IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JOSHUA SOMOGYI, KELLY WHYLE SOMOGYI and STEWART SIELEMAN, on behalf of themselves and all others similarly situated, Plaintiffs, v. FREEDOM MORTGAGE CORP., Defendant.	Case No. 1:17-cv-06546-RMB-JS CLASS ACTION JURY TRIAL DEMANDED

PLAINTIFFS' MOTION FOR FINAL APPROVAL
OF CLASS ACTION SETTLEMENT

Plaintiffs Joshua Somogyi, Kelly Whyle Somogyi and Stewart Sieleman (collectively, "Plaintiffs") respectfully move this Court pursuant to FED. R. CIV. P. 23 for entry of the accompanying proposed Order and Final Judgment:[1]

1. granting final approval to the Settlement of this Action as set forth in the Parties' agreed-upon proposed Order and Final Judgment filed contemporaneously herewith;

2. granting final approval to the certification of the Settlement Class for purposes of the Settlement as defined in the Settlement Agreement pursuant to Fed.R.Civ.P. 23(a) and (b)(3);

[1] Unless otherwise stated, all capitalized terms used herein are as defined in the Stipulation and Agreement of Settlement filed with the Court on August 1, 2019 (Dkt. 89-4) (the "Settlement Agreement").

3. granting final approval to the appointment of Plaintiffs Joshua Somogyi, Kelly Whyle Somogyi and Stewart Sieleman as the representatives of the Settlement Class;

4. granting final approval to the appointment of Lawrence J. Lederer and Lane L. Vines of Berger Montague PC and Brian Mahany of Mahany Law Firm as counsel to the Settlement Class;

5. approving the Notice given to the Settlement Class as the best notice practicable in the circumstances in accordance with the requirements of FED. R. CIV. P. 23 and due process; and

6. dismissing the Action with prejudice as set forth in the Parties' Settlement Agreement.

The grounds on which this motion is based are set forth in the accompanying memorandum of law, the Declaration of Lawrence J. Lederer in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement and Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Payment of Service Awards filed concurrently herewith (the "Lederer Decl."), the documents, exhibits and additional information set forth in and attached to the Lederer Decl., all other documents filed in connection with the Settlement and all other proceedings in this Action.

Plaintiffs have conferred with defendant FMC which reviewed this motion prior to its filing and have been advised that FMC supports entry of the accompanying proposed Order and Final Judgment. *See* Lederer Decl. at ¶ 59.

Accordingly, Plaintiffs respectfully request that this motion be granted and that the Court approve and enter the accompanying proposed Order and Final Judgment.

Dated: June 2, 2020

Respectfully submitted,

Berger Montague PC

By: */s/ Lane L. Vines*

Lawrence J. Lederer (admitted *pro hac vice*)
Lane L. Vines
1818 Market Street, Suite 3600
Philadelphia, PA 19103
Tel.: 215/875-3000
Fax: 215/875-4604
Email: llederer@bm.net
lvines@bm.net

- and -

Mahany Law Firm
Brian Mahany (admitted pro hac vice)
Timothy Granitz (admitted pro hac vice)
8112 West Bluemound Road
Suite 101
Milwaukee, WI 53213
Tel.: 414/258-2375
Fax: 414/777-0776
Email: brian@mahanylaw.com
tgranitz@mahanylaw.com

Attorneys for Plaintiffs and the Settlement Class

Law Offices of Stefan Coleman, P.A.
Stefan Coleman
1072 Madison Avenue #1
Lakewood, NJ 08701
Tel.: 877/333-9427
Fax: 888/498-8946
Email: law@stefancoleman.com

Additional Plaintiffs' Counsel

CERTIFICATE OF SERVICE

I, Lane L. Vines, hereby certify that I caused a true and correct copy of the foregoing *Plaintiffs' Motion for Final Approval of Class Action Settlement, Memorandum of Law in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement, the Declaration of Lawrence J. Lederer in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement, and all exhibits thereto,* to be served upon counsel for defendant Freedom Mortgage Corp. via the Court's electronic filing system (ECF) on June 2, 2020:

Michael W. McTigue, Jr.
Meredith C. Slawe
Cozen O'Connor
One Liberty Place
1650 Market Street, Suite 2800
Philadelphia, PA 19103
mmctigue@cozen.com
mslawe@cozen.com

/s/ Lane L. Vines
Lane L. Vines

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JOSHUA SOMOGYI, KELLY WHYLE SOMOGYI and STEWART SIELEMAN, on behalf of themselves and all others similarly situated, Plaintiffs, v. FREEDOM MORTGAGE CORP., Defendant.	Case No. 1:17-cv-06546-RMB-JS CLASS ACTION JURY TRIAL DEMANDED

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

Table of Contents

Table of Authorities

Page(s)

CASES

STATUTES

RULES

Table of Citation to Abbreviations

Case Document	Abbreviation
Defendant's Certificate of Compliance With Class Action Fairness Act	FMC's CAFA Cert.
Declaration of David M. Kaufman of the Settlement Administrator (Heffler Claims Group, LLC) Confirming Implementation of Court-Ordered Notice Plan	Kaufman Decl.
Declaration of Lawrence J. Lederer in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement and Plaintiffs' Motion for an Award of Attorneys' Fees, Reimbursement of Expenses, and Payment of Service Awards	Lederer Decl.
Declaration of Professor Jacob Hale Russell in Support of Plaintiffs' Motion for Final Approval of Class Action Settlement	Russell Decl.

I. Introduction

Plaintiffs[1] respectfully request that the Court grant final approval to the Parties' Settlement. If the Court grants final approval, the Settlement will enable Settlement Class Members to share in a non-reversionary cash fund of $9.5 million, *and* bind defendant Freedom Mortgage Corp. ("FMC") to specific remedial relief designed to enhance its compliance with the Telephone Consumer Protection Act, 47 U.S.C. § 227 (the "TCPA"), *ad infinitum*.

This achievement was not guaranteed at the outset. Rather, it is the product of over two years of hard-fought litigation, extensive mediation proceedings, and arm's-length settlement negotiations. It was achieved in the face of pretrial motion practice that could have ended the case. And it was negotiated amid ongoing challenges and changes in how the TCPA is interpreted and applied that could have resulted in no class being certified, or no relief at all.

The Settlement is not only fair, reasonable, and adequate under Rule 23(e)(2), but an excellent result in the circumstances of this case. The Court should therefore grant final approval.

---

[1] Unless otherwise stated, all capitalized terms used herein are as defined in the Stipulation and Agreement of Settlement filed with the Court on August 1, 2019 (Dkt. 89-4) (the "Settlement Agreement"); all citation to docket entries in the *Somogyi* action are to ECF rather than native page numbers; and all emphasis is added and internal quotation marks, citations and footnotes are omitted.

II. Background

A. Procedural Posture[2]

The proposed Settlement was arrived at following extensive litigation, discovery, mediation and direct settlement negotiations. Since the initial complaint was filed on August 30, 2017, Plaintiffs briefed, argued and successfully opposed two separate rounds of motions to dismiss or stay accompanied by briefing (Dkt. 15, 26, 28, 32), supplemental briefing (Dkt. 36, 37), additional written submissions (Dkt. 33, 34, 40, 41, 43, 44) and oral argument (Dkt. 42, 45); prepared and filed three other complaints or amended complaints (Dkt. 19, 80; *Sieleman* Dkt. 1); negotiated a discovery confidentiality order that the Court approved (Dkt. 71); analyzed thousands of pages of documents and spreadsheets obtained from FMC; subpoenaed and obtained additional documents from nine non-parties including FMC's telemarketing and telephone equipment vendors and certain telephone carriers; deposed three FMC employees and prepared for and noticed the depositions of four other FMC employees as of the time the Settlement was reached; obtained additional information by interrogatories, initial disclosures and requests for onsite inspection of FMC's headquarters and branch offices; briefed

[2] The Parties' Settlement Agreement (Dkt. 89-4 ¶¶ B-Y) and Plaintiffs' memorandum concerning preliminary approval of the proposed Settlement (Dkt. 89-2 at 10-16) describe this case's history and is incorporated here. The Court is also familiar with this history as it "has managed the litigation since its inception." *Quoting* Feb. 19, 2020 Hrg. Tr. (Lederer Decl. Exhibit 4) at 16.

and argued discovery disputes (*e.g.*, Dkt. 59-60); retained and consulted with experts concerning automatic telephone dialing systems ("ATDS") and telephone voicemail and data mining issues; prepared and analyzed detailed mediation statements and attended three separate in-person mediation sessions conducted under the guidance of the Hon. Diane Welsh, retired former Magistrate Judge for the Eastern District of Pennsylvania; and engaged in additional, independent negotiations directly with defendant FMC following the mediation that led to the proposed Settlement. *See* Lederer Decl. ¶¶ 9-25.

Even before filing their first lawsuit, Plaintiffs via counsel had engaged in an extensive pre-complaint investigation that included, among other things, interviewing former FMC call center employees. *Id.* ¶ 9; *accord Somogyi v. Freedom Mortg. Corp.*, C.A. No. 17-6546 (JBS/JS), 2018 WL 3656158, at *2 (D.N.J. Aug. 2, 2018). Plaintiffs also produced applicable documents to FMC, and each Plaintiff was deposed by FMC. *See* Lederer Decl. ¶ 19.

On May 31, 2019, the Parties reached an agreement-in-principle to settle this Action and, on July 8, 2019, entered into an MOU. Dkt. 89-4 ¶ X. On July 31, 2019, the Parties entered into the Settlement Agreement. On August 1, 2019, Plaintiffs filed with the Court the Settlement Agreement and accompanying motion papers seeking preliminary approval of the proposed Settlement. *See* Dkt. 89.

If granted final approval, FMC will be obligated to pay $9.5 million into a non-reversionary escrow account administered by the Escrow Agents (Dkt. 89-4 ¶¶ 1.8, 2.1) *and*, within 180 days after the Effective Date:

> (a) designate a senior manager to be responsible for assuring FMC's compliance with the TCPA. That person will report directly to the office of the CEO;
>
> (b) provide additional training concerning the TCPA's do-not-call ("DNC") lists to ensure that all FMC employees, as well as all external third-party vendors of FMC (including any newly hired such vendors) that make marketing calls for or on behalf of FMC, adhere to FMC's DNC List; and
>
> (c) establish, maintain, and implement updated written procedures to facilitate TCPA compliance regarding DNC policies and DNC lists.

Id. at ¶ 3.1. The Parties acknowledge that this remedial relief is "another material term to the proposed Settlement[.]" *Id.*

Following the filing of the Settlement, the Parties consented to this Court to preside over the Settlement and related proceedings, which Judge Bumb approved. Dkt. 88. On January 23, 2020, the Court conducted a conference call with the Parties to discuss but not decide Plaintiffs' motion for preliminary approval (Dkt. 92), following which Plaintiffs submitted an amended proposed Preliminary Approval Order. Dkt. 93. By oral ruling following a hearing on February 19, 2020, the Court granted preliminary approval and, on February 24, 2020, issued its Preliminary Approval Order. Dkt. 96. By Letter Order also filed February 24,

2020 (Dkt. 95), the Court directed Plaintiffs to submit their deposition transcripts and additional information to the Court, and that Plaintiffs address the ruling in *Ward v. Flagship Credit Acceptance LLC*, C.A. No. 17-2069, 2020 WL 759389 (E.D. Pa. Feb. 13, 2020). These matters are addressed below.[3]

B. The Notice Program

In the Preliminary Approval Order, the Court directed FMC to provide to the Settlement Administrator, Heffler Claims Group LLC ("Heffler"), the addresses of putative Settlement Class Members no later than 20 days after entry of that Order, and for Heffler to initially mail notice of the proposed Settlement to Settlement Class Members no later than 60 days after entry of that Order. Dkt. 96 ¶ 15. In addition, the Court directed that Heffler "also take reasonable steps to follow-up to the extent practicable and identify current addresses and timely resend the Notice to Settlement Class Members for whom the initially mailed or emailed Notice was returned as undeliverable." *Id.* ¶ 8.

In accord with the Preliminary Approval Order, Heffler timely received putative class members addresses from FMC and, on April 24, 2020, mailed a total

[3] Plaintiffs separately submitted their deposition transcripts, with exhibits, to the Court pursuant to the Court's Letter Order. *See* Lederer Decl. ¶ 38. In addition, and also in accord with the Court's Letter Order, Plaintiffs file herewith a declaration attesting to the other pending or closed cases against FMC addressing the subject matter of this litigation. *Id.*

of 1,523,970 short-form notices to them, including 1,051,704 by email and 472,266 by regular U.S. Mail. Kaufman Decl. ¶ 10.

Also as of April 24, 2020, Heffler "went live" with the website, www.MortgageTCPASettlement.com, that posts additional documents and information concerning the Settlement. The website, which Heffler prepared in consultation with class counsel, includes easily accessible links to the short-form and long-form notices, the Preliminary Approval Order, Plaintiffs' motion for preliminary approval, the Settlement Agreement and other documents. *Id.* ¶ 7. The website address is also identified in the notices as is a toll-free telephone number to call with questions regarding any aspect of the Settlement. *Id.* ¶ 6.

To provide the best notice practicable, and also in accord with the Preliminary Approval Order, Heffler also undertook additional efforts to identify current addresses for notices initially returned as undeliverable, by using the U.S. Postal Service change of address database and a skip-tracing process of LexisNexis. As a result, Heffler obtained updated addresses for, and re-mailed the notice to, those for whom updated addresses were available. *Id.* ¶¶ 9-11.

The notice attached a simple Claim form as directed by the Preliminary Approval Order. *Id.* ¶ 8. Settlement Class Members could submit claim forms electronically via the Settlement website, or by regular U.S. mail. *Id.* ¶ 13.

The notice also directs that requests for exclusion be mailed to Heffler by June 23, 2020, and that any objections to the Settlement or attorneys' fees and costs or Service Awards be filed with the Court also by June 23, 2020.

Also in accord with the Preliminary Approval Order (Dkt. 96 ¶ 14), FMC, in conjunction with Heffler, timely gave the requisite notice of the Settlement to state and federal officials as required by the Class Action Fairness Act ("CAFA"). Kaufman Decl. ¶ 4. In response, no federal or state official filed any objection to the proposed Settlement. FMC's CAFA Cert. ¶ 1.

C. The Class's Response to the Settlement to Date

The claims and notice process still remains open, but the response of the Settlement Class to date to the Settlement has been overwhelmingly positive. The Settlement Class consists of 1,524,198 current or former FMC client families, although FMC does not concede that it or its vendors on its behalf called any in violation of the TCPA. Dkt. 96 ¶ 2; *accord* Dkt. 89-4 ¶¶ 1.27, 5.3.[4]

As of May 29, 2020, Heffler received 49,705 claim forms seeking to share in the Settlement, and only four requests for exclusion.[5] Kaufman Decl. ¶¶ 12-13. In

[4] For purposes of the Settlement, "FMC's 'clients' means borrowers and co-borrowers, spouses, civil union partners, and successors-in-interest, who shall collectively be deemed one client." Dkt. 96 ¶ 2; *accord* Dkt. 89-4 ¶ 1.27.

[5] A list of those requesting exclusion is attached as Exhibit D to the Kaufman Decl. Plaintiffs intend to file with the Court updated information concerning

addition, the Parties have received no objections as of May 29, 2020. Lederer Decl. ¶ 53.

III. Argument

A. Applicable Legal Standards

Rule 23(e) provides that courts should grant final approval to class action settlements that are "fair, reasonable, and adequate." FED. R. CIV. P. 23(e)(2). Because the circuit courts implemented this standard through various formulations, the 2018 amendments to Rule 23 articulated a four-factor test to harmonize the varying articulations of the fairness criteria, and "focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision …." FED. R. CIV. P. 23(e)(2) Adv. Comm. Notes to 2018 Amendments.

Under amended Rule 23(e)(2), a settlement is "fair, reasonable, and adequate" if:

> (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 to the class is adequate, taking into account:
>
> (i) the costs, risks, and delay of trial and appeal;

---

exclusions, objections and the number of claims by August 31, 2020 in accord with the Preliminary Approval Order. Dkt. 96 ¶ 15.

(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 the timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equally to each other.

Subparagraphs (A) and (B) address the "procedural fairness" of the settlement, while Subparagraphs (C) and (D) address "substantive fairness." FED. R. CIV. P. 23(e)(2) Adv. Comm. Notes to 2018 Amendments.

For motions seeking approval of "settlement only" class actions as here (*see* Dkt. 89-4 ¶ 5.2), the court "favor[s] the parties reaching an amicable agreement" and should not "intrude overly on the parties' hard-fought bargain[,]" but also, "[a]t the same time, … has an obligation as a fiduciary for absent class members to examine the proposed settlement with care." *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 934 F.3d 316, 326 (3d Cir. 2019). "The decision of whether to approve a proposed settlement of a class action is left to the sound discretion of the district court." *Girsh v. Jepson*, 521 F.2d 153, 156 (3d Cir. 1975).

B. The Proposed Settlement is Procedurally Fair

Rule 23(e)(2)(A) and (B) look "to the conduct of the litigation" and "the negotiations leading up to the proposed settlement." FED. R. CIV. P. 23(e)(2) Adv.

Comm. Notes to 2018 Amendments. The "focus at this point is on the actual performance of counsel" for the class, and courts may consider "the nature and amount of discovery"; the "conduct of the negotiations"; the "involvement of a neutral … mediator"; and other factors. *Id.* A key goal is to determine whether counsel "had an adequate information base." *Id*.

A settlement is presumed fair where "(1) the negotiations occurred at arms length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." *In re Google*, 934 F.3d at 326.

These criteria are satisfied here. First, the Parties' negotiations leading to the Settlement were well-informed, prolonged and arm's-length. Lederer Decl. ¶ 25. The Settlement was reached following three separate in-person mediation sessions with Judge Welsh that did not result in any resolution, and only after the Parties had additional, direct negotiations thereafter. *Id.* ¶¶ 24-25; Dkt. 89-4 ¶¶ V-X. This supports a finding of procedural fairness. *Hall v. AT&T Mobility LLC*, C.A. No. 07-5325 (JLL), 2010 WL 4053547, at *7 (D.N.J. Oct. 13, 2010) ("[T]he participation of an independent mediator in settlement negotiations virtually insures that the negotiations were conducted at arm's length and without collusion between the parties."); *Smith v. Merck & Co., Inc.*, C.A. No. 13-2970 (MAS) (LHG), 2019 WL 3281609, at *4 (D.N.J. July 19, 2019) (accord).

Second, Plaintiffs had an adequate information base and were well-informed concerning the claims and defenses through over two years of investigation, litigation and discovery. Lederer Decl. ¶ 25; Dkt. 89-4 ¶¶ B-U (describing history of the litigation). The Settlement followed the filing of multiple pleadings, two motions to dismiss or stay accompanied by extensive briefing and oral argument, party and non-party document and deposition discovery, and a comprehensive investigation and evaluation of the claims, evidence and defenses that began before the filing of the first complaint, and extended throughout the mediation and settlement negotiation process. As the Court stated during the preliminary approval hearing, this "case was vigorously and appropriately and professionally litigated by both sides as reflected in the extensive docket entries." *Quoting* Feb. 19, 2020 Hrg. Tr. (Lederer Decl. Exhibit 4) at 16.

Third, as the Court also previously stated, "class counsel have adequate experience and abilities to represent the class." *Id.* at 17. *See also* Lederer Decl. ¶¶ 3, 5 (attaching Berger Montague and Mahany Law firm résumés). Where, as here, class counsel are experienced in class action litigation, their recommendations should be accorded deference "as they are most familiar with the intricacies of the case." *Maddy v. General Elec. Co.*, C.A. No. 14-190-JBS-KMW, 2017 WL 2780741, at *5 (D.N.J. June 26, 2017). *See also Atis v. Freedom Mortgage Corp.*, C.A. No. 15-03424 (RBK/JS), 2018 WL 5801544, at *2 (D.N.J.

Nov. 6, 2018) ("A settlement is presumed fair when it results from 'arm's-length negotiations between experienced, capable counsel after meaningful discovery.'"); *Collier v. Montgomery Cty. Hous. Auth.*, 192 F.R.D. 176, 186 (E.D. Pa. 2000) (accord).

Fourth, with only four opt-outs and 49,705 claims filed as of May 29, 2020, the class's response to the proposed Settlement thus far also favors final approval. *See, e.g., In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 812 (3d Cir. 1995) (courts evaluate "the number and vociferousness of" any objectors).

The benefits afforded by the proposed Settlement here and the work that Plaintiffs' counsel did that preceded -- and, indeed, enabled -- it represent the first important distinction between this case and *Ward*. In *Ward*, 2020 WL 759389, at *1, Judge Baylson declined to apply the initial presumption of fairness where plaintiff filed his complaint and then "[t]he parties immediately entered into" settlement negotiations; defendant "never filed an answer or motion" (*id.* at *3); and "[t]here was no briefing on the substantive issues" and plaintiff did only "informal discovery" pre-mediation, and "confirmatory formal discovery" post-mediation, that "did not include investigation into the merits." *Id.* at *12. Here, in sharp contrast, the proposed Settlement followed, and was informed by, extensive investigation, litigation, discovery, motion practice and briefing and argument that

enabled Plaintiffs and counsel to evaluate the claims and defenses on a comprehensive record. Accordingly, the proposed Settlement here is presumptively fair and satisfies Rule 23(e)(2)(A) and (B).[6]

C. The Proposed Settlement is Substantively Fair

The proposed Settlement is also substantively fair under Rule 23(e)(2)(C) and the *Girsh* factors that, for over four decades, have guided courts' assessments of class action settlements. *Girsh*, 521 F.2d at 157. Six of the nine *Girsh* factors are now captured by amended Rule 23(e)(2)(C)(i), namely: (1) the complexity, expense and likely duration of the litigation; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action; (7) the ability of the defendant to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best potential recovery; and (9) the range of reasonableness of the settlement in light of all the attendant risks of litigation. *Id.*[7]

---

[6] The parties in *Ward* seek to appeal Judge Baylson's ruling under FED. R. CIV. P. 23(f). *See Ward v. Flagship Credit Acceptance LLC*, No. 20-8019 (3d Cir.). Among other things, defendant contends that Judge Baylson "incorrectly failed to apply a presumption of reasonableness … finding instead that the parties' substantial informal discovery was insufficient." *Id*. Dkt. 2 at 9.

[7] *Girsh* factors two (the reaction of the class to the settlement) and three (the stage of the proceedings and the amount of discovery completed) are encompassed within the Rule 23(e)(2)(A) and (B) procedural standards discussed above. Amended Rule 23(e)(2) also incorporates other applicable "*Prudential*" factors that courts may also evaluate such as the maturity of the underlying issues and the

1. Rule 23(e)(2)(C)(i) -- The Proposed Relief is Superior to Continued Litigation

The relief provided by the proposed Settlement is superior to the costs, risks and delay of further litigation. The $9.5 million fund alone is squarely within the range of fairness in pure monetary terms and "a very, very reasonable sum comparatively to what we usually see in these cases." *Quoting* Feb. 19, 2020 Hrg. Tr. (Lederer Decl. Exhibit 4) at 23. *See also* Dkt. 89-2 at 21-22 (estimating per claimant payment of $37.61; citing recoveries in other TCPA cases); *Rose v. Bank of Am. Corp.*, C.A. Nos. 5:11-2390-EJD, 5:12-4009-EJD, 2014 WL 4273358, at *10 (N.D. Cal. Aug. 29, 2014) ($20 to $40); *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 493 (N.D. Ill. 2015) ($30 per class member); *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 790 (N.D. Ill. 2015) ($34.60 per claimant); *Estrada v. iYogi, Inc.*, C.A. No. 13-1989, 2015 WL 589542, at *7 (E.D. Cal. Oct. 6, 2015) ($40); *Hashw v. Dep't Stores Nat'l Bank*, 182 F. Supp. 3d 935, 944 (D. Minn. 2016) ($33.20).

Here, moreover, the proposed Settlement is enhanced by remedial relief designed to end the allegedly improper telemarketing practices that gave rise to this litigation in the first place, and which go well beyond the mere baseline requirements of the TCPA to also include, *inter alia*, enhanced training,

---

provisions for attorneys' fees and claims processing. *See In re Prudential Ins. Co. Am. Sales Practices Litig.*, 148 F.3d 283, 323 (3d Cir. 1998).

monitoring, and compliance reporting directly to the office of FMC's CEO. *See* Russell Decl. ¶¶ 16, 26-30. Further, if the Settlement is granted final approval, these TCPA compliance enhancements will be triggered automatically and classwide, without regard to whether the Settlement Class Member files a claim. And FMC will remain obligated to implement *and* maintain these practices indefinitely, with potential additional consequences for any alleged future violations. *See* 47 U.S.C. § 227(b)(3)(C) (providing treble damages for willful and knowing violations). Russell Decl. ¶ 17.

The remedial relief adds to the overall benefit of the proposed Settlement particularly given that the Settlement Class includes current and ongoing borrower clients serviced by FMC. *See In re Anthem, Inc. Data Breach Litig.*, 327 F.R.D. 299, 322 (N.D. Cal. 2018) (settlement required defendant "to make changes to its data security systems and policies"; "These mandatory changes constitute additional relief to the Class over and above the Settlement Fund itself."). As summarized by Professor Russell, the remedial relief "provides a novel and significant benefit to members of the settlement class, is meaningfully related to the purpose of the TCPA statute, and contributes substantial additional value to the adequacy of the proposed settlement." Russell Decl. ¶ 4.

Two other features of the proposed Settlement will likely increase the proposed per-claimant payout. First, only those Settlement Class Members who

attest that they received one or more marketing calls during the Class Period to which they did not consent are eligible to share in distributions. Dkt. 89-4 ¶ 5.4. This provision is designed to maximize payments to those claimants, while precluding payments to those who did not receive any such calls. This is especially fair as a practical matter here since the Settlement Class consists solely of FMC borrower clients who would know whether they received any such calls.

Second, the notices mailed by Heffler advised that Plaintiffs would seek "up to" and "no more than" 33⅓% in attorneys' fees, but Plaintiffs actually seek an award of 31.58% of the settlement fund amid the Court's concerns regarding payment of fees on claims administration costs. *See* Dkt. 96 at 15, 23. Although claims administration funds are usually included in computing fees (*see, e.g., In re Home Depot, Inc., Customer Data Sec. Breach Litig.*, C.A. No. 1:14-MD-02583-TWT, 2020 WL 415923, at *7 (N.D. Ga. Jan. 23, 2020) (awarding 33⅓% fee; "the benefit from the settlement includes … *the costs of notice and administration* …")), this reduces the requested fee $166,666, and thereby will also increase the per-claimant payout.[8]

[8] To the extent notice and administration costs are less than $500,000, the balance will also be added dollar-for-dollar to the Net Settlement Fund and distributed *pro rata* to Authorized Claimants. Dkt. 89-4 ¶¶ 4.1, 4.2.

The sheer scope of the combined monetary and corporate compliance relief here is a second core distinction to *Ward*. *Ward*, 2020 WL 759389, at *1, involved a $4 million fund and $35.30 per-claimant payment, no remedial relief, and a "confluence of a number of negative factors motivat[ing]" the Court to deny final approval, including "nothing in the record regarding" defendant's defenses (*id*. at *20) which "differentiates the case from others where the reviewing court had a well-rounded view of the litigious issues …." *Id*. at 21. Here, by contrast, the estimated per-claimant payments are within or exceed those in the two "high-low" and *Ocwen* cases that Judge Baylson cited with approval in *Ward*,[9] and the cash fund is supplemented by remedial relief that "is closely calibrated to its intended goal of reducing the likelihood of TCPA violations in the future." Russell Decl. ¶ 12. As Judge Baylson stated, "[t]hese comparisons simply confirm that the facts and circumstances of each TCPA settlement are unique." *Ward*, 2020 WL 759389, at *19.

[9] *See Ward*, 2020 WL 759389, at *10-11, 17-18 (citing *Charvat v. Valente*, C.A. No. 12:5746, 2019 WL 5576932, *2 (N.D. Ill. Oct. 28, 2019) ("each claimant receiv[ed], on average, $22.27"); *Parker v. Universal Pictures*, C.A. No. 6:16-1193-Orl-41DCI ("maximum" awards of $35 for the ATDS class, and $50 for the other classes); *Snyder v. Ocwen Loan Servicing, LLC*, C.A. No. 14-8461, 2019 WL 2103379, at *7 (N.D. Ill. May 14, 2019) ($53 - $74)).

a. The Risks of Establishing Liability and Damages

This factor "requires a balancing of the likelihood of success if the case were taken to trial against the benefits of immediate settlement." *In re Safety Components, Inc. Sec. Litig.*, 166 F. Supp. 2d 72, 89 (D.N.J. 2001). *Accord In re Prudential*, 148 F.3d at 319.

Although class counsel believe that the claims are meritorious, FMC has asserted several defenses throughout the litigation any one of which could derail Plaintiffs' case. For example, FMC maintains that it had the requisite consent to call its own client borrowers and that any calls fall within the "established business relationship" exception of the TCPA (*see, e.g.*, Dkt. 85 ¶¶ 2-3 at 23); that any calls were informational, noncommercial and do not constitute telemarketing under the TCPA (*id.* ¶ 1 at 23); and that FMC did not place any calls using an ATDS or an artificial or prerecorded voice (*id.*). Even in rejecting the motions to dismiss, Judge Simandle recognized that the ATDS issues continued to be disputed, holding only that, "*[a]t this stage*, Plaintiffs' allegation satisfies the human intervention test …." *Somogyi*, 2018 WL 3656158, at *6. *Accord Sieleman v. Freedom Mortg. Corp.*, C.A. No. 17-13110 (JBS/JS), 2018 WL 3656159, at *6 (D.N.J. Aug. 2, 2018) ("Plaintiff has *adequately pleaded* the ATDS element under the TCPA.").

While Plaintiffs would have to win every one of these challenges, FMC could lose all except one and still evade liability. *See, e.g., Leyse v. Bank of*

America, N.A., No. 11-7128 (SDW) (SCM), 2020 WL 1227410, at *5 (D.N.J. Mar. 13, 2020) (granting defendant summary judgment after nearly nine years of litigation; finding that plaintiff lacked standing and that defendant qualified for the "established business relationship" exception); *Richardson v. Verde Energy USA Inc.*, 354 F. Supp. 3d 639, 650 (E.D. Pa. 2018) (granting defendant summary judgment in part for lack of an ATDS); *Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 121 (3d Cir. 2018) (accord; interpreting ATDS); *Collins v. Nat'l Student Loan Program*, 360 F. Supp. 3d 268, 274 (D.N.J. 2018) (Bumb, J.) (accord; "Plaintiff fails to cite any evidence" that the system "has the 'present capacity' to initiate autodialed calls"); *Fleming v. Assoc. Credit Services, Inc.*, 342 F. Supp. 3d 563, 577 (D.N.J. 2018) (the system was "merely a predictive dialer and not an ATDS"); *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 469 (7th Cir. 2020) (affirming summary judgment for defendant for lack of an ATDS).

The TCPA itself is subject to ongoing challenge, such as whether its automated-call ban is an unlawful content-based restriction on speech, as to which the U.S. Supreme Court granted *certiorari* and is expected to soon issue a decision. *See Barr v. Am. Assoc. of Political Consultants, Inc.*, C.A. No. 19-631 (Cert. granted Jan. 10, 2020; oral argument May 6, 2020). *See also Glasser v. Hilton Grand Vacations Co., LLC*, 948 F.3d 1301, 1309-10 (11th Cir. 2020) ("Would the

First Amendment really allow Congress to punish every unsolicited call to a cell phone?").

Additional defenses, such as whether FMC clients could even unilaterally revoke their consent to be called, would also be contested. *See, e.g., Medley v. Dish Network, LCC*, C.A. No. 18-13841, 2020 WL 2092594, at *5 (11th Cir. May 1, 2020) (holding that the TCPA does not "allow[] a consumer to unilaterally revoke consent to receive automated calls when such consent is given as part of a bargained-for exchange").

Assuming Plaintiffs prevail through summary judgment and the TCPA survives intact, Plaintiffs would also have to establish damages. *See, e.g., McGee v. Cont'l Tire N. Am., Inc.*, C.A. No. 06-6234 (GEB), 2009 WL 539893, at *5 (D.N.J. March 4, 2009) (damages factor favors settlement where "damages would have been aggressively contested at trial, with both sides presenting expert testimony on the subject"); *Golan v. FreeEats.com, Inc.*, 930 F.3d 950, 962 (8th Cir. 2019) (affirming ruling that statutory damages under the TCPA violates the Due Process Clause). This factor therefore favors final approval.

b. The Risks of Maintaining Class Certification

This factor "measures the likelihood of obtaining and keeping a class certification if the action were to proceed to trial." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 537 (3d Cir. 2004).

FMC disputes that any class can be certified for purposes of continued litigation. For example, FMC argues that class members include borrower clients of FMC who consented to telephone solicitations, and that the issues of consent, and whether class members properly revoked their consent and whether calls were placed for telemarketing or informational purposes, raise individual issues that predominate over common issues and thereby preclude any class certification. *See, e.g.*, Dkt. 85 ¶¶ 2-3 at 23.

Once again Plaintiffs remain confident that the class would be certified. But these defenses also pose risk. *See, e.g., Tillman v. The Hertz Corp.*, C.A. No. 16-4242, 2019 WL 3231377, at *2 (N.D. Ill. July 18, 2019) (striking class action allegations; "[n]umerous contested facts … destroy any notion of adequacy and typicality"); *City Select Auto Sales, Inc. v. David Randall Assocs., Inc.*, 296 F.R.D. 299, 314 (D.N.J. 2013) (Simandle, C.J.) (certifying TCPA class where, unlike here, "there is no dispute that" defendant *lacked* "established business relationships" with those solicited, and thus no dispute that defendant lacked consent to place calls); *Cholly v. Uptain Grp., Inc.*, C.A. No. 15-5030, 2017 WL 449176 (N.D. Ill. Feb. 1, 2017) ("individual inquiries necessary to determine class membership will 'inevitably predominate' over any common questions of fact"); *Wolfkiel v. Intersections Ins. Servs. Inc.*, 303 F.R.D. 287, 293 (N.D. Ill. 2014) (accord; "to determine whether each potential class member did in fact revoke his or her prior

consent at the pertinent time, the Court would have to conduct class-member-specific inquiries for each individual"); *Ginwright v. Exeter Fin. Corp.*, 280 F. Supp. 3d 674, 688 (D. Md. 2017) (accord).

Even if Plaintiffs prevail in certifying one or more classes and subclasses, FMC would likely seek to appeal under FED. R. CIV. P. 23(f), thereby adding additional cost, delay and risk. *See, e.g., In re Lamictal Direct Purchaser Antitrust Litig.*, C.A. No. 19-1655, 2020 WL 1933260, at *7 (3d Cir. Apr. 22, 2020) (reversing class certification on predominance grounds under Rule 23(f), and remanding). And even if Plaintiffs prevail under Rule 23(f), FMC could move to decertify any class at or following trial and, in any event, appeal subsequently on the merits. *See, e.g., In re Warfarin*, 391 F.3d at 537 (a "district court retains the authority to decertify or modify a class at any time"); *Gene and Gene LLC v. BioPay LLC*, 541 F.3d 318, 328-29 (5th Cir. 2008) (reversing class certification).

The Parties' continued disputes regarding whether any litigation class could be certified would add additional cost and potentially years to this case, further delaying and perhaps even precluding any compensation or other relief to the Settlement Class. This factor therefore also supports final approval.

c. The Proposed Relief is Reasonable in Light of the Best Potential Recovery and Litigation Risk

To assess this factor, "the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement." *In re Gen. Motors Corp.*, 55 F.3d at 806. *See also In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 440 (3d Cir. 2016) (plaintiffs would likely obtain "substantial damages awards" if they establish liability, but the risks of continued litigation could result "in no recovery at all").

A simple arithmetic computation of the $500 or $1,500 per-violation potential damages multiplied by 1,524,198 putative class members that assumes a single improper call to each yields over $762 million or $2.28 billion. But these theoretical amounts should be balanced against FMC's many defenses to liability and class certification in the actual circumstances of this case, and the substantial benefit and certainty of the Settlement. Lederer Decl. ¶¶ 41-44.

This case has several inherent risks and uncertainties of law and fact, such as whether FMC or its vendors even used an ATDS. FMC also maintains that it did not violate any DNC policies (Dkt. 85 ¶ 5 at 23); that Plaintiffs lack standing (*id.* ¶ 13 at 24) and are not proper representatives of any litigation class (*id.* ¶ 19 at 25); and that FMC "established and implemented, with due care, reasonable practices

and procedures to effectively prevent telephone solicitations in violation of the TCPA or any of its regulations." *Id.* ¶ 21 at 25. FMC also contends that neither it nor its vendors even called all class members during the class period, let alone did so multiple times or solicited them in violation of the TCPA, and that this "uninjured" class member issue defeats any finding of Rule 23(b)(3) predominance necessary to certify a litigation class, and also violates FMC's due process rights. *Id.* ¶ 25 at 26 ("To the extent Plaintiffs purport to seek relief on behalf of any person who has not suffered any damages," the claim "violates [FMC's] right to Due Process ….").

Assuming Plaintiffs overcome these defenses and succeed in class certification through any Rule 23(f) appeal, Plaintiffs would have to defeat FMC's inevitable *Daubert* challenges concerning, for example, expert testimony on disputed ATDS issues; prevail in challenges to the admissibility of key evidence at trial through *in limine* motions; defeat likely motions for judgment as a matter of law; obtain a favorable jury verdict; defeat likely motions for judgment notwithstanding the verdict; and prevail on appeal. *See, e.g., Weiss v. Mercedes-Benz of N. Am., Inc.*, 899 F. Supp. 1297, 1301 (D.N.J.), *aff'd*, 66 F.3d 314 (3d Cir. 1995) ("the risks surrounding a trial on the merits are always considerable").

The proposed Settlement, by contrast, eliminates these considerable risks, and provides substantial, immediate and guaranteed monetary and remedial relief

that, in combination, makes it "a terrific" result. *Quoting* Feb. 19, 2020 Hrg. Tr. (Lederer Decl. Exhibit 4) at 23. *Accord* Lederer Decl. ¶ 40 (attaching Plaintiffs' supplemental declarations); *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 228 (N.D. Ill. 2016) ("Individual class members receive less than the maximum value of their TCPA claims, but they receive a payment 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."); *In re ATI Techs., Inc. Secs. Litig.*, C.A. No. 01-2541, 2003 U.S. Dist. LEXIS 7062, at *7 (E.D. Pa. Apr. 28, 2003) (it is "entirely possible that the class would have recovered nothing at all, or a range of recovery not far from what this bird-in-the-hand supplies"); *In re AT&T Corp.*, 455 F.3d 160, 170 (3d Cir. 2006) (settlements can amount to a fraction of the potential recovery); *Hefler v. Wells Fargo & Co.*, C.A. No. 16-05479-JST, 2018 WL 6619983, at *8 (N.D. Cal. Dec. 18, 2018) (securities class actions of over $1 billion in estimated damages "settled for *median* recoveries of 2.5 percent between 2008 and 2016, and 3 percent in 2017"). Hence, this factor favors final approval.

d. FMC's Ability to Withstand a Larger Judgment

This factor considers whether the defendant could withstand a judgment greater than the settlement. As in *Ward* but again unlike here, this factor "is most relevant when the defendant's professed inability to pay is used to justify the

amount of the settlement." *In re Nat'l Football League*, 821 F.3d at 440; *accord Ward*, 2020 WL 759389, at *15 ("This factor is relevant here because Plaintiff cited financial instability as one justification for the size of the settlement fund.").

Here, Plaintiffs sought to maximize the monetary and other relief they obtained throughout the litigation, mediation and settlement negotiation phases. Lederer Decl. ¶ 25. Again unlike *Ward*, Plaintiffs do not rely on the defendant's professed inability to pay to justify the Settlement. Instead, Plaintiffs submit that the proposed Settlement should be approved on its own merits for the relief it secures for the Settlement Class, balanced against the risk of continued litigation as reflected in the substantial litigation and discovery record in this case.

Even if defendant FMC could have paid more, that would not counsel against final approval given the weight of the other Rule 23(e)(2) and *Girsh* factors which overwhelmingly favor final approval. Settlements are routinely approved despite a defendant's assumed ability to pay more because, "in any class action against a large corporation, the defendant entity is likely to be able to withstand a more substantial judgment …." *Weber v. Gov't Employees Ins. Co.*, 262 F.R.D. 431, 447 (D.N.J. 2009). *Accord In re Warfarin*, 391 F.3d at 538 (the defendant is not "obligated to pay any more than what the … class members are entitled to under the theories of liability that existed at the time the settlement was reached"); *Sullivan v. DB Inv. Inc.*, 667 F.3d 273, 323 (3d Cir. 2011); *Henderson v. Volvo*

Cars of N. Am., LLC, C.A. No. 09-4146-CCC, 2013 WL 1192479, at *11 (D.N.J. Mar. 22, 2013) (citing cases; "to withhold approval of a settlement of this size because [Volvo] could withstand a greater judgment would make little sense where the [settlement] is within the range of reasonableness and provides substantial benefits to the Class'"); *Galt v. Eagleville Hosp.*, 310 F. Supp. 3d 483, 495 (E.D. Pa. 2018) ("Here, the parties have not presented evidence concerning Defendant's ability to withstand a greater judgment, and thus this factor is neutral in this case."); *Gray v. Talking Phone Book*, C.A. No. 08-1833, 2012 WL 12978113, at *6 (D.S.C. Aug. 13, 2012) (defendant's "ability to pay is not in question and does not raise questions about the circumstances or adequacy of the Settlement").

Were the rule otherwise, a plaintiff could not obtain any relief from a class action unless it financially cripples the defendant. This case is no exception. Even assuming, *arguendo*, that FMC could pay more in a fully litigated judgment, many years in the future, that does not undercut the fairness of an otherwise exemplary settlement. *Charron v. Pinnacle Grp., N.Y. LLC*, 874 F. Supp. 2d 179, 201 (S.D.N.Y. 2012).

2. Rule 23(e)(2)(C)(ii) -- The Claims Process is Clear and Rational

The notice and claims process is designed to effectively and efficiently process the claims and distribute the Net Settlement Fund to Authorized Claimants.

The short-form and long-form notices clearly and concisely explain who is eligible to share in the net proceeds, and how much each may receive. Kaufman Decl. ¶ 8 (attaching exemplars of the notices). The notice and claim forms are similarly clear and concise, and designed to streamline and facilitate distribution of the net proceeds. These processes comply with Rule 23(e)(2)(C)(ii).

The method of distributing the relief is also rational. The remedial relief would govern automatically, and Settlement Class Members who contend they received a telephone solicitation from or for FMC to which they did not consent are permitted to self-identify, by simply attesting to this in a short, user-friendly claim form. Claimants need not substantiate their claim with additional documents such as telephone records. This process is accessible and straightforward, and will serve to fairly and effectively distribute the net proceeds in accordance with Rule 23(e)(2)(C)(ii). *See* Adv. Comm. Notes to 2018 Amendments ("A claims processing method should deter and defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding."); *Maley v. Del. Glob. Techs. Corp.*, 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002) (distribution plan is fair where it has a "reasonable, rational basis").

3. Rule 23(e)(2)(C)(iii) -- The Proposed Attorneys' Fees Support Final Approval

The Settlement provides that Plaintiffs' counsel will seek an award of attorneys' fees of "not more than" 33⅓% of $9.5 million, or $3,166,666 plus interest (Dkt. 89-4 ¶ 7.1); that any such award will be paid after the Effective Date at the time "ordered by the Court" (*id.* at ¶ 7.3); and that the fee petition will be filed with the Court at least 21 days prior to the opt-out and objection deadlines, and posted publicly on the Settlement website. *Id.* ¶ 7.1; *accord* Dkt. 96 ¶ 15 at 9.

A one-third fee is within the range of awards in TCPA and other cases, and would be warranted here given the results achieved. *See, e.g., Landsman & Funk, P.C. v. Skinder-Strauss Assocs.*, 639 Fed. App'x 880, 884 (3d Cir. 2016) (affirming fee of one-third); *Bais Yaakov of Spring Valley v. Peterson's Nelnet, LLC*, C.A. No. 3:11-11 (TJB), 2015 WL 12866997 (D.N.J. Jan. 26, 2015); *Dakota Med., Inc. v. RehabCare Grp., Inc.*, C.A. No. 1:14-02081-DAD-BAM, 2017 WL 4180497, at *7-8 (E.D. Cal. Sept. 21, 2017); *Vandervort v. Balboa Capital Corp.*, 8 F. Supp. 3d 1200, 1210 (C.D. Cal. 2014); *Todd S. Elwert, Inc., DC v. All. Healthcare Servs., Inc.*, C.A. No. 15-2673, 2018 WL 4539287, at *4 (N.D. Ohio Sept. 21, 2018); *Wreyford v. Citizens for Transportation Mobility, Inc.*, C.A. No. 1:12-2524-JFK, 2014 WL 11860700, at *1 (N.D. Ga. Oct. 16, 2014); *Schwyhart v. AmSher*

Collection Servs., Inc., C.A. No. 15-1175, 2017 WL 1034201, at *3 (N.D. Ala. Mar. 16, 2017); *In re Capital One*, 80 F. Supp. 3d at 795.

As noted above, however, counsel seeks a fee of $3,000,000, or approximately 31.58% of the settlement fund rather than 33⅓%, which is especially warranted given the combined cash and remedial relief here. *See, e.g.*, *Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1244-45 (11th Cir. 2011) ("the $1.5 million payment is designed to compensate the class counsel for the non-monetary benefits they achieved for the class"). Class counsel have separately filed their fee motion and accompanying papers herewith, and respectfully submit that it is eminently fair and modest in the circumstances and, therefore, also supports final approval of the Settlement.

4. Rules 23(e)(2)(C)(iv) and (e)(3) -- Plaintiffs Have Identified All Agreements Concerning the Settlement

The Parties' complete Settlement Agreement with exhibits was filed with the Court on August 1, 2019. *See* Dkt. 89-4. The Parties' Settlement Agreement, in turn, identifies that they entered into an MOU prior to entering into their Settlement Agreement. *Id.* ¶ X. The MOU, which outlined only certain basic terms and is superseded by the Settlement Agreement, are the only agreements concerning the Settlement that have been entered into by the Parties. FED. R. CIV. P. 23(e)(2)(C)(iv) and Rule 23(e)(3).

5. Rule 23(e)(2)(D) -- The Settlement Treats Settlement Class Members Equitably

The Settlement proposes to distribute the net proceeds to Authorized Claimants equally (Dkt. 89-4 ¶ 4.1), and the remedial relief would govern automatically and classwide. Accordingly, the proposed Settlement treats Settlement Class Members equitably under Rule 23(e)(2)(D).

The only feature of the Settlement that proposes a disproportionate recovery is the $15,000 in total Service Awards, or $5,000 each, for the three Plaintiffs. These awards are reasonable given Plaintiffs' service to the Settlement Class, including producing applicable documents, testifying at FMC's depositions, consulting with counsel and assisting in achieving the Settlement. *See Fairway Med. Ctr., L.L.C. v. McGowan Enterprises, Inc.*, C.A. No. 16-3782, 2018 WL 1479222, at *3 (E.D. La. Mar. 27, 2018) ("Courts have held that service awards are an efficient and productive way to encourage members of a class to become class representatives."); *Spicer v. Chi. Bd. Options Exchange, Inc.*, 844 F. Supp. 1226, 1267-68 (N.D. Ill. 1993) (citing incentive awards of $5,000 to $100,000; approving $10,000 to each plaintiff); Lederer Decl. ¶¶ 83-86.

D. The Notice Program Complied With Rule 23 and Due Process

Rule 23(c)(2)(B) requires "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." "Although the Rule provides broad discretion to

district courts with respect to the notice's form and content, it must satisfy the requirements of due process." *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 180 (3d Cir. 2013). "The adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules is measured by reasonableness." *Arbuthnot v. Pierson*, 607 F. App'x 73, 73 (2d Cir. 2015).

A notice for a Rule 23(b)(3) settlement class "must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(2)." FED. R. CIV. P. 23(c)(2)(B)(i)-(vii).

The notice program complied with these requirements. The notices summarize the claims and the terms of the Settlement and releases; the plan to allocate the net proceeds; the attorneys' fees, Service Awards and notice costs; the definition of the Settlement Class; the time and manner for requesting exclusion; the binding effect of the Settlement; and the options to appear at the Final Approval Hearing and object to any aspect of the proposed Settlement. Dkt. 96 at 12-17, 23; Kaufman Decl. ¶ 8 (attaching notices). Both notices use easily

understood language, contain the information required by Rule 23(c)(2)(B)(i)-(vii), and include an update concerning the Final Approval Hearing in view of COVID-19.[10]

The mailing of the notice complied with the Court's Preliminary Approval Order and Rule 23(c)(2)(B). The notice and claim form was mailed, by email or U.S. Mail, to the Settlement Class at the addresses provided by FMC. Kaufman Decl. ¶¶ 9-10. Heffler also provided online access to case documents via the Settlement website. *Id.* ¶ 7.

E. The Settlement Class Should Be Granted Final Approval

Amended Rule 23(e) acknowledges that classes may "be certified for purposes of settlement" subject to court approval. As the Court already held in the Preliminary Approval Order (Dkt. 96 ¶ 1), the Settlement Class here meets each requirement of Rule 23(a) and (b)(3).

1. The Requirements of Rule 23(a) Are Met

FED. R. CIV. P. 23(a) requires that the plaintiff demonstrate the following:

---

[10] At Plaintiffs' suggestion and with FMC's agreement, the Parties added the following language to both notices: "Due to the evolving situation concerning COVID-19, the Court may decide to hold this [Final Approval] Hearing telephonically. In the event the Court requires or permits telephonic participation in this Hearing, the dial-in number for the Hearing will be posted on the Settlement website. Interested Settlement Class Members should check the Settlement website for that information prior to the Hearing." *See* Kaufman Decl. ¶ 8; Lederer Decl. ¶ 47.

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Numerosity: The numerosity requirement is met where the class is so numerous that joinder of all members is impracticable. "No minimum number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met." *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001). The proposed Settlement Class of 1,524,198 present and former portfolio client families meets the requirement of numerosity.

Commonality: The commonality requirement is met where "there are questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). Where, as here, the defendant is alleged to have engaged in standardized conduct towards members of the proposed class, common questions of law and fact exist. "'The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class.'" *Stewart*, 275 F.3d at 226-27.

By definition, Plaintiffs' claim that FMC engaged in unlawful marketing calls raises several issues of fact *and* law that are common to the Settlement Class including, among others:

- whether FMC made telemarketing calls to putative Settlement Class Members during the Class Period using an ATDS or artificial voice message system;
- whether FMC improperly placed telemarketing calls to persons on DNC lists;
- whether FMC's conduct violated the TCPA;
- whether FMC's violations were knowing or willful; and
- whether Settlement Class Members are entitled to statutory damages under the TCPA.

Typicality: Rule 23(a)(3) requires that the class representatives' claims be "typical of the claims … of the class." As the Third Circuit has stated, "[t]he typicality requirement 'is designed to align the interests of the class and the class representatives so that the latter will work to benefit the entire class through the pursuit of their own goals.'" *In re Warfarin*, 391 F.3d at 531.

"'[C]ases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individual claims.'" *Barel v. Bank of Am.*, 255 F.R.D. 393, 398 (E.D. Pa. 2009).

Typicality is met here since Plaintiffs' claims are shared by the Settlement Class -- namely, whether FMC improperly placed telemarketing calls in violation of the TCPA. Plaintiffs and the Settlement Class are alleged to have been subjected to "the same or similar calls" (*quoting* Feb. 19, 2020 Hrg. Tr. at 17); suffered from the same alleged injuries; and will, if the Settlement is granted final approval by the Court, similarly benefit from the relief provided by the Settlement. *Accord Gehrich*, 316 F.R.D. at 224 ("The proposed class also satisfies commonality and typicality. Each class member suffered roughly the same alleged injury: receipt of at least one phone call … from [defendant] to her cell phone.").

Adequacy: Rule 23(a)(4)'s adequacy of representation requirement "considers whether the named plaintiffs' interests are sufficiently aligned with the absentees, and it tests the qualifications of the counsel to represent the class." *In re Cmty. Bank of N. Virginia*, 418 F.3d 277, 303 (3d Cir. 2005). "This requirement 'has two components': '[f]irst, the adequacy inquiry tests the qualifications of the counsel to represent the class'; and '[s]econd, it seeks to uncover conflicts of interest between named parties and the class they seek to represent.'" *Carr v. Flowers Foods, Inc.*, C.A. No. 15-6391, 2019 WL 2027299, at *10 (E.D. Pa. May 7, 2019). *Accord Atis*, 2018 WL 5801544, at *7.

Plaintiffs' interests are squarely aligned with, and are not antagonistic to, those of the Settlement Class. Throughout these proceedings, Plaintiffs sought to

maximize the relief for the benefit of the Settlement Class as a whole. Plaintiffs believe that they have obtained an "excellent" Settlement that provides real value particularly given the contingent risks of continued litigation. Lederer Decl. ¶ 40 (attaching Plaintiffs' supplemental declarations); *accord* Dkt. 89-7 ¶ 4; 89-8 ¶ 4; 89-9 ¶¶ 4-5 (Plaintiffs' declarations filed during preliminary approval).

Further, "plaintiffs' counsel and proposed class counsel have adequate experience and abilities to represent the class." *Quoting* Feb. 19, 2020 Hrg. Tr. at 17. *See also* Lederer Decl. ¶¶ 3, 5; Dkt. 89-5 and 89-6 (attaching firm résumés of Berger Montague PC and Mahany Law); www.bergermontague.com and www.mahanylaw.com. And Plaintiffs and counsel have "vigorously and appropriately and professionally" represented the interests of the Settlement Class. *Quoting* Feb. 19, 2020 Hrg. Tr. at 16. Accordingly, the requirements of Rule 23(a)(4) are satisfied.

2. The Requirements of Rule 23(b)(3) Are Met

The Settlement Class also complies with FED. R. CIV. P. 23(b)(3).

Predominance: The Rule 23(b)(3) predominance inquiry "measures whether the class is sufficiently cohesive to warrant certification." *Newton v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 187 (3d Cir. 2001). "[T]he predominance inquiry focuses a common course of conduct by which the defendant may have injured class members." *Barel*, 255 F.R.D. at 399. *See also*

Cannon v. Cherry Hill Toyota, Inc., 184 F.R.D. 540, 545 (D.N.J. 1999) (stating that "class members need not be identically situated upon all issues, so long as their claims are not in conflict").

Here, predominance is readily demonstrated by the nature of the claims and even certain of the defenses at issue. Plaintiffs and the Settlement Class are similarly alleged recipients of FMC's improper telemarketing calls. Those calls and some of FMC's defenses, such as whether FMC used an ATDS, raise issues concerning liability that predominate over individual issues. Indeed, if granted final approval, the Settlement eliminates potential defenses *against* class certification, such as concerning whether customer consent to calls allegedly necessitates individual inquiry as discussed above.

Superiority: "The superiority requirement 'asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication.'" *Good v. Nationwide Credit, Inc.*, 314 F.R.D. 141, 154 (E.D. Pa. Mar. 14, 2016). "When assessing superiority and '[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, ... for the proposal is that there be no trial.'" *Id.*

Here, the Settlement will provide redress for those who individually may have potential damages of several thousand dollars at most, and who thus, as a

practical matter, may be economically foreclosed from pursuing any relief outside of this case. Even if Settlement Class Members were economically incentivized to pursue litigation, the proposed Settlement avoids potential piecemeal adjudication, results in greater efficiencies and provides cash and remedial relief that may not even be achieved in any such individual litigation.

Ascertainability: The Settlement Class is also fixed and readily ascertainable from FMC's own business records. *Byrd v. Aaron's Inc.*, 784 F.3d 154, 169 (3d Cir. 2015) ("objective records that can readily identify … class members" satisfy ascertainability); *In re Cmty. Bank of N. Va. Mortg. Lending Practices Litig.*, 795 F.3d 380, 397 (3d Cir. 2015) (class members ascertainable through bank records). FMC has already identified and provided addresses for Settlement Class Members from FMC's own business records in accordance with the Preliminary Approval Order. *See* Dkt. 96 ¶ 15; Kaufman Decl. ¶ 9. Accordingly, the ascertainability requirement is satisfied.

CONCLUSION

By any measure, the Settlement here was reached on a well-informed and arm's-length basis following extensive litigation, and is fair, reasonable and adequate under Rule 23(e) such that it should be granted final approval. Accordingly, Plaintiffs respectfully request that the Court enter the Parties' agreed-upon proposed Order and Final Judgment submitted herewith.

Dated: June 2, 2020

Respectfully submitted,

Berger Montague PC

By: */s/ Lane L. Vines*
Lawrence J. Lederer (admitted *pro hac vice*)
Lane L. Vines
1818 Market Street, Suite 3600
Philadelphia, PA 19103
Tel.: 215/875-3000
Fax: 215/875-4604
Email: llederer@bm.net
lvines@bm.net

- and -

Mahany Law Firm
Brian Mahany (admitted *pro hac vice*)
Timothy Granitz (admitted *pro hac vice*)
8112 West Bluemound Road
Suite 101
Milwaukee, WI 53213
Tel.: 414/258-2375
Fax: 414/777-0776
Email: brian@mahanylaw.com
tgranitz@mahanylaw.com

Attorneys for Plaintiffs and the Settlement Class

Law Offices of Stefan Coleman, P.A.
Stefan Coleman
1072 Madison Avenue #1
Lakewood, NJ 08701
Tel.: 877/333-9427
Fax: 888/498-8946
Email: law@stefancoleman.com

Additional Plaintiffs' Counsel

kal9194898

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JOSHUA SOMOGYI, KELLY WHYLE SOMOGYI and STEWART SIELEMAN, on behalf of themselves and all others similarly situated, Plaintiffs, v. FREEDOM MORTGAGE CORP., Defendant.	Case No. 1:17-cv-06546-RMB-JS CLASS ACTION JURY TRIAL DEMANDED

[PROPOSED] FINAL APPROVAL ORDER AND ENTRY OF JUDGMENT

This matter came for hearing on September 10, 2020 (the "Final Approval Hearing"), to determine whether the terms and conditions of the Parties' Settlement Agreement are fair, reasonable and adequate and whether final approval should be granted. Due and adequate notice having been given to the Settlement Class, and the Court having considered all papers filed and proceedings in this Action and otherwise being fully informed, and good cause appearing therefore, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. This Final Approval Order and Entry of Judgment (the "Final Approval Order" or "Order") incorporates by reference the definitions in the Settlement Agreement, and all capitalized terms used herein shall have the same

meanings as set forth in the Settlement Agreement, unless otherwise set forth below.

2. This Court has jurisdiction over the subject matter of the Action and over all Parties to the Action, including all Settlement Class Members.

3. The Court preliminarily approved the Settlement Agreement by entering the Preliminary Approval Order dated February 24, 2020 (Dkt. No. 96) and notice was subsequently given to Settlement Class Members pursuant to the terms of the Preliminary Approval Order.

4. The Court finds that:

(a) the Settlement Class is so numerous that joinder of all members is impracticable;

(b) there are questions of law or fact common to the Settlement Class;

(c) Plaintiffs' claims are typical of the claims of the Settlement Class;

(d) Plaintiffs and Settlement Class Counsel will fairly and adequately protect the interest of the Settlement Class;

(e) questions of law and fact common to the Settlement Class Members, including questions relevant for settlement purposes, predominate over the questions affecting only individual Settlement Class Members; and

(f) certification of the Settlement Class is superior to other available methods for the fair and efficient adjudication of the controversy.

5. In light of the above findings and solely for purposes of the Settlement, the Court certifies this Action as a class action pursuant to FED. R. CIV. P. 23(a) and 23(b)(3). The Settlement Class consists of:

> All portfolio clients of FMC in the United States whose mortgages FMC serviced and who, during the Class Period September 1, 2013 through July 22, 2019, received one or more calls or voicemails made by or on behalf of FMC to any one or more of the client's cellular, voice over internet protocol (VOIP), residential, or landline phone numbers. For purposes of the Settlement Class, FMC's "clients" means borrowers and co-borrowers, spouses, and successors-in-interest, who shall collectively be deemed one client. Excluded from the Settlement Class are (i) FMC; (ii) any affiliates of FMC; (iii) any employee of FMC or members of their Immediate Family; (iv) Plaintiffs' Counsel; (v) the Judges who have presided over the Action; (vi) those persons who file a timely and valid request to be excluded from the Settlement Class; and (vii) the legal representatives, heirs, successors and assigns of any excluded person or entity. Based on FMC's records, 1,524,198 current or former FMC clients qualify as members of the Settlement Class, although FMC does not concede that any such clients were called by FMC or any FMC vendor in violation of the TCPA or otherwise.

6. The Court appoints, solely for purposes of the Settlement, Plaintiffs Joshua Somogyi, Kelly Whyle Somogyi and Stewart Sieleman to serve as the representatives of the Settlement Class.

7. The Court appoints, solely for purposes of the Settlement, Lawrence J. Lederer and Lane L. Vines of Berger Montague PC and Brian Mahany of Mahany Law Firm to serve as Settlement Class Counsel.

8. Pursuant to FED. R. CIV. P. 23, the Court approves the Settlement as set forth in the Settlement Agreement and finds that:

(a) the Settlement is fair, reasonable and adequate and is in the best interest of the Settlement Class;

(b) there was no collusion in connection with the Settlement;

(c) the Settlement was the product of informed, arm's-length negotiations among competent, able counsel with the assistance of a well-respected mediator; and

(d) the record is sufficiently developed and complete to have enabled Plaintiffs and FMC to have adequately evaluated and considered their positions.

9. Accordingly, the Court authorizes and directs implementation and performance of all terms of the Settlement Agreement and this Order. The Court hereby dismisses the Action and the claims asserted in the Action with prejudice. The Parties are to bear their own costs except as and to the extent provided in the Settlement Agreement and this Order.

10. Upon the Effective Date, and in exchange for the benefits under the Settlement, Plaintiffs and all Settlement Class Members shall release and forever discharge the Released Parties from the Released Claims. "Released Claims" mean any and all claims, liens, demands, actions, causes of action, obligations, damages or liabilities of any nature whatsoever that arose during the Class Period, whether legal or equitable or otherwise, that actually were, or could have been, asserted in the Action including those that arise from or relate to any communications, actions or inactions by the Released Parties allegedly in violation of any provision of the TCPA or its implementing regulations or any similar claims under state statutes or the common law, and any claim arising directly or indirectly out of, or in any way relating to, the claims that actually were, or could have been, asserted in the Action based on or relating to the allegations in the Action. Also upon the Effective Date, FMC and all Released Parties shall release and forever discharge Plaintiffs and Plaintiffs' Counsel from all claims, counterclaims or causes of action, whether legal or equitable or otherwise, relating to the claims at issue in the Action, provided, however, that FMC does not release any other claims or potential claims including, but not limited to, any claims relating to the payment by any person or entity of any amounts due on any mortgage that may be serviced by FMC. Any person who knowingly violates the foregoing injunction shall pay the attorney's

fees and costs incurred by Defendant and/or any other Released Party as a result of the violation.

11. In connection with and as part of the Released Claims, Plaintiffs and Settlement Class Members expressly acknowledge that they are familiar with principles of law such as Section 1542 of the Civil Code of the State of California, which provides:

> **A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party.**

Notwithstanding California or other law, Plaintiffs and Settlement Class Members expressly agree that, in connection with and as part of the Released Claims, the provisions, rights and benefits of Section 1542 and all similar federal or state laws, rights, rules or legal principles of any other jurisdiction that may be applicable herein are hereby knowingly and voluntarily waived, released and relinquished to the fullest extent permitted by law in connection with the Released Claims and any unknown claims that are substantially similar to or overlap with the Released Claims; and also agree and acknowledge that the foregoing is an essential term of the releases provided herein. Plaintiffs and Settlement Class Members also agree and acknowledge in connection with and as part of the Released Claims that they may discover claims presently unknown or unsuspected or facts in addition to or

different from those which they now know or believe to be true with respect to matters released herein, and that such claims, to the extent that they are substantially similar to or overlap with the Released Claims, are hereby released, relinquished and discharged.

12. The Notice given to the Settlement Class was the best notice practicable under the circumstances, including individual notice to all Settlement Class Members who could be identified through reasonable effort, and constituted due and sufficient notice to all persons. The form and method of the Notice fully satisfied the requirements of FED. R. CIV. P. 23 and due process. Thus, it is hereby determined that all Settlement Class Members are bound by this Final Approval Order.

13. This Court finds that FMC properly and timely notified the appropriate state and federal officials of the Settlement Agreement under the Settlement Class Action Fairness Act of 2005, 28 U.S.C. § 1715 ("CAFA"), and that more than ninety (90) days have elapsed since FMC provided the required notice, as required by 28 U.S.C. § 1715(d).

14. The Plan of Allocation proposed by Settlement Class Counsel set forth in the Notice, whereby each Settlement Class Member who timely submits a valid Claim Form will receive an equal share of the Net Settlement Fund, is hereby approved.

15. Neither the Settlement nor the Settlement Agreement nor any act performed or document executed pursuant to or in furtherance of the Settlement or the Settlement Agreement:

(a) shall be offered or received against any of the Released Parties as evidence of, or be deemed to be evidence of, any presumption, concession or admission by any of the Released Parties with respect to the truth of any fact alleged by any of the Parties or the validity, or lack thereof, of any claim or counterclaim, or the existence of any class that has been or could have been asserted in the Action or in any other litigation against FMC, or the deficiency of any defense that has been or could have been asserted in the Action or in any other litigation against FMC, or of any liability, negligence, fault or wrongdoing of any of the Released Parties;

(b) shall be offered or received against the Released Parties as evidence of a presumption, concession or admission of any fault, misrepresentation or omission with respect to any statement or written document approved or made by any of the Released Parties, or against any of the Released Parties as evidence of any infirmity in the claims asserted in the Action;

(c) shall be offered or received against any of the Released Parties as evidence of a presumption, concession or admission with respect to any liability, negligence, fault or wrongdoing, or in any way referred to for any other reason as

against any of the Parties, in any arbitration proceeding or other civil, criminal or administrative action or proceeding, other than such proceedings as may be necessary to effectuate the provisions of the Settlement Agreement; provided, however, that the Released Parties may refer to the Settlement Agreement and Settlement to effectuate the liability protection granted them hereunder; and

(d) shall be construed against any of the Released Parties as an admission or concession that the consideration to be given hereunder represents the amount which could be or would have been recovered after trial.

16. Any of the Parties may file the Settlement Agreement and/or this Final Approval Order in any other action that may be brought against them in order to support a defense, claim or counterclaim based on principles of *res judicata*, collateral estoppel, release, good faith settlement, judgment bar or reduction, or any theory of claim preclusion or issue preclusion or similar defense or counterclaim.

17. Without affecting the finality of this Final Approval Order and Entry of Judgment in any way, this Court hereby retains continuing jurisdiction over the administration, consummation and enforcement of the Settlement Agreement.

18. Except as otherwise provided in the Parties' Settlement Agreement, in the event the Settlement and the Settlement Agreement are terminated or if the Effective Date fails to occur for any reason, the Parties shall be deemed to have reverted *nunc pro tunc* to their respective status in the Action as of the date of

execution of the Settlement Agreement, and except as otherwise expressly provided, the Parties shall proceed in all respects as if the Settlement Agreement and any related orders had not been entered and without any prejudice in any way from the negotiation, fact, or terms of the Settlement.

19. The Parties have consented to this Court presiding over all proceedings concerning the Parties' Settlement pursuant to 28 U.S.C. § 636(c)(1) as set forth in the Settlement Agreement, and this Court has accordingly so presided and continues to so preside.

20. There is no just reason for delay in the entry of this Final Approval Order and Entry of Judgment and immediate entry by the Clerk of the Court is expressly directed.

IT IS SO ORDERED:

DATED: _____ _____

Judge Joel Schneider