UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GRACE MURRAY, AMANDA ENGEN, STEPHEN BAUER, JEANNE TIPPETT, 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' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND ATTORNEYS' FEES

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INTRODUCTION

During the May 11, 2021 final approval hearing, the Court asked Class Counsel to provide supplemental briefing on whether, despite HelloFresh's litigation position that all of its former customers are subject to some iteration of HelloFresh's arbitration clause, (i) the interests of Settlement Class Members have been adequately represented in reaching a settlement; and (ii) the settlement serves the public interest. The Court also sought clarification on the total amount of, and basis for, Class Counsel's attorneys' fee request for work performed on behalf of the Settlement Class. ECF 89 (Final Hearing Transcript at 31:15-32:4, 32:13-22, 33:12-17).

The Court's concerns regarding adequacy of representation are mitigated by two important factors. ***First***, all class members have the same defense to arbitration, namely that no version of the arbitration agreement applies to any Settlement Class Members, all of whom are *former* HelloFresh customers. Thus, no intra-class conflict exists. The parties fully briefed this issue previously, and the Class's arguments that HelloFresh could not invoke arbitration as to any Settlement Class Member, or similar conduct to former customers in the future, holds true today. ***Second***, even if varying arbitration defenses exist, numerous courts have held that unresolved arbitration issues do not impede certifying a *settlement class* under Rule 23 on behalf of a single class represented by the same class counsel, where all Class Members face common procedural litigation risk.

The Court's public interest concern is likewise an important one. Indeed, class settlements may be approved as fair, reasonable and adequate if the public interest is served. Here, on balance, the Settlement achieves such public good. The Court should consider the strong public interest in both (i) encouraging settlement of difficult and unpredictable complex class litigation, which, here, results in class members receiving significant cash payments; and (ii) disincentivizing future

attempts to compel consumer arbitration. In fact, the unintended consequence of finding, for purposes of class settlements, that the value of claims *diminish* when an arbitration demand is made, further *encourages* companies to adopt arbitration clauses and vigorously pursue motions to compel arbitration in the class context, as a way to mitigate statutory damage liability and risk. That was not the lesson HelloFresh learned here. Class Counsel did not entertain discounted payments for certain Class Members and instead vigorously sought the highest and best settlement for the Class as a whole, resulting in the largest TCPA settlement in Massachusetts federal court history. For these reasons, the Court's concern regarding HelloFresh's arbitration defenses should give way to the public benefits achieved if this settlement is finally approved—finality, certainty, waiver of arbitration defenses and the message that arbitration defenses do not reduce liability for statutory damage claims.

Regarding the Court's attorney fee question, the Class's ***net*** settlement amount is **$13,473,556.24**, after subtracting expenses,[1] (not the $8.9 million discussed at the hearing). Plaintiffs and Class Counsel respectfully request the Court approve attorneys' fees of one-third of the net settlement, in the amount of $4,486,694.22. Class Counsel's fee request mirrors the approach Your Honor adopted in numerous class actions and is supported by a lodestar crosscheck. As discussed below, Class Counsel effectively pursued this complex class action involving HelloFresh's multi-year telephone "win back" campaign in violation of the TCPA in multiple cases across the country. Class Counsel invested significant time and financial resources on behalf of the Settlement Class, without any guarantee of success. Because of their efforts, Class Members

[1] Of the $14 million settlement, the Court approved the following expenses: (1) $36,443.76 in litigation costs; (2) $450,000 in settlement administration expenses; and (3)service awards totaling $40,000 to the Named Plaintiffs as class representatives, making the net settlement amount $13,473,556.24.

achieved a favorable Settlement that provides $14 million in monetary relief, less fees and expenses. In addition, HelloFresh ceased its illegal calling activity after Plaintiffs filed this lawsuit, which further benefits the Settlement Class.

DISCUSSION

I. The Settlement Class, Comprised of Former HelloFresh Customers, Was Adequately Represented Because All Class Members Shared a Common Arbitration Risk.

The Court's inquiry on whether a potential intra-class conflict (arising out of HelloFresh's arbitration demands) undercut the adequacy of representation in this Class Settlement is necessary because the Court, like Class Counsel, has fiduciary duties to the entire Class. *Reynolds v. Beneficial Nat. Bank*, 288 F.3d 277, 279-80 (7th Cir. 2002). "District judges presiding over such actions are expected to give careful scrutiny to the terms of proposed settlements in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole." *Mirfasihi v. Fleet Mortg. Corp*., 356 F.3d 781, 785 (7th Cir. 2004). However, absent any ruling that HelloFresh's arbitration provision was enforceable against any subset of Settlement Class Members (all former HelloFresh customers), it would have been inappropriate for Class Counsel to negotiate a settlement that contemplates less valuable recovery for such a hypothetical subclass. *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 36 (1st Cir. 2009) (class counsel are fiduciaries to the class as a whole). The fact is, HelloFresh sought to compel arbitration against *all* of its former customers. Thus, in pursuing TCPA actions against HelloFresh, every Class Member faced a similar risk that HelloFresh might successfully compel arbitration. Because every Member of the Settlement Class faced a similar procedural obstacle, Class Counsel and the Class Representatives adequately represented the Settlement Class.

A. No Intra-class Conflict Exists Because all Class Members Were Former Customers for Whom the Arbitration Agreement Does Not Apply.

Plaintiffs believe they have the better argument: HelloFresh cannot compel its former customers to arbitrate because HelloFresh's arbitration clauses do not encompass claims arising from a telemarketing win-back campaign. HelloFresh disagrees, arguing that, but for the Settlement Agreement, HelloFresh has a viable arbitration defense against all Class Members. ECF 83. But, for purposes of determining whether Class Counsel and Class Representatives adequately represented the Settlement Class, the relative strength of the litigants' competing arguments is less important than the fact that *all* Settlement Class Members shared a common arbitration defense and a common arbitration risk.

In this case, and in the companion federal court cases against HelloFresh, HelloFresh asserted that every former HelloFresh customer agreed to arbitrate this dispute through updates to HelloFresh's terms and conditions.[2] However, Plaintiffs' response to HelloFresh's arbitration demand applied equally to all Class Members: that no former HelloFresh customer agreed to arbitrate TCPA claims arising from HelloFresh's win-back campaign.

Indeed, HelloFresh's arbitration provisions are limited in scope, applying only to claims that arise from HelloFresh's products or services, and by extension did not apply to its telemarketing conduct: "[CLAIMS] . . . ARISING FROM OR RELATING IN ANY WAY TO [THE CUSTOMER'S] PURCHASE OR USE OF PRODUCTS OR OFFERINGS THROUGH THE SITE AND/OR APP." ECF 12-2 (2017 version); *Engen*, 19-cv-02433, ECF 28 at 5-6 (D. Minn. Dec. 10, 2019) (2018 version). This provision is not nearly as broad as other arbitration clauses that call for arbitration of "all claims" or "any dispute" between the parties and is too narrow to encompass HelloFresh's alleged actions in this case—calling Class Members in

[2] ECF 9, 28. *See also*, *Engen v. Grocery Delivery E-Services USA Inc. d/b/a Hello Fresh*, No. 0:19-cv-02433 (D. Minn.), ECF 28 & 48; *Engen v. Grocery Delivery E-Services USA Inc. d/b/a Hello Fresh*, No. 20-1923 (8th Cir.).

violation of the TCPA after they had terminated their contractual relationship with HelloFresh. *See Borecki v. Raymours Furniture Co.*, No. 17-cv-1188, 2017 WL 5953172 (S.D.N.Y. Nov. 28, 2017).

As Plaintiff explained in her opposition to the motion to compel arbitration, abundant case law relating to arbitration and TCPA claims supports this proposition. Appellate courts across the country, including the First Circuit Court of Appeals, have held that TCPA claims brought by ***former customers*** for general telemarketing calls made by a defendant do not arise under a service/product agreement with that defendant and thus do not fall within the scope of even a broadly worded arbitration provision.[3] *See, e.g., Breda v. Cellco P'ship,* 934 F.3d 1, 5, 7-9 (1st Cir. 2019) (affirming denial of motion to compel arbitration of TCPA claim by former customer).[4] Put simply, HelloFresh "could have violated the TCPA, and [plaintiff] could have brought [this] lawsuit against [defendant] without there ever having been a contract . . . between the two parties." *Gamble*, 735 Fed. App'x at. 667.[5]

Whether Class Members ultimately could have prevailed on their arbitration defense is not material to whether there was adequate representation for the Settlement Class. The Settlement Class's representation was adequate because all Class Members faced similar arbitration risk.

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[3] Because this Court found there was no valid agreement to arbitrate between Plaintiff Murray and HelloFresh as to any claims in this case, the Court did not reach this "former customer" analysis. ECF 44.

[4] *See also*, *Gamble v. New Eng. Auto Fin., Inc.,* 735 Fed. App'x 664 (11th Cir. 2018) (same); *Stevens-Bratton v. Trugreen, Inc.,* 675 Fed. App'x 563 (6th Cir. 2017) (reversing judgment compelling arbitration of TCPA claim by former customer); *Revitch v. DIRECTV, LLC*, 977 F.3d 713, 715 (9th Cir. 2020).

[5] S*ee also, Rahmany v. T-Mobile USA Inc.,* 717 Fed. App'x 752, 753 (9th Cir. 2018) (reversing grant of motion to compel arbitration of TCPA claims because the TCPA claims at issue "do not rely on the terms of the [Product/Service Agreement containing asserted arbitration provision]" nor allege misconduct "founded in or intimately connected with the obligations of [that Product/Service Agreement]").

B. In Approving Class Settlements, Courts Find No Conflict Among Class Members Where the Settlement Resolves Common Procedural Risk.

Even if there were an intra-class conflict due to HelloFresh's varying arbitration provisions, the Court still should grant final approval because in the context of settlement, a shared risk has been resolved. Courts presented with class settlements where varying arbitration agreements were at issue, have found that such variations do not give rise to a conflict between class members or class counsel when settling the case. *See, e.g. Harvey v. Morgan Stanley Smith Barney LLC*, No. 18-CV-02835-WHO, 2020 WL 1031801, at *9 (N.D. Cal. Mar. 3, 2020) (approving a class settlement over objections that the plan of allocation did not take into account which settlement class members were bound by varying arbitration agreements or releases).

The logic applies equally to the Court's typicality and adequacy analysis. Where each Settlement Class Member was "subjected to the same practice and suffered the same type of injury," typicality is satisfied regardless of any individual arbitration defenses that the defendant may have as to specific class members. *In re Checking Acct. Overdraft Litig.*, No. 1:09-MD-02036-JLK, 2020 WL 4586398, at *14 (S.D. Fla. Aug. 10, 2020); *see also Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 225 (N.D. Ill. 2016) ("the fact that some class members… may have consented to the calls and alerts, or that some class members signed arbitration clauses extinguishing their TCPA claims, does not vitiate the typicality of the class representatives' claims."). Here, HelloFresh engaged in the same illegal telemarketing conduct with all Settlement Class Members, each of whom is a former HelloFresh customer. As a result, each Settlement Class Member suffered the same injury— being subjected to unwanted telephone calls— and has an identical remedy of statutory damages under the TCPA. There is no evidence that the various HelloFresh arbitration provisions lead to such atypicality between Plaintiff and the Settlement Class that "the interests of the [Settlement Class] are placed in significant jeopardy." *In re*

Checking Acct. Overdraft Litig., 2020 WL 4586398 at *14 (finding that the question of whether an arbitration provision applied to the named plaintiff and the class members was not a "unique defense" that would "consume the merits" of the case "in the context of a settlement in which [the defendant] decided to waive it[s] arbitration defense" for the claims being settled).

The same reasoning holds true for the question of adequacy, where "the question is not whether the final [settlement] could be prettier, smarter, or snazzier, but whether it is fair, adequate, and free from collusion." *Id.* (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998)) (internal quotation marks omitted). If class counsel has shown that the class settlement was reached after arm's length negotiation, with consideration of the risks of ongoing litigation (including that a class may never be certified or succeed on the merits of the claims) and that each settlement class member "has a common motivation to be compensated" for defendant's conduct, then there is no conflict of interest. *Id.*; *see also Matamoros v. Starbucks Corp.*, 699 F.3d 129, 138 (1st Cir. 2012) ("Only conflicts that are fundamental to the suit and that go to the heart of the litigation prevent a plaintiff from meeting the Rule 23(a)(4) adequacy requirement.") (citation omitted).

Tennille v. Western Union Co., 785 F.3d 422 (10th Cir. 2019) is a road map for what the Court should do here. In *Tennille*, the Tenth Circuit affirmed the district court's exercise of discretion in approving a single settlement class even where *some but not all* of the settlement class members had signed arbitration agreements and class waivers with the defendant. Here, by contrast, Settlement Class Members face a more uniform arbitration risk since they are all former customers. In *Tennille*, the district court found the named plaintiffs, who had signed arbitration agreements, were *not* bound by arbitration; at the time of settlement, this arbitration issue was on interlocutory appeal. *Id*. at 431. The settlement class was a single class of Western Union

customers, some of whom had signed arbitration agreements and others who had signed class action waivers. An objector, who had not signed an arbitration agreement but had signed a class waiver, opposed final approval and argued the settlement was not fair and adequate for class members who did not have an arbitration agreement. *Id*. The Tenth Circuit affirmed the district court's exercise of discretion in granting final approval of a single settlement class, finding the objector likewise faced procedural hurdles that could prevent her from representing the class. *Id*. The Court reasoned the Class Representatives' interests were therefore "sufficiently coextensive" with the interests of other class members. *Id*. On balance, the Court said the district court, "having considered serious legal questions that placed the litigation's outcome in doubt and the value of the immediate recovery provided by this settlement with only the possibility of a more favorable outcome after further litigation" did not abuse its discretion in finding the settlement was fair, reasonable and adequate. *Id*. at 436.

Here, the Court likewise should grant final approval finding the Class Representatives' interests in overcoming an arbitration defense are co-extensive with that of all Settlement Class Members who likewise were former HelloFresh customers who were called in HelloFresh's win-back campaign. Regardless of the specific arbitration clause that HelloFresh could point to, *each* Settlement Class Member can argue HelloFresh cannot compel arbitration on former customers, as the First Circuit has held in *Breda*, a TCPA case. And each Class Member has "an incentive to settle the class claims in order to avoid the possible enforcement of a procedural obstacle that would have prevented [them] from participating in this class litigation." *Tennille,* 785 F.3d at 431. "All class settlements strike compromises based on probabilistic assessments. If these types of compromises automatically created subclasses that required separate representation, the class action procedure would become even more cumbersome." *Charron v. Wiener*, 731 F.3d 241, 253-

54 (2d Cir. 2013) (cleaned up) (rejecting objector's argument that intra-class conflicts required separate representation). No conflict of interest exists, subclasses are not required, and Plaintiffs and Class Counsel have adequately represented the Settlement Class.

II. Final Approval of the Class Settlement Serves the Public Interest in Resolving Complex Consumer Claims and by Preserving the Statutory Value of Claims Regardless of Arbitration Demands.

The Court also should find the Class Settlement best serves the public interest, even in light of the Court's stated arbitration-related concerns. Courts recognize an overriding public interest in favor of settling class actions. *Lazar v. Pierce*, 757 F.2d 435, 439 (1st Cir. 1985). This is true "even when the substantive issues of the case reflect a broad public interest in the rights to be vindicated or the social or economic policies to be established." *Donovan v. Estate of Fitzsimmons*, 778 F.2d 298, 307 (7th Cir. 1985).

Here, the Class Settlement serves the public interest by conserving resources, allowing the litigants to resolve their dispute and providing meaningful monetary damages to Settlement Class Members, including those against whom HelloFresh might attempted to compel arbitration.[6] In particular, the public interest is served if Settlement Class Members who are subject to HelloFresh's various arbitration provisions in force during the Class Period, are allowed to participate in the Class Settlement rather than facing lengthy proceedings to determine the proper forum to resolve their claims. Although HelloFresh raised the arbitration issue during litigation to challenge the parties' forum, once HelloFresh agreed to settle this case, it waived its arbitration defense to the related claims and accepted the jurisdiction of this Court. *See* ECF 61-1 at 1.29 (Settlement Agreement defining the "Released Claims"). In relevant part, the Settlement

[6] As discussed *supra*, the Settlement Class is comprised solely of former HelloFresh customers, therefore the merits of HelloFresh's arbitration demand are dubious.

Agreement provides that, in exchange for HelloFresh's payment of $14,000,000 to a common fund, Plaintiffs and the Settlement Class will release the following claims:

> ***Any and all claims…as of the date of the Final Approval Order, that arise out of or relate in any way to the Released Parties' use of any telephone, any telephone or dialing equipment, any dialing systems or tools, an "automatic telephone dialing system," or an "artificial or prerecorded voice" to contact or attempt to contact Members of the Settlement Class. This release expressly includes, but is not limited to, all claims under the Telephone Consumer Protection Act and corollary or similar state laws or enactment of any other statutory or common law claim arising. The Released Claims include any and all claims that were brought or could have been brought in the Action.***

ECF 61-1 at 9-10 (emphasis added). The Settlement Agreement contemplates that HelloFresh will not seek to compel arbitration of the claims the Settlement Class is releasing (*see* ECF 61-1 at 8.2). *See Paola Beltran v. InterExchange, Inc.*, No. 14-CV-03074-CMA-KMT, 2019 WL 3496692, at *3 (D. Colo. Aug. 1, 2019) ("The Tenth Circuit acknowledges that the parties' settlement obviates the need to compel arbitration"). Given HelloFresh's waiver of arbitration in settlement, any possible arbitration-based interclass conflict is rendered hypothetical and not an appropriate basis to vacate the Settlement Agreement. *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.*, No. 14-md-02503, 2017 WL 4621777, at *13 (D. Mass. Oct. 16, 2017) ("Hypothetical conflicts, particularly regarding damages allocation, are insufficient to defeat a showing of adequacy under Rule 23(a)(4).")*; Cobell v. Salazar*, 679 F.3d 909, 920 (D.C. Cir. 2012)(same).

As a reminder, this Court found that Plaintiff Murray could not be compelled to arbitrate her claims, and the *Engen* court ruled the same with respect to Plaintiff Engen. *Engen*, 453 F. Supp. 3d 1231, 1234 (D. Minn. 2020). In light of those rulings and HelloFresh's desire to settle on a class-wide basis, Class Counsel fulfilled their fiduciary duty to the Class by reaching a settlement with significant monetary benefits to *all* Settlement Class Members that are greater than many other TCPA settlements. *See* ECF 79 at 19 n. 14 (Plaintiffs' final approval brief citing TCPA settlements with significantly lower monetary damages per class member than achieved here).

The Court should also weigh the public interest in approving the Settlement precisely because it does *not* devalue claims which are clouded by HelloFresh's arbitration demands. Had the Settlement Agreement distinguished among such claims, companies like HelloFresh would be further incentivized to try to compel arbitration with hopes of lowering statutory liability in future class actions. That did not happen here. Consistent with Class Counsel's duty to absent class members, in negotiating this settlement, Class Counsel did not give more weight to some versions of HelloFresh's terms and conditions over others because no version applies to the Settlement Class which includes only former customers.

If the Court denies final approval of the Class Settlement on the grounds that the arbitration agreements were material and reduced the value of certain Settlement Class Members' claims, the message is sent to companies like HelloFresh that an arbitration demand (even dubious ones) has the effect of reducing statutory liability for wrongdoing. The TCPA does not distinguish between claims that are, or could be, subject to an arbitration agreement. Rather, it provides identical statutory damages for each proven violation. *See* 47 U.S.C. §§ 227(b)(3), 227(c)(5). Finding that subclasses are required for those that may be subject to arbitration demands would diminish the value of these statutory claims in a manner inconsistent with the TCPA. Further, reducing liability for claims associated with consumers subject to arbitration would only embolden companies like HelloFresh to further push the bounds of arbitration.

The Court should find the public interest is served by signaling just the opposite; that in settling a TCPA class action, arbitration demands do not diminish the value of consumers' statutory damages. This, along with the public interest in allowing the litigants finality and certainty and the conservation of resources, supports a finding that the Class Settlement is in the public interest and should be finally approved.

III. The Class's Net Settlement Amount is $13,473,556.24, and Class Counsel Seeks One-Third of The Net Settlement Amount for Attorneys' Fees.

Class Counsel respectfully requests attorneys' fees of one-third of the net Settlement Fund (meaning the amount remaining after subtracting all expenses). *See* ECF 71. The total settlement amount is $14 million. After subtracting all expenses, the net settlement amount is $13,473,556.24. The Court ordered that attorneys' fees are to be paid out of the *net* settlement amount, thus Class Counsel requested one-third of that net settlement amount—$4,486,694.22. The calculation is as follows: [7]

$	14,000,000.00	Total Settlement Fund
$	36,443.76	Expenses[8]
$	450,000.00	Settlement Administration[9]
$	40,000.00	Named Representative Service Awards
$	13,473,556.24	Settlement Fund, *net of expenses*
$	4,486,694.22	1/3 requested attorneys' fees of net settlement fund
=	$9,986,862.02	Remaining fund for distribution after fee payment

Heeding the Court's directive, this request is consistent with attorneys' fee awards Your Honor and other courts around the country have ordered, and compensates Class Counsel for its time, effort, and commendable result on behalf of the Settlement Class. This fee request is also consistent with provisions of the Settlement Agreement and the Settlement Notice to the Class. The Settlement Agreement provides that Plaintiffs may seek reasonable attorneys' fees in

[7] Class Counsel understood the Court intended the net settlement amount meant subtracting not just counsel's costs and expenses, but every expense, regardless of where that expense was paid. Thus, Class Counsel also subtracted the Service Awards and the compensation to the Settlement Administrator to arrive at the net settlement amount.

[8] These expenses were calculated as of the April 26, 2021, filing date for the Motion for Final Approval. Class Counsel did not seek reimbursement for the expense of retaining Dr. Haghayeghi to opine on the economic benefit of the settlement during the time HelloFresh ceased its calling conduct. Nor has Class Counsel sought reimbursement for the expenses for legal research, courier, and other costs incurred since April 26, 2021.

[9] Dkt. 79-1, Declaration of Jay Geraci ("Geraci Decl.") at ¶ 23.

consideration for Class Counsel's work. ECF 61-1 (Settlement Agreement, Sec. 2.1.4). The Settlement Notice the Court approved disclosed that Class Counsel would seek up to $4,706,666.67 for the attorneys' fees, costs, and expenses, and that disclosure is greater than the total Class Counsel requests here ($4,486,694.22 in fees + $36,443.76 in costs and expenses).[10] *See* ECF 79-1 (Ex. E, Long Form Settlement Notice at 33). The Court itself established the confines of a reasonable fee request in its Preliminary Approval Order dated December 28, 2020, stating that "Attorneys' fees will be a portion of the net settlement figure after expenses." ECF 67. As articulated in Plaintiffs' fee motion (ECF 71) and motion for final approval (ECF 79), Class Counsel respectfully ask the Court to grant the attorney fee request. Because Class Counsel has briefed this issue previously, this supplemental memorandum will focus only on the discussion raised at the final approval hearing.

A. The Work Class Counsel Performed And The Results Achieved For the Settlement Class Supports The Fee Request.

Class Counsel expended significant time and effort prosecuting this action and achieving the Class Settlement. As of May 11, 2021, the total amount of time Class Counsel invested is 2,600.5 hours, and additional work will be required to administer the Settlement and address any potential appeal. Declaration of Stacey Slaughter ("Slaughter Decl.") ¶¶ 24, 26.[11] This work is detailed in the accompanying declarations from Class Counsel and is briefly summarized below.

1. Work Conducted To-Date To Obtain Settlement Approval.

Prior to filing this action, Class Counsel conducted a thorough and extensive investigation of the legal claims asserted as well as of the factual basis for those claims. Slaughter Decl. ¶ 20.

[10] The Service Award for a total of $40,000 and compensation for the settlement administrator for settlement administration were itemized separately in the notice.

[11] *See also* Declaration of Anthony Paronich ("Paronich Decl.") ¶ 13; Declaration of Samuel Strauss (Strauss Decl.) ¶ 17.

Thereafter, Class Counsel vigorously prosecuted the action on behalf of the Class. Among other things, Class Counsel: (1) drafted the initial Minnesota class action Complaint, the Amended Complaint, the Massachusetts Complaint, and the New York Complaint; (2) drafted a comprehensive set of discovery requests to HelloFresh; (3) met and conferred with Defendants during the course of discovery over several discovery disputes; (4) briefed and filed a motion to compel discovery; (5) served six third-party subpoenas; (5) reviewed over 20,000 pages of documents and extensive class data produced by Defendant and third parties; (6) forensically collected the computer hard drive and documents of Plaintiff Engen; (7) collected the documents of Plaintiffs Bauer, Groff, Hall, McOsker, Murray, Simecek, Tippet, and Tubesing; (7) responded to HelloFresh's document requests and produced plaintiff documents; (8) responded to HelloFresh's requests for admission and interrogatories; (9) briefed the opposition to Defendant's motion to compel arbitration in federal district court in Minnesota; (10) appeared for an in-person hearing to argue the opposition to Defendant's motion to compel arbitration in federal district court in Minnesota; (11) briefed the opposition to Defendant's motion to compel arbitration in federal district court in Massachusetts; (12) appeared in person for the virtual hearing to argue the opposition to Defendant's motion to compel arbitration in federal district court in Massachusetts; (13) briefed the opposition to Defendant's motion to stay district court proceedings in Minnesota pending HelloFresh's appeal of the arbitration decision; (14) briefed the opposition to Defendant's motion to stay district court proceedings in Massachusetts pending HelloFresh's appeal of arbitration decision; (15) began drafting an opposition to HelloFresh's Eighth Circuit appeal of the arbitration decision; (16) began drafting an opposition to HelloFresh's First Circuit appeal of the arbitration decision; (17) prepared and noticed the deposition of HelloFresh's corporate representative on 44 topics; (18) served third-party discovery on the Better Business Bureau; (19) engaged multiple experts on relevant trial issues; (20) prepared a mediation

brief; (21) engaged in a JAMS mediation before the Hon. Judge George King (Ret.); and (22) consulted with the Class Representatives throughout the course of the case. Slaughter Decl. ¶ 20.

In addition, Class Counsel undertook considerable work in connection with the Settlement and Settlement Administration. This has included (1) assisting in the drafting the Settlement Agreement and exhibits thereto; (2) preparing Plaintiff's Preliminary Approval papers; (3) reviewing the bids received from settlement administrator vendors; (4) selecting the competitive bid from the Settlement Administrator (KCC); (5) reviewing the final drafts of the Settlement Notice prepared by the Settlement Administrator, and ensuring that they were timely mailed and e-mailed; (6) working with the Settlement Administrator to create a settlement website and telephone support line for Settlement Class Members; (7) communicating with Settlement Class Members; (8) preparing the Final Approval Motion; (9) attending the Final Approval Hearing; and (10) preparing this supplemental brief supporting final approval. *Id.* ¶ 21.

The result of Class Counsel's significant efforts was the largest TCPA class settlement in Massachusetts federal court history, nearly universally well-received. Settlement Class Members' objections are miniscule (0.00000062% out of the total number of Settlement Class Members). As noted in Plaintiff's final approval brief, the settlement establishes a $14,000,000 Settlement Fund, and Settlement Class Members who submit a valid claim will receive at least $89.00,[12] if the Court approves the requested attorneys' fees and expenses, which far exceeds comparable common fund settlements in TCPA cases. ECF 79 at 19 n.14 (citing cases). Additionally, HelloFresh has stopped its illegal telemarketing to Settlement Class Members, a benefit that could not have been obtained without Class Counsel's efforts in this litigation.

2. Additional and Remaining Work that Will Be Performed

[12] Dkt. 79-1, Geraci Decl. at ¶ 23.

Class Counsel's work on this matter remains ongoing. Prior to the Final Fairness Hearing, Class Counsel responded to the objections, including that of Sarah McDonald. Slaughter Decl. ¶ 23. Class Counsel also sought discovery of objector McDonald to determine motive, credibility, and whether her interests aligned with those of the Settlement Class. *Id*. If final approval is granted, Class Counsel will supervise the distribution of payments to Settlement Class Members. *Id.* ¶ 24. In addition, Class Counselwill respond to questions from Settlement Class Members and take other actions necessary to support the Settlement until the conclusion of the Settlement Period. *Id.* Class Counsel will brief and argue any appeals in this case. *Id*. This ongoing work is not reflected in Class Counsel's hours of work to date, but could certainly be significant, and therefore further supports the requested attorneys' fees.

B. Class Counsel's Fee Request Is Reasonable And Consistent With Case Law.

The one-third percentage of the net fund requested here is reasonable in light of Class Counsel's Settlement Notice, prior decisions by this Court, the lodestar cross-check, and the overwhelming case law from the First Circuit and around the country. Class Counsel's extensive efforts in this case and exceptional result for the Settlement Class amply support the reasonableness of the fee.

1. The Requested Fee Is Consistent With Awards in Similar Cases and in This Court.

As Your Honor has previously recognized, "the First Circuit and several district courts in this circuit have approved the use of the percentage of fund method in common fund cases where a pool of money is to be divided among class members," which is exactly the Settlement structure at issue here. *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 78 (D. Mass. 2005) (citing cases). In fact, this Court has routinely used the percentage of the fund methodology (rather than the alternative lodestar method) to determine attorneys' fees generally, and, specifically, has often

found that one-third of the settlement common fund is an appropriate amount of attorneys' fees in a class action settlement. In *Moitoso v. FMR LLC*, 18-cv-12122-WGY, ECF No. 271 (D. Mass. Feb. 26, 2021), this Court approved class counsel's request for attorneys' fees of $9,022,127.67, which was one-third of the net settlement common fund, finding that the requested amount was "reasonable and appropriate." Similarly, in *In re Relafen Antitrust Litigation*, 231 F.R.D. at 82, this Court held that attorneys' fees of one-third of a $67 million settlement was within the applicable range of percentage of the fund fee awards.[13] *See also Courtney v. Avid Tech., Inc.*, No. 1:13-CV-10686-WGY, 2015 WL 2359270, at *1 (D. Mass. May 12, 2015) (this Court awarding class counsel attorneys' fees of 30% of the settlement fund); *In re Indigo Sec. Litig.*, 995 F. Supp. 233, 235 (D. Mass. 1998) (this "court award[ed] attorneys' fees in the amount of thirty (30) per cent of the Gross Settlement Fund to all counsel for the class representatives."); *Crandall v. PTC, Inc.*, 16-cv-10471-WGY, ECF No. 60 (D. Mass. July 14, 2017) (this Court awarded class counsel one-third of the total settlement amount and finding that such an award was "fair and reasonable" given counsel's skill, the complexity of the action, and the risk associated with the case); *Tyler v. Michaels Stores, Inc.*, 150 F. Supp. 3d 53, 66 (D. Mass. 2015) (this Court acknowledged that if it were to use the percentage of the fund methodology rather than the lodestar methodology to determine the reasonableness of the requested attorneys' fees, one-third of the settlement fund would be appropriate).

Other courts in this district have given awards similar to those given by this Court, and "[c]ourts in the First Circuit have recognized that fee awards in common fund cases typically range

[13] Unlike the $67 million common fund at issue in *In re Relafen*, which led the Court to note that a one-third percentage may be on the high end of fees for a fund of that size, the Settlement Fund here is only $14,000,000, making a one-third fee "not unreasonable as a matter of law." *Id.* at 82.

from 20 to 30 percent." *In re Lupron Mktg. & Sales Pracs. Litig.*, No. 01-CV-10861-RGS, 2005 WL 2006833, at *5 (D. Mass. Aug. 17, 2005) (citing *In re Fleet/Norstar Securities Lit.,* 935 F.Supp. 99, 109 (D.R.I. 1996).[14]

Moreover, the requested fee of one-third of the net settlement is consistent with awards in other TCPA cases, many of which award one-third of the gross settlement. *See e.g. Davila-Lynch v. HOSOPO Corporation, et al.*, No. 18-cv-10072, ECF No. 178 (D. Mass. February 5, 2021) (Judge Saylor approving a one-third fee of the gross amount in TCPA common fund settlement); *Gonzalez v. TCR Sports Broad. Holding, LLP*, No. 1:18-CV-20048-DPG, 2019 WL 2249941, at *6 (S.D. Fla. May 24, 2019) (awarding 1/3 of gross settlement, noting that "courts… regularly base fee awards on the market rate of one-third of the common fund in TCPA class action settlements."); *Leung v. XPO Logistics, Inc.*, 326 F.R.D. 185, 201 (N.D. Ill. 2018) (approving attorneys' fees of one third of the net settlement fund in a TCPA case); *Vandervort v. Balboa Cap. Corp.*, 8 F. Supp. 3d 1200, 1203 (C.D. Cal. 2014) (TCPA case in which court awarded 1/3 of gross common fund).

2. The Lodestar Cross-Check Supports Class Counsel's Fee Request.

"The First Circuit does not require a court to cross check the percentage of fund against the lodestar in its determination of the reasonableness of the requested fee." *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 81 (D. Mass. 2005). Rather, "[t]he lodestar approach (reasonable hours spent times reasonable hourly rates, subject to a multiplier or discount for special circumstances, plus

[14] *Conley v. Sears Roebuck & Co.,* 222 B.R. 181, 187 (D. Mass. 1998); *In re Compact Disc Minimum Advertised Price Antitrust Lit.,* 216 F.R.D. 197, 216 n. 45 (D. Mass. 2003); Theodore Eisenberg & Geoffrey Miller, Attorneys Fees in Class Action Settlements: An Empirical Study, 1 J.EMP. L.STUD. 27, at 33 (March 2004); *Manual For Complex Litigation* § 14.121; *Stevens v. SEI Invs. Co.*, No. CV 18-4205, 2020 WL 996418, at *14 (E.D. Pa. Feb. 28, 2020) (approving one-third fee where settlement was reached after parties agreed to early mediation during initial Rule 16 conference); *Conant v. FMC Corp.*, No. 2:19-cv-00296, ECF No. 42 (D. Me. Sept. 1, 2020) (approving one-third fee in an action that was resolved during discovery).

reasonable disbursements) ***can be*** a check or validation of the appropriateness of the percentage of funds fee, but is not required." *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, No. 05-11148-PBS, 2009 WL 2408560, at *1 (D. Mass. Aug. 3, 2009) (citation omitted; emphasis added). When the lodestar is used as a cross-check, "the focus is not on the 'necessity and reasonableness of every hour' of the lodestar, but on the broader question of whether the fee award appropriately reflects the degree of time and effort expended by the attorneys." *In re Tyco Intern., Ltd. Multidistrict Litig.*, 535 F. Supp. 2d 249, 270 (D.N.H. 2007) (quoting *In re Thirteen Appeals Arising Out of San Juan Dupont Plaza Hotel Fire Litig.*, 56 F.3d 295, 307 (1st Cir. 1995)).

There is no question that Class Counsel devoted significant time and effort to this case at great risk. This was a proprietary case that Class Counsel investigated itself. It was not a follow-on to any government inquiry or investigation. Class Counsel litigated this case vigorously, pursuing the case in three federal courts to maximize the strategic benefit to the Settlement Class and exert pressure on HelloFresh, which remained unwilling to admit liability, even throughout mediation.

As a result of these extensive efforts, Class Counsel's lodestar as of May 11, 2021 totals $1,635,097. Slaughter Decl. ¶ 29.[15] Without considering ongoing and future work, the multiplier as of May 11 was 2.74. *Id.* This further supports Class Counsel's fee request, as it is typical for courts to approve fees in excess of the lodestar to compensate counsel for the risks they assumed in contingent fee cases. *See City of Detroit v. Grinnell*, 495 F.2d 448, 470 (2d Cir. 1974) ("No one

[15] Class Counsel can certainly provide the Court with detailed time records if requested but has not done so here where it appears the Court historically has not required such records. *See, e.g. Moitoso*, 18-cv-12122-WGY, ECF. Nos. 254, 254-2, 271 (D. Mass.); *In re Relafen Antitrust Litig.*, 01-cv-12239-WGY, ECF Nos. 295, 457 (D. Mass.).

expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success."). In general, courts consider multipliers of more than two reasonable in common fund cases. *In re Relafen Antitrust Litig.*, 231 F.R.D. at 82 ("A multiplier of 2.02 is appropriate"); *see also Steiner v. Am. B'casting Co., Inc.*, 248 Fed. App'x. 780, 783 (9th Cir. 2007) (multiplier of 6.85 "falls well within the range of multipliers that courts have allowed"…The requested multiplier here (2.09) falls at the low end of this range). *In re Cendant Corp.,* 243 F.3d 722, 742 (3d Cir. 2001) (holding that a lodestar multiplier of 3 would be reasonable and appropriate); *In re TJX Cos. Retail Sec. Breach Litig.,* 584 F. Supp. 2d 395, 408 (D. Mass. 2008) (lodestar multiplier of 1.97); *In re Tyco*, 535 F. Supp. 2d at 271 (lodestar multiplier of 2.697); *In re Visa Check*, 297 F. Supp. 2d 503, 524 (E.D.N.Y. 2003) (lodestar multiplier of 3.5); *In re Prudential Ins. Co. America Sales Practice Litig. Agent Actions*, 148 F.3d 283, 341 (3d Cir. 1998) ("[M]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied."). *Cf. Stevens*, 2020WL 996418, at *13 (approved one-third fee represented a 6.16 multiplier); *Conley*, 222 B.R. at 182 (approving $7.5 million in attorneys' fees at a lodestar multiplier of 8.9); *CarpentersHealth*, 2009 WL 2408560 at *2 (finding a lodestar multiplier of 8.3 reasonable). Thus, the lodestar cross check here supports Class Counsel's fee request.

CONCLUSION

For these reasons, Plaintiffs respectfully request that the Court find Class Counsel adequately represented the Settlement Class, approve the class settlement, and award $4,486,694.22 in attorneys' fees.

Dated: June 1, 2021

Respectfully Submitted,

/s/ Stacey P. Slaughter

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CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2021, a true and correct copy of the foregoing was served by CM/ECF to the parties registered to the Court's CM/ECF system.

Dated: June 1, 2021 */s/ Stacey Slaughter*