EXHIBIT 1

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GRACE MURRAY, AMANDA ENGEN, JEANNE TIPPET, STEPHEN BAUER, ROBIN TUBESING, NIKOLE SIMECEK, MICHELLE MCOSKER, JACQUELINE GROFF, and HEATHER HALL, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

GROCERY DELIVERY E-SERVICES USA INC. DBA HELLO FRESH,

Defendant.

Case No. 19-cv-12608-WGY

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

INTRODUCTION

Ms. McDonald, represented by counsel who has helped her object to other class action settlements across the country, does not dispute that the fourteen-million-dollar ($14,000,000) common fund is the largest settlement in Massachusetts federal court history for a Telephone Consumer Protection Act[1] ("TCPA") class case. Similarly, Ms. McDonald does not dispute that the Hon. George H. King (Ret.), the former Chief Judge of the U.S. District Court for the Central District of California, oversaw and guided the settlement negotiations through a mediation. She instead implies that Judge King must be complicit or ignorant to the nefarious goal she projects onto Class Counsel and the nine plaintiffs, one of whom is an attorney for the Department of Justice, namely to enter into a collusive settlement designed to enrich only themselves. However, there is no basis to make such a serious accusation. The Court should overrule Ms. McDonald's objection and order final approval of the Class Action Settlement.

ARGUMENT

I. Ms. McDonald's Opposition Downplays Litigation Risks with the NDNCR Claim.

Ms. McDonald asserts the Class Settlement—again the *largest* in Massachusetts federal court history for a TCPA claim—should have been larger because she believes claims for violations of the National Do Not Call Registry ("NDNCR") were more valuable than the $89 per Settlement Class Member and that NDNCR claims should be paid at a higher rate than the ATDS or Internal Do Not Call claims. Ms. McDonald's argument is based on faulty logic.

Incredibly, Ms. McDonald argues there was *zero* risk associated with the NDNCR claims: "[t]he risk involved in establishing the statutory damages of at least $500 per call is nil." Dkt. 85 at 15. Not surprisingly, Ms. McDonald and her counsel offer *zero* support for that

[1] 47 U.S.C. § 227.

argument. If Ms. McDonald or her counsel had ever litigated a TCPA class action alleging NDNCR claims, they would presumably know the claims faced substantial risks. Unlike the other claims in this lawsuit, the NDNCR claim was subject to an "established business relationship" defense, given that the individuals HelloFresh called were all former customers of HelloFresh. Indeed, class certification has been denied in TCPA cases on this basis. *See e.g. Fitzhenry v. ADT Corp.,* No. 14-80180-MIDDLEBROOKS/BRAN, 2014 U.S. Dist. LEXIS 166243, at *18 (S.D. Fla. Nov. 3, 2014) ("Plaintiff has not convinced the Court that Defendants will be unable to present any evidence of an established business relationship as a defense to some proposed class members' claims.") Similarly, Ms. McDonald's attack on the Class Settlement fails to account for the existence of the "Safe Harbor" affirmative defense that is available to the NDNCR claims but not to other claims. *See* 47 U.S.C. § 227(c)(5)(C); 47 C.F.R. § 64.1200(c)(2). Finally, the use of cellular telephones for purely "residential" purposes, as opposed to also being used for business, is a risk associated only with NDNCR claims and has also raised concerns about individualized issues in TCPA cases. *See Stevens-Bratton v. Trugreen, Inc.*, 437 F. Supp. 3d 648, 658 (W.D. Tenn. 2020) (the "determination about 'whether any particular wireless subscriber is a 'residential subscriber' is 'fact-intensive'").

Instead, Ms. McDonald argues that NDNCR claims are worth more because in *Krakauer v. Dish Network, L.L.C.*, Civil Action No. 1:14-CV-333, Dkt. No. 292 (M.D.NC. September 9, 2015), a jury awarded plaintiffs $1,200 per NDNCR claim. The jury's award in *Krakauer* is not the proper measure of this claim's settlement value because *Krakauer* is distinguishable from this case in meaningful ways. First, the *Krakauer* case involved "cold calls" to consumers who had no prior relationship with Dish Network, therefore, the "established business relationship" defense was a non-issue in *Krakauer*. Second, unlike HelloFresh, Dish Network had an extensive

pre-litigation history of Do Not Call violations and had breached an Assurance of Voluntary Compliance agreement with the FTC[2], which made the "Safe Harbor" defense unavailable to it. Here by contrast, prior to Plaintiffs' lawsuits, HelloFresh did not appear to ever be named in a TCPA lawsuit or fined for telemarketing misconduct, unlike *Krakauer*. To say nothing of the fact that at the time of the lawsuit in *Krakauer*, the federal government was pursuing claims against Dish Network. *Id.*

Ms. McDonald's position that the Class Settlement undervalues Plaintiffs' NDNCR claims also rests on a faulty premise: that the ATDS and Internal Do Not Call claims in this case have no value. This "no-value" assumption allows Ms. McDonald to exaggerate the perceived injustice, that the NDNCR claims were underpaid. To get there, however, Ms. McDonald engages in Monday morning quarterbacking, stating "the Supreme Court's answer [in the Facebook case] [was not] unexpected." Dkt. 85 at 17. Ms. McDonald's self-serving statement ignores that the Supreme Court's decision in *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021) *reversed* the Ninth Circuit's ruling thereby narrowing what qualifies as an ATDS. Ms. McDonald also ignores that the Sixth and Second Circuit Court of Appeals, where HelloFresh resides, had agreed with the Ninth Circuit's position, which the Supreme Court subsequently reversed. Indeed, Judge Saylor also previously adopted the Ninth Circuit's ATDS definition in *Gonzalez v. Hosopo Corp.*, 371 F. Supp. 3d 26 (D. Mass. 2019). In other words, the Supreme Court resolved a true circuit split:

> There is a circuit split regarding what constitutes an ATDS. The Seventh and Eleventh Circuits take a narrow view of the definition of an ATDS, giving credence to a strict grammatical reading of the statute and concluding that an ATDS must include a random or sequential number generation. *See Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458 (7th Cir. 2020); *Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301 (11th Cir. 2020). The Second and Ninth Circuits have applied a broader

[2] *See United States v. Dish Network LLC*, 256 F. Supp. 3d 810, 829 (C.D. Ill. 2017).

> definition, finding that systems, generally referred to as predictive dialers, that call from a stored list of number are sufficiently automatic to be considered an ATDS. *See Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1052 (9th Cir. 2018); *Duran v. La Boom Disco, Inc.*, 955 F.3d 279, (2d Cir. 2020).
>
> On July 29, 2020, the Sixth Circuit issued an opinion expressing its agreement with the Second and Ninth Circuits, holding that [*7] that the TCPA's statutory definition of an ATDS includes telephone equipment that can automatically dial phone numbers stored in a list. *Allan v Pa. Higher Educ. Assistance Agency*, 968 F.3d 567, 580 (6th Cir. 2020). The Sixth Circuit did not read the statute to require that the stored numbers be randomly or sequentially generated.

Bristow v. Am. Nat'l Ins. Co., No. 20-10752, 2021 U.S. Dist. LEXIS 992, at *6-7 (E.D. Mich. Jan. 4, 2021). It is revisionist history to suggest everyone, including Class Counsel and HelloFresh, knew all along the *Facebook* decision would narrow the ATDS claim.

Ms. McDonald also tries to dismiss the strength of the Internal Do Not Call claims based on an Eleventh Circuit Court of Appeals decision in *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259 (11th Cir. 2019). On remand the court only denied certification because it was undisputed that DirecTV's vendor *did not* record who requested to no longer be contacted. *See Cordoba v. Directv*, No. 1:15-CV-3755-MHC, 2020 U.S. Dist. LEXIS 173150, at *13 (N.D. Ga. July 23, 2020) ("Cordoba's first proposed method—look to Telecel's records—cannot work because, as Cordoba alleges in the Third Amended Complaint, Telecel did not maintain an internal do-not-call list and did not record requests not to be called."). Here, there is no such evidence that it would have been impossible to make such a determination. Indeed, HelloFresh did maintain a list of individuals who had previously asked to not be called and mandated the same from its call centers, which is required by the TCPA. Furthermore, Ms. McDonald is unable to dispute that the Court in *Krakauer* also certified Internal Do Not Call claims and instead reminds Class Counsel that those claims were abandoned. However, that decision was not because the claims were no longer certifiable, but instead due to a case law development that held damages for both

Internal and National Do Not Call Registry claims could not be maintained in the same case. Indeed, at least one circuit court of appeals has adopted this position; *See Charvat v. GVN Michigan, Inc.*, 561 F.3d 623, 631 (6th Cir. 2009) (the "language [of § 227(c)(5)] unambiguously allows for statutory damages on only a per-call basis."); *see also Shelton v. Fast Advance Funding, LLC*, 378 F. Supp. 3d 356, 365 (E.D. Pa. 2019) ("This Court concludes that this language of § 227(c)(5) anticipates a plaintiff receiving $500 *per call* that is in violation of § 227(c), and not $500 per violation per call.")

Ms. McDonald's continued insistence that the NDNCR claim's value far exceeded that of the other two claims also ignores the risks to the Plaintiffs' theories as a whole. HelloFresh's contract with its third-party call center vendors prohibited any conduct that violated federal law, including the TCPA. As discussed in Plaintiffs' motion for final approval, several TCPA cases have been dismissed for failure to establish the defendant's knowledge of a vendor's illegal conduct. ECF No. 79 at *17. Here, as discussed above, the Plaintiffs were not aware of any prior lawsuits filed against HelloFresh alleging that their vendors had violated the TCPA. This was a risk to all of the claims. *See McDermet v. DirecTV, LLC,* Civil Action No. 19-11322-FDS, 2021 U.S. Dist. LEXIS 11123, at *30 (D. Mass. Jan. 21, 2021) (granting motion for summary judgment in TCPA case holding "McDermet has offered no evidence that defendants were either aware of or 'shut [their] eyes to' the retailers' conduct").

II. The Objector's Attacks on Class Counsel and the Attorney Fee and Incentive Awards are Unfounded.

Ms. McDonald's objection is rife with unsupported, misinformed and unnecessary allegations, which the Court should ignore. First, Ms. McDonald wrongly accuses Class Counsel of usurping the Court's authority as to the method of determining an attorney fee award, given

that Class Counsel is seeking a percent-of-fund, rather than lodestar award. Dkt. 85 at 10. The Court's Preliminary Approval Order informed the parties that "Attorneys' fees will be a portion of the net settlement figure after expenses."[3] Indeed, as the First Circuit has explained the percentage of the fund method "enhances efficiency" and "better approximates the workings of the marketplace." *In re Thirteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 307 (1st Cir. 1995); *see also Heien v. Archstone*, 837 F.3d 97, 100 (1st Cir. 2016) ("court has discretion in common fund cases like here to award fees using a POF instead of lodestar method"). Thus, Class Counsel's fee award request is directly responsive to the Court's Order and not the hide-the-ball scheme Ms. McDonald claims it to be. There is also no other indicia of any such collusive ruse that Ms. McDonald alludes to. For example, the Settlement does not include a "clear sailing" provision that sets a negotiated ceiling for Class Counsel's fees or service awards to the plaintiffs. Such provisions can be "red flags" in class action agreements, as Judge O'Toole previously explained in *Hill v. State St. Corp.*, No. 09-12146-GAO, 2015 U.S. Dist. LEXIS 2166, at *11 (D. Mass. Jan. 8, 2015):

> In such instances, there is a concern that a defendant may negotiate higher fees at the expense of the class. *Weinberger*, 925 F.3d at 524 (observing 'the danger . . . that the lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment on fees') That is not the case here, where the attorneys' fees will be paid as a portion of a common fund settlement.")

citing *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518 (1st Cir. 1991)). In this case, just as in *Hill*, the amount the Court awards, which all parties agree is within its sole discretion, will control and the Class Plaintiffs and Class Counsel will recover accordingly.

[3] ECF No. 67.

Ms. McDonald similarly continues to insist that service awards to class representatives are *per se* illegal even though she *herself* has requested such awards. ECF No. 77. Ms. McDonald's reliance on *Johnson* v. NPAS Solutions, LLC, 975 F.3d 1244 (11th Cir. 2020) for the proposition that incentive award are illegal ignores that *all* reported decisions outside of the Eleventh Circuit that have considered *Johnson* have rejected it, including Judge Saylor in February of this year when a $10,000 service award was provided to a TCPA plaintiff in connection with a $800,000 common fund settlement. *See Davila-Lynch v. HOSOPO Corporation, et. al.*, Civil Action No. 18-cv-10072, ECF No. 178 (D. MA. February 5, 2021).

Finally, Ms. McDonald continues to assert this Court should not "defer" to the opinions of Class Counsel, launching *ad hominem* attacks[4] while ignoring that Class Counsel have been appointed as fiduciaries in class actions nationwide and recovered more than a hundred million dollars in TCPA common fund cases as class counsel. Class Counsel have no doubt this Court will carefully consider the pending motions and note that "[w]hen the parties' attorneys are experienced and knowledgeable about the facts and claims, their representations to the court that the settlement provides class relief, which is fair, reasonable and adequate should be given significant weight." *Rolland v. Cellucci*, 191 F.R.D. 3, 10 (D. Mass. 2000).

[4] With an unattributed quote to Lin-Manuel Miranda, Ms. McDonald attempts to discredit Class Counsel Anthony Paronich by suggesting he was not part of the litigation team that successfully achieved a TCPA verdict in *Thomas Kraukauer v. Dish Network, LLC*, Civil Action No. 1:14CV333, Dkt. No. 292 (M.D.N.C. Sept. 9, 2015). Dkt. 85 at 23-24 ("Mr. Paronich was not even in the room where it happened"). Ms. McDonald, an attorney, should know better. A litigation team is comprised of many professionals, not just persons who try the case. Mr. Paronich was appointed class counsel in that case and his work, including deposition testimony, was read into the record. Ms. McDonald knows this, as she states she has the entire transcript of the trial.

III. Ms. McDonald's Opposition Ignores that the Proposed Settlement is well within the "Range of Reasonableness" of TCPA Settlements.

Ms. McDonald claims that a trial victory in *Krakauer* should set the market for settlement valuation in this case. However, Ms. McDonald completely ignores the extensive case law provided by the Plaintiffs regarding the "the range of reasonableness" in light of the risks and best possible recovery. Class members who submitted a valid claim will receive at least $89.00, an amount that far exceeds comparable common fund settlements against large corporations alleged to have violated the TCPA, including cases where class members have had objections overruled claiming that the smaller recovery was insufficient. *See e.g.*, *Markos v. Wells Fargo Bank, N.A.*, No. 1:15-cv-01156-LMM, 2017 WL 416425, at *4 (N.D. Ga. Jan. 30, 2017) ($24.00); *Hashw v. Dep't Stores Nat'l Bank*, 182 F. Supp. 3d 935, 944 (D. Minn, 2016) ($33.20); *Kolinek v. Walgreen Co.*, No. 13-cv-4806, 2015 WL 7450759, at *7 (N.D. Ill. Nov. 23, 2015) ($30); *In re Capital One TCPA Litig.*, 80 F. Supp. 3d 781, 789 (N.D. Ill. 2015) ($34.60).

Indeed, as one Court stated regarding an anticipated TCPA recovery, "the present estimate is $75.30. Insofar as TCPA cases are concerned, this payment is within the range of other settlements that have been approved and in fact is on the high side." *Somogyi v. Freedom Mortg. Corp.*, No. 17-6546 (RMB/JS), 2020 U.S. Dist. LEXIS 194035, at *21-22 (D.N.J. Oct. 20, 2020). Ms. McDonald offers nothing to support her remarkable proposition that this Court should ignore these other settlements against similarly sized defendants and that the only rational course available was to take this matter to trial since success was guaranteed from her perspective. For the reasons outlined herein and in the motion for final approval, this was not the case.

Dated: May 7, 2021

Plaintiffs and the Settlement Class
by their attorneys,

/s/ Anthony I. Paronich
Anthony I. Paronich
PARONICH LAW, P.C.
350 Lincoln Street, Suite 2400
Hingham, MA 02043
Telephone: (617) 485-0018
anthony@paronichlaw.com

Stacey P. Slaughter (*pro hac vice*)
Brenda L. Joly (MA657255; MN386791)
ROBINS KAPLAN LLP
800 LaSalle Ave., Suite 2800
Minneapolis, MN 55402
sslaughter@robinskaplan.com
bjoly@robinskaplan.com

TURKE & STRAUSS LLP
Samuel J. Strauss (*prohac vice*)
613 Williamson Street, Suite 100
Madison, WI 53703
(608) 237-1775
Sam@turkestrauss.com

Attorneys for Plaintiffs and Proposed Class

CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will automatically send notification to all attorneys of record.

/s/ Anthony I. Paronich
Anthony I. Paronich