McClintic v. Lithia Motors, Inc.

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EXHIBIT E

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1 SEAN REIS (SBN 184004)
sreis@edelson.com
2 EDELSON MCGUIRE, LLP
30021 Tomas Street, Suite 300
3 Rancho Santa Margarita, California 92688
Telephone: (949) 459-2124
4 Facsimile: (949) 459-2123

5 JOHN G. JACOBS (*Pro Hac Vice*)
jgjacobs@jacobskolton.com
6 BRYAN G. KOLTON (*Pro Hac Vice*)
bgkolton@jacobskolton.com
7 JACOBS KOLTON, CHTD.
122 South Michigan Avenue, Suite 1850
8 Chicago, Illinois 60603
Telephone: (312) 427-4000
9 Facsimile: (312) 427-1850

10 JAY EDELSON (*Pro Hac Vice*)
jedelson@edelson.com
11 RYAN D. ANDREWS (*Pro Hac Vice*)
randrews@edelson.com
12 EDELSON MCGUIRE, LLC
350 North LaSalle Street, Suite 1300
13 Chicago, Illinois 60654
Telephone: (312) 589-6370
14 Facsimile: (312) 589-6378

15 ATTORNEYS FOR PLAINTIFFS
AND THE SETTLEMENT CLASS
16

UNITED STATES DISTRICT COURT
17 **NORTHERN DISTRICT OF CALIFORNIA**
OAKLAND DIVISION
18

19 LACI SATTERFIELD, CARMELLA
20 MILLER, and CHARLENE KOUF, individually and on behalf of a class of
21 similarly situated individuals,

22 *Plaintiffs*,

23 v.

24 SIMON & SCHUSTER, INC., a New York
25 corporation, and IPSH!NET, INC., a Delaware corporation,

26

27 *Defendants*.

28

Case No. 4:06-cv-02893

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AGREEMENT AND AWARD OF ATTORNEYS' FEES AND EXPENSES AND INCENTIVE AWARDS

Judge: The Honorable Claudia Wilken
Location: Courtroom 2, 4th Floor.
1301 Clay Street
Oakland, California 94612-5212
Date: August 5, 2010
Time: 2:00 p.m.

1 **NOTICE OF MOTION**

2 NOTICE IS HEREBY GIVEN that the Plaintiffs will move the Court, pursuant to Federal
3 Rule of Civil Procedure 23(e), to grant final approval of the settlement in this class action on
4 August 5, 2010, at 2 p.m., or at such other time as may be set by the Court located at 1301 Clay
5 Street, Oakland, California, 94612-5212, in Courtroom 2, Fourth Floor, before the Honorable
6 Claudia Wilken.

7 The Plaintiffs seek final approval of this class action settlement as fair, reasonable and
8 adequate. Plaintiffs also seek approval of Class Counsel's request for the agreed-upon reasonable
9 attorneys' fees and expenses and incentive awards for the named Plaintiffs for serving as class
10 representative in this matter. The Plaintiffs seek entry of the Final Judgment And Order Of
11 Dismissal With Prejudice, a copy of which was Exhibit F to the Settlement Agreement and a copy
12 of which is attached hereto. The Motion is based on this Notice of Motion, the accompanying
13 Brief in Support of the Motion and the authorities cited therein, oral argument of counsel, and any
14 other matter that may be submitted at the hearing.
15
16 Dated: July 20, 2010
17 Respectfully Submitted,
18 LACI SATTERFIELD, CARMELLA MILLER, and
19 CHARLENE KOUF, individually and on behalf of a class of similarly situated individuals,
20
21 /s/ John G. Jacobs
John G. Jacobs, Co-Lead
Counsel For the Class
22
23 JOHN G. JACOBS (*Pro Hac Vice*)
jgjacobs@jacobskolton.com
24 BRYAN G. KOLTON (*Pro Hac Vice*)
bgkolton@jacobskolton.com
25 JACOBS KOLTON, CHTD.
122 South Michigan Avenue, Suite 1850
26 Chicago, Illinois 60603
Telephone: (312) 427-4000
27 Facsimile: (312) 427-1850
28

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I. INTRODUCTION

After four years of intense litigation against extremely skilled adversaries, up to the Ninth Circuit and back, this lawsuit has settled, after establishing landmark rulings clarifying an heretofore uncharted area of the law. As the Court is aware from the preceding four years of litigation, the class action settlement for which the parties seek final approval arose when Defendants sent roughly 60,000 text message to consumers' mobile phones advertising the then-forthcoming Stephen King novel *Cell.* Plaintiffs alleged that text message campaign to have been in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq*. (the "TCPA"), and for years the parties fought over the metes and bounds of the TCPA and its application *vel non* to the facts of this case. The Parties met for a full day of mediation with the Honorable Daniel Weinstein (ret.) of JAMS in November of 2009 and continued the process under his supervision for weeks thereafter until, on January 15, 2010, the Parties reached the instant settlement. (Dkt. 112-1.) Detailed descriptions of this litigation, which for efficiency will not be repeated here, have been summarized in both the Settlement Agreement and in Plaintiff's Motion for Preliminary Approval. (Dkts. 112, 112-1.)

On March 3, 2010, the Court gave its preliminary approval to the settlement, directed the parties to implement the notice plan giving an opportunity for class members to opt out of the settlement or object to any of its terms (including attorneys' fees and expenses or incentive awards to the representative plaintiffs, all of which were clearly disclosed), and set a date for the final approval hearing. (Dkt. 119.) As called for in the notice plan approved by the Court, direct notice to each class member ascertainable through substantial effort was provided via U.S. Mail and email and was supported with nationwide publication, a settlement website, and Google AdWords advertising. CAFA notice was also provided to the required governmental agencies. The deadline for the submission of exclusions has now passed and given the strength of the settlement—providing a settlement fund of $10 million and affording each class member that submits a valid claim by September 20, 2010, a cash payment of $175 — it is not surprising that there has been not a single objection to any aspect of the settlement and only one opt-out.

1 The complexity and novelty of Plaintiffs' claims, coupled with the continued vigorous
2 defense promised by the Defendants, further supports that this Court should find the results
3 achieved in this litigation are more than "fair, reasonable, and adequate" and that the settlement
4 fully warrants final approval. Plaintiffs further request that this Court grant the agreed-upon
5 request for attorneys' fees and expense reimbursement in the amount of $2,725,000 and for an
6 incentive award of $25,000 for Laci Satterfield and $5,000 each for Carmella Miller and Charlene
7 Kouf.

8 **II. KEY TERMS OF THE SETTLEMENT**

9 As the Court knows from the preliminary approval process, this litigation has brought
10 about several salutary results. The key terms of the settlement follow:

11 **A. Class Definition:** The March 3, 2010 Preliminary Approval Order (Dkt. 119)
12 certified a settlement class consisting of all persons who in January 2006 were sent the following
13 text message:

14 The next call you take may be your last...Join the Stephen King VIP Mobile Club at www.cellthebook.com. rplySTOP2OptOut. PwdByNexton.
15

16 **B. Cash Payments To The Class:** The Settlement Agreement provides for the
17 creation of a settlement fund of $10,000,000. It is, to our knowledge, the largest settlement fund
18 ever achieved in a TCPA text message case. It provides for a cash payment of $175 to each class
19 member who submits a valid claim form by September 20, 2010. At the time this settlement was
20 made, it was the largest per-claim payout of which we are aware in any TCPA text message class
21 action case. (If the total amount of approved claims submitted by September 20, 2010, exceeds
22 the settlement fund after payment of claims administration expenses, the fee award, *cy pres*
23 payment, and incentive awards, then each class member with an approved claim will receive a *pro*
24 *rata* share of the amount of the settlement fund available after payment of such amounts.
25 Presently, the Parties anticipate that all class members who timely submit approved claims will
26 receive the full awards.)
27
28

1 **C.** ***Cy Pres*:** Under the Settlement Agreement, Defendants have agreed to pay from
2 the settlement fund $250,000 as a form of *cy pres,* subject to the Court's approval, to the following
3 organizations selected by Plaintiffs in consultation with Defendants.

4 **I. <u>DonorsChoose.org.</u>** The Parties have agreed, and seek the approval of the
5 Court, for the payment of $125,000 of the *cy pres* amount to be paid to
6 DonorsChoose.org. Donors Choose is a national charity that supports specific
7 projects for classroom teachers across the country (and, if approved by the Court,
8 will be focused on lower income schools) to provide them with teaching
9 materials. (*See* www.donorschoose.org.)

10 **II. <u>Blessed Sacrament Youth Center.</u>** The Parties have agreed, and seek the
11 approval of the Court, for the payment of $ 50,000 of the *cy pres* amount to be
12 paid to the Blessed Sacrament Youth Center. Established in 1987, BSYC is a
13 youth development center that seeks to create an environment where youth of all
14 ages can get to work and play together to promote moral values and to develop
15 the maturity and skills needed to become responsible adults and leaders. (*See*
16 www.bsyc.org.)

17 **III. <u>The International Center For Cooperation And Conflict Resolution</u>**
18 The Parties have agreed, and seek the approval of the Court, for the payment of
19 $75,000 of the *cy pres* amount to be paid to The International Center for
20 Cooperation and Conflict Resolution ("ICCCR"). Established in 1986, ICCR is
21 an innovative center committed to developing knowledge and practice to promote
22 constructive conflict resolution, effective cooperation, and social justice. ICCCR
23 partners with individuals, groups, organizations, and communities to create tools
24 and environments from which conflicts can be resolved constructively and just
25 and peaceful relationships can develop. ICCCR works with sensitivity to cultural
26 differences and emphasizes the links between theory, research, and practice. (See
27 www.tc.columbia.edu/icccr/).
28

D. ***Payment of Notice and Administrative Fees*****:** Defendants have paid out of the settlement fund the full cost of sending the settlement class notice directly to the class members, for nationwide publication in *USA Today* and *People Magazine*, for Google AdWords, and web hosting, as well as all costs of administration of the settlement and the processing of claims.

E. ***Compensation for the Class Representatives*****:** In addition to any award under the settlement, and in recognition of their efforts on behalf of the class, subject to the approval of the Court, Defendants have agreed to pay the class representatives incentive awards out of the settlement fund as follows for appropriate compensation for their time and effort serving as the class representatives in this litigation: $25,000 for Laci Satterfield; and $5,000 each for Carmella Miller and Charlene Kouf.

F. ***Payment of Attorneys' Fees and Expenses*****:** Subject to the approval of the Court, Defendants have agreed to pay Class Counsel from the settlement fund $2,725,000 for both attorneys' fees and the reimbursement of costs. Defendants have agreed that they will not oppose Class Counsel's request for such an award, directly or indirectly. *See* Section V, supra.

G. Release of Claims

Should the Court award final approval to the Settlement and after the time for appeal has expired, Plaintiffs and each member of the settlement class who has not timely filed a request to be excluded from the settlement class will release and forever discharge the Defendants from any and all manner of claims, whether known or unknown, involving the sending of the Text Message to the Settlement Class for the Stephen King book *Cell*. (*See* Dkt. 112-1, ¶¶ 1.24; 3.2 for full Release language.)

III. THE NOTICE DIRECTED TO THE CLASS COMPORTS WITH DUE PROCESS AND RULE 23

Before final approval of a class action can issue, notice of the settlement must be provided to the class. Fed. R. Civ. P. 23(e)(1). Rule 23 requires the class receive "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). Actual notice, however, is not required. *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994). Notice to the class must be

"reasonably calculated under all the circumstances, to apprise interested parties 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).

Not only must notice of a class action settlement be properly disseminated to the class, its content must also "generally describe[] the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and come forward to be heard." *Churchill Village, LLC v. Gen Elec.*, 361 F.3d 566, 575 (9th Cir. 2004). Under Rule 23(c)(2)(B), the notice directed to the class must clearly, and in concise, plain, easily understood language state: (a) the nature of the action; (b) the definition of the class certified; (c) the class claims, issues, or defenses; (d) that a class member may enter an appearance through an attorney if he or she desires; (e) that the court will exclude any member of the class upon request; (f) the method and time to request exclusion; and (g) that the judgment will be binding on class members. These requirements have been strictly adhered to in this case.

In the March 3, 2010, Preliminary Approval Order the Court found that the form and methods set forth in Settlement Agreement's Notice Plan is the "best notice practicable under the circumstances and that it constitutes due and sufficient notice to all persons entitled thereto and complies fully with the requirements of the Federal Rules of Civil Procedure and of Due Process." (Dkt. 112-1, ¶ 8.) RSM McGladrey, the Court-appointed Settlement Administrator, has fully implemented the directives of that Order. (*See* Affidavit of Risa Neiman.) Specifically, by using two different reverse directory search firms, McGladrey was able to locate mailing addresses for 28,924 persons from the 58,079 cell phone numbers to which the text message in question was sent, and mailed the court-approved notice and claim form to those addresses by First Class Mail on April 9, 2010. (Neiman Aff. ¶¶ 3-6.) Additional direct notice was provided to all members of the Settlement Class via email. (Neiman Aff. ¶¶ 8-9.) Working through defense counsel, Class Counsel was able to obtain from the former President of Nextones.com (currently in Finland) the list of email addresses associated with the telephone numbers to which the text message in question was sent. (Declaration of Christopher Turner, ¶¶ 7-12; Jacobs Decl. ¶¶ 20-21.) It was to

these email addresses that McGladrey sent the Email Notice called for Exhibit G to the Settlement Agreement. A follow-up second email was sent to 29,674 members of the Settlement Class who McGladrey determined did not open the initial email that was sent to them. (Neiman Aff. ¶ 9.)

In addition to these forms of direct notice garnered from information obtained from available records, notice to the Settlement Class was made in three additional ways. First, an approved summary notice appeared in *USA Today* on April 26, 2010 and appeared in a two-thirds of a page ad in the May 3, 2010 issue of *People Magazine*. (Neiman Aff. ¶ 7.) McGladrey also created a website at www.satterfieldtextsettlement.com that included copies of the settlement agreement (in English and Spanish) as well as copies of other relevant documents, provided for the online filing of claims, and also contained answers to Frequently Asked Questions. Each of these notices fully explained the settlement class members' rights and listed a toll-free number where Class Counsel were available to answer any class member questions. (*See* Neiman Aff. ¶ 11; Declaration of Jay Edelson ¶ 10.) Finally, McGladrey launched a Google Adwords campaign using pre-approved phrases to assist in a person's search on the internet. AdWords ads are displayed when someone searches Google using one of the pre-approved keywords aided in directing more than 13,000 potential members of the Settlement Class to the settlement website as a result of the links appearing on the Google search page. (Neiman Aff. ¶ 10.)

Accordingly, notice to the class complied with the Preliminary Approval Order, Rule 23, and Due Process, and plainly satisfied the standard of the "best notice practicable under the circumstances."

IV. THE SETTLEMENT WARRANTS FINAL APPROVAL

Under Federal Rule of Civil Procedure 23(e), "[t]he court must approve any settlement, voluntary dismissal, or compromise of the claims, issues or defenses of a certified class" and such approval may occur "only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate." Fed. R. Civ. P. 23; *In re OmniVision Tech. Inc.*, 559 F. Supp. 2d 1036, 1040 (N.D. Cal. 2008) (citing *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003)). While the Court has discretion in approving any settlement, "[i]n exercising this

discretion, this circuit has long deferred to the private consensual decision of the parties." *Garner v. State Farm Mut. Auto. Ins. Co.*, No. CV-08-1365-CW, 2010 WL 1687832, *8 (N.D. Cal. April 22, 2010 (citing *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 965 (9th Cir. 2009)("We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution . . .")).

While a number of factors must be balanced when considering the final approval of a class action settlement, "[i]n the Ninth Circuit, a court affords a presumption of fairness to a settlement, if: (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." *Lewis v. Starbucks Corp.*, No. 07-cv-00490, 2008 WL 4196690, at *7 (E.D. Cal. Sept. 11, 2008 (citing Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11:41 (4th Ed. 2002)). As discussed above, the Settlement Agreement, to which there has been no objection, was reached by experienced counsel with sufficient discovery and after extensive arm's length negotiations and mediation with Judge Weinstein. Accordingly, the Court's analysis of the factors listed below should be examined with a presumption that the Settlement Agreement is fair.

It is well-settled that in analyzing the fairness, reasonableness and adequacy of a class action settlement, the Court may consider the following non-exhaustive list of 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 throughout the 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." *Rodriguez*, 563 F.3d at 963 (quoting *Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003)). In the instant case, each of these factors militates in favor of approving the settlement.[1]

---

[1] The Court, however, need not rule on a blank slate in evaluating the fairness of the settlement. Judge Wayne Andresen has previously awarded final approval in a very similar matter previously pending in the Northern District of Illinois. *Weinstein v. The Timberland Co. et al*, No. 1:06-cv-00484, Dkt. 93 (N.D. Ill. Dec. 18, 2008).

1 **A. *The Strength of the Plaintiffs' Case***

2 "Basic to [analyzing a proposed settlement] in every instance, of course, is the need to
3 compare the terms of the compromise with the likely rewards of the litigation." *Protective Comm.*
4 *for Indep. Stockholders v. Anderson*, 390 U.S. 414, 424-25 (1968). The analysis of Plaintiff's
5 probability of success on the merits, however, is not rigid or beholden to any particular formula
6 and "the Court may presume that through negotiation, the Parties, counsel, and mediator arrived at
7 a reasonable range of settlement by considering Plaintiff's likelihood of recovery." *Garner*, 2010
8 WL 1687832, *9 (citing *Rodriguez*, 563 F.3d at 965).

9 While Class Counsel believe the Plaintiffs claims are strong in light of the Ninth Circuit's
10 ruling and from the discovery in their possession, it would blink reality to deny the risks inherent
11 in foregoing this settlement. (*See* Declaration of John G. Jacobs Decl. ¶¶ 7, 13.) This uncertainty
12 is underscored by the fact that settlement occurred prior to class certification and the completion
13 of expert discovery on the use of an "Automated Telephone Dialing System" to transmit the text
14 messages at issue, as well as Defendants' continued promise to vigorously defend the action.
15 Simon & Schuster's Answer to the Amended Complaint asserted twenty-seven separate
16 affirmative defenses (Dkt. 102), and ipsh!'s Answer asserted nineteen affirmative defenses (Dkt.
17 100). Only one of these need gain traction with a jury to defeat Plaintiffs' claims. So, too, if
18 plaintiffs failed to obtain class certification: the case would effectively be over. Given the novelty
19 of the issues remaining that underlie Plaintiffs' claims, the assuredly vigorous defense that would
20 be presented, and the number of affirmative defenses presented, the strength of Plaintiffs' case
21 could not justify rejection of this excellent settlement. The first factor (strength of plaintiffs'
22 case) favors approval of the settlement.

23 **B. *The Risk of Continued Litigation***

24 The second fairness factor this Court may consider is "the risk of continued litigation
25 balanced against the certainty and immediacy of recovery from the Settlement." *OmniVision*, 559,
26 F. Supp. 2d at 1041 (citing *Dunleavy v. Nadler*, 213 F.3d 454, 458 (9th Cir. 2000)). "The Court
27 should consider the vagaries of litigation and compare the significance of immediate recovery by
28

way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation. In this respect, it has been held proper to take the bird in hand instead of a prospective flock in the bush." *Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1323 (S.D. Fla. 2005); *see also Garner*, 2010 WL 1687832, *10 ("Settlement avoids the complexity, delay, risk and expense of continuing with the litigation and will produce a prompt, certain, and substantial recovery for the Plaintiff class."). Further, this factor favors the approval of a settlement where, as here, significant procedural hurdles remain, including anticipated summary judgment motions, *Daubert* motions, and additional appeals. *Garner*, 2010 WL 1687832, *10 (citing *Rodriguez*, 563 F.3d at 966).

In the absence of the Settlement, it is certain that the expense, duration, and complexity of the protracted litigation that would result from the continued litigation of this matter would be substantial. Significant costs would be incurred were this matter to proceed to trial, including expenses for expert witnesses, technical consultants, and the myriad of other costs necessitated by the trial of a class action. (Jacobs Decl. ¶ 17.) Further, evidence and witnesses from across the country and abroad would have to be assembled. (*Id.*) As a result, Plaintiffs certainly faced a significant challenge in proving their case on the merits. Given the complexity of the issues, the defeated party would likely appeal. As such, the substantial and prompt relief provided to the class under the Settlement weighs heavily in favor of its approval compared to the inherent risk of continued litigation, trial, and appeal.

C. *The Risk of Maintaining Class Action Status*

The Court's March 3, 2010 Order certified a nationwide class for settlement purposes only. (Dkt. 119, ¶ 4.) However, if the Court fails to grant final approval to the Settlement Agreement for any reason, the certification of the class will automatically become void. (*Id.* ¶ 7.) Although Plaintiffs and Class Counsel believe they would be successful in obtaining certification of an adversarial class absent the Settlement Agreement, Defendants have made it clear that in its absence they would vigorously oppose adversarial certification. (*See* Dkt. 112-1, ¶ I.) Further, even if Plaintiffs were successful in a motion for class certification absent the Settlement

Agreement, Defendants could move for decertification of the class before or during trial and likely would challenge certification on appeal. (Jacobs Decl. ¶ 13.) Accordingly, this factor weighs in favor of approving the Settlement Agreement because if at any point the Class failed to become certified or if certification was reversed, the Class would get nothing.

D. *The Amount Offered in the Settlement is Substantial*

The next factor relevant to a consideration of the reasonableness of the Settlement Agreement is the amount of recovery offered by Defendants. *See Rodriguez*, 563 F.3d at 963. The reasonableness of the amount offered can be determined by comparing it to the maximum potential recovery if Plaintiffs were to ultimately succeed at trial. *See OmniVision*, 559 F. Supp. 2d at 1042 (finding a certain recovery of 6% of the potential recovery after accounting for attorneys' fees and costs to be reasonable and favor approval of the settlement). However, although treble damages are available under the TCPA, the Court need not factor their availability into its consideration of the reasonableness of the negotiated amount. *See Rodriguez*, 563 F.3d at 965-66. In fact, "[i]t is well-settled that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 628 (9th Cir. 1982). Moreover, the certainty and relative immediacy of the cash payment under the Settlement agreement, when compared with the risk associated with seeking the full amount but receiving nothing, further justifies the reasonableness of accepting less than the maximum potential recovery. *See OmniVision*, 559 F. Supp. 2d at 1042.

In this matter, if Plaintiffs were successful in proving the Defendants violated the TCPA, the Class Representatives and the approximately 60,000 class members would be statutorily entitled to $500 per violation. 47 U.S.C. § 227(b)(3).[2] Therefore, the amount of the proposed settlement of $175 per class member paid from a $10,000,000 settlement funds equals one-third of the potentially available statutory damages. As in *Rodriguez*, here "the negotiated settlement amount is fair and reasonable no matter how you slice it." 563 F.3d at 965. Given the potential

[2] Further, if Plaintiffs were successful in demonstrating the willful violation of the TCPA, the Court has the discretion to treble the available damages. 47 U.S.C. § 227(b)(3).

1 risks that could result in non-payment detailed above further demonstrates the reasonableness of
2 the immediate payment of $175 afforded to the class in the settlement. Accordingly, this factor
3 too favors the final approval.

4 **E. *The Extent of Discovery Completed And The Stage of the Litigation***

5 The next factor requires the Court consider both the extent of the discovery conducted to
6 date and the stage of the litigation as indicators of class counsel's familiarity with the case and
7 ability to make informed decisions. *OmniVision*, 559 F. Supp. 2d at 1042 (citing *Dunleavy*, 213
8 F.3d at 459). Where extensive discovery and prior summary judgment proceedings have occurred,
9 it is reasonable for the district court to conclude that Class Counsel fully grasped the merits of the
10 case prior to engaging in settlement or mediation. *Rodriguez*, 563 F.3d at 967.

11 This case is well-developed—the parties have been through an early mediation and initial
12 focused discovery on certain legal issues, summary judgment proceedings on those issues, appeal
13 of that decision, and then further discovery preceding the second successful mediation with Judge
14 Weinstein. (*See* Dkt. 42, 47, 60, 63-68, 71, 76, 82-82, 86, 97.) When Class Counsel appeared at
15 the mediation with Judge Weinstein, they were intimately familiar with the applicable case law
16 and were in possession of sufficient discovery to intelligently negotiate the terms of the instant
17 settlement to the ultimate benefit of the class members. Accordingly, this factor too favors
18 approval of the Settlement Agreement.

19 **F. *The Experience and Opinion of Counsel***

20 The next factor has the Court consider counsel's experience and views about the adequacy
21 of the Settlement. *Garner*, 2010 WL 1687832, *14 (considering views of plaintiff's and
22 defendant's counsel that the settlement was fair); *see aslo OmniVision*, 559 F. Supp. 2d at 1043.
23 In fact, "[t]he recommendations of plaintiff's counsel should be given a presumption of
24 reasonableness." *OmniVision*, 559 F. Supp. 2d at 1043 (quoting *Boyd v. Bechtel Corp.*, 485 F.
25 Supp. 610, 622 (N.D. Cal. 1979)). Reliance on such recommendations is premised on the fact that
26 "parties represented by competent counsel are better positioned than courts to produce a settlement
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1 that fairly reflects each party's expected outcome in the litigation." *Rodriguez*, 563 F.3d at 967
2 (quoting *In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995)).
3 Class Counsel have regularly engaged in major complex litigation, and have had extensive
4 experience in prosecuting consumer class action lawsuits of similar size and complexity. (*See*
5 Jacobs Decl. ¶ 2; *see also* Edelson Decl. ¶ 3.) Through their investigation, review of discovery
6 materials, litigation, two mediations, appeal, and the settlement process, Class Counsel have
7 gained an intimate understanding of the instant litigation and believe the settlement to more than
8 exceed the "fair, adequate, and reasonable" standard required for the Court's approval. (Dkt. 112-
9 1, ¶ K; Jacobs Decl. ¶ 18; Edelson Decl. ¶ 4.) Further, Defendants' counsel are some of the
10 country's leading firms and lawyers and they, while not agreeing with the validity of Plaintiffs'
11 claims, agree that the Settlement Agreement is fair. (*See* Dkt. 112-1, ¶¶ I-K.) This factor,
12 therefore, also favors the Court's final approval of the Settlement Agreement.

13 **G. *The Absence of Collusion Supports Approval***

14 This Court also must also consider the absence or presence of collusion between the
15 parties. *Garner*, 2010 WL 1687832, *13. "Before approving a class action settlement, the district
16 court must reach a reasoned judgment that the proposed agreement is not the product of fraud or
17 overreaching by, or collusion among, the negotiating parties." *Id.* (quoting *Class Plaintiffs v. City*
18 *of Seattle*, 955 F.2d 1268, 1290 (9th Cir. 1992)).
19 The instant Settlement Agreement is about as far on the other end of the spectrum from
20 collusion as one could hope to see. To say that it has been vigorously litigated (and that the
21 settlement negotiations were equally vigorously conducted) is an understatement. (Jacobs Decl.
22 ¶¶ 14-16.) As with the settlement (and arms' length negotiations) approved by this Court in
23 *Garner*, "t]he Parties engaged in a full day mediation before an experienced mediator, Judge
24 Daniel Weinstein, and thereafter reached an agreement in principle with the further capable
25 assistance of Judge Weinstein. For two months thereafter, the Parties worked together to
26 extensively finalize the Agreement." *Id.* Accordingly, the Court should again find that this
27 process resulted in a Settlement free from any taint of collusion.
28

H. *The Presence of a Governmental Participant*

Although there we no "governmental coattails for the class to ride" in this case, *Rodriguez*, 563 F.3d at 964, Defendants were nonetheless obligated to notify the Unites States Attorney General and the appropriate state officials as a condition of obtaining Court approval. 28 U.S.C. § 1715. *Garner*, 2010 WL 1687832, *14. "Although CAFA does not create an affirmative duty for either the state or federal officials to take any action in response to a class action settlement, CAFA presumes that, once put on notice, state or federal officials will raise any concerns that they may have during the normal course of the class action settlement procedures." *Id.* Defendants timely complied with CAFA's notice requirement and provided the requisite notice on February 22, 2010. (Turner Decl. ¶¶ 3-6.) As of the date of filing, no state of federal official has raised any objection to the settlement. (Jacobs Decl. ¶ 23.) Accordingly, this factor favors approval of the Settlement.

I. *The Reaction of Class Members*

The final factor in the Court's determination of the fairness, adequacy, and reasonableness of the Settlement Agreement is the reaction of the class to the settlement. *Molski*, 318 F.3d at 953. "It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class action settlement are favorable to the class members." *Nat'l Rural Telecomms Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528-29 (C.D. Cal. 2004). A complete lack of objections from the class members to the Settlement Agreement further favors its approval. *Churchill Village LLC v. Gen. Elec.*, 361 F.3d 566, 577 (9th Cir. 2004).

In this case, the court-approved notice procedures were fully implemented by the parties and the Settlement Administrator, yet they yielded no objections and only one request for exclusion. (Jacobs Decl. ¶¶ 20-23 .) In this day of professional objectors and cynicism about class actions, the fact that there is a single request for exclusion and not a single objection says much about the appropriateness of granting final approval of the settlement. Accordingly, this and the other factors all favor this Court's entering final approval of the settlement.

V. THE AGREED-UPON ATTORNEYS' FEES & EXPENSES ARE REASONABLE

Defendants have agreed to pay from the Settlement Fund attorneys' fees and the reimbursements of expenses in the amount of $2,725,000 and this amount is reasonable under both accepted methods of analysis. When expenses are deducted from the $2,725,000, the fees requested are just over 26% of the fund. (Jacobs Decl. ¶ 12; Edelson Decl. ¶ 12) It is well established that the Court has discretion to choose either the percentage of the fund or lodestar method to determine the amount of reasonable fees in a common fund case. *OmniVision*, 559, F. Supp. 2d. at 1046 (citing *Chem. Bank v. City of Seattle*, 19 F.3d 1291, 1296 (9th Cir. 2004)). Although the Court retains discretion, "use of the percentage method in common fund cases appears to be the dominant approach." *Id.* (citing *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002)). Ultimately, the object in selecting either method is to "reasonably compensate counsel for their efforts in creating the common fund." *Paul, Johnson, Alston, & Hunt v. Graulty*, 886 F.2d 268, 271 (9th Cir. 1989).

Here, the Court should apply the percentage approach as the reasonableness of the agreed-upon percentage of the fund is supported by the facts of this case and the factors espoused by the Ninth Circuit. These factors—similar to those used to evaluate the reasonableness of the settlement—include: "(1) the results achieved; (2) the risk of litigation; (3) the skill required and the quality of work; (4) the contingent nature of the fee and the financial burden carried by the plaintiff; and (5) awards made in similar cases." *OmniVision*, 559, F. Supp. 2d. at 1046 (citing *Vizcaino*, 290 F.3d at 1048-50).

A. *The Results Achieved By Class Counsel Were Exceptional*

A substantial benefit being conferred on the Class as result of the litigation is the most critical factor in approving an award. *Id.* The benefits conferred, however, are not limited to the monetary amount of the settlement fund and can include the litigation's clarification of major issues of law. *Vizcaino*, 290 F.3d at 1049. As discussed above, Class Counsel were able to secure an exceptional result for the class that includes $175 individual payments and $250,000 in charitable *cy pres* awards. Moreover, the judicial opinions in this litigation, at both the trial court

1 and appellate level, have been seminal in clarifying the law regarding, *inter alia*, the application of
2 the TCPA to unauthorized text messages. *See Satterfield v. Simon & Schuster*, 2007 WL 1839807
3 (N.D. Cal. June 26, 2007) and 569 F.3d 946 (9th Cir. 2009). Accordingly, the exceptional result
4 achieved on behalf of the class supports the reasonableness of the agreed-upon fee.

5 **B. *There Was Significant Risk In Bringing and Maintaining the Action***

6 The risk associated with continued litigation resulting in a lesser or no benefit to the class
7 than that achieved by the settlement is also a significant factor. *OmniVision*, 559 F. Supp. 2d. at
8 1046-47 (citing *Vizcaino*, 290 F.3d at 1048). The risk here was substantial. This was an untested
9 area of the law, and no one could undertake such litigation with any confidence as to the expected
10 result. But here, Class Counsel not only undertook the litigation, but applied substantial resources
11 to it (more than $1.3 million in uncompensated time, as well as more than $70,000 in out-of-
12 pocket expenses) in the face of determined opposition by Defendants. In addition to the reasons
13 discussed previously, Class Counsel's willingness to undertake this litigation given the untested
14 nature of the claims and the continued prosecution of this case in the face of the exceptional
15 settlement offer would have been fraught with risk and uncertainty. These factors fully support the
16 reasonableness of the agreed-upon fee.

17 ***C. Class Counsel Skillfully Prosecuted The Action***

18 The litigation of a complex, multiparty, nationwide class action "requires unique skills and
19 abilities." *OmniVision*, 559 F. Supp. 2d at 1047. Throughout this litigation, Class Counsel faced
20 formidable opposition from seasoned defense counsel and were able to prevail on appeal in the
21 Ninth Circuit in a case of first impression. Most importantly, Class Counsel were able to
22 successfully negotiate the instant settlement to the benefit of the Class. Each detail was vigorously
23 and extensively negotiated. Accordingly, the agreed-upon fee request is supported by this factor.

24 ***D. The Contingency of the Fee Supports Its Approval***

25 The contingent fee allows competent counsel to accept cases and provide adequate
26 representation in class actions and is a basis for providing a larger fee than if the matter was billed
27 on a flat or hourly basis. *OmniVision*, 559, F. Supp. 2d. at 1047 (citing *Chem. Bank*, 19 F.3d at
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1299-1300). Through the four-plus years this litigation has been pending, Class Counsel have spent some 2,600 hours representing the Plaintiffs and the class without compensation and requiring that other work be forgone. (Jacobs Decl. ¶¶ 8, 11; Edelson Decl. ¶¶ 16-18.) Further, Class Counsel have advanced over $ 71,364 in litigation expenses prosecuting this case with considerable risk of non-return. (Jacobs Decl. ¶ 12; Edelson Decl. ¶ 17.) As such, the contingent fee in this case fully supports the requested fee award.

E. The Agreed-Upon Fee is Consistent With Awards In Similar Cases

In the Ninth Circuit, a twenty-five percent "benchmark" award has been established in common fund cases. *See e.g. In re Pac. Enters Sec. Litig.*, 47 F.3d at 379. The percentage awarded is to be based off the total amount of the fund made available to the class. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 477-478 (1980). Although Class Counsel are requesting an award slightly above the "benchmark," "in most common fund cases[] the award exceeds the benchmark." *OmniVision*, 559, F. Supp. 2d. at 1047; *see also In re Activison Sec. Litig.*, 723 F. Supp. 1373, 1377-78 (N.D. Cal. 1989) ("nearly all common fund awards range around 30%"). Accordingly, the agreed-upon fee is in line with awards in class action litigation and the slight increase over the benchmark is warranted by the numerous factors discussed above.

F. The Agreed-Upon Fee is Supported by Class Counsel's Lodestar

Whether the Court in its discretion chooses to apply solely the lodestar method or uses the lodestar analysis merely as a cross-check on agreed-upon fee,[3] Class Counsel's request is reasonable. The lodestar figure is based on the total number of reasonable attorney hours expended multiplied by a reasonable hourly rate for each attorney involved in the litigation. *Friend v. Kolodzieczak*, 72 F.3d 1386, 1389 (9th Cir. 1995). It is appropriate to calculate attorneys' fees at prevailing rates to compensate for delay in receipt of payment. *Vizcaino*, 290 F.3d at 1051.

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[3] Lodestar is frequently used as a "crosscheck" on reasonableness of the requested percentage of a common fund. *OmniVision*, 559, F. Supp. 2d. at 1048; *see also Vizcaino*, 290 F.3d at 1050-51 ("Calculation of the lodestar, which measures the lawyers' time in the litigation, provides a check on the reasonableness of the percentage award.")

Further, the standard lodestar formula is not limited to this initial mathematical calculation and may be enhanced with a multiplier upon consideration of the factors set forth in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69 (9th Cir. 1975).[4]

Lodestar fee enhancement accounts for the possibility that the attorney will not receive payment if the suit does not succeed and is routinely applied in common fund cases. *Vizcaino*, 290 F.3d at 1051. The majority of class action fee awards using lodestar apply a multiplier of 1.5 to 3, but considerably higher amounts have been awarded. *Id.* at 1051 n. 6.[5] In fact, it has been found an abuse of discretion to fail to apply a multiplier in certain matters. *Fischel v. Equitable Life Assur. Society of U.S.*, 307 F.3d 997, 1008 (9th Cir. 2002) ("It is an abuse of discretion to fail to apply a risk multiplier, however, when (1) attorneys take a case with the expectation that they will receive a risk enhancement if they prevail, (2) their hourly rate does not reflect that risk, and (3) there is evidence that the case was risky.")

As supported by the attached declarations, Class Counsel's base lodestar is represented by the following chart:

ATTORNEY	YEARS OF	HOURS	HOURLY	TOTAL

[4] The *Kerr* factors include: (1) the time and labor required; (2) the novelty and difficulty of the issues involved; (3) the skill required to perform the legal services properly; (4) the preclusion of other employment; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the case; (8) the amount in question and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Kerr*, 526 F.2d at 69-70. Many of these factors are addressed throughout this brief and "[t]he Court need not discuss specifically each factor so long as the record shows that the court considered the factors called in to question by the case at hand. *Newhouse v. Robert's Ilima Tours, Inc.*, 708 F.2d 436, 441 (9th Cir. 1983).

[5] *See also, Craft v. County of San Bernardino*, No. EDCV05-00359 SGL, 2008 WL 916965 (C.D. Cal. Apr 01, 2008 (approving a multiplier of 5.2 and stating that "there is ample authority for such awards resulting in multipliers in this range or higher"); *In re Trilogy Sec. Litig.*, C-84-20617(A) (N.D. Cal. 1986) (cited in 3 Newberg & Conte, Newberg on Class Actions, § 1403, at 14-5 n.20) (multiplier of 4.37); *Keith v. Volpe*, 86 F.R.D. 565, 575-77 (C.D. Cal.1980) (awarding multiplier of 3.5); *Underwood v. Pierce*, 79-1318-HP (3.5 multiplier) (C.D. Cal. 1983); and *Steiner v. American Broadcasting Co., Inc.*, 248 Fed. Appx. 780 (9th Cir. Aug 29, 2007) (affirming a lodestar multiplier of 6.85 in common fund case).

(position)	PRACTICE		RATE	
J. Jacobs (partner: Jacobs Kolton, Chtd.)	37 years	983.3	$605	$ 594,897
B. Kolton (partner: Jacobs Kolton, Chtd.)	11 years	625.3	$450	$ 281,385
J. Edelson (Managing Partner: Edelson McGuire)	14 years	150.7	$565	$85,145.50
M. McGuire (Partner: KamberEdelson)	9 years	384.7	$495	$190,426.50
R. Andrews (associate: Edelson McGuire)	5 years	230.9	$380	$87,742.00
S. Teppler (partner: Edelson McGuire)	30 years	64.1		
M. McMorrow (partner: Edelson McGuire)	10 years	62.1	$470	$29,187.00
B. Richman (associate: Edelson McGuire)	1 year	31.9	$290	$9,251.00
Law Clerks / Paralegal / Legal Assistants		106.9	Varies	$ 17,009.00
TOTAL		**2,639.9**		**$ 1,323,888**

The attorneys performing work on this litigation are billed at rates that correlate to their respective experience, that are reasonable in the Chicago and California legal markets, are what they charge their hourly clients, and have been approved by state and federal courts in similar settlements. (*See* Edelson Decl. ¶¶ 15-16; Jacobs Decl. ¶¶ 9-10.) Although two firms were primarily involved in the litigation of this matter, both made conscious effort to minimize the duplication of work in this matter. (Jacobs Decl. ¶ 11; Edelson Decl. ¶ 12.) Further, the hours submitted were reviewed

1 and any unnecessary hours or duplicative hours have been adjusted. (Edelson Decl. ¶
2 16.) Therefore, Class Counsel's base lodestar amount is $ 1,323,888.[6]
3 Before considering the expenses Class Counsel incurred prosecuting this matter, it is
4 apparent that a multiplier of at least 2.0 to the base lodestar is warranted in this case. Class
5 Counsel's willingness to undertake this litigation was risky, and despite such risk, an exceptional
6 result was achieved for the class. Notably, each class member is entitled to a $175 cash payment,
7 and $250,000 is going to charity as a form of *cy pres*. Plaintiffs' claims were largely untested and
8 the amount in controversy was substantial, and Class Counsel agreed to commence this litigation
9 knowing they would assuredly face significant opposition. (Jacobs Decl. ¶ 3.) Indeed,
10 throughout the litigation Defendants' counsel mounted a vigorous opposition. (Jacobs Decl. ¶ 7.)
11 As noted above, the rates employed by Class Counsel are their normal billing rates and they would
12 not have brought this action absent the prospect of a multiplier on their actual fees expended.
13 (Jacobs Decl. ¶¶ 9-10.) Analysis of novel issues, significant investigation, discovery, appeal, and
14 careful and extended negotiation of the final settlement agreement were required to ensure a
15 substantial benefit to class, and that is in fact what the class got. Accordingly, Class Counsel's
16 base lodestar of $ 1,323,888 warrants a multiplier of at least the roughly 2.0 that is effectively
17 requested here, which is commonly awarded and reasonable given the result obtained.
18 In addition to this amount, or such other amount awarded by Your Honor, Class Counsel
19 have expended $ 71,361.17 in reimbursable expenses, such as filing fees, appearance fees, expert
20 consulting charges, travel, copying, case administration, and ordering of deposition transcripts,
21 with more expenses yet to come. (Edelson Decl. ¶ 17; Jacobs Decl. ¶ 12.) Therefore, Class
22 Counsel requests the Court approve as reasonable the agreed-upon fees and expenses of
23 $2,725,000.
24
25
26 [6] Class Counsel anticipate at least an additional $25,000 in time and expenses to be incurred
27 through final approval of the settlement and the expiration of the claims deadline, which is <u>not</u> included in the base lodestar.
28

1 **VI. THE COURT SHOULD APPROVE THE AGREED-UPON INCENTIVE AWARDS**

2 The Settlement provides that, subject to Court approval, Class Representative Laci
3 Satterfield is to receive an award of $25,000 and Class Representatives Carmella Miller and
4 Charlene Kouf are to receive an award of $5,000 each. (Dkt. 112-1, ¶ 8.4.) "[N]amed plaintiffs,
5 as opposed to designated class members who are not named plaintiffs, are eligible for reasonable
6 incentive awards." *Knight v. Red Door Salons, Inc*, No. 08-01520 SC, 2009 WL 248367, at *7
7 (N.D. Cal. Feb. 2, 2009) (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003)). The
8 Court has discretion to approve any incentive award and should consider relevant factors,
9 including: (1) the actions the plaintiff has taken to protect the interests of the class; (2) the degree
10 to which the class benefited from those actions; (3) the amount of time and effort the plaintiff
11 expended in pursuing the litigation; and (4) reasonable fears of workplace retaliation. *Staton*, 327
12 F.3d at 977; *see also Garner*, 2010 WL 1687832, *17 (approving award of $20,000 to a class
13 representative who exhibited strong commitment to the Class by subjecting herself to public
14 attention, appearing for deposition where personal affairs and sensitive subjects were discussed,
15 attending hearings, reviewing major pleasing, and aiding in several sets of discovery).

16 Laci Satterfield's award, which has been agreed upon and to which there is no objection
17 despite having been expressly disclosed in the extensive class notice, is entirely reasonable and
18 appropriate given that Ms. Satterfield's involvement in this action was critical to the ultimate
19 success of this case. (*See* Jacobs Decl. ¶ 5.) In fact, prior to the agreement in principle of the
20 terms of the class relief and procedures, the parties never discussed incentive awards of any type.
21 (Jacobs Decl. ¶ 6.). Ms. Satterfield exhibited a willingness to participate and undertake the
22 responsibilities and risks attendant with bringing a representative action, despite the fact that Ms.
23 Satterfield was subject to great public scrutiny and personal risk for her involvement. Ms.
24 Satterfield, a retired police officer, appeared for her deposition where her son and other personal
25 affairs were discussed, she attended the first scheduled mediation between the parties, and she
26 aided Class Counsel with several sets of discovery, including matters of considerable emotional
27 difficulty for her. (Jacobs Decl. ¶ 5.) Further, personal information about Ms. Satterfield was
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1 made public in court filings, in media outlets across the country, and appeared as the subject of a
2 law review article. (Edelson Decl. ¶ 20). Nonetheless, Ms. Satterfield continued to assist Class
3 Counsel in their prosecution of this matter. (Jacobs Decl. ¶ 5.) Class Counsel therefore request
4 that the Court approve the agreed-upon incentive award of $25,000.

5 Given their later involvement in the action, Class Representatives Carmella Miller and
6 Charlene Kouf are, subject Court approval, to receive an award of $5,000 each under the agreed-
7 upon terms of the settlement, fully disclosed to the Class by the extensive notice that was given.
8 As noted above, prior to the agreement in principle of the terms of the class relief and procedures,
9 the parties never discussed incentive awards of any type. (Jacobs Decl. ¶ 6.) Ms. Miller and Ms.
10 Kouf also showed a strong commitment to the Class and this action by assisting Class Counsel in
11 answering lengthy discovery, preparing amended pleading and aiding in preparation for the
12 mediation that resulted in this settlement. (Edelson Decl. ¶ 19.) Accordingly, Class Counsel
13 request the Court approve the agreed-upon incentive awards of $5,000 for each of these
14 representative plaintiffs.

15 **VII. CONCLUSION**

16 For the foregoing reasons, Plaintiffs respectfully ask that the Court grant final approval to
17 the settlement agreement, find that the agreed-upon attorneys' fees and expenses and incentive
18 awards are reasonable, enter the proposed Final Approval order separately submitted herewith, and
19 grant such further relief the Court deems reasonable and just.

20

21 Dated: July 20, 2010 Respectfully Submitted,

22 LACI SATTERFIELD, CARMELLA MILLER, and
23 CHARLENE KOUF, individually and on behalf of a class of similarly situated individuals,

24 /s/ John G. Jacobs

25

26 John G. Jacobs (*Pro Hac Vice)*
Bryan G. Kolton (*Pro Hac Vice)*
27 JACOBS KOLTON, Chtd.
122 South Michigan Avenue, Suite 1850
28 Chicago, Illinois 60603

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Jay Edelson (*Pro Hac Vice*)
Ryan D. Andrews (*Pro Hac Vice)*
EDELSON MCGUIRE, LLC
350 N. LaSalle Street, Ste. 1300
Chicago, Illinois 60654

Sean Reis (SBN 184044)
sreis@edelson.com
EDELSON MCGUIRE, LLP
30021 Tomas Street, Suite 300
Rancho Santa Margarita, California 92688

1 **CERTIFICATE OF SERVICE**

2 I, John G. Jacobs, an attorney, certify that on July 20, 2010, I served the above and
3 foregoing ***Notice of Motion and Motion for Final Approval of Class Action Settlement***
4 ***Agreement and Award of Attorneys' Fees and Incentive Awards*** by causing true and accurate
5 copies of such paper to be filed and transmitted to the persons registered to receive such notice via
6 the Court's CM/ECF electronic filing system.
7
8 /s/ John G. Jacobs
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RULE 45 CERTIFICATION

Pursuant to the provisions of Section X.B of the Northern District of California's General Order No. 45, I certify that I, John G. Jacobs, have obtained the concurrence of each person whose signature appears on any affidavit or declaration herein (Jay Edelson, Risa Neiman, Christopher Turner, James A. Lerner, Breona Lantz and Howard Kramer) either directly or, in the case of Lerner, Lantz and Kramer, through signatory Neiman.

Dated: July 20, 2010

/s/ John G. Jacobs
John G. Jacobs

EXHIBIT F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

VICTOR LOZANO, individually and on behalf of a class of similarly situated individuals,	)	
Plaintiff,	)	No. 09-CV-6344
v.	)	Honorable Amy J. St. Eve
TWENTIETH CENTURY FOX FILM CORP., a Delaware corporation, TWENTIETH CENTURY FOX HOME ENTERTAINMENT LLC D/B/A FOXSTORE.COM, a Delaware limited liability company,	)	
Defendants.	)	

FINAL JUDGMENT AND ORDER OF DISMISSAL WITH PREJUDICE

This matter coming to be heard on Plaintiffs' Uncontested Motion & Memorandum in Support of Final Approval of Class Action Settlement, Approval of Attorneys' Fees, Incentive Award, due and adequate notice having been given to the Settlement Class, and the Court having been fully advised in the premises, it is HEREBY ORDERED, ADJUDGED and DECREED as follows:

1. Terms and phrases in this Order shall have the same meaning as ascribed to them in the Class Acton Settlement Agreement ("Settlement Agreement.")

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

3. On November 17, 2010, this Court granted preliminarily approval the Settlement Agreement and certified the Settlement Class consisting of:

> All Persons Nationwide who in September or October of 2005 were sent a text message that stated:
> GEAR UP 4 THE HILARIOUS ANIMATED FILM ROBOTS ON DVD @FOXSTORE.COM. TAKE AN EXTRA $5 OFF THE ALREADY LOW PRICE BY USING COUPON CODE ROBOFOX PWRDBYZINGY

(Dkt. 57, ¶ 2.) Excluded from the Settlement Class are those persons who have submitted valid and timely requests for exclusion pursuant to the Preliminary Approval Order and the Notice sent to Settlement Class Members. Annexed hereto as Appendix 1 is a schedule of all such persons excluded from the Settlement Class.

4. This Court now gives final approval to the settlement and finds that the Settlement Agreement is fair, reasonable, adequate, and in the best interests of the Settlement Class. Specifically, the complex legal and factual posture of this case, and the fact that the Settlement Agreement is the result of arms' length negotiations presided over by a neutral mediator support this finding. The Class Representative and Class Counsel adequately represented the Settlement Class for purposes of entering into and implementing the Settlement Agreement. Accordingly, the Settlement Agreement is hereby finally approved in all respects, and the Parties are hereby directed to perform its terms. The Settlement Agreement and every term and provision thereof shall be deemed incorporated herein as if explicitly set forth, and shall have the full force of an Order of this Court.

5. The Court approved Notice to the Settlement Class, as set forth in the Preliminary Approval Order on November 17, 2010, was the best notice practicable under the circumstances, including individual notice via U.S. Mail to the class members whose addresses were obtained through reasonable efforts with records in Defendants' custody or control, nationwide newspaper publication, website publication, targeted on-line advertising, and a press release. The Notice has been successfully implemented and satisfies the requirements of Federal Rule of Civil Procedure 23 and Due Process.

6. The Court finds that the Defendants properly and timely notified the appropriate state and federal officials of the Settlement Agreement, pursuant to the Class Action Fairness

Act of 2005 ("CAFA"), 28 U.S.C. § 1715. The Court has reviewed the substance of Defendants' notices and accompanying materials, and finds that they complied with all applicable requirements of CAFA.

7. Subject to the terms and conditions of the Settlement Agreement, this Court hereby dismisses the Action on the merits and with prejudice.

8. Upon the Effective Date of this settlement, the Plaintiffs and each and every Settlement Class Member who did not opt out of the Settlement Class (whether or not such members submit claims) and to the extent the Settlement Class Member is not an individual, all of its present, former, and future direct and indirect parent companies, affiliates, subsidiaries, divisions, agents, franchisees, successors, predecessors-in-interest, and all of the aforementioned's present, former, and future officers, directors, employees, shareholders, attorneys, agents, independent contractors; and, to the extent the Settlement Class Member is an individual, any present, former, and future spouses, as well as the present, former, and future heirs, executors, administrators, representatives, agents, attorneys, partners, successors, predecessors-in-interest, and assigns of each of them, shall be deemed to have released Defendants Twentieth Century Fox Film Corp. and Twentieth Century Fox Home Entertainment LLC, sued as "Twentieth Century Fox Home Entertainment LLC D/B/A FoxStore.com," as well as ipsh!net, Inc. ("ipsh!") and any and all of their respective present or past heirs, executors, estates, administrators, predecessors, successors, assigns, parents, subsidiaries, affiliates, associates, employers, employees, agents, consultants, independent contractors, insurers, directors, managing directors, officers, partners, principals, members, attorneys, accountants, financial and other advisors, investment bankers, underwriters, shareholders, lenders, auditors, investment advisors, legal representatives, successors in interest, assigns and Persons, firms,

trusts, corporations, officers, directors, other individuals or entities in which any of the Defendants or ipsh! has a controlling interest or which is affiliated with any of them, or any other representatives of any of these Persons and entities, from any and all actual, potential, filed, known or unknown, fixed or contingent, claimed or unclaimed, suspected or unsuspected, claims, demands, liabilities, rights, causes of action, contracts or agreements, extracontractual claims, damages, punitive, exemplary or multiplied damages, expenses, costs, attorneys' fees and or obligations (including "Unknown Claims" as defined in the Agreement), whether in law or in equity, accrued or unaccrued, direct, individual or representative, of every nature and description whatsoever, whether based on the TCPA or other federal, state, local, statutory or common law or any other law, rule or regulation, including the law of any jurisdiction outside the United States arising out of the facts, transactions, events, matters, occurrences, acts, disclosures, statements, misrepresentations, omissions or failures to act regarding the alleged sending of the Text Message to the Settlement Class or that were or could have been alleged or asserted in the Action relating to such Text Message.

9. Upon the Effective Date the above release of Claims and the Settlement Agreement will be binding on, and have *res judicata* and preclusive effect in all pending and future lawsuits or other proceedings maintained by or on behalf of Plaintiff and all other Settlement Class Members, Releasing Parties, and their heirs, executors and administrators, successors and assigns. All Settlement Class Members who have not been properly excluded from the Settlement Class are hereby permanently barred and enjoined from filing, commencing, prosecuting, intervening in, or participating (as class members or otherwise) in, any lawsuit or other action in any jurisdiction based on or arising out of the sending or receipt of the Text Message.

10. The Court approves the agreed-upon Fee Award to Class Counsel in the amount of $3,750,000.00, which the Court finds to be fair and reasonable. The Fee Award shall be paid pursuant to and in the manner provided by the terms of the Settlement Agreement.

11. The Court approves the payment by Defendants of $15,000.00 to the Class Representative Victor Lozano as an incentive award for taking on the risks of litigation and helping achieve the results to be made available to the Settlement Class. Such payment shall be made pursuant to and in the manner provided by the terms of the Settlement Agreement.

12. The Parties shall bear their own costs and attorneys' fees, except as otherwise provided in the Settlement Agreement and this Order.

13. This Court hereby directs the entry of this Final Judgment based upon the Court's finding that there is no just reason for delay of enforcement or appeal of this Final Judgment notwithstanding the Court's retention of jurisdiction to oversee implementation and enforcement of the Settlement Agreement.

14. This Final Judgment and order of dismissal with prejudice, the Settlement Agreement, the settlement that it reflects, and any and all acts, statements, documents, or proceedings relating to the Settlement Agreement are not, and shall not be construed as, or used as an admission by or against Defendants of any fault, wrongdoing, or liability on any Defendant's part, or of the validity of any Claim or of the existence or amount of damages.

15. The Parties, without further approval from the Court, are hereby permitted to agree to and adopt such amendments, modifications and expansions of the Settlement Agreement and its implementing documents (including all exhibits to the Settlement Agreement) so long as they are consistent in all material respects with the Final Judgment and do not limit the rights of Settlement Class Members.

16. Without affecting the finality of this Judgment in any way, this Court hereby retains continuing jurisdiction over, *inter alia*, (a) implementation, enforcement, and administration of the Settlement Agreement, including any releases in connection therewith; (b) resolution of any disputes concerning class membership or entitlement to benefits under the terms of the Settlement Agreement; and (c) all parties hereto, for the purpose of enforcing and administering the Settlement Agreement and the Action until each and every act agreed to be performed by the parties has been performed pursuant to the Settlement Agreement.

It is so ordered, this 15th day of April 2011.

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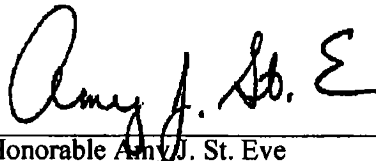

Honorable Amy J. St. Eve
United States District Court Judge