IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIAN RICHARDSON, *et al.*, individually and on behalf of all others similarly situated, Plaintiffs, v. VERDE ENERGY USA, INC., Defendant.	No.: 5:15-cv-06325-WB

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

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Plaintiffs Brian Richardson, Michelle Hunt, Jacqueline Bowser, Kris Villiger, and Donna Schley ("Plaintiffs"), on behalf of themselves and the Settlement Class,[1] respectfully submit this memorandum of law in support of Plaintiffs' Motion for Final Approval of Class Action Settlement. Following a hearing on January 9, 2020, the Court entered an Order granting preliminary approval of the Settlement and directing that notice of the Settlement be given to the Settlement Class. (Dkt. 136). In accord with that Order, notice was issued to the Settlement Class, and Plaintiffs now move the Court to enter the Parties' proposed Final Approval Order and Final Judgment, certifying the Settlement Class and granting final approval of the Settlement as being fair, reasonable, and adequate, pursuant to FED. R. CIV. P. 23.

I. INTRODUCTION[2]

This Motion follows approximately four years of highly-contested litigation, in which Plaintiffs assert against Defendant Verde Energy USA, Inc. ("Verde" or "Defendant") claims arising from Defendant's alleged violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* ("TCPA"). The proposed Settlement will resolve and release all claims asserted in this Action and deliver to the Settlement Class an immediate and certain recovery. The result here is not only fair, reasonable, and adequate, but is commendable in the circumstances. This Settlement will provide a certain, tangible and immediate benefit to Settlement Class Members and will avoid the costs, uncertainties and risk of receiving no redress with continued litigation. Accordingly, Plaintiffs respectfully request the Court grant final approval of the Settlement.

[1] Capitalized terms not otherwise defined have the meaning set forth in the Parties' Amended Stipulation and Agreement of Settlement dated December 19, 2019 (the "Settlement Agreement" or "Settlement") filed previously with the Court. *See* Dkt. 134-1.

[2] Defendant consents, for settlement purposes only, to the relief requested herein, but not to the allegations in the Complaint or Plaintiffs' arguments regarding those allegations.

II. SUMMARY OF THE ACTION

On November 25, 2015, Plaintiffs Brian Richardson and Michelle Hunt filed a Class Action Complaint (Dkt. 1) against Verde in this Action on behalf of a nationwide class for violation of the TCPA. Jacqueline Bowser was added as a named plaintiff in this Action via an Amended Class Action Complaint filed on February 26, 2016 (Dkt. 15); and Kris Villiger and Donna Schley were added as named plaintiffs via a Consolidated Amended Class Action Complaint filed on November 1, 2017 (Dkt. 61).

The TCPA prohibits the use of "an artificial or prerecorded voice" in calling cellular telephones for non-emergency purposes without "prior express consent" from the recipient of the calls. 47 U.S.C. § 227(b)(1). The statute provides a private right of action; for each violation, a consumer may recover $500 in damages and up to $1,500 if a "court finds that the defendant willfully or knowingly violated" the TCPA. 47 U.S.C. § 227(b)(3). Plaintiffs allege that Defendant violated the TCPA by calling the cellular telephones of Plaintiffs and the other Settlement Class Members using an artificial or prerecorded voice for purposes of telemarketing without obtaining the requisite prior express consent of the persons called.

Following motion practice on the pleadings, Defendant filed its Answer (Dkt. 70) to the Consolidated Amended Class Action Complaint on November 15, 2017, denying any and all liability with respect to the claims alleged, among other things. On December 19, 2018, the Court entered an Order (Dkt. 108) granting in part and denying in part Defendant's motion for partial summary judgment. That ruling dismissed Plaintiffs' claims as to Defendant's alleged use of an automatic telephone dialing system ("ATDS"). On March 29, 2019, Plaintiffs filed a Second Amended Class Action Complaint (Dkt. 122) to conform the allegations to the Court's ruling on summary judgment.

The Parties first agreed to mediate this Action in 2017 and retained the Honorable Diane M. Welsh, U.S. Magistrate Judge for the Eastern District of Pennsylvania (Retired) to serve as the mediator. On May 4, 2017 and July 13, 2017, Judge Welsh conducted full day mediation sessions between counsel for the Parties, but unfortunately, these sessions did not result in a settlement. In the Spring of 2019, the Parties again agreed to mediate and retained the Honorable Lawrence F. Stengel, the former Chief U.S. District Judge for the Eastern District of Pennsylvania (Ret.) to serve as the mediator (the "Mediator"). On April 15, 2019, Judge Stengel conducted a full day mediation session, and at the conclusion of that session, the Parties accepted the Mediator's compromise settlement proposal subject to the negotiation of a definitive settlement agreement and the approval of the Settlement by the Court in accordance with FED. R. CIV. P. 23.

Prior to agreeing to the Settlement, Plaintiffs' Counsel conducted a thorough examination and investigation of the facts and law relating to the matters in this Action, including, but not limited to, examining certain documents and data produced by Defendant and deposing certain relevant witnesses. Plaintiffs' Counsel analyzed and considered the relative strengths and weaknesses of the Parties' claims and contentions and the benefits the Settlement offers to the Settlement Class. Plaintiffs and their Counsel, after considering the risks, uncertainties and costs of further litigation, as well as the Court's comments and rulings during the September 23, 2019 hearing, are satisfied that the terms and conditions of this Settlement are fair, reasonable, and adequate, and that the Settlement is in the best interest of the Settlement Class.

Defendant, while continuing to deny all allegations of wrongdoing and disclaiming any liability with respect to any and all claims, considers it desirable to resolve this Action on the terms of the Settlement, in order to avoid further expense, inconvenience, and interference with ongoing business operations, and to dispose of burdensome litigation. As such, the Settlement reflects a

compromise and the Parties have agreed that the Settlement shall not be construed as or be deemed an admission or concession by any of the Parties of the truth of any allegation or the validity of any purported claim or defense asserted in any of the pleadings in this Action, or of any fault or liability on the part of Defendant.

III. THE SETTLEMENT AND NOTICE PROGRAM

The Settlement will benefit a Settlement Class defined as:

> all individuals in the United States who received a call made by or on behalf of Verde Energy USA, Inc. to the individual's cellular or landline telephone, through the use of a pre-recorded or artificial voice, from October 16, 2013 to February 14, 2019.

Settlement ¶ 1.25. Excluded from the Settlement Class are: (i) Verde; (ii) any affiliates of Verde; and (iii) any employee of Verde or members of their Immediate Family. *Id.*

If approved, the Settlement will resolve all claims asserted by the Parties. Settlement ¶¶ 1.21, 1.22, 5.4, 5.6, 7.2, 7.6. The Settlement provides that Verde will pay $3,000,000 plus additional funds from the Supplemental Fund via a wire transfer into an escrow account established by the Settlement Administrator within ten (10) business days after the Effective Date, except that Defendant shall pay the Settlement Administrator's actual, and reasonably incurred Notice costs within fourteen (14) days of the Court's entry of the Preliminary Approval Order, to be credited against the Settlement Fund. Once the Court granted preliminary approval, then notwithstanding that the Effective Date had not yet occurred, the Parties agreed that up to $300,000 from the Settlement Fund would be used to pay the reasonable Notice and Administration Costs actually incurred. Settlement ¶ 2.1. Such costs and expenses shall include, without limitation, the costs of printing and mailing the Notice, the administrative expenses actually incurred and fees reasonably charged by the Settlement Administrator in connection with searching for Settlement Class Members and providing Notice. Settlement ¶¶ 1.16, 2.1, 4.7.

The Amended Settlement Agreement provides that the Settlement funds will be used to make Settlement payments to Authorized Claimants who submit timely and valid Claim Forms on a pro rata basis (the "Calculated Payment"); provided, however, that if an Authorized Claimant's Calculated Payment totals less than One Hundred Dollars ($100), the Calculated Payment will be deemed to be $100, and Defendant will provide additional funds to the Settlement Administrator equal to the lesser of (i) the amount necessary to ensure that each Authorized Claimant receives a Calculated Payment of $100, or (ii) Two Million Dollars ($2,000,000) (such lesser amount, the "Supplemental Fund").[3] Settlement ¶ 2.2.

The Settlement provides that Authorized Claimants will receive equal shares of the Net Settlement Fund and the Supplemental Fund (if applicable). Settlement ¶¶ 1.14, 1.28, 2.2-2.3, 3.1-3.2. The Notice described the terms of the Settlement, including that the Net Settlement Fund and the Supplemental Fund (if applicable) will be distributed to eligible Settlement Class Members who submitted valid and timely Claim Forms approved by this Court (*see* Notice at 2-3); advised Settlement Class Members of, among other things, Plaintiffs' Counsel's application for attorneys' fees and litigation costs and expenses (*id.* at 3), the procedures for objecting to the Settlement, or the request for attorneys' fees, costs and expenses (*id.* at 4), and the date, time and location of the Final Approval Hearing (*id.* at 2); and advised Settlement Class Members how they may exclude themselves from the Settlement (*id*. at 3-4). The Settlement also provided for a simple claims process in which Claim Forms could be submitted by website, email, fax, or U.S. mail, and Claimants need only sign the form provided to them and need not submit any additional

[3] The Parties agreed that Defendant's liability under the Settlement shall not exceed the "Maximum Settlement Amount" of $5,000,000. Settlement ¶ 2.2. In the event that the aggregate total dollar value of all Calculated Payments submitted by the Authorized Claimants exceeds the Net Settlement Fund plus the Supplemental Fund, each Authorized Claimant's Calculated Payment shall be reduced and the Authorized Claimant shall receive, as his/her/its Calculated Payment, a pro rata share of the Net Settlement Fund plus the Supplemental Fund. Settlement ¶ 2.3.

documentation.

Pursuant to the Preliminary Approval Order, and in accordance with the Settlement Agreement, the Notice Program was implemented by the Settlement Administrator, Angeion Group, LLC ("Angeion"). On February 13, 2020, Angeion timely mailed the Notice to 357,387 Settlement Class Members.[4] According to the Court's Preliminary Approval Order and the Notice, Settlement Class Members had 60 days from that mailing, or until April 13, 2020, to: file a Claim Form; request exclusion from the Settlement; or object to the Settlement. Dkt. 136 at ⁋ 14; Vines Decl., Ex. 5 (Morrison Decl., at ¶¶ 15-19). Timely and complete Claim Forms have so far been processed for approximately 18,565 Settlement Class Members, representing approximately 5.2% of the Settlement Class. A total of 26 Settlement Class Members filed requests for exclusion, and there are zero (0) objections to the Settlement. Vines Decl., Ex. 5 (Morrison Decl., at ¶¶ 17-19).[5]

IV. ARGUMENT & ANAYLSIS

The Third Circuit has long recognized that there is a "strong presumption in favor of voluntary settlement agreements." *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594 (3d Cir. 2010) (citing *Pennwalt Corp. v. Plough*, 676 F.2d 77, 79-80 (3d Cir. 1982)). "This policy is also evident in the Federal Rules of Civil Procedure and the District Court's Local Rules, which encourage facilitating the settlement of cases." *Id.* "This presumption is especially strong in 'class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal

[4] *See* Declaration of Andy Morrison ("Morrison Decl.") at ¶¶ 5-7, 9-14. The Morrison Decl. is attached as Exhibit 5 to the Declaration of Lane L. Vines in Support of Plaintiffs' Motion for Attorney's Fees, Expenses, and Service Award for Plaintiffs and Plaintiffs' Motion of Final Approval of Class Action Settlement ("Vines Decl."), filed concurrently herewith.

[5] In addition, counsel for Defendant has certified compliance with the Class Action Fairness Act of 2005, 28 U.S.C. § 1715 ("CAFA"), by providing appropriate federal and state officials with the Amended Notice of Class Action Settlement and all other information and materials required by the CAFA. *See* Vines Decl., Ex. 6 (Certificate of Compliance with Class Action Fairness Act).

litigation.'" *Id.* at 595 (quoting *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995)). "Settlement agreements are to be encouraged because they promote the amicable resolution of disputes and lighten the increase, ng load of litigation faced by the federal courts." *Id.* In addition, "[t]he parties may also gain significantly from avoiding the costs and risks of a lengthy and complex trial." *Id.*

The Settlement will provide a tangible and valuable recovery to Settlement Class Members and avoid the uncertainties and expense of continued litigation. In seeking final approval of the Settlement, Plaintiffs also seek to have the Settlement Class certified for purposes of the Settlement so that Settlement Class Members may receive the benefits of the Settlement. *Accord Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997) As demonstrated below, certification of the Class and final approval of the Settlement is warranted.

A. The Class Should Be Certified for Final Approval of the Settlement

Before assessing the Parties' settlement, the Court should first confirm that the underlying Settlement Class meets the requirements of Rule 23. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997); MANUAL FOR COMPLEX LITIGATION, FOURTH, § 21.632 (2004). The prerequisites for class certification under Rule 23(a) are numerosity, commonality, typicality, and adequacy—each of which is satisfied here. FED. R. CIV. P. 23(a).

In addition, Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FED. R. CIV. P. 23(b)(3); *accord Reibstein v. Rite Aid Corp.*, 761 F. Supp. 2d 241, 247-48 (E.D. Pa. 2011). However, when a court is "[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." *Amchem*, 521 U.S. at 620; *see*

also Sullivan v. DB Investments, Inc., 667 F.3d 273, 322 n.56 (3d Cir. 2011) (same).[6]

1. The Elements of Rule 23(a) Are Satisfied

As demonstrated below, each of the elements of Rule 23(a) are satisfied.

a. Numerosity

The numerosity requirement is met where the class is so numerous that joinder of all members is impracticable. *Carr v. Flowers Foods, Inc.*, No. 15-cv-6391, 2019 WL 2027299, at *8 (E.D. Pa. May 7, 2019) (Beetlestone, J.) (finding 4,521 recipients in TCPA action satisfied numerosity). "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). Numerosity is satisfied here, as it is presumed "if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40." *Atis v. Freedom Mortg. Corp.*, No. 15-cv-03424 (RBK/JS), 2018 WL 5801544, at *6 (D.N.J. Nov. 6, 2018).

Based upon Defendant's records which were used to contact the Settlement Class Members, the Settlement Class is estimated to include approximately 357,387 persons. Vines Decl., Ex. 5 (Morrison Decl., at ¶ 5). As such, numerosity is easily met for settlement purposes.

b. 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); *Carr v. Flowers Foods, Inc.*, No. 15-cv-6391, 2019 WL 2027299, at *9. "Commonality requires a showing of the existence of questions of law or fact common to the class." *Hawk Valley, Inc. v. Taylor*, 301 F.R.D. 169, 182 (E.D. Pa. 2014) ("A

[6] *Accord* Dkt. 136, Preliminary Approval Order at ⁋⁋ 1-2 (preliminarily certifying Settlement Class); Dkt. 132, Sept. 23, 2019 Hearing Tr. at 21:1-2, 30:21-23, 31:7 ("Here, the requirements of both [federal Rule] 23(a) and (b) are 2 likely satisfied…. It is an oral opinion from the bench …. as if I had written it and had signed it, 23 that is the opinion…. You can place reliance on it.").

common question is one arising from a common nucleus of operative facts."). "Generally, where defendants have engaged in standardized conduct towards members of the proposed class, common questions of law and fact exist. *Id.* "'[T]he commonality standard of Rule 23(a)(2) is not a high bar: it does not require identical claims or facts among class members.'" *Stewart v. Abraham*, 275 F.3d at 227 (citation omitted). "'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.'" *Id.* (citing *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994)).

Here, the claims asserted by Plaintiffs are predicated on allegations that Verde engaged in unlawful marketing practices, by making calls to Settlement Class Members' telephones through the use of a pre-recorded or artificial voice messages, without obtaining the requisite prior express consent. As such, Plaintiffs contend that there are issues of fact and law exist that are common to all Settlement Class Members, including:

- Whether Verde made calls to Settlement Class Members' telephones during the period October 16, 2013 to February 14, 2019;
- Whether Verde's telephone calls to Settlement Class Members used a pre-recorded or artificial voice messages;
- Whether Verde had proper consent from the recipients of the calls made;
- Whether Verde's conduct violated the TCPA;
- Whether Verde's TCPA violations were knowing or willful; and
- Whether Settlement Class Members are entitled to TCPA statutory damages.

These common questions are wholly sufficient to satisfy the commonality requirement for settlement purposes. *Accord In re Urban Outfitters, Inc., Secs. Litig.*, No. 13-cv-5978, 2016 U.S. Dist. LEXIS 24915, at *3-4 (E.D. Pa. Feb. 29, 2016) (preliminarily certifying class action).

c. Typicality

Rule 23(a)(3) requires that the claims of the class representative are "typical of the claims ... of the class." "The 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 Sodium Antitrust Litig*., 391 F.3d 516, 531 (3d Cir. 2004) (citation omitted). As the Third Circuit has held, "'[t]he concepts of commonality and typicality are broadly defined and tend to merge.'" *Baby Neal v. Casey*, 43 F.3d at 56 (citation omitted). "In this respect 'the commonality and typicality requirements both seek to ensure that the interests of the absentees will be adequately represented.'" *Chakejian v. Equifax Info. Servs. LLC*, 256 F.R.D. 492, 498 (E.D. Pa. 2009) (quoting *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 311 (3d Cir. 1998)). "'[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) (quoting *Stewart v. Abraham*, 275 F.3d at 227).

Here, typicality is met as Plaintiffs claim that Verde improperly engaged in telemarketing using an artificial or pre-recorded voice to contact Settlement Class Member's telephones without obtaining prior express consent and is thus liable for statutory damages under the TCPA. *Accord Gehrich v. Chase Bank U.S.*, 316 F.R.D. 215, 224 (N.D. Ill. 2016) (TCPA case; "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."); *Grannan v. Alliant Law Group, P.C.*, No. 10-cv-02803 HRL, 2012 U.S. Dist. LEXIS 8101, at *11 (N.D. Cal. Jan. 24, 2012) ("The claims of the Named Plaintiff are typical of the Settlement Class, and arise out of the TCPA violations committed by defendant Alliant.").

For settlement purposes, Plaintiffs are typical of the absent Settlement Class Members

because they were allegedly subjected to the same Verde practices, they suffered from the same injuries, and both Plaintiffs and the Settlement Class will benefit from the relief provided.

d. Adequacy

"[T]he adequacy of representation requirement of Rule 23(a)(4) 'considers whether the named plaintiffs' interests are sufficiently aligned with the absentees', and it tests the qualifications of the counsel to represent the class.'" *Cosgrove v. Citizens Auto. Fin., Inc.*, No. 09-cv-1095, 2011 U.S. Dist. LEXIS 95656, at *11 (E.D. Pa. Aug. 25, 2011) (quoting *In re Community Bank of N. Va.*, 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.*, 2019 WL 2027299, at *10 (quoting *In re Warfarin*, 391 F.3d at 532).

"A class representative is adequate if: (1) the class representative's counsel is competent to conduct a class action; and (2) the class representative's interests are not antagonistic to the class's interests." *In re Ravisent Techs., Inc. Secs. Litig.*, No. 00-cv-1014, 2005 U.S. Dist. LEXIS 6680, at *16 (E.D. Pa. Apr. 18, 2005) (quoting *In re GMC Pick-Up Truck*, 55 F.3d at 800-01).

Here, nothing suggests that Plaintiffs have interests antagonistic to those of the Settlement Class Members. Plaintiffs' interest in maximizing a recovery for the Settlement Class is aligned with the interests of Settlement Class Members. Plaintiffs have obtained an advantageous Settlement that treats all Settlement Class Members in the same fashion and provides real value to all claimants. Moreover, Plaintiffs' Counsel have substantial experience in litigating consumer class actions and other complex commercial cases.[7] Plaintiffs and their counsel have, and will

[7] *See* Vines Decl., at ¶¶ 4, 5. Berger Montague PC has successfully represented victims of fraud and other misconduct for the past 50 years, recovering over $30 billion for our clients and the classes they have represented. Hughes Ellzey, LLP also has significant experience in representing plaintiffs in complex business, consumer, and class-action litigation, including TCPA claims.

continue, to zealously represent the interests of the proposed Settlement Class. As such, the adequacy requirement is wholly satisfied, and Plaintiffs Brian Richardson, Michelle Hunt, Jacqueline Bowser, Kris Villiger, and Donna Schley should be appointed as the Settlement Class representatives and Plaintiffs' Counsel as counsel for the Settlement Class, pursuant to Rule 23(g).

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

The Settlement Class also satisfies FED. R. CIV. P. 23(b)(3), which requires that the court find that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."

a. 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) (citing *Amchem Prods., Inc., v. Windsor*, 521 U.S. 591, 623 (1997)). [T]he predominance inquiry focuses a common course of conduct by which the defendant may have injured class members." *Barel v. Bank of Am.*, 255 F.R.D. at 399 (citing *In re Prudential Ins.*, 148 F.3d at 314). For example, in *Barel v. Bank of Am.*, 255 F.R.D. 393, involving consumer claims under the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.* ("FCRA"), the court found predominance satisfied where the defendant was alleged to have engaged "in a common course of conduct" and where "all class members, by definition, were subjected to the same practices." *Id.* at 399 ("The predominating, indeed the dispositive, issue is whether Defendant willfully violated the FCRA by obtaining consumer reports of non-customers.").

Bursor & Fisher, PA is nationally recognized with substantial experience litigating, trying, and settling TCPA cases. Marcus & Zelman, LLC is a consumer protection law firm specifically focused on handling TCPA, FCRA, and FDCPA cases.

Here, for settlement purposes, predominance is demonstrated by Verde's alleged course of misconduct. Plaintiffs and the Settlement Class Members were each the alleged recipients of Defendant's telemarketing calls. Those calls and the contact information of persons called are recorded in Verde's business records; indeed, Verde has identified some 357,387 unique cellular telephone numbers it called using an artificial or pre-recorded voice. Defendant would then either have or lack the necessary written consents required by the TCPA for those calls.

b. Superiority

The other requirement of Rule 23(b)(3) is the superiority requirement, *i.e.*, that a class action suit provides the best way of managing and adjudicating the claims at issue. "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.*, No. 14-cv-4295, 2016 U.S. Dist. LEXIS 32154, at *22 (E.D. Pa. Mar. 14, 2016) (quoting *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d at 533-34). "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.* at *23 (quoting *Amchem Prods., Inc., v. Windsor*, 521 U.S. at 620).

Here, the Settlement provides redress for Settlement Class Members who individually may have potential damages of several thousand dollars at most and who thus are economically foreclosed from otherwise pursuing any relief. To the extent Settlement Class Members did pursue litigation outside of the class context, the Settlement would avoid potential individual cases that could be filed by the some 357,387 Settlement Class Members for the same claims asserted here.

For all of the above reasons, the Settlement Class should be certified.

B. Final Approval of the Settlement is Warranted

1. The Standard for Final Approval: Amended Rule 23(e)

Federal Rule of Civil Procedure 23(e) provides that a class action cannot be settled or compromised without approval by the court. Judicial approval is required regardless of whether the action is certified for trial and later settled or is certified for purposes of settlement. MANUAL FOR COMPLEX LITIGATION, FOURTH, § 21.61 (2004). Recent revisions to federal Rule 23(e)—effective on December 1, 2018—standardize the factors governing final approval, stating that approval is proper upon a finding that the settlement is "fair, reasonable, and adequate" after considering whether:

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

a. Adequacy of Representation and Arm's Length Negotiation

As explained above, Plaintiffs have adequately represented the Class throughout this case as have Class Counsel. Class Counsel are well-versed in class litigation and have significant experience in representing plaintiffs in complex business, consumer, and class-action litigation, including TCPA claims such as this, and have steadfastly represented the Class throughout this matter. Class Counsel engaged in significant motion practice and massive offensive discovery

efforts to prosecute the Class claims. *See* Vines Decl., at ⁋⁋ 3-5, 13, 30-35. The Class Representatives are equally committed and unconflicted. They were actively engaged in the process—producing numerous documents, sitting for lengthy depositions, and regularly communicating with counsel, including approving the proposed Settlement. *See id.* at ⁋ ⁋ 51.

Further, the Settlement was at all times negotiated at arm's-length. "Courts in this Circuit give considerable weight and deference to the views of experienced counsel as to the merits of an arms-length settlement." *Moore v. GMAC Mortg.*, No. 07-cv-4296, 2014 U.S. Dist. LEXIS 181431, at *9 (E.D. Pa. Sept. 19, 2014) (citing *In re Auto. Refinishing Paint Antitrust Litig.*, MDL 1426, 2004 U.S. Dist. LEXIS 29161, at *7 (E.D. Pa. Sept. 27, 2004)). Class Counsel undertook significant factual and legal investigation of the issues prior to filing the case and during the litigation. The parties engaged in discovery about both the facts and law relating to the matters in the Action, including but not limited to, examining certain documents and data provided by Defendant and deposing certain relevant witnesses. *See* Vines Decl., at ⁋ 13.

Finally, the Honorable Lawrence F. Stengel (Ret.) presided over the parties' formal, arm's length and adversarial mediation. *See id.* at ⁋ 16. "'[T]he participation of an independent mediator in settlement negotiations virtually insures [sic] that the negotiations were conducted at arm's length and without collusion between the parties.'" *In re ViroPharma Inc. Secs. Litig.*, No. 12-cv-2714, 2016 U.S. Dist. LEXIS 8626, at *24 (E.D. Pa. Jan. 25, 2016) (quoting *Hall v. AT&T Mobility LLC*, 2010 U.S. Dist. LEXIS 109355, at *26 (D.N.J. 2010)). Thus, deference is due where, as here, Plaintiffs' Counsel are highly experienced in consumer class actions and other complex litigation and the Parties reached the Settlement through the assistance of an independent mediator. The Settlement clearly emerges from a formal, arms-length negotiation process between the Parties.

b. Adequacy of Relief

The Settlement provides substantial relief to the Class, considering (i) the costs, risks, and

delay of trial and appeal; (ii) the effectiveness of the proposed distribution plan; and (iii) the fair terms of the separately-negotiated proposed award of attorney's fees. *See* FED. R. CIV. P. 23(e)(2)(C). The monetary recovery is significant given the complexity of the Action and the significant barriers that lay ahead for Plaintiffs and the Settlement Class. By any reasonable measure, this recovery is a significant achievement given the extraordinary obstacles Plaintiffs and the Settlement Class faced in the litigation. *See* Dkt. 10. The Settlement is an extremely fair and reasonable recovery for the Settlement Class, in light of Defendant's available defenses and the challenging and unpredictable path of litigation Plaintiffs would have faced absent settlement. *Id.*

i. The Settlement Mitigates the Costs, Risks, and Delays of Continued Litigation

The Settlement secures significant benefits, even in the face of the uncertainties of litigation. Compromise in exchange for certain and timely benefits under the Settlement is an unquestionably reasonable outcome. As many courts have endorsed, "[i]nstead of the lengthy, costly, and uncertain course of further litigation, the settlement provides a significant and expeditious route to recovery ... [such that] it may be preferable 'to take the bird in the hand instead of the prospective flock in the bush.'" *In re Currency Conversion Fee Antitrust Litig.*, MDL No. 1409, 2006 U.S. Dist. LEXIS 81440, at *16 (S.D.N.Y. Nov. 8, 2006) (citation omitted).

This is a risky case. Defendant chose to fight, not concede. While Verde has agreed to settle, Verde is not without significant defenses (Dkt. 10), including that: Verde had the requisite consent, in accord with the TCPA, prior to making calls to Settlement Class Members; and Verde did not use a TCPA-actionable artificial or prerecorded voice, as well as various defenses to challenge the appropriateness of class certification. Absent the Settlement, 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 ATI Techs., Inc. Secs. Litig.*, No. 01-cv-2541, 2003 U.S. Dist.

LEXIS 7062, at *7 (E.D. Pa. Apr. 28, 2003).

Because of the costs, risks to both sides, and delays of continued litigation, the Settlement presents a fair and reasonable alternative to continuing to pursue litigation, and thus, the immediate economic certainty of this Settlement favors final approval.

ii. The Settlement Class Will Receive Relief Through A Straightforward Claims Process

The Settlement relief will be distributed via a straight-forward claims process utilizing easy to understand and use claim forms. The Parties selected Angeion to serve as the settlement administrator to manage the notice and claims process. Through Angeion, the Settlement Class received information about the Settlement options through the Court approved Notice Program. *See* Dkt. No. 136; *see also* Dkt. No. 134-1. Angeion created a detailed notice plan to notify the Settlement Class Members about the settlement and to assist them in signing up for the class. *See* Dkt. No. 134-1. The notice plan provided for a very simple claims process in which Claim Forms could be submitted by website, email, fax, or U.S. mail, and Claimants only needed to sign the form provided to them and were not required to submit any additional documentation. Within thirty (30) calendar days after the Effective Date, Angeion will send to each Authorized Claimant his, her, or its Calculated Payment. *Id.*

c. The Settlement Treats Each Respective Class Member Equitably

The proposed Settlement fairly and reasonably allocates benefits among Class Members without any unwarranted preferential treatment of certain segments of the Class. *See* FED. R. CIV. P. 23(e)(2)(D). In fact, all members of the Settlement Class are eligible to receive the same benefits. No Class Member is receiving greater or different relief than another.

2. The Standard for Final Approval: Historic Factors

In revising Rule 23(e), the Advisory Committee noted that "[t]he goal of this amendment

is not to displace any factor" previously considered in any given Circuit. *See, e.g.*, 4 NEWBERG ON CLASS ACTIONS § 13:58 (5th ed.) ("[V]arious pre-existing legal factors not captured by amended Rule 23(e)(2)'s list of factors may prove relevant in particular cases."). Accordingly, the Third Circuit's traditional factors used to assess the fairness of a class action settlement are still highly relevant to this Court's analysis regarding whether to finally approve the proposed settlement.

Moreover, this Court has considerable discretion to determine whether to finally approve the settlement. "Trial courts generally are afforded broad discretion in determining whether to approve a proposed class action settlement." *In re Processed Egg Prod.*, 284 F.R.D. 249, 266 (E.D. Pa. 2012. Trial courts have this broad discretion because "[t]he evaluation of [a] proposed settlement in this type of litigation ... requires an amalgam of delicate balancing, gross approximations and rough justice." *Williams v. Aramark Sports, LLC*, No. 10-cv-1044, 2011 WL 4018205, at *6 (E.D. Pa. Sept. 9, 2011) (citation omitted). Accordingly, this Court should consider whether the proposed settlement is within a "range of reasonableness" that experienced attorneys could accept in light of the relevant risks of the litigation. *See Walsh v. Great Atlantic & Pacific Tea Co.*, 96 F.R.D. 632, 642 (D.N.J. 1983). Settlements also make sense, especially in the context of class actions. *See In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 102 (D.N.J. 2012) (citing *In re General Motors*, 55 F.3d 768, 784 (3d Cir. 1995)) ("The law favors settlement, particularly in class actions … where substantial judicial resources can be conserved by avoiding formal litigation."); *see also In re Warfarin*, 391 F.3d at 535 (there is an "overriding public interest in settling class action litigation, and it should therefore be encouraged").

A class settlement is entitled to a presumption of fairness when "(1) the negotiations occurred at arm's 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 Nat'l*

Football League Players Concussion Injury Litig., 821 F.3d 410, 436 (3d Cir. 2016).

As explained above, each of these factors is met here: the Settlement was the result of vigorous arm's-length negotiations among experienced counsel well-versed in the strengths and weaknesses of the claims. The Settlement was reached after engaging in informal and formal fact discovery concerning the Parties' claims and defenses.[8] The Settlement is not only a product of informed, arm's-length negotiations, but also substantial proceedings conducted under the auspices of the Parties' independent mediator, Judge Stengel. And finally, no objections to the Settlement were filed. Accordingly, the Settlement is procedurally fair.

The Third Circuit has identified the following factors ("the *Girsh* factors") to consider in determining whether a proposed class action settlement is fair, reasonable, and adequate:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

In re Nat'l Football League, 821 F.3d at 437 (quoting *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975)); *see also Moore v. GMAC Mortg.*, 2014 WL 7690156, at *4 (E.D. Pa. Sept. 18, 2014).

[8] Notably, the benefits afforded by the proposed Settlement here and the work that Plaintiffs' counsel did that preceded -- and, indeed, enabled -- it represent an important distinction between this case and the circumstances in the recent decision rendered in *Ward v. Flagship Credit Acceptance LLC*, C.A. No. 17-2069, 2020 WL 759389 (E.D. Pa. Feb. 13, 2020). In *Ward*, 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 at summary judgment, extending over a four year period, that enabled Plaintiffs and counsel to evaluate the claims and defenses on a comprehensive record.

a. The Complexity, Expense, and Likely Duration of Litigation

The first *Girsh* factor addresses "the probable costs, in both time and money, of continued litigation." *In re Nat'l Football League*, 821 F.3d at 437. A settlement is favored when "continuing litigation through trial would have required additional discovery, extensive pretrial motions addressing complex factual and legal questions, and ultimately a complicated, lengthy trial." *In re Warfarin*, 391 F.3d at 536. "The Court must balance the proposed settlement against the time and expense of achieving a potentially more favorable result through further litigation. Where the complexity, expense, and likely duration of the litigation are significant, the Court will view this factor as weighing in favor of settlement." *Lenahan v. Sears, Roebuck & Co*., No. 02-cv-0045, 2006 WL 2085282, at *12 (D.N.J. July 24, 2006), *aff'd*, 266 Fed. Appx. 114 (3d Cir. 2008) (citing *In re Prudential Ins. Co. of Am. Sales Practices Litig*., 962 F. Supp. 450, 536 (D.N.J. 1997)).

Here, continued litigation would be long, complex, expensive, and a burden to the Court and the litigants. Continuing this litigation against Defendant would entail a lengthy and expensive battle that may result in no relief to the Settlement Classes or delay relief for years. It is reasonable to expect that the issues at hand would continue to be sharply disputed and contested, and that a jury trial (assuming the case proceeded beyond pretrial motions) might well turn on class questions of proof, making the outcome of a trial uncertain for all parties. Moreover, even after trial is concluded, there would likely be one or more lengthy appeals. Given this uncertainty, a "bird in the hand in this litigation is surely worth more than whatever birds are lurking in the bushes." *In re Chambers Dev. Sec. Litig*., 912 F. Supp. 822, 838 (W.D. Pa. 1995).

b. The Reaction of the Class to Settlement

The second factor "attempts to gauge whether members of the class support the settlement." *Prudential*, 148 F.3d. at 318. Typically, the reaction of the class is reviewed by looking at the percentage of objections and opt-outs received in relation to the class as a whole.

See, e.g., Varacallo v. Mass. Mut. Life Ins. Co., 226 F.R.D. 207, 251 (D.N.J. 2005) (one factor favoring approval of the settlement is that only 0.06% of the class members opted out); *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1313-14 (3d Cir. 1993) ("Less than 30 of approximately 1.1 million shareholders objected. This small proportion of objectors does not favor derailing settlement"). Here, ***no Settlement Class Member has objected*** and only 26 out of the 357,387 Settlement Class Members (or some 0.007%) have requested exclusion.

The fact that there are no pending objections to the Settlement "strongly militates a finding that the settlement is fair and reasonable." *In re Pressure Sensitive Labelstock Antitrust Litig.*, 584 F. Supp. 2d 697, 701 (M.D. Pa. 2008) (quoting *In re Linerboard Antitrust Litig.*, 321 F. Supp. 2d 619, 629 (E.D. Pa. 2004)). The lack of objections and paucity of opt outs in this case strongly weighs in favor of approving the Settlement. *See Boone v. City of Phila.*, 668 F. Supp. 2d 693, 712 (E.D. Pa. 2009) ("A low number of objectors compared to the number of potential class members creates a strong presumption in favor of approving the settlement."); *In re Cendant Corp. Litig.*, 264 F.3d 201, 235 (3d Cir. 2001) ("The vast disparity between the number of potential class members who received notice of the Settlement and the number of objectors creates a strong presumption that this factor weighs in favor of the Settlement").

c. The Stage of the Proceeding and Amount of Discovery Completed

The third factor "captures the degree of case development that class counsel [had] accomplished prior to settlement. Through this lens, courts can determine whether counsel had an adequate appreciation of the merits of the case before negotiating." *In re Cendant*, 264 F.3d at 235 (quoting *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 813 (3d Cir. 1995).

Here, Class Counsel received sufficient information to evaluate the strengths and weaknesses of the claims. At the time the Settlement was reached, Plaintiffs were well informed

about the merits by obtaining significant fact discovery, including depositions of Verde and its vendors, document productions and written discovery concerning Verde's business practices and operations. *See* Vines Decl., at ⁋ 13. Class Counsel carefully evaluated Plaintiffs' claims before agreeing to the Settlement. Where Class Counsel had an "adequate appreciation of the merits of the case before negotiating," the third *Girsh* factor favors final approval of the Settlement, even where no formal discovery was conducted. *In re Gen. Motors Corp*., 55 F.3d at 813.

d. The Risks of Establishing Liability and Damages

Girsh factors four and five -- the risks of establishing liability and proving damages -- "survey the possible risks of litigation in order to balance the likelihood of success and the potential damage award if the case were taken to trial against the benefits of an immediate settlement." *In re Prudential*, 148 F.3d at 319. In examining these factors, the Court "need not delve into the intricacies of the merits of each side's arguments, but rather may 'give credence to the estimation of the probability of success proffered by class counsel, who are experienced with the underlying case, and the possible defenses which may be raised to their causes of action.'" *Perry v. FleetBoston Fin. Corp*., 229 F.R.D. 105, 115 (E.D. Pa. 2005) (citation omitted).

Class Counsel believe that the claims asserted in Plaintiffs' complaint are meritorious, but subject to strong defenses and inherent risks. Here, Class Members would likely face significant obstacles in prosecuting their claims if this litigation continued. *Accord In re Diet Drugs Prods. Liab. Litig.*, MDL No. 1203, 2000 WL 1222042, at *61 (E.D. Pa. Aug. 28, 2000) ("Although the court makes no determination of the merits of the claims of plaintiffs, it notes several obstacles that they would have to overcome ... [noting, among other things, the speculative nature of future medical costs, debate over defendant's awareness of the dangers posed by their products, causation issues, defenses of comparative and contributory negligence, scientific complexity of the case, and statute of limitations defenses].... These risks to establishing liability and damages show that

plaintiffs' success at trial cannot be guaranteed. Thus, these factors weigh in favor of settlement.").

For example, in order to succeed on the merits, Plaintiffs would be required to prove that Defendant contacted them and the members of the Class on their cell phone via an artificial or prerecorded voice without prior express written consent. It is likely Defendant would contend that it had the requisite consent, in accord with the TCPA, prior to making calls to Settlement Class Members; and it did not use a TCPA-actionable artificial or prerecorded voice, as well as various defenses to challenge the appropriateness of class certification. While the Parties dispute the merits of Defendant's position, these are nonetheless defenses that Plaintiffs would be required to overcome. If Defendant were to be successful on such defenses, Plaintiffs' claims would likely be defeated. Moreover, additional risk and uncertainty would result from any appeal Defendant might take to the Third Circuit on issues ranging from class certification to liability to damages. Thus, while Plaintiffs are confident in the merits of their claims, Plaintiffs and Class Counsel recognize and appreciate the many potential obstacles, risks and uncertainties Plaintiffs would face in continued litigation. Again, the above weighs strongly in favor of approving the Settlement.

e. The Risk of Maintaining the Class Action Through Trial

The sixth *Girsh* factor asks whether the class action could be maintained through trial, or whether it would pose "intractable management problems if it were to become a litigation class and therefore be decertified." *In re Warfarin*, 391 F.3d at 537. However, "under Federal Rule of Civil Procedure 23(a), a district court may decertify or modify a class at any time during the litigation if it proves to be unmanageable," and "proceeding to trial would always entail the risk, even if slight, of decertification." *Cendant*, 264 F.3d at 239 (internal quotation marks omitted).

Here, in continued litigation, Defendant could well be expected to vigorously oppose class certification on a contested motion or on a subsequent appeal. Defendant could be expected to argue that individual issues defeat predominance and that the class is not ascertainable. The

Settlement removes any potential threats to class certification based on individual defenses and damages issues. Without class certification, Settlement Class Members would each be left to fend for themselves, with all of the attendant risks and uncertainties. This factor too favors settlement.

f. The Ability of Defendant to Withstand a Greater Judgment

The seventh factor "is concerned with whether the defendants could withstand a judgment for an amount significantly greater than the Settlement." *In re Cendant*, 264 F.3d at 240. "Even if solvency could be assured," the Third Circuit "regularly find[s] a settlement to be fair even though the defendant has the practical ability to pay greater amounts." *McDonough v. Toys "R" Us, Inc*., 80 F. Supp. 626, 645 (E.D. Pa. 2015) (citing cases). For example, in *Lazy Oil*, the district court concluded that the fact that a settling defendant had the financial resources to pay a larger judgment did not weigh against settlement "in light of the risks that Plaintiffs would not be able to achieve any greater recovery at trial." *Lazy Oil v. Witco Corp*., 95 F. Supp. 2d 290, 318 (W.D. Pa. 1997).

Class Counsel believe they obtained the maximum settlement value, given all risks of litigation. Even if Plaintiffs proceeded to trial and won, and then prevailed on appeal, a successful collection of a full judgment is not a certainty. Moreover, this Settlement was not premised on the contention that Defendant does not have the financial resources to pay a larger judgment and thus this factor does not weigh against approval when considered along with the substantiality of the Settlement within the context of this long-battled litigation. In light of the real possibility of recovering less or nothing at all, this factor weighs in favor of final approval.

g. The Range of Reasonableness of the Settlement

There is no doubt this settlement falls into the range of reasonableness when compared to similar cases. "While the court is obligated to ensure that the proposed settlement is in the best interest of the class members by reference to the best possible outcome, it must also recognize that settlement typically represents a compromise and not hold counsel to an impossible standard." *In*

re Aetna Inc. Secs. Litig., MDL No. 1219, 2001 WL 20928, at *6 (E.D. Pa. Jan. 4, 2001).

Here, based on the claims received and processed to date, it is currently estimated that the Settlement will provide each Authorized Claimant with a payment of $100. Settlement ¶ 2.2. *See* Vines Decl., at ⁋⁋ 18, 25 (Morrison Decl. at ⁋ 21). The value of the Settlement is squarely in line with, and generally exceeds, other TCPA settlements. For example, in *Vasco v. Power Home Remodeling Group LLC*, No. 15-cv-4623, 2016 U.S. Dist. LEXIS 141044 (E.D. Pa. Oct. 12, 2016), the Court approved a TCPA class action settlement that provided for payments of $27 per claimant. There, the court found that "[t]his amount is consistent with other class action settlements under the Act." *Id.* at *23 (citing, *e.g., Kolinek v. Walgreen Co.*, No. 13-cv-4806, 2015 WL 7450759, at *7 (N.D. Ill. Nov. 23, 2015) ($30); *In re Capital One TCPA Litig.*, 80 F. Supp. 3d 781, 789 (N.D. Ill. 2015) ($34.60); *Rose v. Bank of Am. Corp.*, No. 11-cv-02390- EJD, 2014 U.S. Dist. LEXIS 121641, at *30 (N.D. Cal. Aug. 29, 2014) ($20 to $40)).

Similarly, in *Gehrich*, 316 F.R.D. 215, another court recently approved a TCPA class action settlement of $34 million. There, the court found that while "[t]he theoretical recovery per [class] member is about $1.00", "[t]he actual recovery per claimant is approximately $52.50." *Id.* at 23. Although "that recovery is well below the $500 statutory recovery available for each call", the court found that "the recovery falls well within the range of recoveries in other recent TCPA class actions." *Id.* As the court in *Gehrich* held, "'[t]he essential point here is that the court should not 'reject[]' a settlement 'solely because it does not provide a complete victory to plaintiffs,' for 'the essence of settlement is compromise.'" *Id*. (quoting *Isby v. Bayh*, 75 F.3d 1191, 1200 (7th Cir. 1996)). "An acceptable settlement is properly 'a bilateral exchange ... where both sides gain as well as lose something.'" *Id*. (quoting *In re Gen. Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1135 (7th Cir. 1979)). Moreover, the *Gehrich* court reasoned:

> Individual class members receive less than the maximum value of their TCPA claims, but they receive a payout without having suffered anything beyond a few unwanted calls or texts, they receive it (reasonably) quickly, and they receive it without the time, expense, and uncertainty of litigation. [Defendant], for its part, buys peace and mitigates risk. However improbable it may be, complete victory for Plaintiffs at $500 or $1,500 per class member could bankrupt [the defendant]. Even assuming (conservatively and unrealistically) only one violation per class member, if Plaintiffs won a complete victory, [defendant] Chase would owe $16.1 billion, and $48.4 billion if the jury found that Chase's violations were knowing or willful. A $52.50 recovery in the hand is better than a $500 or $1,500 recovery that must be chased through the bankruptcy courts.

Id. at 228.

3. The *Prudential* and *Baby Products* Considerations Are Also Satisfied

The Third Circuit expanded the *Girsh* factors to include, where appropriate, additional factors known as the *Prudential* considerations: "'the maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, the extent of discovery on the merits, and other facts that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages; the existence and probable outcome of claims by other classes and subclasses; the comparison between the results achieved by the settlement for individual class or subclass ...; whether class or subclass members are accorded the right to opt out of the settlement; whether any provisions for attorneys' fees are reasonable; and whether the procedure for processing individual claims under the settlement is fair and reasonable.'" *Rougvie v. Ascena Retail Grp., Inc.*, 2016 U.S. Dist. LEXIS 99235, at *63-64 (E.D. Pa. July 29, 2016) (quoting *In re Prudential*, 148 F.3d at 323). Many of the above *Prudential* factors, including an award of attorneys' fees, are addressed above or in Class Counsels' separate motion for approval of attorneys' fees and costs. Notably, however, the Third Circuit has also instructed courts to consider the "'degree of direct benefit provided to the class.'" *Id.* (quoting *In re Baby Products Antitrust Litig.*, 708 F.3d 163, 174 (3d Cir. 2013)).

Here, unlike cases where the true benefit of the settlement may be unclear (such as in

Rougvie v. Ascena Retail, 2016 U.S. Dist. LEXIS 99235, where vouchers were to be issued), the full cash Net Settlement Fund will be equally and equitably distributed to Authorized Claimants. Settlement ¶ 2.2. This Plan of Allocation also warrants approval. As courts have recognized in other TCPA cases, "[e]ach class member suffered roughly the same alleged injury: receipt of at least one phone call or text message." *Gehrich v. Chase Bank U.S.*, 2016 U.S. Dist. LEXIS 26184, at *13. While "the TCPA provides for statutory damages per violation, ... conducting individual inquiries into the number of violations for each class member either would be administratively unmanageable or ... would deplete the settlement fund through vastly increased administrative expenses, reducing the amount available to claimants and increasing the delay in receiving their awards. *Id*. at 34 (citing *In re Capital One*, 80 F. Supp. 3d at 793). *Accord Sullivan v. DB Invs., Inc*., 667 F.3d 273, 327 (3d Cir. 2011) ("A district court's 'principal obligation' in approving a plan of allocation 'is simply to ensure that the fund distribution is fair and reasonable as to all participants in the fund.'") (citation omitted).

C. The Notice Program Met Due Process Requirements

In any proceeding that is to be accorded finality, due process requires that interested parties be provided with notice reasonably calculated, under the circumstances, to apprise them of the pendency of the action and afford them an opportunity to present their objections. *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950). That means the settlement notices must fairly apprise the class members of the terms of the proposed compromise and give class members sufficient information to decide whether they should accept the benefits offered, opt out and pursue their own remedies, or object to the settlement. *Id.* Additionally, the notice must be designed so as to have a reasonable chance of reaching a substantial percentage of the class members. *Id*. at 318 (explaining notice must be reasonably calculated to reach interested parties).

Here, the form and method of Notice approved by the Court was implemented, reaching

90.53% of the Settlement Class. *See* Vines Decl., at ¶ 22. Accordingly, the Court should find the Notice plan was reasonably calculated to give actual notice to Settlement Class Members of the right to receive benefits from the Settlement, and to be excluded from or object to the Settlement and that the Notice plan met the requirements of Rule 23 and due process.

D. The Court Should Confirm as Final its Prior Appointments

In the Preliminary Approval Order the Court preliminarily appointed Class Counsel, Class Representatives, and the Settlement Administrator (Dkt. 136). The Court should now confirm those appoints as final.

Under Rule 23, "a court that certifies a class must appoint class counsel . . . [who] must fairly and adequately represent the interests of the class." FED. R. CIV. P. 23(g)(1)(B). In making this determination, courts generally consider the following attributes: (1) the proposed class counsel's work in identifying or investigating potential claims, (2) the proposed class counsel's experience in handling class actions or other complex litigation, and the types of claims asserted in the case, (3) the proposed class counsel's knowledge of the applicable law, and (4) the proposed class counsel's resources committed to representing the class. FED. R. CIV. P. 23(g)(1)(A)(i-iv).

Here, proposed Class Counsel have extensive experience prosecuting class action cases, and specifically TCPA cases. They have undertaken an enormous amount of work, effort, and expense in this litigation and demonstrated their willingness to devote whatever resources were necessary to see it through to a successful outcome. Accordingly, the Court should confirm as final the appointment of Shanon J. Carson and Lane L. Vines of Berger Montague PC, W. Craft Hughes and Jarrett L. Ellzey of Hughes Ellzey, LLP, Joshua Arisohn of Bursor & Fisher, P.A., and Ari H. Marcus of Marcus & Zelman, LLC as Class Counsel.

Likewise, in light of their dedication to this matter and shepherding of this case from filing to resolution, the Court should confirm as final its prior appointment of Plaintiffs, who were named

as the Class Representatives in Plaintiffs' motion for preliminary approval as Class Representatives for settlement purposes only.

Finally, the Court's previous appointment of Angeion Group, LLC as the Settlement Administrator should also be confirmed as final.

V. CONCLUSION

For the foregoing reasons, the Court should enter an order (i) finally certifying the Settlement Class; (ii) finally appointing Plaintiffs as Settlement Class Representatives of the Settlement Class; (iii) finally appointing Shanon J. Carson and Lane L. Vines of Berger Montague PC, W. Craft Hughes and Jarrett L. Ellzey of Hughes Ellzey, LLP, Joshua Arisohn of Bursor & Fisher, P.A., and Ari H. Marcus of Marcus & Zelman, LLC as "Class Counsel" for the Settlement Class; (iv) finally approving the Settlement of this action; (v) finally appointing Angeion Group, LLC to serve as the Settlement Administrator; and (vi) finding that the Notice Program satisfied Rule 23 and due process.

Dated: May 6, 2020

Respectfully submitted,

BERGER MONTAGUE PC

By: */s/ Lane L. Vines*

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CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2020, I caused the foregoing to be electronically filed with the Clerk of Court using the CM/ECF system, which will send a notification of such filing to all counsel of record.

/s/ Lane L. Vines
Lane L Vines