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Attorneys for Plaintiffs, Dolores M. Krug, Mark A. Castellano, Diane L. Hortsman, James J. Hortsman, Dane T. Wood, Lisa A. Wood, and all others similarly situated

DOLORES M. KRUG, an individual; MARK A. CASTELLANO, an individual; DIANE L. HORSTMAN, an individual; JAMES J. HORSTMAN, an individual; DANE T. WOOD an individual; and LISA A. WOOD, an individual; on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

ERICA L. BRACHFELD, A PROFESSIONAL CORPORATION doing business as LAW OFFICES OF BRACHFELD & ASSOCIATES, a California Corporation; ERICA L. BRACHFELD also known as ERICA L. SHUBIN, individually and in her official capacity,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
GLOUCESTER COUNTY

Civil Action

Docket No. GLO-L-~~6366-10~~ 419-11

FINAL JUDGMENT APPROVING AND ENFORCING CLASS SETTLEMENT AGREEMENT INCLUDING INJUNCTION, AND AWARDING COUNSEL FEES

This matter having come before the Court for a hearing ("Fairness Hearing") on August 25, 2011 in accordance with the Court's Order dated June 2, 2011 ("Certification Order"), and, based on the docketed materials and the representations of counsel at the hearing, the Court finds and concludes:

1. **NATURE OF THE CASE**

1.01. Plaintiffs commenced this class action ("Action") on July 30, 2010 in this Court, venued in Essex County and, by Order of the Essex County Assignment Judge, venue in this

matter was changed to Gloucester County.

1.02. The Plaintiffs, DOLORES M. KRUG, MARK A. CASTELLANO, DIANE L. HORSTMAN, JAMES J. HORSTMAN, DANE T. WOOD, and LISA A. WOOD ("Plaintiffs" or "Class Representatives") are consumers from New Jersey, Florida and Kansas who each allegedly became delinquent on a consumer debt.

1.03. Defendant, ERICA L. BRACHFELD, A PROFESSIONAL CORPORATION doing business as LAW OFFICES OF BRACHFELD & ASSOCIATES, a California Corporation ("BRACHFELD"), is debt collector who attempted to collect these alleged debts from each of the respective Plaintiffs.

1.04. Plaintiffs contend that, in attempting to collect these alleged consumer debts from them, and other debts from the Class they seek to represent, Defendant left telephone voice messages for them that violated the federal Fair Debt Collection Practices Act, 15 U.S.C. §§1692, *et seq.* ("FDCPA").

1.05. The Plaintiffs allege that the Defendant's telephone messages failed to provide meaningful identification of the caller in violation of 15 U.S.C. §1692d(6), and that the messages also failed to give the disclosures required by 15 U.S.C. §1692e(11).

1.06. In the Answer to the Complaint, Defendant denies Plaintiffs' allegations and asserts, *inter alia*, that any alleged violation, if it was a violation, was unintentional and resulted from a *bona fide* error notwithstanding the maintenance of procedures reasonably adapted to avoid the violation.

1.07. Substantially the same claims and defenses were asserted amongst substantially the same parties in an action commenced on February 20, 2009 in the United States District Court for the District of New Jersey as Case 1:09-cv-00767 ("Federal Action").

1.08. Over the course of several months, counsel for the Plaintiffs and Defendants reviewed and analyzed the complex legal and factual issues present in this Action, the risks and expenses involved in pursuing the litigation to conclusion, the likelihood of recovering damages in excess of those obtained through this settlement from Defendant, the protracted nature of the litigation and the likelihood, costs and possible outcomes of one or more appeals of procedural and substantive issues.

1.09. Based upon these reviews and analyses, the Plaintiffs and Defendants embarked upon and concluded comprehensive settlement discussions, with the assistance of the court in the Federal Action.

1.10. Preliminarily, the parties consented to dismiss the Federal Action without prejudice and to commence this Action. Ultimately, the parties' negotiations led to their execution of a Stipulation of Settlement ("Stipulation") and the filing of a motion ("Certification Motion") for class certification and preliminary approval of the Stipulation. A copy of the Stipulation was filed with the Certification Motion in accordance with R. 4:32-2(e)(1)(C). The Certification Motion was granted by way of an order ("Certification Order") on April 1, 2010.

1.11. Defendants made certain admissions during the discovery phase of this Action to Class Counsel concerning the number of class members; specifically, there exists a pool of potential Class Members which exceeds 1,000,000 people. Defendant has further confirmed that, at the time discovery was made, its net worth was negative thereby making the maximum amount of statutory damages under 15 U.S.C. §1692k that could be recovered if a litigation class were to be certified and the Class Representative Plaintiffs were to prevail on the merits at trial and on appeal to be zero dollars.

2. **ELEMENT FOR CLASS CERTIFICATION UNDER R. 4:32-1(a)**

2.01. Under R. 4:32-1(a), one or more members of a class may sue or be sued as representative on behalf of a class if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the class representatives are typical of the claims or defenses of the class; and (4) the class representative will fairly and adequately protect the interests of the class. These four elements are referred to as: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy.

2.02. *Numerosity.* Based upon information received from Defendant, there are over 1,000,000 members of the Settlement Class. This is sufficient for numerosity.

2.03. *Commonality.* A common nucleus of operative fact is sufficient to satisfy the commonality requirement. The Court finds that there are common questions of law or fact affecting the Class including whether the Defendants' telephone messages left for consumers violated 15 U.S.C. §1692d(6), whether the Defendant's telephone messages left for consumers violated 15 U.S.C. §1692e(11), whether Plaintiffs and the Class Members are entitled to injunctive relief, whether Plaintiffs and the Class Members are entitled to recover statutory damages and, if so, in what amount, and whether Plaintiffs and the Class Members are entitled to recover attorney's fees and costs and, if so, in what amount. These common questions of law and fact evince a common nucleus of operative fact sufficient to establish commonality.

2.04. *Typicality.* A class representative's claim is typical if it "arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *Keele v. Wexler*, 149 F.3d 589, 595

(7th Cir. 1998). The typicality prong is analyzed by asking whether the named plaintiff has incentives that align with those of absent class members so as to assure that the absentees' interests will be fairly represented. *Baby Neal v. Casey*, 43 F.3d 48, 57 (3d Cir. 1994), *citing* 3B Moore & Kennedy, P 23.06-02; 1 Newberg & Conte, § 3.13. Plaintiffs' claims are typical of the claims of the Class. Specifically, Plaintiffs allege that the Defendant left at least one telephone voice message for each of them and each Class Members which message uniformly failed to provide meaningful disclosure of the caller's identity in violation of 15 U.S.C. § 1692d(6) and which did not contain the disclosures required by 15 U.S.C. § 1692e(11). Thus, typicality is established.

2.05. *Adequacy*. In order for Plaintiffs to be considered fair and adequate representatives of the Settlement Class, three requirements must be met: (1) counsel must be qualified, experienced, and generally able to conduct the proposed litigation; (2) the class representative must have sufficient interest in the outcome to ensure vigorous advocacy; and (3) the class representative must not have antagonistic or conflicting interests with other members of the proposed class. Plaintiffs have and will fairly and adequately represent the interests of the Class and have no interests adverse to the Class Members, and through their attorneys of record, Plaintiffs have been willing to pay the costs of notice and litigation associated with the Action. The Court also finds that Plaintiffs have hired an attorney with significant experience in the handling of both consumer protection class actions and other types of complex litigation. The Court, therefore, finds that adequacy exits.

3. **ELEMENTS FOR CLASS CERTIFICATION UNDER R. 4:32-1(b)**

3.01. Plaintiffs have sought class certification under R. 4:32-1(b)(1) and R. 4:32-1(b)(2).

3.02. The parties concede that, under caselaw, injunctive relief is not available to Plaintiffs under the FDCPA were they to succeed in litigating this matter as a contested case. Nevertheless, Defendant consents to such relief.

3.03. As provided in R. 4:32-1(b)(1), the prosecution of separate actions by or against individual members of the Class would create a risk either of inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct for the party opposing the class.

3.04. Generally, federal courts apply the their rules' equivalent to R. 4:32-1(b)(2) (namely, Fed.R.Civ.P. 23(b)(2)) when a plaintiff seeks both injunctive relief and monetary damages and the monetary damages are secondary or "incidental" to the injunctive relief. See, e.g., *In re Allstate Ins. Co.*, 400 F.3d 505 (7th Cir. 2005). "Incidental" damages are found when the determination of damages do not require an inquiry into the circumstances of each individual class member but, instead, flow directly from the Defendant's conduct generally applicable to the class. *Hunt v. Check Recovery*, 241 F.R.D. 505, 513 (N.D.Cal. 2007) This is precisely the type of damages sought for the Class in this Action as statutory damages under the FDCPA are not based on an inquiry into the circumstances of each individual class member but, instead, on the factors set forth in 15 U.S.C. §1692k(b)(2).

3.05. Therefore, The Court finds that monetary relief awarded by the Court pursuant to the Stipulation of Settlement constitutes incidental damages flowing from Defendant's conduct generally applicable to the Class, which conduct is addressed in the injunction. Consequently, the Court confirms its prior certification of this action as a class action under R. 4:32-1(b)(2).

3.06. Notice for a class certified under Fed.R.Civ.P. 23(b)(2) is not mandatory. Nevertheless, in accordance with the Stipulation, the Court ordered notice by publication. Proof of publication was submitted to the Court at the Fairness Hearing which the Court finds to be in compliance with its order and to be fair, adequate and consistent with due process.

4. THE SETTLEMENT IF FAIR, REASONABLE AND ADEQUATE.

4.01. R. 4:32-2(e)(1)(C) provides, in part, that the Court may approve a settlement "only after a hearing ... and on finding that it is fair, reasonable, and adequate." The Court held such a hearing; namely, the Fairness Hearing and, for the following reasons, finds that the settlement is fair, reasonable and adequate.

4.02. Had this matter proceeded as a contested matter and Plaintiffs prevailed on all issues, the following relief could have been awarded: (a) up to but no more than $1,000 in statutory damages to each Plaintiff; (b) a discretionary incentive award to each Plaintiff; (c) no statutory damages to the Class; and (d) Plaintiffs' attorneys' fees and costs. Such relief could have only been obtained if Plaintiffs established all elements for class certification under both R. 4:32-1(a) and R. 4:32-1(b), Plaintiffs proved liability, and Plaintiffs successfully defended any appeal. In the Certification Motion and at the Fairness Hearing, some of the myriad reasons why Plaintiffs might not have succeeded were discussed.

4.03. By settling, the parties agreed to:

4.03.1. In addition to having paid the costs to publish notice in a nationally circulated newspaper, Defendants will fund $125,000 consisting of

4.03.1.1. $15,000 payable to the six Plaintiffs divided as $1,000 to each for their individual statutory damages claim under 15 U.S.C. §1692k(a)(2)(A)

and $1,500 for their time, expense and risk acting as a class representative;

4.03.1.2. $25,000 as a *cy pres* payment to one or more charitable institutions without any political or religious affiliations; and

4.03.1.3. $85,000 as a stipulated limit on recoverable attorneys' fees and costs.

4.03.2. Defendant stipulating to an injunction. The injunction requires Defendant to comply with the law as interpreted by Plaintiffs (as well as most other District Courts which have addressed the issues although neither the Supreme Court nor any Court of Appeals have addressed them), to report claimed violations for a twelve month period and, if violated, carries the potential of a contempt charge, civil sanctions and such other equitable and legal remedies to enforce compliance.

4.04. The Court will grant the payment of class statutory damages as a *cy pres* payment.

4.05. The Court finds that the award of those funds as a *cy pres* payment is justified because statutory damages do not represent actual damages in compensation for a loss actually suffered by the class members, each Class Member would not receive any statutory damages because Defendants' net worth was negative at the time it made discovery of its net worth, a classwide distribution would result in a per capita distribution of mere pennies, the cost of such a distribution would dwarf the amount being distributed, and the policies of the FDCPA are better promoted by the *cy pres* payment.

4.06. The combination of the *cy pres* payment and the injunction together – both of which could not have been obtained by Plaintiffs under the FDCPA or without Defendants' consent – dwarf any possible result had Plaintiffs successfully prosecuted this action and advance the purposes of the FDCPA. Consequently, the Court finds the Stipulation

eminently fair, reasonable and adequate.

5. **COUNSEL FEES AND COSTS**

5.01. The Court approves an award of counsel fees and costs in the amount of $85,000. The Court is satisfied that Class Counsel is able and experienced and is well-qualified and who obtained relief by way of settlement which could not have been available through continued litigation and which provides a significant public benefit and promotes the public policies embodied in the FDCPA. Having reviewed the Class Counsel's application for fees and costs submitted in accordance with R. 4:32-2(h) and R. 4:42-9, the Court finds that 137.9 hours expended by Philip D. Stern, Esq., 37.4 hours expended by Inna Ryu, Esq., (an attorney employed by Mr. Stern), and 68.3 hours expended by Mr. Stern's law clerk, Andrew T. Thomasson, are reasonable. The Court also finds that evidence submitted supports reasonable hourly rates for Philip D. Stern, Esq. of $525.00, for Inna Ryu, Esq. of $300.00, and for Andrew T. Thomason of $125.00. Furthermore, the Court finds that costs actually expended in the amount of $674.95 are reasonable. Consequently, the Court finds that $89,829.95 is a reasonable sum for fees and costs awardable to Class Counsel however the application is for $85,000 representing the maximum amount Class Counsel agreed to in the Stipulation and the Court approves the award in the amount of $85,000.00.

6. **OBJECTIONS AND OPT-OUTS**

6.01. The Court received no objections to the approval of the Settlement and no one has elected to opt-out. At the Fairness Hearing, Class Counsel and defense counsel reported that none of them received any objections nor notice of any opt-outs.

Based on the foregoing findings and conclusions, and for good cause shown:

IT IS ON THIS 25TH DAY OF AUGUST, 2011, ORDERED AND ADJUDGED:

1. The Court confirms the certification of this action as a class action under R. 4:32-1(b)(1) and (2), and, in accordance with R. 4:32-2(a):

   (a) defines the "Class" as

   > All persons with addresses in the United States of America who received from BRACHFELD & ASSOCIATES a telephonic voice message left during the class period, which message failed to meaningfully identify BRACHFELD & ASSOCIATES as the caller, disclose that the communication was from a debt collector, or state the purpose or nature of the communication, or which falsely implied that the communication was from an attorney. Excluded from the class are:
   > (i) all consumers who have filed for bankruptcy protection since the start of the class period;
   > (ii) all consumers who are deceased; and
   > (iii)all consumers who have entered into any general release of claims against Defendants.

   (b) defines the "Class Claims" as any and all claims arising from Defendants' telephonic messages left in substantially the same form as those in Plaintiffs' Complaint which were received by members of the Class during the Class Period

   (c) defines the "Class Period" as beginning on February 21, 2008 and continuing uninterrupted up through and including the date of the Certification Order; and

   (d) appoints Plaintiff's counsel, Philip D. Stern, as Class Counsel.

2. The Court declares that the notice to the Settlement Class satisfies the requirements of R. 4:23 and due process.

3. The Court declares that the terms of the settlement, as set forth in the Stipulation, are fair, reasonable and adequate.

4. The Court approves the disbursement of the *cy pres* payment as provided for in the Stipulation to the following charitable institution(s): $12,500 to Legal Services of New Jersey, and $12,500 to Lions Clubs International Foundation.

5. The Court approves the award of attorneys' fees and costs to Class Counsel in the amount of $85,000.00 and declares such fees and costs to be fair and reasonable.
6. The parties are directed to implement the settlement in accordance with the Stipulation.
7. This Order and Judgment is the "Final Approval Order" and constitutes "Final Approval" within the meaning of the Stipulation.
8. In accordance with the Stipulation:
    (a) "Unknown Claims" has the same meaning as set forth in the Stipulation.
    (b) Plaintiffs each fully, finally, and forever release, relinquish and discharge Defendants from any and all claims, including Unknown Claims, arising out of or relating to the allegations and/or claims asserted in the Action arising out of state or federal law, including any and all such claims.
    (c) Pursuant to R. 4:32-1(b)(1)(B) and 4:32-1(b)(2), all Class Members release, and hereby are deemed to fully, finally, and forever release, relinquish, and discharge Defendants and each Defendant's past or present officers, directors, partners, agents, employees, attorneys, accountants or auditors, consultants, legal representatives, predecessors, successors, heirs, assigns, parents, subsidiaries, divisions, and any entity that controls the Defendants from any and all claims for statutory damages or injunctive relief, including Unknown Claims for such relief, arising out of, or related to, claims involving the identical factual predicate asserted in the complaint arising out of state or federal law, including any and all such claims relating to Defendants' use of messages on telephone answering devices. Notwithstanding anything in this Stipulation to the contrary, the Class Members do not release any claim for actual damages as contrasted with and separate from statutory damages.

9. Defendants are permanently enjoined as follows:

(a) Defendants shall use their "best efforts" to ensure that they identify themselves by their legal name in all telephone messages left for consumers, that they disclose the call is from a debt collector and concerns the collection of a debt, and that the call is from a non-attorney debt collector unless a licensed attorney has left the message.

(b) "Final" means when the last of the following with respect to this Order has occurred: (i) the expiration of three business days after the time to file a motion to alter or amend this Order under R. 4:49-2 has passed without any such motion having been filed; (ii) the expiration of three business days after the time in which to appeal this Order has passed without any appeal having been filed (which date shall be deemed to be 48 days following the entry of this Order, unless the date to take such an appeal shall have been extended by Court order or otherwise, or unless the 48th day falls on a weekend or a Court holiday, in which case the date for purposes of this Stipulation is deemed to be the next business day after such 48th day); and (iii) if such motion to alter or amend is filed, or if an appeal is taken, three business days after a determination of any such motion or appeal that permits the consummation of the Settlement in substantial accordance with the terms and conditions of this Stipulation.

(c) "Quarter" means a period of three consecutive calendar months.

(d) For four consecutive Quarters, the first Quarter beginning on the first day of the month immediately following when this Order becomes Final, Defendants will send to Class Counsel written reports of all lawsuits filed and informal complaints any Defendant receives in writing which allege any Defendant's failure to either (a) properly identify themselves by their legal name in all telephone messages left for

consumers, (b) disclose that the call is from a non-attorney debt collector (unless a licensed attorney left the message), or (c) disclose that the call concerns the collection of a debt. These written reports will be sent to Class Counsel for receipt by the 10th day after the conclusion of each quarter.

(e) Class Counsel will be entitled to recover reasonable attorney fees and costs if Class Counsel brings and successfully prosecutes a proceeding in any court for violation of the injunction provided, however, that Class Counsel may not recover such fees unless either Class Counsel gives written notice of the allegations of such violation to Defendants' counsel at least 14 days before commencing any proceeding (so as to allow Defendants a reasonable opportunity to rebut the allegations and, possibly, avoid unnecessary litigation) or the Court concludes that the failure to give such notice was necessary to prevent the reasonable likelihood of immediate and irreparable harm.

(f) In accordance with R. 4:52-4, this injunction is binding upon Defendants, and such of their officers, agents, employees, and attorneys, and upon such persons in active concert or participation with them as receive actual notice of the order by personal service or otherwise.

(g) In any proceeding seeking relief based on Defendant's violation of this injunction, Defendant may not be held in violation if Defendant "shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. §1692k(c).

10. The Court retains jurisdiction over the interpretation, enforcement, and implementation of the

Agreement and this Final Order. Except as retained, all claims against all Defendants are dismissed with prejudice and without taxing costs.

HONORABLE EUGENE J. MC CAFFREY, JR., P.J.S.C.

Appearances:
Philip D. Stern, Esq. for Plaintiffs
Matthew P. O'Malley, Esq. for
Defendants

For the reasons stated on the record on 8/25/11.