UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GRACE MURRAY, AMANDA ENGEN, JEANNE TIPPET, STEPHEN BAUER, ROBIN TUBESING, NIKOLE SIMECEK, MICHELLE MCOSKER, JACQUELINE GROFF, and HEATHER HALL, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

GROCERY DELIVERY E-SERVICES USA INC. DBA HELLO FRESH,

Defendant.

Case No. 19-cv-12608-WGY

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

Class plaintiffs have reached the largest settlement in Massachusetts federal court history for a lawsuit about Telephone Consumer Protection Act[1] ("TCPA") violations. The fourteen million dollar ($14,000,000) common fund settlement with Defendant Grocery Delivery E-Services USA, Inc. d/b/a HelloFresh has no reverter. The parties negotiated this arm's-length settlement under the guidance of a highly-skilled and experienced mediator, Hon. George H. King (Ret.), the former Chief Judge of the U.S. District Court for the Central District of California. The class's reaction to the settlement has been overwhelmingly positive. Because this settlement is fair, reasonable, and adequate, the class respectfully moves the Court to approve the final settlement.

ARGUMENT

A. The Class Meets the Rule 23(a) and (b)(3) Standard.

For certification, the class must satisfy Fed. R. Civ. P. 23(a) and (b). As briefed already, the class meets the numerosity, commonality, typicality, and adequacy requirements. Dkt. Nos. 61, 71.[2] The class also meets the Fed. R. Civ. P. 23(b) predominance and superiority requirements. Dkt. No. 61. Under First Circuit case law, predominance "does not require an entire universe of common issues, but does require a sufficient constellation of them." *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 70 (D. Mass. 2005) (citing *Waste Mgmt. Holdings, Inc. v. Mowbray,* 208 F.3d 288, 298 (1st Cir. 2000)). The superiority requirement ensures that a class action resolution will achieve economies of time, effort, and expense, and promote a uniform

[1] 47 U.S.C. § 227.

[2] Plaintiffs incorporate in full its Motion for Preliminary Approval of Class Action Settlement (Dkt. No. 61) and its Memorandum in Support of Plaintiffs' Motion for a Service Award for Class Representatives and For An Award of Attorneys' Fees and Expenses (Dkt. No. 71).

decision to similarly situated people, without sacrificing procedural fairness or causing undesirable results. *Id.* The court in *Bezdek* considered these principles when it concluded that class member differences on causation and damages did not defeat predominance. *Bezdek v. Vibram USA Inc.*, 79 F. Supp.3d 324, 342 (D. Mass. 2015).[3] All class members here faced a common, overriding issue. They were former HelloFresh customers who received unwanted "win-back" telephone calls after deactivating their accounts. A class action is the superior method for resolving these claims, when statutory damages of $500 per occurrence is the same for all class members and low compared to the cost of bringing an individual lawsuit.[4]

B. The Class Action Settlement is Fair, Reasonable, and Adequate.

The First Circuit has long recognized an overriding public interest in favor of settling class actions. *Lazar v. Pierce,* 757 F.2d 435, 439 (1st Cir. 1985). A district court may approve a class action settlement if it is fair, reasonable, and adequate, and not a product of collusion. *See*

[3] As the court observed, "by employing a broad definition of the class that includes individuals who purchased FiveFingers footwear during the relevant time period for any reason (other than resale), the settlement provides relief to the broadest class of individuals to whom relief would potentially be available." *Id.* at 341. The court went on: "Although this is notably less than the theoretical maximum potential relief available at trial, it appears as a practical matter in the range of what any class member could reasonably expect through pursuit of an individual claim, if it were feasible. *Id.* at 342.

[4] Other courts that certified TCPA classes reached a similar conclusion. *See Bee, Denning, Inc. v. Capital Alliance Grp.*, No. 13-cv-2654- BAS-WVG, 2015 U.S. Dist. LEXIS 129495, at *37-38 (S.D. Cal. Sept. 24, 2015) ("A statute such as the TCPA, which provides for a relatively small recovery for individual violations but is designed to deter conduct directed against a large number of individuals, can be effectively enforced only if consumers have available a mechanism that makes it economically feasible to bring their claims. Without the prospect of a class action suit, corporations balancing the costs and benefits of violating the TCPA are unlikely to be deterred"). Indeed, as the Massachusetts Court of Appeals stated, "the majority of courts to have discussed the issue under various cognate class action provisions and hold that the class action mechanism is a superior avenue for adjudication of claims under 47 U.S.C. § 227." *Hazel's Cup & Saucer, LLC v. Around The Globe Travel, Inc.,* 2014 WL 4106870, at *3 (Mass. App. Ct. August 22, 2014).

Fed. R. Civ. P. 23(e)(2); *In re Relafen Antitrust Litig.,* 231 F.R.D at 57, 71-72; *City Pshp. Co. v. Atlantic Acquisition*, 100 F.3d 1041, 1043 (1st Cir. 1996). Factors the court considers include:

> (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 the 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.

In re Relafen Antitrust Litig., 231 F.R.D at 72. Fed. R. Civ. P. 23(e)(2), revised on December 1, 2018, sets forth overlapping factors a court must consider:

> (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats class members equitably relative to each other.

1. <u>The Class Settlement Is Entitled to a Presumption of Fairness.</u>

The settlement agreement is entitled to a presumption of fairness and adequacy because experienced, fully-informed counsel reached it only after discovery and extensive arm's-length negotiations, with the assistance of nationally-recognized mediator Hon. George H. King (Ret.). Dkt. Nos. 61, 71. While the parties aggressively pursued discovery and prepared for trial, and as two appeals were pending, they participated in a JAMS mediation on October 7, 2020, ultimately resolving the cases over the following week. "Although the district court must carefully scrutinize the settlement, there is a presumption in favor of the settlement if the parties negotiated it at arms-length after conducting meaningful discovery." *New England Carpenters*

Health Benefits Fund, et al. v. First Data Bank, Inc., 602 F.Supp.2d 277, 280 (D. Mass. 2009); *see also In re Relafen Antitrust Litig.,* 231 F.R.D. at 71-72; *Lapan v. Dick's Sporting Goods, Inc.,* No. 1:13-cv-11390-R, 2015 U.S. Dist. LEXIS 169508, at *3 (D. Mass. Dec. 11, 2015) ("The assistance of an experienced mediator…reinforces that the Settlement Agreement is non-collusive.").[5]

2. Class Members Received Notice of the Settlement That Complied with Due Process.

a. Structure of the Settlement

The parties agreed on the following settlement class:

> All persons in the United States from September 5, 2015, to December 31, 2019 to whom HelloFresh, either directly or by a vendor of HelloFresh, (a) placed one or more calls on their cellphones placed via a dialing platform; (b) at least two telemarketing calls during any 12-month period where their phone numbers appeared on the NDNCR for at least 31 days before the calls; and/or (c) received one or more calls after registering the landline, wireless, cell, or mobile telephone number on which they received the calls with Hello Fresh's Internal Do-Not-Call List.

Dkt. No. 61-1 (Agreement ¶ 1.33). The proposed settlement encompasses 4,831,285 individuals and establishes a non-reversionary $14,000,000.00 settlement fund. Shortly after the class filed the first of several lawsuits resolved by this settlement,[6] HelloFresh also ceased its outbound calling activity.

[5] *In re Telik Sec. Litig.*, 576 F. Supp. 2d 570, 576 (S.D. NY 2008) (the use of an experienced mediator "in the settlement negotiations strongly supports a finding that they were conducted at arm's length and without collusion").

[6] As explained in the preliminary approval motion and motion for attorneys' fees, Dkt. Nos. 61 and 71, the parties were litigating three nationwide class action lawsuits and two circuit court appeals when the settlement was reached.

b. The Form and Manner of Notice Complied with Rule 23 and Due Process.

Fed. R. Civ. P. 23(e)(1) requires the court to direct notice in a reasonable manner to all class members who would be bound by a proposed settlement. The best practicable notice is "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." *Lightspeed Media Corp. v. Smith*, 761 F.3d 699, 704 (7th Cir. 2014) (citing *United States Air Funds, Inc. v. Espinosa*, 559 U.S. 260, 272 (2010)). The notice that this Court approved preliminarily, and which was disseminated to the settlement class satisfies these criteria. The notice is clear and straightforward and provides class members with enough information to evaluate whether to participate in the settlement.

On December 28, 2020, after this Court granted preliminary approval for the settlement, KCC was appointed as settlement administrator. Dkt. No. 68. KCC has complied with the Court's Order and provided notice to the class. In January 2021, 4,423,730 class members were sent an initial e-mail notice. *See* Exhibit 1, Declaration of Jay Geraci, employee of KCC Class Action Services, LLC ("Geraci Dec.") at ¶ 9. KCC determined that 4,197,974 of those e-mail notices were sent successfully. *Id.* at ¶ 14. However, 225,756 e-mail notices were not delivered successfully, and KCC sent postcard notices to those class members. *Id.* at ¶ 15. Beginning on March 11, 2021, and again on March 22, 2021, KCC sent two additional rounds of more than 4,000,000 e-mail reminder notices to settlement class members who had a previously successful e-mail address and who had not yet filed a claim. *Id.* at ¶ 11. There were 406,354 settlement class members without an e-mail address in the class data and those class members were sent postcard notices. *Id.* at ¶ 9. Since mailing the postcard notices to the class members, KCC has received 81,439 notice packets returned by the USPS with undeliverable addresses. *Id.* at ¶ 16. KCC

performed address searches for these undeliverable notice packets, found updated addresses for 20,161 class members, and promptly re-mailed notice packets to the found new addresses. *Id.*

In addition to the direct mailed and emailed notices, KCC also established a website, www.HelloFreshTCPASettlement.com, where potential class members could view settlement documents and make claims. *Id.* at ¶ 18. The website received 264,442 visits. *Id.* at ¶ 18. KCC also established a toll-free telephone number through which potential class members could receive additional information about the settlement. *Id.* at ¶ 19. Finally, KCC provided notice to relevant governmental entities pursuant to the Class Action Fairness Act ("CAFA"). *Id.* at ¶ 3.

Notice is adequate if it is "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." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174 (1974). Sending notice by first class mail to class members identified by reasonable means is regularly deemed adequate under Rule 23(c)(2). *Reppert v. Marvin Lumber & Cedar Co., Inc.*, 359 F.3d 53, 56-57 (1st Cir. 2004). The parties also used e-mail where available, an approach endorsed by federal courts following the 2018 amendment to Fed. R. Civ. P. 23(c)(2)(B), including in TCPA cases.[7] Particularly relevant here, HelloFresh regularly engages with its customers and former customers via e-mail, and all settlement class members are former customers. As best as determinable, 98.69% of the

[7] *See e.g. Chinitz v. Intero Real Estate Servs.,* No. 18-cv-05623-BLF, 2020 U.S. Dist. LEXIS 224999, at *7 (N.D. Cal. Dec. 1, 2020) ("email notice for each class member for whom an email address is available…if email notice cannot be used, there will be postcard notice for each class member."); *Abramson v. American Advisors Group, et. al.,* No. 2:19-cv-01341-MJH, ECF No. 80 (W.D. PA, September 29, 2020) (same).

notices have reached class members. This percentage far exceeds established due process requirements for class notice.[8]

The notice plan constituted the best notice practicable, provided due and sufficient notice to the settlement class, and fully satisfied due process and Fed. R. Civ. P. 23 requirements.

3. The Class's Reaction to The Settlement Is Positive.

The class's reaction to this settlement has been positive. Even though over 4,800,000 class members received direct, personal notice via e-mail or first-class mail (98.69%), only three objections[9] (0.00000062% of settlement class members) have been received. By contrast, 100,433 class members filed timely claim forms,[10] and those who have done so stand to receive at least $89.18 each.[11] Following direct notice under CAFA to each state attorney general's office, no state attorney general, nor the Attorney General of the United States, has objected. Class members' overwhelming support for the settlement favors final approval.

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[8] *See* Federal Judicial Center, Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide (2010), *available at* https://goo.gl/KTo1gB (instructing that notice should have an effective "reach" to its target audience of 70-95%); *see also Swift v. Direct Buy, Inc.*, No. 2:11-cv-401-TLS, 2013 WL 5770633, at *3 (N.D. Ind. Oct. 24, 2013) ("The Federal Judicial Center's checklist on class notice instructs that class notice should strive to reach between 70% and 95% of the class").

[9] One such objection, filed by Kari Hand Benson, was a generic *pro se* objection based on the settlement class member's indifference to receipt of the telemarketing calls. The second objection was filed by Sarah McDonald, who has filed at least six objections to class action settlements. *See* Dkt. No. 77, incorporated here in full. Ms. McDonald has also filed a claim in this settlement. *See* Geraci Dec. ¶ 22. The final objection filed by Keith Head, is also *pro se*, and is limited to the overall amount of the settlement, the amount of the service award and attorneys' fees, all discussed below.

[10] There were also 270 class members who decided to exclude themselves from the settlement, 26 of which are represented by a single law firm, Lemberg Law. *Id.* at ¶ 21.

[11] This will be each valid claimant's recovery if the Court approves the settlement as presented with deductions made for: (a) attorneys' fees ($4,516,666.67); (b) attorneys' costs ($36,443.76); (c) named plaintiff awards ($40,000); and (d) administration costs ($450,000). Geraci Dec. ¶ 23.

4. The Class Representatives and Class Counsel Have Adequately Represented the Class.

"When the parties' attorneys are experienced and knowledgeable about the facts and claims, their representations to the court that the settlement provides class relief which is fair, reasonable and adequate should be given significant weight." *Rolland v. Cellucci*, 191 F.R.D. 3, 10 (D. Mass. 2000). Class counsel previously submitted for the Court's review their qualifications, a detailed account of the course of this litigation, and strategic positioning of the pending cases. Dkt. Nos. 61, 71. Plaintiffs and their counsel believe the settlement is fair, reasonable, adequate, and in the best interests of the class members.

Ms. McDonald is mistaken in her assertion that class counsel are asking the Court to "rubber stamp" the settlement and are seeking final approval "based simply on the arguments and recommendations of counsel." *See* Dkt. No. 75,[12] at *15. Instead, as endorsed repeatedly by courts in this District, when class counsel have extensive experience in the type of litigation that is the subject of the settlement, there should be "significant weight to this representation." *Gulbankian v. MW Mfrs., Inc.,* No. 10-10392-RWZ, 2014 U.S. Dist. LEXIS 177668, at *11 (D. Mass. Dec. 29, 2014).

5. Diverse and Substantial Legal and Factual Risks Weigh in Favor of Settlement.

Litigating this case is not without risks. On April 1, 2021, the Supreme Court decided the question of whether the dialing system used was an "Automatic Telephone Dialing System," which will make such a claim more difficult to litigate. *Facebook, Inc. v. Duguid*, No. 19-511, 2021 U.S. LEXIS 1742 (Apr. 1, 2021). Furthermore, whether cellular telephones are properly subject to the TCPA's Do Not Call provision is an often-litigated issue. *See, e.g., Morgan v. U.S. Xpress, Inc.,* No. 3:17-CV-00085, 2018 WL 3580775, at *2–3 (W.D. Va. July 25, 2018)

[12] Objection of Sarah McDonald ("McDonald Objection").

(granting motion to dismiss because Plaintiff has failed to plausibly allege the calls were made to a "residential telephone line" within the meaning of the relevant section of the TCPA). As the *Morgan* court observed: "It would be odd if a cell phone, largely used outside the home and at work, became a residential line just because it was brought home and thereby erased those statutory categories." *Id.* Calls to cell phones comprise most class members, including Ms. McDonald. HelloFresh has also maintained that all the calls were made by their vendors, and any calls that violated the TCPA are breaches of those vendors' contractual obligations. The Supreme Court in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), held that traditional agency and vicarious liability principles apply for liability under the TCPA. Several TCPA cases have been dismissed for failure to establish the defendant's knowledge of a vendor's illegal conduct. *See e.g. Jones v. Royal Administration*, 887 F.3d 443 (9th Cir. 2018). Indeed, even TCPA cases that were certified have been dismissed on summary judgment later for that vicarious liability issue. *See, e.g., McCurley v. Royal Sea Cruises, Inc.,* No. 17-cv-00986-BAS-AGS, 2021 U.S. Dist. LEXIS 17619 (S.D. Cal. Jan. 28, 2021).

Class certification is also far from automatic in TCPA cases. *See, e.g., Tomeo v. CitiGroup, Inc.*, No. 13 C 4046, 2018 WL 4627386, at *1 (N.D. Ill. Sept. 27, 2018) (denying class certification in TCPA case after nearly five years of hard-fought discovery and litigation). In addition, at least some courts view awards of aggregate, statutory damages under the TCPA with skepticism and reduce such awards on due process grounds, even after a plaintiff has prevailed on the merits. *See, e.g., Golan v. FreeEats.com*, *Inc.*, 930 F.3d 950 (8th Cir. 2019) (reducing TCPA statutory damages in class action to $10 per call).

Litigating this case through multiple appeals and a trial would be time-consuming and expensive. As with most class actions, this case is complex. Absent settlement, trial followed by

appeals could continue for years before the class would see any recovery. A settlement that eliminates this delay and expense strongly favors approval.

6. The Risk of Maintaining a Class Through Trial Favors Settlement.

Even though Plaintiffs believe that this case is appropriate for class action treatment, Courts have decertified TCPA classes for a variety of reasons. *See, e.g., Cordoba v. DIRECTV, LLC,* 942 F.3d 1259 (11th Cir. 2019) (decertifying TCPA class due to predominance issues related to standing); *Trenz v. On-Line Adm'rs*, No. 2:15-cv-08356-JLS-KS, 2020 U.S. Dist. LEXIS 187788 (C.D. Cal. Aug. 10, 2020) (same, but for individualized issues of consent). Any decision to grant certification absent settlement would be subject to the delay and uncertainty of a Rule 23(f) appellate challenge before the class could proceed to trial. And, an appeal from any verdict or judgment in favor of the class could likewise follow. If a class could not be certified, then it would leave few, if any, class members with both the resources and financial incentive to chase a maximum $500 award for each statutory violation on their own, with the practical result of no recovery by anyone.

7. The Ability to Withstand a Greater Judgment.

One court put this factor into perspective against a larger and deeper pocket when approving a TCPA settlement against Chase Bank:

> Individual class members receive less than the maximum value of their TCPA claims, but they receive a payout without having suffered anything beyond a few unwanted calls or texts, they receive it (reasonably) quickly, and they receive it without the time, expense, and uncertainty of litigation.... *[C]omplete victory for Plaintiff at $500 or $1,500 per class member could bankrupt [the defendant].... [The] recovery in the hand is better than a $500 or $1,500 recovery that must be chased through the bankruptcy courts.*

Gehrich v. Chase Bank USA, N.A., 316 F.R.D. 215, 228 (N.D. Ill. 2016) (emphasis added). The same analysis is true here. At worse, this issue is neutral. *See, e.g., Roberts v. TJX Cos.,* No. 13-cv-13142-ADB, 2016 U.S. Dist. LEXIS 136987, at *26-27 (D. Mass. Sep. 30, 2016).[13]

8. The Monetary Terms of this Proposed Settlement Provide Substantial Relief for the Class.

Rule 23(e)(2)(C) and (D) direct the Court to evaluate whether "the relief provided for the class is adequate" and "the proposal treats class members equitably relative to each other." The settlement requires HelloFresh to pay $14,000,000 into a settlement fund. Class members who submitted a valid claim will receive at least $89.00, an amount that far exceeds comparable common fund settlements against large corporations alleged to have violated the TCPA.[14] The settlement, which counsel believes is the largest in Massachusetts federal court history in a TCPA case, provides substantial relief to class members without delay or litigation risk.

9. The Settlement is an Effective and Equitable Means to Distribute Relief to the Settlement Class.

The settlement treats each class member in precisely the same way. *See* Fed. R. Civ. P. 23(e)(2)(C) & (D) advisory committee's note (asking whether "the scope of the release may

[13] In evaluating this factor against the range of reasonableness of the settlement and litigation risk, the *Roberts* court reasoned: "Specifically, the Plaintiffs argue that the defendant's ability to withstand a greater judgment does not on its own suggest that the settlement is unfair. The Court agrees. [This] factor seems to be appropriately assessed within the context of the eighth and ninth factors. For example, if the settlement amount were significantly below even the most pessimistic estimates of a possible recovery, then considering the defendant's ability to pay (the seventh factor) would be relevant in assessing whether the settlement amount was nonetheless fair. Thus, the seventh factor on its own appears to be neutral."

[14] *See e.g.*, *Markos v. Wells Fargo Bank, N.A.*, No. 1:15-cv-01156-LMM, 2017 WL 416425, at *4 (N.D. Ga. Jan. 30, 2017) ($24.00); *Hashw v. Dep't Stores Nat'l Bank*, 182 F. Supp. 3d 935, 944 (D. Minn, 2016) ($33.20); *Kolinek v. Walgreen Co.*, No. 13-cv-4806, 2015 WL 7450759, at *7 (N.D. Ill. Nov. 23, 2015) ($30); *In re Capital One TCPA Litig.*, 80 F. Supp. 3d 781, 789 (N.D. Ill. 2015) ($34.60); *Rose v. Bank of Am. Corp.*, No. 11-cv-02390-EJD, 2014 U.S. Dist. LEXIS 121641, at *30 (N.D. Cal. Aug. 29, 2014) ($20 to $40)); *Steinfeld v. Discover Fin. Servs.*, No. C 12-01118, 2014 WL 1309352, at *6 (N.D. Cal. Mar. 10, 2014) ($46.98); *In re Jiffy Lube Int'l, Inc. Text Spam Litig.*, No. 3:11-md-02261 (S.D. Cal. Feb. 20, 2013) ($12.97).

affect class members in different ways that bear on the apportionment of relief"). Every class member who made a claim will receive the same relief in return for the same release of HelloFresh's liability. No class member was favored, disfavored, or otherwise treated differently. Moreover, class members' positive reaction to the settlement and its relief supports the settlement's fundamental equality and effectiveness. Here, there are three objectors compared to over 100,000 valid claimants.

Ms. McDonald mischaracterizes the claims asserted here as "vary[ing] significantly from one another in their value," to argue that separately represented subclasses are required. All class members' claims are for telephone calls placed in violation of the TCPA, and the same statutory damages of $500 applies to each claim under the TCPA. 47 U.S.C. §§ 227(b)(3), 227(c)(5). This case is thus unlike the mass tort asbestos claims at issue in *Amchem Prods v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fiberboard Corp.*, 527 U.S. 815 (1999). Moreover, in *In re Nexium (Esomerazole) Antitrust Litig.*, this Court rejected arguments that theoretical potential for "differences in damages among" different groups of plaintiffs would "warrant the need for separate counsel and representatives." 297 F.R.D. 168, 172-73 (D. Mass. 2013).

"[P]erfect symmetry of interest is not required and not every discrepancy among the interests of class members [is] untenable. 'Only conflicts that are fundamental to the suit and that go to the heart of the litigation prevent a plaintiff from meeting the Rule 23(a)(4) adequacy requirement.'" *Matamoros v. Starbucks Corp.*, 699 F.3d 129, 138 (1st Cir. 2012) (quotation omitted). "[T]he intra-class conflict must be so substantial as to overbalance the common interests of the class members as a whole." *Id.*

The named plaintiffs' "interest in this litigation is the same as each other class members' interest: to recover the maximum statutory penalty for each violative call." *Moser v. Health Ins.*

Innovations, Inc., No. 17-cv-1127-WQH-KSC, 2019 WL 3719889, at *9 (S.D. Cal. 2019) (finding adequacy of class representation for TCPA claims); *see also Robinson v. Paramount Equity Mortgage, LLC*, No. 2:14-cv-02359-TLN-CKD, 2017 WL 117941 (Jan. 10, 2017 E.D. Cal. 2017) (finding adequate representation and other requirements met for certification of class to whom calls in violation of TCPA were made using autodialing and to numbers on do not call registry). No "fundamental" conflict exists. Instead, all class members have received calls in violation of the TCPA giving rise to the claims that have statutory damages of $500 available. No subclass of plaintiffs, therefore, have only prospective injury like in *Amchem* and *Ortiz*.

"Hypothetical conflicts, particularly regarding damages allocation, are insufficient to defeat a showing of adequacy under Rule 23(a)(4)." *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.*, No. 14-md-02503, 2017 WL 4621777, at *13 (D. Mass. Oct. 16, 2017). Yet, Ms. McDonald's argument is premised on the unsupported argument that "members of the NDNCR subclass clearly have by far the strongest and most valuable claims." McDonald Objection at *4. The argument entirely ignores that HelloFresh asserted "established business relationship" defenses that could negate NDNCR violations but not ATDS violations of the TCPA. *See Hand v. Beach Entm't Kc*, 456 F. Supp. 3d 1099, 1122 (W.D. Mo. 2020) (a call is "not considered a telephone solicitation that violates the national do-not-call regulations if it is made to a person with whom the caller has an established business relationship."). Furthermore, the NDNCR claim has a "safe harbor" affirmative defense that an ATDS violation does not, if a company had reasonable safeguards in place to avoid TCPA violations. *See, e.g., Simmons v. Charter Communs., Inc.,* 222 F. Supp. 3d 121, 137 (D. Conn. 2016) ("Accordingly, Charter took the sufficient steps to comply with subsection (c)'s safe harbor provision and avoid liability under the TCPA for the calls Empereon placed to Simmons in violation of the national DNC rules.").

Ms. McDonald, without citation to any case law other than a TCPA case about *faxes*, claims that the Internal Do Not Call claims are virtually worthless because they could never be certified. Again, this is inconsistent with TCPA cases that have certified those claims. *See, e.g., Chinitz v. Intero Real Estate Servs.,* No. 18-cv-05623-BLF, 2020 U.S. Dist. LEXIS 247921 (N.D. Cal. July 22, 2020) (certifying both a National Do Not Call and Internal Do Not Call class under the TCPA); *Krakauer v. Dish Network L.L.C.,* 311 F.R.D. 384 (M.D.N.C. 2015) (same).

Ms. McDonald also fails to consider that HelloFresh asserted arbitration defenses as to all class members, the subject of multiple circuit appeals when this settlement was reached, which makes any hypothetical difference in value between "NDNCR" and "ATDS" even more speculative. *See Gehrich*, 316 F.R.D. at 225-26 (rejecting argument that TCPA class was not adequately represented even though class encompassed groups with potentially different likelihoods of success that could be considered in negotiating settlement payouts).[15]

"All class settlements strike compromises based on probabilistic assessments. If these types of compromises automatically created subclasses that required separate representation, the class action procedure would become even more cumbersome." *Charron v. Wiener*, 731 F.3d 241, 253-54 (2d Cir. 2013) (cleaned up) (rejecting objector's argument that intra-class conflicts required separate representation). No subclasses are needed for the 100,000 claimants to receive $89 each to resolve their $500 TCPA claim.

[15] In this way, the subclass proposal is completely unneeded, unlike in *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242 (2d Cir. 2011), a copyright dispute cited by Ms. McDonald. The proposed plan of allocation in *Literary Works* paid two categories of class members more than a third. *Id.* The settlement also capped defendants' total liability at $18 million and, if the total amount of all claims plus costs and fees exceeded $18 million, then the payout to only one category of claims would be reduced. Here, all class members receive an equal payment.

C. The Court May Award Attorney Fees Using Percentage of Fund Method, and the Lodestar Method Is Not Required in Common Fund Cases.

When this Court entered the Preliminary Approval Order on December 28, 2020, it informed the parties that "Attorneys' fees will be a portion of the net settlement figure after expenses". ECF No. 67. This percentage-based approach is consistent with First Circuit and Supreme Court precedent, as explained in detail in the Plaintiffs' motion for service award and attorneys' fees. Ms. McDonald misreads or mischaracterizes case law in arguing a lodestar method must be used to award attorney fees. *Perdue v. Kenney A. ex rel. Winn* held only that when a lodestar method is employed, enhanced or increased awards for superior performance or results are allowed, but directed that the circumstances for use of such enhancements should be limited because the normal lodestar method is already intended to account for those particular factors to provide presumptively reasonable awards. 559 U.S. 542 (2010). Moreover, the case was one involving a federal fee-shifting statute, not a common fund case. *Id.* Furthermore, the TCPA is not a fee-shifting statute. *Bais Yaakov of Spring Valley v. ACT, Inc.*, 798 F.3d 46, 47 n.1 (1st Cir. 2015).

As the First Circuit has explained, "[a]lthough the lodestar method is entrenched in the statutory fee-shifting context," courts commonly use the alternate percentage of fund [POF] method to fee-setting in common fund cases, such as class actions like here, and indeed POF has become the "prevailing praxis" in such cases because of its "distinct advantages." *In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305-07 (1st Cir. 1995). The very "foundational" Supreme Court case Ms. McDonald cites as supporting her argument actually shows, as the First Circuit observed, that POF is an appropriate way to award fees in a common fund case because it awards fees "computed as a percentage of the fund." *Id.* at 305 (citing *Central R.R. Banking Co. v. Pettus*, 113 U.S. 116, 127-128 (1885)). In *Pettus*, the

Court resolved a dispute about whether the specific percentage of the fund was reasonable when evidence showed that appellee had entered contracts for a smaller percentage of recovery. Still, the Court awarded fees based on a percent of fund recovered (not based on hours or lodestar, as McDonald argues). *Id.* at 128.[16]

In short, contrary to Ms. McDonald's argument, with regard to common fund cases "it is the lodestar method, not the POF method, that breaks from precedent." *In re Thirteen Appeals*, 56 F.3d at 305. So it follows that "all fee awards in common fund cases should be structured as a percentage of the fund." *Id.* at 306 (*quoting* Report of the Third Circuit Task Force at 108 F.R.D. 237, 255 (1985)). The First Circuit has said a district court may in its discretion use a lodestar method or POF method, although the POF method "enhances efficiency" and "better approximates the workings of the marketplace." *Id*. at 307; *see also Heien v. Archstone*, 837 F.3d 97, 100 (1st Cir. 2016) ("court has discretion in common fund cases like here to award fees using a POF instead of lodestar method").

Ms. McDonald also misreads *In re Thirteen Appeals* in arguing the court must review time log records to grant a fee award. While the First Circuit noted time logs can be relevant to a POF inquiry as they can "illuminate the attorney's role in the creation of the fund, and, thus, inform the court's inquiry into the reasonableness of a particular percentage," it did not hold such collection or review of time logs is required. 56 F.3d at 307. To the contrary, it stated use of the POF method "permits the judge to focus on 'a showing that the fund conferring a benefit on the

[16] The *Harrison v. Perea* case Ms. McDonald cites did not involve a common fund, but rather was a probate administration case where the Supreme Court merely noted the lower court had appropriately allowed an attorney to be paid fees from the estate for recovering some money improperly taken by an individual from the estate." 168 U.S. 311, 325 (1897). *United States v. Equitable Trust Co.* is similarly inapposite as it also was not a common fund case but rather a trust fund administration case involving fees paid to guardian's attorneys for services in recovering money paid out due to fraud. 283 U.S. 738 (1931).

class resulted from' the lawyers' efforts" "*[r]ather than forcing the judge to review the time records of a multitude of attorneys*[.]" *Id.* (emphasis added; quotation omitted); *see also Williams v. Rohm*, 658 F.3d 629, 636 (7th Cir. 2011) ("a lodestar check is not an issue of required methodology"). As detailed in class counsel's motion for fees, its requested fees are appropriate and reasonable given it did all of the legal work to create the fund benefitting the entire class with one of the largest funds created for this type of case. Dkt. No. 71.

D. The Named Plaintiffs Should Receive a Service Award.

Federal courts often exercise their discretion under Rule 23(d) and (e) to approve case contribution awards to plaintiffs who prosecuted actions "to recognize their willingness to act as a private attorney general." *Ridgeway v. Wal-Mart Stores Inc.,* 269 F. Supp. 3d 975, 1002 (N.D. Cal. 2017). Ms. McDonald argues that service awards are unlawful in common fund cases, which is ironic since she *herself has sought several and received at least one service award* as a putative class plaintiff.[17]

Ms. McDonald's argument here relies on two Supreme Court decisions, *Cent. R.R. & Banking Co. v. Pettus,* 113 U.S. 116 (1885), and *Trustees v. Greenough,* 105 U.S. 527 (1881). Both cases predate Rule 23 by several decades and neither case precludes service awards in common fund cases.[18] Indeed, the Second Circuit rejected the same argument made by counsel for Ms. McDonald in approving service awards in another TCPA case. *Melito v. Experian Mktg.*

[17] *See* Dkt. No. 77.

[18] In *Pettus*, the Supreme Court held that the attorneys who brought a creditors' bill to reach the assets of a railroad company could recover their fees from the fund their work created for the benefit of all creditors. 113 U.S. at 124-25. The case did not address service awards or any other payments to class members. In *Greenough*, the plaintiff, a bondholder of a railroad company, filed suit against trustees, board members and others who allegedly wasted and destroyed the fund pledged to pay the interest accruing on the bonds. 105 U.S. at 528-29. Allowing the plaintiff to recover those amounts, the Court said, "would present too great a temptation to parties to intermeddle in the management of valuable property or funds in which they have only the interest of creditors, and that perhaps only to a small amount." *Id.* at 537-38.

Sols., Inc., 923 F.3d 85, 96 (2d Cir. 2019) ("The cases cited by Bowes for this proposition are inapposite.").

Ms. McDonald also relies on *Johnson v. NPAS Sols., LLC*, 975 F.3d 1244 (11th Cir. 2020), a first of its kind decision, as explained by Judge Martin dissenting:

> The majority's decision to do away with service awards for class representatives in class actions takes our court out of the mainstream. To date, none of our sister circuit courts have imposed a rule prohibiting service awards…But upon deciding to undertake this issue here, the majority skips any analysis about our modern authority to approve these awards. It goes straight to decisions from the 1880s that do not reflect the current views of the Supreme Court or other circuits.

975 F.3d at 1268. Indeed, *all* of the reported decisions outside of the Eleventh Circuit that have considered *Johnson* have rejected applying it to approve class settlements. *See Somogyi v. Freedom Mortg. Corp.,* No. 17-6546 (RMB/JS), 2020 U.S. Dist. LEXIS 194035, at *27 (D.N.J. Oct. 20, 2020) (approving a TCPA settlement holding "there is substantial precedent from this Circuit supporting approval of incentive payments. Until and unless the Supreme Court or Third Circuit bars service awards or payments to class plaintiffs, they will be approved by this Court if appropriate under the circumstances.").[19] Furthermore, in February of this year Judge Saylor awarded $10,000 to a TCPA plaintiff as a service award in connection with an $800,000

[19] *See also Grace v. Apple, Inc.,* No. 17-CV-00551-LHK, 2021 U.S. Dist. LEXIS 66294, at *20 (N.D. Cal. Mar. 31, 2021); *In re Apple Inc. Device Performance Litig.,* No. 5:18-md-02827-EJD, 2021 U.S. Dist. LEXIS 50546 (N.D. Cal. Mar. 17, 2021); *Knox v. John Varvatos Enters.,* 2021 U.S. Dist. LEXIS 29410 (S.D.N.Y. Feb. 17, 2021); *Wickens v. Thyssenkrupp Crankshaft Co., LLC*, No. 1:19-cv-6100, 2021 U.S. Dist. LEXIS 17884 (N.D. Ill. Jan. 26, 2021); *Wood v. Saroj & Manju Invs. Phila. LLC*, No. 19-2820-KSM, 2020 U.S. Dist. LEXIS 243700 (E.D. Pa. Dec. 28, 2020); *Izor v. Abacus Data Sys.,* No. 19-cv-01057-HSG, 2020 U.S. Dist. LEXIS 239999 (N.D. Cal. Dec. 21, 2020); *In re Lithium Ion Batteries Antitrust Litig.,* No. 13-MD-02420 YGR (DMR), 2020 U.S. Dist. LEXIS 233607 (N.D. Cal. Dec. 10, 2020); *Hart v. BHH, LLC*, No. 15cv4804, 2020 U.S. Dist. LEXIS 173634, at *31 (S.D.N.Y. Sep. 22, 2020).

common fund settlement. *See Davila-Lynch v. HOSOPO Corporation, et. al.*, Civil Action No. 18-cv-10072, ECF No. 178 (D. Mass. February 5, 2021).

Here, the service awards are not reimbursements for the class representatives' private expenses, and thus are not comparable to the "salary" and "private expenses" (totaling nearly $1,300,000 in today's dollars) the plaintiff sought in *Greenough*. Moreover, the Court's reasoning in *Greenough*—that the payments would tempt creditors to bring lawsuits challenging the management of property or funds—does not apply to class actions brought under Rule 23, which are intended to serve as a vehicle for individuals to litigate a common wrong. Nor do the service awards suggest collusion. The settlement agreement did not guarantee the service awards and instead left the question of whether to award them and in what amount to the district court's discretion. *See Cobell v. Salazar*, 679 F.3d 909, 922 (D.C. Cir. 2012) (rejecting argument that the service awards created an intra-class conflict where the decision of payments and their amount was left to the court's discretion).

E. The Court Should Overrule the Remaining Issues Raised in McDonald's Objection.

1. The Expenses Incurred Were Reasonable.

In addition to an award of attorneys' fees, Class Counsel respectfully seek reimbursement for litigation expenses incurred in the prosecution of the claims. These expenses are properly recoverable. *See In re Fidelity/Micron Sec. Litig.*, 167 F.3d 735, 737 (1st Cir. 1999) ("lawyers whose efforts succeed in creating a common fund for the benefit of a class are entitled not only to reasonable fees, but also to recover from the fund . . . expenses, reasonable in amount, that were necessary to bring the action to a climax"). The request for $36,443.76 in expenses was related to expert witness costs, mediation fees, electronic production processing, filing fees, and service fees. *See* Dkt. No. 71 at *18. Without citation to any case law, Ms. McDonald objects to the expenses. But she does not object that the expenses are unrecoverable or unreasonable, but as

lacking specificity. However, the categories of expenses are specified. Moreover, class counsel have not sought reimbursement for the work of Dr. Haghayeghi, as Ms. McDonald speculates.

2. The Work of Dr. Haghayeghi Is Subject to Peer Review and has been Accepted in other TCPA Class Settlements.

Ms. McDonald's untoward attacks on Dr. Haghayeghi are as inaccurate as they are gratuitous. While Dr. Haghayeghi was elected to serve as the Executive Director of the Commercial Fisheries Entry Commission, he has been an economic consultant for 12 years, possessing his Bachelor's, Master's, and Doctorate degrees in economics. *See* Exhibit 2 at ¶ 3.[20] The materials Dr. Haghayeghi relied upon were peer-reviewed and conservatively estimated, including by Dr. Hal Varian, the Chief Economist at Google and Distinguished Fellow of the American Economics Association, as well as Dr. Ivan Png, a faculty member at UCLA and Hong Kong University, who wrote two papers that rely on data from the federal do-not-call registry in 2007. *Id.* at ¶¶ 5-7. Dr. Haghayeghi's methodology has been used in a series of reports and multiple TCPA cases in expert reports produced by his firm, Burkman & Associates, as explained in the Plaintiffs' motion for service awards and attorneys' fees. ECF No. 71.

CONCLUSION

Plaintiffs respectfully submit that the settlement in this matter is an excellent result for class members, and the response from class members suggests they agree. A proposed Final Approval Order is attached as Exhibit 3 and Proposed Final Judgment is attached as Exhibit 4.

[20] Indeed, it was his experience in economics for why he was selected to serve as Executive Director of the commission, where he provides leadership to a research team comprised of economists and data scientists. *Id.* at ¶ 4.

Dated: April 27, 2021

Plaintiffs and the Settlement Class
by their attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will automatically send notification to all attorneys of record.

/s/ Stacey P. Slaughter
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