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**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

ARI FRIEDMAN, INDIVIDUALLY) Case No. CV13-00818 CBM (ANx)
AND ON BEHALF OF ALL)
OTHERS SIMILARLY SITUATED,) CLASS ACTION

Plaintiff,) **NOTICE OF AND PLAINTIFF'S**
) **MOTION FOR FINAL APPROVAL**
) **OF CLASS ACTION**
) **SETTLEMENT**

vs.)

) **Date: June 30, 2014**
) **Time: 2:30pm**
LAC BASKETBALL CLUB, INC.,) Ctrm: 2
)
Defendant.) **Hon. Consuelo B. Marshall**
)
)
)

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1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on June 30, 2014, at 2:30 p.m., before the
3 United States District Court, Central District of California, Courtroom 2, 312 N.
4 Spring Street, Los Angeles, CA 90012, Plaintiff ARI FRIEDMAN (“Plaintiff”)
5 will move this Court for an order granting final approval of the class action
6 settlement detailed in Plaintiff’s memorandum of points and authorities.

7 This Motion is based upon this Notice, the accompanying Memorandum of
8 Points and Authorities, the declarations and exhibits thereto, the Complaint, all
9 other pleadings and papers on file in this action, and upon such other evidence
10 and arguments as may be presented at the hearing on this matter.

11
12 Respectfully submitted this 2nd day of June 2014.

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

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16 By: /s/ Todd M. Friedman
17 Todd M. Friedman
18 Attorney for Plaintiff
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1 **CERTIFICATION OF COMPLIANCE WITH LOCAL RULE 7-3**

2 Plaintiff’s counsel certifies that prior to filing the instant motion, the
3 parties, through counsel, met and conferred pertaining to the contents of the
4 instant motion. Defendant does not oppose Plaintiff’s motion and requested
5 relief and will file a statement confirming same.

6
7 Respectfully submitted this 2nd day of June 2014.

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

9
10 By: /s/ Todd M. Friedman

11 Todd M. Friedman
12 Attorney for Plaintiff

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. INTRODUCTION.....6

II. FACTS AND PROCEDURAL HISTORY.....9

A. CLASS ALLEGATIONS.....9

B. SETTLEMENT.....9

C. CAFA NOTICES.....10

D. REQUEST FOR ENTRY OF PRELIMINARY APPROVAL ORDER.....10

E. ATTORNEYS’ FEES, COSTS AND INCENTIVE PAYMENTS APPLICATION.....10

F. FAIRNESS HEARING.....10

III. PROPOSED CLASS ACTION SETTLEMENT TERMS.....11

A. CERTIFICATION OF A FED. R. CIV. P. 23(B)(3) SETTLEMENT CLASS.....11

B. SETTLEMENT BENEFITS.....11

C. THE NOTICE PROVISIONS.....13

1. DIRECT MAIL NOTICE PROVIDED.....13

2. THE NOTICE WAS POSTED ON THE SETTLEMENT WEBSITE.....14

3. PUBLICATION NOTICE.....14

D. CLAIMS PROCEDURE AND CLAIMS FILED.....14

E. EXCLUSIONS.....15

F. OBJECTIONS.....15

G. CLASS REPRESENTATIVE PAYMENT.....15

H. CLASS COUNSEL’S ATTORNEYS’ FEES, COSTS, AND EXPENSES.....16

IV. ARGUMENT.....16

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**A. THE PROPOSED SETTLEMENT IS FUNDAMENTALLY FAIR,
REASONABLE, AND ADEQUATE.....16**

**B. THE STRENGTH OF THE LAWSUIT AND THE RISK, EXPENSE,
COMPLEXITY, AND LIKELY DURATION OF FURTHER
LITIGATION.....18**

C. THE VALUE OF THE SETTLEMENT.....19

D. THE EXTENT OF DISCOVERY COMPLETED.....21

E. THE EXPERIENCE AND VIEWS OF CLASS COUNSEL.....21

**F. THE REACTION OF THE CLASS MEMBERS TO THE PROPOSED
SETTLEMENT.....22**

V. CONCLUSION.....23

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiff ARI FRIEDMAN, (“Plaintiff” or “Class Representative”), submits
3 this memorandum in support of his unopposed Motion for Final Approval of
4 Class Action Settlement. Defendant LAC BASKETBALL CLUB, INC. (“LAC”
5 or “Defendant”) do not oppose this motion and is expected to file a statement to
6 that effect.

7 **I. INTRODUCTION**

8 This Settlement is an excellent result and merits final approval. The
9 Settlement set forth in the Class Action Settlement Agreement and Release
10 (hereinafter referred to as the “Agreement” or “Agr.”) provides, on a claims-made
11 basis, that all class members who submit a valid claim, can receive *either* of
12 following:

13 A). Two (2) free tickets to one (1) Los Angeles
14 Clippers’ home game at the Staples Center in Los
15 Angeles, California for a game to be played on October
16 8, 17, 22 or 24, 2014 (located predominantly in
17 Sections 301-334) (“Two Ticket Option”). The Two
18 Ticket Option has a fair market value of between \$30-
19 \$50 (face value of each ticket will be between \$15 and
20 \$25 each); *or*;

21 B). One (1) free ticket to one (1) Los Angeles Clippers’
22 home game at the Staples Center in Los Angeles,
23 California for a game to be played on October 8, 17, 22
24 or 24, 2014 (located predominantly in Sections 301-
25 334) (the single ticket has a fair market value of
26 between \$15-25), *and* a savings voucher in the amount
27 of twenty dollars (\$20) that can be used toward the
28 purchase of merchandise at the Team LA Store located
in the Staples Center, or at www.clippersstore.com
 (“Single Ticket Option”).

1 The Class Members have been informed of and had the opportunity to call
2 a toll free number or to go online to easily file a claim. But without adequate
3 notice, even that simple claims process would be meaningless, so this Settlement
4 also provided that the Class Members for whom addresses could be obtained
5 would receive a direct mail postcard summary notice. As of May 21, 2014,
6 addresses were obtained for 37,809 Class Members based solely upon their
7 respective cellular telephone numbers, and each of these Class Members was sent
8 a postcard summary notice via direct mail. Racines Final App. Decl., ¶ 4-6;
9 Contorno Final App. Decl., ¶ 7-10. Furthermore, in addition to direct mail notice,
10 notice was published in a nationwide periodical, USA TODAY, on two (2)
11 separate occasions. The costs of litigating this action, including Plaintiff's
12 attorneys' fees and the costs of notice and claims administration, are being paid
13 by LAC, and the tickets and/or savings vouchers are separate from LAC's
14 aforementioned payments. This means that all Class Members who submit a
15 valid claim will receive either tickets or savings vouchers, regardless of how
16 many claims are submitted. In other words, the value of the settlement benefits to
17 Class Members will not be diluted by the costs of settlement administration, the
18 attorneys' fees and costs to Plaintiff's counsel, or the number of claims that are
19 made.

20 In addition, the Settlement also has the effect of putting an end to conduct
21 alleged to be a violation of the TCPA. As a result of the Settlement, Defendant
22 agreed not to send "non-confirmatory" text messages to cellular telephones for a
23 period of twenty-four (24) months, preventing calls to cell phones for which there
24 is no prior express consent, thus resulting in a significant non-monetary benefit to
25 Class Members and non-Class Members alike. *Agr.*, § 4. Therefore, this is an
26 excellent result and should be given final approval by the Court.

27 On April 29, 2014, based upon the Agreement, the Preliminary Approval
28 Motion, and the record, the Court entered an Order of Preliminary Approval of

1 Class Action Settlement (hereinafter referred to as the “Preliminary Approval
2 Order”). (Dkt. No. 60). Pursuant to the Preliminary Approval Order, the Court,
3 among other things: (i) preliminarily certified (for settlement purposes only) a class
4 of plaintiffs (hereinafter referred to as the “Class Members”) with respect to the
5 claims asserted in the Action; (ii) preliminarily approved the proposed settlement;
6 (iii) appointed Plaintiff Ari Friedman as the Class Representative; (iv) appointed
7 Law Offices of Todd M. Friedman, P.C. as Class Counsel; and (v) set the date and
8 time of the Final Approval Hearing for June 30, 2014, at 2:30 P.M. (Dkt. No. 60).

9 As required by the Preliminary Approval Order, the Parties engaged a third
10 party class action administrator, Kurtzman Carson Consultants, LLC, (hereinafter
11 referred to as “KCC” or “Claims Administrator”), to assist in administration of
12 the class action settlement process. As detailed below, KCC disseminated the
13 summary and full notices which advised Class Members that, in order to receive
14 tickets or savings vouchers, they needed to call KCC’s toll-free number, submit a
15 claim online, or mail in a claim form no later than July 30, 2014. The summary
16 and full notices also advised Class Members that the deadline to exclude
17 themselves from the settlement or object was June 11, 2014. Racines Final App.
18 Decl., ¶ 4-12. KCC was also engaged to receive and process all claims and
19 requests for exclusion (“opt outs”). As of May 23, 2014, one (1) opt-out and zero
20 (0) objections were received. Racines Final App. Decl., ¶ 15-16.

21 Although no objections have been filed with the Court as of June 2, 2014,
22 the deadline for filing objections is June 11, 2014, which is nine (9) days after the
23 filing of this brief in support of final approval. Class Counsel will advise the
24 Court of any objections received after this date and will address them as needed.
25 In total, as of May 28, 2014, **751 claims, zero objections and one (1) opt-out,**
26 have been have been submitted by Class Members to KCC. Racines Final App.
27 Decl., ¶ 15-17.
28

1 Pursuant to Fed. R. Civ. P. 23(e), Plaintiff now seeks final certification and
2 approval of the proposed class action settlement. Specifically, Plaintiff requests
3 the Court enter a Final Order and Judgment similar to the proposed Order
4 submitted with this motion.

5 **II. FACTS AND PROCEDURAL HISTORY**

6 **A. CLASS ALLEGATIONS**

7 On February 6, 2013, Plaintiff filed this Action under the TCPA against
8 Defendant (Dkt. #1). Specifically, Plaintiff alleged that Defendant violated the
9 TCPA by sending automated text messages to his cellular telephone without
10 “prior express consent,” using an “automatic telephone dialing system” and using
11 an “artificial or prerecorded voice.” Plaintiff sought for himself and the putative
12 class \$500 per negligent violation and \$1,500 per willful violation, as well as
13 injunctive relief under 47 U.S.C. § 227(b)(3)(B) and § 227(b)(3)(C). On April 4,
14 2013, Defendant answered and denied all of the allegations and liability. (Dkt.
15 No. 8.). Furthermore, on June 28, 2013, Defendant filed a Motion for Judgment
16 on the Pleadings (“MJOP”) seeking to have the entire matter dismissed. (Dkt.
17 No. 11). Plaintiff filed his opposition to the MJOP on July 8, 2013 (Dkt. No. 12)
18 and further filed a Notice of Supplemental Authority on July 9, 2013 (Dkt. No.
19 13). On July 29, 2013, this Honorable Court denied Defendant’s MJOP. On
20 August 1, 2013, this Honorable Court confirmed the denial and further issued its
21 Scheduling Order. (Dkt. No. 23). On August 1, 2013, Plaintiff filed his Motion
22 for Class Certification. (Dkt. No. 22).

23 **B. SETTLEMENT**

24 In an earnest attempt to settle the Lawsuit and avoid the risks inherent in
25 proceeding to trial, the Parties discussed settlement on numerous occasions.
26 Counsel for the Parties also exchanged various offers and counteroffers through in-
27 person meetings, telephone conferences, a multitude of e-mails, and a full day
28 mediation session with Hon. Hon. Leo S. Papas (Ret.). Happily, the efforts of

1 Counsel to reach a compromise in the form of a proposed class settlement proved
2 fruitful; on December 13, 2013, approximately ten months after the case was
3 initially filed, the Parties were able to reach an understanding, the terms of which
4 are memorialized in the Agreement.

5 **C. CAFA NOTICES**

6 LAC has an obligation under the Class Action Fairness Act of 2005
7 (“CAFA”) to serve written notice of the proposed settlement on the U.S. Attorney
8 General and the Attorney General of each state. Defendant served the proper
9 CAFA notice as required by the Court on March 13, 2014. Chernila Final App.
10 Decl., ¶ 3.

11 **D. REQUEST FOR ENTRY OF PRELIMINARY APPROVAL ORDER**

12 On March 4, 2014, the Plaintiff filed an unopposed Motion for Preliminary
13 Approval of Class Action Settlement (Dkt. No. 49). On April 29, 2014, the Court
14 entered the Preliminary Approval Order, preliminarily certifying the proposed class
15 and preliminarily approving the proposed class settlement (Dkt. No. 60).

16 **E. ATTORNEYS’ FEES, COSTS AND INCENTIVE PAYMENTS**

17 **APPLICATION**

18 At the Fairness Hearing, the Court will also consider Class Counsel’s
19 Motion for Attorney’s Fees, Costs of Litigation and Incentive Payments to named
20 Plaintiff (“Fee Brief”). Plaintiff’s Fee Brief will be filed concurrently. The
21 Plaintiff requests that the Court enter an Order similar to the Final Approval
22 Order submitted with this motion, which also includes a provision for such
23 requested attorneys’ fees, costs of litigation and incentive payments.

24 **F. FAIRNESS HEARING**

25 Per the Preliminary Approval Order, the Court set the Fairness Hearing for
26 June 30, 2013, 2:30 p.m., at the United States District Court for the Central
27 District of California, located at 312 N. Spring Street, Los Angeles, CA 90012,
28 Courtroom 2 (Dkt. No. 60).

1 **III. PROPOSED CLASS ACTION SETTLEMENT TERMS**

2 The significant terms of the proposed settlement are the following:

3 **A. CERTIFICATION OF A FED. R. CIV. P. 23(B)(3) SETTLEMENT CLASS**

4 The Preliminary Approval Order confirmed the following persons are in
5 the Settlement Class:

6 All persons within the United States who received an
7 unsolicited text message from LAC, which text
8 message was not made for emergency purposes or with
9 the recipient's prior express consent between February
10 6, 2009 and the date on which this Order is signed.

11 Preliminary Approval Order, p. 1:14-17.

12 **B. SETTLEMENT BENEFITS**

13 Under the Settlement, LAC agrees to provide each Settlement Class
14 Member who submits a Valid Claim, either of the following, at the Settlement
15 Class Member's election:

16
17 A). Two (2) free tickets to one (1) Los Angeles
18 Clippers' home game at the Staples Center in Los
19 Angeles, California for a game to be played on October
20 8, 17, 22 or 24, 2014 (located predominantly in
21 Sections 301-334) ("Two Ticket Option"). The Two
22 Ticket Option has a fair market value of between \$30-
\$50 (face value of each ticket will be between \$15 and
\$25 each); *or*;

23
24 B). One (1) free ticket to one (1) Los Angeles Clippers'
25 home game at the Staples Center in Los Angeles,
26 California for a game to be played on October 8, 17, 22
27 or 24, 2014 (located predominantly in Sections 301-
28 334) (the single ticket has a fair market value of
between \$15-25), *and* a savings voucher in the amount
of twenty dollars (\$20) that can be used toward the
purchase of merchandise at the Team LA Store located

1 in the Staples Center, or at www.clippersstore.com
2 (“Single Ticket Option”).

3
4 *Agreement* §2(A)-(E).

5 The free tickets claimed pursuant to the Two Ticket Option and Single
6 Ticket Option will be distributed on a first come first serve basis, and will be
7 filled beginning with the highest valued tickets in the specified sections
8 (approximately 8,000 tickets are available for the October 2014 home games). If
9 more free tickets are claimed than are available in the October 2014 home games
10 in the Sections specified in Paragraphs (2)(A)(i) and (2)(A)(ii) above (*i.e.* more
11 than 8,000 tickets), then LAC will have the election to either (1) make additional
12 tickets available in the October 2014 home games in order to fulfill the claims, or
13 (2) roll the claims for free tickets above the 8,000 cap over into Los Angeles
14 Clippers’ home games in October 2015 (at an approximate cap of an additional
15 6,000 tickets). The dates of the October 2015 home games have not yet been
16 determined. *Agreement* §2(B).

17 If more free tickets are claimed than are available in the October 2014 and
18 2015 home games combined (*i.e.*, more than 14,000 tickets), then LAC will have
19 the option to either: (1) make more tickets available in the October 2014 and/or
20 2015 home games; or (2) have the excess claims default to an award of a savings
21 voucher in the amount of forty dollars (\$40) (“Savings Voucher Alternative”).
22 The savings voucher in the amount of forty dollars (\$40) pursuant to the Savings
23 Voucher Alternative can be used toward the purchase of merchandise at the Team
24 LA Store located in the Staples Center, or on www.clippersstore.com. *Agreement*
25 §2(B).

26 If the proposed settlement is not approved by the Court with sufficient time
27 to distribute free tickets for the 2014 season then the benefits provided to the class
28 members as stated herein (free tickets and savings vouchers) will be advanced by
one year (*i.e.*, free tickets and savings vouchers will be for home games in

1 October 2015 and, if necessary, will roll over into home games in October 2016.
2 *Agreement* §2(C).

3 Thus, the class members with valid claims will receive goods and/or
4 savings vouchers with an average total value of \$40.00 per person whose cellular
5 telephone number is verified as being a number identified in LAC's records.
6 Furthermore, the Settlement Class will also receive the benefit of a proposed
7 stipulated injunction preventing such actions in the future for a period of 24
8 months. *Agreement* §4.

9 LAC also agrees to pay: 1) all costs of administrating the proposed
10 settlement to conclusion; 2) the proposed \$1,000 Incentive Payment to the
11 Plaintiff; and 3) the costs of litigation and legal fees incurred by Plaintiff's
12 counsel, not to exceed \$600,000.00. *Agreement* §5-7.

14 C. THE NOTICE PROVISIONS

15 1. DIRECT MAIL NOTICE PROVIDED

16 KCC complied with the notice procedure set forth in the Preliminary
17 Approval Order, p. 2, ¶ 8. As required by the Preliminary Approval Order, KCC
18 mailed individual postcard notices by direct mail to the Settlement Class members
19 that included a summary of the Settlement's terms, instructions for making a claim,
20 and information regarding a website address <http://www.lactcpasettlement.com/>
21 (hereinafter referred to as the "Settlement Website") and KCC's toll-free telephone
22 number to both receive calls regarding the Settlement and to file claims. Racines
23 Final. App. Decl., ¶¶ 11.

24 Through a "reverse lookup" of cellular telephone numbers of Settlement
25 Class Members, which was the only identifying information that the parties had,
26 names and addresses associated with 37,809 of the cellular telephone numbers
27 were identified, and summary notice of the proposed class settlement was mailed
28 to these Class Members. Contorno Final App. Decl., ¶ 8-10. Thus, based on

1 cellular telephone numbers alone, 37,809 – nearly one third – of the Class
2 Members with located addresses received direct mail notice of the Settlement.

3 **2. THE NOTICE WAS POSTED ON THE SETTLEMENT WEBSITE**

4 In compliance with the Preliminary Approval Order, KCC also posted on
5 the Settlement Website the detailed and full notice in a question and answer
6 format explaining the case, the proposed settlement, and each Class Member’s
7 options, *see* Preliminary Approval Order, p. 2, ¶ 8; Racines Final App. Decl., ¶ 8.
8 That website also contains the Settlement Agreement, the Preliminary Approval
9 Order, the direct mail notice and the lengthy long form notice in a “Frequently
10 Asked Questions” format. The website will also have these Final Approval briefs,
11 Fee Brief and supporting documents posted after filing.

12 **3. PUBLICATION NOTICE**

13 For the remaining Class Members who were not sent a direct mail notice
14 because their name and address information was not identified based on cellular
15 telephone numbers alone via the “reverse lookup”, these Class Members were
16 provided notice by other means, such as the approved notice published in the
17 national publication USA Today, published on May 5, 2014 and again on May
18 12, 2014. *See* Racines Final App. Decl., ¶¶ 10.

19 **D. CLAIMS PROCEDURE AND CLAIMS FILED**

20 The Class Members are provided until July 30, 2014 to make a claim for
21 tickets and/or savings vouchers (the direct mail notice was mailed May 1, 2014
22 and the claims deadline is July 30, 2014), and to submit an exclusion or file an
23 objection by June 11, 2014. Preliminary Approval Order, p. 2-3, ¶ 9. The claims
24 procedure was made as easy as possible – no paper claim form was necessary
25 unless someone wanted to use regular U.S. Mail to submit a claim form
26 downloaded from the Settlement Website. Friedman Final App. Decl., ¶ 15. All
27 that was required to file a claim was a call to a toll-free number or complete an
28 on-line submission to determine if the claimant’s cell phone number was called

1 and if so, a claim was then filed. *Id.* The deadline to submit a claim is July 30,
2 2014. In total, 751 claims have been filed as of May 28, 2014. Racines Final App.
3 Decl., ¶ 17.

4 The final amount of claims filed by the claims deadline and the number of
5 opt outs will be provided to the Court. All of these claims were examined and
6 validated by KCC. *Id.* Based upon the present number of claims in the amount of
7 751, each claimant will receive, at their election, tickets and/or savings vouchers,
8 as discussed below. Friedman Final App. Decl., ¶ 17 and 20. KCC will be
9 distributing the tickets and/or savings vouchers after final approval, and after the
10 final numbers relating to the Settlement Class are known.

11 **E. EXCLUSIONS**

12 KCC was also engaged to receive and process all claims and requests for
13 exclusion (“opt outs”). The Preliminary Approval Order required the Class
14 Members to send their requests for exclusion to KCC no later than June 11, 2014.
15 As of May 28, 2014, only one (1) exclusion has been received. *See* Racines Final
16 App. Decl., ¶ 15.

17 **F. OBJECTIONS**

18 The deadline for filing an objection to the Settlement is June 11, 2014.
19 Preliminary Approval Order, p. 3-4, ¶¶ 10. The Preliminary Approval Order
20 requires any objection to be filed with the Court and also served on counsel by
21 that date. As of May 28, 2014, Class Counsel reports no objections. If any
22 objections are filed and served after the date of this filing, Class Counsel will
23 advise the Court and respond accordingly. Friedman Final App. Decl., ¶ 19; *see*
24 *also* Racines Final App. Decl., ¶ 16.

25 **G. CLASS REPRESENTATIVE PAYMENT**

26 Pursuant to the Agreement, § 6, and subject to Court approval, Defendant
27 agrees Plaintiff may be paid an incentive award. Class Counsel has requested
28 only \$1,000.00 for the Class Representative, in recognition of his service in

1 bringing this action. Class Counsel will submit briefing on that issue in Plaintiff's
2 Fee Brief.

3 **H. CLASS COUNSEL'S ATTORNEYS' FEES, COSTS, AND EXPENSES**

4 Class Counsel is seeking a total sum of \$600,000.00 for all attorneys' fees
5 and costs incurred during the litigation. Plaintiff will be submitting a Fee Brief in
6 support of such an award concurrently with the instant brief. The Parties and their
7 counsel further represent and agree that allowance or disallowance by the Court
8 of the agreed-upon amount of \$600,000.00 for attorneys' fees and costs may be
9 considered by the Court separately from the Court's consideration of the fairness,
10 reasonableness, and adequacy of the settlement, and any order or proceedings
11 relating to the fees, costs, and/or expenses owed Class Counsel, or any appeal
12 from any order relating thereto, or reversal, or modification thereof, shall not
13 operate to terminate or cancel the Agreement, or affect or delay the finality of the
14 proposed Final Approval Order approving the Agreement and the settlement of
15 the Action. *Agr.* § 5.

16 **IV. ARGUMENT**

17 The Rule 23(a) and (b) factors were previously analyzed and applied by the
18 Plaintiff in his Motion for Preliminary Approval. *See* Docket No. 49. As the
19 Court ruled in its Preliminary Approval Order, this case satisfies the Rule 23
20 requirements. *See id.*

21 **A. THE PROPOSED SETTLEMENT IS FUNDAMENTALLY FAIR,**
22 **REASONABLE, AND ADEQUATE**

23 "Unlike the settlement of most private civil actions, class actions may be
24 settled only with the approval of the district court." *Officers for Justice v. Civil*
25 *Service Com'n of City and County of San Francisco*, 688 F.2d 615, 623 (9th Cir.
26 1982). "The court may approve a settlement . . . that would bind class members
27 only after a hearing and on finding that the settlement . . . is fair, reasonable, and
28 adequate." Fed. R. Civ. P. 23(e)(1)(C). The Court has broad discretion to grant

1 such approval and should do so where the proposed settlement is “fair, adequate,
2 reasonable, and not a product of collusion.” *Hanlon v. Chrysler Corp.*, 150 F.3d
3 1011, 1026 (9th Cir. 1998).

4 “To determine whether a settlement agreement meets these standards, a
5 district court must consider a number of factors, including: ‘the strength of
6 plaintiffs’ case; the risk, expense, complexity, and likely duration of further
7 litigation; the risk of maintaining class action status throughout the trial; the
8 amount offered in settlement; the extent of discovery completed, and the stage of
9 the proceedings; the experience and views of counsel; the presence of a
10 governmental participant; and the reaction of the class members to the proposed
11 settlement.’” *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003). “The
12 relative degree of importance to be attached to any particular factor will depend
13 upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief
14 sought, and the unique facts and circumstances presented by each individual
15 case.” *Officers for Justice*, 688 F.2d at 625. To determine whether the proposed
16 settlement is fair, reasonable and adequate, the Court must balance against the
17 continuing risks of litigation and the immediacy and certainty of a substantial
18 recovery. *See Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975); *In re Warner*
19 *Communications Sec. Litig.*, 618 F. Supp. 735, 741 (S.D. N.Y. 1985).

20 The Ninth Circuit has long supported settlements reached by capable
21 opponents in arms’ length negotiations. In *Rodriguez v. West Publishing Corp.*,
22 563 F.3d 948 (9th Cir. 2009), the Ninth Circuit expressed the opinion that courts
23 should defer to the “private consensual decision of the [settling] parties.” *Id.* at
24 965, citing *Hanlon, supra*, 150 F.3d at 1027 (9th Cir. 1998).

25 The district court must exercise “sound discretion” in approving a
26 settlement. *See Torrasi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir.
27 1993); *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980),
28 aff’d 661 F.2d 939 (9th Cir. 1981). However, “where, as here, a proposed class

1 settlement has been reached after meaningful discovery, after arm's length
2 negotiation conducted by capable counsel, it is presumptively fair." *M. Berenson*
3 *Co. v. Faneuil Hall Marketplace, Inc.*, 671 F. Supp. 819, 822 (D. Mass. 1987).

4 Application of the relevant factors here confirms that the proposed
5 settlement should be finally approved.

6 **B. THE STRENGTH OF THE LAWSUIT AND THE RISK, EXPENSE,**
7 **COMPLEXITY, AND LIKELY DURATION OF FURTHER LITIGATION**

8 Defendant has raised numerous defenses to the class claims. Many of these
9 defenses are set forth at length in Defendant's Answer and Motion for Judgment
10 on the Pleadings, which were filed with the Court. *See* Docket No. 8 and Docket
11 No. 11; *see also Agr.*, § A. Defendant avers that its defenses have merit and
12 would defeat the claims of the putative class. However, settlement eliminates any
13 further risk and expense for the Parties. Considering the potential risks and
14 expenses associated with continued prosecution of the Lawsuit, the probability of
15 appeals, the certainty of delay, and the ultimate uncertainty of recovery through
16 continued litigation, the proposed settlement is fair, reasonable, and adequate. *See*
17 Preliminary Approval Order, p. 1, ¶ 2. As the Ninth Circuit has made clear, the
18 very essence of a settlement agreement is compromise, "a yielding of absolutes
19 and an abandoning of highest hopes." *Officers for Justice*, 688 F.2d at 624.
20 "Naturally, the agreement reached normally embodies a compromise; in exchange
21 for the saving of cost and elimination of risk, the parties each give up something
22 they might have won had they proceeded with litigation..." *Id.*

23 While Class Counsel believe strongly in the merits of their claims brought
24 on behalf of the class, they also recognize that any case encompasses risks and
25 that settlements of contested cases are preferred in this circuit. Moreover, even if
26 Plaintiffs were to prevail at trial, risks to the class remain. *See West Virginia v.*
27 *Chas. Pfizer & Co.*, 314 F. Supp. 710, 743-44 (S.D. N.Y. 1970) ("[i]t is known
28 from past experience that no matter how confident one may be of the outcome of

1 litigation, such confidence is often misplaced”), aff’d, 440 F.2d 1079 (2d Cir.
2 1971); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979)
3 (reversing \$87 million judgment after trial).

4 C. THE VALUE OF THE SETTLEMENT

5 The Agreement requires that Defendant provide each and every Class
6 Member who submits a timely, valid claim with tickets and/or savings voucher(s),
7 with an average value of \$40.00 per Class Member (i.e., each ticket has an
8 average value of \$20.00 and each savings voucher will have a value of \$20.00).
9 If each and every one of the 132,098 Class Members submitted a timely, valid
10 claim, this would equate to \$5,283,920.00 in value to the Settlement Class.
11 Friedman Final App. Decl. ¶ 20. This value to each Class Member is on par with
12 other TCPA settlements approved, and warrants final approval. *See Adams v.*
13 *AllianceOne Receivables Management, Inc.*, 08-CV-0248 JAH (WVG) (S.D. Cal)
14 (Class members received \$40 per claim).

15 Here there were a total of 37,809 Class members who were mailed a direct
16 notice postcard. Racines Final App. Decl., ¶ 11. The fact that only 2% of those
17 persons receiving such direct mail notice made valid claims as of May 28, 2014
18 should not deter the Court from approving the Settlement. Not only is there still
19 approximately sixty (60) days left for Class Members to submit claims, but this is
20 a consumer case and consequently subject to lower claims rates than other types
21 of cases. Friedman Final App. Decl., ¶ 17. Class Counsel used direct mail notice
22 to ensure as many of the Class Members were notified as possible with only
23 cellular telephone numbers available to identify the Class members. Friedman
24 Final App. Decl., ¶ 15; Racines App. Decl., ¶ 11.

25 In addition, the notice was also published in a national publication, USA
26 Today, on two (2) separate occasions. Racines Final App. Decl., ¶¶ 10.
27 Furthermore, there could not be an easier claims process for any claimant to file a
28 claim by allowing the Class Members to do so claim online. The Claim form

1 only required a confirmation of the class member's name and cellular telephone
2 number. Friedman Final App. Decl., ¶ 15. Thus, the fact that the number of
3 claims actually submitted to date is small does not affect the underlying fairness
4 of the settlement.

5 As the court held in *Beecher v. Able*, 441 F. Supp. 426, 429 (S.D. N.Y.
6 1977), where a much smaller number of claims was made in a class action than
7 expected, “[i]n such circumstances, the settlement agreement should not lightly
8 be set aside merely because subsequent developments have indicated that the
9 bargain is more beneficial to one side than to the other.” In that case, the
10 defendant urged the court to set aside the non-reversionary settlement agreement
11 because the total settlement amounts would be paid not back to defendant but to a
12 much smaller group of claimants than the parties expected. The court refused to
13 set aside the agreement, especially since the parties had built contingencies into
14 the agreement in the event of high or low number of claims, as was done in the
15 present case, and thus any mistakes were only a matter of degree, not to the heart
16 of the matter. *Id.* at 430.

17 In this case, regardless of the number of claims, either potential or submitted,
18 the Defendants are required to provide each and every Class Member who submits
19 a claim, tickets and/or savings vouchers in addition to being required to pay all
20 attorneys’ fees and costs approved by the Court, a Class Repetitive incentive
21 award approved by the Court and all claims administration costs. In the context of
22 the facts surrounding this Action, such an amount of represents a significant sum of
23 money. This payment is likely to discourage any future behavior that could
24 potentially violate the TCPA; in fact, it will encourage compliance with the law, as
25 explained in Plaintiffs’ Fee Brief.

26 Ultimately, the Settlement established by the Agreement here will serve both
27 of the intended purposes of compensating the Class Members for their injuries and
28 deterring future wrongful conduct. This settlement creates an incentive for

1 businesses to comply with the TCPA, which benefits the Class Members,
2 consumers in general, as well as compliant competitive businesses. *See* David R.
3 Hodas, *Enforcement of Environmental Law in A Triangular Federal System: Can*
4 *Three Not Be A Crowd When Enforcement Authority Is Shared by the United*
5 *States, the States, and Their Citizens?*, 54 Md. L. Rev. 1552, 1657 (1995)
6 (“[A]llowing a violator to benefit from noncompliance punishes those who have
7 complied by placing them at a competitive disadvantage. This creates a
8 disincentive for compliance.”). Thus, the Settlement should be approved by the
9 Court as fair and reasonable.

10 **D. THE EXTENT OF DISCOVERY COMPLETED**

11 This case settled after extensive discovery and a mediation session
12 conducted months apart to enable the Parties to ascertain the full extent of the
13 Class. Class Counsel conducted both formal and informal discovery as well as
14 confirmatory discovery. The important information needed in these cases is how
15 many cell phones were called during the Class Period and to whom were the calls
16 made. This information was obtained through informal, formal and confirmatory
17 discovery and the numbers were confirmed by and through Class Counsel’s
18 discovery efforts. *See* Friedman Final App. Decl., ¶¶ 2-9. Thus, the litigation had
19 reached the stage where “the parties certainly have a clear view of the strengths
20 and weaknesses of their cases.” *Warner Communications*, 618 F. Supp. at 745.
21 Further, considering that the disputed issues between the Parties are legal, and not
22 factual, in nature, the Parties have exchanged sufficient information to make an
23 informed decision about settlement. *See Linney v. Cellular Alaska Partnership*,
24 151 F.3d 1234, 1239 (9th Cir. 1998).

25 **E. THE EXPERIENCE AND VIEWS OF CLASS COUNSEL**

26 Moreover, “[t]he recommendations of plaintiffs’ counsel should be given a
27 presumption of reasonableness.” *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622
28 (N.D. Cal. 1979). The presumption of reasonableness in this action is fully

1 warranted because the settlement is the product of arm's length negotiations
2 conducted by capable, experienced counsel. *See M. Berenson Co.*, 671 F. Supp.
3 at 822; *Ellis*, 87 F.R.D. at 18 (“the fact that experienced counsel involved in the
4 case approved the settlement after hard-fought negotiations is entitled to
5 considerable weight”); 2 Newberg on Class Actions § 11.24 (4th Ed. & Supp.
6 2002); *Manual for Complex Litigation*, Fourth § 30.42.

7 Here, it is the considered judgment of experienced counsel that this
8 settlement is a fair, reasonable and adequate settlement of the litigation. As set
9 forth in the declarations attached to the Motion for Preliminary Approval and in
10 support of their Fees Brief, Class Counsel are experienced consumer class action
11 lawyers (*see* Dkt. No. 49). This settlement was negotiated at arms'-length by
12 experienced and capable Class Counsel who now recommends its approval.
13 Given their experience and expertise, Class Counsel are well-qualified to not only
14 assess the prospects of a case, but also to negotiate a favorable resolution for the
15 class. Class Counsel have achieved such a result here, and unequivocally assert
16 that the proposed settlement should receive final approval. Friedman Final App.
17 Decl., ¶¶ 20-22.

18 **F. THE REACTION OF THE CLASS MEMBERS TO THE PROPOSED**
19 **SETTLEMENT**

20 The absence of any valid objection, at least to the date of filing this brief,
21 by a Class Member is an important factor in evaluating the fairness,
22 reasonableness and adequacy of the settlement and supports approval of the
23 settlement. *See Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974);
24 *Warner Communications*, 618 F. Supp. at 746. In fact, the lack of objections may
25 well evidence the fairness of the settlement. *See In re PaineWebber Ltd. Litig.*,
26 171 F.R.D. 104, 126 (S.D. N.Y.), *aff'd*, 117 F.3d 721 (2d Cir. 1997).

27 Here, there has been no resistance to the proposed settlement, and 751
28 Class Members have filed valid claims. No Class Member has filed an objection

1 to date. It is also worth noting that only one (1) Class Member requested
2 exclusion. Racines Final App. Decl., ¶ 15-17. Furthermore, the absence of
3 objections and *de minimus* requests for exclusion from Class Members reinforces
4 the notion that the proposed settlement is worthy of approval. Also, the Class
5 Representative supports this motion. *See* Declaration of Ari Friedman in Support
6 of Final Approval of Class Action Settlement.

7 **V. CONCLUSION**

8 The Parties have reached this Settlement following extensive arms' length
9 negotiations. When adding up the average \$40.00 value available to each Class
10 Member who submits a valid claim, this Settlement is worth over \$5,000,000.00.
11 Thus, the Settlement is fair and reasonable. For the foregoing reasons, Plaintiff
12 respectfully requests that the Court:

- 13 1. Grant approval of the proposed settlement;
- 14 2. Grant the motion for fees and costs scheduled to be heard the same date
15 as this motion;
- 16 3. Enter the proposed Final Approval Order submitted; and
- 17 4. Retain continuing jurisdiction over the implementation, interpretation,
18 administration and consummation of the Settlement.

19
20 Respectfully submitted this 2nd day of June, 2014.

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

22
23 By: /s/ Todd M. Friedman

24 Todd M. Friedman
25 Attorney for Plaintiff
26
27
28

PROOF OF SERVICE

I, Todd M. Friedman, state the following:

I am employed in Los Angeles, California; I am over the age of 18 and am not a party to this action; my business address is 324 S. Beverly Dr., Ste. 725, Beverly Hills, CA 90212. On June 2, 2014, I served the following documents:

NOTICE OF AND PLAINTIFF’S MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT; DECLARATION OF TODD M. FRIEDMAN; DECLARATION OF LACEY RACINES; DECLARATION OF RON CONTORNO; DECLARATION OF JEANNE M. CHERNILA; DECLARATION OF ARI FRIEDMAN

On the parties listed below:

ADRIANNE E. MARSHACK
E-mail: AMarshack@katzyoon.com
4 Park Plaza, Ste. 1040
Irvine, CA 92614

By the following means of service:

BY ELECTRONIC CASE FILING: I filed the submitted the document listed above via the court’s Electronic Case Filing (ECF) system which provides electronic mail (email) service of the listed document directly to the party listed above to his/her “email address of record.”

STATE: I declare under penalty of perjury under the laws of California that the above is true and correct.

Executed on June 2, 2014, at Beverly Hills, California.

By: /s/ Todd M. Friedman
Todd M. Friedman