THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

GRACE MURRAY, on behalf of herself and others similarly situated, Plaintiff, v. GROCERY DELIVERY E-SERVICES USA INC. DBA HELLO FRESH, Defendant.	Case No. 1:19-cv-12608-WGY CLASS ACTION

HELLOFRESH'S SUPPLEMENTAL BRIEF ON ARBITRATION IN SUPPORT OF THE MOTION FOR FINAL APPROVAL OF THE CLASS SETTLEMENT

I. INTRODUCTION

Because it is fair and reasonable, the Court should grant final approval of the class action settlement of $14 million. In particular, it is equitable for each class member who has submitted a claim to be paid the same amount on a pro rata basis. This is true despite the fact that some class members may be subject to arbitration.

Courts regularly approve class action settlements that include class members who may be subject to arbitration. Courts also regularly approve class action settlements where class members are paid equally despite the fact that some of them may have agreed to arbitration.

This is because an arbitration defense does not affect the merits or value of any particular claim, but only whether the claim may be brought in court or in arbitration. For example, if a defendant is liable for violating the Telephone Consumer Protection Act ("TCPA") for making a

phone call, the plaintiff can recover a statutory penalty of $500 for each call in violation regardless of whether the plaintiff brings that claim in court or in arbitration.

Arbitration can, of course, defeat or narrow the scope of class certification, but does not impact the value of an individual claim. Courts also regularly certify class actions as part of class action settlements even if some members are subject to arbitration because parties can waive any right to arbitration and because it is rare for there to be a final ruling on arbitration at the time of settlement, making the issue contested and risky for both sides. Here, for example, this Court has only ruled that Murray's claim is not subject to arbitration, but that ruling has been appealed and is not final. The Court has not concluded that any member of the class is subject to arbitration.

Even though HelloFresh started including arbitration provisions in its terms in February of 2017, Plaintiffs argue that none of the class here is subject to arbitration because the arbitration clause is narrow and because they canceled their service and thus canceled their contracts and are not subject to arbitration for claims arising from phone calls they received after they canceled their contracts. Doc. 92 at pp. 4-5. While HelloFresh disputes such arguments, there is risk on both sides, as to arbitration and as to the many other issues and defenses described by HelloFresh in its original brief in support of the motion for final approval of the class action settlement. These risks on both sides have led to a compromised settlement that includes consumers regardless of whether they agreed to arbitration and pays each class member who submits a valid claim the same. *See* Doc. 92 at p. 6.

HelloFresh believes the settlement is fair and reasonable and should be approved.

II. THE SETTLEMENT REASONABLY PAYS CLASS MEMBERS THE SAME REGARDLESS OF WHETHER SOME MAY HAVE AGREED TO ARBITRATION

The Court should grant Plaintiffs' motion for final approval of the class action settlement. To begin with, the public interest generally favors approval of class action settlements. *See Lazar v. Pierce,* 757 F.2d 435, 439 (1st Cir. 1985). District courts should approve class action settlements if fair, reasonable, and adequate. Fed. R. Civ. P. 23(e)(2); *City Pshp. Co. v. Atlantic Acquisition*, 100 F.3d 1041, 1043 (1st Cir. 1996). In approving class action settlements, courts must consider a variety of factors, including "the costs, risks, and delay of trial and appeal," and whether "the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(C)(i) and (D).

Arbitration is not a merit-based defense but a procedural defense that can potentially defeat or narrow the scope of class certification. This is true regardless of whether the arbitration provision includes a class action waiver, because the U.S. Supreme Court has held that an arbitrator does not have authority to certify a class action unless expressly granted by the terms of arbitration. *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010); *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1419 (2019). Unlike other defenses on the merits, the defense of arbitration does not affect the value of any particular claim.

In considering class settlements, courts regard the potential applicability of an arbitration provision like other potential defenses that pose a risk to the plaintiffs and thus warrant approval of a class settlement for a compromised amount. *See, e.g., Jabbari v. Farmer*, 813 F. App'x 259, 261 (9th Cir. 2020) (affirming approval of class settlement where "arbitration and certification issues presented risk"); *In re NFL Players Concussion Injury Litig.*, 821 F.3d 410, 440 (3d Cir. 2016) (affirming approval of class action settlement as a "fair deal" where "available affirmative

defenses could have left [plaintiffs] to pursue claims in arbitration or with no recovery at all"); *In re TracFone Unlimited Service Plan Litigation*, 112 F. Supp. 3d 993, 999-1000 (N.D. Cal. 2015) (approving class settlement in part because "there is substantial risk of lengthy and complicated litigation if this case is not settled, and a sizeable risk that such litigation could not be maintained as a class action and would instead be compelled to individual arbitrations"); *Perry v. Fleetboston Financial Corp.*, No. 04-0507, 229 F.R.D. 105, 116 (E.D. Pa. June 28, 2005) (approving class settlement because even though the district court had denied a motion to compel arbitration the risk on this issue remained on appeal).

In the *Perry* case, as with the claims of two of the named Plaintiffs here, Murray and Engen, the court denied the motion to compel arbitration because the defendant in that case did not include an arbitration provision in its terms until after the plaintiff agreed to earlier terms without such a provision. The court in *Perry*, like the Court here regarding Murray's claim, was unpersuaded that the plaintiff could be bound by later terms because of a unilateral modification provision in the original terms. Nevertheless, the court recognized that the appellate court might disagree and approved the class action settlement because of this risk. *Perry*, 229 F.R.D. at 116. Similarly here, HelloFresh has appealed the denials of the motions to compel arbitration of the claims brought by Murray and Engen.

For the settlement here, the Court seems concerned that class members are paid the same amount on a pro rata basis regardless of whether they signed up before or after HelloFresh started including an arbitration provision in its terms in February of 2017.

Courts, however, regularly approve class settlements of equal payments to class members regardless of whether the member agreed to arbitration or not, usually for one or more of the

following reasons: (1) arbitration does not impact the underlying merits or value of a claim, but only whether the plaintiff can pursue that claim in court or in arbitration; (2) whether any particular class member agreed to arbitration and whether an arbitration provision can be enforced is a complicated, fact intensive inquiry, especially when contract terms and consent processes have changed over time (as is the case here); (3) the parties can waive any right to arbitration including through a settlement; and (4) whether subject to arbitration or not, class members have the equal right to opt-out of the class settlement and pursue their claims individually, either in court or in arbitration as the case may be.

For example, in *Harvey v. Morgan Stanley Smith Barney LLC*, No. 18-02835, 2020 U.S. Dist. LEXIS 37580 (N.D. Cal. Mar. 3, 2020), the court approved the class settlement despite the objector's argument that class members with arbitration agreements should receive less than those without them. *Id*. at *21-26. The court found that equal payment was fair and reasonable because determining whether any particular class member was subject to arbitration was a complicated, fact-intensive inquiry that varied by individual and equal payment as part of a compromised settlement was the most practical and equitable resolution. *Id.*

In *Tennille v. W. Union Co.*, 785 F.3d 422 (10th Cir. 2015), the Tenth Circuit affirmed the district court's decision to approve a settlement and certify a class where the named plaintiffs, but not all class members, had contractually agreed to arbitrate their disputes. *Id.* at 431. The court rejected the objector's argument that the named plaintiffs could not adequately protect her interest and the interest of similarly situated class members who had not agreed to arbitration their claims. *Id.*

In *Dasher v. RBC Bank United States (In re Checking Account Overdraft Litig.)*, No. 09-02036, 2020 U.S. Dist. LEXIS 142012 (S.D. Fla. Aug. 10, 2020), the court also approved the class settlement with equal payments to class members regardless of whether they agreed to arbitration. *Id.* at *43. The court noted that the defendant could waive its right to arbitration as part of the settlement and found that arbitration did not impact the merits of the underlying claims—a claim is not worth less simply because it must be decided by an arbitrator rather than a court. *Id.* at *40.

In *Swinton v. Squaretrade, Inc.*, 454 F. Supp. 3d 848 (S.D. Iowa 2020), the court approved the class settlement of equal payments and rejected the objectors' attempt to "ascribe theoretical value to the absence of an enforceable arbitration clause." *Id.* at 869. According to the court, an arbitration provision "makes the merits of Class Members' claims no more or less colorable, and any assessment of how the lack of mandatory arbitration might influence a different settlement in this or any other case is unduly speculative." *Id.* The court also noted that whether subject to arbitration or not, class members had an equal opportunity to opt out of the class and pursue their claims in court or in arbitration as the case might be. *Id.*

In *Couser v. Comenity Bank*, 125 F. Supp. 3d 1034 (S.D. Cal. 2015), the court approved a class action settlement in a TCPA case involving equal pro rata payments to the class despite the fact that some class members were subject to contracts including an arbitration provision. That case involved a class fund of $8,475,000 for a class consisting of about four million members. Because of a relatively high claims rate of 17%, each class member would receive an equal pro rata payment of $13.75. The court found that "the presence of an arbitration clause in the cardholder agreement (which includes a class action waiver) for many [but not all] Class

Members presents a major risk in seeking class certification and maintaining a class throughout litigation." *Id.* at 1042. The court was untroubled by the fact that class members would be paid equally regardless of whether their claim was subject to arbitration.

In re Centurylink Sales Practices & Sec. Litig., No. 17-2795, 2020 U.S. Dist. LEXIS 227558 (D. Minn. Dec. 4, 2020), the court approved the class action settlement with equal payments to the class members despite the fact that many class claims were subject to arbitration. *Id.* at *19-20. In particular, the court noted there "was evidence that every Named Plaintiff, save one, had agreed to mandatory arbitration and a class-action waiver." The court found that "the Settlement benefits the Class by resolving otherwise individual defenses, such as the enforceability of arbitration provisions and class-action waivers, on a classwide basis." *Id.* at *47.

Similarly, here, the settlement benefits the class by resolving HelloFresh's defense regarding the enforceability of its arbitration provision and class action waiver, on a class-wide basis. Further, the issue of whether HelloFresh's post-February 2017 arbitration provisions are enforceable against class members is a contested one. The only issue that this Court has decided with respect to HelloFresh's arbitration provision is whether Plaintiff Grace Murray agreed to its arbitration clause that was added to its terms and conditions after she had already signed up for meal-delivery services. Doc. 9. The Court concluded that she did not because she signed up before February of 2017 when HelloFresh started including an arbitration provision in its terms. Docs. 28, 44. (This too, is disputed and not final, as HelloFresh has appealed the issue.) The issue of whether HelloFresh's arbitration provision is enforceable against *other* class members, including those members who signed up after February 2017, was never before this Court. Thus,

the Court never had an opportunity to review HelloFresh's various post-February 2017 disclosures, arbitration provisions, and signup procedures, and determine whether the arbitration provisions are enforceable. *See Harvey*, 2020 U.S. Dist. LEXIS 37580, at *21-26 (rejecting objector's argument that class members "with releases and arbitration agreements should receive less than those without" as there were multiple iterations of the arbitration agreements and releases which arose in various contexts and therefore the parties were unable to easily allocate class members based on whether class members signed arbitration agreements and releases or not). As in *Harvey*, HelloFresh had different disclosures, provisions, and signup processes at different times over the class period.

Like liability, affirmative defenses, and class certification, the parties also dispute whether any class member is subject to arbitration. Plaintiffs argue that none of the class members are subject to arbitration, including those who signed up after February of 2017. Doc. 92 at pp. 4-5. Plaintiffs argue that HelloFresh's arbitration provisions are limited in scope and do not apply to their TCPA claims. *Id.* Plaintiffs argue that the class consists only of former HelloFresh customers who deactivated their accounts, thus cancelling their contractual relationship with HelloFresh, including any arbitration terms they may have agreed to while customers. *Id.* Plaintiffs argue that calls received by former customers after they cancelled their contracts are not subject to an arbitration provision contained in those contracts. *Id.* Plaintiffs also argue that the arbitration provision is unenforceable as unconscionable.

Though HelloFresh disagrees with Plaintiffs' arguments, HelloFresh recognizes there is risk. As part of the class action settlement only, HelloFresh has waived its right to arbitration to resolve this and all other risks for a compromised amount. By doing so, HelloFresh is seeking to

avoid lengthy litigation, including on appeal, including as to arbitration, which might result in liability to HelloFresh.

Perhaps most importantly, however, it is equitable to pay all class members the same because arbitration does not impact the underlying merits or affect the value of any particular claim. *See Swinton*, 454 F. Supp. 3d at 869 (explaining that "it is not clear how the absence of an enforceable arbitration clause will actually benefit the class. **It makes the merits of Class Members' claims no more or less colorable**, and any assessment of how the lack of mandatory arbitration might influence a different settlement in this or any other case is unduly speculative." (emphasis added)); *see also Gehrich v. Chase Bank United States,* 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. All class members allegedly received calls or text messages from Chase in violation of the TCPA . . .").

The merits and value of a class member's claim do not change simply because the member signed up after February 2017 and may potentially be required to pursue their claims in arbitration. Rather, the merits and value of each class member's claim are substantially the same across the entire class regardless of whether they are subject to arbitration or not. Moreover, a class member's claim does not disappear if an arbitration agreement is found to be enforceable against them. It simply means that they have to resolve their claim in arbitration or small claims court instead of in civil court. *See* Doc. 12-1, Meininghaus Decl., Ex. A (carving out small claims court from the arbitration provision); Doc. 12-2, Meininghaus Decl., Ex. B (same). Thus, it would be unfair to pay class members who signed arbitration provisions less than those who

did not. Class members should be treated equally regardless of whether they may *potentially* be subject to arbitration.

This is especially true in light of the fact that the notice procedures allowed the class members the opportunity to opt out of the settlement for any reason, including, for example, if they wished to pursue their claims elsewhere such as arbitration. *See Swinton*, 454 F. Supp. 3d at 869 (noting that "[i]f Class Members think as highly as [the objectors] do about their prospects of litigating legally dubious claims just because some Class Members might not be compelled to arbitration, they could have opted out of the Settlement."). Out of the 4.75 million class members who were provided notice, only 270 members chose to opt-out of the class. ECF 79-1, ¶ 17. With respect to the remaining class members, HelloFresh is willing to settle all claims here as part of a class action settlement.

Indeed, if the settlement is not approved, the parties would have to try to renegotiate a new settlement or abandon settlement efforts and engage in lengthy and protracted litigation regarding the enforceability of HelloFresh's various post-February 2017 arbitration clauses, in addition to HelloFresh's many other defenses. If the parties are able to agree on a modified settlement, there would be additional administration costs, including the cost of providing notice to the class members of the modified agreement and additional legal fees. These costs could potentially diminish the payment amount to each class member.

In any event, the value of any particular claim does not change merely because the claim might be subject to arbitration. For this reason, it is fair, reasonable, and equitable to pay class members equally on a pro rata basis.

III. CONCLUSION

For these reasons, the Court should grants Plaintiffs' motion for final approval of the class action settlement in which HelloFresh will pay $14 million to resolve the TCPA class action claims.

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By */s/ Lisa Yun Pruitt*

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the CM/ECF system will be sent electronically to the registered participants as identified on the NEF (NEF) and paper copies will be sent to those indicated as non-registered participants on June 7, 2021.

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