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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

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

Plaintiff,

vs.

SUPERCARE, INC. and DOES 1 through 10, inclusive,

Defendant.

CASE NO.: 20STCV03833

[Assigned for All Purposes to the Hon. David S. Cunningham, Dept. 11]

NOTICE OF PLAINTIFF'S UNCONTESTED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENTL DECLARATION OF TODD M. FRIEDMAN; DECLRATION OF DAVE VACCARO; DECLARATION OF BRAD MADDEN; [PROPOSED] ORDER

Hearing Date: March 7, 2023
Hearing Time: 9:30 am
Dept.: 11

Submitted Under Separate Cover

- Declaration of Todd Friedman; Declaration of Dave Vaccaro; Declaration of Bradley Madden; and [Proposed] Order.

ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that on March 7, 2023, at 9:30 a.m., or as soon thereafter as counsel may be heard, in Department 11 of the Los Angeles Superior Court, located 312 N. Spring Street, Los Angeles, California, 90012, Plaintiff DAVID VACCARO ("Plaintiff"), by and through his attorneys of record ("*Vacarro* Counsel") will move the Court for an Order Granting Final Approval of Class Action Settlement.

This Motion is based on this Notice of Motion, the accompanying Memorandum of Points and Authorities, the Declarations of Todd M. Friedman, David Vaccaro and Brad Madden, the complete file in this action and any other documentary and/or oral evidence as may be presented at the time of the hearing on this Motion.

Dated: February 14, 2023

LAW OFFICES OF TODD M. FRIEDMAN

By: 

ADRIAN R. BACON, ESQ.
ATTORNEY FOR PLAINTIFF

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

After Plaintiff David Vaccaro ("Plaintiff") and Supercare, Inc. ("Supercare" or "Defendant") have reached a full and final settlement, they appeared before this Court and moved this Court to allow the parties to inform the Members of the Class of the Settlement that was reached, which is embodied in the Class Action Settlement Agreement and Release ("Settlement Agreement") filed with the Court in support of preliminary approval. The Honorable Court ruled that the Agreement was "fair, reasonable and adequate" due to having been reached at arms-length with an experienced mediator, and being sufficiently substantiated to justify notice to the Class. *See* Order Granting Motion for Preliminary Approval. Since that time, the overwhelmingly positive response of the Class Members is illustrative that the settlement reached was fair to both the parties who participated in a full day of mediation and the rest of the Class Members affected by the settlement. In fact, *all* the factors evidencing a strong presumption that the Settlement Agreement is fair and reasonable is present in this case. There have been zero objectors, and only 5 opt outs. *See* Declaration of Brad Madden ("Madden Decl."), at ¶¶15-16, served and filed herewith.

The proposed Settlement resulted from the Parties' participation in two all-day mediation sessions before Class Action Mediator Lynn Frank and subsequent settlement discussions. The Settlement provides for a substantial financial benefit to the Class Members. The Settlement Class consists of all persons who, from January 30, 2019, through October 11, 2022, were monitored or recorded by Defendant and/or Defendant's dialing vendors without notice and through means of a telephone or other device. The Settlement Class comprises approximately 78,000 individuals.

The compromise Settlement reached with the guidance of Lynn Frank will create a Settlement Fund to be established by Defendant in the amount of $750,000. The amount of the Settlement Fund shall not be reduced as a result of any member(s) of the Settlement Class electing to opt out or be excluded from the Settlement or for any other reason. The Settlement Fund will pay for a Settlement Administrator, Postlethwaite & Netterville. ("P&N"), which will

be responsible for providing notice to the Settlement Class, providing notice of this proposed settlement, providing and disbursing settlement checks to Class Members who submit a claim form and who do not opt-out, creating and maintaining a Settlement Website, maintaining a toll-free telephone number, preparing an Opt-Out List, preparing a list of persons submitting objections to the settlement and acting as a liaison between Class Members and the Parties regarding the settlement. Settlement members who submit a timely and valid Claim Form and do not opt-out will receive a pro rata share of the Settlement Fund in the form of a check (after any attorneys' fees and costs awarded by the Court, any Service Award to Class Representative, and any costs of claims administration are deducted from the Settlement Fund). Plaintiff David Vaccaro will receive a Service Award of $10,000.00 (subject to Court approval) for bringing and litigating this action. Class Counsel will request an attorneys' fee award of $250,000.00, (i.e., approximately 33.33% of the total settlement amount), and costs of up to $10,000 subject to Court approval, to be paid out of the Settlement Fund. Any unclaimed funds from uncashed settlement checks, including settlement checks to Class Members who submit valid claim forms but whose current valid address could not be determined shall be delivered 50% to EPIC and 50% to Public Justice as *cy pres* recipients.[1]

In consideration for the Settlement Fund, Plaintiff, on behalf of the proposed Settlement Class, will enter judgment under the terms of the Settlement. The Settlement is fair, reasonable and adequate, and should be given final approval. Therefore, Plaintiff respectfully requests that this Court grant final approval and enter the proposed order submitted herewith.

II. STATEMENT OF FACTS

A. Factual Background

Plaintiff's operative Complaint alleges that Supercare violated The California Invasion of Privacy Act, Cal. Penal Code § 630 et seq. ("IPA") during every call, by recording consumers' communications without telling them they are doing so at the outset of the

[1] Both organizations are non-profit consumer advocacy groups which focus on advancing consumer privacy rights. Thus, both satisfy the requirements of CCP 384 and will both further the purpose of the underlying action and benefit Class Members. This *cy pres* payment is after all settlement costs and direct payments to the Settlement Class are paid.

conversation. Plaintiff contends he and the Class are entitled to statutory damages pursuant to the IPA. Defendant has vigorously denied and continue to deny that it violated the IPA,and denies all charges of wrongdoing or liability asserted against it in the Action.

B. <u>Proceedings to Date</u>

Plaintiff's Complaint was filed on January 30, 2020, alleging violations of the IPA. Plaintiff's claims stemmed from recorded phone calls made by Defendant that took place in or about June of 2019. The Parties engaged in written discovery before agreeing to mediation. The Parties attended a mediation with Lynn Frank on February 2, 2021. Through her guidance, this Settlement was reached. *See Friedman Decl*, ¶ 8.

Plaintiff filed a Motion for Preliminary Approval before this Honorable Court on July 20, 2021, which was Originally set for hearing on November 9, 2021. On November 8, 2021, the Court issued a Checklist to the parties, advising of changes that needed to be made in advance of any potential Preliminary Approval, including questions needed to be answered on Defendant's financial state, and the information exchanged between both parties that assisted the joint decision to resolve this matter. This Honorable Court also ordered the parties to make extensive changes to the agreement and notice, including, but not limited to, changes to the Civil 1542 Waiver and final Judgment. *See Friedman Decl*, ¶ 9.

Both parties worked to make changes to the settlement, notices and provide further information to the Court and a new hearing on the parties Motion for Preliminary Approval was set to be heard on April 22, 2022. On that date the Court issued an Order requiring more supplemental briefing and information/changes to be provided before preliminary approval could be granted. This information was provided to the Court on July 18, 2022, and on October 21, 2022, this Court granted Preliminary Approval of this settlement (Please Order Attached as Exhibit "B"). *See Friedman Decl*, ¶ 10.

After, notice was mailed to 75,234[2] Class Members' last known addresses, fully laying out the terms of the settlement agreement, the rights of the Class Members to object and the rights of the Class Members to opt out of the class[3], less than 7% of which were returned without finding an updated address. *See Declaration of Brad* Madden. at ¶12. After the Class Members were so informed, ***zero objections and only five opt-outs*** were lodged. *See* Madden Decl. at ¶ ¶15-16. The Settlement is fair, reasonable and adequate, and should be given final approval. Therefore, Plaintiff respectfully requests that this Court grant final approval of the Settlement Agreement and enter the proposed order submitted herewith.

C. Description of the Settlement

1. The Settlement Class

a. The Settlement Class

The "Settlement Class" is defined in the Agreement as follows:

> *"*All California residents who, from January 30, 2019, through and including the date preliminary approval is granted, were monitored or recorded by Defendant and/or Defendant's dialing vendors without notice and through means of a telephone or other device*."* (Agreement § 2.1).

Based on data Supercare and its counsel produced, the number of unique cell phone numbers called is approximately 77,975. 2,651 records did not contain a California area code or a California zip code and were removed from the Settlement Class List. P&N identified 75,234 unique California class members within the class list. This was verified by a data review by Class Counsel and the Class Settlement Administrator.

2. Settlement Payment

Under the Proposed Settlement, Defendants agree to establish a Settlement Fund in the amount of $750,000 (Agreement § 4.1, p. 7) in order to fund the following:
(1) providing notice to Class Members; (2) providing settlement checks to Class Members entitled to receive a settlement check; (3) creating and maintaining the Settlement Website; (4)

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[2] This was the total number of confirmed addresses for class members between the addresses provided by Defendant and the reverse look ups performed by P&N.
[3] A copy of the notice mailed to the class members is attached as Exhibit #1 to Madden Decl.

maintaining a toll-free telephone number (total estimated administration costs of 120,265[4]); (5) Litigation expenses of up to $10,000.00; (6) to pay the proposed $10,000 Service Award to the Plaintiff (Agreement § 7, p.8); (7) payment of the proposed Attorneys' Fees of $100,000.00 (33.33% of the Settlement Fund) (Agreement § 6, p. 7). *See Friedman Decl*, ¶¶ 20-25. Any funds remaining after payment of all settlement costs and Payments to the Settlement Class shall be paid 50% to EPIC and 50% to Public Justice, as cy pres recipients.

The amount of the Settlement Fund shall not be reduced as a result of any member(s) of the Settlement Class electing to opt out or be excluded from the Settlement or for any other reason. (Agreement § 4.4, p. 7.)

3. Monetary Benefit to Class Members and Class Notice

The Settlement Agreement provides for $750,000 in cash benefits (minus Settlement Costs, attorney's fees, and litigation costs) to Class Members on a pro rata basis after the claims period. There are approximately 75,234 Class Members with unique phone numbers who participated in allegedly surreptitiously recorded phone calls with Supercare.

The Class Members who file a Claims Form and do not Opt Out and/or Object will each receive a pro-rata share. After fees, costs and administration expenses, it is estimated there will be approximately $359,735.00 for the Settlement Class to be distributed on a pro-rata basis. Based on the amount of opt ins, each participating class member is expected to receive approximately $42.55. *See Madden Decl*, ¶14.[5]

4. Scope of Release

The scope of the release by all Settlement Class Members who do not request exclusion included only claims specific to the class period and allegations in the complaint, as ordered by the Court during the Preliminary Approval Process by Supercare to and from mobile phone numbers during the Class Period. (Agreement § 16).

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[4] Although P&N initially estimated administration costs of $110,000, Administration costs have increased slightly based on increased postage rates and cost of paper. See Declaration of Brad Madden ¶17.

[5] The Declaration of Brad Madden is attached as Exhibit A to the Declaration of Todd M. Friedman.

5. Opportunity to Opt Out and Object

As explained before, both the Opt Out and Objection deadlines were 120 days following entry of Preliminary Approval. (Agreement §§ 11-12, pp. 11-12). There were only five opt outs and zero objections to the Settlement.

After all payments have been made to Settlement Class Members, as required by this Agreement, any remaining portion of the Distribution Amount, along with any amounts remaining from settlement checks that have not been cashed by their stale date and have not been reissued, will be identified and reported to the Court as part of a final accounting on a date set by the Court. In connection with the final accounting, The Settlement Administrator shall submit a declaration that, states the total amount that was actually paid to all Settlement Class. After the final accounting report is received, the Court shall amend the judgment to direct the Settlement Administrator to pay the sum of the unpaid residue or unclaimed or abandoned class member funds, plus any interest that has accrued thereon, for cy pres distribution 50% to EPIC and 50% to Public Justice. Both organizations are non-profit consumer advocacy groups which focus on advancing consumer privacy rights.

6. Payment of Notice and Administrative Costs

After final judgment is issued, Supercare will make a single payment of $750,000 into an escrow account held by the Settlement Administrator. (Agreement § 4, p. 6). The Settlement Administrator will use these funds to administer all costs of the settlement, including providing Class Notice, maintaining the website and toll free number and arranging for payments to Class Members. (*Id*.) The funds shall also be used to cover Attorneys' Fee Award to Class Counsel and the Service Award to plaintiff Dave Vaccaro. (*Id*.)

7. Class Representative's Application for Service Award

The proposed Settlement contemplates that Class Counsel will request a Service Award in the amount of $10,000 to be distributed to the Class Representative, subject to Court approval.

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8. Class Counsel's Application for Attorneys' Fees, Costs and Expenses

The proposed Settlement contemplates that Class Counsel shall be entitled to apply to the Court for an award of attorneys' fees in the amount of $250,000.00 (33.33% of the Settlement Fund), plus costs of up to $10,000. (Agreement § 6, p. 8). Pursuant to the proposed Settlement, Supercare will not oppose the application, as long as it does not exceed this stated amount. (*Id*.)

9. Cy Pres Distribution.

Under the proposed Settlement, any funds remaining after payment of all settlement costs and Payments to the Settlement Class shall be paid to a *cy pres* recipient. (Agreement § 15.6, p.15). The parties propose 50% of the *cy pres* funds to EPIC and 50% to Public Justice. Since, the distribution is pro-rata for those who file Claims Forms, this *cy pres* distribution is not expected to be substantial.

The Plaintiff and Class Counsel believe that the Settlement provides a favorable recovery for the Settlement Class, based on the claims asserted, the evidence developed, and the damages that might be proven against Defendant in the Action. Friedman Decl. ¶¶ 31-35. The Plaintiff and Class Counsel further recognize and acknowledge the expense and length of continued proceedings necessary to prosecute the Action against Defendant through trial and appeals. *Id.* They also have considered the uncertain outcome and the risk of any litigation, especially in complex litigation such as the Action, as well as the difficulties and delays inherent in any such litigation. *Id.* In light of the risk of further litigation and the defenses that Defendant has asserted and could assert, the proposed Settlement set forth in the Settlement Agreement is fair, reasonable, adequate, in the best interests of the Settlement Class. *Id.* After the mediation, the basic terms of the Settlement were set forth in a signed Memorandum of Understanding. The Parties then prepared the full Settlement Agreement now presented to this Court for final approval. .

For settlement purposes only, Defendant will stipulate to the certification of class claims that are subject to the certification requirements of California Code of Civil Procedure

Section 382. Defendant disputes that certification is proper for the purposes of litigating the class' claims proposed in or flowing from the claims asserted in the Action.

III. LEGAL STANDARD

When a proposed class-wide settlement is reached, the settlement must be submitted to the court for approval. 2H. Newberg& A. Conte, *Newberg on Class Actions (3d* ed. 1992) at §11.41, p.l 1- 87. The primary question presented on an application for preliminary approval of a proposed class action settlement is whether the proposed settlement is "within the range of possible approval." *Manual for Complex Litigation,* Second §30.44 at 229; *Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982).[6] During Final Approval, however, the Court must determine whether the settlement is "fair, adequate, and reasonable." *See Wershba v. Apple 10 Computer*, 91 Cal. App. 4th 224, 244 (2001). The approval of a proposed settlement of a class action suit is a matter within the broad discretion of the trial court. *Id*. at 235. In making this determination the courts look to the following factors: 1) the strength of plaintiffs' case, 2) the risk, expense, complexity and likely duration of further litigation, 3) the risk of maintaining class action status through trial, 4) the amount offered in settlement, 5) the extent of discovery completed and the stage of the proceedings, 6) the experience and views of counsel, 7) the presence of a governmental participant, and 8) the reaction of the class members to the proposed settlement." *See Id*. at 244-45. "However 'a presumption of fairness exists where: (1) the settlement is reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small.'" *Id*. at 245. (internal citations omitted).

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[6] California courts look to federal authority on class actions. *Vasquez v. Superior Court*, 4 Cal.3d 800, 821 (1971). "It is well established that in the absence of relevant state precedents trial courts are urged to follow the procedures prescribed in Rule 23 of the Federal Rules of Civil Procedure for conducting class actions." *Frazier v. City of Richmond*, 184 Cal. App.3d 1491, 1499 (1986) (citing *Green* v. *Obledo*, 29 Cal.3d 126, 145-146 (1981)).

IV. THE SETTLEMENT MEETS THE CRITERIA NECESSARY FOR THIS COURT TO GRANT FINAL APPROVAL

This settlement agreement is fair, adequate, and reasonable by every standard set out by the California courts. The initial presumption is met here as the parties had engaged in a day long mediation, where this settlement agreement was reached by adverse parties who were adequately represented by experienced counsel who examined the evidence supporting both parties' claims and fully evaluated the strengths and weaknesses of their respective cases and the risk of prolonged litigation, and zero objections were filed in this case. In addition, as explained below, each and every factor weighs in favor of the position that this settlement is fair, adequate and reasonable.

A. <u>There is a Strong Initial Presumption of Fairness in this Case</u>

a<u>. The settlement was reached through arm's-length bargaining</u>

As mentioned above, the parties' entered into this settlement with conflicting positions about the case and as adverse parties who came to the terms of the Settlement Agreement after 2 daylong mediations and several months of additional negotiation, with the help and advice of Lynn Frank, a well-respected and experienced mediator for class actions and IPA lawsuits. In preparation for the mediation, Defendant provided Class Counsel with necessary records and information for the members of the Class, including the number of class members, information necessary to assess the scope of the claims. Plaintiff analyzed the documents, data and prepared and each party submitted a mediation brief to Lynn Frank. After a full days of settlement negotiations and the months that ensued, the Parties through counsel reached an agreement, in light of the uncertainties of protracted litigation. As a result, the Parties signed a Memorandum of Understanding, and the final settlement terms were then negotiated and set forth in the Settlement Agreement now presented for this Court's approval. Friedman Decl. Ex A. Importantly, Plaintiff and Class Counsel believe that this Settlement is fair, reasonable and adequate. This settlement is the result of extensive and hard-fought negotiations before an

experienced and well-respected mediator. Defendant has expressly denied and continues to deny any wrongdoing or legal liability arising out of the conduct alleged in the Lawsuit. Plaintiff and Class Counsel have determined that it is desirable and beneficial to the Class to put to rest the Class Members' Released Claims.

Plaintiff and Class Counsel recognize the expense and length of continuing to litigate and trying this Lawsuit against Defendant through possible appeals which could take several years. Class Counsel has also taken into account the uncertain outcome and risk of litigation, especially in complex actions such as this Lawsuit. Class Counsel is also mindful of and recognizes the inherent problems of proof under, and alleged defenses to, the claims asserted in the Lawsuit. Based upon their evaluation, Plaintiff and Class Counsel have determined that the settlement set forth in the Settlement Agreement is in the best interest of the Class Members. Friedman Decl ¶¶ 31-35. Here, there can be no dispute that the litigation has been hard-fought with aggressive and capable advocacy on both sides. The Parties were represented by experienced and capable counsel who zealously advocated their positions. Accordingly, "[t]here is likewise every reason to conclude that settlement negotiations were vigorously conducted at arms' length and without any suggestion of undue influence." *In re Wash. Public Power Supply System Sec. Litig.*, 720 F. Supp. at 1392.

b. Investigation and discovery are sufficient to allow counsel and the court to act intelligently

With regard to class action settlements, the opinions of counsel should be given considerable weight both because of counsel's familiarity with this litigation and previous experience with cases such as these. *Officers for Justice*, 688 F.2d615, 625 (9th Cir. 1982); *In re Wash. Public Power Supply System Sec. Litig.*, 720 F. Supp. 1379, 1392 (D. Ariz. 1989); *Kirkorian v. Borelli*, 695 F. Supp. 446,451 (N.D. Cal. 1988); *Weinberger*, 698 F.2d at 74. For example, in *Lyons v. Marrud, Inc.*, [1972-1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) Paragraph 93,525 (S.D.N.Y. 1972), the court noted that "[experienced and competent counsel have assessed these problems and the probability of success on the merits.... The parties' decision regarding the respective merits of their position has an important bearing." *Id.* at

92,520. "The recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 622 (N.D. Cal. 1979). As a result, courts hold that the recommendation of counsel is entitled to significant weight. *Nat'l Rural Telecomms. Coop.* v. *DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004).

The Plaintiff and Class Counsel believe that the Settlement provides a favorable recovery for the Settlement Class, based on the claims asserted, the evidence developed, and the damages that might be proven against Defendant in the Action. The Plaintiff and Class Counsel further recognize and acknowledge the expense and length of continued proceedings necessary to prosecute the Action against Defendant through trial and appeals. They also have considered the uncertain outcome and the risk of any litigation, especially in complex litigation such as the Action, as well as the difficulties and delays inherent in any such litigation. In light of the risk of further litigation and the defenses that Defendant has asserted and could assert, the proposed Settlement set forth in the Settlement Agreement is fair, reasonable, adequate, in the best interests of the Settlement Class. Friedman Decl. ¶¶ 31-35.

Prior to mediation, the Parties engaged in investigation and the exchange of documents and information in connection with the Lawsuit. As part of this process, Defendant has provided documents and detailed information to Class Counsel to review and analyze, and the Plaintiff and Class Counsel have also conducted their own independent investigations and evaluations.

Class Counsel has conducted a thorough investigation into the facts of the class action. Class Counsel has diligently evaluated the Settlement Class Members' claims against Defendant. Prior to the Parties executing the Settlement Agreement, counsel for Defendant provided Class Counsel with access to data and information for the Class, including call records and information concerning the Defendant's practices. In addition, Class Counsel has previously negotiated settlements involving nearly identical issues and analogous defenses. Based on the foregoing data and their own independent investigation, evaluation and experience, Class Counsel believes that the settlement with Defendant on the terms set forth in the Settlement Agreement is fair, reasonable, and adequate and is in the best interest of the

Class in light of all known facts and circumstances, including the risk of significant delay, defenses asserted by Defendant, and numerous potential appellate issues. Friedman Decl. at ¶¶ 31-35. Defendant and Defendant's counsel also agree that the Settlement is fair and in the best interest of the Class.

At the same time, Plaintiff runs the risk of losing Class Certification, which may make it impossible for the Class Members to find an attorney that would be willing to litigate the issue on an individual basis, leaving the Class Members with nothing. These are just a few of the issues and risks available for Plaintiff, Defendant, and the Court to evaluate the settlement, and Plaintiff will explain these in even more detail below. As a result, there is more than a sufficient amount of investigation and discovery to allow counsel and the Court to evaluate the settlement in this case. As the Ninth Circuit explains, "the very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" *Officers for Justice v. Civil Service Com'n of City and County of S.F.*, 688 F.2d 615, 624 (9th Cir. 1982).

c. Counsel is experienced in similar litigation

Both Plaintiff and Defendant's counsel are extremely experienced in this type of litigation. Defendant's counsel is a California based Law firm that specializes in Business Litigation, while Plaintiff's counsel has years of Class Action and Consumer Protection experience. Plaintiff's counsel is one of the main plaintiff litigators of consumer rights in the southern California. Attorney Todd M. Friedman has been requested to and has made regular presentations to community organizations regarding consumer rights. The Law Offices of Todd M. Friedman has litigated over 1000 individual based consumer cases and class actions. These class actions were litigated in federal courts in California, as well as California State Courts. The Law Offices of Todd M. Friedman has served as plaintiff's counsel in dozens of class action cases involving various consumer rights and wage and hour claims, where a settlement was reached on a class-wide basis, and have achieved over $300,000,000 in class-wide relief for consumers. *See* Friedman Decl. at ¶¶42-48.

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d. The percentage of objectors is small

In settling this class action, the parties agreed to a notice mailing program that consisted of a two-sided Postcard Form Notice mailing to all Class Members. *See* Madden Decl. Exhibit A. The Settlement Class Member master mailing list was prepared from records obtained from Defendant that consisted of a spreadsheet containing 77,975 records. *See Id.* at ¶5. P&N mailed 74,982 postcards to the records on the mailing list after cross referring all available databases to get good addresses for potential class members. *Id*. Prior to sending the Notices, P&N processed the names and addresses on this list through the National Change of Address database to update any address information on file with the United States Postal Service ("USPS"). *See Id at ¶7*. Since mailing the Notices, P&N has received 4,379 Postcard Notices returned by the USPS with undeliverable addresses. *Id*. On November 16, 2022, P&N established the dedicated Settlement website, www.SuperCareSettlement.com,, to provide easy and immediate access to information regarding the proposed Settlement and to allow Settlement Class Members to file a claim electronically. A copy of the *Settlement Agreement and Release*, *Order Granting Motion for Preliminary Approval of Class Action Settlement, Notice of Pendency of Class Action Settlement, Proposed Settlement and Hearing Date for Court Approval, Request for Exclusion/Opt-Out Form* and *Claim Form* were posted on said website. See Id at ¶9.

After, notice was mailed to the Class Members' last known addresses, fully laying out the terms of the settlement agreement, the rights of the Class Members to object and the rights of the Class Members to opt out of the class, less than 7% of which were returned without finding an updated address. *See* Id. At ¶13. After the Class Members were so informed, *zero objections and only five opt outs* were lodged. *S*ee Id. at ¶¶15-16. Consequently, this Settlement is presumed to be fair, since the settlement is reached through arm's-length bargaining; investigation and discovery are sufficient to allow counsel and the court to act intelligently; counsel is experienced in similar litigation; and the percentage of objectors is small.

B. The Settlement Agreement is Fair, Reasonable, and Adequate

As mentioned above, in making this determination the courts look to the following factors: 1) the strength of plaintiffs' case, 2) the risk, expense, complexity and likely duration of further litigation, 3) the risk of maintaining class action status through trial, 4) the amount offered in settlement, 5) the extent of discovery completed and the stage of the proceedings, 6) the experience and views of counsel, 7) the presence of a governmental participant, and 8) the reaction of the class members to the proposed settlement." *See Wershba v. Apple 10 Computer*, 91 Cal. App. 4th 224, 244 (2001). As explained below, all of these factors weigh in favor of the Court approving the Settlement Agreement.

a. The strength of Plaintiff's case

On January 30, 2020, Dave Vaccaro filed a complaint in Los Angeles County Superior Court (Case No. 20STCV03833) asserting claims under the California's Invasion of privacy Act ("IPA). Plaintiff's claims stemmed from a recorded phone call made by Defendant that took place on or about June of 2019. Friedman Decl. at ¶ 4.

Plaintiff alleges that Defendant failed to disclose to Plaintiff and class members that Defendant was recording their calls. Defendant denies the allegations in the Action, denies that it has engaged in any wrongdoing; denies that any Settlement Class Member were ever damaged. Defendant denies that Plaintiff's allegations state valid claims, denies that a litigation class could properly be certified in the Action, and states that it is entering into this Settlement Agreement solely to eliminate the uncertainties, burden, expense, and delay of further protracted litigation. A bona fide dispute exists as to whether any amount of money is due from Defendant to any putative Settlement Class Member. Friedman Decl. ¶¶ 32-36.

b. The risk, expense, complexity and likely duration of further litigation

Where both sides face significant uncertainty, the attendant risks favor settlement. *Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1026 (9th Cir. 1998). Class actions such as these pose serious risk, expense, complexity and likely last for years of protracted litigation, and this

case is no different. There is a significant risk on liability, damages, and issues of Class Certification.

Here, a number of defenses asserted by Defendant presented serious threats to the claims of the Plaintiff and the other Settlement Class Members. These defenses arguably weakened Plaintiff's claims, on liability, value, and class certifiability. If successful, Defendant's defenses could eliminate or substantially reduce any recovery to the Class. While Plaintiff believes that these defenses could be overcome, Defendant maintains these defenses have merit and therefore present a serious risk to recovery. Friedman Decl. at ¶¶ 32-36.

There was also a significant risk that, if the Lawsuit was not settled, Plaintiff would be unable to obtain class certification and thereby not recover on behalf of any individuals other than himself. Friedman Decl. at ¶¶ 32-36. After arm's length negotiations between experienced and informed counsel, the Parties recognized the potential risks and agreed on the settlement of $750,000. As the federal court recently held in *Glass*, where the parties faced similar uncertainties:

> In light of the above-referenced uncertainty in the law, the risk, expense, complexity, and likely duration of further litigation likewise favors the settlement. Regardless of how this Court might have ruled on the merits of the legal issues, the losing party likely would have appealed, and the parties would have faced the expense and uncertainty of litigating an appeal. "The expense and possible duration of the litigation should be considered in evaluating the reasonableness of [a] settlement." See *In re Mego Financial Corp, Securities Litigation.*, 213 F.3d 454, 458 (9th Cir. 2000).

Here, the risk of further litigation is substantial. These risks of liability are multiplied for each Class Members if certification cannot be established, which may make it impossible for the Class Members to find an attorney that would be willing to litigate the issue on an individual basis, leaving the Class Members with little to no recourse. However, even if Class Certification were established in this case, additional risks ensue for both parties as Plaintiff is forced to prove a widespread, systematic and common violations as to all Members of the Class, while Defendant is forced to carry a huge seven figure judgement over its head.

c. The risk of maintaining class action status through trial

At trial, many of the risks and expenses that were outlined above with respect to litigation are also applicable to trial. Plaintiff and Defendant will have to call multiple witnesses and experts with little assurance of succeeding at trial. The case would only proceed to trial if there were genuine factual issues that must be determined by a fact-finder, and thus no party would be able to accurately predict the outcome. In the meantime, there would be a long, difficult struggle that would likely last for days with substantial risk hanging over both parties.

d. The amount offered in settlement

As set forth above, Defendant has agreed to a common fund settlement in the amount of $750,000. After administration costs, proposed attorney's fees, costs of suit, and the proposed incentive award, Settlement Class Members will collectively receive at least $359,735 of these available funds. The amount of the check shall be calculated by the Claims Administrator on a pro-rata basis, which currently equates to approximate recoveries of $42.55 per Class Member who submitted a valid Claim. Madden Decl. ¶ 14.

Class Member data provided to the Claims Administrator in the course of disseminating Notice verifies that the Class is comprised of 75,234 unique individuals. The net recovery, after fees and costs, to each Class Member claimant will be approximately $42.55. This is a highly favorable per-person recovery for the Class. Moreover, this outstanding result was achieved without having to subject Settlement Class members to the substantial risks ahead in litigation, which include having to fight class decertification.

The settlement award that each Class Member will receive is fair, appropriate, and reasonable given the purposes of the IPA, the limitations of class-wide liability, and in light of the anticipated risk, expense, and uncertainty of continued litigation. Although it is well-settled that a proposed settlement may be acceptable even though it amounts to only a small percentage of the potential recovery that might be available to the class members at trial, here,

the Settlement provides significant and meaningful relief.[7] Moreover, Class Members were able to avoid the time, expense and risk associated with bringing their own IPA action.

e. The extent of discovery completed and the stage of the proceedings

The stage of the proceedings at which this settlement was reached also militates in favor of final approval of the settlement. As mentioned above, Class Counsel has conducted a thorough investigation into the facts of the class action. Class Counsel began investigating the Class Members' claims before this action was filed. Class Counsel engaged in a thorough review and analysis of the relevant documents and data. Class Counsel was also experienced with the claims at issue. The agreement to settle did not occur until Class Counsel possessed sufficient information to make an informed judgment regarding the likelihood of success and the results that could be obtained through further litigation. Friedman Decl. at ¶¶ 6-8.

Based on the foregoing data and their own independent investigation and evaluation, Class Counsel is of the opinion that the settlement with Defendant for the consideration and on the terms set forth in the Settlement Agreement is fair, reasonable, and adequate and is in the best interest of the class in light of all known facts and circumstances, including the risk of significant delay, defenses asserted by Defendant, and numerous potential appellate issues. Defendant and Defendant's counsel also agree that the Settlement Agreement is fair and in the best interest of the Class Members. There can be no doubt that Counsel for both parties possessed sufficient information to make an informed judgment regarding the likelihood of success on the merits and the results that could be obtained through further litigation. Friedman Decl. at ¶¶ 6-8; 32-36.

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[7] *National Rural Tele. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004) ("well settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery"); *In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 460 (E.D. Pa. 2000) ("the fact that a proposed settlement constitutes a relatively small percentage of the most optimistic estimate does not, in itself, weigh against the settlement; rather, the percentage should be considered in light of strength of the claims"); *In re Omnivision Tech., Inc.*, 559 F. Supp. 2d 1036 (N.D. Cal. Jan. 9, 2008) (court-approved settlement amount that was just over 9% of the maximum potential recovery); *In re Mego Fin'l Corp. Sec. Litig.*, 213 F. 3d 454, 459 (9th Cir. 2000).

In *Glass,* the Northern District of California granted final approval of a class action although in *Glass* no formal discovery had been conducted prior to the settlement:

> Here, no formal discovery took place prior to settlement. As the Ninth Circuit has observed, however," [i]n the context of class action settlements, 'formal discovery is not a necessary ticket to the bargaining table' where the parties have sufficient information to make an informed decision about settlement." See *In re Mego Financial Corp. Securities Litigation,* 213 F.3d at 459.

Glass, 2007 U.S. Dist. LEXIS 8476 at *14. Here, Class Counsel was in a far stronger position to evaluate the fairness of this settlement because Class Counsel had the same sufficient information, as well as independent investigations and due diligence to confirm the accuracy of the information supplied by Defendant.

f. The experience and views of counsel

As mentioned above, counsel for both Plaintiff and Defendant have a plethora of experience in cases similar to this one. Class Counsel has conducted a thorough investigation into the facts of the class action. Based on the foregoing data and their own independent investigation, evaluation and experience, Class Counsel believes that the settlement with Defendant on the terms set forth in the Settlement Agreement is fair, reasonable, and adequate and is in the best interest of the Class in light of all known facts and circumstances, including the risk of significant delay, defenses asserted by Defendant, and numerous potential appellate issues. Friedman Decl. at ¶¶ 32-36. Defendant and Defendant's counsel also agree that the Settlement is fair and in the best interest of the Class.

g. The presence of a governmental participant

In this case, there is no governmental participant who has an interest in this case. This is a civil matter brought by private parties.

h. The reaction of the class members to the proposed settlement

As mentioned above, the reaction of the class members was exceptionally positive. After, notice was mailed to 70,603 Class Members' last known addresses, fully laying out the terms of the settlement agreement, the rights of the Class Members to object and the rights of the Class Members to opt out of the class, less than 7% of which were returned without finding an updated address. *See* Madden Decl. at ¶12. After the Class Members were so informed, ***zero objections*** were lodged only five were received. *See* Madden Decl. at ¶¶15-16. Moreover, the 11.2% claims rate is indicative of an engaged Class who finds the terms favorable. This is a higher claims rate than typical in consumer class actions.

V. PLAINTIFF IS ENTITLED TO A SERVICE AWARD

Plaintiff apples to the Court for a Service Award of $10,000 in consideration for his service and for the risks undertaken on behalf of the class. Settlement Agreement at § 7. Plaintiff performed his duty by working with Class Counsel. Declaration of Dave Vaccaro at ¶¶ 8-12. At this stage, the requested Service Award is well within the accepted range of awards. See e.g. *Louie v. Kaiser Foundation Health Plan, Inc., 2008 WL 4473183, *7* (S.D. Cal. Oct. 06, 2008) (awarding $25,000 service award to each of six plaintiffs in class action); *Glass v. UBS Fin. Servs.*, 2007 WL 221862, *16-17 (N.D. Cal. Jan. 27 2007) (awarding $25,000 service award in class action and a pool of $100,000.00 in enhancements); *Van Vranken v. Atlantic Richfield Co*., 901 F.Supp. 294, 299-300 (N.D. Cal. 1995) (awarding incentive award of $50,000); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 373 (6th Cir. 2003); *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998). As explained in *Glass*, service awards are routinely awarded to class representatives to compensate for the time and effort expended on the case, for the risk of litigation, and to serve as an incentive to vindicate the rights of other similarly situated Class Members. 2007 WL 221862 at *16-17. Mr. Vaccaro assisted counsel in the investigation of this lawsuit, and gave up his right to bring the claims individually, in order to pursue claims on behalf of the other Class Members.

Plaintiff applies for and respectfully requests an award of $10,000 be awarded to Mr. Vaccaro for his services. This case involves secret call recording of Class members by

Defendant. Were it not for Mr. Vaccaro's awareness and vigilance regarding this privacy invasion, the Class Members would never have known that their privacy rights were being violated, and there would have never been any justice for these invasions. Mr. Vaccaro should be provided an incentive award for not only spending time working on behalf of the Class, but also for bringing these issues before the Court on their behalf, that otherwise would have unquestionably gone unchecked. The nature of CIPA violations make it particularly important to provide incentive awards to plaintiffs who sound such an alarm.

VI. CONCLUSION

Plaintiff respectfully requests that the Court approve the proposed settlement and sign the proposed Final Approval Order, which is submitted herewith.

Dated: January 15, 2023 LAW OFFICES OF TODD M. FRIEDMAN, P.C.

By: _____

TODD M. FRIEDMAN
ADRIAN R. BACON
Attorneys for Dave Vaccaro and the Class

PROOF OF SERVICE

I am employed in Los Angeles County, California. I am over the age of 18 and not a party to this action. My business address is 21031 Ventura Blvd Suite 340, Woodland Hills, CA 91364.

On February 14, 2023, I served the foregoing document, described as:

MOTION FOR FINAL APPROVAL; DECLARATION OF TODD M. FRIEDMAN WITH EXHIBITS; PROPOSED ORDER

[ ] the original of the document
[x] true copies of the document

Via Case Anywhere addressed as follows:

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 U.S. MAIL:** I sealed and placed such envelope for collection and mailing to be deposited on the same day at Los Angeles County, CA. The envelopes were mailed with postage thereon fully prepaid. I am readily familiar with the Law Offices of Todd M. Friedman's practice of collection and processing correspondence for mailing. Under this practice, documents are deposited with the U.S. Postal Service on the same day that is stated in the proof of service, with postage fully prepaid at Los Angeles County, CA, in the ordinary course of business.

[xx] **BY ELECTRONIC MAIL**: I served the above documents in pdf format to the email listed in the service caption above via Case Anywhere. A true and correct copy of transmittal will be produced if requested by any party or the Court.

[xx] **STATE:** I declare under penalty of perjury under the laws of the state of California that the above is true and correct.

[ ] **FEDERAL:** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed this February 14, 2023, at Orange, California.

_/s Todd M. Friedman

Todd M. Friedman