys' fees, and an incentive awards as awarded by the Court. *Id*. at ¶2.4. Each Settlement Class Member is eligible

to submit a claim form (which confirms they are a Settlement Class Member), and 4,205 persons have done so. Settlement Class Members who submit approved claim forms will receive a pro rata share of the remaining common fund depending on the number of calls placed to them. Parisi Decl., Ex. 1, ¶¶1.12, 4.3, 4.4, 4.6.

C. Attorneys' Fees and an Incentive Award

Pursuant to the Agreement, Class Counsel has applied to the Court for an award of attorneys' fees and reimbursement of costs and expenses incurred in the prosecution of this action, as well as class representative incentive awards. Parisi Decl., Ex. 1, ¶2.4. Class Counsel filed a motion for fees and costs (Dkt. No. 112) which seeks fees and costs of $1,300,000, and the class representatives seek incentive awards of $5,000 each. *Id*.

D. *Cy Pres* Award

The Agreement provides that the common fund will be distributed to Class Members who submitted valid claims by mailing checks for the entire amount remaining in the fund. Hence, the parties intend to distribute the entire fund to Class Members, after making deductions for the Representative Plaintiffs, the Settlement Administrator, and Class Counsel. Parisi Decl., Ex. 1, ¶4.6. The Agreement precludes reversion of any funds back to Collecto. Still, Class Members have 180 days to deposit their checks and it is likely not every check will be deposited. Parisi Decl., Ex. 1, ¶4.6. If any money remains in the fund after the last check becomes invalid, that money will be paid to the proposed *cy pres* recipient, Privacy Rights Clearinghouse. Parisi Decl., Ex. 1, ¶¶4.6, 1.6. Privacy Rights Clearinghouse is a national non-profit which maintains the website privacy-information.org which has received *cy pres* funds in privacy related litigation in the past.

E. CAFA Notice

The Agreement provides for appropriate notice to the Attorney General of the United States and the Attorneys General of all fifty states, within ten days of the submission of this

Motion, under 28 U.S.C. § 1715(b). Parisi Decl., Ex. 1, ¶2.3. This notice has been given. Molina Decl., ¶5.

F. Notice to the Class

The Settlement Agreement calls for Notice in several formats.

Direct Notice Claim Form. The Settlement Agreement called for direct notice to class members. Parisi Decl., Ex. 1, ¶3.3.1. Class Counsel retained data analysis experts to prepare a class list of potential Class Members based on data produced by Collecto. The list identified potential class members who were called by Collecto, on cellular telephones, where the name of the debtor did not match the name of the owner of the cell phone based on a commercially reasonable database of historical cellular telephone numbers and the names attached to those numbers. Dkt. No. 106, Verkhovskaya Decl., ¶¶8-15. Class Counsel's data analysis experts then obtained the mailing addresses from a reverse lookup database. *Id.* Through this extensive analysis of previously-produced data and use of reverse-lookup databases, between 80% and 90% of potential Class Members received that notice. *Id.*, ¶18. This percentage comports with the 70-95% reach guideline set forth in the *Federal Judicial Center's Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide*. *Id.*

Website Notice. By the time that notice was mailed out, the Settlement Administrator posted on a publicly accessible Internet website the long-form Website Notice attached to the Settlement Agreement as Exhibit C-2. Parisi Decl., Ex. 1, ¶3.3.2; Monlina Decl., ¶8. The website also included the Claims Form and copies of relevant filings and judicial rulings in the case. *Id.*

PR Newswire Notice. The Settlement Administrator also ensured that notice was posted via a PR Newswire Media Notice which described the settlement and identified the website for the Class Notice and claim forms are located. Parisi Decl., Ex. 1, ¶3.3.3.

III. PROCEDURAL AND FACTUAL HISTORY

This case has been long-fought and extensively litigated since July 2013. A summary of

important milestones in the litigation follows below.

This litigation began with three separate class actions. On July 16, 2013, John Lofton filed a class action against Collecto, Inc. alleging violations of the TCPA. On July 23, 2013, Ralph and Richard Davenport filed a similar TCPA class action against Collecto. Then on August 13, 2013, Robert Pegg filed a similar TCPA class action against Collecto. Plaintiff Lofton filed a motion to transfer and consolidate with the Judicial Panel on Multidistrict Litigation which was granted by the JPML. The actions were then assigned to the Hon. Richard G. Stearns in February 2014. With an Order entered February 20, 2014, Judge Stearns coordinated these actions for pretrial purposes under the caption *In re: Collecto, Inc., Telephone Consumer Protection Act (TCPA) Litigation*.

After coordination, the initial phase of the litigation was focused on discovery related to class certification as well Collecto's initial motion to stay this case in anticipation of the FCC's then-pending order on the definition of an "automatic telephone dialing system" under 47 U.S.C. § 227(a)(1). Counsel for plaintiffs opposed the motion to stay, which was denied by the Court on November 3, 2014. Because Plaintiff Lofton and his counsel had been in litigation with Verizon, one of Collecto's clients, since 2012, plaintiffs' counsel were familiar with Collecto and its dialers. During this initial phase, Plaintiffs deposed Peter Cappola, Collecto's Director of Telephony Services and Steven Madden, Collecto's Manager of Application Development. In addition, plaintiffs served 56 requests for admission, twelve interrogatories and 56 document requests on Collecto. Parisi Decl., ¶¶6-7.

By December 2014, it appeared probable that class related discovery could become voluminous, and the parties believed that production could involve production and analysis of many terabytes of data regarding over 65 million telephone calls. See ECF No. 31. Collecto also contended that it had no liability because its dialing systems were not automatic telephone

dialing systems as defined by the TCPA. The parties agreed to defer class certification and certification related discovery in favor of a motion for summary judgment by Collecto, which the parties believed would promote and facilitate the overall resolution of the case. Plaintiffs and defendant exchanged exert reports and the experts were deposed. On August 31, 2015, Collecto filed its motion for summary judgment focused on the status of its dialers as "Automated Telephone Dialing Systems," as that term is used in the TCPA. On the September 21, the parties attended a mediation before Mr. Antonio Piazza. Parisi Decl., ¶10. The mediation was not successful and in October Plaintiffs filed their opposition to the motion for summary judgment. *Id*. Though the summary judgment motion was complex and raised novel arguments, it was ultimately denied, after a hearing, on February 10, 2016.

After the denial of Collecto's motion for summary judgment, plaintiffs focused their efforts on class certification. Plaintiffs served six sets of requests for admission directed to Collecto with a total of 104 individual requests, three sets of interrogatories directed to Collecto with a total of 21 interrogatories, and ten sets of requests for production of documents with a total 180 individual requests. *Id.*, ¶6. This discovery generated huge quantities of information about Collecto, its dialers, and its defenses in this action. Plaintiffs also filed five motions to compel further responses to discovery, which resulted in yet even more information being provided by Collecto. *Id*., ¶12. Plaintiffs ultimately retained two data analysis firms to analyze the volumes of call data produced.

While class certification discovery was pending, the parties attended two days of mediation in Boston with Mr. Rodney Max, another mediator with a very good reputation for resolving TCPA class actions. *Id*., ¶13. The mediation ended without a resolution even in principal, but an agreement among the participants to likely attend a third session of mediation. *Id*. Thereafter, the Parties continued their discussions and were ultimately able to come to an

agreement in principal to resolve this action. With the agreement in principal, on December 8, 2016, the Parties notified this Court of the settlement. *Id*., ¶14.

Even after the Parties reached an agreement in principal, Plaintiffs' counsel's work was not complete. To support a settlement on a class-wide basis, counsel for Plaintiffs had to work extensively with their experts to develop an appropriate and supportable methodology for identifying potential class members and for providing notice to them. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). This process was time consuming and required frequent communication between counsel for Plaintiffs and their experts given the volume and complexity of the electronic information produced by Collecto. Ultimately, counsel for Plaintiffs, with the assistance of their experts, were able to develop a methodology for parsing Collecto's books and records and combining that information with information contained in third-party databases so as to identify potential class members. Based upon this methodology, counsel for Plaintiffs were then able to negotiate the form and manner of notice with Collecto, ultimately resulting in the Parties agreeing to direct mail notice as the best practicable notice under Federal Rule of Civil Procedure 23. Also during this time, the Parties negotiated the other details of the settlement, including the content of notice and claims procedures.

Ultimately, the Parties presented their proposed settlement to the Court in a motion for preliminary approval filed on July 12, 2017. See ECF Nos. 105-107.

IV. THE COURT SHOULD CONFIRM CERTIFICATION OF THE SETTLEMENT CLASS

"Before this Court can determine whether the settlement is fair, it must finally certify the class." *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 67 (D. Mass. 2005). In their Motion for Preliminary Approval (Dkt. No. 107), Plaintiffs detailed the legal and factual bases justifying class certification pursuant to Federal Rule of Civil Procedure 23(b)(3), and the Court conditionally certified a Settlement Class. Dkt. No. 109. In support of final certification of the

Settlement Class, Plaintiffs incorporate by reference their arguments in his Motion for Preliminary Approval. Dkt. No. 107. For those reasons and the reasons set forth below, the Court should confirm certification of the Settlement Class.

To certify a class for any purpose, the proposed class must satisfy each of Rule 23(a)'s four prerequisites: numerosity, commonality, typicality, and adequacy of representation. *See* Fed. R. Civ. P. 23(a); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614-22 (1997). Because the Settlement Class was conditionally certified under Rule 23(b)(3), Plaintiffs must also show that (i) the questions of law or fact common to Class Members predominate over any individual questions and (ii) that maintaining the lawsuit as a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3); *In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 87 (D. Mass. 2005). Here, the Settlement Class continues to meet—and exceed—these criteria.

A. The Settlement Class is Sufficiently Numerous

Rule 23(a)'s numerosity requirement that "the class is so numerous that joinder of all members is impractical," Fed. R. Civ. P. 23(a)(1), is easily satisfied, as discovery has indicated that there are approximately 206,000 Class Members. Dkt. No. 106, Verkhovskaya declaration, ¶14. *McAdams v. Mass. Mut. Life Ins. Co.*, No. 99-cv-30284, 2002 WL 1067449, at *3 (D. Mass. May 15, 2002) *aff'd*, 391 F.3d 287 (1st Cir. 2004) (finding that classes of 40 or more members are sufficiently numerous for certification).

B. The Settlement Class Members Share Common Issues of Law and Fact

Commonality requires that "at least one common issue of fact or law at the core of the action must shape the class," but not that every class member "share every factual and legal predicate of the action." *In re Lupron*, 228 F.R.D. at 88. Here, members of the Settlement Class share a common set of legal claims that arise out of the same core facts, including, inter alia: whether Defendants (i) used an automatic telephone dialing system; (ii) to place calls to Class

Members; (iii) who never had an agreement with the creditor for whom Collecto sought to collect; (iv) between July 23, 2009 and June 30, 2014; and (iv) in violation of the TCPA.

Regardless of the answers, these questions commonly focus on Defendant's conduct, and commonality is satisfied. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (explaining that commonality is found where the claims of all class members "depend upon a common question," and "even a single common question will do").

C. The Class Representatives' Claims are Typical of Those of the Settlement Class

Next, Rule 23(a)'s typicality requirement asks whether a plaintiff's claims are typical of those of the proposed class and requires the plaintiff to show that "[a] sufficient nexus is established [demonstrating that] the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory." *In re Lupron*, 228 F.R.D. at 89 (quoting *In re Terazosin Hydrochloride Antitrust Litig.*, 220 F.R.D. 672, 686 (S.D. Fla. 2004)).

Here, the claims of Representative Plaintiffs Lofton, Pegg, Ralph Davenport and Richard Davenport and the class they seek to represent all arise from the same unlawful calls to cellular telephones by Collecto. The Representative Plaintiffs, like all class members, received unsolicited calls and were not the debtors. They have sustained identical statutory damages. The claims of the Representative Plaintiffs are "typical" and "similar" to all other class members as they arise from the same event or practice or course of conduct that gives rise to the claims of other class members, and are based on the same legal theory as the members of the class.

As a result of that conduct, Plaintiffs and the Settlement Class were damaged in the exact same manner. As such, typicality is satisfied.

D. The Class Representatives and Class Counsel Adequately Represent the Settlement Class

Rule 23(a)(4) requires two things: Plaintiffs must confirm their interests do not conflict

with the interests of the Settlement Class, and Class Counsel must confirm they are qualified and experienced to represent the Settlement Class. *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 130 (1st Cir. 1985). Both are satisfied here. First, Plaintiffs and the Settlement Class all have an interest in vindicating the rights of all individuals who are similarly aggrieved, and to hold Collecto fully accountable for its practices. Further, Plaintiffs do not have any individual interests in this case (as evidenced through discovery) that would be antagonistic to those of the Settlement Class; indeed, their vigorous pursuit of this action demonstrates as much.

Second, Class Counsel have regularly engaged in major complex litigation involving the consumer class actions—including the prosecution of numerous class actions involving the TCPA just like those at issue here— have the resources necessary to conduct litigation of this nature, and have frequently been appointed lead class counsel by courts throughout the country. Dkt. No. 112-2 (Parisi Decl., ¶¶2-3; Dkt. No. 112-3 (Meyer Decl., ¶4). Class Counsel have diligently investigated, prosecuted, and dedicated substantial resources to the claims in this Action, and they will continue to do so throughout its pendency. Dkt. No. 112-2 (Parisi Decl., ¶¶5-11); Dkt. No. 112-3 (Meyer Decl., ¶¶5-10).

E. The Settlement Class Meets Ruel 23(b)(3)'s Requirements

In addition to confirming that the Settlement Class satisfies the four Rule 23(a) prerequisites, the Court must also confirm pursuant to Rule 23(b)(3) that (i) questions of law and fact common to members of the Settlement Class predominate over questions affecting only individuals and (ii) the class action mechanism is superior to other available methods for the fair and efficient adjudication of the controversy. *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 38 (1st Cir. 2003).

1. Common Questions of Law and Fact Predominate

The predominance requirement is satisfied where a plaintiff demonstrates that the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Donovan v.*

Philip Morris USA, Inc., 268 F.R.D. 1, 28 (D. Mass. 2010) (quoting *Amchem*, 521 U.S. at 623). The test is "readily met" in consumer class actions where common issues regarding liability are paramount, even if some issues remain as to individual damages. *In re Lupron*, 228 F.R.D. at 91.

Here, there are core factual issues applicable to the Settlement Class that predominate over any individual issues. Predominance is a test readily met in certain cases alleging widespread consumer fraud or injury. *Amchem*, 521 U.S. at 625. Here, plaintiffs have alleged that between July 23, 2009 and June 30, 2014, Collecto placed calls in violation of the TCPA, with automatic telephone dialing systems, to consumers on their cellular telephones, that the consumers never had an agreement with the creditor for whom Collecto sought to collect a debt, and the consumers were the subscriber, or the assigned user of the telephone number called by Collecto. The claims of each class member will succeed or fail based on common proof. These factual issues predominate over any issues affecting only individual members of the Settlement Class.

Accordingly, Rule 23(b)(3)'s predominance requirement remains satisfied.

2. A Class Action is the Superior Method for Adjudicating this Controversy

Rule 23(b)(3) also requires the Court to confirm whether this class action is superior to other available methods for the fair and efficient adjudication of the Settlement Class's claims. This is almost always true where "few, if any, members of the settlement class have incurred damages in an amount sufficient to justify the costs of pursuing an individual action." *In re Lupron*, 228 F.R.D. at 92; *see also Smilow*, 323 F.3d at 42 ("[t]he core purpose of Rule 23(b)(3) is to vindicate the claims of consumers and other groups of people whose individual claims would be too small to warrant litigation."). Here, the uniformity of claims and the small amount of individual damages relative to the costs of litigating their claims clearly establish that a class action is by far the superior method of adjudicating this dispute. This is particularly true when

the alternative is hundreds of thousands of individual suits—or no suits at all. *See In re Relafen Antitrust Litig.*, 221 F.R.D. at 287 (finding superiority satisfied where a class action ensures "vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all."). As a result, this class action is the superior method for adjudicating this controversy.

V. CLASS MEMBERS HAVE BEEN PROVIDED SUFFICIENT NOTICE OF THE ACTION AND THE SETTLEMENT AGREEMENT

Following certification of a class under Rule 23(b)(3) and before the Court may enter final approval, class members must be provided "the best notice that is practicable under the circumstances" describing "the right of the class member to seek to appear by his own attorney or to opt out of the class and—if he fails to opt out—a warning that he or she will be bound by the judgment." *Brown v. Colegio de Abogados de Puerto Rico*, 613 F.3d 44, 50-51 (1st Cir. 2010) (citing Fed. R. Civ. P. 23(c)(2)(B)); Fed. R. Civ. P. 23(e)(1). Ultimately, the notice provided must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Neither Rule 23 nor due process requires receipt of actual notice by all class members, *Jurvis v. Inamed Corp.*, 685 F.3d 1294, 1321 (11th Cir. 2012), and the Federal Judicial Center has suggested that a notice plan that reaches 70% of class members is reasonable.[2] Notice that provides "the basic elements of the case, the general terms of the proposed settlement, the legal rights of the affected customers, and the process for filing a claim . . . [and] also include[s] [] dedicated Internet and mailing addresses and a toll-free telephone number that consumers could call to obtain additional information" is sufficient to allow class members to make "an informed

[2] *See* Federal Judicial Center, Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide at 3 (2010), available at http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/$file/NotCheck.pdf.

and intelligent" decision about their rights under a proposed settlement. *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 203-04 (D. Maine 2003).

Here, the Court approved the Parties' proposed notice, finding that it "constitutes the best practicable notice under the circumstances and is reasonably calculated, under all the circumstances, to apprise Settlement Class Members of the pendency of this Action, the terms of the Agreement, and their right to object to or to exclude themselves from the Settlement Class" and appointed Ilym Group, Inc. as Settlement Administrator.[3] (Dkt. No. 109, ¶¶5, 6, 8.) The notice called for direct notice to the Settlement Class via U.S. Mail, as well as publication on a website created for the settlement and publication via PR Newswire. *Id*., ¶6. The notice process was reasonably estimated to reach between 80 and 90 percent of class members. Dkt. No. 106, Verkhovskaya decl., ¶18.

The Settlement Administrator and the Parties diligently followed the Court-approved notice. Notice was mailed to all 207,036 Settlement Class Members as identified by Plaintiffs. Molina Decl., ¶6 and Ex. C attached thereto. The Settlement Administrator also re-mailed the 40,715 postcards which were returned and identified an additional 3,136 postcard notices which were forwarded. Id., ¶7. In addition, a class website was created to provide immediate access to information about the settlement and a toll-free number was set up to assist consumers. Id. at ¶¶8-9. Finally, in accordance with the Preliminary Approval Order and the Class Action Fairness Act, 28 U.S.C. § 1715, notice was sent to the United States Attorney General and the Attorneys General for all fifty states, the District of Columbia, and Puerto Rico. *Id*., ¶5.

VI. THE SETTLEMENT IS FAIR, REASONABLE, ADEQUATE, AND DESERVING OF FINAL APPROVAL

Under Rule 23, this Court may approve a class settlement "only after a hearing and on

[3] Ilym Group, Inc. is an experienced class action notice and settlement administration firm with which has administered class action settlements with sizes ranging from 26 to 4.5 million class members. Molina Decl., ¶2 and Ex. A attached thereto.

finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *Nat'l Ass'n of Chain Drug Stores v. New England Carpenters Health Benefits Fund*, 582 F.3d 30, 44 (1st Cir. 2009). While proponents of a class action settlement have the burden of establishing its reasonableness, judicial policy encourages settlements. *Nat'l Ass'n of Chain Drug Stores*, 582 F.3d at 44 (internal citations omitted); *see also In re Relafen*, 231 F.R.D. at 68 (noting that, notwithstanding the necessary scrutiny inherent in the Rule 23 analysis, "the law favors class action settlements.").

The First Circuit has not adopted its own determinative set of factors to assess the fairness, reasonableness, and adequacy of a proposed settlement, but courts in this District commonly apply a full or modified version of a test set forth by the Second Circuit in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), *overruled on other grounds by Missouri v. Jenkins*, 491 U.S. 274 (1989). *See, e.g., In re Lupron*, 228 F.R.D. at 93-94; *Nat'l Ass'n of Chain Drug Stores*, 582 F.3d at 44.

In *In re Lupron*, this Court analyzed the following six factors from *Grinnell* in deciding whether to grant final approval to a class action settlement:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability and damages; (5) the ability of the defendants to withstand a greater judgment; and (6) the amount of the settlement fund in contrast to the best possible recovery.

In re Lupron, 228 F.R.D. at 93–98; *see also In re Relafen Antitrust Litig.*, 231 F.R.D. at 2 (adopting an identical test).[4]

[4] The nine *Grinnell* factors are: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *Grinnell*, 495 F.2d at 463. As this Court concluded in *In re Lupron*—both explicitly and through its analysis—several of the

In addition to the *Grinnell* factors, some courts examine whether the settlement was procured by collusion or whether it was instead the product of arm's-length negotiations informed by discovery. *See In re Lupron*, 228 F.R.D. at 93 (noting that "[w]hen sufficient discovery has been provided and the parties have bargained at arms-length, there is a presumption in favor of settlement") (citing *City P'ship Co. v. Atl. Acquisition Ltd. P'ship*, 100 F.3d 1041, 1043 (1st Cir. 1996)). Here, the Settlement Agreement easily passes both tests: it is free from collusion, having been the product of arm's-length negotiations after sufficient discovery between the Parties with the assistance of a neutral mediator, and it satisfies each of the relevant *Grinnell* reasonableness factors identified by the Court.

A. The Settlement is the Result of Arm's-Length Negotiations Through Mediation Between the Parties After Sufficient Discovery.

The context in which the Settlement Agreement was procured confirms that the settlement was the result of arm's-length and informed negotiations and is thus entitled to a presumption of fairness. The Parties engaged in extensive, long-fought litigation before beginning any settlement discussions. Plaintiffs served numerous discovery requests resulting in the production of documents as well as significant electronic data from Collecto. Plaintiffs deposed corporate representatives of the Defendant on multiple occasions, retained several experts, and produced at least one expert report all prior to any settlement discussions taking place. In fact, it was only after extensive briefing, receiving a ruling on Defendant's motion for summary judgment, and engaging in formal discovery— including the production and review over a terabyte of data produced by Defendant—that the Parties believed they had sufficient information to discuss a potential resolution of the case.

The settlement discussions in the case were conducted under the auspices of third-party

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factors overlap and can be analyzed together, while others related to manageability of the case at trial are not relevant in the settlement context. 228 F.R.D. at 95.

mediators, first through Anthony Piazza and then later through Rodney Max. Parisi Decl., ¶¶10, 13. The first round of mediation did not result in any agreement, and at the outset of the second round of mediation, it was not even clear that a deal would be possible. *Id*. But with the assistance of Mr. Max over several months, the Parties were ultimately able to agree on the principle terms of what, with further negotiations, would result in the instant settlement.

Because the Settlement Agreement was the result of arm's-length negotiations (reached only with the assistance of a neutral mediator), in which both sides were well-informed of the strengths and weaknesses of the other's position, it is clear that it was not the product of fraud or collusion, and this Court should not hesitate to approve it. Parisi Decl., ¶¶18-30; *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 117 (2d Cir. 2005) (finding settlement was entitled to presumption of fairness when negotiated by informed counsel with the assistance of mediator); *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 693 (N.D. Ga. 2001) ("The fact that the entire mediation was conducted under the auspices of . . . a highly experienced mediator, lends further support to the absence of collusion.").

B. The Settlement Satisfies Each of the Relevant *Grinnell* Factors.

In addition to being the result of arm's-length and informed negotiations free from fraud or collusion, the Settlement Agreement also satisfies each of the relevant *Grinnell* factors.

1. Complexity, Expense and Likely Duration of the Litigation

In the absence of settlement, it is certain that the expense, duration, and complexity of the continued litigation would be substantial. "When comparing the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation, there are clearly strong arguments to be made for approving a settlement." *Rolland v. Cellucci*, 191 F.R.D. 3, 10 (D. Mass. 2000).

Class litigation required a complex analysis of Collecto's call logs to identify calls to class members and to weed out other calls, including calls that did not connect. This complexity

was inherently a threat to the class recovering, and that threat was compounded by the long delay – over three years—in simply obtaining the correct records (i.e., CDRs) from Collecto.

While Plaintiffs and Class Counsel ultimately believe in the merits of the claims, Class Counsel foresee numerous hurdles in the road to trial. Continued litigation would require the expenditure of significant time and money for additional discovery, the preparation of several expert witnesses, technical consultants, motion practice on class certification as well as discovery and dispositive motions, costly trial preparation, and a technically complex and lengthy trial. Parisi Decl., ¶¶23-26. Given the complexity of the issues, as well as the amount in controversy, the defeated party or parties would likely appeal any decision on summary judgment or verdict at trial. In addition, had the Court certified a class in a litigation context, it is possible that Collecto would have sought permission to appeal such an interlocutory order under Federal Rule of Civil Procedure 23(f), adding to the length and complexity of the case as well as the uncertainty of recovery on behalf of a class. In comparison, the relief provided to the Settlement Class under the Agreement weighs heavily in favor of its approval compared to the inherent risks of continued litigation, trial, and appeal. *See In re Relafen Antitrust Litig.*, 231 F.R.D. at 72 (finding "the complexity, expense and likely duration of the litigation . . . weighs heavily in favor of this settlement."); *Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1323 (S.D. Fla. 2005) ("[I]t has been held proper to take the bird in hand instead of a prospective flock in the bush.").

2. The Reaction of the Class to the Settlement

The reaction of the Settlement Class to the settlement—which has been overwhelmingly positive—is analyzed by comparing the number of objectors and opt-outs with the number of claimants, and by assessing the extent to which notice effectively reached absent class members. *In re Lupron*, 228 F.R.D. at 96. Here, notice reached over 80% of the approximately 206,000 Class Members directly, over 4,200 of whom have submitted valid claims. Only one person

chose to exclude themselves from the Class, and no one has objected to the settlement. Molina Decl., ¶10. These numbers are more favorable to those in *Lupron*, where this Court found that 10,000 consumer claims, forty-nine opt-outs, and ten objections, out of a class of hundreds of thousands of purchasers generally supported approval of the settlement. *In re Lupron*, 228 F.R.D. at 96; *see also Giusti-Bravo v. U.S. Veterans Admin.*, 853 F. Supp. 34, 40 (D.P.R. 1993) ("Another indication of the fairness of a class action settlement is the lack of, or small number of, objections."); *Lipuma*, 406 F. Supp. 2d at 1324 ("a low percentage of objections points to the reasonableness of a proposed settlement and supports its approval.").

Moreover, while notice of the settlement was sent to the U.S. Attorney General, and Attorneys General of all fifty states, the District of Columbia, and Puerto Rico, none have voiced any opposition to the terms of the Agreement. This lack of governmental opposition to the settlement likewise militates in favor of its approval. *See Fresco v. Automotive Directions, Inc.*, 03-cv-61063, 2009 WL 9054828, at *5 (S.D. Fl. 2009).

3. The Stage of Proceedings and the Amount of Discovery Completed

The next *Grinnell* factor looks to the stage of proceedings at which settlement was achieved "to ensure that the plaintiffs have access to sufficient information to adequately evaluate the merits of the case and weigh the benefits of the settlement against further litigation." *Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1383 (S.D. Fla. 2007); *see also Rolland*, 191 F.R.D. at 10 ("the parties' discovery efforts have enabled the attorneys to assess the merits of the action and negotiate a principled compromise.").

Plaintiffs and Class Counsel successfully opposed summary judgment, retained experts on auto-dialers and data analysis, served twenty-nine sets of discovery, litigated five motions to compel, deposed Collect three times through its designated representatives, and both sides retained experts who were also deposed. Parisi Decl., ¶¶6-9.

Thus, by the time the Parties engaged in the final mediation, Plaintiffs had enough information to sufficiently evaluate the strength of the claims of the Settlement Class and weigh the benefits of settlement against continued litigation. The stage of proceedings factor thus weighs in favor of approval. *See, e.g., In re M3 Power Razor Sys. Mktg. & Sale Practice Litig.*, 270 F.R.D. 45, 63 (D. Mass. 2010); *Duhaime v. John Hancock Mut. Life Ins. Co.*, 177 F.R.D. 54, 67 (D. Mass. 1997).

4. The Risks of Establishing Liability and Damages

Although Plaintiffs and Class Counsel are confident in the strength of the claims at issue, as in every class action, there was a significant risk that this litigation would result in a lesser recovery for the Class, or no recovery at all. *See In re Lupron*, 228 F.R.D. at 97 ("As any experienced lawyer knows, a significant element of risk adheres to any litigation taken to binary adjudication."). In order to prevail on the claims, Plaintiffs would be required to establish that class members could be adequately identified, that each of Collecto's dialer met the definition of an ATDS, and even that Collecto did not have in place sufficient measures to prevent calls of the type at issue here. Further, given that Plaintiffs' case relies upon both judicial and agency interpretations of the TCPA, there was always a significant chance that the judicial or agency interpretation of the law upon which this case is based could shift in Defendants' favor. Defendant also asserted at least twelve affirmative defenses, any one of which may have gained traction with the jury and defeated Plaintiff's claims. There was also risk inherent in litigating the propriety of class certification. Plaintiffs spent significant time with their experts to develop an appropriate methodology to identify class members in the settlement context. Had Plaintiffs been required to undertake this same task in the context of litigation, they would have faced significantly more risk and expense. Thus, absent the present settlement, Plaintiffs may have been limited to recovering only for themselves, which would have resulting in significantly

lower damages overall and potentially no recovery whatsoever for settlement class members.

In this same vein, Plaintiffs faced some risk with respect to establishing the amount of damages. While the TCPA contains a liquidated damages amount of $500 per violation and $1,500 per violation for "willful" violations, some courts have viewed the statute as authorizing damages "up to" these statutory amounts, while other courts have reduced statutory damages as being unconstitutionally excessive. *See, e.g., Maryland v. Universal Elections, Inc.,* 862 F. Supp. 2d 457, 465 (D. Md. 2012); *Texas v. Am. Blastfax, Inc.*, 164 F. Supp. 2d 892 (W.D. Tex. 2001); *Golan v. Veritas Ent., LLC*, 4:14-cv-00069-ERW, 2017 WL 3923162 (E.D. Missouri).

These risks, particularly when weighed against the value of the relief afforded the Settlement Class, further demonstrate the fairness and adequacy of the settlement.

5. The Ability of Defendants to Withstand a Greater Judgment

The next *Grinnell* factor examines the reasonableness of the settlement in light of Defendant's capacity to pay more. *See In re Lupron*, 228 F.R.D. at 97 (finding the factor to be neutral where defendant had "deep pockets"); *see also Wehlage v. Evergreen at Arvin LLC*, No. 10–cv– 05839, 2012 WL 2568151, at *1 (N.D. Cal. June 25, 2012) ("the [c]ollectability of a judgment . . . bear[s] on the reasonableness of a settlement in relation to the defendants' ability to withstand a greater one") (internal quotations omitted) (brackets in original); *Aramburu v. Healthcare Fin. Servs., Inc.*, No. 02–cv–6535, 2009 WL 1086938, at *4 (E.D.N.Y. Apr. 22, 2009) ("[a] related consideration weighing in favor of settlement is defendant's dire financial condition, which makes obtaining a greater recovery than provided by the [s]ettlement . . . difficult") (internal quotations omitted).

Here, there were significant risks associated with Plaintiffs proceeding to trial and ultimate judgment. Given the volume of calls Collecto made during the class period, there was a substantial likelihood that a class-wide judgment could exceed Collecto's assets and resources.

See, e.g., Dkt. No. 52. Collecto had potential insurance coverage for some of the claims Plaintiffs were asserting, but even the ultimate amount of insurance coverage available to Collecto was a matter of dispute in a separate proceeding before this Court. As a part of the present settlement, Collecto's insurers have agreed to separately settle their coverage disputes and provide funding for the Settlement Agreement. Thus, absent the Settlement Agreement, class members could have faced an uncollectable and bankrupt defendant while with the Settlement Agreement, class members can benefit from insurance coverage and share in a significant common fund. Accordingly, this factor further supports the reasonableness of the settlement.

6. The Amount of the Settlement Fund in Contrast to the Best Possible Recovery

The last *Grinnell* factor compares the value of the damages a Plaintiff could recover should he or she prevail (appropriately discounted for the risk of losing) with the value of what is offered by the proposed settlement. In re Lupron, 228 F.R.D. at 97 (quoting *In re Gen. Motors Corp. Pick- Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 805 (3d Cir. 1995)); *see also Protective Comm. for Indep. Stockholders v. Anderson*, 390 U.S. 414, 424–25 (1968) ("Basic to [analyzing a proposed settlement] in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation."). That said, "[a] fine tuned equation by which to determine the reasonableness of the size of a settlement does not exist." *In re Relafen*, 231 F.R.D. at 73.

Here, a complete victory on the merits for Plaintiffs and the Class would include (i) an award of damages of "up to" $500, per violation (or "up to" $1,500 if "willful or knowing" violations), for each of the more than 206,000 Class Members and (ii) an injunction preventing the continued misconduct.

While the potential best-case scenario could result in a large verdict, Plaintiffs are

cognizant that very few TCPA actions are tried to verdict and Collecto simply does not have the assets to pay such a judgment. Further, while the TCPA provides for $500 in damages for each violation, defendants have successfully argued at times that the statute does have mandate that the Court actually award such damages and the trier of fact could award less, depending on the facts. Thus, this final *Grinnell* factor supports the court approving the settlement because while class members stand to recover less than in a "homerun" scenario under the settlement, there are significant risks that warrant the court discounting the value of such a rosy picture. When appropriately discounted, the value of the present settlement compares very favorably to what Plaintiffs and class members could hope to achieve even if they had fully prevailed in a litigated context.

VII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant final approval to the settlement upon the terms set forth in detail in the Settlement Agreement.

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