Suzanne Havens Beckman (SBN 188814)
shavens@parisihavens.com
David C. Parisi
dcparisi@parisihavens.com
PARISI & HAVENS LLP
15233 Valleyheart Drive
Sherman Oaks, CA 91403
Telephone: (818) 990-1299
Facsimile: (818) 501-7852

Ryan D. Andrews (*Pro Hac Vice)*
randrews@edelson.com
Ari J. Scharg (*Pro Hac Vice*)
ascharg@edelson.com
John C. Ochoa (*Pro Hac Vice*)
jochoa@edelson.com
EDELSON MCGUIRE LLC
350 North LaSalle, Suite 1300
Chicago, IL 60654
Telephone: (312) 589-6370
Facsimile: (312) 589-6378

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

SAMANTHA ELLISON, individually and on behalf of a class of similarly situated individuals, Plaintiff, v. STEVEN MADDEN, LTD., a Delaware corporation, Defendant.	CV-11-05935 PSG-AGR **PLAINTIFF'S RESPONSE TO OBJECTIONS** **Date: February 25, 2013** **Time: 1:30 p.m.** *****Hearing date and time authorized by the Court's September 28, 2012 Order (Dkt. 48)***** Hon. Philip S. Gutierrez

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases:

United States Circuit Court of Appeals Cases:

United States District Court Cases:

State Court Cases:

Statutes:

Miscellaneous Authorities:

I. INTRODUCTION

Federal Rule 23 rightly affords class members the opportunity to present the Court with objections to the terms of class action settlements that affect their interests, and such objectors can, and in many instances do, play a valuable adversarial role in assisting the Court and counsel in assessing unintended flaws in the fairness, adequacy, and reasonableness of proposed settlements. However, objectors Aileen Connors and Constance Giratos—and more accurately, their lawyers, Steve Miller, Jonathan Fortman, John Kress, and Maureen Connors—play no such role, nor do they add any such value for the Court or counsel here. This group of attorneys have a demonstrated history of acting as professional serial objectors to class action settlements, collectively submitting scores of meritless canned objections that are designed not to improve the settlements for the benefit of class members, but rather to use the threat of delaying class relief—through appeal of the routine denial of their objections—to extract a personal payday.

Perhaps the best evidence of the strength of the instant settlement agreement is that of the 203,254 Class Members, the only objection came from professional objectors, and the objection is weak. *See*, *e.g.*, *Rodriguez v. West Publ'g. Corp.*, 563 F.3d 948, 967 (9th Cir. 2009) (finding "a favorable reaction . . . among class members" where there were "only fifty-four submitted objections" out of 376,301 class members receiving notification). Even beyond the lack of substantive merit presented by the objection, what is most shocking here is that one of the objectors, Constance Giratos, is not even a member of the Class. When Class Counsel informed Mr. Miller and his serial objecting accomplices that Ms. Giratos was not a Class Member, they first blatantly misrepresented that they had accidentally provided the wrong cell phone number in their objection, before submitting another phone number and affirming that it, in fact, was the number that purportedly received the messages at issue. (Declaration of Jay Edelson, ¶¶ 4-6, attached hereto as Exhibit A.) When this new cell phone number again did not appear on the class

list, Ms. Giratos's counsel initially persisted in claiming she had received the messages, before admitting she was not a Class Member and requesting to withdraw her objection.[1] (Edelson Decl. ¶¶ 7-8; Dkt. 54.)

As a non-Class Member, Ms. Giratos has no standing to take part in this litigation, no standing to object, and no standing to appeal, and her objection should be stricken from the record. *See San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 59 F. Supp. 2d 1021, 1032 (N.D. Cal. 1999) ("[N]onclass members have no standing to object to the settlement of a class action."); *see also Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1326 (9th Cir. 1999) (finding that the "particularized, traceable, remediable injury necessary for an objector's standing arises from his claim on his share" of a settlement's benefits as a class member.)

The lone remaining objection—which fails to raise a single issue not addressed in the Court's Order granting preliminary approval or discussed during the preliminary approval hearing—does nothing to call into question the fairness, reasonableness, and adequacy of the Settlement and should therefore be overruled.

II. THE PROFESSIONAL OBJECTORS

The four attorneys representing objectors Connors and Giratos have collectively lodged objections to at least 26 class action settlements in the last five years, including four in this District. (*See* Objectors Chart, attached hereto as Exhibit B.) Often working in concert, attorneys Steve A. Miller, Jonathan E. Fortman, John C. Kress, and Maureen Connors have repeatedly utilized a rotating stable of "clients," relying on family members,[2] coworkers,[3] and on more than one

---

[1] Evidence exists strongly suggesting that the filing of this objection on behalf of a non-class member was *not* inadvertent. Prior to filing their objection, objector Aileen Connors, or perhaps her sister Maureen Connors, called the Settlement Administrator and confirmed that she was a member of the Class and that her cell phone number appeared on the Class List. (Edelson Decl. ¶ 10; dkt. 55-4, ¶ 3.)

[2] Maureen and Aileen both appeared as objectors in *In re Groupon Marketing and Sales Pracs. Litig.*, No. 11-md-2238 (S.D. Cal), where Miller, Fortman, and Kress represented them. These same attorneys also represented an objector named

occasion, each other[4] or themselves[5] to serve as objectors to these settlements.[6]

Submitting boilerplate objections and arguments often cut and pasted from case to case (*see e.g.,* Highlighted Objection to *In re Groupon*, attached as Exhibit C.), this group of professional objectors appear less concerned with the fairness of this or any other settlement, and more concerned with achieving a quick payout in return for withdrawing their objections. The strategy employed by these attorneys

---

Andrea Miller in this case, likely a relative of Steve A. Miller. Similarly in *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-md-1827 (N.D. Cal.), attorneys Miller, Fortman, and Kress represented objectors including Kelly Kress. In both *In re Lawnmower Engine Horsepower Mktg. & Sales Pracs. Litig.*, No. 08-md-01999 (E.D. Wis., MDL No. 1999) and *Blessing v. Sirius XM Radio Inc.*, No. 09-cv-10035-HB-RLE (S.D.N.Y), Miller represented an objector by the name of Jeannine Miller, while in *Milliron v. T-Mobile USA, Inc.*, No. 08-04149-JLL-ES (D.N.J.) he represented an objector by the name of Aaron Miller.

[3] In *In re Lawnmower*, Fortman represented Kelly Marie Spann, his own paralegal. *See* www.facebook.com/pages/Law-Office-of-Jonathan-E-Fortman-LLC/178498295555120 ("Congratulations to Kelly Spann, my trusted paralegal and friend on her 7th anniversary of starting at the law office.") Further, while it is unclear as to whether Aileen works with or for Maureen, according to Maureen, Aileen Connors often works out of Maureen's office. (*See* Ex. 2, attached to Edelson Decl.)

[4] Maureen Connors, represented by her co-counsel in this case, served as an objector in *In re Groupon*. John C. Kress also served as an objector in *In re: Pre-Filled Propane Tank Mktg. and Sales Prac. Litig.*, No. 09-md-02086 (W.D. Mo.), represented by Fortman.

[5] Miller has appeared as an objector, on his own behalf or on behalf of the Steve A. Miller, P.C. Profit Sharing Plan in *Mobbs v. Farmers Ins. Co. Inc.,* No. 03-cv-00158 (W.D. Ok.); *Baggett v. Hewlett-Packard Co. et al*, No. 07-cv-00667 (C.D. Cal.); *In re Am. Intern. Group, Inc. Sec. Litig.*, No. 04-cv-08141-DAB (S.D.N.Y.); and *In re Initial Public Offering Sec. Litig.*, No. 21 MC 92 (SAS) (S.D.N.Y.).

[6] At least one objector, Chase Thompson, has objected to no fewer than 3 settlements while represented by attorney Miller. However, Other objectors represented by these attorneys in the same or different actions include Constance and Patrick Giratos, Chris and Mark Schulte, Kelly Marie and Todd M. Spann, Lon and Betty Wilkens, Randy R. and Kimberley Lyons, Jeanne and John Finn, Thomas A. and Channing Carder, George S. and Jill R. Bishop, and Ann and John Talley. (*See* Objectors Chart, Ex. B.)

is one practiced by other notorious professional objectors: solicit a class member, file a boilerplate objection, have the objection overruled by the trial court, and then file an appeal to maximize leverage on the parties to the settlement. *See In re Checking Account Overdraft Litig.,* 830 F. Supp. 2d 1330, 1361 n. 30 (S.D. Fla. 2011). The objector-attorneys in this case are no strangers to this strategy.

Of their 26 objections to settlements, the attorney-objectors proceeded to file notices of appeal in at least 21 of them. (*See* Objectors Chart, Ex. B.) Of those, 12 of the appeals were eventually voluntarily or jointly dismissed—some only a few weeks after the notice of appeal was filed[7]—which likely means they were successful in leveraging the appeal into a personal payment. However, the most notable statistic amongst these 26 objections is the consistency of their track record: Class Counsel has been unable to find a single instance where these professional-objectors have had their objections sustained or where they were recognized or awarded any type of fees for their role in helping improve the settlement. In fact, instead of receiving commendations for their contributions to settlements, courts have done the opposite, criticizing these attorney-objectors in cases in which they have taken part. *See*, *e.g.*, *In re Checking,* 830 F. Supp. 2d at 1362 n.30 (recognizing Fortman, Kress and other objectors to the settlement as being "motivated by things other than a concern for the welfare of the Settlement Class . . . whose sole purpose is to obtain a fee by objecting to whatever aspects of the Settlement they can latch onto.").[8] The Southern District of Florida recognized

[7] *See e.g. Mobbs,* No. 03-cv-00158 (W.D. Ok.) (Miller filed his notice of appeal on October 19, 2011, then voluntarily dismissed the appeal—presumably following a payoff—on November, 7, 2011).

[8] Lamenting their involvement, the *In re Checking* court even considered taking additional steps to prevent their eventual appeal and holdup of the settlement, noting "[s]hould these or any other Objectors choose to persist in their objections in order to tie up the execution of this Settlement and further delay payment to the members of the Settlement Class, the Court will consider additional measures to

what the serial objectors' actions make clear: they are not acting to protect the Class, but rather to use the Class as a tool to fashion themselves a substantial payday.

III. THE OBJECTION LACKS BOTH LEGAL & FACTUAL MERIT

The Objection, while presenting a jumbled litany of purported justifications, makes three primary claims: (1) that the 25% of the Common Fund sought as attorneys' fees is not supported by law; (2) that the up to $150 made available to each Class Member is inadequate; and (3) that the injunctive relief is inadequate and cannot be considered as the basis for the award of attorneys' fees. None of these arguments are sound.

The Ninth Circuit has long recognized that a "[class action] [s]ettlement is the offspring of compromise; the question [addressed] is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998). Under Rule 23, "[i]n evaluating a proposed settlement, 'it is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness.'" *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1063 (C.D. Cal. 2010) (quoting *Hanlon*, 150 F.3d at 1026). Thus, class member concerns that a settlement could have been "different" or "better" have little or no bearing on the Rule 23 analysis, and the Ninth Circuit has observed that "the fact that the overwhelming majority of [a settlement] class willingly approved [of an] offer and stayed in the class presents at least some objective positive commentary as to its fairness." *Hanlon*, 150 F.3d at 1027. That commentary is strengthened where, as here, "a small number of class members opted-out of the class . . . which shows that 'at least some portion of the class understood the notice and chose not to participate in the settlement for whatever reason.'" *Anderson v. Nextel Retail Stores, LLC*, No.

---

make sure that the members of the Settlement Class are not further harmed as a result." 830 F. Supp. 2d at 1362, n.30.

CV 07-4480, 2010 WL 8591002, at *12 (C.D. Cal. Apr. 12, 2010) (citing *Hanlon*, 150 F.3d at 1025).

Indeed, when examining whether a negotiated amount is fair and reasonable, "this [C]ircuit has long deferred to the private consensual decision of the parties." *Rodriguez*, 563 F.3d at 965 (citing *Hanlon*, 150 F.3d at 1027). To that end, the Ninth Circuit "[has] emphasized 'the court's intrusion upon . . . [negotiated agreements] must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.'" *Rodriguez*, 563 F.3d at 965 (quoting *Hanlon*, 150 F.3d at 1027). Accordingly, it is outside of the role of the court to substitute its judgment with that of the parties. *See Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004) (quoting *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995) ("Parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in the litigation.")). Instead, the Court should focus on whether the settlement is the product of adversarial negotiation as opposed to fraud or collusion. *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 490 (E.D. Cal. 2010) (quoting *Cotton v. Hinton,* 559 F.2d 1326, 1330 (5th Cir. 1977)).[9]

Further, the Objectors bear the burden of proving any assertions they raise challenging the reasonableness of a settlement. *U. S. v. State of Or.*, 913 F.2d 576,

[9] Further, the Ninth Circuit "has held that a district court need not respond to objections with findings of fact and conclusions of law if the court 'provide[s] a reasoned response elsewhere in the record.' In *In re Pacific Enterprises*, this court held that a district judge satisfied this procedural requirement even though he stated in conclusory fashion that the settlement was 'fair, reasonable and adequate' where the record reflected that the judge held an extensive hearing where he responded to objections." *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1242–43 (9th Cir. 1998) (internal citations omitted).

581 (9th Cir. 1990) (citing *Moore v. City of San Jose*, 615 F.2d 1265, 1272 (9th Cir. 1980) ("In this circuit, we have usually imposed the burden on the party objecting to a class action settlement."); *see also Manual for Complex Litigation*, *Fourth*, §21.643 (2004) ("Even a weak objection may have more influence than its merits justify in light of the inherent difficulties that surround review and approval of a class settlement."). For the reasons that follow, each objection should be overruled.

A. Class Counsel's Attorneys' Fee Application is Reasonable and in Accord with Ninth Circuit Law

The bulk of the Objectors' argument is aimed at attempting to show that this Court should deviate from the Ninth Circuit's well-established "benchmark" fee of 25% in common fund settlements. The Objectors' focus on the propriety of the Fee Award is ironic given their counsel has a demonstrated history of filing objections solely to extract an unearned payout. Specifically, Objectors argue that the fee, recommended as part of Judge Infante's (ret.) mediator's proposal, is not supported by law because: (1) the case settled too quickly; (2) the $10 million Settlement Fund is insufficient to pay each Class Member $150; (3) the Settlement Fund is limited to the initial $5 million contribution and the Court must wait until all claims are submitted and award fees as a percentage of the amounts claimed; (4) the reversion of any unclaimed funds to the Defendant is improper; (5) the Defendant should have mailed each Class Member a check; (6) the Settlement contains a "clear sailing" agreement that was the product of a "reverse auction"; and (7) no multiplier should be applied to Class Counsel's lodestar.[10] Some of these arguments are based on a misreading or ignoring of the Settlement's terms, others rely on a fundamental misunderstanding of governing law, and none impose an obstacle to the approval of the agreed-upon fee or fairness of the Settlement.

[10] Although Objectors' arguments are scattered throughout their brief, each will nonetheless be addressed.

1. The Parties Had Sufficient Information to Reach A Fair Settlement.

Objectors' first attack on the fairness of the Settlement and appropriateness of the "benchmark" fee award is that resolution was achieved too quickly. (Dkt. 53 at 2.) Objectors insist that a settlement cannot be fair, nor attorneys' fees be justified, unless Rule 12(b) motions are briefed and summary judgment proceedings held. They even go so far as to claim (without any basis whatsoever) that the 300 gigabytes of data Class Counsel reviewed in response to discovery requests are irrelevant because that data was unrelated to the case and not used in the litigation. (*Id.*) Such arguments are without any legal or factual justification.

For decades "[b]oth federal courts and legal commentators have rejected the view that early settlement of litigation should necessarily reduce the attorney's fee awarded." *In re TSO Fin. Litig.,* No. CV 87-7903, 1989 WL 80316, at *7 (E.D. Pa. July 17, 1989) ("Indeed, it would be the height of folly to penalize an efficient attorney for settling a case on the ground that less total hours were expended in the litigation.") (citing John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as a Bounty Hunter is Not Working*, 42 Md. L. Rev. 215 (1983); George D. Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 Harv. L .Rev. 658 (1956); *Dorfman v. First Boston Corp.,* 70 F.R.D. 366, 385 (E.D. Pa. 1976); *Blank v. Talley Indus.,* 390 F. Supp. 1 (S.D.N.Y.1975); *Bleznak v. C.G.S. Scientific Corp.,* 387 F. Supp. 1184 (E.D. Pa. 1974); *Arenson v. Board of Trade of the City of Chicago,* 372 F. Supp. 1349, 1356 (N.D. Ill. 1974)). Further, the well-established policy of the Ninth Circuit and the Central District favors the speedy settlement of class action litigation. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); C.D. Cal. Gen. Order No. 11-10 (stating the purpose of the Central District's ADR Program is "to encourage the fair, speedy, and economical resolution of controversies by referring suitable cases to an impartial neutral. . . ."); *see also* Civ. L.R. 16-15 Policy Re:

Settlement & ADR. In fact, "as long as the parties have sufficient information to make an informed decision about settlement, formal discovery is not a necessary ticket to the bargaining table." *Gardner v. GC Servs., LP,* No. 10-CV-0997, 2012 WL 1119534, at *5 (S.D. Cal. Apr. 2, 2012) (quoting *Linney,* 151 F.3d at 1239) (internal quotations omitted). Despite the unsupported insistence of the Objectors, compliance with well-established law and policy cannot be the basis for finding this settlement or the agreed-upon "benchmark" fee award unfair.

Pursuant to Local Rule 16-15 and the Order of this Court, dkts. 19 & 30, the Parties agreed to attempt to resolve this litigation while simultaneously moving forward with discovery in preparation for class certification. To that end, Plaintiff propounded several sets of party and third-party discovery and insisted that such discovery be produced before proceeding with the mediation with the Hon. Edward Infante (ret.) of JAMS. The discovery answers and documents produced—contrary to baseless accusations of the Objectors—informed Class Counsel about the size of the Class, the number and content of each of the text messages sent promoting Madden, the recipients' purported methods of consent (or lack thereof), and the manner by which the text messages were transmitted by Mogreet. This knowledge, combined with Class Counsel's prior experience litigating a panoply of issues surrounding the merits of class actions related to alleged text message spam, allowed them to assess the merits and risks of proceeding with further litigation.[11] *See Milliron v. T-Mobile USA, Inc*., No. CV 08-4149, 2009 WL 3345762, at *10 (D.N.J. Sept. 10, 2009) *aff'd*, 423 F. App'x 131 (3d Cir. 2011) ("The recovery achieved here came about quickly and swiftly, and though Class Counsel faced few

[11] *Abbas v Selling Source, LLC,* No. 09-cv-3413, 2009 WL 4884471 (N.D. Ill. Dec. 14, 2009); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009); *Lozano v. Twentieth Century Fox*, 702 F. Supp. 2d 999 (N.D. Ill. 2010); *Kramer v. Autobytel, Inc.*, 759 F. Supp. 2d 165 (N.D. Cal. 2010); *In re Jiffy Lube Int'l, Inc., Text Spam Litig*., 847 F. Supp. 2d 1253 (N.D. Cal. 2012); *Smith v. Microsoft* Corp., No. 11-cv-1958, 2012 WL 2975712 (S.D. Cal. July 20, 2012).

legal difficulties in this particular case (due to the early settlement), the fact remains that a settlement of this magnitude only occurred because both sides properly recognized the legal and factual risks of going to trial."). As such, both the facts and the law compel the overruling of the first objection.

2. The Amount Class Members Will Receive Is Clear and Not Misleading.

The second argument Objectors offer up is that the Class recovery is both unknown and also misrepresented to the Court as "up to $150 per member," because the Settlement Fund would need to exceed $38 million to pay each of the 203,254 Class Members the full $150. (Dkt. 53, pgs. 3–4.) This argument deliberately ignores key terms of both the Settlement and the Court-approved notice. As an initial point, had Objectors' counsel chosen to invest even minimal effort in their filing by ordering the transcript of preliminary approval, they would have discovered that Class Counsel and the Court discussed at length the amount of funds anticipated to be available to distribute to the Class Members. As such, Objectors' accusations that the Court has been misled about the amount available to pay Class Member claims are simply false. That aside, their argument nearly defeats itself, given that on one hand the Objectors claimed that expenses—and therefore the amount of the fund left distributable to the Class—were unknown, (*see* dkt. 53 at 3), while on the other, they used the Settlement Agreement to list each of the expense items, along with their associated costs, that would be deducted from the Settlement Fund save for the exact cost of the direct mailing and magazine ads, which the Court was informed to be estimated to be $420,000. (*See id.*).[12] As such,

[12] It is well-accepted that administrative expenses and notice costs are considered benefits to the putative class and are properly included in a common settlement fund. *See Staton v. Boeing Co.*, 327 F.3d 938, 975 (9th Cir. 2003) ("The post-settlement cost of providing notice to the class can reasonably be considered a benefit to the class" and where it "is the defendant who pays for the notice, we may assume that the inherent incentives to minimize the cost involved are sufficient.").

even without listing the then-unknown exact amount of notice and administration costs, it was readily apparent that the amounts available to pay Class Member Claims—should the Court grant the agreed-upon fee request—would have ranged from $7–7.3 million. It was so apparent in fact, that later in their Objection the objectors specifically identify that $7.5 million is being set aside for the benefit of the Class. (Dkt. 53, pg. 10:17–20.) So although Objectors refused to speculate as to the amount available here, they clearly were able to accurately estimate the amount available.

Objectors' related argument, that it is disingenuous for the Settlement and Notice to claim that Class Members could receive up to $150 each, ignores both the practical reality that not every member of the Class is going to file a claim, as well as the language of the Settlement and Notice that clearly explains what happens should this occur. First, the Court-approved Notice plainly describes the Settlement's terms, stating that Class Members:

> are entitled to receive up to $150. The exact amount of your payment cannot be calculated at this time. Your payment will depend on the total number of valid claims that are filed. The Class contains approximately 203,254 members. Your payment may be reduced if the amount required to pay all claims made by the Settlement Class exceeds the amount available, after paying fees and expenses, from the Settlement Fund. In the event this occurs, each Class Member who filed a valid claim shall receive a proportionate share of that Settlement Fund.

(Dkt. 41-1 at 40.) The Ninth Circuit has made clear this description of the amount of individual recovery being made available is proper. *CLRB Hanson Indus., LLC v. Weiss & Assoc., PC*, 465 F. App'x 617, 619 (9th Cir. 2012) ("Our cases require that a settlement notice describe the aggregate amount of the settlement fund and the plan for allocation, but do not require that such notice allow class members to estimate their individual recovery.") (internal citation and quotations omitted)). Also, this type of *pro rata* distribution is commonly approved in both TCPA and non-TCPA settlements. *See e.g. Lo v. Oxnard European Motors, LLC,* No. 11-CV-

1009, 2012 WL 1932283 (S.D. Cal. May 29, 2012) (approving *pro rata* distribution of $49,000 Settlement Fund in TCPA action); *Mangone v. First USA Bank*, 206 F.R.D. 222, 224–25 (S.D. Ill. 2001) (approving *pro rata* distribution of $28.7 million settlement fund should claims of the 18.5 million member class be less than the stated $29 per claim); *In re Lupron Mktg. & Sales Pracs. Litig.*, 228 F.R.D. 75, 87, 98 (D. Mass. 2005) (approving similar *pro rata* distribution based on claims submission).

Finally, in order for the *pro rata* distribution to begin lowering payments from the $150 maximum, more than 46,666 Class Members (23%) would need to file a Claim. Based on known claims-rates in similarly structured class action settlements (as provided in Plaintiff's Confidential Memorandum), Class Counsel were confident during settlement negotiations that Class Members would most likely receive $150 payments.[13] However, participation in class action settlement is inherently unpredictable so Class Counsel allowed for *pro rata* distribution and secured a common fund large enough to still pay Class Members a reasonable recovery should claims-rates be much higher than anticipated. Accordingly, Objectors' second argument is misplaced and should be overruled.

3. The Settlement Fund is Not Limited to Defendant's Initial $5 Million Contribution or the Amount of Claims Filed.

Objectors' next assault on the Settlement and Class Counsel's requested fee argues that the fund created for the benefit of the Class is limited to Madden's initial $5 million contribution, or that attorneys' fees must be calculated as a percentage of claims ultimately paid to Class Members out of the common fund. (Dkt. 53 at 4-5.) These arguments are neither grounded in reality nor the law.

[13] Although the deadline to file claims is April 11, 2013, as of the date of filing there have been almost 14,000 claims submitted, which is well within the range Class Counsel informed the Court was anticipated. Should claims continue to be submitted at their current rate, Class Members will each receive a $150 payment and most of the Settlement Fund will be paid out.

Here, Class Counsel insisted on an initial 50% contribution to the Settlement Fund so that there would at all times be adequate money to pay for Notice and administration, and to begin the payment of claims after the Court grants Final Approval. As an initial matter, because fees have not yet been decided by the Court, *see* Fed. R. Civ. P. 23(h), the fees cannot—despite Objectors' vehemence to the contrary—immediately come out of that initial $5 million contribution. Further still, settlements often do not require any capital contribution from defendant to a common fund until *after* the settlement is finally approved by the Court. *See e.g. Garcia v. Gordon Trucking, Inc.,* No. 10-CV-0324 (E.D. Cal. 2012). The fact that Defendant was initially required to set aside $5 million to be used to pay for the costs of notice and ongoing settlement administration does not change the fact that a $10 million fund has been created for the benefit of the Class. As noted above, if only 23% of the Class submits a claim, the entire $10 million fund will be extinguished (should the Court approve the requested fees). As such, neither the amount of the initial contribution to the common fund nor any subsequent payments to the fund changes the fact that Madden is on the hook for $10 million to the Class.

In addition to improperly limiting the value of the common fund to its initial capital contribution, Objectors contend that the Court must wait and see how many claims are filed and award attorneys' fees as a percentage of the amounts claimed against those payments. Although objectors find support for this argument in the "Pocket Guide," those particular suggestions directly conflict with binding precedent. Although the deadline for Class Members to file claims is April 11, 2013, the Court need not wait until that time to determine attorneys' fees, as the calculation of fees in class actions creating a common fund like this one, is based on a percentage of the entire $10,000,000 Settlement Fund, not the amount claimed against it. *See Boeing Co. v. Van Gemert,* 444 U.S. 472, 480, 100 S. Ct. 745, 750, 62 L. Ed. 2d 676 (1980); *Williams v. MGM-Pathe Commc'n. Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (finding an abuse of discretion to calculate attorneys' fees

using the percentage of fund method against the claimed amount of the fund rather than the total fund itself); *Hartless v. Clorox Co.*, 273 F.R.D. 630, 645 (S.D. Cal. 2011) ("objector[]'s argument that the Court should base the attorneys' fee award on the amount actually claimed by class members is without merit as that argument has been rejected" by the Ninth Circuit); Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 1.18 (3d ed. 1992) ("[I]t is now settled that class counsel may seek a fee award based on **the total potential benefit to the class**, rather than being limited by the total amount of claims actually exercised by class members.") (emphasis added). In fact, this is the rule in the majority of jurisdictions. *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir. 2007) (finding instructions in CAFA and the PSLRA inapplicable in ruling that "[t]he entire Fund, and not some portion thereof, is created through the efforts of counsel at the instigation of the entire class" and that "[a]n allocation of fees by percentage should therefore be awarded on the basis of the total funds made available, whether claimed or not."); *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1295–98 (11th Cir. 1999), *cert. denied* 530 U.S. 1223 (2000) (approving award of attorneys' fees based on the total amount of the settlement fund even though portions not claimed by class members reverted to defendant). In addition, the payment of fees based on the total amount available to the class also helps achieve the deterrence function of class actions. *See* Richard A. Posner, Economic Analysis of Law 626–27 (5th ed. 1998) ("[T]he most important point from an economic standpoint is that the violator be confronted with the costs of his violation-this achieves the allocative purpose of the suit-not that he pays them to his victims."). As such, this Court can follow the clear and controlling precedent and overrule this objection as well.

4. The Reversion of Any Remaining Funds Does Not Make the Settlement Unfair or Reduce the Total Fund Value.

Objectors next argue that the Settlement in unfair and its value misleading

because unclaimed money in the Settlement Fund would revert back to Madden. Again, as discussed during the preliminary approval hearing, in some settlements such an argument would be valid—but not under this set of facts. Here, Defendant Steve Madden is alleged to have violated the TCPA by sending its customers promotional text messages, which if proven, creates statutory liability for the greater of actual damages or $500 per violation. *See* 47 U.S.C. § 227(b)(3)(B). This litigation does *not* involve a situation where Madden stands accused of consumer fraud under the UCL for stealing or misappropriating $500 from each of the Class Members—a situation where reversion of any portion of the Settlement Fund would permit Madden to keep its ill-gotten gains. *Nabal v. BJ's Wholesale Club, Inc.*, No. 02-CV-2604, 2002 WL 32349137, at *4 (E.D. Pa. Aug. 2, 2002) ("Of course, when a defendant is ordered to pay restitution by disgorging all of its profits, a court would be unlikely to allow reversion of unclaimed funds.").

Rather, while the receipt of such messages is certainly a noted invasion of consumer privacy, *Mims v. Arrow Fin. Servs. LLC*, 132 S. Ct. 740, 744, 181 L. Ed. 2d 881 (2012), and the potential statutory damages are sizable, actual monetary damages here are limited to per-text-message charges ($0.05 to $0.25) or a deduction of messages from a purchased text-message "bucket plan." The Parties have agreed to settle this matter and pay each claimant a sizable portion of the statutory damages available and the facts are such that it is reasonable that Defendant receive any unclaimed money back.

Not only does the Objection find no support with the facts, it equally finds no support with the case law. In fact, not only is the inclusion of a reversionary clause "not itself problematic," *McKinnie v. JP Morgan Chase Bank, N.A.*, 678 F. Supp. 2d 806, 813 (E.D. Wis. 2009) (awarding attorneys' fees based on $2.1 million made available to the class "regardless of the fact that a small number of class members actually filed claims" and amounts remaining reverted to defendant), the reversion of unclaimed funds has been a feature of numerous analogous TCPA text-

messaging settlements that have received final approval from federal courts in the Ninth Circuit and elsewhere across the country. *Sarabri v. Weltman, Weinberg & Reis Co., L.P.A.*, No. 10CV1777, 2012 WL 3809123, at *3 (S.D. Cal. Sept. 4, 2012); *see also Satterfield v. Simon & Schuster*, No. 06-cv-2893 (N.D. Cal. 2010); *Lozano v. Twentieth Century Fox*, No. 09-cv-6344 (N.D. Ill. 2011); *Kramer v. Autobytel, Inc.*, No. 10-cv-2722 (N.D. Cal. 2011).

Further, in *Glass v. UBS Fin. Servs., Inc.*, an identical objection about the reversion of settlement funds to the defendant was overruled because the objector, as here, "cite[d] no authority holding improper a settlement providing for [a] reversion of unclaimed or unawarded funds; indeed, there is authority suggesting to the contrary." No. C-06-4068, 2007 WL 474936, at *8 (N.D. Cal. Jan. 17, 2007) *aff'd*, 331 F. App'x 452 (9th Cir. 2009) (citing *Williams*, 129 F.3d at 1027 (discussing class action settlement without expressing concern as to provision for reversion of unclaimed funds to defendant)). In fact, a reverter clause can substantially benefit a class by allowing for greater recovery by more class members than would be otherwise achievable without the clause. *McKinnie*, 678 F. Supp. 2d at 815 ("[A] reverter clause can be a useful tool in negotiating a settlement when the total number of eventual claimants is unknown [as] [a] defendant may agree to a higher maximum settlement amount-which allows more claimants to be fully compensated for their damages if a large number of claims are filed-in return for possible reversion of a portion of the unclaimed funds."). As such, the reversion of unclaimed funds to Madden does not impugn the fairness of the Settlement or the reasonableness of the fee request, and the objection should be overruled.

5. Claim Forms Are an Accepted and Widely-Used Method of Distributing Settlement Funds, and Simply Mailing Checks Would Be Impractical.

Weaved into their argument about the propriety of the reversion, the Objectors argue that the Claim Form process should be dispensed with in favor of

just mailing checks to the same address that the notice was sent to. This argument too fails for several reasons. Initially, "there is nothing inherently suspect about requiring class members to submit claim forms in order to receive payment, especially in a common fund case like this, where the defendant's payout is capped regardless of the take rate [, . . . but] perhaps most importantly, the claims process is a negotiated facet of this settlement,. . .[and] [t]he Court may not make unilateral modifications or alterations to the proposed settlement such as the substitution of a claims process for a direct payout." *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 593 (N.D. Ill. 2011) (internal citation and quotation omitted); *see also Milliron,* 2009 WL 3345762, at *6 ("the Court finds it perfectly appropriate to require Class members to submit certain information proving that they are entitled to collect the relief awarded in this case"); Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 8:45 (4th ed. 2002) (settlements employing proof of claim requirement are "commonly employed").

In addition, this argument has been consistently rejected where, as here, the parties simply do not have sufficient records to determine the identity of Class Members other than a list of their cellular numbers. *See Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 66–67 (S.D.N.Y. 2003) (overruling objection suggesting that defendant identify all eligible class members from its business records because defendant "has no practical means to independently identify from its records every individual entitled to settlement benefits and determine where such individual may now reside"); *Mangone,* 206 F.R.D. at 234 (rejecting objection to claims process in which objector argued that the defendant should be required to determine the identity of class members from its business records because the objection "wrongly assumes that [defendant] keeps records in the ordinary course of its business that would permit" the defendant to identity class members).

Here, the only information in the Parties' possession regarding the identity of potential Class Members is a list of the cellular phone numbers that were sent the

allegedly unauthorized text messages. Madden did not keep records of Class Members' names, addresses, or email addresses in relation to their Mobile Club database. Further, Madden contends that some or all of the Class Members consented to receive the text messages at issue and insisted that any settlement payments be contingent on Class Members affirming that they received messages without consent. Accordingly, Objectors' suggestion that Madden could have determined the identity of all Class Members entitled to payment without the claims process ignores the realities of this case and is thus without merit. *In re Wells Fargo Loan Processor Overtime Pay Litig.*, MDL C-07-1841, 2011 WL 3352460, at *8 (N.D. Cal. Aug. 2, 2011) (finding a substantial need for a claims process in order to prevent defendant from compensating individuals not entitled to payments).

6. Objectors' Boilerplate "Clear Sailing" and "Reverse Auction" Arguments Recycle Prior Objections, Misstate the Facts, and Misinterpret the Case Law.

Objectors next contend that the Settlement contains a "clear sailing" agreement, in addition to being the product of a "reverse auction," arguing that both are indicators of collusion amongst Class and Defendant's counsel. However, there is in fact no evidence to support either theory. First, Objectors' boilerplate assertions fail to consider the specific facts surrounding this Settlement, namely that Class Counsel were the sole litigators of this action, making it impossible for a reverse auction to have taken place. Second, Objectors misinterpret the Ninth Circuit's concerns relating to "clear sailing provisions." Contrary to Objectors' contention, such provisions are not automatically an indicator of collusiveness. Instead, courts are concerned with those instances in which the provision includes a "kicker" arrangement reverting unawarded fees directly to a defendant and where the requested fees are disproportionate to the recovery of the class. *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011). Both arguments must fail for lack of factual or legal basis.

A reverse auction occurs when a defendant collusively selects "the weakest attorney among a number of plaintiff attorneys who have filed lawsuits dealing with the same subject matter; in other words, a reverse auction is the 'sale' of a settlement to the lowest bidder among counsel for competing or overlapping classes." Barbara J. Rothstein & Thomas E. Willging, Federal Judicial Center, *Managing Class Action Litigation: A Pocket Guide for Judges,* at 21 (2010). Often, the settlement will be brokered by counsel "who [have] not been involved in litigating the class claims that other attorneys have been pursuing, an especially suspicious circumstance" or will involve "[q]uestionable settlements between class counsel and the same defendant in unrelated cases." *Id.* Notably, many courts flat-out reject the reverse auction argument, noting "[it] would lead to the conclusion that no settlement could ever occur in the circumstances of parallel or multiple class actions-none of the competing cases could settle without being accused by another of participating in a collusive reverse auction." *Negrete v. Allianz Life Ins. Co. of N. Am.*, 523 F.3d 1091, 1100 (9th Cir. 2008) (quotation omitted).

Regardless, Objectors' argument is null, as a reverse auction could not take place in the instant action given that it involves neither competing counsel nor overlapping classes. In fact, Objectors fail to apply the actual definition of a reverse auction to the Settlement at hand, instead relying on blanket accusations and generalizations that are neither grounded in fact or in the terms of the Settlement. From the outset, Class Counsel have vigorously pursued this litigation on their own, utilizing their substantial experience in the realm of text message spam and arm's-length mediations with Judge Infante to negotiate the instant Settlement. At no point did Class Counsel play the role of the "weakest attorney" submitting the lowest bid to effectuate a collusive settlement. More than likely, Objectors simply recycled yet another portion of their boilerplate objections, neglecting to consider whether this issue was truly raised in this Settlement. (*See* Highlighted Portion of Groupon Objection, at 3–4, attached as Ex. C.)

Objectors' next argument concerning the presence of a "clear sailing" agreement fairs no better. A "clear sailing" agreement exists "where the party paying the fee agrees not to contest the amount to be awarded by the fee-setting court so long as the award falls beneath a negotiated ceiling." *Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1081 (C.D. Cal. 2010) (citation and quotation omitted). A "clear-sailing" provision in and of itself is not an indication of collusiveness, and courts, including those in the Ninth Circuit, "recognize[] that clear sailing agreements are routinely accepted in both the federal and California courts." *Hartless,* 273 F.R.D. at 645 n.6 *aff'd in part*, 473 F. App'x 716 (9th Cir. 2012); *see also In re Consumer Privacy Cases*, 175 Cal. App. 4th 545, 553 (Cal. Ct. App. 2009). Heightened scrutiny of a clear sailing provision is only necessary in those instances where a "kicker" arrangement is added to the provision and operates to revert unawarded fees directly to the defendant—often indicating a separate, private agreement whereby fees are paid separate and apart from payments to the class—and where the requested fees are disproportionate to the recovery of the class. *In re Bluetooth*, 654 F. 3d at 947–49.

Here, the concerns over "clear sailing" provisions raised by the Ninth Circuit are absent from the instant Settlement. While Defendant has agreed not to contest Class Counsel's request for attorneys' fees up to 25% of the common fund, the mere presence of such a provision is not enough to render it unfair or collusive in nature. First, the Settlement is devoid of any "kicker" agreement that would revert unawarded fees to Defendant. If in fact any portion of the requested fees are unawarded, they will revert to the Settlement Fund and be used to pay Approved Claims of Class Members. (Dkt. 41-1, § 8.2.) Second, both the Settlement and attorneys' fees were negotiated with the assistance of the skilled and neutral assistance of third-party mediator Judge Infante. The presence of a third-party mediator is additional evidence against collusiveness, even where a "clear sailing"

provision is present. *In re HP Laser Printer Litig.*, No. CV 07-0667, 2011 WL 3861703, at *4 (C.D. Cal. Aug. 31, 2011).

Finally, Class Counsel's request for 25% of the common fund is directly in line with the Ninth Circuit's benchmark for fee awards, weighing against an air of collusiveness or unfairness. *In re Bluetooth*, 654 F.3d. at 942 (citing *Six (6) Mexican Workers v. Ariz. Citrus Growers,* 904 F.2d 1301, 1311 (9th Cir. 1990)); *see also Amunrud v. Sprint Commc'ns Co. L.P.*, No. CV 10-57, 2012 WL 443751, at *3 (D. Mont. Feb. 10, 2012) (noting that clear sailing provisions for benchmark fees do not represent "an excessive fee in exchange for an unfair settlement, which a clear sailing provision can sometimes suggest."). Without factual or legal support, both of these objections should be overruled.

7. Lodestar Cross-Check Confirms the Reasonableness of the Fee Request.

Objectors' final argument opposing the award of attorneys' fees questions why Class Counsel request a lodestar cross-check, claims Class Counsel provide no explanation why the 3.8 multiplier is sought, and conclude that no multiplier is warranted. (Dkt. 53 at 9.) As to the first point, Counsel produced its lodestar analysis and time-sheets as required by this Court's Order (dkt. 45 at 13) and the Ninth Circuit's instruction in *In re Bluetooth*. 654 F.3d at 944. As to the remaining contentions, Class Counsel's Request for Attorneys' Fees provided over four pages of analysis as to why the requested multiplier was appropriate, including itemized billing records. (Dkts. 52 at 16-21; 52-1.) Objectors fail to provide any analysis of those bases or to any portion of the itemized records. As such, this objection too lacks substance and should be overruled.

B. The $10 Million Settlement Fund That Will Pay Up To $150 Per Class Member Is A Substantial Recovery.

Objectors' next exclaim that a payment of $150 to each class member and the creation of $10 million Settlement Fund is inadequate and suggest that a settlement

for anything less than the full amount of statutory damages (over $2 billion according to Objectors' math) is "pure folly." (Dkt. 53 at 9–12.) This argument is completely without merit. First, the Ninth Circuit recently rejected "Objectors' argument insofar as it stands for the proposition that the district court [i]s required to find a specific monetary value corresponding to each of the plaintiff class's statutory claims and compare the value of those claims to the proffered settlement award." *Lane v. Facebook, Inc.,* 696 F.3d 811, 823 (9th Cir. 2012); *see also Rodriguez*, 563 F. 3d at 965 (dismissing objection arguing "that the court should have specifically weighed the merits of the class's case against the settlement amount and quantified the expected value of fully litigating the matter.") In addition, the Ninth Circuit in *Lane* held that the common fund recovery—$9.5 million distributed entirely to *cy pres*—was both "substantial under most circumstances" and sufficient because "a class-action *settlement* necessarily reflects the parties' pre-trial assessment as to the potential recovery of the entire class." *Lane*, 696 F.3d at 824 (emphasis in original). In fact, the Ninth Circuit considered the $9.5 million common fund to be substantial *for Facebook* even though some of the 3.6 million class members had claims for statutory damages of $2,500 per person. *Id.* Moreover, a settlement does not need to obtain full recovery to be approved. *See Hanlon*, 150 F.3d at 1027; *Linney,* 151 F.3d at 1241 (overruling objection that offered "nothing more than speculation about what damages 'might have been' had they prevailed at trial" and stating "it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements.") (internal citation omitted). Ultimately, this objection is nothing more than a disagreement with Class Counsel about the value of the case, and such a disagreement is insufficient to prevent approval. *See*, *e.g.*, *Nat'l. Rural Telecomms. Coop.*, 221 F.R.D. at 528; (quoting *In re Pac. Enters.*, 47 F.3d at 378).

When negotiating this Settlement, Class Counsel were obviously aware that should this litigation have proceeded to trial, a complete victory would have

resulted in a statutory damage award of over $101 million at the statutory maximum of $500 per Class Member. But, as explained in detail in Plaintiff's Motion for Final Approval and Confidential Memorandum, the prospect of obtaining a judgment for this amount means little for the Class if further litigation results in a victory for Defendant on any of the number of contested issues, the verdict exceeds the applicable insurance limits or actually obtaining that judgment forces Defendant out of business, or if the Court elects to award actual damages instead of statutory damages. *See Laguna v. Coverall N. Am., Inc.*, No. 09-CV-02131, 2012 WL 607622, at *3 (S.D. Cal. Feb. 23, 2012) (approving a settlement in which "[p]laintiffs' concern over [defendant]'s ability to pay seems to have played a large role in driving the settlement."); *see also In re Wireless Tele. Fed. Cost Recovery Fees Litig.,* 396 F.3d 922, 932–33 (8th Cir. 2005) (mandating the consideration of a defendant's financial condition when evaluating the value of a class action settlement agreement); *Grannan v. Alliant Law Group, P.C.,* No. C 10-02803, 2012 WL 216522, at *7 (N.D. Cal. Jan. 24, 2012) (settlement "before the court is the best offer the plaintiffs will get" because defendant wasn't able to provide "full compensation for [its] statutory violations" because it only had a $1 million insurance policy); *Texas v. Am. Blastfax, Inc.*, 164 F. Supp. 2d 892, 900–01 (W.D. Tex. 2001) (reducing TCPA damages award from statutory damages of $500 per violation, to $0.07 per violation, equal to the actual damages suffered per violation).

In addition to the uncertainties of continued litigation and obtainable recovery, the amount made available through this Settlement is reasonable when compared to other settlements approved in this Circuit. *See e.g., Kazemi v. Payless Shoesource, Inc. et al*, No. CV09-5142 (N.D. Cal. April 2, 2012) (granting approval in TCPA settlement with over $4 billion in statutory liability that provided $6 million in $25 certificates with no cash value to class members); *Kramer v. Autobytel, Inc., et al.,* No. 10-cv-2722 (N.D. Cal. 2012), (granting approval in TCPA settlement with 42 million class members who could receive up to $100 from

a $12,200,000 settlement fund). As such, this objection should also be rejected.

C. The Settlement Sufficiently Deters the Reoccurrence of the Alleged Conduct and Supports the Requested Fee Application.

Objectors' final argument is yet another example of what happens when a professional objector takes a boilerplate legal argument from one objection and completely misapplies it to the facts of another. (*See* Ex. C.) Here, Objectors cite case law and make arguments as if Class Counsel have assigned a particular monetary value to Madden's prospective obligations under Paragraphs 2.2 and 2.3 of the Settlement and are now seeking a percentage of that as fees. While such arguments are often made to support fee requests, *see, e.g. Fraley v. Facebook, Inc.*, No. C 11-1726, 2012 WL 5838198 (N.D. Cal Aug. 17, 2012) (denying preliminary approval of class action settlement where the plaintiff's attorneys sought $10 million in attorneys' fees, class members received no direct cash payment, and the plaintiff's attorneys valued the injunctive relief at over $100 million), the Motion for Award of Attorneys' Fees is unequivocal that Class Counsel is not attempting to put a monetary value on the prospective relief, but is seeking "benchmark" fees of 25% based off the total $10 million cash value of the Settlement Fund. (Dkt. 52 at n.10, stating "Class Counsel's request for fees does not even account for the value of the prospective relief in the Settlement, which is commonly included as part of determining the common benefit to the class. *Hall v. Cole*, 412 U.S. 1, 5 n.7, 93 S. Ct. 1943, 1946 n.7, 36 L. Ed. 2d 702 (1973) (noting the common fund doctrine 'must logically extend, not only to litigation that confers a monetary benefit on others, but also to litigation which corrects or prevents an abuse which would be prejudicial to the rights and interests; of those others.")) (quotations omitted). As such, this portion of the objection is nonsensical and should be ignored.

Mixed into their flawed legal argument, Objectors claim that the Settlement merely requires Madden to "follow the law," that it is "ineffectual," and "has zero value." (Dkt. 53 at 12.) First, the question here is not whether the injunctive relief

is perfect or addressed every conceivable need, but rather whether it contributes to the Settlement being fair. *Lane*, 696 F.3d at 818 (citing Fed. R. Civ. P. 23(e)). More importantly, the terms of the Settlement ensures Madden's compliance with the TCPA through specific practices that go well beyond the requirements of federal law. Specifically, Madden is required to obtain the consumers' prior express consent *in writing* to receive any text message ads, (dkt. 41-1, § 2.2) and that any written authorization must contain "clear and conspicuous" disclosure language that ensures the consumer understands that he or she is consenting to receive text messages from Madden. (*Id*.) Such requirements are not listed anywhere in the TCPA and ensure that the consent disclosures are not "buried" in fine print as is a common industry practice. Further, these requirements apply not only to Madden, but any also to any third-parties that Madden contracts with to conduct advertising and marketing. (*Id*.) In addition, the Settlement Agreement requires Madden to retain all written proof of a consumer's prior express consent for a period of four (4) years after receipt, which also goes beyond what is required by federal law. (Dkt. 41-1, § 2.2.) Finally, the claim form allows Class Members to specifically request that their phone numbers be removed from Madden's databases. (Dkt. 41-1, § 2.3.) Accordingly, Objectors' argument that the Settlement only requires that Defendant "not violate federal law" and as such is of no value is demonstrably false and should be overruled.

IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court strike the Objection of non-class member Constance Giratos, and overrule each of the remaining objections, and award such relief as the Court deems reasonable and just.

Dated: January 25, 2013

Respectfully Submitted,

SAMANTHA ELLISON, individually and on behalf of a class of similarly situated individuals,

/s/ Ari J. Scharg
One of Plaintiff's Attorneys

Suzanne Havens Beckman (SBN 188814)
shavens@parisihavens.com
David C. Parisi
dcparisi@parisihavens.com
PARISI & HAVENS LLP
15233 Valleyheart Drive
Sherman Oaks, CA 91403
Telephone: (818) 990-1299
Facsimile: (818) 501-7852

Ryan D. Andrews (*Pro Hac Vice)*
randrews@edelson.com
Ari J. Scharg (*Pro Hac Vice*)
ascharg@edelson.com
John C. Ochoa (*Pro Hac Vice*)
jochoa@edelson.com
EDELSON MCGUIRE LLC
350 North LaSalle, Suite 1300
Chicago, IL 60654
Telephone: (312) 589-6370
Facsimile: (312) 589-6378

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused to be served the above and foregoing ***Plaintiff's Response to Objections*** to all counsel of record via email and the court's CM/ECF system on this, January 25, 2013.

/s/ Ari J. Scharg