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August 17, 2011

Law Division - Bergen County
Superior Court of New Jersey
Case Processing Section
Justice Center, Room 119
10 Main Street
Hackensack, NJ 07601-0769

Re: Christine M. Nicholas vs. CMRE Financial Services, Inc.
Docket No. BER-L-4336-11

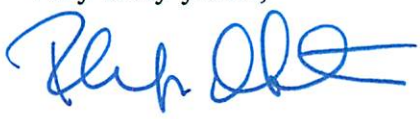
Dear Madam/Sir,

I enclose for filing an original and one copy of:

1. Plaintiff's Notice of Motion (on short notice with leave of court);
2. Statement Identifying Settlement Agreement;
3. Certification of Philip D. Stern;
4. Memorandum of Law; and
5. Proposed form of Order.

I also enclose a check for $30.00 as the filing fee.

Very truly yours,



Philip D. Stern
enclosure(s)
via hand delivery

cc: Honorable John J. Langan, Jr., J.S.C. via hand delivery
Virginia A. Pallotto, Esq. via email

PHILIP D. STERN & ASSOCIATES, LLC
ATTORNEYS AT LAW
697 Valley Street, Suite 2d
Maplewood, NJ 07040
(973) 379-7500
Attorneys for Plaintiff, Christine Nicholas

CHRISTINE M. NICHOLAS, an individual; on behalf of herself and all others similarly situated, Plaintiffs, vs. CMRE FINANCIAL SERVICES, INC., a California Corporation, Defendant.	**SUPERIOR COURT OF NEW JERSEY** **LAW DIVISION** **BERGEN COUNTY** Civil Action Docket No. BER-L-4336-11 **NOTICE OF MOTION** **(ON SHORT NOTICE BY LEAVE OF COURT)** **FOR** **CLASS CERTIFICATION AND PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT** WITH PROOF OF SERVICE **(ORAL ARGUMENT REQUESTED)**

TO: Virginia A. Pallotto, Esq.
Budd Larner, P.C.
150 John F. Kennedy Parkway
Short Hills, NJ 07078-2703

Please take notice that at 9:00 a.m. on August 19, 2011 or as soon afterwards as counsel may be heard, the undersigned, as attorneys for Plaintiff, Christine Nicholas will move for an Order certifying that this action may be maintained as a class action and for related relief.

In support of this Motion, the undersigned will rely on the following which is submitted with this Motion:

1. Certification of Philip D. Stern;

2. Statement Identifying Settlement Agreement; and

3. Memorandum.

A proposed form of Order is submitted with this Motion.

In accordance with *R.* 1:6-2(d), ORAL ARGUMENT is requested.

Philip D. Stern & Associates, LLC
Attorneys for Plaintiff, Christine Nicholas

By: _____
Philip D. Stern

Dated: August 17, 2011

Certification of Service By Attorney Under *R.* 1:5-3(3)

I, Philip D. Stern, certify that I am the attorney for Plaintiff, Christine Nicholas and that I served this Notice of Motion together with all supporting papers and the proposed form of Order on the following:

Virginia A. Pallotto, Esq.
Budd Larner, P.C.
150 John F. Kennedy Parkway
Short Hills, NJ 07078-2703

Service was made by consent of Ms. Pallotto via email.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

_____
Philip D. Stern

Dated: August 17, 2011

PHILIP D. STERN & ASSOCIATES, LLC
ATTORNEYS AT LAW
697 Valley Street, Suite 2d
Maplewood, NJ 07040
(973) 379-7500
Attorneys for Plaintiff, Christine Nicholas

CHRISTINE M. NICHOLAS, an individual; on behalf of herself and all others similarly situated, Plaintiffs, vs. CMRE FINANCIAL SERVICES, INC., a California Corporation, Defendant.	**SUPERIOR COURT OF NEW JERSEY** **LAW DIVISION** **BERGEN COUNTY** Civil Action Docket No. BER-L-4336-11 **STATEMENT INDENTIFYING SETTLEMENT AGREEMENT**

I, Philip D. Stern, certify as follows:

1. I am an attorney at law of the State of New Jersey and represent the Plaintiff, Christine M. Nicholas in this action. I make this Certification in support of Plaintiff's Motion for Class Certification and related relief in conjunction with the settlement agreement entered into with Defendant, CMRE Financial Services, Inc.

2. In accordance with *R.* 4:32-2(e)(2), I hereby identify the attached document as the complete settlement agreement executed by all parties to this action.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

Dated: August 17, 2011

PHILIP D. STERN

CHRISTINE M. NICHOLAS, an individual; on behalf of herself and all others similarly situated, Plaintiff, vs. CMRE FINANCIAL SERVICES, INC., a California Corporation, Defendant.	**SUPERIOR COURT OF NEW JERSEY LAW DIVISION BERGEN COUNTY** Civil Action Docket No. BER-L-4336-11 **CLASS ACTION SETTLEMENT AGREEMENT**

This Settlement Agreement ("Agreement")[1] in the captioned action is between Plaintiff, individually and on behalf of a Class of similarly situated persons, and Defendant, and was reached after arms-length negotiations between counsel for Plaintiff and Defendant, and is entered when executed by all Parties and their respective counsel.

Recitals:

A. Plaintiff and Defendant acknowledge that the claims and defenses asserted in this action were initially pled in the Federal Action which was terminated on February 10, 2011 by a Stipulation and Order (entered on the docket as Document No. 37 and No. 38) which expressly anticipated the commencement of an action in the Superior Court of New Jersey. The Parties consent to venue in Bergen County as Plaintiff resides in Bergen County and there are Class Members who are residents of Bergen County.

B. The Class Members are individuals on whose behalf Plaintiff filed a class action complaint ("Complaint") in the captioned action.

C. The Complaint alleges that Defendant violated the FDCPA and that such alleged violations render Defendant liable for statutory damages, costs, and reasonable attorney's fees and expenses.

D. As in the Federal Action, Defendant denies the material allegations of the

[1] Terms expressed in initial capital letters are expressly defined in this Agreement.

Complaint, disputes both factually and legally that it is liable in any way to Plaintiff or the Class, denies that its actions violated state or federal law in any manner, and asserts that even if Plaintiff were to prevail, its maximum class liability is limited by 15 U.S.C. § 1692k(a)(2) to an amount which is less than three cents per Class Member, such that there could not ever be a meaningful distribution of money to Class Members. Nevertheless, Defendant concludes that the further conduct of this Lawsuit by it would be protracted and expensive, and that it is desirable that this Lawsuit be fully, finally and forever settled in the manner set forth in this Agreement. Defendant is therefore willing to enter into this Agreement to avoid the further expense and inconvenience of litigation and to buy peace and resolve and settle all claims which have been made or could be made against it by Plaintiff and the Class arising out of the alleged statutory violations.

E. In the Federal Action, Defendant moved to dismiss the complaint arguing that the factual allegations failed to state a violation of the FDCPA as a matter of law. That motion was denied. Nevertheless, Plaintiff acknowledges that no appellate court has decided the issue and, although the majority of trial courts which have considered the issue have ruled favorably to consumers, the result of any appeal on that issue and on any other issue arising from a contested action is far from certain. Plaintiff further recognizes that there are risks from continued litigation including the risks that a disputed class certification could be denied, that the evidence admitted at trial would not satisfy the trier of fact, the uncertainty as to any damages or that Defendant proves an affirmative defense. Therefore, Plaintiff and Class Counsel conclude that the further conduct of this Lawsuit by it would be protracted and expensive, and that it is desirable that the Lawsuit be fully, finally and forever settled in the manner set forth in this Agreement.

F. Class Counsel has considerable experience in handling class actions, consumer protection cases and complex litigation. On behalf of Plaintiff, Class Counsel analyzed the facts and law relevant to the Lawsuit, recognizes the substantial expense and delay associated with the continued prosecution of this Lawsuit against Defendant through trial and through appeals, is mindful of the possible limitations on recovery to the Class even if the Court were to award the maximum recovery allowed by law, and recognizes that protracted litigation would likely increase reasonable attorney's fees and litigation expenses without an equally likely advancement of the interest of the Plaintiff or the Class Members beyond the benefits of this Agreement.

G. Based on Class Counsel's extensive analysis of the law and facts at issue in this Lawsuit, and the conclusion that, under the statutory scheme applicable to this case, the maximum pro-rata distribution to the Class Members would be less than three cents per person, and pursuant to the advice of Class Counsel, Plaintiff believes that the settlement on the terms set forth in this Agreement is fair, adequate, and reasonable, and thus in the best interest of the Class.

H. Based on extensive analysis by Defendant's counsel of the law and facts at issue in this Lawsuit, and pursuant to the advice of Defendant's counsel, Defendant believes that this settlement on the terms set forth in this Agreement is fair, adequate, and reasonable and in its interests. However, nothing contained herein shall be construed as providing any opinion or advice to Plaintiff or to any Class Members.

I. The Parties are desirous of entering into, and obtaining approval of this Agreement, pursuant to Rule 4:32-1 of the New Jersey Court Rules, in order to fully and finally resolve all claims and disputes arising out of, or related to Plaintiff's claims of violations of the

FDCPA by Defendant.

ARTICLE I
DEFINITIONS

When used in this settlement Agreement, the following terms shall mean:

1.1. "Agreement" means this Class Action Settlement Agreement including four exhibits labeled "Exhibit A-1," "Exhibit A-2", "Exhibit B" and "Exhibit C."

1.2. "Business Day" means any day on which courts in the State of New Jersey are open for business.

1.3. "Class" means all natural persons in the United States and Puerto Rico whom, during the Class Period, received from Defendant at least one voice message on the person's telephone answering device or automated telephone call which call or message either failed to identify Defendant as the caller, state the purpose or nature of the call, or disclose that the call was from a debt collector, excluding those persons who:

A. filed for bankruptcy protection since the start of the Class Period;

B. entered into any general release with Defendant;

C. are deceased; or

D. filed a claim arising under the FDCPA against Defendant in any action commenced prior to the last day of the Class Period.

1.4. "Class Claims" are defined as any and all claims and causes of action arising from Defendant's voice message left on a person's telephone answering device or Defendant's automated telephone call which message or call failed to identify Defendant as the caller, state the purpose or nature of the call, or disclose that it was from a debt collector and was left during the Class Period;

1.5. "Class Counsel" means Philip D. Stern, Esq. of Philip D. Stern & Associates,

LLC.

1.6. "Class Members" means those persons who are a part of the Class.

1.7. "Class Notice" means the notice to the Class as approved by the Court including the Publication Notice and the Web Notice.

1.8. "Class Period" means the period from September 30, 2007 to the Preliminary Approval Date .

1.9. "Class Representative" is the Plaintiff.

1.10. "Court" means the Superior Court of New Jersey in which the Lawsuit is heard.

1.11. "Defendant" means CMRE Financial Services, Inc. and includes all past, present or future officers, directors, shareholders, agents, servants, employees, assigns, attorneys, parents, subsidiaries, divisions, insurers, or entity that controls Defendant.

1.12. "Effective Date" means the first Business Day on which the later of the following occurs:

A. the time for perfecting an appeal of the Final Order has expired with no appeal taken; or

B. the affirmance on appeal of the Final Order which is not subject to further review by any Court with appellate jurisdiction over the Lawsuit.

1.13. "FDCPA" means the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq.

1.14. "Federal Action" means a certain action commenced on September 30, 2008 in the United States District Court for the District of New Jersey designated by Case No. 2:08-cv-04857 and terminated on February 10, 2011.

1.15. "Final Hearing" means the hearing to be conducted by the Court pursuant to

R. 4:32-2 of the New Jersey Court Rules to consider the fairness, adequacy, and reasonableness of this Agreement.

1.16. "Final Order" means the final order and judgment to be entered by the Court approving this Agreement as fair, adequate, and reasonable under *R.* 4:32-1, confirming certification of the Class for settlement purposes only, awarding attorney's fees and expenses, and resolving all other issues as to all Parties. The Final Order shall be in substantially the same form as the attached Exhibit C.

1.17. "Lawsuit" means the above-captioned civil action.

1.18. "Parties" means the Class Members (including Plaintiff), Class Counsel and Defendant.

1.19. "Plaintiff" means Christine M. Nicholas.

1.20. "Preliminary Approval Date" means the date that the Court enters its order granting the Motion for Conditional Certification and Preliminary Approval of Class Action Settlement Agreement, in a form substantially similar to the attached Exhibit B.

1.21. "Preliminary Approval Motion" is defined in Section 2.1(A).

1.22. "Preliminary Order" is defined in Section 2.1(A).

1.23. "Publication Notice" means the notice approved by the Court for publication in a newspaper with national distribution in a form substantially similar to the attached Exhibit A-1.

1.24. "Released Claims" means:

A. For Plaintiff, all known and unknown claims, actions, causes of action, demands, rights, damages, costs, attorneys' fees, expenses, and compensation whatsoever that she or her heirs, executors, administrators, successors, assigns, and attorneys may have against Defendant or any of its principals, members, subsidiaries, and

affiliate entities, partners, officers, directors, shareholders, managers, employees, agents, representatives, successors, assigns, insurance carriers, clients, and attorneys as of the date of this Agreement, it being the Plaintiff's intent to release all claims of any kind or nature, known or unknown, arising pursuant to contract, tort, common law, federal or state statute, or regulations, that she may have against the parties herein released and Plaintiff expressly waives all rights under § 1542 of the Civil Code of California and any similar law of any state of territory of the United States. That section provides as follows:

> Certain claims not affected by general release. A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with debtor.

B. For the Class, all known and unknown claims, actions, causes of action, demands, rights, damages, costs, attorneys' fees, expenses, and compensation whatsoever that they or their heirs, executors, administrators, successors, assigns, and attorneys may have against Defendant or any of its principals, members, subsidiaries, and affiliate entities, partners, officers, directors, shareholders, managers, employees, agents, representatives, successors, assigns, insurance carriers, clients, and attorneys, arising pursuant to contract, tort, common law, federal or state statute, or regulations, that relate in any way to any of Defendant's voice messages left on a person's telephone answering devise or automated telephone calls which message or call failed to identify Defendant as the caller, state the purpose or nature of the call, or disclose that it was from a debt collector and was left during the Class Period. The Class Members expressly waive all

rights under § 1542 of the Civil Code of California and any similar law of any state of territory of the United States. That section provides as follows:

> Certain claims not affected by general release. A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with debtor.

C. Provided, however, that Released Claims do not:

i. include any debt owed to Defendant's clients or principals by Plaintiff or any Class Member,

ii. operate as an accord and satisfaction of such debts, or

iii. operate to waive any defense Plaintiff or any Class Member may have with respect to those debts.

1.25. "Web Notice" means the notice approved by the Court for publication on Class Counsel's website in a form substantially similar to the attached Exhibit A-2.

Article II
TERMS AND CONDITIONS OF THE SETTLEMENT

Plaintiff and Defendant agree to the following settlement, subject to the terms and conditions of this Agreement, and that the relief provided for under this Agreement is in full satisfaction of all Defendant's liability for all Released Claims of Plaintiff and the Class Members.

2.1 **Class Action Settlement Procedures.**

A. Plaintiff will file a Motion for Conditional Certification and Preliminary Approval of Class Action Settlement Agreement with the Court (the "Preliminary Approval Motion") seeking entry of an Order ("Preliminary Order") to:

i. certify, for settlement purposes only, that the Lawsuit may be maintained

as a class action pursuant to *R.* 4:32-1(b)(1) and/or (b)(3), and define the Class and the Class Claims;

ii. preliminarily approve this Agreement;

iii. approve the form of the proposed Publication Notice and Web Notice, being the notice to the Class in a form substantially similar to the two forms attached as Exhibits A-1 and A-2, respectively;

iv. approve the method of notice to the Class;

v. appoint Plaintiff as the Class Representative;

vi. appoint Class Counsel;

vii. set the date for the Final Hearing;

viii. set the date and prescribe the notice for the application for fees and costs by Class Counsel; and

ix. be in a form substantially similar to the attached Exhibit B.

B. The Publication Notice shall be distributed by Defendant, at Defendant's sole expense, by publication once in *USA Today* or another newspaper or magazine with a national distribution to the general public and published within 30 days after the entry of the Preliminary Order.

C. The Web Notice shall be distributed by Class Counsel, at Class Counsel's sole expense, by publication on Class Counsel's web site no later than the date on which the Publication Notice is published.

D. Plaintiff, Defendant and their respective counsel agree to support this settlement, to undertake all reasonable actions to assure the reasonably prompt implementation and enforcement of its terms, and to take no action inconsistent

with such support. Such support, however, is expressly conditioned upon the Court's entry of the Preliminary Order and the Final Order, is for purposes of this Agreement only, and, if application for the Preliminary Order or Final Order is denied either by the Court or after all appeals are exhausted, such support is without prejudice to any *status quo ante* claims, defenses, rights, or positions in this Lawsuit.

E. If any of the following enumerated events occur, the Preliminary Order and the Final Order including, but not limited to, certification of the Class and all findings of fact and conclusions of law in those Orders shall be automatically dissolved without further order of the Court, null and void and of no force and effect, and, as of earliest date on which a Party signed this Agreement, all *status quo ante* rights of Plaintiff, Defendant and the Class Members to, among other things, pursue or oppose any effort to certify this action or any other subsequently filed or reinstated class action litigation as a class action, and all other claims, defenses, rights, and positions shall in all respects be unaffected, and the Preliminary Order and the Final Order shall so provide:

   i. this Agreement is not approved by the Court,

   ii. approval of this Agreement, including the entry of the Preliminary Order or the Final Order, is reversed or modified on appeal in a manner materially inconsistent with this Agreement (except for the modification of any attorney's fee award),

   iii. any one of the conditions precedent set forth in Article IV of this Agreement is not met, or

iv. any termination right under Section 5.2 of this Agreement is exercised.

F. At the Final Hearing, Plaintiff, Defendant and their respective counsel will seek the entry of the Final Order to:

i. Confirm certification of the Class;

ii. Approve the proposed relief to the Class;

iii. Grant the individual and Class releases described in this Agreement;

iv. Approve Class Counsel's application for fees and expenses;

v. Otherwise enforce the terms of this Agreement; and

vi. be in a form substantially similar to that attached as *Exhibit C*.

2.2 **The Class**. The Class is defined in Section 1.3.

2.3 **Settlement Consideration**. Subject to the terms of this Agreement, Defendant will pay the sum of the following Class Relief, Plaintiff's Relief, and Attorney's Fees/Expenses, to be distributed as follows:

A. Class Relief. $66,773.00 as a *cy pres* distribution on behalf of the Class to one or more charitable organizations, recognized as non-profit entities by the IRS, without any religious or political affiliations and without any relationship to the Plaintiff, Defendant, Class Counsel or Defendant's counsel. The recipient(s) of the *cy pres* payment will be designated by mutual agreement of counsel for the Plaintiff and Defendant with the approval of the Court, the identities of which will be disclosed to the Court no later than the Final Hearing. If counsel for Plaintiff and Defendant are unable to agree on the recipient(s), each may submit requests to the Court and the Court will identify the recipient(s). The sum of $66,773.00 represents the maximum recovery of statutory damages under the FDCPA, as it represents one percent of Defendant's net worth of $6,677,300, which amount has been ascertained through confirmatory

discovery provided by Defendant to Class Counsel. If requested by the Court, Defendant will provide to the Court documentation establishing such net worth for an *in camera* inspection.

B. Plaintiff's Relief. $1,500.00 to Plaintiff for her individual statutory damage claims the total amount of $1,000, as provided for in 15 U.S.C. § 1692k, and in consideration of her service to the Class, Defendant will pay to the Plaintiff an additional $500.

C. Attorneys' Fees/Expenses. Class Counsel shall be entitled to receive an award to cover all reasonable attorney's fees, costs and expenses arising out of this Lawsuit, the Federal Action, and services to be provided in the administration of this class action. Class Counsel agrees to limit the application for such an award to $76,727.00. Class Counsel will accept the amount of fees, costs and expenses awarded by the Court in full satisfaction of reasonable attorney's fees, and costs and expenses and will neither assert a charging or retaining lien nor request additional fees from Defendant, Plaintiff, or any Class Member. Furthermore, Plaintiff and Defendant stipulate that the full amount of $76,727.00 is fair and reasonable under the circumstances including, without limitation, the overall benefit to the Class and Plaintiff from the settlement embodied in this Agreement, Class Counsel's services thus far and prospective services with respect to the administration of the Class pursuant to this Agreement, Class Counsel's willingness to limit fees and costs even though it remains uncertain as to the extent of necessary prospective services, Class Counsel having provided services for nearly two years (or longer if there is an appeal of the Preliminary Order or the Final Order) without receipt of any compensation, Class Counsel's advancement of litigation expenses, the success in bringing about a result by settlement which equates to the maximum recovery under the FDCPA, Class Counsel's undertaking of the risk that compensation for services might never be paid even if the asserted claims were successfully prosecuted, and that none of the fees and costs will come from

any fund generated for the Class or the Plaintiff. Regardless of the amount approved by the Court in no event will Defendant pay to Class Counsel any attorney's fees, expenses or costs in excess of $76,727.00.

2.4 **Opting Out.**

A. The Web Notice will include instructions for opting out of the Class as provided in this Section 2.4.

B. A member of the Class may opt out of the Class at any time prior to the expiration of the Opt-Out Period set by the Court in the Preliminary Order. To opt out, the person must notify Class Counsel and Defendant's Counsel in writing of the person's request for exclusion from the Class. All requests for exclusion must be received by Class Counsel and Defendant's counsel on or before the end of the Opt-Out Period set by the Court. Except for those persons who have properly and timely opted out, each member of the Class will be deemed a Class Member for purposes of this Agreement. Any person who opts out of the Class pursuant to this Section shall not be entitled to relief under nor be affected by this Agreement.

2.5 **Class Members' Release and Exclusive Remedy.**

A. Upon entry of the Final Order, each Class Member, including the Plaintiff, on behalf of such Class Members and of any person claiming by or through each such Class Member as heir, administrator, devisee, predecessor, successor, representative of any kind, or assignee shall be deemed to release and forever discharge Defendant and all of its present, former or future principals, members, subsidiaries, and affiliate entities, partners, officers, directors, shareholders, managers, employees, agents, representatives, successors, assigns, sureties, insurance carriers, clients, and attorneys (the "Released

Persons"), from any and all of the Released Claims.

B. The relief provided for in this Agreement is the exclusive method of recovery and exclusive remedy for all Class Members for any and all of the Released Claims, and is in lieu of any other remedy or right of action against the Released Persons for the Released Claims. Accordingly, the Released Persons shall not be subject to liability of any kind to any Class Member with respect to any of the Released Claims, other than as set forth in this Agreement.

C. Each Class Member, upon the Court's entry of the Final Order, shall be enjoined by that Order from instituting or maintaining any action for any of the Released Claims against the Released Persons. The Final Order shall enjoin such actions for the Released Claims and the Court will retain jurisdiction over the administration of this Agreement and may use its equitable powers to enforce this Agreement.

2.6 **Attorney's Fees of Individual Class Members**. Any Class Member or other person may be represented by counsel of his or her choice, but all fees and expenses of such counsel, if other than Class Counsel, will be paid by the Class Member or other person.

2.7 **No Admission of Liability by Defendant**. Plaintiff, Defendant, and their respective counsel stipulate that this Agreement does not constitute an admission by Defendant that any claim or fact alleged by any party in the Lawsuit, or in the Federal Action, is true or correct, and Defendant expressly denies any liability or wrongdoing whatsoever in connection with matters which are the subject of this Lawsuit or any other prior or subsequent lawsuit or Class action.

2.8 **Objection Period for Class Members.**

A. Class Members and any other person who intends to assert an objection to

one or more of the terms of this Agreement or the Final Order, must do so by notifying the Court, Class Counsel and counsel for Defendant, in writing.

B. Subject to Court approval, the Preliminary Order will require that notice of such objections must include:

(1) a statement of each objection being made;

(2) a detailed description of the facts underlying each objection;

(3) a detailed description of the legal authorities underlying each objection;

(4) a statement of whether the objector intends to appear at the Final Hearing;

(5) a list of witnesses whom the objector may call for live testimony, oral deposition testimony or affidavit during the Final Hearing; and

(6) a list of exhibits which the objector may offer during the Final Hearing; along with copies of all the exhibits.

C. Subject to Court approval, the Preliminary Order will further provide that Class Members, and all other interested persons shall file notice of such objections with the Court and serve such notice of objections upon Class Counsel and counsel for Defendant at the addresses set forth in Section 5.7 no later than a date which is at least seven calendar days prior to the Final Hearing. Unless otherwise agreed by both Defendant and Class Counsel, and the Court, Class Members or other persons who fail to properly or timely file their objections with the Court, or fail to timely serve such objections on Class Counsel and counsel for Defendant, will not be heard during the Final Hearing and the Court will not consider their objections.

Article III
REPRESENTATIONS AND WARRANTIES

3.1 **Representations and Class Counsel's Warranties.** Class Counsel represents and warrants that he believes the settlement set forth in this Agreement is in the best interest of the Class. However, such representations do not constitute the giving of legal advice to Defendant, which stipulates that it is relying on the legal advice of its own attorneys in deciding whether to enter into this settlement.

3.2 **Representations and Warranties of the Plaintiff.** Plaintiff represents and warrants as follows:

A. that on the date of execution of this Agreement she is the owner of the individual claims asserted in the Lawsuit, she has not assigned, pledged (except to their attorney), sold or otherwise transferred such claims (or an interest in such claims), and that on the Effective Date, she will own such claims free and clear of any and all liens, claims, charges, security interests or other encumbrances of any nature whatsoever, except for any contingent legal fees and expenses; and

B. that this Agreement does not constitute an admission by Defendant that any claim or fact alleged by any party in the Lawsuit or any other action is true or correct, and Defendant has always and consistently expressly denied any liability or wrongdoing whatsoever in connection with matters which are the subject of this or any other Class action.

Article IV
CONDITIONS TO SETTLEMENT

4.1 **Conditions.** The foregoing agreements of Plaintiff and Defendant are subject to the accuracy of the representations and warranties contained in the Agreement and to the

performance by the Parties of their obligations under this Agreement in all material respects. Additionally, Defendant's obligation to provide the Relief to Plaintiff, the Class and the Attorney's Fees/Expenses set forth in Section 2.3 in this Agreement is subject to the satisfaction of each of the following conditions:

A. the Effective Date shall have occurred;

B. the Court shall have approved and signed a Final Order in substantially the same form as the attached Exhibit C that includes a release of all of the Released Claims;

C. Defendant and Plaintiff shall have been furnished with such additional documents as may be reasonably required in order to implement the transactions contemplated by this Agreement; and

D. the representations and warranties contained in Article III of this Agreement shall be true and correct as of the date of execution of this Agreement.

Article V
MISCELLANEOUS PROVISIONS

5.1 **Appeals**. If an appeal is taken by a Class Member or any other person from the Preliminary Approval Order or the Final Order, Plaintiff and Defendant agree to support the position on such appeal that the order or orders appealed from should be affirmed in its or their entirety, and to file briefs or other appropriate court papers in support of that position. Nothing contained herein, however, shall prejudice the rights of Plaintiff, Class Counsel, or Defendant to appeal from any order of the Court that is inconsistent with the orders contemplated by this Agreement.

5.2 **Termination**. This Agreement shall be terminable by Defendant upon three Business Days' prior written notice if any of the terms, conditions, or representations of the

Agreement are not adhered to by the Court or by the Plaintiff or Class Counsel. It may also be terminable by Defendant if the Court does not approve the proposed manner of notice to the Class as set forth above and contemplated in Exhibits A-1 and A-2, or more than 50 of the Class Members opt out of the Class in a timely fashion, and Defendant provides written notice of its intent to terminate to Class Counsel no later than three Business Days prior to the scheduled date of the Final Hearing. The effect of termination under this Section 5.2 is governed by Section 2.1(E).

5.3 **Distribution of Settlement Funds**. Subject to Approval of the Court, the settlement funds will be paid and distributed as follows:

A. Within 35 calendar days after entry of the Final Order and provided no appeal has been filed, Defendant shall deliver to Class Counsel the sum of the Class Relief, Plaintiff's Relief, and Attorney's Fees/Expenses described in Section 2.3 for deposit in Class Counsel's trust account. Class Counsel will provide Defendant with a completed IRS Form W-9 with respect to that payment.

B. Upon receipt of such funds, Class Counsel shall file a certification stating receipt of those funds and shall deposit the funds in an IOLTA trust account. Upon delivery of such funds, Defendant shall have fulfilled all obligations under the Final Order.

C. On the third Business Day after the Effective Date, Class Counsel shall, in accordance with Section 2.3, distribute the Class Relief of $66,773.00, the Plaintiff's Relief of $1,500.00, and Attorney's Fees/Expenses in the amount approved by the Court not to exceed $76.727.00. Class Counsel may withhold any payment until such time as the recipient has provided a completed IRS Form W-9.

Upon entry of the Final Order, Class Counsel may notify the *cy pres* recipient(s) of their respective award and request a completed IRS Form W-9. If any *cy pres* recipient has failed to provide a completed IRS Form W-9 within 60 days after Class Counsel's request, Class Counsel may move, on notice to Defendant's counsel and the *cy pres* recipient for further direction including designation of a replacement recipient.

D. Upon distribution of all funds, Class Counsel shall file a certification setting forth the fact that all distributions have been made in accordance with the Final Order and shall deliver to Defendant's counsel an executed Warrant to Satisfy Judgment.

5.4. **No Admission**. The Parties and their attorneys stipulate that this Agreement is a compromise of disputed claims, and that this Agreement is entered into without admitting any liability, which liability is expressly denied, and without agreement by any Party to any of the allegations made by another Party. The Parties and their attorneys further stipulate that nothing contained in this Agreement, the supporting documents, or the negotiations leading up to this Agreement shall be construed as an admission of liability or wrongdoing of any kind, or – if this Agreement is terminated – as a waiver of any claim or defense that Defendant or Plaintiff may have in the Lawsuit, nor of Plaintiff's right to seek class certification on a contested basis, nor of Defendant's right to oppose such certification.

5.5 **Entire Agreement**. This Agreement, including all referenced Exhibits, is the entire agreement of the Parties. All antecedent or contemporaneous extrinsic representations, warranties, or collateral provisions concerning the negotiation and preparation of this Agreement are intended to be discharged and nullified, with the exception of the Stipulation of Dismissal

without prejudice filed by Plaintiff and Defendant in the Federal Action which Stipulation permitted the re-filing of this Class action in this Court.

5.6 **Modification**. No modification of this Agreement may be made, except by written agreement executed by Plaintiff, Class Counsel, and Defendant, and approved by the Court.

5.7 **Notices**. All notices between and to Class Counsel and Defendant required under this Agreement shall be sent by first class U.S. mail, by any method for which there is a signed receipt obtained from the recipient by a carrier in the business of delivering documents (such as the U.S. Post Office, Federal Express and N.J. Lawyers Service), or by hand delivery to the recipient designated in this Agreement, with a courtesy copy sent by email. The timeliness of all submissions and notices shall be measured by the date that is three Business Days after the date of the postmark (if sent by mail), or by the date of receipt (if hand delivered or there is a signed receipt) regardless when or whether the copy sent via email is received. The persons designated to receive notice are as follows:

Philip D. Stern, Esq.
Philip D. Stern & Associates LLC
697 Valley Street, Suite 2D
Maplewood, NJ 07040
(973) 379-7500
pstern@philipstern.com

Class Counsel

and:

Virginia A. Pallotto
Budd Larner, P.C.
150 John F. Kennedy Parkway, CN 1000
Short Hills, NJ 07078-2703
(973) 379-4800, Ext. 4450
vpallotto@budd-larner.com

Attorney for Defendant

5.8 **Execution in Counterparts and Facsimile**. This Agreement may be executed in any number of counterparts and each of which when so executed shall be deemed an original and all of which taken together shall constitute one and the same Agreement. Facsimile signatures will be deemed originals provided that the attorney offering the facsimile signature certifies it in accordance with *R.* 1:4-4(c).

5.9 **Applicable Law**. This Agreement shall be governed by and shall be construed and enforced in accordance with the laws of the United States and the State of New Jersey without regard to any conflict of law provision in said laws of the State of New Jersey that might otherwise require the application of the laws of a jurisdiction other than that of the State of New Jersey to the performance, validity, construction, or enforcement of this Agreement.

5.10 **Headings**. Article and Section heading in this Agreement are for convenience of reference only and are not to be taken to be a part of the provisions of this Agreement, nor to control or affect meanings, constructions or the effect of the same.

5.11 **Benefit of Agreement**. The Agreement shall be binding upon and inure to the benefit of the Parties, the Class Members, the Released Persons, and their respective successors, heirs, and assigns. Nothing in this Agreement is intended or shall be construed to give any other person or corporation any legal or equitable right, remedy or claim under or in respect to this Agreement or any provision herein entered.

5.12 **Place of Performance**. This Agreement shall be performed in the State of New Jersey.

5.13 **Best Efforts**. All signatories to this Agreement and their counsel shall exercise their best efforts to take all steps and expend all efforts that may become necessary to effectuate

this Agreement.

5.14 **Parties Are Equal Drafters**. The Plaintiff and Defendant shall be deemed to have drafted this Agreement equally, and the settlement documents shall not be construed strictly against Plaintiff or Defendant.

CHRISTINE M. NICHOLAS, individually and on behalf of all others similarly situated	CMRE FINANCIAL SERVICES, INC By: _____ (PRINT NAME AND TITLE BELOW SIGNATUE)
Dated: August 17 , 2011	Dated: , 2011
Attorneys for Plaintiff: By: _____ PHILIP D. STERN Philip D. Stern & Associates, LLC 697 Valley Street, Suite 2d Maplewood, NJ 07040	Attorneys for Defendant: By: _____ VIRGINIA A. PALLOTTO Budd Larner, P.C. 150 John F. Kennedy Parkway 3rd Floor Short Hills, NJ 07078-2703
Dated: , 2011	Dated: , 2011

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this Agreement.

5.14 **Parties Are Equal Drafters.** The Plaintiff and Defendant shall be deemed to have drafted this Agreement equally, and the settlement documents shall not be construed strictly against Plaintiff or Defendant.

CMRE FINANCIAL SERVICES, INC

By: Sandy Lawrence

(PRINT NAME AND TITLE BELOW SIGNATURE)
SANDY LAWRENCE, Pres.

CHRISTINE M. NICHOLAS, individually and on behalf of all others similarly situated

Dated: , 2011

Dated: 8/16 , 2011

Attorneys for Plaintiff:

By:

PHILIP D. STERN
Philip D. Stern & Associates, LLC
697 Valley Street, Suite 2d
Maplewood, NJ 07040

Dated: , 2011

Attorneys for Defendant:

By: Virginia A. Pallotto

VIRGINIA A. PALLOTTO
Budd Larner, P.C.
150 John F. Kennedy Parkway
3rd Floor
Short Hills, NJ 07078-2703

Dated: August 16 , 2011

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EXHIBIT A-1

EXHIBIT A-1 TO SETTLEMENT AGREEMENT

CLASS ACTION SETTLEMENT NOTICE
(THIS NOTICE WAS APPROVED BY THE COURT)

TO: All persons in the United States and Puerto Rico who received from CMRE FINANCIAL SERVICES, INC. a telephonic voice message or automated call from September 30, 2007 to ____[CLASS CERT ORDER DATE]____:

YOU ARE HEREBY NOTIFIED that a proposed class action settlement has been preliminarily approved by the Court in Christine M. Nicholas v. CMRE Financial Services, Inc. Docket No. BER-L-4336-11 (Superior Court of New Jersey, Law Division, Bergen County). The plaintiffs claim that defendant violated consumers' rights under the Fair Debt Collection Practices Act when leaving messages on consumers' telephone answering devices or making automated telephone calls. Defendant denies liability and asserted defenses. The Court has not made any decision concerning the merits of the lawsuit.

Subject to Court approval at a Final Hearing scheduled for _____, 2011, the settlement includes a payment of $66,773.00 to a charitable institution, $1,500.00 to the named plaintiff, and attorney's fees and costs not to exceed $76,727.00. The rights of class members will be affected by the settlement.

For further information regarding the settlement and your rights, including information on how to exclude yourself from the Class by the opt-out deadline of [insert date]____ or object to the terms of the settlement agreement prior to the Final Hearing, please do one of the following:

1. Using an internet browser, navigate to www.PhilipStern.com and click on the "Class Actions" tab. Then, click on the link for the "Notice to Class Members" under the "Focus Receivables Management" heading.
2. Send a request by email to: FRMFullNotice@PhilipStern.com and include your full name, email address and your postal address.
3. Call toll-free (888) 609-3859 and follow the instructions to leave a message with either your email address or your postal mailing address.
4. Write to Class Counsel in sufficient time to be received by [DATE WHICH IS 7 CALENDAR DAYS BEFORE OPT-OUT DEADLINE]:

   Philip D. Stern, Esq.
   Philip D. Stern & Associates, LLC
   697 Valley Street, Suite 2d
   Maplewood, NJ 07040-2642

DO NOT CONTACT THE COURT OR THE CLERK'S OFFICE

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EXHIBIT A-2

EXHIBIT A-2

CHRISTINE M. NICHOLAS, an individual; on behalf of herself and all others similarly situated, Plaintiff, vs. CMRE FINANCIAL SERVICES, INC., a California Corporation, Defendant.	**SUPERIOR COURT OF NEW JERSEY** **LAW DIVISION** **BERGEN COUNTY** Civil Action Docket No. BER-L-4336-11

NOTICE OF CLASS ACTION AND PROPOSED SETTLEMENT

TO: ALL INDIVIDUALS IN THE UNITED STATES AND PUERTO RICO WHO RECEIVED TELEPHONIC MESSAGES OR AUTOMATED TELEPHONE CALLS FROM CMRE FINANCIAL SERVICES, INC., BETWEEN OCTOBER 1, 2007 AND _____, 2011

NOTICE IS HEREBY GIVEN THAT, pursuant to the Order of the Superior Court of New Jersey, Bergen County (the "Court"), dated _____, 2011, it was determined that the above-captioned Fair Debt Collections Practices Act ("FDCPA") lawsuit may be settled on behalf of a Class of natural persons (the "Class") pursuant to N.J. Court Rule 4:32-1(b)(1) and defined as follows:

> All natural persons in the United States and Puerto Rico whom, during the "Class Period", received from Defendant, CMRE Financial Services, Inc., at least one voice message on the person's telephone answering device, or automated telephone call, which message or call either failed to identify the Defendant as the caller, state the purpose or nature of the call, or disclose that the call was from a debt collector, excluding those persons who:
>
> A. filed for bankruptcy protection since the start of the Class Period;
> B. entered into any general release with Defendant;
> C. are deceased; or
> D. filed a claim arising under the FDCPA against Defendant in any action commenced prior to the last day of the Class Period.
>
> "Class Period" means the continuous period beginning on September 30, 2007 and continuing through and including _____, 2011.

A. Summary of the Litigation

Plaintiff, Christine M. Nicholas ("Plaintiff") alleges that she, along with other consumers, received telephonic voice messages left on answering devices or voice mail or automated telephone calls by the Defendant, CMRE Financial Services, Inc., ("Defendant") that failed to provide meaningful disclosure of Defendant's identity, which failed to disclose that the message

or call was from a debt collector and/or failed to disclose the purpose or nature of the message or call was an attempt to collect a debt, in violation of the FDCPA, 15 U.S.C. § 1692 *et seq.*, including but not limited to §§ 1692d(6) and 1692e(11). It is not alleged that such alleged failure caused or was capable of causing any actual damages to the Plaintiffs or any other person.

Defendant denies that it has any liability to Plaintiff or to the Class, but has agreed to settle this case based on the likely high cost of protracted litigation. The FDCPA provides for the recovery of actual damages, if any, statutory damages, costs and reasonable attorneys' fees to a successful plaintiff. This lawsuit seeks only statutory damages for both the individual Plaintiff and the class members ("Class"). The maximum amount recoverable for this Class under the FDCPA is the lesser of one percent of the Defendant's net worth or $500,000. Here, one percent of Defendant's net worth, as established through confirmatory discovery, is $66,773.00 and, as a practical matter, that amount is incapable of being distributed to the Class, given that it would, at most, be less than two cents per Class Member. As such, the settlement provides for a *cy pres* distribution as explained more fully below.

For a complete statement of all for the contentions and proceedings in this case, you should consult the Court file relating to this lawsuit, a copy of which is available for inspection on the website of Class Counsel:

http://www.philipstern.com/ClassActions.html

or in the Superior Court of New Jersey, Deputy Clerk of the Superior Court, Civil Division, Room 115, Justice Center, 10 Main St., Hackensack, NJ 07601. This case was originally filed in the United States District Court for the District of New Jersey, under Civil Action No. 2:08-cv-04857-JLL-CCC, but the parties agreed to dismiss that federal action, without prejudice, for the purpose of re-filing the action in state court in the above-captioned action. A copy of the prior federal court proceedings is available for inspection the website of Class Counsel

http://www.philipstern.com/ClassActions.html

or at the Clerk of the United States District Court for the District of New Jersey, M.L. King, Jr. Federal Bldg. & US Courthouse, 50 Walnut St., Newark, NJ 07102 or through the internet: pacer.njd.uscourts.gov.

B. Certification of the Class

On _____, 2011, the Class was conditionally certified pursuant to Rule 4:32-1(b)(1) of the New Jersey Court Rules as a class action. The Court appointed the Plaintiff, Christine M. Nicholas as the representative of the Class, and her attorney, Philip D. Stern, of the Philip D. Stern & Associates, LLC, as Class Counsel. The Court certified the Class Claims as any and all claims and causes of action arising from Defendant's voice message left on a person's telephone answering device or Defendant's automated telephone calls which failed to identify Defendant as the caller, state the purpose or nature of the call, or disclose that it was from a debt collector and was left during the Class Period.

C. Settlement of the Litigation

A proposed settlement has been preliminarily approved by the Court. Under the terms of the proposed settlement, Defendant has agreed to provide the following relief to the Plaintiff and the Class:

A. Defendant shall pay $66,773.00 to one or more charitable organizations to be later appointed by the Court that is not affiliated with any religious, political organization, Party or Counsel, as a *cy pres* distribution on behalf of the Class, which sum represents one percent of Defendant's net worth and is the maximum amount of statutory damages available to the Class under the Fair Debt Collection Practices Act ("FDCPA").

B. Defendant will also pay to the Plaintiff for her individual statutory damage claims the total amount of $1,000, as provided for in 15 U.S.C. § 1692k, and in consideration of her service to the Class, Defendant will pay to the Plaintiff an additional $500.

C. Defendant shall bear the costs of class administration, with the exception of publication of this notice on Class Counsel's website and class counsel's toll free number, and (subject to Court approval) pay the reasonable attorneys' fees and expenses of Plaintiffs' attorneys in an amount not to exceed $76,727.00.

The Court will hold a Final Hearing as describe in Section F., below, which will include consideration of final approval of the settlement. Upon final approval of the settlement, the Court will enter a judgment which will include releasing Defendant of all liability to Plaintiff for all claims and of all liability to the Class for the Class Claims, and enjoining prosecution of the released claims.

Class Counsel believes that the proposed settlement is fair, reasonable, adequate, and in the best interests of the Class. This settlement represents the maximum recoverable for a Class under the FDCPA. Because the potential Class is conservatively estimated to be over 1,140,000 persons for just a one-year period from September 30, 2007 through September 30, 2008, any Class member would receive less than three cents and it has been determined that distribution to the Class would not be economical or practical to administer. Accordingly, the settlement provides only for a *cy pres* payment to one or more non-profit charities to be approved by the Court at the Final Hearing. It has been agreed that the *cy pres* recipient must be a non-profit, charitable organization that is not affiliated with any religious or political organization or any Party or their Counsel. There is no distribution to any Class members, other than to the Plaintiff as Class Representative as set forth above. While a person could possibly recover more if he or she filed an individual lawsuit and were successful, individual suits under the FDCPA are sometimes not economical. In addition, Defendant has denied that it violated the FDCPA. An individual who elects to opt out of the Class might recover nothing.

If the settlement is not approved, the case will proceed as if no settlement has been attempted. Defendant retains its rights to contest whether this case should be maintained as a class action and the merits of the suit.

This notice contains only a general description of the terms of the settlement. You may inspect the entire settlement agreement, a copy of which is available on the website of Class Counsel,

http://www.philipstern.com/ClassActions.html, in the Court's file, or by contacting Class Counsel and requesting a copy of it at your own expense.

A member of the Class may elect to opt out of the Class or file objections to the settlement as set forth below or a member may do nothing and accept the terms of the settlement.

D. Opting Out

A member of the Class may opt out of the Class at any time prior to the expiration of the Opt-Out Period, which will expire Seven Calendar Days before the Final Hearing, scheduled for [insert hearing date]_, or by _[insert opt-out date]_____.

To opt out of the Class, a class member must notify Class Counsel and Defendant's counsel in writing requesting exclusion from the Class and must be received by Class Counsel and Defendant's counsel Seven Calendar Days before the Final Hearing scheduled for [insert hearing date], or by [insert opt-out date]. The written request may be sent to Class Counsel by mail or hand-delivery (including a commercial courier such as Federal Express). To insure timely delivery of a written request sent by regular mail, it should be postmarked no later than ten calendar days prior to the Final Hearing.

Except for those persons who have properly and timely opted out, each member of the Class will be deemed a Class Member for purposes of the settlement Agreement. Any person who opts out of the Class shall not be entitled to relief under nor be affected by the settlement Agreement, nor shall such person be entitled to object to the settlement.

E. Objections

You have the right to object to the proposed settlement by filing and serving a written objection. Your objection must state your name, address, the case name and number, and the information described below. You or your attorney must sign your objection personally. You must FILE and SERVE your objection on or before _____, 2011. You file your objection with the Court, at the following address:

Deputy Clerk of the Superior Court
Civil Division, Room 115
Justice Center, 10 Main St.
Hackensack, NJ 07601

You serve (service is complete on receipt) a copy of your objection on Class Counsel and Counsel for Defendant at the following addresses:

Philip D. Stern, Esq.
Philip D. Stern & Associates, LLC
697 Valley Street, Suite 2-D
Maplewood, New Jersey 07040
(973)379-7500

Class Counsel

and:

Virginia A. Pallotto, Esq.
BUDD LARNER, P.C.
150 John F. Kennedy Parkway, CN 1000
Short Hills, NJ 07078-2703
(973) 379-4800, Ext. 4450
Attorney for Defendant

Service shall be made in one of the following manners authorized under New Jersey Court Rule 1:5-2: "mailing a copy to the attorney at his or her office by ordinary mail, by handing it to the attorney, or by leaving it at the office with a person in the attorney's employ."

No member of the Class, or any other person, will be heard at the Final Hearing in opposition to class certification, the Class Settlement, Class Counsel's proposed attorneys' fees and expenses, or the proposed payments to Class Representative unless his or her objection contains the following: (i) a statement of each objection being made; (ii) a detailed description of the facts underlying each objection; (iii) a detailed description of the legal authorities underlying each objection; (iv) a statement of whether the objector intends to appear at the Final Hearing; (v) a list of witnesses whom the objector may call by live testimony, oral deposition testimony or affidavit during the Final Hearing, together with a summary of each witness' anticipated testimony; and (vi) a list of exhibits which the objector may offer during the Final Hearing, together with true copies of all of the exhibits.

Class Members and any other persons who fail to file or serve their objections properly or timely will not be heard during the Final Hearing and the Court will not consider their objections.

If you do not want to exclude yourself from the Class and you do not object to the settlement, it is not necessary for you to take any action.

F. Final Hearing

NOTICE IS HEREBY GIVEN THAT a hearing will be held before the Honorable _____, Superior Court Judge for the Superior Court of New Jersey, on _____ 2011, at _____ _.m., at the Bergen County Courthouse, 10 Main Street, Hackensack, NJ 07601. This hearing will be held to determine if the proposed settlement is fair, reasonable, and adequate and should be approved, and to determine Class Counsel's petition for fees and costs in the amount of $76,727.00. If the proposed settlement is approved, it will be binding and will release Defendant from the Class Claims.

Questions concerning this class action litigation should be directed to Class Counsel at the address above.

PLEASE DO NOT CALL THE JUDGE OR THE COURT CLERK.

THIS NOTICE WAS APPROVED BY THE COURT.

EXHIBIT B

EXHIBIT B

CHRISTINE M. NICHOLAS, an individual; on behalf of herself and all others similarly situated, Plaintiff, vs. CMRE FINANCIAL SERVICES, INC., a California Corporation, Defendant.	**SUPERIOR COURT OF NEW JERSEY** **LAW DIVISION** **BERGEN COUNTY** Civil Action Docket No. BER-L-4336-11 **ORDER** **CONDITIONALLY CERTIFYING CLASS AND GRANTING PRELIMNARY APPROVAL OF THE SETTLEMENT AGREEMENT**

THIS MATTER HAVING been opened to the Court by Philip D. Stern, Esquire, of Philip D. Stern & Associates, LLC, attorneys for Plaintiff, on Notice of Motion to Conditionally Certify a Class and Granting Preliminary Approval of the Settlement pursuant to *R.* 4:32-2, and Virginia Pallotto, Esquire, of Budd Larner, P.C., attorneys for Defendant, having joined in the Motion, and the Court having reviewed the moving papers, and having heard the arguments of counsel (if orally argued),

AND THE COURT having made the following facts and conclusions in connection with this matter:

A. The parties submitted a proposed Class Action Settlement Agreement ("Agreement") which has been filed with the motion papers in this matter in accordance with Court Rule;

B. The parties request:

   i. conditionally certifying, for settlement purposes only, that this action may be maintained as a class action, and defining the class and the class claims;

   ii. appointment of the class representatives and class counsel;

iii. approval of the form and manner of notice to the class;

iv. preliminarily approving the terms of the proposed Agreement; and

v. setting dates for notice, opt-out, objections, and the hearing for final approval.

B. After consideration of the papers filed in this action and, if orally argued, the arguments of counsel, the Court has made a preliminary determination that:

(i) the proposed settlement class is certified under *R.* 4:32-1(a) and 4:32-1(b)(1);

(ii) the proposed settlement of the claims of the Class against Defendant appears to be fair, adequate, and reasonable, and therefore, within the range of approval; and

(iii) the proposed settlement appears to satisfy the requirements of *R.* 4:32-1(a), as it will provide the maximum benefit that Plaintiff and the Class could hope to achieve if this case were tried on the merits. The Court further finds that in light of the large class size, the cap on liability to the class provided for in 15 U.S.C. § 1692k(a)(2)(B), and the costs of direct mail notice, that the best notice that is practicable under the circumstances and consistent with due process is publication notice. Requiring Defendant to mail notice to each of the class members would frustrate the Congressional purpose in setting a cap on Defendant's class liability, as the cost of postage alone would be in excess of ten times Defendant's maximum class liability to the class. Furthermore, the combination of a publication notice and a web site notice is reasonably calculated to give notice of the proposed settlement to any class member.

C. The Court also finds that the proposed form of notice is adequate and will give all

Class Members sufficient information to enable them to make intelligent decisions as to whether to remain Class Members, opt out or object to the proposed settlement and its terms.

D. The Court also finds that Plaintiff is an adequate class representative and that Plaintiff's attorney meets the qualifications for approval as class counsel;

and for good cause shown;

IT IS ON THIS DAY OF , 2011, ORDERED:

1. Pursuant to *R.* 4:32-2(a), the Court certifies that this action is maintainable as a class action for settlement purposes pursuant to *R.* 4:32-1(b)(1) and (3) and designates Plaintiff, Christine M. Nicholas, as the class representatives.

2. Pursuant to *R.* 4:32-2(a), the Court defines the class as:

> All natural persons in the United States and Puerto Rico whom, during the Class Period, received from Defendant at least one voice message on the person's telephone answering device or automated telephone call which message or call either failed to identify Defendant as the caller, state the purpose or nature of the call, or disclose that the call was from a debt collector, excluding those persons who:
> A. filed for bankruptcy protection since the start of the Class Period;
> B. entered into any general release with Defendant;
> C. are deceased; or
> D. filed a claim arising under the FDCPA against Defendant in any action commenced prior to the last day of the Class Period.

3. Pursuant to *R.* 4:32-2(a), the Court defines the Class Claims as any and all claims and causes of action arising from Defendant's voice message left on a person's telephone answering device or defendant's automated telephone calls which message or call failed to identify Defendant as the caller, state the purpose or nature of the call, or disclose that it was from a debt collector and was left during the Class Period.

4. The Class Period is defined as the continuous period beginning on September 30,

2007 and continuing through and including the date of this Order.

5. Pursuant to *R.* 4:32-2(a) and (g), the Court appoints Plaintiff's attorney, PHILIP D. STERN, ESQ., as class counsel.

6. On _____, 2011, at _____ ___.m. (a date which is 42 days or more after the entry of this Order), the Court will hold a hearing ("Final Hearing"), pursuant to *R.* 4:32-2(e)(C), for the purpose of determining: (i) whether the preliminarily certified settlement class meets the requirements for class certification under *R.* 4:32-1; (ii) whether the proposed settlement is fair, reasonable and adequate, and should, therefore, be granted final approval; and (iii) the amount of attorney's fees and expenses that should be awarded to Class Counsel.

6. The Final Hearing will be held before the undersigned at the Superior Court of New Jersey, Justice Center, 10 Main St., Hackensack, NJ 07601.

7. Pursuant to *R.* 4:32-2(e)(1)(B), notice to the Class shall be given to the Settlement Class: (a) by publication once, in a newspaper or magazine with a national distribution of the publication Class Notice, appearing at least 21 days before the Final Hearing and substantially in the form of the attached as Exhibit A-1; and (b) by posting on Class Counsel's web site a notice substantially in the form of the attached Exhibit A-2.

8. In accordance with and within the time set forth in the Court-approved Class notices, a Class Member may exercise his or her election to opt out of the Class by written notice to Class Counsel and Defendant's Counsel to be received by Class Counsel and Defendant's Counsel not later than seven calendar days prior to the Final Hearing.

9. In accordance with and within the time set forth in the Court-approved Class notices, a Class Member who has not elected to opt out of the Class shall not be heard at the Final Hearing unless he or she files with the Court and serves on both Class Counsel and

Defendant's counsel not later than seven calendar days prior to the Final Hearing written notice of objection including: (a) a statement of each objection being made; (b) a detailed description of the facts underlying each objection; (c) a detailed description of the legal authorities underlying each objection; (d) a statement of whether the objector intends to appear at the Final Hearing; (e) a list of witnesses whom the objector may call by live testimony, oral deposition testimony or affidavit during the Final Hearing; and (f) a list of exhibits which the objector may offer during the Final Hearing, along with copies of all of the exhibits.

10. At the Final hearing, the Court will hear and determine Class Counsel's application for an award of $76,727.00 for attorney's fees and expenses of litigation which the Plaintiff and Defendant, by stipulation in the Settlement Agreement, have deemed to be fair and reasonable. Seven days prior to the Final Hearing, Class Counsel shall file and serve any additional papers in support of that application.

11. This Order shall not be construed or deemed to be a finding of this Court or evidence of a presumption, implication, concession, or admission by Defendant concerning (1) any alleged liability, fault, or wrongdoing by Defendant; (2) the appropriateness of any measure of alleged loss or damages; or (3) the appropriateness of class certification for any purposes other than Settlement. If the Agreement is terminated pursuant to its terms, or if the settlement is not approved or consummated for any reason whatsoever, the Agreement and all proceedings had in connection therewith shall be without prejudice to the *status quo ante* rights of the parties to this action.

12. It is further Ordered that a copy of this Order be served on all counsel of record within __ days hereof.

, J.S.C.

Opposed: NO

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EXHIBIT C

EXHIBIT C

CHRISTINE M. NICHOLAS, an individual; on behalf of herself and all others similarly situated, Plaintiff, vs. CMRE FINANCIAL SERVICES, INC., a California Corporation, Defendant.	**SUPERIOR COURT OF NEW JERSEY** **LAW DIVISION** **BERGEN COUNTY** Civil Action Docket No. BER-L-4336-11 **FINAL JUDGMENT**

THIS MATTER HAVING come before the Court for a final hearing pursuant to *R.* 4:32-2(e)(C) scheduled pursuant to the Order ("Preliminary Order") filed _____, 2011, and Court having conducted such a hearing in the presence of counsel, and the Court considered the papers submitted which led to the entry of the Preliminary Order, such other papers as have been filed subsequent to the entry of the Preliminary Order, such papers as were presented at the hearing, and the arguments and representations of counsel, and based on all of the foregoing, the Court finds and concludes as follows:

A. The Complaint in this action alleges that Defendant violated the Fair Debt Collection Practices Act ("FDCPA"). Defendant denies Plaintiff's allegations and asserts, *inter alia*, that its conduct was not in violation of that Act. The settlement does not constitute an admission of liability by Defendant, and the Court expressly does not make any finding of liability or wrongdoing by Defendant.

B. Plaintiff and Defendant entered into a Class Action Settlement Agreement ("Agreement") dated as of _____, 2011.

C. On _____, 2011, the Court entered an Order ("Preliminary Order") which, among other things, (A) conditionally certified this action under *R.* 4:32-1(b)(1) and (3) including defining the class and class claims, appointed Plaintiff as the class representative, and appointed class counsel; (B) preliminarily approved the Agreement; (C) approved the form and manner of notice to the Class; (D) set the deadlines for opt-outs and objections; and (E) set the date for the Final Hearing and approval of class counsel's fee application.

D. In the Preliminary Order, the Court certified the settlement class, consisting of:

> All natural persons in the United States and Puerto Rico whom, during the Class Period from September 30, 2007 to the date of this Order, received from Defendant at least one voice message on the person's telephone answering device or an automated telephone call which message or call either failed to identify Defendant as the caller, state the purpose or nature of the call, or disclose that the call was from a debt collector, excluding those persons who:
>
> a. filed for bankruptcy protection since the start of the Class Period;
> b. entered into any general release with Defendant;
> c. are deceased; or
> d. filed a claim arising under the FDCPA against Defendant in any action commenced prior to the date of the Preliminary Order.

E. In the Preliminary Order, the Court defined the Class Claims as any and all claims and causes of action arising from Defendant's voice message left on a person's telephone answering device or Defendant's automated telephone call which message or call failed to identify Defendant as the caller, state the purpose or nature of the call, or disclose that it was from a debt collector and was left during the Class Period.

F. In the Preliminary Order, the Court defined the Class Period as the continuous period beginning on September 30, 2007 and continuing through and including the date of the Preliminary Order.

G. The Class notices as prescribed in the Preliminary Order were published in substantially the form approved by the Court and in the manner approved by the Court which notices were consistent with *R.* 4:32-2(b)(1) and due process and gave the class fair, adequate and reasonable notice of this action and the proposed class action settlement agreement and the Class Member's rights to opt out or object to the agreement.

H. The following individuals timely filed and served an election to opt out of the Class: NONE (modify as appropriate).

I. The following individuals timely filed and served objections, all of which the Court has duly considered and overrules: NONE (modify as appropriate).

J. The proposed settlement agreement is fair, reasonable and adequate and meets the requirements of R. 4:32-1(a) and R. 4:32-2(e)(1)(C), particularly in light of the following factors;

(1) the complexity, expense and likely duration of the litigation;

(2) the reaction of the Class to the settlement;

(3) the stage of the proceedings and the amount of discovery completed;

(4) the risks of establishing liability;

(5) the risks of establishing damages;

(6) the risks of maintaining the class action through trial;

(7) the ability of the Defendant to withstand a greater judgment, especially given the cap on class action damages in the FDCPA;

(8) the range of reasonableness of the settlement fund in light of the best possible recovery; and

(9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

K. The Agreement calls for Defendant to provide the following relief to the Plaintiff and the Class:

(1) Defendant shall pay a *cy pres* distribution on behalf of the Class, the total sum of $66,773.00. This sum represents one percent of Defendant's net worth, which is the maximum statutory class amount provided under the Fair Debt Collection Practices Act ("FDCPA").

(2) Defendant will also pay to the Plaintiff for her individual statutory claims the total amount of $1,000, as provided for in 15 U.S.C. § 1692k, and in consideration of her service to the Class, Defendant will pay to the Plaintiff an additional $500, for a total of $1,500.00 to be paid within three Business Days after the Effective Date of the Agreement.

L. Defendant agreed to pay the reasonable attorneys' fees, costs and expenses of Plaintiff's attorney/Class Counsel, not to exceed $76,727.00.

M. Defendant agreed to pay the sum of the *cy pres* payment, class representative payments, and Class Counsel's attorney's fees within 35 days after the entry of this Final Judgment to Class Counsel provided no appeal is filed from this Final Order, to be held in escrow and distributed after the Effective Date of the Agreement.

N. The Court finds that Class Counsel has secured benefits for the Class, and that he should be compensated for his reasonable and necessary attorneys' fees, costs and expenses in this case in the amount of $76,727.00 to be paid by Defendant in addition to the compensation to Plaintiff and the Class, which amount the Court finds to be fair and

reasonable. The Court further finds the proposed *cy pres* recipient, _____, to be appropriate and proper and in accordance with the terms of the Parties' Agreement.

O. The Court finds the settlement to be fair, adequate and reasonable based upon the limitation on class liability created by 15 U.S.C. § 1692k and the fact that there has been no admission of wrongdoing, and Defendant has not been found to have acted unlawfully. Furthermore, the lack of objections and opt-outs by Class Members is further evidence of the fairness, reasonableness, and adequacy of the settlement.

P. The Court finds that the settlement negotiations were conducted at arms-length and in good faith among all counsel and that the terms of the Agreement are fair, reasonable, and adequate to Plaintiff and all Class Members.

and for good cause shown;

IT IS ON THIS DAY OF , 2011; ORDERED AND ADJUDGED:

1. The class certification in the Preliminary Order is confirmed allowing this action to be maintained as a Class Action under *R.* 4:32-1(b)(1) and (3), including the appointment of the Class representative and Class Counsel. The "Class Period" began on September 30, 2007 and ended on ___, 2011 (the date of the Preliminary Order).

2. The Class is defined as:

> All natural persons in the United States and Puerto Rico whom, during the Class Period, received from Defendant at least one voice message on the person's telephone answering device or an automated telephone call which message or call either failed to identify Defendant as the caller, state the purpose or nature of the call, or disclose that the call was from a debt collector, excluding those persons who:
>
> A. filed for bankruptcy protection since the start of the Class Period;
> B. entered into any general release with Defendant;
> C. are deceased; or
> D. filed a claim arising under the FDCPA against Defendant in any action commenced prior to the date of the Preliminary Order.

3. The Class Claims are defined as any and all claims and causes of action arising from Defendant's voice message left on a person's telephone answering device or Defendant's automated telephone call which message or call failed to identify Defendant as the caller, state the purpose or nature of the call, or disclose that it was from a debt collector and was left during the Class Period.

4. PHILIP D. STERN, ESQ. of Philip D. Stern & Associates, LLC, Maplewood, New Jersey, is appointed Class Counsel. The Court approves attorney's fees, expenses and costs to Class Counsel in the amount of $76,727.00 as being fair and reasonable.

5. The Agreement that has been filed in this case is hereby approved as fair, reasonable and adequate. Words spelled in this Final Judgment with initial capital letters have the same meaning as set forth in the Agreement.

6. In accordance with the Agreement, Plaintiff and the members of the Class who have not timely opted-out, release the Released Parties from the Released Claims, as follows:

A. For Plaintiff, all known and unknown claims, actions, causes of action, demands, rights, damages, costs, attorneys' fees, expenses, and compensation whatsoever that she or their hers, executors, administrators, successors, assigns, and attorneys may have against Defendant or any of its present, former or future principals, members, subsidiaries, and affiliate entities, partners, officers, directors, shareholders, managers, employees, agents, representatives, successors, assigns, sureties, insurance carriers, clients, and attorneys as of the date of the Agreement, it being the Plaintiff's intent to release all claims of any kind or nature, known or unknown, pled or unpled, arising pursuant to contract, tort, common law, federal or state law, statute or

regulation, that she may have against the parties herein released, and Plaintiff specifically waives all rights under § 1542 of the Civil Code of California and any similar law of any state of territory of the United States. That section provides as follows:

> Certain claims not affected by general release. A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with debtor.

B. For the Class, all known and unknown claims, actions, causes of action, demands, rights, damages, costs, attorneys' fees, expenses, and compensation whatsoever that they or their heirs, executors, administrators, successors, assigns, and attorneys may have against Defendant or any of its principals, members, subsidiaries, and affiliate entities, partners, officers, directors, shareholders, managers, employees, agents, representatives, successors, assigns, insurance carriers, clients, and attorneys, arising pursuant to contract, tort, common law, federal or state statute, or regulations, that relate in any way to any of Defendant's voice messages left on a person's telephone answering devise or Defendant's automated telephone calls which message or call failed to identify Defendant as the caller, state the purpose or nature of the call, or disclose that it was from a debt collector and was left during the Class Period. The Class Members expressly waive all rights under § 1542 of the Civil Code of California and any similar law of any state of territory of the United States. That section provides as follows:

> Certain claims not affected by general release. A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have

materially affected his settlement with debtor.

C. Provided, however, that Released Claims do not:

i. include any debt owed to Defendant's clients or principals by Plaintiff or any Class Member,

ii. operate as an accord and satisfaction of such debts, or

iii. operate to waive any defense Plaintiff or any Class Member may have with respect to those debts..

7. Plaintiff and the Class Members are forever barred and enjoined from instituting or further prosecuting, in any forum whatsoever, including but not limited to, any State, Federal, or Foreign Court or arbitration forum, against the Released Parties based on any Released Claim.

8. Within 35 days after the entry of this Final Judgment and provided no appeal has been filed from this Final Order, Defendant shall pay to Class Counsel, in escrow, the sum of $_____, being the total of the *cy pres* payment, class representative payment, and awarded attorney's fees, expenses and costs.

9. In accordance with the Agreement, the Effective Date is the first Business Day on which the later of the following occurs:

A. the time for perfecting an appeal of the Final Order has expired with no appeal taken; or

B. the affirmance on appeal of the Final Order which is not subject to further review by any Court with appellate jurisdiction over the Lawsuit.

10. In accordance with the Agreement, Class Counsel will distribute those funds on the third Business Day after the Effective Date as follows: (A) $1,500 to the Class

Representative, (B) $67,773.00 to _____, a non-profit organization, as the *cy pres* recipient, and (C) $76,727.00 to Class Counsel.

11. In accordance with the Agreement, upon distribution, Class Counsel shall file a certification setting forth the fact of such distribution and shall provide Defendant with a Warrant to Satisfy Judgment.

12. This Court reserves jurisdiction over all matters arising out of the Agreement and this Final Judgment.

13. Except for the relief granted in this judgment, all remaining claims and affirmative defenses of the parties are hereby dismissed with prejudice and with the parties each to bear their own costs.

14. This Order resolves all claims against all parties in this action and is a final order.

15. This Order shall not be construed or deemed to be a finding of this Court or evidence of a presumption, implication, concession, or admission by Defendant concerning (1) any alleged liability, fault, or wrongdoing by Defendant; (2) the appropriateness of any measure of alleged loss or damages or the appropriateness of class certification for any purposes other than settlement in this case.

16. It is further Ordered that a copy of this Order be served on all counsel of record within __ days hereof.

_____

, J.S.C.

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PHILIP D. STERN & ASSOCIATES, LLC
ATTORNEYS AT LAW
697 Valley Street, Suite 2d
Maplewood, NJ 07040
(973) 379-7500
Attorneys for Plaintiff, Christine Nicholas

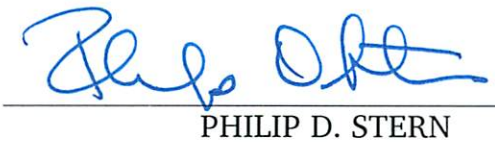
CHRISTINE M. NICHOLAS, an individual; on behalf of herself and all others similarly situated, Plaintiffs, vs. CMRE FINANCIAL SERVICES, INC., a California Corporation, Defendant.	**SUPERIOR COURT OF NEW JERSEY** **LAW DIVISION** **BERGEN COUNTY** Civil Action Docket No. BER-L-4336-11 **CERTIFICATION OF PHILIP D. STERN**

I, Philip D. Stern, certify as follows:

1. I am an attorney at law of the State of New Jersey and represent the Plaintiff, Christine M. Nicholas in this action. I make this Certification in support of Plaintiff's Motion for Class Certification and related relief in conjunction with the settlement agreement entered into with Defendant, CMRE Financial Services, Inc.

2. As mentioned in the Memorandum of Law, I have attached a copy of the decision in *Hecht v. United Collection Bureau*, 2011 WL 841322 (D.Conn. Mar. 8, 2011).

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.



Dated: August 17, 2011

PHILIP D. STERN

Only the Westlaw citation is currently available.

United States District Court,
D. Connecticut.
Chana HECHT, Plaintiff,
v.
UNITED COLLECTION BUREAU, INC., Defendant.

No. 3:10cv1213 (MRK).
March 8, 2011.

Lawrence Katz, Law Offices of Lawrence Katz, Cedarhurst, NY, for Plaintiff.

Barry Jacobs, Abrams, Gorelick, Freidman & Jacobson, New York, NY, Brian J. Farrell, Jr., Joshua Aaron Yahwak, Law Offices of Brian J. Farrell, Jr., New Haven, CT, for Defendant.

MEMORANDUM OF DECISION

MARK R. KRAVITZ, District Judge.

***1** In this case, Plaintiff Chana Hecht asserts two claims against Defendant United Collection Bureau, Inc. ("United Collection"): a federal law claim under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*, and a state law claim under the Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen.Stat. § 42-110a *et seq.* Ms. Hecht alleges that United Collection, a debt collector, left a message on her telephone answering machine without identifying itself as such. Ms. Hecht and her attorney hope eventually to have this case certified as a damages class action pursuant to Rule 23(b)(3) of the *Federal Rules of Civil Procedure,* though they have not yet moved to certify a Rule 23(b)(3) class.

There are two motions to dismiss pending before the Court: United Collection's Motion to Dismiss the First and Second Causes of Action [doc. # 19], and United Collection's Motion to Dismiss the Second Cause of Action from the First Amended Complaint [doc. # 28]. Both of the motions to dismiss are brought pursuant to Rule 12(b)(6). In support of the motions, United Collection argues that its settlement of an FDCPA class action in the United States District Court for the Eastern District of New York, *see* Final Order, *Gravina v. United Collection Bureau, Inc.,* No. 09cv4816 (LDW) (E.D.N.Y. Nov. 29, 2010), ECF No. 36, precludes Ms. Hecht's sole federal claim under the FDCPA, and that Ms. Hecht's Amended Complaint [doc. # 25] fails to state a claim for relief under CUTPA. For the reasons set forth below, the Court agrees with United Collection's first argument and ultimately finds it unnecessary to reach United Collection's second argument.

I.

As it must, the Court accepts the factual allegations in Ms. Hecht's Amended Complaint as true and draws all reasonable inferences in Ms. Hecht's favor. *See Matson v. Board of Education of the City School District of New York,* 631 F.3d 57, 63 (2d Cir.2011) (citation omitted).

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United Collection is an Ohio-based debt collector. On July 22, 2010,[FN1] United Collection called Ms. Hecht at her home in Fairfield, Connecticut. United Collection left a message on Ms. Hecht's answering machine asking her to call Charles Hallaby at (800) 925-9043 about an important business matter. United Collection did not identify itself in the message; did not indicate that it was a debt collector; and did not indicate that the purpose of the call was to attempt to collect on a debt. Ms. Hecht alleges that by leaving the message and causing her to play back the message on her answering machine, United Collection caused her to use additional electricity in her home that she would not otherwise have used.[FN2]

FN1. The original Complaint [doc. # 1] alleged that the incident at issue in this case occurred on July 22, 2010, and the parties' briefs also indicate that the incident occurred on that date. Although the Amended Complaint does not mention the date of the incident, the Court assumes that the omission of the date is simply an oversight.

FN2. Ms. Hecht included the allegation regarding her additional electricity usage because the FDCPA permits recovery of $1,000 statutory damages plus "actual damage[s]," 15 U.S.C. § 1692k(a), and CUTPA only authorizes suits by those who have suffered an "ascertainable loss" and limits their recovery to "actual damages" plus punitive damages. Conn. Gen.Stat. § 42-110a.

II.

The Court must apply a familiar standard when ruling on any motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6). The Court must "accept [ ] all factual allegations in the complaint as true, and draw[ ] all reasonable inferences in the plaintiff's favor." *Matson,* 631 F.3d at 63 (2d Cir.2011) (citation omitted). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal,* --- U.S. ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

***2** In assessing the plausibility of a plaintiff's allegations, the question is not whether the plaintiff will ultimately prevail, but whether the "complaint [is] sufficient to cross the federal court's threshold." *Skinner v. Switzer,* --- S.Ct. ----, No. 09-9000, 2011 WL 767703, at *6 (Mar. 7, 2011). The "plausible grounds" requirement "does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence" supporting the plaintiff's claim for relief. *Twombly,* 550 U.S. at 556; *see also Arista Records, LLC v. Doe 3,* 604 F.3d 110, 120-21 (2d Cir.2010) ("[W]e reject [the] contention that *Twombly* and *Iqbal* require the pleading of specific evidence or extra facts beyond what is needed to make the claim plausible."). Simply put, "[w]hile a complaint need not contain 'detailed factual allegations,' it requires 'more than an unadorned, the defendant-unlawfully-harmed-me accusation.' " *Mason,* 631 F.3d at 63 (citing *Iqbal,* 129 S.Ct. at 1949).

III.

There are two different motions to dismiss pending this case. Each motion to dismiss is targeted at a different claim in Ms. Hecht's Amended Complaint. The Court will first address

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whether the *Gravina* class action settlement precludes Ms. Hecht's FDCPA claim. *See* 15 U.S.C. § 1692k. Because the Court concludes that the *Gravina* settlement precludes Ms. Hecht's sole federal law claim, the Court ultimately finds it unnecessary to reach the issue of whether Ms. Hecht's Amended Complaint states a CUTPA claim. *See* Conn. Gen.Stat. § 42-110g(a).

A.

As a preliminary matter, although United Collection's Motion to Dismiss the First and Second Causes of Action initially targeted both of Ms. Hecht's claims, the Court permitted Ms. Hecht to amend her original Complaint in response to United Collection's argument that the original Complaint contained insufficient factual allegations to state a CUTPA claim. Ms. Hecht later filed an Amended Complaint containing additional factual allegations regarding her CUTPA claim. The Court therefore DENIES IN PART AS MOOT United Collection's Motion to Dismiss the First and Second Causes of Action, insofar as that motion to dismiss argued that the factual allegations supporting Ms. Hecht's original CUTPA claim were insufficient.

United Collection's Motion to Dismiss the First and Second Causes of Action therefore remains pending only as to Ms. Hecht's FDCPA claim. On September 15, 2010, the United States District Court for the Eastern District of New York certified *Gravina* as a Rule 23(b)(2) class action. In its order certifying the class, the *Gravina* court defined the Rule 23(b)(2) class as including "all persons with addresses in the United States of America who received a message left by Defendants on a telephone answering device which did not identify Defendant itself by name as the caller, state the purpose or nature of the communication, or disclose that the communication was from a debt collection and which message was left" between November 5, 2008 and September 15, 2010. Order Certifying Settlement Class and Preliminary Approval of Settlement, *Gravina,* No. 09cv4816 (LDV) (E.D.N.Y. Sept. 15, 2010), ECF No. 31. Ms. Hecht received her call from United Collection on July 22, 2010, and her claim thus clearly falls within the bounds of the *Gravina* class.

***3** On November 29, 2010, the *Gravina* court entered an order approving a class action settlement pursuant to Rule 23(e). In that order, the court again defined the class; noted that a notice of the settlement had appeared in the Monday edition of *USA Today* on September 20, 2010; [FN3] and indicated that as of November 29, 2010, no class members had elected to opt out of or to object to the settlement in any way. The court-approved settlement awarded *cy pres* relief in the amount of $13,245.01 to the Make-A-Wish Foundation of Suffolk County, New York, and *cy pres* relief in the amount of $13,254.01 to the Western Center on Law and Poverty, as well as an award of attorneys' fees and costs to the class counsel. The total amount of the *cy pres* payments equaled 2% of United Collection's net worth. The settlement permanently enjoined United Collection from leaving messages without identifying the nature of its communications.

FN3. Neither party bothered to provide this Court with a copy of the notice published in *USA Today.* However, the Court takes judicial notice of the notice language the *Gravina* parties jointly proposed in Exhibit B to their Consent Motion to Certify Class, No. 09cv4816 (LDW) (E.D.N.Y. Sept. 1, 2010), ECF No. 27-2, which the *Gravina*

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court approved.

United Collection argues that the class action settlement in *Gravina* precludes Ms. Hecht's FDCPA damages claim. It is undisputed that Ms. Hecht is in a member of the *Gravina* class; that Ms. Hecht made no attempt to opt out of the *Gravina* class, or to ask the *Gravina* court to reconsider its decision approving the settlement, or to attempt to appeal that decision to the Second Circuit directly; and that Ms. Hecht's FDCPA claim is essentially identical to the FDCPA claim in *Gravina.* But Ms. Hecht nonetheless argues that the *Gravina* settlement does not preclude her FDCPA claim for three reasons. First, she argues the *Gravina* settlement does not preclude FDCPA money damages claims by absent class members because the *Gravina* class was certified as a Rule 23(b)(2) class action rather than as a Rule 23(b)(3) class action. Second, she argues that giving preclusive effect to the *Gravina* settlement would deprive her of property without due process of law. *See* U.S. Const. amend. V. Third, she argues that the *Gravina* settlement can have no preclusive effect because United Collection failed to comply with the requirements of the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1715 *et seq.* All three arguments are without merit.

Ms. Hecht does not cite any authority in support of her blanket assertion that a settlement or judgment in a Rule 23(b)(2) class action does not preclude later damages claims brought by class members. Rule 23(b)(2) permits the maintenance of a class action if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." *Id.* Rule 23(b)(2)'s "drafters contemplated that a claim for money damages would not necessarily preclude class certification under (b)(2)." *Parker v. Time Warner Entertainment Co., LP,* 331 F.3d 13, 23 (2d Cir.2003) (Newman, J., concurring); *see Robinson v. Metro-North Commuter Railroad Co.,* 267 F.3d 147, 162 (2d Cir.2001). However, the drafters also cautioned that Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." Fed.R.Civ.P. 23 Advisory Committee's Note; *see Robinson,* 267 F.3d at 163. The Second Circuit has thus directed that a district court faced with deciding whether to certify a Rule 23(b)(2) class seeking both injunctive or declaratory relief and money damages must determine whether the "injunctive or declaratory relief [sought] predominates," taking into account "all of the facts and circumstances of the case." *Robinson,* 267 F.3d at 164 (citations omitted). One of the factors that the Second Circuit has directed district courts to consider is whether "class treatment would be efficient and manageable, thereby achieving an appreciable measure of judicial economy." *Id.* at 164.

***4** Because the Second Circuit has explicitly approved the use of Rule 23(b)(2) certification in cases seeking both injunctive relief and damages, this Court has no choice but to reject Ms. Hecht's blanket assertion that settlements and judgments in such cases cannot bind absent class members. After all, what would be the purpose of permitting district courts to certify 23(b)(2) class actions involving claims for money damages if the resolution of such claims could never bind absent, unnamed class members? Consistent with the Second Circuit's indication in *Robinson* that Rule 23(b)(2) may be used to resolve damages claims as long as injunctive or declaratory relief is the predominant form of relief sought, the *Gravina* court indicated that the settlement released United Collection from "*all* causes of action, controversies, actions, demands, torts, *damages,* costs, attorneys' fees, moneys due on account, obligations,

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judgments, alleged violations of the FDCPA and liabilities *of any kind whatsoever in law or* equity." Final Order, *Gravina,* No. 09cv4816 (LDW) (E.D.N.Y. Nov. 29, 2010), ECF No. 36 (emphasis added). The Court must assess the preclusive effects of the *Gravina* settlement and the *Gravina* court's broad release language under the general framework that it would use to assess the preclusive effects of any class action settlement, whether under Rule 23(b)(2) or (b)(3).

Although "the general rule always has been that a judgment in an *in personam* action is not binding on anyone who has not been designated as a party and been served with process," a "recognized exception to th[at] principle is that a judgment in a class or representative action may bind members of the class who were not parties to the suit provided their interests were adequately represented." 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1789, at 546 (3d ed.2005). At one time, the preclusive effect of a class action judgment depended on the characterization of the suit as a "true," "hybrid," or "spurious" class action. *Id.* § 1789, at 558. But the current version of Rule 26 provides "that uniform treatment be accorded to judgments in *all* class actions." *Id* . § 1789, at 550 (emphasis added); *see Cooper v. Federal Reserve Bank of Richmond,* 467 U.S. 867, 874, 104 S.Ct. 2794, 81 L.Ed.2d 718 (1984) (providing that "a judgment in a properly entertaining class action is binding on class members in any subsequent litigation"). Rule 23(c)(3) provides that the judgment in any class action must describe those whom the court finds to be class members-including, if the action was certified under Rule 23(b)(3), those to whom notice was directed and who have not requested exclusion from the class. *See* Fed.R.Civ.P. 23(b) . "The obvious implication of Rule 23(c)(3) is that anyone properly listed in the judgment should be bound by it absent some special reason for not doing so." 7AA Wright, Miller & Kane § 1789, at 553.

***5** "Although the judgment in a class action will include by its terms all the class members, ... this does not mean necessarily mean that all the persons named will be bound." *Id.* § 1789, at 553-54. "According to traditional notions, a member of the class in a Rule 23 suit is considered to be a party by representation, and thus we bound to the same extent as an action party." *Id.* § 1789.1, at 563-64. However, "in order to be deemed a party by representation, a class member must be represented in such a way that the member's rights are protected." *Id.* § 1789.1, at 564. "[A]n absent class member, even when specifically identified in the judgment, will not be bound if the absentee can establish that to do so would result in the deprivation of property without due process of law, either because the class was inadequately represented or because of a failure to give adequate notice." *Id .; see, e.g., Stephenson v. Dow Chemical Co.,* 273 F.3d 249, 261 (2d Cir.2001) (concluding that class action settlement did not bind the plaintiffs because they were inadequately represented in the prior class action litigation), *aff'd in part and vacated in part, Dow Chemical Co. v. Stephenson,* 539 U.S. 111, 123 S.Ct. 2161, 156 L.Ed.2d 106 (2003) (per curiam); *Morgan v. Ward,* 699 F.Supp. 1025, 1035 (N.D.N.Y.1988) (concluding that class action settlement did not bind the plaintiffs because they did not receive notice that they were required to adjudicate their damage claims as part of the prior class action). "On the other hand, if the Court finds that the member's due-process rights were satisfied in the first proceeding, then the judgment will be binding." 7AA Wright, Miller & Kane § 1789.1, at 567; *see, e.g., TBK Partners, Ltd. v. Western Union Corp.,* 675

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F.2d 456,

Thus, the only way that Ms. Hecht can avoid being bound by the *Gravina* settlement-and the comprehensive release language in the order approving the settlement-is by showing that the settlement violated her Fifth Amendment right to due process. *See Stephenson,* 273 F.3d at 261.[FN4] "Due process requires adequate representation 'at all times' throughout the litigation, notice 'reasonably calculated ... to apprise the interested parties of the pendency of the action,' and an opportunity to opt out." *Id.* at 260 (quoting *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 811-12, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985)). To satisfy due process, the notice given must be the best "practicable" notice under all the circumstances. *Phillips Petroleum,* 472 U.S. at 812.

FN4. It is the established law of the Second Circuit that an absent class member may raise the issue of adequacy of representation through a collateral attack on a class settlement. *See Stephenson,* 273 F.3d at 249. But that issue is not settled once and for all as a matter of federal law. The Supreme Court granted certiorari to review the Second Circuit's decision in *Stephenson, see Dow Chemical Co. v. Stephenson,* 537 U.S. 999, 999, 123 S.Ct. 485, 154 L.Ed.2d 393 (2002), and one of the questions on which the Supreme Court granted certiorari was whether such a collateral attack was permissible. Petition for Writ of Certiorari, *Dow Chemical Co.,* 539 U.S. 111, 123 S.Ct. 2161, 156 L.Ed.2d 106 (No. 02-271). An equally divided Supreme Court affirmed the Second Circuit's decision on that question. *See Dow Chemical Co.,* 539 U.S. at 112.

Ms. Hecht has not shown that the *Gravina* settlement violated her due process rights. First, Ms. Hecht has made no attempt whatsoever to argue that she was not adequately represented in the *Gravina* litigation. Even if she had made that argument, the Court would reject it. As the notice published in *USA Today* regarding the *Gravina* settlement indicated, there were more than two million total members of the class to which Ms. Hecht concedes she belongs. The FDCPA provides that in an FDCPA class action, the class may recover a maximum of 1% of the debt collector's net worth. *See* 15 U.S.C. § 1692k(a)(2)(B). Under the *Gravina* settlement-which settled a state law claim as well as an FDCPA claim-United Collections paid the maximum amount of 1% of its net worth on the FDCPA claim, plus an additional 1% of its net worth on the state law claim, for a total payment of 2% of its net worth, or $26,508.02. United Collections paid most of the settlement in the form of *cy pres* payments, because it was not feasible to distribute $26,508.02 amount more than 2,000,000 class members. No named Plaintiff received more than $3,500, and class counsel received a payment of $90,000 for fees and expenses. It does not appear from those circumstances that Ms. Hecht and other class members who did not receive any damage payments were inadequately represented.

***6** Second, the Court is quite confident that the notice the *Gravina* parties published in *USA Today* was the best practicable notice available under the circumstances, and was reasonably calculated to apprise interested parties of both the pending class action and the settlement. *See id.* at 811-12. Ms. Hecht suggests that the notice was inadequate because she did not receive personal notice, but it is well established that constructive notice through publication may be sufficient to satisfy due process. *See Wolfert ex rel. Estate of Wolfert v. Transamerica Home First, Inc.,* 439 F.3d 165, 170 n. 4 (2d Cir.2006) (citing *Phillips Petroleum,* 472 U.S. at

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808). Again, as the notice itself indicated, there were more than two million members of the class and the maximum that United Communication could have been required to pay to those class members under the FDCPA was approximately $13,000.

Under those circumstances, sending personal notice to every class member would have been anything but practicable. And even if the United States District Court for the Eastern District Court had certified *Gravina* as a Rule 23(b)(3) class action-in which was Rule 23(c)(2)(B) would have required "individual notice to all members who can be identified through reasonable efforts"-Ms. Hecht has not bothered to explain to this Court how it is that she thinks United Collection could have identified her specifically as a member of that two million member class through reasonable efforts. Under the circumstances, then, and particularly in light of Ms. Hecht's failure to articulate any other form of notice which would have been practicable under the circumstances, the Court concludes that notice by publication in *USA Today* was sufficient to satisfy the requirements of due process. *See, e.g., One Cowdray Park LLC v. Marvin Lumber & Cedar Co.*, 371 F.Supp.2d 167, 171 (D.Conn.2005) ("[O]n the limited record before the Court it appears that the newspaper notice provided to absent class members ... satisfied the requirements of due process....").

Finally, it is clear that Ms. Hecht had an opportunity to opt out of the settlement. The Second Circuit holds that an absent class member cannot be bound by a class action judgment or settlement if she was not provided with a chance to opt out of the judgment or settlement. *See Stephenson*, 273 F.3d at 261. The *Federal Rules of Civil Procedure* require that district courts give absent class member notice of the right to opt out of a Rule 23(b)(3) class, *see* Fed.R.Civ.P. 23(c)(2)(B)(v), but they do not explicitly require that notice be given of the right to opt out of a Rule 23(b)(1) or (b)(2) class. *See* Fed.R.Civ.P. 23(c)(2)(A) ("For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class."). Thus, Ms. Hecht is likely correct that there are circumstances under which a notice in a Rule 23(b)(1) or (b)(2) class would be fully compliant with the requirements of the *Federal Rules of Civil Procedure,* yet would not provide an essential due process requirement to make a class judgment or settlement binding on all absent class members. *See Chateau de Ville Productions, Inc. v. Tams-Witmark Music Library, Inc.*, 586 F.2d 962, 966 n. 14 (2d Cir.1978) ("[U]nder (b)(3) class members must be given an opportunity to opt out of the class and avoid the binding effect of the judgment, whereas that is not the case under (b)(2).").

***7** This, however, is not such a case. The United States District Court for the Eastern District of New York was careful to ensure that absent class members had notice of their right to opt out of the *Gravinas* settlement, and a real opportunity to opt out, even though the *Federal Rules of Civil Procedure* did not require such notice or such opportunity to be given. The notice published in *USA Today* explicitly indicated that any class member could opt out, bring an individual claim under the FDCPA, and recover up to $1,000 plus actual damages. By explicitly providing notice of the right to opt out, the *Gravina* court adequately protected the due process rights of Ms. Hecht and the other absent class members. *See In re Visa,* 280 F.3d at 147 (providing that "the primary concern about certifying a class with significant damages under Rule 23(b)(2) is the absence of mandatory notice and opt-out rights"); *Allison v. Citgo Petroleum Corp.,* 151 F.3d 403, 418 n. 13 (5th Cir.1998) ("By providing (b)(2) class members with the procedural safeguards of notice and opt-out, the district court can permit ... class ac-

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tions to proceed under 23(b)(2) without requiring that such actions meet the stiffer requirements of 23(b)(3), yet still ensure that the class representatives adequately represent ... unnamed class members.").

The Court now turns to Ms. Hecht's CAFA argument. CAFA provides: "Not later than 10 days after a proposed settlement of a class action is filed in court, each defendant ... shall serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement...." *Id.* § 1715(b). CAFA further provides: "A class member ... may choose not to be bound by a settlement agreement ... in a class action if the class member demonstrates that the notice required under subsection (b) has not been provided." *Id.* § 1715(e)(1). Ms. Hecht asserts in opposition to the motion to dismiss that United Collection never served notice of the proposed settlement on the Connecticut Attorney General or any other representative of Connecticut. But United Collection has submitted an affidavit and other materials from the *Gravina* case documenting that, in fact, United Collections sent notice of the proposed settlement to the all fifty state Attorneys General, as well as the Attorneys General of the United States Territories and Puerto Rico and the United States Attorney General. *See* Ex. F to Reply Mem. in Further Supp. of Def.'s Mot. to Dismiss the First and Second Causes of Action [doc. # 27-6]. Ms. Hecht's CAFA argument is baseless.

Therefore, there can be no doubt that the *Gravinas* class action settlement precludes Ms. Hecht's FDCPA claim. As a result, the Court GRANTS IN PART United Collection's Motion to Dismiss the First and Second Causes of Action.

C.

United Collection's Motion to Dismiss the Second Cause of Action from the First Amended Complaint is targeted at Ms. Hecht's CUTPA claim only. Ms. Hecht invokes this Court's federal question jurisdiction under 28 U.S.C. § 1331 because of the FDCPA claim, and argues that the Court also has supplemental jurisdiction over the CUTPA claim under 28 U.S.C. § 1367.[FN5] Supplemental or pendent jurisdiction is a matter of discretion, not of right. *See United Mine Workers v. Gibbs,* 383 U.S. 715, 715-26, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). This Court may decline to exercise supplemental jurisdiction when it has dismissed all of the claims over which it had original jurisdiction. *See* 28 U.S.C. § 1367(c)(3); *Kolari v. New York-Presbyterian Hospital,* 455 F.3d 118, 121-22 (2d Cir.2006). Because Ms. Hecht's only federal claim has been dismissed, the Court declines to exercise supplemental jurisdiction over her remaining state law claim. Should she wish to do so, Ms. Hecht is free to pursue that claim in state courts. United Collection's Motion to Dismiss the Second Cause of Action is therefore DENIED as moot.

FN5. There does not appear to be a basis for diversity jurisdiction in this case, as it seems highly unlikely that Ms. Hecht suffered more than $75,000 in damages as a result of her alleged additional electricity use. *See* 28 U.S.C. § 1332(a).

IV.

***8** In sum, then, the Court concludes that United Collection's Motion to Dismiss the First and Second Causes of Action is moot insofar as it attacked the sufficiency of the factual alleg-

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ations in Ms. Hecht's original Complaint, which has been amended; that the *Gravina* settlement precludes Ms. Hecht's FDCPA claim, which is essentially identical to the claims asserted in *Gravina;* and that there is no reason for the Court to exercise discretionary jurisdiction over Ms. Hecht's remaining CUTPA claim. As a result, United Collection's Motion to Dismiss the First and Second Causes of Action is DENIED IN PART and DENIED IN PART AS MOOT; and United Collection's Motion to Dismiss the Second Cause of Action from the First Amended Complaint is DENIED AS MOOT. **The Court directs the Clerk to enter judgment for United Collection on Ms. Hecht's FDCPA claim and to dismiss Ms. Hecht's CUTPA claim without prejudice to renewal in state court. The Court further directs the Clerk to close this case.**

IT IS SO ORDERED.

D.Conn.,2011.
Hecht v. United Collection Bureau, Inc.
Slip Copy, 2011 WL 841322 (D.Conn.)

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CHRISTINE M. NICHOLAS, an individual; on behalf of herself and all others similarly situated, Plaintiffs, vs. CMRE FINANCIAL SERVICES, INC., a California Corporation, Defendant.	Superior Court of New Jersey Law Division Bergen County Civil Action Docket No. BER-L-4336-11 MEMORADUM OF LAW IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

Plaintiff, Christine M. Nicholas, moves under *R.* 4:32 for the entry of an Order certifying this action to proceed as a nationwide "B3" class action (including defining the class and the class claims, appointing class counsel, and approving the form and manner of notice to the class) and preliminarily approving the parties' Settlement Agreement, and, shows that:

I. Nature of the Claim and Procedural History

This case involves a claim that Defendant is a debt collector who left voice mail messages in connection with its attempt to collect a debt without disclosing the purpose of the call or that the caller was a debt collector in violation of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 et seq. The specific sections alleged to be violated are 15 U.S.C. §§ 1692d(6) and 1692e(11). These are referred to as "Foti" claims based on *Foti v. NCO Fin. Sys., Inc.,* 424 F.Supp.2d 643 (S.D.N.Y. 2006).

The FDCPA sets forth rules of conduct for debt collectors and provides financial incentives for consumers to enforce those rules. Congress adopted the FDCPA with the "express [dual] purpose to eliminate abusive debt collection practices by debt collectors, and to insure that those debt collectors whc refrain from using abusive debt

collection practices are not competitively disadvantaged." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. __, 130 S. Ct. 1605, 1623, 176 L. Ed. 2d 519 (2010) (internal quotes and ellipsis omitted). "A basic tenet of the Act is that all consumers, even those who have mismanaged their financial affairs resulting in default on their debt, deserve 'the right to be treated in a reasonable and civil manner.'" *FTC v. Check Investors, Inc.*, 502 F.3d 159, 165 (3d Cir. 2007) (citations omitted).

The FDCPA provides that "the placement of telephone calls without meaningful disclosure of the caller's identity" violates 15 U.S.C. § 1692d(6). "Meaningful disclosure" has been held to require disclosing the employer's name and the nature of the call. *Wright v. Credit Bureau of Georgia, Inc.*, 548 F. Supp. 591, 597 (N.D. Ga. 1982). In addition, when a debt collector communicates orally or in writing with a consumer, the debt collector must disclose in its initial communication that "the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose" and, in subsequent communications, "that the communication is from a debt collector." 15 U.S.C. § 1692e(11). *Foti* decided that these provisions applied to voice messages left on consumer's telephone answering devices.

Debt collectors have raised various arguments as to why *Foti* was wrongly decided and the problems it has caused in their industry. Nevertheless, although no appellate court has ever ruled on *Foti*, nearly three dozen federal district courts have considered the claim since 2005 and, with one exception, all have ruled that, when leaving a voice message for a consumer in connection with the collection of a debt, a debt collector's failure to include the disclosures described in either 15 U.S.C. § 1692d(6) or § 1692e(11) violates the FDCPA. The one exception was a 2007 decision from the Western District of Oklahoma where the court only considered the § 1692e(11) claim. At least three courts have expressly rejected that decision.

Plaintiff initially presented her claims by way of an action filed in the United States District Court for the District of New Jersey entitled *Nicholas v. CMRE Financial Services, Inc.*, Case No. 08-CV-4857. On March 16, 2010, the Honorable Dennis M. Cavanaugh, U.S.D.J. denied CMRE's motion to dismiss for failure to state a claim and the District of New Jersey joined the districts following *Foti*. On May 10, 2010, in *Krug v. Focus Receivables Management, LLC*, Case No. 09-CV-4310, the Honorable Joseph E. Irenas, U.S.D.J. followed *Nicholas* and likewise denied the debt collector's motion to dismiss the consumers' Foti claims.

In subsequent discussions between counsel, it was ultimately stipulated that the

parties desired to proceed in this Court based, in part, on the federal court's more restrictive class notice rules which could have imposed such a tremendous cost on the parties that settlement would have been impossible. That distinction between the federal and state court rules is discussed below in Section VII. Consequently, on February 10, 2011, the federal action was dismissed without prejudice.

The Complaint here was filed on May 17, 2011 and the Answer was filed on June 27, 2011.

It is "Congress's intent that the Act should be enforced by debtors acting as private attorneys general." *Graziano v. Harrison*, 950 F.2d 107, 113 (3d Cir. 1991). The Act prefers the term "consumer" over "debtor" and the two are used interchangeably. *See, Graziano*, supra at 111 fn5. To promote enforcement, Congress provided consumers with financial incentives. Specifically, in addition to any actual damages, a successful consumer can recover statutory damages of up to $1,000 per case (not per violation) plus attorney's fees. 15 U.S.C. § 1692k(a)(1), (a)(2)(A), and (a)(3). Consequently, only one violation is necessary to prevail under the Act. *Taylor v. Perrin, Landry, deLaunay & Durand*, 103 F.3d 1232, 1238 (5th Cir. 1997); *Bentley v. Great Lakes Collection Bureau*, 6 F.3d 60, 62-3 (2d Cir. 1993). Statutory damages do not compensate for any loss but, in effect, encourages consumers to bring valid claims and compensates them undertaking the time and effort to successfully enforce the Act.

The FDCPA also expressly provides for statutory damages to be recovered in class actions. The named plaintiffs recover as if they brought an individual claim and the class recovers the lesser of 1% of the debt collector's net worth or $500,000. 15 U.S.C. § 1692k(a)(2)(B). By expressly qualifying that the class recovery is "without regard to a minimum individual recovery," Congress contemplated that class actions should be maintained regardless of the amount, if any, distributable to the individual class members as statutory damages. *Id.*; and, see, *Barkouras v. Hecker*, 06-cv-0366, 2006 WL 3544585 (D.N.J. Dec. 8, 2006). This approach highlights Congress's preference that the public benefit in deterring violations by compelling payment of class statutory damages outweighs the desire for a substantial individual class member distribution.

II. Class Actions in New Jersey

The class action rule, *R.* 4:32, "is required to be liberally construed and the class action permitted to be maintained unless there is a clear showing that it is

inappropriate or improper." Pressler & Verniero, *Current NJ Court Rules* (2011), Comment 1 to *R.* 4:32, at 1612. Here, the parties seek approval of their agreement to resolve this case as a class action naming a nationwide class. "Nationwide class action suits, which seek redress for victims of defective products, consumer fraud, environmental torts, and other wrongs, are now part of the modern legal landscape." *Simmermon v. Dryvit Sys., Inc.*, 196 N.J. 316, 319 (2008). Indeed, consumer protection statutes – such as the FDCPA – are particularly well-suited for class treatment. *Matter of Cadillac V8-6-4 Class Action*, 93 N.J. 412, 425 (1983) ("*In re Cadillac*").

The rule sets out four general requirements in *R.* 4:32-1(a). When those four have been met, then the action must be maintainable under one of the three provisions in *R.* 4:32-1(b) – commonly referred to as B1, B2 and B3. The parties seek to maintain this action as a B3 class action.

Once the Court determines that the action may be maintained as a class action, the Court must "define the class and the class claims, issues or defenses, and shall appoint class counsel." *R.* 4:32-2(a).

When an action is settled on a class basis, the Court is required to approve the settlement, to "direct notice in a reasonable manner to all class members who would be bound by a proposed settlement," and, prior to approval, hold a hearing and find that the settlement is "fair, reasonable, and adequate." *R.* 4:32-2(e)(1).

III. General Requirements for Class Certification under *R.* 4:32-1(a)

The four general requirements under *R.* 4:32-1(a) are referred to as numerosity, commonality, typicality, and adequacy. *Cf.*, *In re Cadillac*, at 435.

Numerosity refers to the fact that "the class is so numerous that joinder of all members is impracticable." *R.* 4:32-1(a)(1). Plaintiff asserts and Defendant so stipulates that the class size is in excess of one million members. In *Saldana v. City of Camden*, 252 N.J.Super. 188, 193 (App. Div. 1991), the court found 81 members sufficient to satisfy numerosity. One million is certainly sufficient.

Commonality requires that "there are questions of law or fact common to the class." *R.* 4:32-1(a)(3). The common questions of fact are that the Defendant left a message for class members. The common questions of law are whether those messages violated the FDCPA by failing to make the disclosures described in 15 U.S.C. §§ 1692d(6) and 1692e(11).

Typicality addresses whether "the claims or defenses of the representative parties are typical of the claims or defenses of the class." *R.* 4:32-1(a)(3). This requirement is satisfied where the Plaintiff's claims "have the essential characteristics common to the claims of the class." *In re Cadillac*, at 425. Here, Plaintiff's claims and those of the class are the same and, therefore, her claim is typical of the class members' claims.

Finally, R. 4:23-1(a)(4), requires that "the representative parties will fairly and adequately protect the interests of the class." Adequacy of representation addresses whether the representative has interests in conflict with those of the class. "To satisfy this requirement, 'the plaintiff must not have interests antagonistic to those of the class.'" *Laufer v. U.S. Life Ins. Co. in City of New York*, 385 N.J. Super. 172, 182 (App. Div. 2006). Plaintiff represents that she will fairly and adequately protect the interests of the class, and represents that she has no interests antagonistic to or in conflict with the class. Consequently, she is an adequate representative. Sometimes adequacy is said to also encompass the adequacy of counsel however Plaintiff submits that those issues are subsumed when the Court addresses the appointment of class counsel in accordance with *R.* 4:32-2(a) and pursuant to *R.* 4:23-2(g) – the subject of which is discussed in Section VI, below.

IV. Requirements to Maintain a "B3" Class Action under *R.* 4:23-1(b)(3)

Having satisfied the four general requirements, the parties seek to have this action certified as maintainable as a B3 class under R. 4:23-1(b)(3), which requires that:

> the court finds that the questions of law or fact common to the members of the class *predominate* over any questions affecting only individual members, and that a class action is *superior* to other available methods for the fair and efficient adjudication of the controversy. [Emphasis added.]

Although "predominance requires, at minimum, a 'common nucleus of operative facts,'" it "does not require the absence of individual issues or that the common issues dispose of the entire dispute." *Iliadis v. Wal-Mart Stores, Inc.*, 191 N.J. 88, 108 (2007). It "tests whether the proposed class is 'sufficiently cohesive to warrant adjudication by representation.'" *Id.* Here, by the terms of the settlement agreement, the class members are only releasing claims arising from telephone messages left by Defendant – in other

words, only the claims that arise from the common facts. Therefore, any extraneous claims of individual members which might otherwise undermine the predominance of the common issues are not within the scope of this action. Consequently, the common questions of law and fact predominate.

Superiority "necessarily 'implies a comparison with alternative procedures,' and mandates assessment of 'the advantages and disadvantages of using the class-action device in relation to other methods of litigation.' More specifically, our analysis demands '(1) an informed consideration of alternative available methods of adjudication of each issue, (2) a comparison of the fairness to all whose interests may be involved between such alternative methods and a class action, and (3) a comparison of the efficiency of adjudication of each method.' The class members' 'lack of financial wherewithal' is an 'important factor' in the superiority analysis." *Iliadis*, supra at 114-15 (citations omitted).

If this action did not proceed as a class action, there are two possible outcomes for class members.

Under one scenario, there will be a tidal wave of $1,000 lawsuits which, while advancing the purposes of the FDCPA, would unfairly burden the courts, deluge the Defendant with small claims throughout the country and the risks of disparate results. The *Barkouras* court referred to this as a "feeding frenzy."

Under the other scenario, very few class members bother to pursue their individual claims – perhaps caused by class members' lack of financial wherewithal – which undermines Congress's deterrence objective and frustrates the FDCPA's purposes.

In contrast, this class action advances *both* the purposes of the FDCPA and adjudicates numerous small claims without unfairly exposing the Defendant to a "feeding frenzy." Consequently, a class action would be superior to other forms of adjudication.

The existence of both predominance and superiority justify certifying this action as a B3 class action.

V. Defining the Class and Class Claims

A class definition should allow for a factual determination as to whether any individual is a member of the class and should be reasonably related to the common facts and questions of law sought to be adjudicated on a class basis. Conte and

Newberg, *Newberg on Class Actions* (4th ed.), § 6:14. The parties' agreement provides this definition:

> "Class" means all natural persons in the United States and Puerto Rico whom, during the Class Period, received from Defendant at least one voice message on the person's telephone answering device or automated telephone call which call or message either failed to identify Defendant as the caller, state the purpose or nature of the call, or disclose that the call was from a debt collector, excluding those persons who:
>
> A. filed for bankruptcy protection since the start of the Class Period;
>
> B. entered into any general release with Defendant;
>
> C. are deceased; or
>
> D. filed a claim arising under the FDCPA against Defendant in any action commenced prior to the last day of the Class Period.

The Class Period would begin one year prior to filing of the parties' initial federal action as the FDCPA carries a one year statute of limitations. 15 U.S.C. § 1692k(d). When the federal action was dismissed, the parties stipulated that claims arising from one year prior to the commencement of that action would be included in the resolution of this action.

The definition excludes certain individuals for reasons which could affect the manageability of the class.

By excluding those who have filed for bankruptcy protection, we avoid interfering with the administration of a bankrupt estate. Similarly, excluding anyone who is deceased avoids complications in the administration of a decedent's estate. By exclusion, both estates retain any individual claims.

Anyone who has already entered into a general release with Defendant is also excluded. The release would have resolved any claim covered by this lawsuit and, therefore, such a consumer would have no standing to opt-out or object.

Finally, anyone who has filed an FDCPA claim is excluded because it is

presumed that, by commencing an action on his or her individual claim, that person would elect to opt-out. Thus, excluding such a person facilitates a smoother administration of this action.

The class is defined to be congruent with the common issues of law and fact while the exclusions address specific pragmatic issues. Therefore, the proposed class definition is appropriate and the parties request that the Court approve it.

Similar to the class definition, "'Class Claims' are defined as any and all claims and causes of action arising from Defendant's voice message left on a person's telephone answering device or Defendant's automated telephone call which message or call failed to identify Defendant as the caller, state the purpose or nature of the call, or disclose that it was from a debt collector and was left during the Class Period."

VI. Appointing Class Counsel

At the time the Court certifies the case as maintainable as a class action, *R.* 4:32-2(a) requires that the Court appoint class counsel in accordance with *R.* 4:32-2(g).

Under the Settlement Agreement, the parties consent to and request the appointment of Philip D. Stern, Esq. as class counsel. *R.* 4:32-2(g)(1)(B) requires that class counsel "fairly and adequately represent the interests of the class" and *R.* 4:32-2(g)(1)(C) requires that the Court consider:

> (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action; (iii) counsel's knowledge of the applicable law, and (iv) the resources counsel will commit to representing the class.

With respect to those factors, Plaintiff submits:

(i) Plaintiff's counsel has investigated the claims by reviewing the recordings of the messages left by Defendant, reviewing materials concerning the debt which Defendant sought to collect to confirm the FDCPA's applicability, interviewing Plaintiff regarding issues relating to suitability as a class representative, reviewing docket entries in cases filed in Federal district courts asserting the same or similar claims against Defendant and other debt collectors, and researching the law;

(ii) Plaintiff's counsel, who has been in the private practice of law for more

than 26 years, is experienced in handling class actions and complex litigation including, but not limited to, being certified as class counsel in the following cases, all of which involved claims under the FDCPA:

> *Anderson v. Rubin & Rothman, LLC,* U.S. District Court for the Eastern District of New York, Case 2:07-cv-03375 (New York class);
>
> *Gravina v. Client Services, Inc.*, U.S. District Court for the Eastern District of New York, Case 2:08-cv-03634 (nationwide class);
>
> *Anderson v. Nationwide Credit, Inc.,* U.S. District Court for the Eastern District of New York, Case 2:08-cv-01016 (nationwide class);
>
> *Seraji v. Capital Management Services, LP*, U.S. District Court for the District of New Jersey, Case 1:09-cv-00767 (nationwide class);
>
> *Williams v. Palisades Collection, LLC*, Superior Court of New Jersey, Docket No. BER-L-001604-11 (nationwide class); and
>
> *Krug v. Erica L. Brachfeld, A Professional Corporation*, Superior Court of New Jersey, Docket No. GLO-L-000419-11 (nationwide class).

(iii) Plaintiff's counsel is knowledgeable in the Fair Debt Collection Practices Act as well as New Jersey practice including having filed in excess of eighty actions under the FDCPA primarily in Federal district courts throughout the United States, and, since 2006, having attended five multi-day national conferences on consumer law and the FDCPA sponsored by the National Consumer Law Center, and is a member of the National Association of Consumer Advocates since 2009, and is a former adjunct professor in Appellate Advocacy at Seton Hall University School of Law; and

(iv) Plaintiff's counsel has committed sufficient resources to fully prosecute this matter as a class action in accordance with the terms of the Agreement.

The rule also permits the Court's consideration of counsel's "ability to represent fairly and adequately the interest of the class and may direct potential class counsel to provide information on any subject pertinent to the appointment and to the proposed

terms for attorney fees and nontaxable costs." *R.* 4:32-2(g)(1). Plaintiff's counsel represents that that he will fairly and adequately represent the interests of the class.

For these reasons, the parties' agreement requests that Philip D. Stern, Esq. be appointed class counsel.

VII. Approving Class Notice by Publication

When approving a class action settlement, *R.* 4:32-2(e)(1)(b) provides that "[t]he court shall direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise." Under *R.* 4:32-2(b)(2), however, when the court certifies a B3 class, "the court shall direct to the members of the class the best notice practicable under the circumstances, consistent with the due process of law." Counsel has found no decision reconciling which rule applies when, pursuant to a settlement agreement, the Court certifies a B3 class. Consequently, the discussion here addresses the more demanding notice requirements under *R.* 4:32-2(b)(2).

The federal rule counterpart to *R.* 4:32-2(b)(2) differs materially. Fed.R.Civ.P. 23(c)(2)(B) provides "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156 (1974) holds that individual notice is mandatory when the class members' identities and addresses can be reasonably ascertained. The difference between *R.* 4:32-2(b)(2) and the federal rule is significant and are discussed in Pressler & Verniero, *Current N.J. Court Rules* (2011), Comment 3.3 to *R.* 4:32-5, pages 1616-7, as follows:

> The notice provisions of the rule as originally adopted were an evident counter-response to the decision [in *Eisen*], which restrictively interpreted the notice provisions of the counterpart federal rule in respect of (b)(3) class actions. * * * This rule does not, however, contain a requirement for giving individual notice to all members reasonably identifiable, substituting instead the requirement that the members of the class be noticed by the best notice practicable under the circumstances "consistent with due process of law." This may be construed as the New Jersey

> Supreme Court's reading of the Eisen decision to having required individual notice because of the language of the rule and not as a matter of constitutional imperative. The purpose of the rule, therefore, is obviously to eliminate any mandatory individual notice requirement and to permit any form of notice which is, in fact, the best practicable under the circumstances provided only this it is consistent with due process. Thus, at least with respect to class actions brought in the New Jersey courts, publication and representative notice and such other forms of constructive notice as will meet the constitutional test of due process under the particular circumstances presented will be permitted.

Similarly, and relying on the late Judge Pressler's commentary to the Rules, the Appellate Division observed that "[t]here is no mandatory individual notice requirement" under our Rules. *Sulcov v. 2100 Linwood Owners, Inc.*, 303 N.J. Super. 13, 36 (App. Div. 1997).

Counsel have been unable to find any reported decision from New Jersey courts either approving or disapproving notice by publication in any particular circumstance. Nevertheless, there are many examples authorizing such notice.

A recent and uniquely similar example demonstrating the propriety of notice by publication is *Hecht v. United Collection Bureau*, 2011 WL 841322 (D.Conn. Mar. 8, 2011). A copy of the decision is attached to the Certification of Philip D. Stern submitted in support of this Motion. There, Ms. Hecht sought to bring her own individual Foti claim. Unfortunately, she was a member of the class in *Gravina v. United Collection Bureau, Inc.*, Case 2:09-cv-04816, where the United States District Court for the Eastern District of New York approved a nationwide class settlement of Foti claims and authorized class notice by publication once in *USA Today* (but, unlike the present case, there was no internet publication).

As the *Gravina* settlement is so similar[1] to the present proposed settlement, the

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[1] *Gravina* included a stipulated injunction in which the debt collector prospectively agreed to only leave Foti-compliant messages for consumers. There is no injunction in our case and none is available under the FDCPA in a private action. *See, Weiss v. Regal Collections*, 385

Hecht court's discussion of due process is presented here at length:

> [T]he only way that Ms. Hecht can avoid being bound by the *Gravina* settlement – and the comprehensive release language in the order approving the settlement – is by showing that the settlement violated her Fifth Amendment right to due process. *See Stephenson*, 273 F.3d at 261 [footnote omitted]. "Due process requires adequate representation 'at all times' throughout the litigation, notice 'reasonably calculated ... to apprise the interested parties of the pendency of the action,' and an opportunity to opt out." *Id.* at 260 (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985)). To satisfy due process, the notice given must be the best "practicable" notice under all the circumstances. *Phillips Petroleum*, 472 U.S. at 812.
>
> Ms. Hecht has not shown that the *Gravina* settlement violated her due process rights. First, Ms. Hecht has made no attempt whatsoever to argue that she was not adequately represented in the *Gravina* litigation. Even if she had made that argument, the Court would reject it. As the notice published in *USA Today* regarding the *Gravina* settlement indicated, there were more than two million total members of the class to which Ms. Hecht concedes she belongs. The FDCPA provides that in an FDCPA class action, the class may recover a maximum of 1% of the debt collector's net worth. See 15 U.S.C. § 1692k(a)(2)(B). Under the *Gravina* settlement – which settled a state law claim as well as an FDCPA claim – United Collections paid the maximum

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F.3d 337, 341 (3rd Cir. 2004). The injunction in *Gravina* was included so as to allow the court to certify a "B2" class for which "the court may direct appropriate notice to the class." Fed.R.Civ.P. 23(c)(2)(A), which is identical to *R.* 4:32-2(b)(1), is much less restrictive than the notice required for a B3 class. As reflected in the quote here from *Hecht*, however, the *Gravina* notice satisfied even the more rigid notice required to a B3 class and, dispositive of the instant issue, the notice was consistent with due process.

amount of 1% of its net worth on the FDCPA claim, plus an additional 1% of its net worth on the state law claim, for a total payment of 2% of its net worth, or $26,508.02. United Collections paid most of the settlement in the form of *cy pres* payments, because it was not feasible to distribute $26,508.02 amount [sic, probably intended to be "among"] more than 2,000,000 class members. No named Plaintiff received more than $3,500, and class counsel received a payment of $90,000 for fees and expenses. It does not appear from those circumstances that Ms. Hecht and other class members who did not receive any damage payments were inadequately represented.

Second, the Court is quite confident that the notice the *Gravina* parties published in *USA Today* was the best practicable notice available under the circumstances, and was reasonably calculated to apprise interested parties of both the pending class action and the settlement. *See id.* at 811-12. Ms. Hecht suggests that the notice was inadequate because she did not receive personal notice, but it is well established that constructive notice through publication may be sufficient to satisfy due process. *See Wolfert ex rel. Estate of Wolfert v. Transamerica Home First, Inc.*, 439 F.3d 165, 170 n. 4 (2d Cir. 2006) (citing *Phillips Petroleum*, 472 U.S. at 808). Again, as the notice itself indicated, there were more than two million members of the class and the maximum that United Communication could have been required to pay to those class members under the FDCPA was approximately $13,000.

Under those circumstances, sending personal notice to every class member would have been anything but practicable. And even if the United States District Court for the Eastern District Court had certified *Gravina* as a Rule 23(b)(3) class action – in which was [sic, probably intended to be "case"] Rule 23(c)(2)(B) would have required

> "individual notice to all members who can be identified through reasonable efforts" – Ms. Hecht has not bothered to explain to this Court how it is that she thinks United Collection could have identified her specifically as a member of that two million member class through reasonable efforts. Under the circumstances, then, and particularly in light of Ms. Hecht's failure to articulate any other form of notice which would have been practicable under the circumstances, the Court concludes that notice by publication in *USA Today* was sufficient to satisfy the requirements of due process. *See, e.g., One Cowdray Park LLC v. Marvin Lumber & Cedar Co.*, 371 F.Supp.2d 167, 171 (D.Conn. 2005) ("[O]n the limited record before the Court it appears that the newspaper notice provided to absent class members ... satisfied the requirements of due process....").

Thus, even under the stricter federal rules, publication notice was held to be the best practicable and consistent with due process. Here, like the notice in *Gravina,* the parties propose notice to an enormous nationwide class by publication in *USA Today* – but with the addition of internet notice. *Hecht* observed that *Gravina* involved approximately two million class members and class recovery of $26,508.02. Here, the class recovery would be $66,773.00 but with Defendant's conservative estimate of more than one million class members – while the difference in the total class recoveries may appear significant, on a per capita basis, the difference is between 1.3¢ in *Gravina* and 6.7¢ here – a *de minimus* distinction when contrasted with the fact that postage only for individual notice would exceed $440,000.00 with additional costs for printing, stuffing, and addressing. Thus, the cost of individual notice would be impractical under these circumstances.

Furthermore, Defendant has represented that it cannot reasonably identify the specific individuals who were in fact left messages thereby making it near impossible to send individual notice. But, even if individual members and their addresses could be identified, notice by publication nevertheless remains the best practicable under the circumstances while being consistent with due process.

VIII. Preliminary Approval of Settlement

"The basic test for court approval of a settlement of a class action is whether it is

fair and reasonable to the members of the class." *Chattin v. Cape May Greene, Inc.*, 216 N.J. Super. 618, 627 (App. Div. 1987).

Counsel represents that the settlement was reached through arms-length negotiations. Indeed, it took several months before they were able to come to an agreement as to all of the terms which they were comfortable recommending to their respective clients. Counsel considered the risks and expense of continued litigation. The risks included that there could be a change in the law concerning Foti claims either by Congress or an appellate decision, Defendant's financial circumstances could change, the Court could award less than the maximum allowable statutory damages after considering the factors under 15 U.S.C. § 1692k(b). The expenses include not only the cost of litigation but the indirect financial impact continued litigation has on the lives of both Plaintiff and Defendant, including the disruption to Defendant's business. Based on all of these factors, the parties – each with the benefit of experienced legal counsel – elected to resolve their differences on the terms set forth in the settlement agreement.

Under the terms of the agreement, although Defendant does not admit liability, Defendant will pay the *maximum* amount that it would have to pay had Plaintiffs been completely successful in a litigated case. Defendant will pay the maximum statutory damages of $1,000 on Plaintiff's individual claim and $66,773.00 on the class's claim which equals 1% of Defendant's net worth and is the maximum statutory award for the class. The parties have stipulated that the attorneys and fees and costs are reasonable at a total of $76,727.00 and Plaintiff's counsel has agreed that he will not seek an award for more than that amount. In addition, Defendant agrees to pay Plaintiff $500.00 as an "incentive award" which is in recognition of the time and effort she put forward to advance the interest of the class.

In exchange for these payments, Plaintiff will provide Defendant with a general release as to all claims and the class will provide a release of all claims arising from Defendant leaving autodialing class members and from leaving voice messages on class members' answering machines.

This settlement is actually better than this case being tried to conclusion where Plaintiff completely succeeded on all issues. Continued litigation would have meant continued litigation expenses, draining of valuable judicial resources, exposing the parties and the class to future risks of a change in the law, Defendant's future inability to pay, the additional time to achieve a resolution, and the likelihood of appeals. Instead, Defendant has agreed to pay the maximum recovery and, in doing so, waives

all rights to appeal.

Were this a litigated case and Plaintiff completely prevailed, the Court would need to address the issue of distribution of the class's statutory damage award as it is not feasible to distribute $66,773.00 among more than one million people. The settlement agreement provides for a *cy pres* distribution to one or more charities.

"The words 'cy pres' are Norman French meaning 'so near' or 'as near'." *Wilber v. Owens*, 2 N.J. 167, 177 (1949). Our courts recognize the use of the *cy pres* doctrine – borrowed from the equity courts when administering charitable trusts – to distribute class funds. *Sulcov v. 2100 Linwood Owners, Inc.*, 303 N.J. Super. 13, 37 (App. Div. 1997). "In the class action context the reason for appealing to cy pres is to prevent the defendant from walking away from the litigation scot-free because of the infeasibility of distributing the proceeds of the settlement ... to the class members." *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004). That court correctly observed, "There is [not even an] indirect benefit to the class from the defendant's giving the money to someone else." *Id.* Thus, the court may direct the monies "to be distributed to a use completely unrelated to the injured class members." Conte and Newburg, *Newburg on Class Actions* (4th ed.), § 10:24 at 535.

Re-directing the class distribution diverts only statutory damages and, therefore, does not deprive the class members of reimbursement for any loss or injury or of compensation for undertaking the time and effort to act as private attorneys general.

Here, the parties' agreement provides that the distribution should be made to an eleemosynary institution "without any religious or political affiliations and without any relationship to the Plaintiff, Defendant, Class Counsel or Defendant's counsel." The parties will attempt to agree upon the recipient(s) for approval by the Court at the final fairness hearing or, absent such an agreement, for the Court to decide.

Under all the circumstances, the settlement is fair and reasonable. Indeed, it is difficult to imagine a more fair settlement. Nevertheless, the parties only ask for the Court's preliminary approval because *R.* 4:32-2(e)(1)(C) requires that the Court may not give final approval until it holds a hearing and finds "that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate."

IX. Conclusion

For the foregoing reasons, Plaintiff, Christine Nicholas, respectfully requests that the Court grant this Motion and enter an Order:

1. Certify this action as maintainable as a "B3" class action conditioned on final approval of the settlement agreement;
2. Define the class and the class claims in accordance with the settlement agreement;
3. Appoint Philip D. Stern, Esq. as class counsel;
4. Preliminarily approve the settlement agreement subject to final approval;
5. Approve the form and manner of class notice; and
6. Schedule the date and time for the hearing on final approval of the settlement agreement and approval of class counsel's fee application.

Respectfully,
Philip D. Stern & Associates, LLC
Attorneys for Plaintiff, Christine Nicholas

By: _____
Philip D. Stern

Dated: August 17, 2011

CHRISTINE M. NICHOLAS, an individual; on behalf of herself and all others similarly situated, Plaintiff, vs. CMRE FINANCIAL SERVICES, INC., a California Corporation, Defendant.	**SUPERIOR COURT OF NEW JERSEY** **LAW DIVISION** **BERGEN COUNTY** Civil Action Docket No. BER-L-4336-11 **ORDER** **CONDITIONALLY CERTIFYING CLASS AND GRANTING PRELIMNARY APPROVAL OF THE SETTLEMENT AGREEMENT**

THIS MATTER HAVING been opened to the Court by Philip D. Stern, Esquire, of Philip D. Stern & Associates, LLC, attorneys for Plaintiff, on Notice of Motion to Conditionally Certify a Class and Granting Preliminary Approval of the Settlement pursuant to *R.* 4:32-2, and Virginia Pallotto, Esquire, of Budd Larner, P.C., attorneys for Defendant, having joined in the Motion, and the Court having reviewed the moving papers, and having heard the arguments of counsel on August 19, 2011,

AND THE COURT having made the following facts and conclusions in connection with this matter:

A. The parties submitted a proposed Class Action Settlement Agreement ("Agreement") which has been filed with the motion papers in this matter in accordance with Court Rule;

B. The parties request:

   i. conditionally certifying, for settlement purposes only, that this action may be maintained as a class action, and defining the class and the class claims;

ii. appointment of the class representatives and class counsel;

iii. approval of the form and manner of notice to the class;

iv. preliminarily approving the terms of the proposed Agreement; and

v. setting dates for notice, opt-out, objections, and the hearing for final approval.

C. After consideration of the papers filed in this action and the arguments of counsel including representations made on the record, the Court has made a preliminary determination that:

(i) the proposed settlement class is certified under *R.* 4:32-1(a) and 4:32-1(b)(3);

(ii) the proposed settlement of the claims of the Class against Defendant appears to be fair, adequate, and reasonable, and therefore, within the range of approval; and

(iii) the proposed settlement appears to satisfy the requirements of *R.* 4:32-1(a), as it will provide the maximum benefit that Plaintiff and the Class could hope to achieve if this case were tried on the merits. The Court further finds that in light of the large class size, the cap on liability to the class provided for in 15 U.S.C. § 1692k(a)(2)(B), and the costs of direct mail notice, that the best notice that is practicable under the circumstances and consistent with due process is publication notice. Requiring Defendant to mail notice to each of the class members would frustrate the Congressional purpose in setting a cap on Defendant's class liability, as the cost of postage alone would be in excess of ten times Defendant's maximum class liability to the class. Furthermore, the combination of a publication notice and a web site notice is reasonably

calculated to give notice of the proposed settlement to any class member.

D. The Court also finds that the proposed form of notice is adequate and will give all Class Members sufficient information to enable them to make intelligent decisions as to whether to remain Class Members, opt out or object to the proposed settlement and its terms.

E. The Court also finds that Plaintiff is an adequate class representative and that Plaintiff's attorney meets the qualifications for approval as class counsel;

and for good cause shown;

IT IS ON THIS DAY OF AUGUST, 2011, ORDERED:

1. Pursuant to *R.* 4:32-2(a), the Court certifies that this action is maintainable as a class action for settlement purposes pursuant to *R.* 4:32-1(b)(3) and designates Plaintiff, Christine M. Nicholas, as the class representatives.

2. Pursuant to *R.* 4:32-2(a), the Court defines the class as:

> All natural persons in the United States and Puerto Rico whom, during the Class Period, received from Defendant at least one voice message on the person's telephone answering device or automated telephone call which message or call either failed to identify Defendant as the caller, state the purpose or nature of the call, or disclose that the call was from a debt collector, excluding those persons who:
> A. filed for bankruptcy protection since the start of the Class Period;
> B. entered into any general release with Defendant;
> C. are deceased; or
> D. filed a claim arising under the FDCPA against Defendant in any action commenced prior to the last day of the Class Period.

3. Pursuant to *R.* 4:32-2(a), the Court defines the Class Claims as any and all claims and causes of action arising from Defendant's voice message left on a person's telephone answering device or defendant's automated telephone calls which message or call failed to identify Defendant as the caller, state the purpose or nature of the call, or disclose that it was

from a debt collector and was left during the Class Period.

4. The Class Period is defined as the continuous period beginning on September 30, 2007 and continuing through and including the date of this Order.

5. Pursuant to *R.* 4:32-2(a) and (g), the Court appoints Plaintiff's attorney, PHILIP D. STERN, ESQ., as class counsel.

6. On _____, 2011, at _____ ___.m. (a date which is 42 days or more after the entry of this Order), the Court will hold a hearing ("Final Hearing"), pursuant to *R.* 4:32-2(e)(1)(C), for the purpose of determining: (i) whether the preliminarily certified settlement class meets the requirements for class certification under *R.* 4:32-1; (ii) whether the proposed settlement is fair, reasonable and adequate, and should, therefore, be granted final approval; and (iii) the amount of attorney's fees and expenses that should be awarded to Class Counsel.

7. The Final Hearing will be held before the undersigned at the Superior Court of New Jersey, Justice Center, 10 Main St., Hackensack, NJ 07601.

8. Pursuant to *R.* 4:32-2(e)(1)(B), notice to the Class shall be given to the Settlement Class: (a) by publication once, in a newspaper or magazine with a national distribution of the publication Class Notice, appearing at least 21 days before the Final Hearing and substantially in the form of the attached as Exhibit A-1; and (b) by posting on Class Counsel's web site a notice substantially in the form of the attached Exhibit A-2.

9. In accordance with and within the time set forth in the Court-approved Class notices, a Class Member may exercise his or her election to opt out of the Class by written notice to Class Counsel and Defendant's Counsel to be received by Class Counsel and Defendant's Counsel not later than seven calendar days prior to the Final Hearing.

10. In accordance with and within the time set forth in the Court-approved Class notices, a Class Member who has not elected to opt out of the Class shall not be heard at the Final Hearing unless he or she files with the Court and serves on both Class Counsel and Defendant's counsel not later than seven calendar days prior to the Final Hearing written notice of objection including: (a) a statement of each objection being made; (b) a detailed description of the facts underlying each objection; (c) a detailed description of the legal authorities underlying each objection; (d) a statement of whether the objector intends to appear at the Final Hearing; (e) a list of witnesses whom the objector may call by live testimony, oral deposition testimony or affidavit during the Final Hearing; and (f) a list of exhibits which the objector may offer during the Final Hearing, along with copies of all of the exhibits.

11. At the Final hearing, the Court will hear and determine Class Counsel's application for an award of $76,727.00 for attorney's fees and expenses of litigation which the Plaintiff and Defendant, by stipulation in the Settlement Agreement, have deemed to be fair and reasonable. Seven days prior to the Final Hearing, Class Counsel shall file and serve any additional papers in support of that application.

12. This Order shall not be construed or deemed to be a finding of this Court or evidence of a presumption, implication, concession, or admission by Defendant concerning (1) any alleged liability, fault, or wrongdoing by Defendant; (2) the appropriateness of any measure of alleged loss or damages; or (3) the appropriateness of class certification for any purposes other than Settlement. If the Agreement is terminated pursuant to its terms, or if the settlement is not approved or consummated for any reason whatsoever, the Agreement and all proceedings had in connection therewith shall be without prejudice to the *status quo ante* rights of the parties to this action.

13. It is further Ordered that a copy of this Order be served on all counsel of record within __ days hereof.

Opposed: NO

HONORABLE JOHN J. LANGAN, J.S.C.

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EXHIBIT A-1

EXHIBIT A-1 TO SETTLEMENT AGREEMENT

CLASS ACTION SETTLEMENT NOTICE
(THIS NOTICE WAS APPROVED BY THE COURT)

TO: All persons in the United States and Puerto Rico who received from CMRE FINANCIAL SERVICES, INC. a telephonic voice message or automated call from September 30, 2007 to ____[CLASS CERT ORDER DATE]____:

YOU ARE HEREBY NOTIFIED that a proposed class action settlement has been preliminarily approved by the Court in Christine M. Nicholas v. CMRE Financial Services, Inc. Docket No. BER-L-4336-11 (Superior Court of New Jersey, Law Division, Bergen County). The plaintiffs claim that defendant violated consumers' rights under the Fair Debt Collection Practices Act when leaving messages on consumers' telephone answering devices or making automated telephone calls. Defendant denies liability and asserted defenses. The Court has not made any decision concerning the merits of the lawsuit.

Subject to Court approval at a Final Hearing scheduled for _____, 2011, the settlement includes a payment of $66,773.00 to a charitable institution, $1,500.00 to the named plaintiff, and attorney's fees and costs not to exceed $76,727.00. The rights of class members will be affected by the settlement.

For further information regarding the settlement and your rights, including information on how to exclude yourself from the Class by the opt-out deadline of [insert date]____ or object to the terms of the settlement agreement prior to the Final Hearing, please do one of the following:

1. Using an internet browser, navigate to www.PhilipStern.com and click on the "Class Actions" tab. Then, click on the link for the "Notice to Class Members" under the "Focus Receivables Management" heading.
2. Send a request by email to: FRMFullNotice@PhilipStern.com and include your full name, email address and your postal address.
3. Call toll-free (888) 609-3859 and follow the instructions to leave a message with either your email address or your postal mailing address.
4. Write to Class Counsel in sufficient time to be received by [DATE WHICH IS 7 CALENDAR DAYS BEFORE OPT-OUT DEADLINE]:

   Philip D. Stern, Esq.
   Philip D. Stern & Associates, LLC
   697 Valley Street, Suite 2d
   Maplewood, NJ 07040-2642

DO NOT CONTACT THE COURT OR THE CLERK'S OFFICE

863809.w

EXHIBIT A-2

EXHIBIT A-2

CHRISTINE M. NICHOLAS, an individual; on behalf of herself and all others similarly situated, Plaintiff, vs. CMRE FINANCIAL SERVICES, INC., a California Corporation, Defendant.	**SUPERIOR COURT OF NEW JERSEY** **LAW DIVISION** **BERGEN COUNTY** Civil Action Docket No. BER-L-4336-11

NOTICE OF CLASS ACTION AND PROPOSED SETTLEMENT

TO: ALL INDIVIDUALS IN THE UNITED STATES AND PUERTO RICO WHO RECEIVED TELEPHONIC MESSAGES OR AUTOMATED TELEPHONE CALLS FROM CMRE FINANCIAL SERVICES, INC., BETWEEN OCTOBER 1, 2007 AND _____, 2011

NOTICE IS HEREBY GIVEN THAT, pursuant to the Order of the Superior Court of New Jersey, Bergen County (the "Court"), dated _____, 2011, it was determined that the above-captioned Fair Debt Collections Practices Act ("FDCPA") lawsuit may be settled on behalf of a Class of natural persons (the "Class") pursuant to N.J. Court Rule 4:32-1(b)(1) and defined as follows:

> All natural persons in the United States and Puerto Rico whom, during the "Class Period", received from Defendant, CMRE Financial Services, Inc., at least one voice message on the person's telephone answering device, or automated telephone call, which message or call either failed to identify the Defendant as the caller, state the purpose or nature of the call, or disclose that the call was from a debt collector, excluding those persons who:
>
> A. filed for bankruptcy protection since the start of the Class Period;
> B. entered into any general release with Defendant;
> C. are deceased; or
> D. filed a claim arising under the FDCPA against Defendant in any action commenced prior to the last day of the Class Period.
>
> "Class Period" means the continuous period beginning on September 30, 2007 and continuing through and including _____, 2011.

A. Summary of the Litigation

Plaintiff, Christine M. Nicholas ("Plaintiff") alleges that she, along with other consumers, received telephonic voice messages left on answering devices or voice mail or automated telephone calls by the Defendant, CMRE Financial Services, Inc., ("Defendant") that failed to provide meaningful disclosure of Defendant's identity, which failed to disclose that the message

or call was from a debt collector and/or failed to disclose the purpose or nature of the message or call was an attempt to collect a debt, in violation of the FDCPA, 15 U.S.C. § 1692 *et seq.*, including but not limited to §§ 1692d(6) and 1692e(11). It is not alleged that such alleged failure caused or was capable of causing any actual damages to the Plaintiffs or any other person.

Defendant denies that it has any liability to Plaintiff or to the Class, but has agreed to settle this case based on the likely high cost of protracted litigation. The FDCPA provides for the recovery of actual damages, if any, statutory damages, costs and reasonable attorneys' fees to a successful plaintiff. This lawsuit seeks only statutory damages for both the individual Plaintiff and the class members ("Class"). The maximum amount recoverable for this Class under the FDCPA is the lesser of one percent of the Defendant's net worth or $500,000. Here, one percent of Defendant's net worth, as established through confirmatory discovery, is $66,773.00 and, as a practical matter, that amount is incapable of being distributed to the Class, given that it would, at most, be less than two cents per Class Member. As such, the settlement provides for a *cy pres* distribution as explained more fully below.

For a complete statement of all for the contentions and proceedings in this case, you should consult the Court file relating to this lawsuit, a copy of which is available for inspection on the website of Class Counsel:

http://www.philipstern.com/ClassActions.html

or in the Superior Court of New Jersey, Deputy Clerk of the Superior Court, Civil Division, Room 115, Justice Center, 10 Main St., Hackensack, NJ 07601. This case was originally filed in the United States District Court for the District of New Jersey, under Civil Action No. 2:08-cv-04857-JLL-CCC, but the parties agreed to dismiss that federal action, without prejudice, for the purpose of re-filing the action in state court in the above-captioned action. A copy of the prior federal court proceedings is available for inspection the website of Class Counsel

http://www.philipstern.com/ClassActions.html

or at the Clerk of the United States District Court for the District of New Jersey, M.L. King, Jr. Federal Bldg. & US Courthouse, 50 Walnut St., Newark, NJ 07102 or through the internet: pacer.njd.uscourts.gov.

B. Certification of the Class

On _____, 2011, the Class was conditionally certified pursuant to Rule 4:32-1(b)(1) of the New Jersey Court Rules as a class action. The Court appointed the Plaintiff, Christine M. Nicholas as the representative of the Class, and her attorney, Philip D. Stern, of the Philip D. Stern & Associates, LLC, as Class Counsel. The Court certified the Class Claims as any and all claims and causes of action arising from Defendant's voice message left on a person's telephone answering device or Defendant's automated telephone calls which failed to identify Defendant as the caller, state the purpose or nature of the call, or disclose that it was from a debt collector and was left during the Class Period.

C. Settlement of the Litigation

A proposed settlement has been preliminarily approved by the Court. Under the terms of the proposed settlement, Defendant has agreed to provide the following relief to the Plaintiff and the Class:

A. Defendant shall pay $66,773.00 to one or more charitable organizations to be later appointed by the Court that is not affiliated with any religious, political organization, Party or Counsel, as a *cy pres* distribution on behalf of the Class, which sum represents one percent of Defendant's net worth and is the maximum amount of statutory damages available to the Class under the Fair Debt Collection Practices Act ("FDCPA").

B. Defendant will also pay to the Plaintiff for her individual statutory damage claims the total amount of $1,000, as provided for in 15 U.S.C. § 1692k, and in consideration of her service to the Class, Defendant will pay to the Plaintiff an additional $500.

C. Defendant shall bear the costs of class administration, with the exception of publication of this notice on Class Counsel's website and class counsel's toll free number, and (subject to Court approval) pay the reasonable attorneys' fees and expenses of Plaintiffs' attorneys in an amount not to exceed $76,727.00.

The Court will hold a Final Hearing as describe in Section F., below, which will include consideration of final approval of the settlement. Upon final approval of the settlement, the Court will enter a judgment which will include releasing Defendant of all liability to Plaintiff for all claims and of all liability to the Class for the Class Claims, and enjoining prosecution of the released claims.

Class Counsel believes that the proposed settlement is fair, reasonable, adequate, and in the best interests of the Class. This settlement represents the maximum recoverable for a Class under the FDCPA. Because the potential Class is conservatively estimated to be over 1,140,000 persons for just a one-year period from September 30, 2007 through September 30, 2008, any Class member would receive less than three cents and it has been determined that distribution to the Class would not be economical or practical to administer. Accordingly, the settlement provides only for a *cy pres* payment to one or more non-profit charities to be approved by the Court at the Final Hearing. It has been agreed that the *cy pres* recipient must be a non-profit, charitable organization that is not affiliated with any religious or political organization or any Party or their Counsel. There is no distribution to any Class members, other than to the Plaintiff as Class Representative as set forth above. While a person could possibly recover more if he or she filed an individual lawsuit and were successful, individual suits under the FDCPA are sometimes not economical. In addition, Defendant has denied that it violated the FDCPA. An individual who elects to opt out of the Class might recover nothing.

If the settlement is not approved, the case will proceed as if no settlement has been attempted. Defendant retains its rights to contest whether this case should be maintained as a class action and the merits of the suit.

This notice contains only a general description of the terms of the settlement. You may inspect the entire settlement agreement, a copy of which is available on the website of Class Counsel,

http://www.philipstern.com/ClassActions.html, in the Court's file, or by contacting Class Counsel and requesting a copy of it at your own expense.

A member of the Class may elect to opt out of the Class or file objections to the settlement as set forth below or a member may do nothing and accept the terms of the settlement.

D. Opting Out

A member of the Class may opt out of the Class at any time prior to the expiration of the Opt-Out Period, which will expire Seven Calendar Days before the Final Hearing, scheduled for [insert hearing date]_, or by _[insert opt-out date]_____.

To opt out of the Class, a class member must notify Class Counsel and Defendant's counsel in writing requesting exclusion from the Class and must be received by Class Counsel and Defendant's counsel Seven Calendar Days before the Final Hearing scheduled for [insert hearing date], or by [insert opt-out date]. The written request may be sent to Class Counsel by mail or hand-delivery (including a commercial courier such as Federal Express). To insure timely delivery of a written request sent by regular mail, it should be postmarked no later than ten calendar days prior to the Final Hearing.

Except for those persons who have properly and timely opted out, each member of the Class will be deemed a Class Member for purposes of the settlement Agreement. Any person who opts out of the Class shall not be entitled to relief under nor be affected by the settlement Agreement, nor shall such person be entitled to object to the settlement.

E. Objections

You have the right to object to the proposed settlement by filing and serving a written objection. Your objection must state your name, address, the case name and number, and the information described below. You or your attorney must sign your objection personally. You must FILE and SERVE your objection on or before _____, 2011. You file your objection with the Court, at the following address:

Deputy Clerk of the Superior Court
Civil Division, Room 115
Justice Center, 10 Main St.
Hackensack, NJ 07601

You serve (service is complete on receipt) a copy of your objection on Class Counsel and Counsel for Defendant at the following addresses:

Philip D. Stern, Esq.
Philip D. Stern & Associates, LLC
697 Valley Street, Suite 2-D
Maplewood, New Jersey 07040
(973)379-7500

Class Counsel

and:

Virginia A. Pallotto, Esq.
BUDD LARNER, P.C.
150 John F. Kennedy Parkway, CN 1000
Short Hills, NJ 07078-2703
(973) 379-4800, Ext. 4450
Attorney for Defendant

Service shall be made in one of the following manners authorized under New Jersey Court Rule 1:5-2: "mailing a copy to the attorney at his or her office by ordinary mail, by handing it to the attorney, or by leaving it at the office with a person in the attorney's employ."

No member of the Class, or any other person, will be heard at the Final Hearing in opposition to class certification, the Class Settlement, Class Counsel's proposed attorneys' fees and expenses, or the proposed payments to Class Representative unless his or her objection contains the following: (i) a statement of each objection being made; (ii) a detailed description of the facts underlying each objection; (iii) a detailed description of the legal authorities underlying each objection; (iv) a statement of whether the objector intends to appear at the Final Hearing; (v) a list of witnesses whom the objector may call by live testimony, oral deposition testimony or affidavit during the Final Hearing, together with a summary of each witness' anticipated testimony; and (vi) a list of exhibits which the objector may offer during the Final Hearing, together with true copies of all of the exhibits.

Class Members and any other persons who fail to file or serve their objections properly or timely will not be heard during the Final Hearing and the Court will not consider their objections.

If you do not want to exclude yourself from the Class and you do not object to the settlement, it is not necessary for you to take any action.

F. Final Hearing

NOTICE IS HEREBY GIVEN THAT a hearing will be held before the Honorable _____, Superior Court Judge for the Superior Court of New Jersey, on _____ 2011, at _____ _.m., at the Bergen County Courthouse, 10 Main Street, Hackensack, NJ 07601. This hearing will be held to determine if the proposed settlement is fair, reasonable, and adequate and should be approved, and to determine Class Counsel's petition for fees and costs in the amount of $76,727.00. If the proposed settlement is approved, it will be binding and will release Defendant from the Class Claims.

Questions concerning this class action litigation should be directed to Class Counsel at the address above.

PLEASE DO NOT CALL THE JUDGE OR THE COURT CLERK.

THIS NOTICE WAS APPROVED BY THE COURT.