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SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DAVE VACCARO, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

SUPER CARE, INC. and DOES 1 through 10, inclusive,

Defendant

Case No.: 20STCV03833

SUPPLEMENTAL MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Hearing Date: April 22, 2022
Hearing Time: 9:00 a.m.
Dept.: 011

Judge: Hon. David S. Cunningham

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff David Vaccaro (hereinafter "Plaintiff", "Vaccaro" or "Class Representative"), individually and on behalf of the Settlement Class hereby submits this supplemental motion for preliminary approval of a proposed settlement of this action and of certification of the proposed settlement class. Super Care, Inc. (hereinafter referred to as "Super Care" or "Defendant") do not oppose Plaintiff's motion (Plaintiff and Defendants shall collectively be referred to as the "Parties"). The terms of the Settlement are set forth in the Amended Settlement Agreement and Release (hereinafter the "Settlement"). See Declaration of Todd M. Friedman Ex. A.

The Court requested that Plaintiff address a number of issues as specified in its November 8, 2021 Order. Plaintiff addresses these points in turn. Further, it is requested that the Court note a typographical error in the Motion for Preliminary Approval, on Page 16, Section (IV)(A), the class definition should be defined as being "from January 1, 2019 to the date preliminary approval is granted, …" as reflected in the Settlement Agreement and elsewhere throughout the Motion.

II. LEGAL ARGUMENT

a. Fairness of Consideration Offered to Class

The Court requested a *Kullar* analysis of the likely maximum damages available to the Class in this case. CIPA claims carry damages of $5,000 per violation. Cal. Penal Code § 637.2.[1] Class certification orders secured by Plaintiff's counsel have certified classes primarily based on the first call between a class member and company. *Raffin v. Medicredit, Inc*., 2017 WL 131745 (C.D. Cal. Jan. 3, 2017); *Zaklit et. al. v. Nationstar Mortgage, LLC*, 2017 WL 3174901 at *5 (C.D. Cal. July 24, 2017). There are an estimated 75,299 class members in this case. Thus, the maximum class-wide damages are $376,495,000.

[1] Without getting into cumbersome explanations that could span 20 pages of briefing, the theory of law that Class Counsel believes will ultimately prove through litigation of CIPA in the years to come is that § 632 and § 632.7 cover the same conduct, but § 632 covers landlines, whereas § 632.7 covers cell phones and cordless phones. Thus, a consumer does not receive two penalties for the same recorded call. Their call either awards penalties based on a violation of § 632 or § 632.7, not both. This is an extension of the position advanced by Class Counsel during the *Smith v LoanMe* oral argument, based on the statutory history.

From this maximum amount of damages there arise a number of risks, including the risk of the case not being certified, the damages being reduced based on due process concerns regarding the amount in aggregate being too high, and merits issues, including a large risk at mediation based on the pending Supreme Court decision in *Smith v LoanMe*. Ultimately, Plaintiff's position on *LoanMe* won the day, but at mediation, this uncertainty could have derailed the entire case on merits grounds, resulting in Plaintiff's § 632.7 claims being dismissed. If that happened, Defendant would have a stronger argument that the § 632 claim was not certifiable, for a host of reasons. Additionally, *Smith v. LoanMe* was an appeal of an appellate court decision which held that § 632.7 did not apply to parties to the call. *Smith* would have to overturn that existing precedent to permit Plaintiff to proceed with his claims, a high bar on an open question of law that would have affected the Class catastrophically if not successful.[2]

In another class action settlement negotiated and approved where Class Counsel represented the consumers in a similar CIPA case, and similar arguments were made (though the case predated *LoanMe*) the Court approved a settlement of $28.53 per Class Member under a common fund theory. See *Lizama v Medical Data Systems, Inc.* Case No. 34-2017-00210986-CU-NP-GDS (Sacramento County Superior Court). A similar valuation in this case would yield a fair settlement estimate of $2.2 million.

Even considering these risks, and benchmarks for settlements in other cases, liability was enormous under a risk-assessment method. Defendant is a small privately-owned company that was experiencing hardship during the pandemic. Thus, Plaintiff would have to look at documents and information regarding Defendant's ability to pay in order to adjust the risk based on a certainty that a class-wide judgment would put Defendant out of business, without question.

Plaintiff requested such information, Defendant provided financial information demonstrating its limited ability to pay. Defendant also demonstrated an available pool of funds

[2] Undersigned counsel recently mediated a wage and hour class action where a mediation took place with a similar gamble, where the appeal went the other direction, and the entire case would have been dismissed but for the settlement secured for the class. See *Marc Cohen v. The Coca-Cola Company et al*, Case No. 2:19-CV-04083 (C.D. Cal.). Class Counsel had to protect the Class from a similar risk here.

in the form of an insurance policy.

Regarding Defendant's limited ability to pay, Defendant provided Plaintiff with audited financial records for 2019 and 2020, showing a drop in revenues and profits in 2020, which were substantially bolstered by PPP stimulus funds. These one-time enhancements could not be used to pay for the settlement and needed to be repaid to the government. Plaintiff was satisfied that the financial records provided sufficient evidence to show that Defendant did not have an ability to contribute much if anything to a class-wide judgment, without jeopardizing its ability to remain in business.

Regarding what evidence was provided that Defendant has the ability to honor the agreed-settlement payment, there is an insurance policy covering this claim, which will provide the majority of benefits negotiated for the Class. Those funds are available and not subject to the same risks as Defendant's business operations. The insurance policy is a burning limits policy, which covers both costs of defense for this case, as well as other cases, and liability for said cases. The policy limit is $1 million. There was another class action lawsuit at the time of mediation being litigated against Defendant under the Telephone Consumer Protection Act in federal court, which was being defended under the same policy. Thus, it was very important for Class Counsel to secure substantial funds under the policy in case the other action diluted (through litigation, liability, settlement or all of the above) the primary available funds that would be able to pay the Class for the harms alleged in this case. In other words, the insurance was the only money, and it was very important that Class Counsel be the first to access it. These funds are being set aside to satisfy the judgment after final approval.

In sum, the maximum potential liability was substantial in this case, as was the risk. But even considering risks, there was no way to achieve a settlement value equivalent to other cases Class Counsel had negotiated in similar cases because of financial constraints, based on a reasonable and informed assessment of financial records. Thus, the biggest settlement that could be negotiated was negotiated. Without doing so, Class Counsel reasonably believed the Class would have experienced a less favorable result, and for these reasons, believe the settlement is fair and reasonable.

b. Plaintiff is Typical and Adequate

As the Court requested, Plaintiff submits herewith a declaration attesting to his typicality and adequacy. An important starting point to the analysis is the fact that Defendant's recording practices were inherently secret to consumers. Only a consumer who knew their rights under the call recording statutes, was inclined to enforce those rights, and also was interested in helping a class of other similarly-situated consumers would be able to uncover the claims, and bring them to the attention of experienced class action attorneys or review. Plaintiff did that, and he did it for the sake of other consumers, beyond himself. Plaintiff maintained notes of his conversations for Class Counsel and provided pertinent information that allowed for the drafting of the complaint, and assisted further in discovery and mediation. Plaintiff participated in settlement, and mediation, as well as reviewing the release and approving the terms. Plaintiff has promptly provided any and all assistance to Class Counsel to advance the Class Members' rights. He has been an ideal representative, and has no conflicts with its members. Plaintiff understands his obligations to protect the Class Members and has retained competent counsel to assist with doing so. Class Counsel are some of, if not the most decorated CIPA class action attorneys in the country, having certified several class actions by contested motion, and successfully argued CIPA claims on multiple appeals including before the Supreme Court. Thus, Plaintiff satisfies the adequacy requirement.

Moreover, the evidence of the case produced in discovery by Defendant showed Plaintiff to be a typical class member. He was contacted on his cellular phone by Defendant, and his call was recorded without his knowledge or permission, just as other members of the Class. Discovery shows his claims to be identical to other Class Members' claims. His claims thus satisfy the typicality requirements as well.

C. A Claims Made Settlement is Necessary

The Court requested further information from Class Counsel regarding why a claims-made settlement was appropriate in this settlement. There are two reasons.

First, while the class member information contained in the class database contains names, addresses and phone numbers, the data is imperfect insofar as it does not necessarily always

accurately identify the individual who picked up the phone and was subject to the recording practice. In some instances, another individual, such as another member of the household may have been the person who was recorded by Defendant. As such, a claims form will need to be filled out by the potential class members confirming that they were the individual who was subject to the recording practice, as well as confirming their current mailing address. Thus, a claim form will assist in ensuring that the appropriate persons are receiving settlement funds, and that people will actually receive and cash those checks. The result will be multifaceted: it will reduce the number of uncashed checks, it will increase the aggregate amount of money that goes to class members vs. going to cy pres, and it will ensure that only class members receive money, and none of it goes to non-class members.

Second, as discussed above, there are significant financial constraints that guide the fairness evaluation of this settlement. Class Counsel inquired into the additional expense that would be associated with mailing and processing all of the additional checks that would be sent out to all class members, vs those individuals who filed claims, based on historic trends with respect to claims made settlements.

The administrator advised that the cost estimate of notice and administration would rise by approximately $23,000, if the settlement checks were sent to every class member, as opposed to sending checks to only those class members who filed claims. Additionally, there is a much higher chance that there are uncashed settlement checks from such a structure which could increase the costs even further if a second distribution were ordered. These expenses will dilute the settlement fund considerably. Currently, under the structure of the settlement, Class Members are going to be receiving a net settlement fund after deductions, in the amount *anticipated to be approximately* $370,000.[3] If these expenses are added, it will be reduced to $347,000, a 6.2% reduction. This is a sizable reduction with no foreseeable or necessary added benefit (at least in aggregate) to the Class. No funds will revert to Defendant, and it is Class Counsels' goal that Class Members receive as much of the negotiated fund as possible. A structure that permits for

[3] Administration costs are currently estimated at $110,000, assuming the Court permits the structure Class Counsel is advising. Class Counsel has been working very hard with the administrator to keep these costs down to ensure the Class receives the maximum amount of remuneration out of the fund. The claims process is one way to do that.

claims will support these goals without compromising the rights of absent class members.

In the strong views of Class Counsel, this would be the most equitable structure for the Class, especially given that Defendant has demonstrated a limited financial ability to pay at mediation. Defendant agrees with this proposal.

D. A Short Form Notice is Necessary for Cost Reasons

Class counsel looked into the possibility of a long form notice being mailed to the class members with the administrator and for costs reasons, Class counsel do not recommend that a long form notice be mailed. The administrator advised as follows:

> We reviewed the cost estimate for Vaccaro v. Super Care to consider the additional notice cost for mailing Long Form Notices to all class members instead of postcard notices. We estimate that there will be an increase of printing costs of approximately $0.50 per notice mailing. For 80,000 class members, this is approximately $40,000, with an additional $4,000 in remails (assuming a 10% returned mail rate). The postage cost would increase by approximately $0.15 per mailing. For 88,000 mailings (original notice of 80,000 plus 10% remails), that would represent a $13,000 increase in postage. In total, the notice cost increase would be approximately $57,000.

Class Counsel recommends instead that these costs would better be served going into the pockets of the Class Members, and that the long form notice can be posted on the class settlement website at no additional expense, for Class Members to review after receiving the postcard. Postcard notice is common in consumer class actions, and in many ways preferable when the class size is large and the costs are a factor, as they are here for the reasons stated above about Defendant's ability to pay.

The Notice has been revised to address the Court's concerns, and otherwise complies with Rule of Court 3.766(d).

E. The Cy Pres Distribution Fulfills the Purpose of the Lawsuit

First and foremost, it should be made clear that there is likely to be very little in the way of cy pres funds remaining for distribution in this case. That is because the proposed claims process will send checks only to verified class members who have confirmed their interest in receiving payment, provided recent mailing address information, and are aware of the case and their entitlement to payment. Thus, the only funds remaining will be from those class members

who made claims, were sent a check, and then did not timely cash it. Class Counsel expects this balance to be small.

Substantively, as the Court noted, any cy pres distribution must fulfill the purpose of the lawsuit or be otherwise appropriate. Here, this is a consumer privacy class action. The two organizations designated are both non-profit consumer privacy advocate groups.

EPIC – the Electronic Privacy Information Center, is a public interest research center in Washington, DC seeking to protect privacy, freedom of expression, and democratic values in the information age. They regularly lobby state and federal government bodies in favor of advancing consumer privacy causes. They also routinely participate as amicus filers in high-impact consumer privacy appeals both on a state and federal level. They wrote an Amicus brief advocating on behalf of Smith's consumer-centric position in the *Smith v LoanMe* matter, assisting directly in the advancement of a legal position that benefitted Class Members

Public Justice is a national non-profit public interest advocacy group, which in part works towards protecting consumer telephone privacy rights. Their purpose is to expand access to justice on behalf of everyday Americans and protect citizens from corporate wrongdoing. This includes substantial work in the area of consumer privacy. Public Justice also wrote an Amicus brief advocating on behalf of Smith's consumer-centric position in the *Smith v LoanMe* matter, assisting directly in the advancement of a legal position that benefitted Class Members.

Neither Party nor their counsel have any interest or involvement in the governance or work of the cy pres recipients.

F. Miscellaneous Concerns Have Been Addresses

Counsel have made revisions to the Settlement release consistent with the Court's concerns in sections I(E), II(B), II(C), II(D), II(E) and III of the Order. Submitted contemporaneously herewith is a declaration from the administrator as to section 2D. Additionally, the class notice has been revised to include the Court's current social distancing procedure, as well as being updated consistent with the Court's concerns in Section II(D) and II(E). These are attached as exhibits to the declaration of Todd Friedman filed contemporaneously herewith. The Administrator will be provided a copy of the judgment for

purposes of posting on the Class notice website.

C. CONCLUSION

Plaintiff respectfully requests that the Court preliminarily approve the proposed settlement and sign the proposed Preliminary Approval Order, and schedule the Final Approval Hearing.

Dated: March 22, 2022

LAW OFFICES OF TODD M. FRIEDMAN, P.C.

By: /s Adrian R. Bacon
TODD M. FRIEDMAN
ADRIAN R. BACON
Attorneys for Dave Vaccaro and the Class

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business Address is 21550 Oxnard St., Suite 780, Woodland Hills, CA 91367.

On June 22, 2021, I served the following document(s) described as: **SUPPLEMENT TO MOTION FOR PRELIMINARY APPROVAL; DECLARATION OF TODD M. FRIEDMAN; DECLARATION OF BRAD MADDEN; DECLARATION OF DAVE VACCARO**, on the following parties:

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[X] **BY EMAIL:** I transmitted the document(s) listed above electronically to the e-mail addresses of all counsel and the Court, by agreement between counsel for the parties to accept service by email of all pleadings via CASE ANYWHERE.

[ ] **BY MAIL**

[X] STATE – I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 22, 2022 at Orange, California.

By: /s Adrian R. Bacon