IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

TOMEKA BARROW and ANTHONY DIAZ, Individually and On Behalf of All Others Similarly Situated, Plaintiffs, v. JPMORGAN CHASE BANK, N.A., Defendant.	*	Civil Action File No. 1:16-cv-03577-AT

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

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I. INTRODUCTION

Plaintiffs Tomeka Barrow ("Barrow") and Anthony Diaz ("Diaz") (together, the "Plaintiffs"), respectfully submit this memorandum in support of their motion for final approval of class action settlement.

The settlement administrator, Kurtzman Carson Consultants, LLC ("Administrator") reports zero objections, only 63 timely requests for exclusion out of approximately 242,359[1] Settlement Class Members, and approximately 13,700 timely and valid claims with a corresponding completed and valid W9 form.

The estimated individual recovery per claimant who submitted a valid claim form and a completed W9 form is approximately $91. However, if the Court were to approve claims that did not include a corresponding W9 form, but are otherwise valid, representing approximately 28,000 claims, then the estimated individual recovery per claimant would be approximately $44. As explained below, Plaintiffs recommend that the Court approve all timely claims, regardless of whether a W9 was provided, which request is not opposed by defendant JPMorgan Chase Bank,

[1] There are an estimated 242,359 Settlement Class Members. Ibey Decl., ¶ 10. However, notice was attempted with regard to 260,540 unique cell phone numbers. JPMC did not have telephone type data for approximately 71,350 phone numbers, but it was estimated that only approximately half of those phone numbers (35,675) were cell phone numbers as opposed to landline phone numbers, which was taken into consideration in the estimated Settlement Class Size of 242,359. [Ibey Decl., ¶ 10(b); *see* Declaration of Lana Lucchesi Re: Notice Procedures ("Lucchesi Decl."), ¶¶ 3-7; *see also*, Dkt. No. 57-7, ¶¶ 9, 12 and 13].

N.A. ("JPMC" or "Defendant"). Ibey Decl., ¶ 16.

Pursuant to the March 16, 2018 Order (Dkt. No. 60), the Court preliminarily approved the proposed Settlement memorialized in the written Settlement Agreement ("Agreement" or "Agr.") filed at Dkt. No. 57-3. This nationwide TCPA settlement, which provides for a significant monetary recovery, should be granted because it satisfies the criteria for final approval. Importantly, final approval is endorsed by the named Plaintiffs and Class Counsel. *See Ingram v. Coca-Cola Co.,* 200 F.R.D. 685, 691 (N.D. Ga. 2001); Kazerounian Decl., ¶ 12; Declaration of Joshua Swigart ("Swigart Decl."), ¶ 11; Declaration of Jason Ibey ("Ibey Decl."), ¶ 18; Declaration of Tomeka Barrow., ¶ 6; Declaration of Anthony Diaz, ¶ 6.

II. BACKGROUND

A. Class Notice

The Court preliminarily approved the Notice program that has now been successfully carried out by the Administrator, with a terrific combined notice reach of 97.6%. Lucchesi Decl., ¶ 11. Settlement Class Members were informed of the proposed Settlement by direct mail or email notice, publication in *People* magazine and the Settlement Website (http://barrowtcpasettlement.com, *see* Exhibit C to Ibey Decl, ¶ 25 (main page of Settlement Website)). Lucchesi Decl., ¶ 13.

Additionally, at the request of the Parties, the Administrator sent three reminder notices prior to the claims submission deadline of August 13, 2018

(Lucchesi Decl., ¶¶ 8 and 16), as the statistics at the time reflected that many claims were submitted without an accompanying W9 form. The reminder notices were transmitted on June 27, July 18 and August 6, 2018. *Id*. at ¶ 8.

Lastly, the CAFA notice required by 28 U.S.C. § 1715 was timely served on March 5, 2018 by JPMC, as reported by counsel for JPMC.

B. Responses to Class Notice

1. No Objections

The deadline to object was August 13, 2018. Lucchesi Decl., ¶ 15. Pursuant to Section III.L.2 of the Agreement, objections were to be filed with the Court and mailed to counsel for both Parties. There are no objections to the Settlement.

A letter dated July 6, 2018, was received by Plaintiffs' counsel from Joshua and Tamera Sauter, which included language of an objection to the proposed Settlement. Ibey Decl., ¶ 23; Exhibit A thereto (Sauters' July 6th Letter). Class Counsel then reached out to the Sauters by email to better understand the nature of the letter, which also included language of requesting exclusion (a Settlement Class Member may not both object and request exclusion, *see* Agr. § III.K.1). Class Counsel learned that the Sauters misunderstood the Release and nature of the proposed Settlement. Ibey Decl., ¶ 14. Subsequently, on August 1, 2018, the Sauters decided to participate in the settlement and clarified by letter (transmitted via email to Class Counsel) that they do not have objection to the Settlement. Ibey

Decl., ¶ 24; Exhibit B thereto (Sauters' August 1st Letter). The Administrator reports that the Sauters submitted a claim form and W9 form. Ibey Decl., ¶ 14(e).

Thus, pursuant to Fed. R. Civ. P. 23(e)(5), the Court should consider the August 1, 2018 letter from the Sauters as clarifying that the Sauters do not object to the settlement, or find that any such objection, if it existed, is now withdrawn.

2. Only 63 Timely Requests for Exclusion

The deadline to request exclusion (opt out) was August 13, 2018. Lucchesi Decl., ¶ 14. There are 63 timely requests for exclusion out of an estimated 242,359 Settlement Class Members (63/242,359 = 0.000259). Lucchesi Decl., ¶ 14; *see also,* Exhibit E to Ibey Declaration (placeholder page for the Administrator's declaration indicating timely requests for exclusion, in connection with motion to seal). There is only one untimely request for exclusion (Lucchesi Decl., ¶ 14), which would be considered an invalid opt out request and thus bound by the terms of the Agreement. Agr. § III.K.1.

3. Claims to the Settlement

The deadline to submit a claim form, either online or by mail, was August 13, 2018. Lucchesi Decl., ¶ 16. A total of 33,138 claim forms have been received by the Administrator. *Id*. Of them, 33,107 were timely, and 31 were late.[2] *Id*. There

[2] There are 53 instances of the same phone number being identified on two claim forms, most of which appear to share the same mailing address. Of the 53

are 844 claims deemed deficient or invalid.[3] *Id*. at ¶ 17. A total of 16,876 W9 forms were received, of which 48 were untimely. *Id*. at ¶ 20.

The claims rate here of approximately 11.55%[4] is much higher than average, and higher than the 5% anticipated by Class Counsel at the time they filed their motion for preliminary approval of the settlement (Dkt. No. 57-1, p. 16 – estimating 5% claims rate). *See Kolinek v. Walgreen Co*., 311 F.R.D. 483, 493 (N.D. Ill. 2015) (approving TCPA class action settlement with 2.5% claims rate); *Couser v. Comenity Bank*, 125 F. Supp. 3d 1034, 1043-44 (S.D. Cal. 2015) (finding the 7.7% claims rate was a "higher than average claims rate" and weighed in favor of approval). Based on a summary submitted to the court in *Wilkins v. HSBC Bank Nevada, N.A., et al.,* No. 1:14-cv-00190, Dkt. No. 109-1 (N.D. Ill. 2014), the claims rate was 5.7% in *Wojcik v. Buffalo Bills, Inc*., No. 8:12-cv-02414

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instances, 22 claim forms were submitted jointly by two claimants. In those instances, the joint claims were accepted as valid and the claim forms submitted independently by one or more of the joint claimants were rejected as duplicative. Where joint claim forms were not submitted, because there was no way to prioritize one claim over another, both claims for a single phone number were accepted as valid (a total of 51 claims).

[3] There are approximately 844 potentially deficient claims (for failure to sign the claim form, an invalid Taxpayer Identification Number, or incomplete name), which could potentially be cured. The Administrator plans to send deficiency notices on October 22, 2018, and provide 14 days to cure. Lucchesi Decl., ¶ 18.

[4] This is based on the total number of timely and otherwise valid claims regardless of whether a completed W9 was received. However, if the Court approves only timely and valid claims where a completed and valid W9 was also submitted, then the valid claims rate would be approximately 5.65%.

(M.D. Florida) [Kazerounian Decl., ¶ 16; Exhibit B thereto]. Although the claims rate was 12% in *Markos v. Wells Fargo Bank, N.A.*, No. 1:15-cv-01156-LMM, 2017 U.S. Dist. LEXIS 17546, n.2 (N.D. Ga. Jan. 30, 2017), in Class Counsels' experience an 11-12% claims rate is higher than average for this type of TCPA action. Kazerounian Decl., ¶ 11; Swigart Decl., ¶ 10.

The higher than average valid claims rate is likely owing to the fact that contact information for most of the estimated 242,359 Settlement Class Members was known by JPMC or obtainable via a reverse phone number lookup (*see* Dkt. No. 57-7, ¶ 12), as well as the strong interest of the Settlement Class Members in participating in this Settlement – suggesting a largely favorable reaction.

C. Monetary Relief

The Settlement provides for a non-reversionary Settlement Fund of $2,250,000, with the amount of the claimant's individual award (to be issued by check valid for 120 days) determined by their *pro rata* share of the net settlement.

After deducting the requested $675,000 for attorneys' fees and costs (representing 30% of the Settlement Fund), class representative service awards totaling $10,000 ($5,000 x 2), and estimated administration expenses of $330,057.68 (Lucchesi Decl., ¶ 21) the estimated individual recovery to the approximately 28,000 claimants who submitted a valid and timely claim form (including an estimate of claim forms that may be cured), regardless of whether a W9

Form was received, is approximately $44.

The Agreement requires submission of a valid and timely claim form as well as a completed W9 form to receive a monetary recovery in the event of settlement approval (Agr. § III.F.3). Should the Court approve only those timely claims that included a completed and valid W9 form, there would then be approximately 13,700 valid claims, resulting in an individual recovery of approximately $91 (based on estimated administration expenses of $312,877.12). *See* Lucchesi Decl., ¶ 21. To be more inclusive, Plaintiffs recommend the Court accept timely claims that were received without a completed W9 form as long as the claims would otherwise be valid, which request JPMC does not oppose.[5] Ibey Decl., ¶ 16.

D. Class Release

Settlement Class Members who did not timely opt out are bound by the Release, which is limited to the claims for automated and artificial/prerecorded calls to cell phones under the TCPA and similar laws. Agr. § III.H.

E. Attorneys' Fees, Costs and Class Representative Service Awards

For the reasons explained in detail in the motion that was timely filed on July 13, 2016 (Dkt. No. 61-1), Class Counsel continue to believe that the combined

[5] "Until the fund created by the settlement is actually distributed, the court retains its traditional equity powers." *Zients v. La Morte*, 459 F.2d 628, 630 (2d Cir. 1972). In *Castillo v. ADT, LLC*, No. No. 2:15-383-WBS-DB, 2017 U.S. Dist. LEXIS 10579, at *8 (E.D. Cal. Jan. 24, 2017), the parties agreed to accept late claim forms.

request for attorneys' fees and litigation costs (30% of the Settlement Fund) and services awards ($5,000 x 2) should be granted. Indeed, the amount of combined attorneys' fees and litigation costs requested by Class Counsel in the fee petition ($675,000, Dkt. No. 61-1, p. 3; *see also*, Kazerounian Decl., ¶ 13; and Ibey Decl., ¶ 20) is less than the maximum that Class Counsel were permitted to request under the Agreement. The Agreement permits Class Counsel to request up to 30% of the Settlement Fund as attorneys' fees, and separately up to $40,000 as litigation expenses. Agr. § III.I.

III. FINAL APPROVAL OF THE SETTLEMENT IS WARRANTED

"The law favors settlement, particularly in class actions and other complex cases where substantial resources can be conserved by avoiding lengthy trials and appeals." Rubenstein, Newberg on Class Actions § 13:44 (5th ed. 2015); *In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992) ("Public policy strongly favors the pretrial settlement of class action lawsuits."); *Columbus Drywall & Insulation, Inc. v. Masco Corp.*, 258 F.R.D. 545, 558 (N.D. Ga. 2007) ("[C]ourts should also bear in mind the judicial policy favoring settlements.").

In determining whether to approve the settlement, courts consider whether it is "fair, adequate, reasonable, and not the product of collusion."*Leverso v. SouthTrust Bank of AL., N.A.*, 18 F.3d 1527, 1530 (11th Cir. 1994). The settlement is appropriate where "the interests of the class as a whole are better served if the

litigation is resolved by settlement rather than pursued." *In re Checking Account Overdraft Litig*., 830 F. Supp. 2d 1330, 1344-45 (S.D. Fla. 2011) (citation omitted).

There are six factors for consideration: (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate, and reasonable; (4) the anticipated complexity, expense, and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which settlement was achieved. *See Faught v. Am. Home Shield Corp*., 668 F.3d 1233, 1240 (11th Cir. 2011); *Bennett v. Behring Corp*., 737 F.2d 982, 986 (11th Cir. 1984). Application of these factors confirms the Settlement should be finally approved.

A. The Settlement Was Reached Without Any Indication of Collusion After Two Mediations

The proposed Settlement resulted from many months of good-faith, adversarial, and contentious arm's-length negotiations (Kazerounian Decl., ¶ 10). *See Bennett*, 737 F.2d at 987 n.9 (approving settlement where "the settlement ha[d] been achieved in good faith through arms-length negotiations and is not the product of collusion between the parties and/or their attorneys"); *Saccoccio v. JP Morgan Chase Bank, N.A*., 297 F.R.D. 683, 692 (S.D. Fla. 2014) ("Where the parties have negotiated at arm's length, the Court should find that the settlement is not the product of collusion.").

The Parties reached settlement only after two in-person meditations before experience mediators, one in Illinois before the Honorable Morton Denlow (Ret.),[6] and one in California before Bruce Friedman, Esq. of JAMS[7] (Kazerounian Decl., ¶ 10; Dkt. No. 61-1, p. 19). *See Ingram v. The Coca-Cola Co*., 200 F.R.D. 685, 693 (N.D. Ga. 2001) ("The fact that the entire mediation was conducted under the auspices of Mr. Hughes, a highly experienced mediator, lends further support to the absence of collusion."). Such circumstances support approval of the settlement. *See e.g.*, *Greco v. Ginn Dev. Co., LLC*, 635 F. App'x 628, 630 (11th Cir. 2015) (approving settlement after four mediations); *Poertner v. Gillette Co*., 618 F. App'x 624, 625 (11th Cir. 2015) (approving settlement after "months" of mediation); *Blessing v. Sirius XM Radio Inc*., 507 F. App'x 1, 3 (2d Cir. 2012) (finding "the proposed settlement was fair" where the "settlement was reached only after contentious negotiations"); 2 McLaughlin on Class Actions § 6:7 (8th ed. 2011) ("A settlement reached after a supervised mediation receives a presumption of reasonableness and the absence of collusion.").

[6] *See Hageman v. AT&T Mobility LLC*, No. CV 13-50-BLG-RWA, 2015 U.S. Dist. LEXIS 25595, at *2 (D. Mont. Feb. 11, 2015) (referring to the "Honorable Morton Denlow of JAMS, an experienced mediator" and former judge).

[7] *See* https://www.jamsadr.com/bruce-friedman/class_action_mass_tort.

B. The *Bennett* Factors Support Approval of the Settlement

The required Rule 23(e) analysis is essentially covered by the first three *Bennett* factors, which address whether the Settlement provides reasonable value to the Class when measured against the strength of the plaintiffs' case. *See Figueroa v. Sharper Image Corp*., 517 F. Supp. 2d 1292, 1323-24 (S.D. Fla. 2007) ("The most important factor relevant to the fairness of a class action settlement is the … strength of the plaintiff's case on the merits balanced against the amount offered in the settlement.") (quoting *Synfuel Techs., Inc. v. DHL Exp. (USA), Inc*., 463 F.3d 646, 653 (7th Cir. 2006)). Nevertheless, courts "must be guided by . . . 'the realization that compromise is the essence of settlement.'" *In re Domestic Air Transp. Antitrust Litig*., 148 F.R.D. 297, 312 (N.D. Ga. 1993) (quoting *Bennett*, 737 F.2d at 986). The Court is "not called upon to determine whether the settlement reached by the parties is the best possible deal, nor whether class members will receive as much from a settlement as they might have recovered from victory at trial." *In re Checking Account Overdraft Litig*., 830 F. Supp. 2d at 1345 (citation omitted).

1. The Settlement Provides Significant Monetary Relief in Light of the Risks

Information supporting this factor is discussed in detail in the motion for preliminary approval (Dkt. No. 57-1, pp. 14-17) and the motion for attorneys' fees,

costs and service awards (Dkt. No. 61-1, pp. 7-9, 12-13, 15-17); Plaintiffs incorporate that analysis here. Moreover, Plaintiffs note that since the Settlement was reached in this matter, several federal District Courts and Circuit Courts have issued differing rulings on the meaning of an ATDS following the D.C. Circuit's decision in *ACA Int'l v. FCC*, 885 F.3d 687, 699 (D.C. Cir. 2018) ("*ACA International*"). The Parties were keenly aware of the then-pending *ACA International* decision issued on March 16, 2018, only 21 days after the Agreement was fully executed on February 23, 2018 (*see* Dkt. No. 57-3, p. 31 of 74).

The recent decisions, post-*ACA International*, pose significant risks to both Parties, as the case law is split on the meaning of an ATDS. *See Reyes v. BCA Fin. Servs., Inc*., 312 F.Supp.3d 1308 (S.D. Fla. May 14, 2018); *Swaney v. Regions Bank*, No. 2:13-cv00544-JHE, 2018 WL 2316452 (N.D. Ala. May 22, 2018); *McMillion v. Rash Curtis & Assocs*., No. 16-CV-03396-YGR, 2018 WL 3023449 (N.D. Cal. June 18, 2018); *Ammons v. Ally Fin., Inc*., No. 3:17-CV-00505, 2018 WL 3134619, -- F. Supp. 3d -- (M.D. Tenn. June 27, 2018); *O'Shea v. Am. Solar Sol., Inc*., No. 3:14-CV-00894-L-RBB, 2018 WL 3217735 (S.D. Cal. July 2, 2018); and *Somogyi v. Freedom Mortg. Corp*., No. CV 17-6546 (JBS/JS), 2018 WL 3656158 (D.N.J. Aug. 2, 2018), which are cases favorable to the Plaintiffs; *but see*, *Pinkus v. Sirius XM Radio, Inc*., No. 16 C 10858, 2018 WL 3586186 (N.D. Ill. Jul. 26, 2018); *Herrick v. GoDaddy.com LLC*, 312 F. Supp. 3d 792 (D. Ariz.

2018); *King v. Time Warner Cable Inc.,* 894 F.3d 473 (2d Cir. 2018); and *Marshall v. CBE Grp., Inc*., 2018 WL 1567852 (D. Nev. Mar. 30, 2018), which are decisions favorable to TCPA defendants. The Court in *Douglas v. Western Union Co.*, No. 14 C 1741) 2018 U.S. Dist. LEXIS 148892, at *19 (N.D. Ill. Aug. 31, 2018) acknowledged that "[t]he D.C. Circuit has since resolved that challenge in a manner favorable to TCPA defendants." There is also a split between the Third Circuit and Ninth Circuit on the meaning of an ATDS. *See Dominguez v. Yahoo, Inc.,* 894 F.3d 116 (3d Cir. 2018); and *Marks v. Crunch San Diego, LLC*, No. 14-56834, 2018 U.S. App. LEXIS 26883, *23 (9th Cir. Sep. 20, 2018).

2. The Monetary Award

Under the settlement, JPMC would provide for a $2,250,000 Settlement Fund, which is an all-in settlement without reversion. Regardless of the Court's decision on this issue of whether to approve claims that did not include a completed W9 form (*see* Section II.C, above), an estimated recovery of even $44[8] (if timely claims without a W9 are approved) is fair and adequate in light of prior settlements and the risks in this TCPA litigation.[9] *See e.g*., *Mahoney v. TT of Pine Ridge, Inc*., No. 17-80029-CIV, 2017 U.S. Dist. 13 LEXIS 217470, at *18 (S.D.

[8] $2,250,000 (fund) - $675,000 - $10,000 - $330,057.68 = Approx. $44.10.

[9] One court, prior to the FCC's 2015 Ruling, opined that "the average TCPA case carries a 43% chance of success," *Amadeck*, 80 F. Supp. 3d at 806.

Fla. Nov. 17, 2017) (finally approving "the Settlement Agreement [under the TCPA that] gave class members the option to choose a $4.00 cash award or a $15.00 voucher"); *Kolinek v. Walgreen Co*., 311 F.R.D. 483 (N.D. Ill. 2015) (finally approving TCPA settlement where the individual settlement award was approximately $30.00); *Amadeck v. Capital One Fin. Corp. (In re Capital One Tel. Consumer Prot. Act Litig.)*, 80 F. Supp. 3d 781, 787 (N.D. Ill. 2015) (awarding $34.60 per claiming class member); *Arthur v. Sallie Mae, Inc*., 10-cv-0198-JLR (W.D. Wash.) (approving settlement where class members were to receive between $20 and $40 dollars per claim); *Wojcik v. Buffalo Bills Inc*., No. 8:12-cv-02414-SDM-TBM (M.D. Fla. Aug. 25, 2014) (awarding a gift card valued at $57.50 to $75.00 per class member) [Dkt. No. 57-4]; and *Jiffy Lube International, Inc. Text Spam Litigation*, 11-MD-02261-JM-JMA (finally approving TCPA class settlement where class members received a single voucher for an oil change, valued at $20.00) [*see* Exhibit H to Kazerounian Decl.].

The Settlement provides direct and actual monetary recovery to Settlement Class Members who submitted valid claims, which was comprised of a simple claim form requesting the claimant's name, address, relevant cell phone number, attestation to receiving a call after orally revoking consent, and a completed W9 form. *See* Exhibits A and B to Lucchesi Decl., ¶¶ 6 and 7. Both the claim form and W9 form could be submitted online or by mail. *Id*. at ¶¶ 13 and 16.

Although the settlement amount does not constitute the full measure of statutory damages potentially available to the Settlement Class Members, this fact alone should not weigh against final approval because of the risks involved and the nature of a settlement as a compromise. *See In re Domestic Air Transp. Antitrust Litig*., 148 F.R.D. at 319 ("In assessing the settlement, the Court must determine whether it falls within the range of reasonableness, not whether it is the most favorable possible result in the litigation.") (internal quotation marks omitted).

3. The Strength of Plaintiffs' Case

At this stage of the proceedings, the Plaintiffs continue to believe in their individual claims against JPMC under the TCPA. Initially, it is essentially undisputed that the two named Plaintiffs were called on a cell phone on several occasions. Plaintiffs both contend that each orally informed JPMC to stop calling yet the calls continued. Plaintiffs reasonably believe that JPMC used an ATDS because it was used to call several thousands of persons over the Settlement Class Period. Moreover, Plaintiffs reasonably believe that a class action could be certified here based the proposed keyword search protocol. *See e.g*., *Abdeljalil v. GE Capital Corp*., 306 F.R.D. 303, 306 (S.D. Cal. 2015) (certifying TCPA class action, based on a proposed keyword search, involving claims that the defendant continued placing automated calls to wrong parties after it was on notice). JPMC denies that a class action is certifiable in this case.

Nevertheless, Plaintiffs and the Class would face several challenges if the litigation were to continue, such as: (i) a legal challenge to the meaning of an ATDS in light of *ACA International*; (ii) disagreement as to what constitutes "clear" and "express" revocation of consent to be called (*see e.g.*, *Van Patten v. Vertical Fitness Group, LLC,* 847 F.3d 1037, 1048 (9th Cir. 2017)); and (iii) the propriety of class certification, were a contested motion filed. *See Nece v. Quicken Loans, Inc.*, No. 8:16-cv-2605-T-23-CPT, 2018 U.S. Dist. LEXIS 31346, at *8-9 (M.D. Fla. Feb. 27, 2018) (opining that the named plaintiff's revocation claim involved "several 'unique' or idiosyncratic facts (including the phrasing of Nece's comments and Nece's repeated submissions) [that] contribute to the determination whether Quicken stopped calling Nece within a reasonable time.") Class Counsel are unaware of an oral revocation class being certified on a contested motion.

4. Continued Litigation Would Likely Be Complex, Lengthy and Expensive

Continued litigation here with JPMC (a national bank) would involve further extensive discovery as to the putative class claims and motion practice, including a crucial motion for class certification and possible motion for summary judgment by JPMC as to whether an "automatic telephone dialing system" was in fact used. *See Arthur v. Sallie Mae, Inc.*, 2012 U.S. Dist. LEXIS 132413, *4 (W.D. Wash. Sept. 17, 2012) ("Courts have split on class certification in TCPA cases, increasing

the risk of maintaining the class action through trial."); *West Loop Chiropractic & Sports Injury Center, Ltd. v. N. Am. Bancard, LLC*, No. 16 C 5856, 2018 U.S. Dist. LEXIS 132865, at *23 (N.D. Ill. May 16, 2018) (noting "a split of opinion in TCPA cases on whether issues of individualized consent predominate over common questions of law or fact so as to prevent class certification").

The Parties would likely need to engage experts to address that issue of whether an ATDS was used by JPMC, and to also analyze call and alleged consent data that would be sought from JMPC as to the (nationwide) putative class claims. Indeed, it is not uncommon in TCPA class action litigation for the named plaintiffs to seek discovery such as outgoing calls records, consent documentation, and expert testimony as to whether an autodialer (47 U.S.C. § 227(a)(1)) was used.[10]

Additionally, the Parties would take the other parties' deposition – the deposition of the two named Plaintiffs (Plaintiff Anthony Diaz resides in California, and Plaintiff Tomeka Barrow resides in Georgia) and the deposition of

[10] *See e.g.*, *Stemple v. QC Holdings, Inc.,* No. 12-cv-1997-CAB (WVG), 2013 U.S. Dist. LEXIS 99582 (S.D. Cal. June 17, 2013) (ordering production of outbound dial list and all alleged consent documentation prior to a motion for class certification); *Medina v. Enhanced Recovery Co., LLC*, No. 15-14342-CIV), 2017 U.S. Dist. LEXIS 186651 (S.D. Fla. Nov. 9, 2017) (ordering production of outbound dial records for putative class); *Shamblin v. Obama*, No. 8:13-cv-2428-T-33TBM, 2015 U.S. Dist. LEXIS 54849 (M.D. Fla. Apr. 27, 2015) (the plaintiff offered expert testimony in support of motion for class certification); *Satterfield v. Simon & Schuster, Inc.,* 569 F.3d 946, 951 (9th Cir. 2009) (noting competing evidence of use of an ATDS, with the plaintiff offering expert testimony).

JPMC (which has its principal place of business in New York) pursuant to Fed. R. Civ. P. 30(b)(6) as to several topics not covered by the confirmatory deposition of JPMC (held in Washington, D.C.) that was taken following settlement in principle.

As of approximately July 13, 2018, the litigation expenses incurred by Plaintiffs' counsel amounted to $30,118.67 (Dkt. No. 61-1, p. 21), and the expenses would likely dramatically increase through further class-related discovery, motion practice and expert testimony.

Since the TCPA case law is in flux following *ACA International* (which, in part, overturned the FCC's 2015 ruling on the meaning of an ATDS), further litigation would likely be complex in terms of determining the meaning of an ATDS, including because the FCC may be issuing a new ruling on that very issue post-*ACA International* (2018 FCC LEXIS 1496), and in light of *Dominquez* and *Marks* mentioned above. Some courts have also begun staying TCPA cases in light of a pending Constitutional challenge to the TCPA. *See Gallion v. Charter Commc'ns, Inc.*, 287 F. Supp. 3d 920 (C.D. Cal. 2018), appeal docketed, No. 18-80031, No. 18-55667 (9th Cir. Mar. 8, 2018). Some courts have declined to certify revocation cases. *See e.g.*, *Ginwright v. Exeter Fin. Corp.*, 280 F. Supp. 3d 674, 688 (D. Md. 2017) (class certification denied where the plaintiff's "claim revolves around individualized questions of consent and the revocation of consent").

The Settlement allows Plaintiffs and Settlement Class Members to receive immediate and certain monetary relief now,[11] without the delay and risks of continued litigation (including changes in TCPA law) and trial. *See Ingram*, 200 F.R.D. at 691 (approving settlement where "the likely alternative to settlement now is lengthy, burdensome, and expensive litigation," and explaining that "the added benefit of obtaining [relief] now rather than years from now makes approval of this settlement in the best interests of the class").

5. There Are No Objections to the Settlement and Only a Small Number of Requests for Exclusion

As explained above, there are no objections to the Settlement. The 63 timely requests for exclusion represent less than 0.002% of the estimated 242,359 Settlement Class Members. Consequently, there is virtually no opposition to Settlement, which favors final approval. *See Perez v. Asurion Corp*., 501 F. Supp. 2d 1360, 1381 (S.D. Fla. 2007) ("A low percentage of objections demonstrates the reasonableness of a settlement."); *Fernandez v. Vict. Secret Stores, LLC*, 2008 U.S. Dist. LEXIS 123546, *48 (C.D. Cal. July 21, 2008) ("Only three class members objected and only twenty-nine opted out. This indicates that counsel achieved a favorable result for the class, which in turn suggests that they are entitled to a

[11] The separate TCPA lawsuit in *Newkirk v. JPMorgan Chase Bank, N.A*., No. 8:17-cv-00630-RAL-AAS (M.D. Fl.) was dismissed with prejudice on July 10, 2018 (Exhibit A to Kazerounian Decl.). *See also,* Agr. § III.O. Thus, the dismissed *Newkirk* action presents no impediment to final approval of this Settlement.

generous fee"); *see also*, *Bennett v. Behring Corp.,* 737 F.2d 982, 988, n.10 (11th Cir. 1984) (holding that the district court properly considered the number and substance of objections in approving a class settlement).

6. The Stage of Proceedings

While the proposed Settlement was reached at an early stage of the litigation, first with the filing of the prior *Diaz* action filed on April 20, 2016 in the Southern District of New York and then this action filed on September 23, 2016 (Dkt. No. 61-4, ¶¶ 6-8), that does not weigh against final approval. Class Counsel and JPMC put in the necessary work and investigation to properly evaluate the value of this case and to then reach a reasonable resolution.

Class Counsel adequately investigated JPMC's pertinent business practices and the named Plaintiffs' TCPA claims through written discovery requests, review of documentation, and confirmatory discovery following mediation. Plaintiffs' investigation and research was critical to Class Counsel's understanding of the claims and remedies at issue. *See* Dkt. No. 57-2, ¶¶ 9-13; Dkt. No. 57-7, ¶¶ 5-14.

Any concerns about the early stage of proceedings are allayed by the significant result of a non-reversionary $2,250,000 Settlement Fund for the benefit of an estimated 242,359 Settlement Class Members nationwide, who were allegedly called on their cell phone without consent after they orally requested that JPMC cease calling. *See Behrens v. Wometco Enters., Inc*., 118 F.R.D. 534, 547-

48 (S.D. Fla. 1988), aff'd, 899 F.2d 21 (11th Cir. 1990) ("The quality of work performed in a case that settles before trial is best measured by the benefit obtained."). Again, the settlement provides for relief now, instead of possible relief after much motion practice, including what would be a contested motion for class certification, and likely years of litigation and the risk of trial and emerging TCPA case law after *ACA International*.

Therefore, final approval of this class action settlement should be granted.

IV. REQUEST FOR APPROVAL OF CY PRES BENEFICIARIES

Pursuant to the Agreement, unclaimed settlement funds after the first distribution will be distributed to claimants who cashed their first settlement check as long as there are sufficient funds to pay each eligible recipient $10.00 by check that will be valid for 90 days (Agr. § III.G.2.), and then to *cy pres* beneficiaries approved by the Court (*id*. at § III.G.3.).

Plaintiffs request that the Court approve as contingent *cy pres* beneficiaries (i) Prosperity Now and (ii) New Media Rights pursuant to Section III.G.3. of the Agreement. In addition to the Agreement, the Court retains its traditional equitable powers in determining the method in which to distribute settlement funds. *Powell v. Georgia-Pacific Corp.*, 843 F. Supp. 491, 495 (W.D. Ark. Jan. 31, 1995); *see also, Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir. 1978). The Settlement Class

was informed of the two proposed, contingent *cy pres* beneficiaries in the detailed class notice on the Settlement Website (Exhibit D to Ibey Decl., ¶ 26).

"[T]he term cy pres has generally referred to an effort to provide unclaimed compensatory funds to a charitable interest that is in some way related to either the subject of the case or the interests of the victims, broadly defined." Martin H. Redish et. al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 620 (2010). The doctrine of *cy pres* allows a court to distribute unclaimed portions of a class action settlement fund to the "next best" class of beneficiaries. *See Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1307–08 (9th Cir. 1990).

Cy pres distributions are commonly utilized for unclaimed funds. *See Nelson v. Greater Gadsden Hous. Auth*., 802 F.2d 405, 409 (11th Cir. 1986); *Battle v. Law Offices of Charles W. McKinnon, P.L*., No. 2:12-cv-14172-KMM, 2013 U.S. Dist. LEXIS 29263, at *15 (S.D. Fla. Mar. 5, 2013) (preliminarily approving a class action settlement in a FDCPA case in which "any funds from uncashed, expired settlement checks . . . will be paid over as a cy pres award … to be distributed to Florida Rural Legal Services, Inc.").

A. Nature of the Lawsuit

This lawsuit was brought to obtain statutory damages for alleged violations of the TCPA, on behalf of Plaintiff and a putative class of persons who received

debt collection telephone calls on their cellular telephone from Defendant where Defendant used an ATDS and/or an "artificial or prerecorded voice." *See* Second Amended Complaint, ¶¶ 1, 20, 40, 64, 84, 86 90 (Dkt. No. 19). Providing a *cy pres* award to the two proposed beneficiaries to foster protection of consumer privacy interests is in line with the nature of the TCPA lawsuit.

B. Objectives of the TCPA

The TCPA is largely designed to protect the privacy rights of consumers with regard to their telephones (47 U.S.C. § 227(b)(1)(A)). "Congress made specific findings that 'unrestricted telemarketing can be an intrusive invasion of privacy' and are a 'nuisance.'" *Van Patten*, 847 F.3d at 1043. The TCPA helps "address telephone marketing calls and certain telemarketing practices that Congress found to be an invasion of consumer privacy." *Jamison v. First Credit Servs.*, 290 F.R.D. 92, 96 (N.D.Ill. 2013).

C. Interests of the Settlement Class Members

The interests of the silent class members would be advanced through a *cy pres* award of unclaimed funds (if any) to New Media Rights and Prosperity Now.

1. <u>New Media Rights</u>

New Media Rights sits on the Federal Communications Commission's Consumer Advisory Committee. For specific examples of work performed by New Media Rights, *see* Declaration of Art Neill on pages 2-4, filed as Exhibit C to

Declaration of Abbas Kazerounian. The work that New Media Rights does with smaller entities and creators has a direct impact on curbing privacy abuses by helping to negate the need for lengthy and expensive litigation and FTC enforcement actions. *Id*. at p. 2. New Media Rights has institutional partners and a proven record in the privacy space. Exhibit C to Kazerounian Decl., p. 2.

New Media Rights ("NMR") assists internet users in understanding their rights regarding unwanted text messages, emails, and phone calls under the TCPA and related privacy laws. *Id*. at p. 1. NMR has also been a moving force in the redrafting portions of the TCPA. *Id.* at pp. 2-3. New Media Rights has been approved by federal district courts as a *cy pres* recipient in other TCPA settlements (*see* Exhibits D-F to Kazerounian Decl., ¶¶ 18-20).

NMR consistently receives funding from multiple grantors and over 200 individuals each year. Exhibit C to Kazerounian Decl., p. 2. The California Consumer Protection Foundation partnered with New Media Rights on three consumer privacy related grants ranging from $50,000 to $100,000. *Id*. These grants supported their preventative legal services, including one-to-one services, education, and advocacy (*id*. at p. 2). The funds will be used to continue and expand NMR's consumer privacy related efforts (*id*.); however, "Funds will not be used for litigation or political advocacy, and JPMorgan Chase Bank, N.A.'s name will not be used without its consent (*id*. at p. 1)." *See also*, Agr. § III.G.3.

2. Prosperity Now

Prosperity Now is a private nonprofit organization which helps people achieve financial security, stability and prosperity through a variety of services to help build credit, address indebtedness, and assist with tax preparation and financial coaching in ways that protect consumer privacy. *See* Exhibit G to Kazerounian Decl. (Letter from Prosperity Now). Prosperity Now manages a national campaign to advance consumer financial protection, including consumer privacy, that educates consumers and advocates on their behalf with policymakers. *Id*. Any *cy pres* funds in this matter would be used "to further assist consumers achieve financial security and stability as well as advance consumer financial and privacy protections." *Id*.

Therefore, New Media Rights and Prosperity Now are appropriate *cy pres* recipients of residual settlement funds, if there should be any, in this TCPA matter.

V. CONCLUSION

In sum, Plaintiffs respectfully request that the Court grant (i) their motion for final approval of class action settlement, (ii) approve for settlement payment all timely and otherwise valid claims, regardless of whether an accompanying W9 form was received, and (iii) approve New Media Rights and Prosperity Now as contingent *cy pres* beneficiaries. A proposed order is submitted herewith.

Dated: October 18, 2018

Respectfully submitted,

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L.R. 7.1(D) CERTIFICATION

I hereby certify that this filing has been prepared with one of the font and point selections approved by the Court in L.R. 5.1(C)—in this case, Times New Roman, 14-point font.

/s/ Abbas Kazerounian

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2018, I filed the foregoing with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to all counsel of record.

/s/ Abbas Kazerounian