IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

NEIL KRAN, individually and on behalf of all others similarly situated, *Plaintiff*, v. HEARST COMMUNICATIONS, INC., a Delaware corporation, A MARKETING RESOURCE, LLC, a Minnesota limited liability company, *Defendants*.	Case No. 0:15-cv-02058-MJD-BRT

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court Cases

United States Court Of Appeals Cases

United States District Court Cases

State Court Cases

Rules and Statutes

Miscellaneous

I. INTRODUCTION

Plaintiff Neil Kran ("Plaintiff" or "Kran") respectfully requests that this Court grant final approval of the class action Settlement with Hearst Communications, Inc. ("Hearst") and A Marketing Resource, LLC ("AMR," collectively "Defendants").[1] The Settlement—which, if finally approved—resolves the claim that Defendants violated the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA") by placing telemarketing calls promoting the *San Francisco Chronicle* newspaper to consumers registered on the National Do Not Call Registry (the "DNC Registry"), is a truly exceptional result for the Settlement Class. To be sure, class members who submitted valid claims are slated to receive full relief for each violative call—equal to $500 *per call*—with the average payment being approximately $6,300, and with one class member who received over 50 calls standing to receive around $25,500. In addition to providing per call relief where most TCPA settlements provide a single payout *per person*, the per call payments themselves also dwarf the overall payment in nearly every other TCPA settlement, where the recovery ranges from less than $25 in cash or coupons to around $200 on the high end. The Settlement also provides meaningful prospective relief requiring Hearst to put procedures in place to ensure that class members, and others on the DNC Registry, do not receive unsolicited phone calls again.

Since preliminary approval was granted on June 29, 2016 (Dkt. 52), the Settlement Administrator has successfully implemented the Court-approved Notice Plan delivering

[1] All capitalized terms not defined in Plaintiff's Motion are defined in the Settlement Agreement. Additionally, although its already been provided, a copy of the Settlement Agreement is attached hereto as Exhibit 1 for the Court's convenience.

direct notice to 98.8% of the Settlement Class, and the deadlines for submitting opt-out requests and objections to the Settlement have expired. Given the unparalleled result obtained, it is of little surprise that there have been no objections and not a single person has requested to be excluded. And, given the active and aggressive group of "professional objectors" who seek out and object to class settlements (and TCPA settlements, in particular), the complete absence of objections speaks volumes as to the fairness and adequacy of the Settlement.

For these reasons, and as explained more fully below, the Court should not hesitate to grant final approval of the Settlement as it is unquestionably fair, reasonable, and adequate.

II. BACKGROUND

A brief summary of the underlying facts and law, largely taken directly from Plaintiff's request for reasonable fees (*see* Dkt. 56), are provided below to give context for the instant Motion and highlight the outstanding results achieved for the Settlement Class.

A. The Underlying Claims and the TCPA.

Starting in or around January 2015, Hearst (a large media company from New York) engaged AMR (a telemarketing agency based in Minnesota) to reverse its declining subscribership to the *San Francisco Chronicle* through a telemarketing campaign. (Dkt. 38 ¶¶ 1-2, 7-8.) Around that same time, Kran began receiving telephone calls on his landline that attempted to sell him a subscription to that newspaper. (*Id.* ¶ 18.) Kran alleged that these calls appeared on his caller ID as coming from a San Francisco

area code and identified the caller as the "SF Chronicle." (*Id.*) Kran further alleged that when he answered one of the calls, the telemarketer explicitly stated that she was calling from the *San Francisco Chronicle* and inquired whether he would like to subscribe to the newspaper. (*Id.* ¶¶ 18-20.) Kran informed the telemarketer that he was not interested in subscribing and that he had never been a subscriber, that his telephone number was on the DNC Registry, and specifically requested to not be called again. (*Id.* ¶ 20.) Nevertheless, Defendants continued to call Kran. (*Id.*) Fed up, and understanding that his experience was not an isolated incident, Kran filed this action on behalf of himself and others similarly situated, claiming Defendants' telemarketing calls to consumers who listed their phone numbers on the DNC Registry violated the TCPA. (*Id.* ¶¶ 32-41.)

The TCPA was enacted in response to "[v]oluminous consumer complaints about the abuses of telephone technology." *Mims v. Arrow Fin. Servs. LLC*, 132 S. Ct. 740, 744 (2012). In passing the statute, Congress specifically sought to prevent "intrusive nuisance calls" to consumers that it deemed "invasive of privacy." *See id*. The DNC Registry portion of the TCPA didn't come about in its present form until 2003, when Congress enacted the Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat 557 (Mar. 11, 2003), and in response the FCC—the agency entrusted with interpreting the TCPA—adopted rules to establish a national do-not-call registry. *See In re Rules & Regulations Implementing the Tel. Consumer Prot. Act. of 1991*, 18 F.C.C.R. 14014 (2003), ¶¶ 28-33. In so doing, the FCC recounted, for instance, the abundant complaints it had received related to telemarketing, *id.* ¶ 28 & n.117, and noted that "incessant telephone

solicitations are especially burdensome for the elderly, disabled, and those that work non-traditional hours." *Id.* ¶ 29 & n.119.[2]

Through its FCC implementing regulations, the TCPA provides that "[n]o person or entity shall initiate any telephone solicitation" to "[a] residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the federal government." 47 C.F.R. § 64.1200(c). This prohibition extends "to any person or entity making telephone solicitations or telemarketing calls to wireless telephone numbers" as well. 47 C.F.R. § 64.1200(e). The TCPA provides a private right of action for any "person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the [FCC's] regulations," 47 U.S.C. § 227(c)(5), and allows for recovery of "up to $500 in damages *for each such violation*," or up to "3 times th[at] amount" if the defendants' conduct is found "willful[] or knowing[]." *Id* (emphasis added).

Additionally, and relevant here, the TCPA's prohibitions extend not only to the party that directly placed the calls, but also impose liability for those "on whose behalf" a solicitation is made. 47 C.F.R. § 64.1200(c)(2). Courts have interpreted this phrase to sweep more broadly than traditional agency principles of actual and apparent authority and ratification. *See Siding & Insul. Co. v. Alco Vending, Inc.*, 822 F.3d 886, 897-99 (6th

[2] The Do-Not-Call Registry is one of the most popular government programs ever created. In fact, "[t]he great American philosopher, Dave Barry, has called the Do-Not-Call Registry the most popular Government program since the Elvis stamp." *Fin. Servs. & Gen. Gov't Approps. for F.Y. 2009*, S. Comm. on Appropriations, Fin. Servs. & Gen. Gov't Approps. Subcomm., 110th Cong. 14 (2008) (statement of Jon Leibowitz, Chairman, FTC).

Cir. 2016); *Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, DDS, PA*, 781 F.3d 1245, 1254 (11th Cir. 2015); *see also Jackson v. Caribbean Cruise Line, Inc.*, 88 F. Supp. 3d 129, 137-38 (E.D.N.Y. 2015) (observing that "common-law vicarious liability is a different legal creature than statutorily created 'on behalf of' liability"). The FCC has likewise made clear that liability under the TCPA will attach to persons or entities who have a high degree of involvement in the transmissions even if they did not place the calls, and that an entity can be liable under the TCPA through federal common law agency principles. *See In the Matter of the Joint Petition Filed by Dish Network, LLC et al. for Declaratory Ruling Concerning the Tel. Consumer Prot. Act (TCPA) Rules*, Declaratory Ruling, 28 FCC Rcd. 6574, 6583-84, 6587, n. 107 (F.C.C. May 9, 2013) (the "2013 FCC Order"); *cf. Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 674 (2016) (finding "no cause to question" the FCC's ruling "that under federal common-law principles of agency, there is vicarious liability for TCPA violations").

B. The Litigation History.

As noted above, Kran received the alleged offending calls in January of 2015 and filed the instant Action on April 20, 2015. (Dkt. 1.) Both Kran's initial and amended complaint allege a single claim: that Defendants violated the TCPA when they placed phone calls to individuals listed on the DNC Registry. (Dkts. 1, 38.) On June 19, 2015, Defendants filed their respective answers to the complaint, each asserting several affirmative defenses and disputing any liability for their alleged conduct. (Dkts. 18, 20.)

As the parties began the discovery process, they also started discussing the potential resolution of this matter. (*See* Declaration of Eve-Lynn J. Rapp at ¶ 4, attached

hereto as Exhibit 2.) Defendants agreed to first produce discovery to Class Counsel regarding the number of calls made, the number of unique telephone numbers dialed, how the calls were placed, and further information regarding the relationship between Defendants after which the Parties would participate in a mediation with the The Honorable Edward A. Infante (ret.) of JAMS in San Francisco. (*Id.* ¶ 5.) The information produced showed that Hearst retained AMR to make the calls at issue and provided it with the telephone numbers to dial in order to effectuate the telemarketing campaign, and ultimately, boost sales of the *San Francisco Chronicle*. (*Id.* ¶ 6.) It also demonstrated that the telemarketing campaign resulted in Defendants placing more than 48,000 calls to the 4,162-person Settlement Class who had their telephone numbers listed on the DNC Registry. (*Id*.)

On December 14, 2015, the Parties participated in a day-long mediation with Judge Infante. (*Id.* ¶ 7.) They were unable to reach a negotiated compromise, but made progress towards closing the gap between them. (*Id.*) As a result, as the mediation was about to conclude, the Parties agreed to allow Judge Infante to make a mediator's proposal. (*Id*.) And, while both Parties ultimately accepted Judge Infante's proposal (after several weeks of additional evaluation), the negotiations did not end there. (*Id.* ¶ 8.) Indeed, even after the Parties' accepted, it took several more weeks of negotiations—and the further assistance of Judge Infante—to finalize the details of the Settlement. (*Id.*)

II. THE TERMS OF THE SETTLEMENT

The terms of the Settlement preliminarily approved by the Court are briefly summarized below:

A. Class Definition. As part of granting preliminary approval, the Court certified a Settlement Class defined as "All individual in the United States (1) who had his or her telephone number(s) registered with the National Do Not Call Registry for at least thirty days prior to the first Telephone Call, (2) who received more than one Telephone Call within a twelve-month period, (3) who were not a subscriber to the *San Francisco Chronicle* for a period of at least 18 months prior to the first Telephone Call (or who have never subscribed at all). (Dkt. 53 ¶ 3.)[3]

B. Monetary Relief. Defendant Hearst has created a $2.1 million non-reversionary Settlement Fund, from which all Settlement Class Member claims will be paid. After Settlement Administration and Notice Expenses, an incentive award, and attorneys' fees have been paid, each Settlement Class Member who submits an Approved Claim will receive a *pro rata* share of the Settlement Fund based upon the number of calls they received. (Exhibit 1, Agreement ¶ 2.1(b), (e).) Currently, class members with Approved Claims are anticipated to receive $500 per call.

C. Prospective Relief. Defendant Hearst has agreed to implement procedures for at least four years to ensure that Settlement Class Members, and the public generally, do not receive phone calls to numbers that are on the DNC Registry. These procedures include (1) cross-referencing all telephone numbers to which it intends to make telephone calls promoting subscriptions or the renewal of subscriptions to the *San Francisco*

[3] A "Telephone Call" is any call to a telephone number registered with the DNC Registry more than thirty (30) days after its registration placed by either Hearst or AMR purportedly on behalf of Hearst to promote subscriptions or the renewal of subscriptions to Hearst's *San Francisco Chronicle* newspaper. (Exhibit 1, Agreement ¶1.24.)

Chronicle against the DNC Registry database for telephone numbers, (2) refraining from calling such numbers identified as being on the DNC Registry, and (3) providing to consumers the option to elect to receive, and unsubscribe from telephone calls promoting subscriptions or the renewal of subscriptions to the *San Francisco Chronicle* through channels such as customer service and by contacting Hearst by other available means. (*Id.* ¶ 2.2(a)–(c).)

D. Payment of Settlement Administration Expenses, Including Notice. The Settlement Fund has been and will be used to pay all reasonable Settlement Administration Expenses, including those related to processing claims and providing Notice. (*Id.* ¶ 1.28.)

E. Payment of Incentive Award and Attorneys' Fees. As detailed in a separate motion to the Court, Hearst has agreed to pay from the Settlement Fund, subject to Court approval, an incentive award of $1,000 to Plaintiff Kran in recognition of his service as Class Representative and an award of reasonable attorneys' fees and expenses to Class Counsel, as may be awarded by the Court. (Dkt. 56.) Despite the Settlement agreement's provision that, with no consideration from Defendants, Class Counsel would limit any fee request to 40% of the Settlement, Class Counsel sought an award thirty-three percent (33 1/3 %), or $700,000 of the Settlement Fund. (*Id.*)

F. The Release. In exchange for the monetary and prospective relief described above, Defendants will be released, acquitted, and forever discharged from any and all claims relating to the alleged making of Telephone Calls to members of the Settlement Class. (*See* Exhibit, Agreement ¶¶ 1.25–1.27, 3 for complete release language.)

III. THE NOTICE PLAN SATISFIES DUE PROCESS

Prior to granting final approval to this Settlement, the Court must first consider whether the Notice to the Settlement Class is "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *accord Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974); *Benacquisto v. Am. Express Fin. Corp.*, No. 00-cv-1980, 2015 WL 4661936, at *2 (D. Minn. Aug. 5, 2015). The notice, however, "need not be perfect; it must only satisfy the 'the broad reasonableness' standards imposed by due process." *Hashw v. Dept. Stores Nat'l Bank*, --- F. Supp. 3d ---, No.13-727-RHK, 2016 WL 1729525, at *6 (D. Minn. April 26, 2016). The Federal Judicial Center has concluded that a notice plan that reaches at least 70% of the class is reasonable. Federal Judicial Center, *Judges' Class Action Notice & Claims Process Checklist & Plain Language Guide* 3 (2010); *see also Hashw*, 2016 WL 1729525, at *6 (finding notice that reached 80% of the class to be reasonable).

The notice plan approved by the Court in this case has been successfully implemented by Court-approved Settlement Administrator Kurtzman Carson Consultants ("KCC"). (*See* Declaration of Kathleen Wyatt, a copy of which is attached at Exhibit 3.)[4] Specifically, KCC was provided with a "Class List" containing the names, physical addresses, email addresses, telephone numbers called and the number of times that a member of the Settlement Class was called by Defendants. (Wyatt Decl. ¶ 3.) After

[4] On March 28, 2016, KCC provided the required notice of the settlement pursuant to CAFA, 28 U.S.C. § 1715, to the 51 state and Puerto Rico attorneys general and to the U.S. Attorney General. (Wyatt Decl. ¶ 2.)

processing the Class List for duplicate entries, and obtaining missing addresses, KCC mailed notice to the entire 4,162-member Settlement Class and also sent an email notice to the 609 individuals for whom they had email addresses. (*Id.* ¶¶ 4-6.) Only 79 of the notices were returned as undeliverable by the Post Office, but a new address was found for 48 of those notices and it was remailed. (*Id.* ¶ 9.) Accordingly, the Court-approved notice successfully reached 98.8% of the Settlement Class.

Each of the summary notices delivered directly to Settlement Class Members directed them to the Settlement Website—www.SFChronicleCallsClassAction.com—an online resource center where they can submit their claims via a short and simple electronic form, as well as access and review important court filings, deadlines, and frequently asked questions. (*Id.* ¶ 7.) KCC also established a toll-free telephone line, enabling members of the Settlement Class to connect with the Settlement Administrator, request a claim form, and obtain additional information about the Settlement. (*Id.* ¶ 8.) Class Counsel's number was also listed on the Settlement Website and Notice as an additional toll-free resource. (*Id.* ¶ 7.) And, Class Counsel's office has spoken to numerous class members about the Settlement. (Rapp Decl. ¶ 11).

As the Court-approved notice reached 98.8% of the Settlement Class directly—a rate that far surpasses others approved within this District and is well above the threshold endorsed by the Federal Judicial Center—and given the comprehensive information provided, the requirements of Due Process and Rule 23 have been satisfied.

IV. THE SETTLEMENT MERITS FINAL APPROVAL.

Federal Rule of Civil Procedure 23(e) mandates that "claims, issues, or defenses of

a certified class may be settled . . . only with the court's approval . . . after a hearing and finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e). Even so, an "initial presumption of fairness" is attached to class settlements. *See, e.g., In re Uponor, Inc. F1807 Plumbing Fittings Prods. Liab. Litig.*, 716 F.3d 1057, 1063 (8th Cir. 2013) (citing *Little Rock Sch. Dist. v. Pulaski Cnty. Special Sc. Dist. No. 1*, 921 F.2d 1371, 1391 (8th Cir. 1990) (finding that settlement agreements are "presumptively valid"). This presumption is strengthened where, as here, "the settlement was reached through mediation with a third-party neutral . . . ." *Hashw*, 2016 WL 1729525, at *3.

The ultimate determination of a settlement's reasonableness and adequacy is analyzed through a multi-factor test, but viewed through a lens presuming its fairness. *See In re Uponor*, 716 F.3d at 1063. Specifically, courts in this District consider: (1) the merits of the plaintiff's case, weighed against the terms of the settlement; (2) the defendant's financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement. *Id.* at 1063 (internal citations omitted). On these factors, the Court need not "go beyond an amalgam of delicate balancing, gross approximations, and rough justice." *White v. Nat'l Football League*, 822 F. Supp. 1389, 1417 (D. Minn. 1993) (internal citations omitted). Rather, "the court's role in reviewing a negotiated class settlement is 'to ensure that the agreement is not the product of fraud or collusion and that, taken as a whole, it is fair, adequate, and reasonable to all concerned.'" *Marshall v. Nat'l Football League*, 787 F.3d 502, 509 (8th Cir. 2014) (internal citation omitted).

Here, each of the factors demonstrates that the Settlement is exceptionally fair, reasonable, and adequate. Accordingly, the Court can grant final approval without hesitation.

A. The strength of Plaintiff's case, compared with the relief afforded under the Settlement, supports granting final approval.

The first and most important consideration in determining whether a settlement is fair, reasonable, and adequate is "the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." *Petrovic v. Amoco Oil Co*., 200 F.3d 1140, 1150 (8th Cir. 1999). These considerations are not intended to generate a precise, mathematical value for the litigation, for a "high degree of precision cannot be expected in valuing a litigation." *Hashw*, 2016 WL 1729525, at * 3 (quoting *Synfuel Techs., Inc. v. DHL Express (USA) Inc*., 463 F.3d 646, 653 (7th Cir. 2006)). Instead, the court must roughly balance the risks and benefits of litigation against the immediate recovery that the settlement provides to class members. *See, e.g.*, *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 124 (8th Cir. 1975); *Petrovic*, 200 F.3d at 1150 (8th Cir. 1999).

Here, the relief obtained for the Settlement Class is exceptional, both compared to other TCPA actions and when viewed in light of the risks of obtaining nothing through continued litigation. The instant settlement is exceptional primarily for two reasons: (1) it is among a handful of deals that provides relief on a per call basis; and (2) the payment of full recovery of $500 per call greatly exceeds the amount typically available in settlements with a single payout without regard to the number of violative calls received.

First, to the best of Class Counsel's knowledge, in only a handful of other TCPA settlements (and all but one which has been handled by Class Counsel here) has per call relief been available. And, in the majority of those instances, the per call claim processes required the provision of call records, and did not allow claimants to recover automatically upon completion of a simple claim form like the instant Settlement. *See, e.g.*, *Hopwood v. Nuance Communications, Inc.*, No. 13-cv-2132, Dkt. 101-1, (N.D. Cal.) (providing class members that submitted claim form with accompanying proof $65 per call); *Flanigan v. The Warranty Group, Inc.*, No. 2014 CH 00956 (Cir. Ct. Cook Cty.) (providing class members that submitted claim form with accompanying proof $50 per call).

Second, in nearly all TCPA cases—and in those few based upon alleged violation of the DNC Registry specifically—the payment to class members is often far less than is anticipated here. *See Hashw*, 2016 WL 1729525, at *1, 4 (approving settlement providing class members who received over 100 calls in violation of the TCPA a single $33 payment); *Ott et al. v. Mortgage. Invest. Corp.*, No. 14-cv-00645, Dkt. 146 at 2 (D. Or. Jan 5, 2016) (providing a single $140 to each class member for defendants' alleged repeated violations of the TCPA's Do Not Call provisions); *see also e.g.*, *Kazemi v. Payless Shoesource, Inc.*, No. 3:09-cv-05142, Dkt. 94 (N.D. Cal. Apr. 2, 2012) (providing for a $25 voucher to each class member); *In re Jiffy Lube Int'l, Inc. Text Spam Litig.*, No. 3:11-md-02261, Dkt. 97 (S.D. Cal. Feb. 20, 2013) (providing for a $20 voucher or $15 cash to each class member); *Arthur v. Sallie Mae, Inc.*, No. 2:10-cv-00198, Dkt. 266 (W.D. Wash. Sept. 17, 2012) (providing for a $20-40 cash payment to

each class member); *In re Capital One TCPA Litig.*, 80 F. Supp. 3d 781, 789 (providing for $34 to each class member). Thus, quite obviously, the full relief afforded per call here and the simplicity of the claims process is far superior to virtually every other TCPA settlement.

When risks of continued litigation are entered into the equation, the tremendous result obtained for the Settlement Class in this case because even more apparent. Specifically, two of Defendants' collectively asserted twenty-nine affirmative defenses put the success of this litigation in reasonable jeopardy. First, Defendants argued that their calls were exempt based on their claim that companies that place calls to numbers on the DNC Registry erroneously, and that, "as part of [their] routine business practice[s] . . . use a process to prevent telephone solicitations to any telephone number of any list established pursuant to the do-not-call rules" come within the regulatory and statutory "safe harbor." *See* 47 C.F.R. 64.1200(c)(2)(i)(D); *see also* 47 U.S.C. § 227(c)(5)(C) ("It shall be an affirmative defense . . . that [a] defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of . . . this subsection."); *Charvat v. NMP, LLC*, 656 F.3d 440, 448-49 (6th Cir. 2011) (acknowledging the establishment and implementation of minimum reasonable procedures may act as an affirmative defense to liability for calls made in violation of the TCPA's do not call provisions). And, while Kran and Class Counsel do not believe that Defendants' policies were adequate to afford such protection, there is very little case law on this issue (and surely none in this Circuit) and at least one decision—if found persuasive—could have been fatal to their claims. *See Simmons v.*

Charter Communications, Inc., 15-cv-317, 2016 WL 1257815 (D. Conn. March 30, 2016), appeal docketed, 2d Cir. No. 16-1405.

Defendants also claimed that Kran could not certify a class under Rule 23. While Class Counsel is confident that the Settlement Class could be adversarially certified, *see Estrada v. iYogi, Inc.*, CV21301989WBSCKD, 2016 WL 310279, at *3 (E.D. Cal. Jan. 26, 2016) (noting that "plaintiffs would have a strong chance of certifying the class given . . . that TCPA class actions are routinely certified); *see also, e.g., Birchmeier v. Caribbean Cruise Line, Inc.*, 302 F.R.D. 240 (N.D. Ill. 2014) (certifying class in TCPA action); *Lee v. Stonebridge Life Ins. Co.*, 289 F.R.D. 292 (N.D. Cal. 2013) (same); *Agne v. Papa John's Int'l, Inc.*, 286 F.R.D. 559, 572 (W.D. Wash. 2012) (same), Kran and Class Counsel are likewise mindful of the occasions in which class certification has been denied on TCPA claims. *See Jamison v. First Credit Servs., Inc.*, 290 F.R.D. 92, 107 (N.D. Ill. 2013) (collecting cases). And, if Defendants were successful in their bid to defeat class certification, the Settlement Class would also receive nothing because meaningful relief on an individual basis would have been hard to obtain. *See Hashw*, 2016 WL 1729525, at *4 (explaining that the class-action mechanism was designed for cases like those involving the TCPA, where because injury is only substantial in the aggregate, individual suits are impracticable). Accordingly, the full recovery per call provided by the Settlement is an exceptionally fair result when compared to the risks facing Kran's case on the merits and therefore favors the granting of final approval.

B. Defendants' financial condition supports final approval.

The next factor—Defendants' financial condition—either supports final approval or is neutral in the analysis. *See Rexam, Inc. v. United Steel Workers of Am.*, No. 03-CV-2998, 2007 WL 2746595, at*4 (D. Minn. Sept. 17, 2007) (finding the "financial condition" factor to counsel in favor of approval where "there is no dispute that [defendant] is fully capable of meeting its obligations under the proposed settlement"). Namely, here, Defendants' financial condition is not in question, *see Marshall*, 787 F.3d at 512 (finding this factor neutral because "[t]he district court found that the NFL is in good financial standing, which would permit it to adequately pay for its settlement obligations or continue with a spirited defense in the litigation . . . [and] [n]o party disagrees with this finding"), and pursuant to the Settlement, Defendants have already deposited the settlement funds into escrow, thereby fulfilling their financial obligations. As such, this factor, if weighing anything at all, supports final approval as well.

C. The complexity and expense of continued litigation support final approval.

In addition to the risks Kran faced on the merits of his suit discussed above, "the various procedural and substantive defenses likely to be argued by [defendants], the expense of proving class members' claims, the certainty that resolution under [the] settlement will foreclose any subsequent appeals, and the fear that, unsettled, the 'ultimate resolution of the action . . . could well extend into the distant future,' all weigh in favor of the settlement's approval." *In re Zurn Pex Plumbing Prods. Liab. Litig.,* No. 08-MDL-1958 ADM/AJB, 2013 WL 716088, at *7 (D. Minn. Feb. 27, 2013).

To be sure, in order to obtain the recovery presently afforded class members, continued litigation—including further class and merits discovery, class certification briefing, summary judgment motions, *Daubert* motions, motions in limine, and ultimately trial—would be required. Beyond that, Plaintiff and Defendants would undoubtedly appeal any class certification or summary judgment order to the Eighth Circuit, further adding to the costs of litigation. Given the class-wide and complex nature of the trial, these expenses would be quite burdensome. *See Schmidt v. Fuller Brush Co*., 527 F.2d 532, 535 (8th Cir. 1975) (finding that class actions "place an enormous burden of costs and expenses upon [] parties."). Instead of exaggerating these expenses with continued litigation, the settlement provides for the cessation of litigation costs and immediate and certain payment to class members, which total exactly what class members would have been entitled to receive, but without any of the costs or effort that would have been otherwise required. *See* 47 U.S.C. § 227(c)(5) (awarding $500 per violation of the statute). As such, this factor plainly supports final approval as well.

D. The Class's lack of opposition to the settlement supports final approval.

The absence of any opposition to the settlement strongly supports final approval. *See Petrovic*, 200 F.3d at 1152 (approving settlement where less than 4 percent of class objected); *Yarrington v. Solvay Pharm., Inc.*, No. 09-CV-2261 (RHK/RLE), 2010 WL 11453553, at *10 (D. Minn. Mar. 16, 2010) ("When objection to a settlement is 'miniscule,' the Eighth Circuit has interpreted that response as evidence that the settlement warrants final approval."). Here, the Court-approved notice reached 98.8% of

the Settlement Class, but given the extraordinary relief, not one person objected nor requested to be excluded from the deal. (Wyatt Decl. ¶¶ 10-11) That type of reaction from the Class is remarkable, and makes clear that the proposed Settlement should be finally approved here.

V. CONCLUSION

For the reasons addressed above, Plaintiff Kran respectfully requests that the Court enter an order (1) granting final approval of the Settlement, and (2) providing such other and further relief as the Court deems reasonable and just.

Respectfully submitted,

NEIL KRAN, individually and on behalf of all others similarly situated,

Dated: September 29, 2016

By: /s/ Eve-Lynn J. Rapp
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CERTIFICATE OF SERVICE

I, Eve-Lynn J. Rapp, an attorney, hereby certify that on September 29, 2016, I served the above and foregoing ***Plaintiff's Memorandum of Points and Authorities in Support of Motion for Final Approval of Class Action Settlement*** by causing a true and accurate copy of such paper to be filed and transmitted to all counsel of record via the Court's CM/ECF electronic filing system, on this the 29th day of September 2016.

/s/ Eve-Lynn J. Rapp