PHILIP D. STERN & ASSOCIATES, LLC
697 Valley Street, Suite 2d
Maplewood, NJ 07040
(973) 379-7500
Attorney of Record: Philip D. Stern
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-000419-11

**NOTICE OF MOTION BY PLAINTIFFS FOR CLASS CLASS CERTIFICATION, APPOINTMENT OF CLASS CLOUNSEL, AND PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AGREEMENT with Proof of Service**

TO: Matthew O'Malley, Esq.
Tompkins, McGuire, Wachenfeld & Barry, LLP
Four Gateway Center
100 Mulberry Street, Suite 5
Newark, NJ 07102
Attorneys for all Defendants

Please take notice that on April 15, 2010 at 9:00 a.m., or as soon thereafter as counsel may be heard, the undersigned attorneys for Plaintiffs will move for an order certifying this action as a class action for settlement purposes, appointing Plaintiffs' counsel as class counsel,

and preliminarily approving the Class Action Settlement Agreement.

In support of this Motion, the Plaintiffs submit:

[1] Memorandum;

[2] Class Action Settlement Agreement (attached to the Memorandum as Exhibit A);

[3] proposed form of Judgment (attached to the Memorandum as Exhibit B);

[4] proposed form of published notice (attached to the Memorandum as Exhibit C);

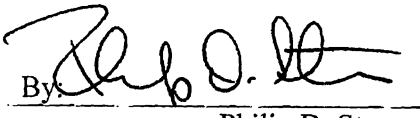
[5] proposed form of full class notice (attached to the Memorandum as Exhibit D); and

[6] proposed form of Certification Order.

Plaintiffs waive oral argument and consent to disposition on the papers unless there is opposition filed. As set forth in the Memorandum, Defendants consent to the form and entry of the proposed Order and, accordingly, Plaintiffs anticipate that Defendants will file papers indicating that they do not oppose this Motion.

Respectfully submitted,

Philip D. Stern & Associates, LLC
Attorneys for Plaintiffs

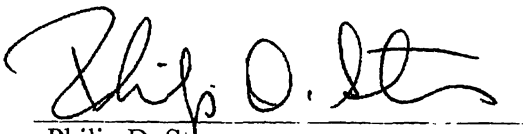
By: 
Philip D. Stern

Dated: March 29, 2011

PROOF OF SERVICE

In accordance with *R.* 1:5-3, I certify that the within pleading was served in accordance with *R.* 1:5-2, on the following attorney on the date set forth below and addressed to:

Matthew O'Malley, Esq.
Tompkins, McGuire, Wachenfeld & Barry, LLP
Four Gateway Center
100 Mulberry Street, Suite 5
Newark, NJ 07102


Philip D. Stern

Dated: March 29, 2011

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Defendants.

**SUPERIOR COURT OF NEW JERSEY**
**LAW DIVISION**
**GLOUCESTER COUNTY**

Civil Action

Docket No. GLO-L-000419-11

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR CLASS CERTIFICATION, APPOINTMENT OF CLASS COUNSEL, AND PRELIMINARY APPROVAL OF CLASS STIPULATION OF SETTLEMENT**

Plaintiffs, DOLORES M. KRUG, MARK A. CASTELLANO, DIANE L. HORTSMAN, JAMES J. HORTSMAN, DANE T. WOOD, LISA A. WOOD, (collectively, "CLASS REPRESENTATIVES" or "Plaintiffs"), move that the Court certify this action as a class action, appoint Plaintiffs as class representatives and Plaintiffs' attorneys as class counsel, preliminarily approve the proposed Stipulation of Settlement ("Stipulation"), direct notice to the class, and schedule a fairness hearing and Plaintiffs' fee application. In support of this Motion, Plaintiffs respectively show:

## A. MOTION TO CERTIFY CLASS AND APPOINT CLASS COUNSEL

### 1. NATURE OF THE CASE

1.1. This case asserts claims under the Fair Debt Collection Practices Act ("FDCPA" or "Act"), 15 U.S.C. §1692 et seq., by six consumers against a California debt collection lawyer and her firm based on the telephone messages left for approximately 1,000,000 consumers throughout the United States.

1.2. Rather than incur the time, expense and risks of continued litigation, the parties have agreed to settle their dispute as a class action and seek the Court's certification of the class and approval of the Stipulation. The settlement results in a greater recovery than Plaintiffs could have obtained had this matter proceeded on a contested basis and Plaintiffs were completely successful – the only exceptions are (a) there is no adjudication of liability as Defendants do not concede that issue, and (b) Plaintiffs' counsel fees would likely be much greater which, under the FDCPA's fee-shifting provisions, would have been chargeable to Defendants in a successful proceeding.

1.3. Attached as ***Exhibit A*** is a true copy of a Stipulation of Settlement ("Stipulation"). This Memorandum sets forth certain facts. Unless expressly stated otherwise, the facts asserted in this Memorandum are as alleged by Plaintiffs and, pursuant to the Stipulation, Defendants stipulate to them for settlement purposes only. The Stipulation will be deemed void and may not be used in this or any other action if the Court does not enter a final order approving the Stipulation in accordance with R. 4:32-2(e)(1)(C).

1.4. Plaintiff, DOLORES M. KRUG, is a natural person residing in the Township of Millville, Cumberland County, New Jersey.

1.5. Plaintiff, MARK A. CASTELLANO, is a natural person residing in the Township of Monroe, Gloucester County, New Jersey.

1.6. Plaintiff, DIANE L. HORTSMAN, is a natural person residing in the City of Inverness, Citrus County, Florida.

1.7. Plaintiff, JAMES J. HORTSMAN, is a natural person residing in the City of Inverness, Citrus County, Florida.

1.8. Plaintiff, DANE T. WOOD, is a natural person residing in the City of Wichita, Sedgwick County, Kansas.

1.9. Plaintiff, LISA A. WOOD, is a natural person residing in the City of Wichita, Sedgwick County, Kansas.

1.10. Defendant, ERICA L. BRACHFELD, A PROFESSIONAL CORPORATION doing business as LAW OFFICES OF BRACHFELD & ASSOCIATES ("BRACHFELD & ASSOCIATES") is a for-profit professional corporation with its principal office located in the City of Torrance, Los Angeles County, California. BRACHFELD & ASSOCIATES' is a collection law firm whose principal purpose is the collection of debts.

1.11. Defendant, ERICA L. BRACHFELD also known as ERICA L. SHUBIN ("SHUBIN"), is a natural person, residing in the City of Venice, Los Angeles County, California. SHUBIN is a principal of BRACHFELD & ASSOCIATES and engages in the collection of debts.

1.12. Plaintiffs' virtually identical claims were alleged in an action ("Federal Action") commenced in the United States District Court for the District of New Jersey on February 20, 2009. Plaintiffs and Defendants subsequently agreed that the present action be commenced in this Court and that the Federal Action be terminated. In connection with that

agreement, Plaintiffs and Defendants agreed that the one-year statute of limitations under 15 U.S.C. §1692k(d) would relate back to one year prior to the commencement of the Federal Action instead of one year prior to the commencement of the present action. Consequently, the parties agree that the Class Period commences on February 21, 2008.

1.13. Within the one year immediately preceding the commencement of the Federal Action, BRACHFELD & ASSOCIATES contacted each of the Plaintiffs and approximately 1,000,000 other consumers nationwide via telephone in an attempt to collect alleged debts. The telephone calls concerned debts allegedly assigned to Defendants and due from Plaintiffs to their respective original creditors arising from one or more transactions in which the money, property, insurance, or services which was the subject of the transaction was primarily for personal, family, or household purposes.

1.14. Within the one year immediately preceding the commencement of the Federal Action, each of the Plaintiffs received at least one "live" telephone voice message ("Messages") on their home answering machines and/or cellular phones. An example of a Message received by each Plaintiff appears in the Complaint at ¶¶90 through 95.

1.15. Plaintiffs allege that each of the Messages uniformly failed to provide meaningful disclosure of BRACHFELD & ASSOCIATES' identity as the caller; failed to disclose that the communication was from a debt collector; failed to disclose the purpose or nature of the communication (i.e., an attempt to collect a debt); and conveyed a false implication that the subject communication is from an attorney.

1.16. Substantially similar Messages left by BRACHFELD & ASSOCIATES on consumers' telephone answering devices number in excess of 1,000,000 throughout the United States.

1.17. Plaintiffs allege, among other things, that the Messages violated the provisions of the Fair Debt Collection Practices Act ("FDCPA"), specifically, 15 U.S.C. §1692d(6), 1692e(3) and 1692e(11).

1.18. Plaintiffs further allege, among other things, that the Messages violated provisions of the Florida Consumer Collection Practices Act ("FCCPA"), on behalf of residents in the State of Florida, specifically, Fla. Stat. §§ 559.72(7), 559.72(10), and 559.72(12).

1.19. Plaintiffs allege that the Class on whose behalf they have sued should recover the maximum statutory damages pursuant to 15 U.S.C. §1692k.

1.20. Plaintiffs therefore seek to certify as a settlement Class:

> 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 Defendants.

1.21. Under both the FDCPA and the FCCPA, Defendant's liability for statutory damages to the Class is "capped" at the lesser of $500,000 or 1% of Defendant's net worth. 15 U.S.C. §1692k. Defendants confirmed in discovery that they have a *negative* net worth of approximately -$21,645.23. Consequently, the maximum recovery if a Class were to be certified and the Class Representatives were to prevail on the merits would include: no statutory damages for the Class; $1,000 for each Plaintiff; reasonable attorney's fees and costs; and a discretionary incentive award for the Class Representatives. The results under the Stipulation far exceed the

maximum recovery under the FDCPA.

1.22. Defendants have denied liability to Plaintiffs, asserting the defenses set forth in the Answer filed in this action. The Stipulation excludes any adjudication as to liability.

1.23. The Stipulation provides that, if it is not approved then the parties retain all *status quo ante* rights which are preserved without prejudice or limitation, including setting aside the Class certification requested in this Motion.

1.24. Based upon the foregoing and all relevant circumstances, the parties jointly agree that the further conduct of this litigation would be protracted and expensive, and that it is desirable that this litigation be fully, finally and forever settled in the matter set forth in the Stipulation.

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

2.1. In New Jersey, class actions are liberally construed and are "permitted unless there is a clear showing that it is inappropriate or improper." Lusky v. Capasso Bros., 118 N.J. Super. 369, 373 (App. Div.) certif. denied, 60 N.J. 466 (1972). A class action is considered the superior method for adjudication of consumer-fraud claims and courts have been cautioned from withholding class certification in consumer-fraud cases where a plaintiff may be unable to demonstrate all the requisites and proof that the suit is manageable. Riley v. New Rapids Carpet Ctr., 61 N.J. 218, 225 (1972).

2.2. To maintain a class action, the class representative must satisfy the four prerequisites of R. 4:32-1(a). See, In re Cadillac v. V8-6-4 Class Action, 93 N.J. 412, 424-25 (1983). The purpose of class certification under the rule is to "save time and money for the parties and the public to promote consistent decisions for people with similar claims." In re: Cadillac, supra, 93 N.J. at 430.

2.3. Under R. 4:32-1(a), one or more members of a class may sue or be sued as representative parties 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 representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. These four elements are referred to simply as numerosity, commonality, typicality and adequacy.

2.4. All elements under R. 4:32-1(a) exist.

2.5. Numerosity: The members of the Class are so numerous, consisting of as many as 1,000,000 individuals, that joinder of all members is impracticable.

2.6. Commonality: There are common questions of law or fact affecting the Class, and these questions include but are not limited to Defendant's use of telephone calls in attempting to collect debts and whether the Messages violated of 15 U.S.C. §1692d(6), 1692e(3), and 1692e(11) and/or Fla. Stat. §§ 559.72(7), 559.72(10), and 559.72(12). The critical consideration is whether there is a "common nucleus of operative facts." Cadillac, supra, 93 N.J. at 431.

2.7. Typicality: Plaintiffs' claims are typical of the claims of the Class. Plaintiffs allege that they received one or more of the Messages. The members of the Class were also left Messages.

2.8. Adequacy: A named Plaintiff must be able to provide fair and adequate protection for the interests of the Class. That protection involves two factors: (a) a plaintiff's attorney must be qualified, experienced and generally able to conduct the proposed litigation; and (b) the plaintiff must not have interests antagonistic to those of the Class. Rosario v. Livaditis, 963 F.2d 1013, 1018 (7th Cir. 1992). See, also, Wetzel v. Liberty Mutual Ins. Co., 508

F.2d 239, 247 (3rd Cir. 1975); Lerwill v. Inflight Motion Pictures, Inc., 582 F.2d 507, 512 (9th Cir. 1978); In Re Alcohol Beverages Litigation, 95 F.R.D. 321 (E.D.N.Y. 1982). Plaintiffs contend that they will fairly and adequately represent the interests of the Class. They are members of the proposed Class and they have expressed interest in representing the Class. Through their attorney of record, the Plaintiffs have been willing to pay the costs of litigation. Plaintiffs represent to the Court that they have no interest adverse to other members of the Class. Plaintiffs have hired the undersigned attorney to represent them in this matter who has substantial experience in Class action litigation.

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

3.1. In addition to satisfying the requirements for numerosity, commonality, typicality and adequacy, under R. 4:32-1(b), an action may be maintained as a Class action only when at least one of the following conditions exist:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk either of :
>
> (A) 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, or
>
> (B) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) 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. The factors pertinent to the findings include:
>
> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the

class;
(C) the desirability or undesirability in concentrating the litigation of the claims in the particular forum; and
(D) the difficulties likely to be encountered in the management of a class action.

3.2. Plaintiffs seek Class certification under R. 4:32-1(b)(1) ("b1") and 4:32-1(b)(2) ("b2").

3.3. Defendants' use of the Messages is alleged to have affected all members of the Class. Inconsistent or varying adjudications with respect to individual members of the Class regarding the propriety and use of the Messages might establish incompatible standards of conduct for Defendants justifying certification under b1.

3.4. With regard to Defendants' alleged statutory violations under the FDCPA, Plaintiffs allege that Defendants acted on grounds generally applicable to the entire Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Class as a whole pursuant to b2. Plaintiffs have sought (and this settlement provides for) permanent, nationwide injunctive relief.

3.5. It is a common misunderstanding that the granting of monetary relief can only be achieved through an action certified under R. 4:32-1(b)(3). It is well-established, however, that monetary damages do not bar class certification under b2 when, like here, damages are deemed "incidental." Incidental does not mean minimal. Rather, damages are "incidental" when "the computation of damages is mechanical, 'without the need for individual calculation.'" In re Allstate Ins. Co., 400 F.3d 505, 507 (7th Cir. 2005) (citing decisions from the 5th, 9th and 11th Circuits and the Manual for Complex Litigation (Fourth)); and see, Drinkman v. Encore Receivable Mgmt., 2007 U.S. Dist. LEXIS 89514 (W.D. Wis. Dec. 3, 2007) (granting class certification in an FDCPA case under Fed.R.Civ.P. 23(b)(2), the Federal counterpart to b2).

3.6. The relief to be granted here is injunctive with incidental damages. Thus, certification under R. 4:32-2(b)(2) is appropriate.

3.7. Solely for the purposes of this settlement, Defendant does not dispute that the proposed Class should be certified.

4. **NOTICE**

4.1. Pursuant to R. 4:32-2(a) and 4:32-2(e)(1)(B), the Court may, but need not, require notice for a settlement class certified under b1 or b2. Based on the relief to be provided under the Stipulation, the Class will be deprived of nothing had this action been litigated and Plaintiffs were entirely successful. Indeed, this settlement provides substantial remedies far in excess of the best possible outcome through continued litigation. Thus, there is arguably no justification for notice.

4.2. Nevertheless, the parties have agreed to publish a notice in *U.S.A. Today*, a newspaper with national distribution so as to ensure that any objections to the Stipulation's fairness can be presented and considered by the Court provided that the cost of such publication does not exceed $12,500. Based on an estimate obtained assuming the proposed notice is approved, the cost of publication is not expected to exceed $12,500.

4.3. The proposed publication notice for the Court's approval is attached as ***Exhibit C*** which directs the reader to the reader's choice of an internet address, a website or a toll-free telephone number to obtain the class notice. The proposed class notice for the Court's approval is attached as ***Exhibit D***.

5. **APPOINTMENT OF CLASS COUNSEL**

5.1. Under the Stipulation of Settlement, the parties consent to the appointment of Philip D. Stern as Class counsel.

5.2. R. 4:32-2(a) requires the appointment of Class counsel when the Class is certified, 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:

> In appointing class counsel, the court must 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.

5.3. With respect to those factors, Plaintiffs submit:

(i) Plaintiffs' counsel has investigated the claims by reviewing the pertinent Messages and reviewing similar cases, including reviewing docket entries in cases filed in Federal Court asserting the same or similar claims against Defendant and other debt collectors;

(ii) Plaintiffs' counsel is experienced in handling class actions and complex litigation including, but not limited to, being certified as class counsel in four matters:

- Anderson v. Rubin & Rothman, LLC, U.S. District Court, Eastern District of New York, Case 2:07-cv-03375.
- Anderson v. Nationwide Credit, Inc., U.S. District Court, Eastern District of New York, Case 2:08-cv-0101634.
- Seraji v. Capital Management Services, LP, U.S. District Court, District of New Jersey, Case 1:09-cv-00767.
- Gravina v. Client Services, Inc., U.S. District Court, Eastern District of New York, Case 2:08-cv-03634.

(iii) Plaintiffs' counsel is knowledgeable in the Fair Debt Collection Practices Act as well as New Jersey practice including having filed approximately 69 actions in the last four years asserting claims under the FDCPA and filed in Federal district courts primarily in New Jersey but throughout the United States, and in the last three years, has 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; and

(iv) Plaintiffs' counsel has committed sufficient resources to fully prosecute this matter as a Class action in accordance with the terms of the Stipulation of Settlement.

**B. MOTION TO APPROVE SETTLEMENT**

**6. NATURE OF SETTLEMENT**

6.1. When a proposed class-wide settlement is reached, it must be submitted to the Court for approval. 2 H. Newberg & Conte, Newberg on Class Actions, (3d. ED. 1992) at Section 11.41, P. 11-87. Trial courts are afforded broad discretion in determining whether to approve a proposed class action settlement. See, Eichenholtz v. Brennan, 52 F.3d 478, 482 (3d. Cir. 1995); Girsh v. Jepson, 521 F.2d 153 (3d Cir. 1975). This discretion is conferred in recognition that "[e]valuation of [a] proposed settlement in this type of litigation... requires an amalgam of delicate balancing, gross approximations and rough justice." City of Detroit v. Grinnell Corp., 356 F. Supp. 1380, 1385 (S.D.N.Y.) aff'd in part and rev'd in part on other grounds, 495 F.2d 448 (2d. Cir. 1974).

6.2. Thus, this Court is now asked to ascertain whether the proposed Settlement is within a "range of reasonableness" which experienced attorneys could accept in light of the relevant risks of the litigation. See, Walsh v. Great Atlantic and Pacific Tea Co., 96 F.R.D. 632, 642 (D.N.J.) aff'd, 726 F.2d 956 (3d. Cir. 1983); see also, City of Detroit, 495 F.2d at 455. In determining what falls within this range, there is consideration of "the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion...". Newman v. Stein, 464 F.2d 689, 693 (2d. Cir.) cert. denied., 409 U.S. 1039 (1972).

6.3. Counsel for the parties represent to the Court that the proposed settlement was reached through extensive arms-length negotiations between the parties.

6.4. Plaintiffs and Defendants have agreed to a settlement of the suit on a class-wide basis. The terms of the settlement are set out in the Stipulation. The Stipulation provides substantial benefits.

6.5. If Plaintiffs were completely successful in prosecuting this action and awarded the maximum allowable recovery, the Court could grant $1,000 to each Plaintiff under 15 U.S.C. §1692k(a)(2)(A), nothing to the Class under 15 U.S.C. §1692k(a)(2)(B) because Defendants have a negative net worth, reasonable attorneys fees and costs under 15 U.S.C. §1692k(a)(3), and a discretionary incentive award to the Class Representatives.

6.6. In two significant respects, the relief under the Stipulation far exceeds any relief which Class members could receive had this action been successfully prosecuted as a Class action under the FDCPA or FCCPA.

6.6.1. Under 15 U.S.C. §1692k(a)(2)(B), the FDCPA allows for statutory damages awarded to the Class but limits the amount to

the lesser of $500,000 or 1% of Defendants' net worth which, in this case would limit the award to zero because Defendants have a negative net worth. Under the settlement, Defendants agreed to pay $25,000 as a *cy pres* payment to one or more charitable organizations without any religious or political affiliations due to the fact that the class size is so large as to render distribution impractical. The parties will, at the time of the Fairness Hearing, identify and jointly request that the Court approve the recipient(s) of the *cy pres* payment. If the Settling Parties are unable to agree on a joint request for the *cy pres* recipient(s), each party may propose recipients for the Court's approval.

6.6.2. The FDCPA does not expressly authorize injunctive or equitable relief in a private action such as this action and, the Third Circuit Court of Appeals concluded that such relief cannot be granted in a private action based on the FDCPA. Weiss v. Regal Collections, 385 F.3d 337, 342 (3rd Cir. 2004). Here, Defendants have consented to a permanent injunction complying with the law as argued by Plaintiffs together with a one-year reporting period to ensure Defendants' practices have changed. The prospective permanent injunction would provide:

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

debt.

> Counsel for Defendants will send 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 nonattorney 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 quarterly to Class Counsel to be received by the 10th day after the conclusion of each quarter for the year immediately following Ultimate Approval. 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.

6.7. Defendants will also pay $15,000 to the individual Plaintiffs, which represents each of them receiving $2,500.00 consisting of $1,000.00 for their statutory damages claims pursuant to 15 U.S.C. §1692k(a)(2)(B)(i), and $1,500.00 to be paid for their respective services on behalf of all the Class Members.

6.8. Plaintiffs' counsel intends to apply to the Court for an award of fees. Defendant has agreed, subject to approval of the Court, to pay the reasonable attorneys fees and expenses of Plaintiffs' attorney of up to $85,000.00. Plaintiff's attorney has agreed not to request an award of fees and costs in excess of $85,000.00 and Defendant has agreed not to oppose a request in that amount. Defendant has agreed not to request any award for fees or costs. In accordance with R. 4:32-2(h), the parties request that Class Counsel's fee application be heard by way of motion returnable at the same time as the Fairness Hearing and that notice be to the

parties. For purposes of that Motion, Plaintiffs are the prevailing parties and $85,000, being based on a combination of lodestar (with respect to relief permitted under the FDCPA) and common fund (with respect to the value of the relief obtained in excess of that available under the FDCPA), represents a fair and reasonable fee.

6.9. Upon Final Judgment, Defendants will be fully, finally and completely released of all liability to the Plaintiffs and, except for those liabilities reserved or arising from the Stipulation, to the Class.

6.10. Recognizing that a settlement represents an exercise of judgment by the negotiating parties, courts have consistently held that the function of a judge reviewing a settlement is neither to rewrite the Stipulation reached by the parties nor to try the case for resolving the issues intentionally left unresolved. Bryan v. Pittsburgh Plate Glass Co., 494 F. 2d 799, 804 (3d. Cir.) cert. denied., 419 U.S. 900 (1974); see also, Officers for Justice v. Civil Services Comm'n of San Francisco, 688 F.2d 615, 625 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983); Grunin v. International House of Pancakes, 513 F.2d 114, 123-24 (8th Cir.) cert. denied, 423 U.S. 864 (1975). A settlement represents the result of a process by which opposing parties attempt to weigh and balance the factual and legal issues that neither side chooses to risk taking to final resolution. Courts, therefore, have given considerable weight to the views of experienced counsel as to the merits of a settlement. See, Cotton v. Hinton, 559 F.2d 1316, 1330 (5th Cir. 1977); City of Detroit, 495 F.2d at 462; see also Lake v. First Nationwide Bank, 900 F. Supp. 726, 732 (E.D. Pa. 1995) ("Significant weight should be attributed to the belief of experienced counsel that settlement is in the best interest of the Class") (citation omitted); Fisher Bros. v. Cambridge-Lee Indus., Inc., 630 F. Supp. 482, 487 (E.D. Pa. 1985); In re: Baldwin-United Corp. Single Premium Deferred Annuities, Ins. Litig., 607 F. Supp. 1312, 1320 (S.D.N.Y.

1985); Oppenlander v. Standard Oil Co., 64 F.R.D. 597, 624 (D. Colo. 1974)("[c]ourts have consistently refused to substitute their business judgment for that of counsel, absent evidence of fraud or over reaching...").

6.11. Here, experienced counsel firmly believe that the settlement, as structured and contemplated by the parties, represents an educated and eminently reasonable resolution of the dispute. An evaluation of the relevant factors demonstrates that the settlement, including the provision for the award of attorney's fees pursuant to statutory fee-shifting principals, fits well within the range of reasonableness and should be approved.

6.12. Absent the settlement, a lengthy and expensive trial would certainly ensue. Extensive trial preparation on both sides would be necessary and it would be reasonable to expect appeals from any result reached. Moreover, the Plaintiffs anticipated filing a Motion for Class Certification shortly in the litigation and Defendants would have responded with a response in opposition to that Motion as well as a Motion for Summary Judgment and/or Motion for Judgment on the Pleadings. These items were not reached in anticipation of settlement and would otherwise be before the Court. Avoidance of this unnecessary expenditure of time and resources benefits all parties. See, In re General Motors Pick-Up Trust Fuel Tank Products Liab. Litig., 55 F.3d 768, 812 (3rd Cir.), cert. denied, 516 U.S. 824 (1995) (concluding that lengthy discovery and ardent opposition from the defendant with "a plethora of pre-trial motions" where facts favoring settlement, which offers immediate benefits and avoids delay and expense).

6.13. The parties estimate that a trial of this litigation would have lasted at least several days with the possibility that it could run longer depending upon the need for and length of expert testimony. The expense of such a trial and the use of judicial resources and the resources of the parties would have been substantial. Moreover, in light of the highly contested

nature of every aspect of the case, it is likely that any judgment entered would have been the subject of post-trial motions and appeals, further prolonging the litigation and reducing the value of any recovery. Thus, a settlement is advantageous to all concerned.

6.14. The risks of being unable to certify a class if this matter were contested also substantiates the reasonableness of the settlement. Injunctive relief is not available under the FDCPA in a private action. Weiss, supra. Thus, a purely monetary class judgment would have to proceed under R. 4:32-2(b)(3). The Court could determine that a *de minimis* individual recovery undermines the superiority requirement for certification as a "b3" class or that, in light of a minimal recovery, the costs of administration would be so great as to render the class unmanageable. Thus, it is by no means certain that the Class would be certified or, if certified, not decertified during trial or on appeal.

6.15. An appeal could also seriously and adversely affect the scope of an ultimate recovery, if not the recovery itself. See, Backman v. Polaroid Corp., 910 F.2d 10 (1st Cir. 1990) (class won a jury verdict and a Motion for Judgment N.O.V. was denied but on appeal the judgment was reversed and the case dismissed); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2nd Cir. 1979), cert. denied, 444 U.S. 1093 (1980) (reversal of multi-million dollar judgment obtained after protracted trial); Transworld Airlines v. Hughes, 312 F. Supp. 478, 485 (S.D.N.Y. 1970), modified, 449 F.2d 51 (2nd Cir. 1971), rev'd. 409 U.S. 363, 366 (1973) ($145 million judgment overturned after years of litigation and appeals). While Plaintiffs are confident of their ability to prevail at trial, no final adjudication has been made as to the validity of their claims. Plaintiffs also recognize that Defendants have continued to deny all liability and allegations of wrongdoing and some or all of Plaintiffs' claims could be dismissed in connection with a filing of dispositive motions, and others filed, were the case to continue.

6.16. In light of the serious risks of an uncertain result as to both questions of fact and law, the value of the proposed settlement substantially outweighs the mere possibility of future relief.

6.17. The Settlement here comes only after pursuing sufficient pre-trial discovery so that all parties and the Court are able to assess its fairness adequately. The debt collection violations asserted in the Complaint on behalf of the Class stem primarily from the wording of voice mail or answering machine messages employed by Defendants. As such, extensive discovery was unnecessary. As a result of the parties efforts, the litigation had reached a stage where "the parties certainly [had] a clear view of the strengths and weaknesses of their cases" In re Warner Communications Sec. Litig., 618 F. Supp. 735, 745 (S.D.N.Y. 1985), aff'd, 798 F.2d 35 (2d Cir. 1986).

6.18. While Plaintiffs believe that they could present clear and convincing testimony on the damages question and obtain a judgment for the full amount of damages available to them and the Class, it is certainly not inconceivable that the court might disagree with the Plaintiffs as to factual findings or conclusions of law. These risks further underscore the reasonableness of the settlement.

6.19. Plaintiffs and Defendants have negotiated a settlement with an overall value far greater than that achievable had Plaintiffs succeeded in a contested case.

6.20. Given the nature of the hard-fought settlement discussions in the case and that the monetary and equitable relief exceeds that which would be available were this case litigated, it is apparent that the consideration to be made under the settlement represents an excellent resolution for the Class.

6.21. The Plaintiffs have obtained a substantial benefit for the Class. This

settlement allows Plaintiffs to avoid the risks described above and insures a substantial and immediate benefit to those members of the Class. Plaintiffs believe the proposed settlement is well within the range of reasonableness and should be approved.

## C. FINAL JUDGMENT

### 7. JUDGMENT

7.1. Plaintiffs further request that, upon completion of the Fairness Hearing, the Court enter Final Judgment giving effect to the Stipulation. A proposed form of Final Judgment is submitted with this Motion and attached as ***Exhibit B***.

## D. CONDITIONS OF SETTLEMENT AND NON-APPROVAL

### 8. CONDITIONS OF SETTLEMENT AND NON-APPROVAL

8.1. Pursuant to the Stipulation, class action certification is conditioned upon the following:

(a) Final approval of the Stipulation of Settlement;

(b) A final judgment which includes the permanent injunction as set forth in the Stipulation;

(c) The accuracy of the representations and warranties contained in the Stipulation of Settlement;

(d) The receipt by Plaintiffs of all documents reasonably required to implement the Stipulation of Settlement.

8.2. If any one of the foregoing conditions is not met as required by the Stipulation of Settlement, the parties agree that, upon motion to the Court, the Court will then decertify the Class. If the settlement is not ultimately approved, the parties agree that the Court will then dissolve *ab initio* certification of the Class and all of the *status quo ante* rights of the

parties shall be restored including, but not limited to, Defendants' right to oppose certification of a class and/or the merits of Plaintiffs' claims on any grounds legal or equitable, and nothing in this Memorandum or other papers in support of this Motion will be used in favor or against any party with respect to the claims and defenses or any issue concerning class certification.

8.3. The parties stipulate that any failure of the Court to approve the settlement shall not operate as a waiver of the claims or defenses of any of the parties on the issue of certification at any such contested hearing.

**E. PRECEDENT**

**9. GRAVINA v. UNITED COLLECTION BUREAU, INC., United States District Court for the Eastern District of New York, Case 2:09-cv-04816.**

9.1. The Gravina Court approved a class settlement against a debt collector for leaving voice messages which were alleged to not meaningfully identify the caller, state the purpose of the call, or disclose that the caller was a debt collector.

9.2. A copy of the filed settlement agreement is attached as ***Exhibit E*** and a copy of the Final Order is attached as ***Exhibit F***.

9.3. The settlement there involved terms substantially similar to the terms in this action – if anything, the terms here are more favorable to the class. In particular:

9.3.1. $2,500 to each plaintiff representing $1,000 for their statutory damages claim and $1,500 for their services as a class representative – here, the payment to the Plaintiffs is also $2,500;

9.3.2. $26,508.02 in statutory damages for the class (representing 2% of the defendant's net worth) paid as a *cy pres* to eleemosynary institutions – here, Defendant has agreed to pay $25,000, also as a *cy pres* payment, although 1% of Defendant's net worth is zero;

9.3.3. An injunction against future violations – here, Defendant agrees to this injunction but also to quarterly reporting for one year so as to verify compliance;

9.3.4. Counsel fees of $90,000 – here, the parties have agreed to $85,000.

9.3.5. Class certification under Fed.R.Civ.P. 23(b)(2) – here, certification would be under R. 4:32-2(b), New Jersey's counterpart to that Federal rule; and

9.3.6. Notice to the class by a one-time publication in a newspaper with national circulation – here, the proposed notice is by the same method but adds internet publication.

9.3.7. The Class released all claims against the defendant arising from messages left by defendant – here, the Class provides a similar release but preserves the right of class members to bring a claim for actual damages.

**10. HECHT v. UNITED COLLECTION BUREAU, United States District Court for the District of Connecticut, 2011 U.S. Dist. LEXIS 22840 (March 8, 2011).**

10.1. Hecht attempted to avoid the *res judicata* effect of Gravina.

10.2. Attached, as ***Exhibit G***, is a copy of the decision in which the court dismissed the collateral attack and concluded that notice was proper, did not violate due process, and there was no basis to conclude that the settlement was not fair, reasonable or adequate.

**WHEREFORE**, Plaintiffs request that the Court enter an Order:

1. Certifying that this action may proceed as a class action for settlement purposes as set forth in the Stipulation of Settlement, including defining the Class and the Class claims;

2. Appointing Plaintiffs as representatives of the Class and Plaintiffs' attorney as Class Counsel;

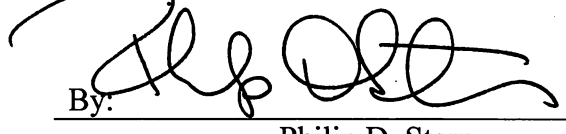
3. Approving, subject to a hearing pursuant to R. 4:32-2(e)(1)(C), the proposed Stipulation of Settlement;

4. Scheduling the Fairness Hearing pursuant to R. 4:32-2(e)(1)(C), as well as the return date for Plaintiffs' motion pursuant to R. 4:32-2(h) for attorney's fees and costs and providing for notice of that motion; and

5. Such other and further relief, both at law and in equity, to effectuate the terms of the Stipulation of Settlement.

Respectfully submitted,

Philip D. Stern & Associates, LLC
Attorneys for Plaintiffs



By: _____
Philip D. Stern

Dated: March 29, 2011

***Exhibit A to Memorandum***

PHILIP D. STERN & ASSOCIATES, LLC
697 Valley Street, Suite 2d
Maplewood, NJ 07040
(973) 379-7500
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,<br><br>Plaintiffs,<br><br>vs.<br><br>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,<br><br>Defendants. | **SUPERIOR COURT OF NEW JERSEY LAW DIVISION – ESSEX COUNTY**<br><br>Civil Action<br><br>Docket No. ESX-L-6366-10<br><br>**STIPULATION OF SETTLEMENT** |

This Stipulation of Settlement ("Stipulation") is made and entered into by and among the Settling Parties[1] to the Action, as those terms are defined herein, between: (i) Class Representatives, on behalf of themselves and each of the Class Members, by and through Class Counsel; and (ii) the Defendants, by and through their respective counsel of record in this Action. This Stipulation is intended by the Settling Parties to fully, finally, and forever resolve,

[1] As used in this Stipulation, capitalized terms have the meanings set forth in Section 1.

discharge, and settle all released rights and claims, as set forth below, subject to the terms and conditions set forth herein.

## RECITALS

**A. Parties.** The parties to this Stipulation are, on the one hand, the Defendants, ERICA L. BRACHFELD, A PROFESSIONAL CORPORATION doing business as LAW OFFICES OF BRACHFELD & ASSOCIATES, and ERICA L. BRACHFELD also known as ERICA L. SHUBIN ("Defendants"), and, on the other hand, Plaintiffs, DOLORES M. KRUG, MARK A. CASTELLANO, DIANE L. HORSTMAN, JAMES J. HORSTMAN, DANE T. WOOD and LISA A. WOOD (collectively, the "Class Representatives"), and a Class, as defined herein.

**B. Nature of Litigation.**

1. Class Representatives filed the above-captioned Action asserting claims under the federal Fair Debt Collection Practices Act, 15 U.S.C. §§1692, *et seq.* ("FDCPA") on behalf of a proposed class consisting of all residents of the United States who received a message left by Defendants on a telephone answering device that did not identify the Defendants by name as the caller, state the purpose or nature of the communication, did not disclose that the message was left by a debt collector, or which falsely implied that the communication was from an attorney.
2. On February 20, 2009, the Class Representatives (excluding Mark A. Castellano but including Richard Gravina) commenced an action ("Federal Action") in the United States District Court for the District of New Jersey designated in that court as Case 1:09-cv-00767.

3. On June 17, 2009, an Amended Complaint was filed in the Federal Action which, among other things, added Mark A. Castellano as a Plaintiff.
4. On July 31, 2009, Defendants filed their Answer and Affirmative Defenses to the Federal Action, generally denying Plaintiffs' claims of negligence and/or wrongdoing and putting Plaintiffs to their proofs.
5. On July 27, 2010, the parties in the Federal Action filed a Stipulation of Dismissal With Prejudice as to the claims of Richard Gravina and filed a Stipulation of Dismissal Without Prejudice which anticipated that this Complaint would be filed. The Plaintiffs and Defendants have conceptually agreed, subject to the Court's approval, to resolve this action on a class basis in this Court. Included in that Stipulation was Defendant's waiver of the statute of limitations except to the extent such defense existed with respect to the Federal Action; consequently, the Class period will begin one year prior to the commencement of the Federal Action.
6. Class Representatives have further asserted claims under the Florida Consumer Collection Practices Act, Fla. Stat. §§ 559, *et seq.* ("FCCPA") on behalf of a proposed class consisting of all residents of the State of Florida who received a message left by Defendants on a telephone answering device that did not identify the Defendants by name as the caller, state the purpose or nature of the communication, did not disclose that the message was left by a debt collector, or which falsely implied that the communication was from an attorney, within one year of the date the action was filed and up through and including the date of preliminary certification of the proposed Class. Class Representatives contend

that Defendants violated the FDCPA and FCCPA by using the above-described messages in connection with their attempt to collect alleged debts.

C. **Class Representatives' Desire to Settle Claims.** With the assistance of legal counsel and after considering the risks, delay, and difficulties involved in establishing a right to recovery in excess of that offered by this Settlement and the likelihood that the litigation will be further protracted and expensive, Class Representatives desire to settle this Action in accordance with this Stipulation of Settlement. Class Representatives believe that the claims asserted in the Action have merit and that there is substantial evidence to support their claims. Class Representatives, however, recognize and acknowledge the expense and length of continued litigation and legal proceedings necessary to prosecute the Action against Defendants through trial and through any appeals. Class Representatives also recognize and have taken into account the uncertain outcome and risks associated with litigation in general, and the Action in particular, as well as the difficulties and delays inherent in any such litigation. Class Representatives are also mindful of the potential problems of proof and the possible defenses to the unlawful conduct alleged by Class Representatives in the Action, as well as the remedies they seek. As a result, Class Representatives believe that the Settlement set forth in this Stipulation provides substantial benefits to Class Members, secures certain consideration and retains important individual rights for Class Members. Class Representatives and Class Counsel have, therefore, determined that the Settlement, as set forth in this Stipulation, is fair, reasonable, adequate, and in the best interests of the Class.

D. **Defendants' Denial of Wrongdoing.** Defendants have denied, and continue to deny, each and every claim and allegation of wrongdoing that has been alleged by Class Representatives in the Action. Defendants have also denied, and continue to deny, *inter alia*, any

allegations that Class Representatives or Class Members have suffered any damage whatsoever, have been harmed in any way, or are entitled to any relief as a result of any conduct on the part of Defendants as alleged by Class Representatives in the Action.

**E.** **Defendants' Desire to Settle Claims.** Nevertheless, Defendants have concluded that further litigation will entail risks, will likely be protracted and expensive with uncertain results, that settlement of the Action is, therefore, advisable to permit the operation of the Defendants' business without further litigation expenses and the distraction of executive personnel, and that it is, therefore, desirable and prudent that the Action between Class Representatives Plaintiff, Class Members, and Defendants be fully and finally resolved and settled in the manner and upon the terms and conditions set forth in this Stipulation.

**F.** **Class Size.** Defendants have made certain admissions during discovery to Class Counsel concerning the number of class members; specifically, that it is impractical to calculate the number of Class Members however there exists a pool of potential members of the Class which exceeds 1,000,000 individuals.

**G.** **Net Worth.** The Settling Parties acknowledge that the FDCPA and FCCPA each limit class recovery of statutory damages to the lesser of $500,000.00 or 1% of the Defendants' net worth. Defendants have made certain admissions to Class Counsel concerning Defendants' net worth. Specifically, Defendants have confirmed in discovery that they have a *negative* net worth of approximately $-21,645.23, making $0.00 the maximum amount of statutory damages that could be recovered if a litigation class were to be certified and the Class Representatives were to prevail on the merits at trial and on appeal.

**H.** ***De Minimis* Class Recovery.** Based on the size of the Class and the maximum class recovery of statutory damages permitted by law, payment to each Class Member of his or

her *pro rata* share of $0.00 in statutory damages would be *de minimis* and, therefore, impractical.

I. **Investigation by Counsel.** Class Counsel has investigated the facts available to him and has researched the relevant law applicable to the Class Representatives' claims.

J. **Recommendation of Counsel.** Based upon the foregoing, and upon a rigorous analysis of the benefits which this Agreement affords to Class Members, Class Counsel considers it to be in the best interest of the Class to enter into this Stipulation of Settlement.

K. **Court Approval.** The Settling Parties acknowledge that Court approval is necessary. Pursuant to New Jersey Court Rules 4:32-1(b)(1)(B) and 4:32-1(b)(2), no notice of the Settlement is required; however, Class Members and Defendants have agreed to place a summary advertisement notifying Class Members of the Settlement in a weekday edition of *USA Today* at least two weeks before the Court's hearing to determine that the Settlement is fair, reasonable, and adequate. Class Members will have an opportunity to opt-out of, or object to, the Settlement. In addition, after affording the opportunity for making any objections, the Court will hold a hearing to determine that the Settlement is fair, reasonable, and adequate. The Settling Parties acknowledge that this Agreement will be Exhibit A to the Class Representatives' Motion For Preliminary Approval of Class Settlement Agreement.

## TERMS

**NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED** to, by and among the Class Representatives (for themselves and all Class Members) and the Defendants, for themselves, and through their respective counsel, that the Action is finally and fully compromised, settled, and released, the Action will be dismissed as to all parties, and the claims of the Settling Parties will be released, subject to the terms and conditions of this Stipulation, and subject to the Final Approval Order.

## 1. DEFINITIONS

As used in this Stipulation:

1.1 "Action" means the captioned civil action.

1.2 "Court" means the Superior court of New Jersey, Law Division, Essex County.

1.3 "Defendants" mean ERICA L. BRACHFELD, A PROFESSIONAL CORPORATION doing business as LAW OFFICES OF BRACHFELD & ASSOCIATES, and ERICA L. BRACHFELD also known as ERICA L. SHUBIN, individually and in her official capacity, and each of those Defendants' 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.

1.4 "Defendants' Counsel" means counsel of record for the Defendants.

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

1.6 "FCCPA" means the Florida Consumer Collection Practices Act, Fla. Stat. §§ 559, *et seq*.

1.7 "Final" means when the last of the following with respect to the Final Approval Order approving this Stipulation has occurred: (i) the expiration of three business days after the time to file a motion to alter or amend the Final Approval 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 the Final Approval Order has passed without any appeal having been filed (which date shall be deemed to be 48 days following the entry of the Final Approval 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.

1.8 "Final Approval" means the approval of this Stipulation and the Settlement by the Court at or after the Final Fairness Hearing, and entry of the Final Approval Order.

1.9 "Final Approval Order" means the order entered by the Court giving Final Approval of this Stipulation and dismissing all claims.

1.10 "Final Fairness Hearing" means the hearing pursuant to R. 4:32-2(e)(1)(C) at which this Stipulation and the Final Approval Order are presented by the Settling Parties for Final Approval and entry by the Court.

1.11 "Preliminary Approval" means the preliminary approval of this Stipulation by the Court and conditional certification of the Plaintiff Class.

1.12 "Settlement" means the settlement entered into by the Settling Parties as set forth and embodied by this Stipulation.

1.13 "Class" means 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 Defendants by name as the caller, state the purpose or nature of the communication, disclose that the communication was from a debt collector, or which falsely implied that the communication was from an attorney, and which message was left after one-year immediately preceding the filing of the initial complaint up through and including the date of order granting preliminary certification of the Class.

1.14 "Class Counsel" means counsel of record for the Class Representatives.

1.15 "Class Member" means a person who falls within the definition of the Class as defined in Section 1.13 of this Stipulation.

1.16 "Class Period" means the period extending from one year immediately prior to the filing of the initial complaint in the Federal Action up through and including the date of Final Approval.

1.17 "Class Representatives" means Dolores M. Krug, Mark A. Castellano, Diane L. Horstman, James J. Horstman, Lisa A. Wood, and Dane T. Wood.

1.18 "Settlement Fund" means the amount paid by Defendants pursuant to Section 2.3.

1.19 "Settling Parties" means, collectively, the Defendants and the Class Representatives on behalf of themselves and all Class Members.

1.20 "Stipulation" means this Stipulation of Settlement.

1.21 "Ultimate Approval" means that the Final Approval Order has become Final.

1.22 "Unknown Claims" means all claims, demands, rights, liabilities, and causes of action for damages arising out of, or relating to, claims involving the identical factual predicate alleged in the Action, which any person does not know or suspect to exist in his, her, or its favor at the time of the release of claims which, if known by him, her, or it, might have affected his, her, or its settlement and release of claims for damages. With respect to any and all claims for damages, the Settling Parties stipulate and agree that, upon Ultimate Approval, all Settling Parties will have expressly waived and, by operation of the Final Approval Order, each of the Class Members will be deemed to have waived the provisions, rights and benefits of California Civil Code § 1542, which provides:

> A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of

executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.

The Settling Parties acknowledge, and the Class Members shall be deemed by operation of the Final Approval Order to have acknowledged, that the foregoing waiver was separately bargained for and a key element of the Settlement of which this release is a part.

## 2. TERMS OF THE SETTLEMENT

In consideration of the foregoing and the mutual promises and obligations under this Stipulation, it is stipulated and agreed by and between Class Representatives, Class Counsel, Defendants, and counsel for the Defendants that, subject to the approval of the Court, the Action be and hereby is settled upon the following terms and conditions:

2.1 **Effective Date.** This Settlement will be effective when it becomes Final.

2.2 **Certification of Class**. Defendants stipulate to the certification, under R. 4:32-1(b)(1)(B) and 4:32-1(b)(2), of the Class.

2.3 **Settlement Fund.** Defendants will pay the total sum $125,000.00 to be allocated as follows:

(a) *Class Representatives' Individual Relief.* $15,000 which represents each Class Representative receiving $2,500.00, consisting of $1,000.00 to be paid from the Settlement Fund as statutory damages pursuant to 15 U.S.C. §1692k(a)(2)(B)(i), and $1,500.00 to be paid from the Settlement Fund in recognition for their respective services to the Class Members.

(b) *Class Relief.* $25,000.00, which represents more than the maximum class recovery permitted under the FDCPA and FCCPA (i.e., 1% of Defendants' net worth which is less than zero), will be paid from the Settlement Fund as a *cy pres* payment to one or more charitable organizations without any religious or political affiliations. The

Settling Parties will, at the time of the Final Fairness Hearing, identify and jointly request that the Court approve the recipient(s) of the *cy pres* payment. If the Settling Parties are unable to agree on a joint request for the *cy pres* recipient(s), each party may propose recipients for the Court's approval.

(c) *Counsel Fees.* Class Counsel shall be entitled to receive up to $85,000.00 from the Settlement Fund, which is intended to cover all fees and expenses arising out of this lawsuit including prospective fees associated with services to be provided in overseeing the implementation of the Injunction. Class Counsel will accept the amount of fees and expenses awarded by the Court in full satisfaction of reasonable attorney's fees and costs and will not request additional fees from Defendants, Class Representatives, or any Class Member. Defendants will not oppose or cause to be opposed an attorney fee application, so long as such application does not exceed $85,000.00. Any fee and expense application, any fee and expense award, and any and all matters related thereto, is not be considered part of this Stipulation, and is to be considered by the Court separately from the Court's consideration of the fairness, reasonableness, and adequacy of the Settlement, and will not operate to terminate or cancel this Stipulation or Settlement, and will not affect or delay the finality of any Final Approval Order approving this Stipulation and the Settlement of the Action. Nevertheless, Defendants stipulate that the full amount of $85,000.00 is fair and reasonable under the circumstances including, without limitation, the overall benefit to the Class and Class Representatives from this Stipulation, Class Counsel's prospective services with respect to the Injunction (see Section 2.5), Class Counsel's willingness to place a "cap" on fees and costs, Class Counsel's willingness to provide services beginning with the work necessary to commence the Federal Action

through the time of payment without receipt of any compensation, and Class Counsel's undertaking of the risk that compensation for services might never be paid even if the claims were successfully prosecuted.

2.4 **Payment.** Within ten calendar days after Final Approval, Defendants will deliver the sum of $125,000.00 to Philip D. Stern & Associates, LLC, payable to "Philip D. Stern, Attorney Trust Account". Upon delivery of these funds, Class Counsel agrees to indemnify and hold Defendants, their agents, servants, employees, officers, directors, attorneys, and insurers harmless with respect to Defendants' payment obligations under this Agreement. Upon delivery of the funds, no person will have a claim against Defendants based on, arising from, or relating to the distribution of benefits from the Settlement Fund. Class Counsel will hold all Settlement Funds in trust and make no disbursements until three calendar days after Ultimate Approval. Thereafter, Class Counsel will have 21 calendar days to disburse the Settlement Funds in accordance with this Stipulation and will provide Defendants' counsel with proof of distribution of the *cy pres* settlement funds.

2.5 **Injunctive Relief.** Defendants consent to the entry of a stipulated injunction mandating that Defendants use their "best efforts" to ensure that they identify themselves by their legal name in all telephone messages left for consumers, and that they further disclose the call is from a non-attorney debt collector (unless a licensed attorney has left the message) and that the call concerns the collection of a debt. As part of the injunction, counsel for Defendants will send 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 [Phil - can this be quarterly? Monthly seems onerous] to Class Counsel to be received by the 10th day after the conclusion of each quarter for the year immediately following Ultimate Approval. 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.

2.6 **Notice.** In connection with the Preliminary Approval, the Settling Parties will request that a short-form notice be approved by the Court for publication once in *USA Today* which will include information on how to obtain from Class Counsel a copy of a long-form notice to be approved by the Court, the Motion For Class Certification and Preliminary Approval of Class Settlement Agreement described in Paragraph 6 (which includes this Stipulation), the Complaint and the Answer. Under no circumstances shall Defendants be liable for notice costs in excess of $12,500.

## 3. RELEASE AND RETENTION OF CERTAIN RIGHTS AND CLAIMS.

All releases in this Stipulation are void if the Settlement does not receive Ultimate Approval. The releases in this Section are conditioned upon Defendants' full performance of all their obligations under this Stipulation, including reasonable confirmatory discovery, the scope

of which defendants reserve the right to object to and petition this Court or another court of competent jurisdiction for appropriate relief.

3.1 **Class Representatives**: Upon Final Approval of the Settlement, Class Representatives will be deemed to have released, and by operation of the Final Approval Order will have fully, finally, and forever released, relinquished and discharged 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 relating to Defendants' use of messages on telephone answering devices.

3.2 **Other Class Members**. Pursuant to R. 4:32-1(b)(1)(B) and 4:32-1(b)(2), upon Final Approval of the Settlement, all Class Members will be deemed to have released, and by operation of the Final Approval Order shall have fully, finally, and forever released, relinquished, and discharged Defendants and Defendants' Related Parties 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 Action 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, if any.

**4. RELEASE OF ATTORNEY'S LIEN.**

In consideration of the Settlement, Class Counsel hereby waives, discharges and releases Defendants, their officers, directors, shareholders, agents, employees, attorneys, heirs, successors, beneficiaries, parents, subsidiaries, representatives, divisions, affiliates, customers, clients, and assigns of and from any and all claims for attorneys' fees and costs, by lien or otherwise, for legal services rendered by Class Counsel in connection with the Action. Class

Counsel further represents and certifies that no other person is entitled to any sum for attorney's fees and costs in connection with the Action, and the undersigned attorneys agrees to indemnify, defend, and save harmless Defendants and their officers, directors, shareholders, agents, employees, attorneys, heirs, successors, beneficiaries, parents, subsidiaries, representatives, divisions, affiliates, clients, customers, and assigns, from any claim for attorney's fees and costs in connection with this Action.

**5. EFFECT OF DISAPPROVAL, CANCELLATION OR TERMINATION.**

5.1 If the Settlement does not receive Ultimate Approval, then the Settlement and this Stipulation becomes null and void; the effects of such event include, without limitation, that the Defendants will not be prejudiced in any way from opposing the certification of a class or classes in the Action or in any other litigation, and Class Counsel will return the Settlement Funds to Defendants. The Defendants expressly state that they would oppose class certification were the matter not to be settled. The Settling Parties acknowledge that the possibility of a grant or denial of class certification is one of the risks being compromised as part of the Settlement. Further, the Settlement Funds will be returned to the Defendants if an Order of the Court granting Final Approval to the Settlement is overturned on appeal, and a revised settlement is not submitted to the Court within 180 days following such appeal.

5.2 If the Settlement does not receive Ultimate Approval, or this Stipulation is terminated, or fails to become effective in accordance with its terms, the Settling Parties and the Class Members will be restored to their respective positions in the Action as of the business day immediately preceding the signing of this Stipulation.

## 6. PRELIMINARY APPROVAL.

As soon as practical after the execution of this Agreement, Class Counsel will file a Motion For Class Certification and Preliminary Approval of Class Settlement Agreement ("Motion"), which will include a copy of this Agreement attached to the Motion as Exhibit A and will seek entry of the Preliminary Approval Order including:

(a) Defining the Class;

(b) Defining the Class Claims;

(c) Appointing Class Counsel;

(d) Preliminary approval of this Settlement;

(e) Directing notice to the Class as set forth in this Agreement, including approval of the form of notice; and

(f) Setting a date for the Final Fairness Hearing to finally determine whether the settlement is fair, reasonable, and adequate.

## 7. MISCELLANEOUS PROVISIONS

7.1 The Settling Parties acknowledge that it is their intent to consummate this Settlement and agree to cooperate fully with one another in taking whatever steps are necessary and appropriate to complete the Settlement, including seeking both Preliminary, Final, and Ultimate Approval of the Settlement, and to use their best efforts to effectuate the full performance of the terms of the Settlement, and to protect the Settlement by applying for appropriate orders enjoining others from initiating or prosecuting any action arising out of or related to the facts or claims alleged in the Action, if so required.

7.2 To the extent that any disputes or issues arise with respect to documenting the Settlement, the Settling Parties agree to use their best efforts to informally resolve any such

disputes or issues; but, if any such dispute or issue cannot be resolved informally, to bring any such dispute or issue to the Court for resolution.

7.3 The Settling Parties intend the Settlement to be a final and complete resolution of all disputes between them with respect to the Action, except as specifically provided for in this Stipulation. The Settlement compromises claims which are contested and will not be deemed an admission by any Settling Party as to the merits of any claim or defense. The Settling Parties agree that the amount paid to the Settlement Fund and the other terms of the Settlement were negotiated at all times at arm's length and in good faith by the Settling Parties, and reflect a settlement that was reached voluntarily after consultation with competent and experienced legal counsel.

7.4 Neither this Stipulation nor the Settlement, nor any act performed or document executed pursuant to or in furtherance of this Stipulation or the Settlement:

(a) is, or may be deemed to be, or may be used as an admission or evidence of, the validity of any claims asserted in the Action, or of any wrongdoing or liability on the part of Defendants; or

(b) is, or may be deemed to be, or may be used as an admission or evidence of any fault or omission of the Defendants in any civil, criminal, or administrative proceeding in any court, administrative agency, or other tribunal. Defendants may file this Stipulation and/or the Final Approval Order in any action that has been or may be brought against them in order to support a defense or counterclaim based on principles of *res judicata*, collateral estoppel, release, good faith settlement, judgment bar, reduction, or any other theory of claim preclusion or issue preclusion, or any similar defense or counterclaim.

7.5 No person will have any claim against Class Counsel based on distribution of benefits made substantially in accordance with this Stipulation or any related Court order.

7.6 This Stipulation may be amended or modified only by a written instrument signed by Defendants' Counsel and Class Counsel, or their respective successors-in-interest.

7.7 This Stipulation constitutes the entire agreement among the Settling Parties, and no representations, warranties, or inducements have been made to any Settling Party concerning this Stipulation, other than those contained here. This Stipulation replaces and voids any and all previous agreements concerning the settlement of the Action. Except as provided for with respect to Class Counsels' Fees, each Settling Party bears its own costs.

7.8 Class Counsel, on behalf of the Class, is expressly authorized by Class Representatives to take all appropriate action required or permitted to be taken by the Plaintiff Class pursuant to this Stipulation to effectuate its terms, and also are expressly authorized to enter into any modifications or amendments to this Stipulation on behalf of the Class that they deem necessary or appropriate.

7.9 Each attorney executing this Stipulation on behalf of any Settling Party warrants that such attorney has the full authority to do so.

7.10 This Stipulation may be executed in one or more counterparts. All executed counterparts and each of them shall be deemed to be one and the same instrument. Facsimile signatures will be deemed originals provided that the attorney offering the facsimile signature certifies, in accordance with R. 1:4-4(c), that the signatory acknowledged the genuineness of the signature and the page with the original signature will be provided if requested by the Court. A complete set of executed counterparts shall be filed with the Court.

7.11 This Stipulation is binding upon, and inures to the benefit of, the successors and assigns of the Settling Parties.

7.12 The Court retains jurisdiction with respect to implementation and enforcement of the terms of this Stipulation, and the Settling Parties submit to the jurisdiction of the Court for purposes of implementing and enforcing the Settlement embodied in this Stipulation including enforcement of the Injunction. The Settling Parties will present the Court with proposed Orders that allow for such retention of jurisdiction, in accordance with applicable law.

7.13 This Stipulation will be considered to have been negotiated, executed and delivered, and to be wholly performed, in the State of New Jersey, and the rights and obligations of the parties to this Stipulation will be construed and enforced in accordance with, and governed by the internal, substantive, laws of the State of New Jersey without giving effect to the State's choice-of-law principles.

7.14 Class Counsel represent that they have no other individual clients who have currently engaged them to pursue claims brought in the Action against Defendants.

7.15 If any Settling Party commences any action arising out of this Stipulation, including, without limitation, any action to enforce or interpret this Stipulation, the prevailing party or parties in such action will be entitled to recover its reasonable attorneys' fees and other expenses incurred in such action. Any award of attorneys' fees and costs in this Action will not be computed according to any court schedule, but, instead, will be in such amount as to fully reimburse all attorneys' fees and costs actually incurred in good faith, regardless of the size of the judgment, as it is the intention of all Settling Parties to compensate fully the prevailing party for all attorneys' fees and costs paid or incurred in good faith.

**IN WITNESS WHEREOF**, the Settling Parties hereto, acting by and through their respective counsel of record, have so agreed.

**Defendants:**

ERICA L. BRACHFELD, A PROFESSIONAL CORPORATION doing business as LAW OFFICES OF BRACHFELD & ASSOCIATES

By: _____
[PRINT NAME AND TITLE BELOW SIGNATURE]

Dated: October ___, 2010

_____
ERICA L. BRACHFELD also known as ERICA L. SHUBIN
Dated: October ___, 2010

**Plaintiffs:**

_____
DOLORES M. KRUG
Dated: October ___, 2010

_____
MARK A. CASTELLANO
Dated: October ___, 2010

_____
DIANE L. HORSTMAN
Dated: October ___, 2010

_____
JAMES J. HORSTMAN
Dated: October ___, 2010

_____
DANE T. WOOD
Dated: October ___, 2010

_____
LISA A. WOOD
Dated: October ___, 2010

**IN WITNESS WHEREOF**, the Settling Parties hereto, acting by and through their respective counsel of record, have so agreed.

**Defendants:**
ERICA L. BRACHFELD, A PROFESSIONAL CORPORATION doing business as LAW OFFICES OF BRACHFELD & ASSOCIATES

By: _____
[PRINT NAME AND TITLE BELOW SIGNATURE]

Dated: October ___, 2010

_____
ERICA L. BRACHFELD also known as ERICA L. SHUBIN
Dated: October ___, 2010

**Plaintiffs:**

Dolores M. Krug
DOLORES M. KRUG
Dated: October 7, 2010

_____
MARK A. CASTELLANO
Dated: October ___, 2010

_____
DIANE L. HORSTMAN
Dated: October ___, 2010

_____
JAMES J. HORSTMAN
Dated: October ___, 2010

_____
DANE T. WOOD
Dated: October ___, 2010

_____
LISA A. WOOD
Dated: October ___, 2010

**IN WITNESS WHEREOF**, the Settling Parties hereto, acting by and through their respective counsel of record, have so agreed.

**Defendants:**
ERICA L. BRACHFELD, A PROFESSIONAL CORPORATION doing business as LAW OFFICES OF BRACHFELD & ASSOCIATES

By: _____
[PRINT NAME AND TITLE BELOW SIGNATURE]

Dated: October 19, 2010

ERICA L. BRACHFELD also known as ERICA L. SHUBIN
Dated: October ___, 2010

**Plaintiffs:**

_____
DOLORES M. KRUG
Dated: October ___, 2010

_____
MARK A. CASTELLANO
Dated: October 10, 2010

_____
DIANE L. HORSTMAN
Dated: October ___, 2010

_____
JAMES J. HORSTMAN
Dated: October ___, 2010

_____
DANE T. WOOD
Dated: October ___, 2010

_____
LISA A. WOOD
Dated: October ___, 2010

**IN WITNESS WHEREOF**, the Settling Parties hereto, acting by and through their respective counsel of record, have so agreed.

**Defendants:**
ERICA L. BRACHFELD, A PROFESSIONAL CORPORATION doing business as LAW OFFICES OF BRACHFELD & ASSOCIATES

By: _____
[PRINT NAME AND TITLE BELOW SIGNATURE]

Dated: October 19, 2010

ERICA L. BRACHFELD also known as ERICA L. SHUBIN
Dated: October ___, 2010

**Plaintiffs:**

DOLORES M. KRUG
Dated: October ___, 2010

MARK A. CASTELLANO
Dated: October ___, 2010

DIANE L. HORSTMAN
Dated: October 8, 2010

JAMES J. HORSTMAN
Dated: October 8, 2010

DANE T. WOOD
Dated: October ___, 2010

LISA A. WOOD
Dated: October ___, 2010

**IN WITNESS WHEREOF**, the Settling Parties hereto, acting by and through their respective counsel of record, have so agreed.

**Defendants:**

ERICA L. BRACHFELD, A PROFESSIONAL CORPORATION doing business as LAW OFFICES OF BRACHFELD & ASSOCIATES

By: _____
[PRINT NAME AND TITLE BELOW SIGNATURE]

Dated: October ___, 2010

_____
ERICA L. BRACHFELD also known as ERICA L. SHUBIN
Dated: October ___, 2010

**Plaintiffs:**

_____
DOLORES M. KRUG
Dated: October ___, 2010

_____
MARK A. CASTELLANO
Dated: October ___, 2010

_____
DIANE L. HORSTMAN
Dated: October ___, 2010

_____
JAMES J. HORSTMAN
Dated: October ___, 2010

Dane T. Wood
DANE T. WOOD
Dated: October 7, 2010

Lisa A. Wood
LISA A. WOOD
Dated: October 7, 2010

**Attorneys for Defendants:**
TOMPKINS, MCGUIRE, WACHENFELD & BARRY, LLP

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Telephone: (973) 622-3000
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Dated: October 28, 2010

**Attorneys for Plaintiffs:**
PHILIP D. STERN & ASSOCIATES, LLC

Philip D. Stern
697 Valley Street, Suite 2D
Maplewood, NJ 07040-2642
Telephone: (973) 379-7500
Facsimile: (973) 532-0866
Dated: October 10, 2010

***EXHIBIT B TO MEMORANDUM***

PHILIP D. STERN & ASSOCIATES, LLC
697 Valley Street, Suite 2d
Maplewood, NJ 07040
(973) 379-7500
Attorney of Record: Philip D. Stern
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,<br><br>Plaintiffs,<br><br>vs.<br><br>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,<br><br>Defendants. | **SUPERIOR COURT OF NEW JERSEY**<br>**LAW DIVISION**<br>**GLOUCESTER COUNTY**<br><br>Civil Action<br><br>Docket No. GLO-L-6366-10<br><br>**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 _____ in accordance with the Court's Order dated April 15, 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 in discovery that its net worth is 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 paying for 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 is negative, 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 imminently fair, reasonable and adequate.

5. **COUNSEL FEES**

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 Plaintiffs' application for fees and costs submitted in accordance with R. 4:32-2(h) and R. 4:42-9, the Court finds that $85,000 fairly represents the value of the services provided by Class Counsel.

6. **OBJECTIONS AND OPT-OUTS**

6.01. [REVISE AS APPROPRIATE:] 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 _____ DAY OF _____, 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): _____.

5. The Court approves the award of attorneys' fees and costs to Settlement Class co-counsel as provided for in the Stipulation 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.

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. McCAFFREY, JR., J.S.C.

## ***EXHIBIT C TO MEMORANDUM***

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

TO: All persons who received from BRACHFELD & ASSOCIATES a telephonic voice message from February 21, 2008 to April 15, 2011:

YOU ARE HEREBY NOTIFIED that a proposed class action settlement has been preliminarily approved by the court in *Dolores M. Krug, et al. v. Erica L. Brachfeld, A Professional Corporation, et al.*, Docket No. GLO-L-000419-11 (Superior Court of New Jersey, Law Division, Gloucester County). The plaintiffs claim that defendants violated consumers' rights when leaving messages on consumers' telephone answering devices. Defendants deny liability and asserted defenses. *The Court has not made any decision concerning the merits of the lawsuit.* Your rights may be affected by the settlement.

For further information regarding the settlement and your rights, including information on how to exclude yourself from the Class or object to the terms of the settlement agreement, please do one of the following:

1. Point your internet browser to: http://www.PhilipStern.com/files/BrachfeldFullNotice.pdf
2. 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 "Brachfeld & Associates" heading.
3. Send a request by email to: BrachfeldFullNotice@PhilipStern.com
4. Call toll-free (888) 609-3859 and follow the instructions to leave a message with either your email address or your postal mailing address.
5. Write to Class Counsel in sufficient time to be received by [DATE WHICH IS 3 BUSINESS 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

***EXHIBIT D TO MEMORANDUM***

| | |
|---|---|
| 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,<br>Plaintiffs,<br><br>vs.<br><br>ERICA L. BRACHFELD, A PROFESSIONAL CORPORATION doing business as LAW OFFICES OF BRACHFELD & ASSOCIATES, a California Corporation; and ERICA L. BRACHFELD also known as ERICA L. SHUBIN, individually and in her official capacity,<br>Defendants. | **SUPERIOR COURT OF NEW JERSEY**<br>**LAW DIVISION**<br>**GLOUCESTER COUNTY**<br><br>Civil Action<br><br>Docket No. GLO-L-000419-11<br><br>**NOTICE OF CLASS ACTION**<br>**AND**<br>**PROPOSED SETTLEMENT** |

TO: **All persons who received from BRACHFELD & ASSOCIATES a telephonic voice message from February 21, 2008 to April 15, 2011:**

**THIS IS NOT A NOTICE OF A LAWSUIT AGAINST YOU.**
**YOU MAY BENEFIT FROM READING THIS NOTICE.**

## WHAT THIS LAWSUIT IS ABOUT

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 ("Plaintiffs") filed an action in the Superior Court of New Jersey, Law Division, Gloucester County alleging class action claims against ERICA L. BRACHFELD, A PROFESSIONAL CORPORATION doing business as LAW OFFICES OF BRACHFELD & ASSOCIATES, a California Corporation, and ERICA L. BRACHFELD also known as ERICA L. SHUBIN, individually and in her official capacity ("Defendants"). On behalf of a class, Plaintiffs alleged that Defendants used false, deceptive and misleading means while attempting to collect alleged personal debts in violation of the Fair Debt Collection Practices Act ("FDCPA").

Defendants denied liability and have raised a number of defenses. The Court has not made any decision concerning the merits of the lawsuit. The Defendants have negotiated a proposed settlement agreement ("Agreement").

On April 15, 2011 the Honorable Eugene J. McCaffrey, Jr., J.S.C. (i) determined that this action should proceed as a class action with respect to the claims of the class described above

against Defendants, with Plaintiffs acting as the representative of the class, and (ii) granted preliminary approval of the settlement, subject to a Fairness Hearing which will take place on _____, 2011 at _____.m. at the Gloucester County Courthouse, 1 North Broad Street, Woodbury, New Jersey.

This notice explains the nature of the lawsuit and the terms of the settlement, and informs you of your legal rights and obligations.

## NO ADMISSION OF LIABILITY

By settling this lawsuit, Defendants do not admit that they did anything wrong. Defendants deny any wrongdoing.

## THE PROPOSED SETTLEMENT

The attorneys for the class believe that this settlement is fair, reasonable, adequate and in the best interests of the class members. A summary of the terms of the settlement are as follows:

1. **Payment to each class member and each Plaintiff**. No direct payment will be tendered to any individual class member. Based upon limitations set forth in the FDCPA, the Court may not award more than 1% of Defendant's net worth to the class. Defendant has provided information reflecting a negative net worth which would limit the award to zero. Nevertheless, Defendants agreed to pay $25,000.00, which in excess of the maximum damages recoverable under the FDCPA. There are over 1,000,000 members of the class. Therefore, it is not economical or feasible to divide and distribute $25,000.00 among more than 1,000,000 total class members. Instead, the Defendant will provide a "*cy pres*" payment to one or more charitable organizations to be approved by the Court at the Fairness Hearing. In addition, the Plaintiffs will each receive $1,000.00 in statutory damages for their individual claims against Defendants, and $1,500.00 in recognition for their services as class representatives.

2. **Release**.
   (a) On the Effective Date of the Agreement, Plaintiffs will be deemed to release and forever discharge the Released Parties from all causes of action, controversies, actions, demands, torts, damages, costs, attorneys' fees, moneys due on account, obligations, judgments, alleged violations of the FDCPA and liabilities of any kind whatsoever in law or equity, arising out of the Agreement or imposed by federal or state statute, common law or otherwise, from the beginning of time to the date the Agreement is signed, whether or not known now, anticipated, unanticipated, suspected or claimed, fixed or contingent, whether yet accrued or not and whether damage has resulted from such or not.
   (b) On the Effective Date of the Agreement, each member of the Class including the Plaintiffs, but excluding those who timely filed with the Clerk of this Court a request to be excluded from the Class, is deemed to release and forever discharge the Released Parties from the Class Claims from the beginning of time to the date of the Preliminary Approval Order except that each member of the Class may bring any action against Defendant to recover any actual damages which the member may have suffered.

(c) "Released Parties" means Defendants and Defendants' successors, predecessors, assignees, and current and former officers, directors, shareholders, and employees.

3. **Injunction.** Under current interpretation of the FDCPA, the FDCPA does not authorize the imposition of an injunction against Defendants. Nevertheless, Defendants have consented to the imposition of an injunction. Specifically, Defendants consent to the entry of a stipulated injunction mandating that Defendants use their "best efforts" to ensure that they identify themselves by their legal name in all telephone messages left for consumers, and that they further disclose the call is from a non-attorney debt collector (unless a licensed attorney has left the message) and that the call concerns the collection of a debt. To ensure compliance with the injunction, counsel for Defendants will send 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 quarterly to Class Counsel to be received by the 10th day after the conclusion of each quarter for the year immediately following Ultimate Approval.

4. **Attorney's Fees and Expenses**. Subject to approval by the Court, Defendants will pay counsel for the class the sum of $85,000.00 for their fees and expenses. None of the fees or expenses will come out of the *cy pres* payment or payment to the named Plaintiffs.

## OPINION OF CLASS COUNSEL CONCERNING THE VALUE OF THE SETTLEMENT

The complaint in this lawsuit alleged that the Defendant used false, deceptive and misleading means when attempting to collect consumer debts in violation of the FDCPA.

In an FDCPA class action, the maximum possible recovery is (i) any actual damages suffered by the class members and (ii) an amount as the Court shall assess, based upon the culpability of the defendant's conduct and the amount of harm caused by the defendant, not exceeding the lesser of $500,000.00 or 1% of the defendant's net worth.

If the alleged violations were established in an individual action, the Plaintiffs would have a right to recover (i) any actual damages suffered and (ii) an amount as the Court shall assess, based upon the culpability of the defendant's conduct and the amount of harm caused by the defendant, not exceeding $1,000.00. Of course, Plaintiffs would only have these rights if they prevailed, which cannot be assured.

Class counsel believes that the payment provided for by this settlement is fair and reasonable and that the class members should accept this settlement. While it is possible that someone could recover more in an individual case if it is brought and is successful, individual suits under the FDCPA are sometimes not economical and, therefore, difficult to find competent legal counsel to prosecute the claim. In addition, Defendants have denied that they have violated the FDCPA, and the Court has not ruled on the merits of the lawsuit. Therefore, a person who elects to opt out of the action might recover nothing.

You do not have to do anything further if you do not wish to object to this settlement or if you do not wish to opt out of this settlement. If you have any questions regarding this settlement please contact the class counsel listed below.

## FAIRNESS HEARING

On _____, 2011 ("Fairness Hearing Date") at _____.m., a hearing will be held on the fairness of the proposed settlement. At the hearing, the Court will be available to hear any objections and arguments concerning the fairness of the proposed settlement. **The hearing will take place before the Honorable Eugene J. McCaffrey, Jr., J.S.C., Gloucester County Courthouse, 1 North Broad Street, Woodbury, New Jersey.** The Court may adjourn the Fairness Hearing to a later date but no additional notice will be provided to the Class however Class Counsel will give notice by regular mail to all class members who timely filed a written objection.

## WHAT CAN YOU DO

You have three choices:

1. Opt Out. You have the right to exclude yourself from both the class action and the settlement. If you choose to do this, you **must** do four things:
   (a) put your request in writing,
   (b) **no later than** ___(2 business days before Fairness Hearing Date)___**, 2011,** file that written request with the Deputy Clerk of the Superior Court of New Jersey, Gloucester County Civil Division, 1 North Broad Street, Woodbury, NJ 08096,
   (c) **no later than** ___(2 business days before Fairness Hearing Date)___**, 2011**, serve a copy of that written request upon Philip D. Stern, Esq. at his law office address listed below, and
   (d) **no later than** ___(2 business days before Fairness Hearing Date)___**, 2011,** serve a copy of that written request upon Defendants' attorney, Matthew O'Malley, Esq. at his law office listed below.

   *Note: Unless you intend to pursue your claim on an individual basis, there is no benefit to excluding yourself. If you exclude yourself from the class, you will have no right to object to the settlement because the settlement will not be binding on you.*

2. Object. If you object to the settlement, you **must** do four things:
   (a) put your objection in writing including a statement of the reasons why you believe that the Court should find that the proposed settlement is not in the best interests of the class,
   (b) **no later than** ___(2 business days before Fairness Hearing Date)___**, 2011,** file that written objection with the Deputy Clerk of the Superior Court of New Jersey, Gloucester County Civil Division, 1 North Broad Street, Woodbury, NJ 08096,
   (c) **no later than** ___(2 business days before Fairness Hearing Date)___**, 2011,** serve a copy of that written objection upon Philip D. Stern, Esq. at his law office address listed below, and

(d) **no later than** ___(2 business days before Fairness Hearing Date)___**, 2011,** serve a copy of that written request upon Defendant's attorney, Matthew O'Malley, Esq. at his law office listed below.

*Note: If you object, you should plan to appear at the Fairness Hearing so that your objection can be properly considered by the Court.*

2. Do Nothing. If you do not want to exclude yourself and do not want to object to the settlement, it is not necessary for you to take any action.

**IMPORTANT: THE COURT REQUIRES THAT ANY REQUESTS FOR EXCLUSION OR OBJECTIONS BE RECEIVED BY THE CLERK NO LATER THAN** ___(2 business days before Fairness Hearing Date)___**, 2011. IF YOU MAIL A REQUEST FOR EXCLUSION OR OBJECTION, YOU BEAR THE RISK OF ANY PROBLEM WITH THE MAILS.**

## ATTORNEYS

ATTORNEYS FOR THE PLAINTIFFS AND THE CLASS

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

ATTORNEYS FOR THE DEFENDANTS

Matthew O'Malley, Esq.
Tompkins, McGuire, Wachenfeld & Barry, LLP
Four Gateway Center
100 Mulberry Street, Suite 5
Newark, NJ 07102

## WHAT YOU SHOULD KNOW

If you wish, you may consult with an attorney (at your expense), exclude yourself from the case, or file objections, as described above. You also have the right to file an appearance in the case.

This notice is only a summary of the terms of the settlement. You may inspect the entire settlement agreement, which is on file with the Deputy Clerk of the Superior Court of New Jersey, Gloucester County.

IF YOU RECEIVED A DISCHARGE OF YOUR DEBT IN CHAPTER 7 BANKRUPTCY, this notice does not affect your discharge. IF YOU ARE CURRENTLY A

DEBTOR IN CHAPTER 13 BANKRUPTCY, send a copy of this notice to your bankruptcy attorney.

**DO NOT ADDRESS ANY QUESTIONS ABOUT THE SETTLEMENT OR THE LITIGATION TO THE CLERK OF THE COURT OR TO THE JUDGE.** They are not permitted to answer your questions.

If the settlement is not approved, the case will proceed as if no settlement had been reached. Defendant will retain its rights to contest whether this case should be maintained as a class action and the merits. **There can be no assurance that if the settlement is not approved, the class will recover more than is provided in this settlement.**

This description of the case is general and does not cover all of the issues and proceedings thus far. In order to see the complete file, you should visit the office of the Deputy Clerk of the Superior Court of New Jersey, Gloucester County Civil Division, 1 North Broad Street, Woodbury, NJ 08096. The Clerk will make the files relating to this lawsuit available to you for inspection and copying at your own expense. You may also obtain a copy online at http://www.philipstern.com/ClassActions.html.

**THIS NOTICE WAS APPROVED BY THE COURT**

***Exhibit E to Memorandum***

# EXHIBIT "A"

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

| | |
|---|---|
| JOANN GRAVINA, an individual; ANTHONY FELIX, an individual; on behalf of themselves and all others similarly situated,<br><br>Plaintiffs,<br><br>vs.<br><br>UNITED COLLECTION BUREAU, INC., an Ohio Corporation; and JOHN AND JANE DOES NUMBERS 1 THROUGH 25,<br><br>Defendants. | CASE NO.: 2:09-cv-04816-LDW-AKT<br><br>**STIPULATION OF SETTLEMENT** |

This Stipulation of Settlement dated as of July 30, 2010 ("Stipulation"), is made and entered into by and among the following Settling Parties to the Action, as those terms are defined herein:[1] (i) Settlement Class Representative Plaintiffs, on behalf of themselves and each of the Settlement Class Members, by and through Settlement Class Counsel; and (ii) the Defendant, by and through its counsel of record in this Action. This Stipulation is intended by the Settling Parties to fully, finally, and forever resolve, discharge, and settle all released rights and claims, as set forth below, subject to the terms and conditions set forth herein.

## RECITALS

A. **Parties.** The parties to this Stipulation are, on the one hand, the Defendant, UNITED COLLECTION BUREAU, INC. ("Defendant"), and, on the other hand, the Settlement Class Representative Plaintiffs, JOANN GRAVINA and ANTHONY FELIX, and a Settlement Class, as defined herein.

[1] As used in this Stipulation, capitalized terms shall have the meanings and definitions set forth in Section 1 hereof.

**B. Nature of Litigation.** Settlement Class Representative Plaintiffs filed the above-captioned Action asserting claims under the federal Fair Debt Collection Practices Act, 15 U.S.C. §§1692, *et seq.* ("FDCPA") on behalf of a proposed class consisting of all residents of the United States who received a message left by Defendant on a telephone answering device that did not identify the Defendant by name as the caller, state the purpose or nature of the communication, or did not disclose that the message was left by a debt collector within one year of the date the action was filed and up through and including the date of preliminary certification of the proposed settlement class.

Settlement Class Representative Plaintiff, ANTHONY FELIX, has further asserted claims under the California Rosenthal Fair Debt Collection Practices Act, Cal. Civ. Code §§ 1788 *et seq.* ("RFDCPA") on behalf of a proposed class consisting of all residents of the State of California who received a message left by Defendant on a telephone answering device that did not identify the Defendant by name as the caller, state the purpose or nature of the communication, or did not disclose that the message was left by a debt collector within one year of the date the action was filed and up through and including the date of preliminary certification of the proposed settlement class.

Settlement Class Representative Plaintiffs contend that Defendant violated the FDCPA and RFDCPA by using the above-described messages in connection with their attempt to collect alleged debts.

**C. Defendant's Denial of Wrongdoing and Desire to Settle Claims.** Defendant has denied, and continues to deny, each and every claim and allegation of wrongdoing that has been alleged by Settlement Class Representative Plaintiffs in the Action. Defendant also has denied, and continues to deny, *inter alia*, any allegations that Settlement Class Representative Plaintiffs or Settlement Class Members have suffered any damage whatsoever, have been harmed in any

way, or are entitled to any relief as a result of any conduct on the part of Defendant as alleged by Settlement Class Representative Plaintiffs in the Action.

Nevertheless, Defendant has concluded that further litigation will entail risks, will likely be protracted and expensive with uncertain results, that settlement of the Action is, therefore, advisable to permit the operation of the Defendant's business without further litigation expenses and the distraction of executive personnel, and that it is, therefore, desirable and prudent that the Action between Settlement Class Representatives Plaintiffs, Settlement Class Members, and Defendant be fully and finally resolved and settled in the manner and upon the terms and conditions set forth in this Stipulation.

D. **Settlement Class Representative Plaintiffs' Desire to Settle Claims.** With the assistance of legal counsel and after considering the risks, delay, and difficulties involved in establishing a right to recovery in excess of that offered by this Settlement and the likelihood that the litigation will be further protracted and expensive, Settlement Class Representative Plaintiffs desire to settle this Action in accordance with this Stipulation of Settlement.

Settlement Class Representative Plaintiffs believe that the claims asserted in the Action have merit and that there is substantial evidence to support their claims. Settlement Class Representative Plaintiffs, however, recognize and acknowledge the expense and length of continued litigation and legal proceedings necessary to prosecute the Action against Defendant through trial and through any appeals. Settlement Class Representative Plaintiffs also recognize and have taken into account the uncertain outcome and risks associated with litigation in general, and the Action in particular, as well as the difficulties and delays inherent in any such litigation. Settlement Class Representative Plaintiffs are also mindful of the potential problems of proof and the possible defenses to the unlawful conduct alleged by Settlement Class Representative Plaintiffs in the Action, as well as the remedies they seek. As a result, Settlement Class

Representative Plaintiffs believe that the Settlement set forth in this Stipulation provides substantial benefits to Settlement Class Members, secures certain consideration and retains important individual rights for Settlement Class Members. Settlement Class Representative Plaintiffs and Settlement Class Counsel have, therefore, determined that the Settlement, as set forth in this Stipulation, is fair, reasonable, adequate, and in the best interests of the Settlement Class.

E. **Class Size.** Defendant has made certain representations to Settlement Class Counsel concerning the number of class members; specifically, that it is impractical to calculate the number of Settlement Class Members. However, Defendant has made further representations to Settlement Class Counsel that there exists a pool of potential Settlement Class Members, which exceeds 2,000,000 people. This information is subject to confirmatory discovery by the Settling Parties.

F. **Net Worth.** The Settling Parties acknowledge that the FDCPA and RFDCPA each limits class recovery of statutory damages to the lesser of $500,000.00 or 1% of the Defendant's net worth. Defendant has made certain representations to Settlement Class Counsel concerning Defendant's net worth. Specifically, Defendant made representations that its net worth is approximately, $1,325,401.00. Thus, $26,508.02 would be the maximum amount of statutory damages that could be recovered if a litigation class was certified and the Settlement Class Representative Plaintiffs were to prevail on the merits at trial and on appeal (i.e. $13,254.01 for claims under the FDCPA, and $13,254.01 for claims under the RFDCPA).

G. ***De Minimis* Class Recovery.** Based on the size of the Settlement Class and the maximum class recovery of statutory damages permitted under the FDCPA and RFDCPA, payment to each Settlement Class Member of his or her *pro rata* share of statutory damages would be *de minimis* and, therefore, impractical.

H. **Investigation by Counsel.** Settlement Class Counsel have investigated the facts available to them and have researched the relevant law applicable to their claims.

I. **Recommendation of Counsel.** Based upon the foregoing, and upon a rigorous analysis of the benefits which this Agreement affords to Settlement Class Members and the promotion of the policies of the FDCPA and the RFDCPA, Settlement Class Counsel considers it to be in the best interest of the Settlement Class to enter into this Stipulation of Settlement.

J. **Court Approval.** The Settling Parties acknowledge that Court approval is necessary. Pursuant to Rules 23(b)(1)(B) and 23(b)(2) of the Federal Rules of Civil Procedure, no notice of the Settlement is required; however, Settlement Class Members and Defendant have agreed to place a summary advertisement notifying Settlement Class Members of the Settlement in a weekday edition of *USA Today* at least two weeks before the Court's hearing to determine that the Settlement is fair, reasonable, and adequate. Settlement Class Members will have an opportunity to opt-out of, or object to, the Settlement. In addition, after affording the opportunity for making any objections, the Court will hold a hearing to determine that the Settlement is fair, reasonable, and adequate. The Settling Parties acknowledge that this Agreement will be Exhibit A to the Settlement Class Representative Plaintiffs' Motion For Preliminary Approval of Class Settlement Agreement.

## TERMS

**NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED** to, by and among the Settlement Class Representative Plaintiffs (for themselves and all Settlement Class Members) and the Defendant, for themselves, and through their respective counsel, that the Action shall be finally and fully compromised, settled, and released, the Action shall be dismissed as to all parties, and the claims of the Settling Parties shall be released, subject to the

terms and conditions of this Stipulation, and subject to the Final Approval Order approving this Stipulation as "Final" as defined herein.

**1. DEFINITIONS**

As used in this Stipulation, the following terms shall have the following definitions and meanings:

1.1 "Action" means the lawsuit captioned as *JOANN GRAVINA, an individual; and ANTHONY FELIX, an individual; on behalf of themselves and all others similarly situated vs. UNITED COLLECTION BUREAU, INC., an Ohio Corporation; and JOHN AND JANE DOES NUMBERS 1 THROUGH 25*, which is currently pending in the Eastern District of New York and bearing Case Number 2:09-cv-04816-LDW-AKT.

1.2 "Court" means the United States District Court for the Eastern District of New York.

1.3 "Defendant" means UNITED COLLECTION BUREAU, INC. and each of Defendant's past or present officers, directors, partners, agents, employees, attorneys, accountants or auditors, consultants, legal representatives, predecessors, successors, assigns, parents, subsidiaries, divisions, and any entity that controls the Defendant.

1.4 "Defendant's Counsel" means counsel of record for the Defendant.

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

1.6 "RFDCPA" means the California Rosenthal Fair Debt Collection Practices Act, Cal. Civ. Code §§ 1788 *et seq.*

1.7 "Final" means when the last of the following with respect to the Final Approval Order approving this Stipulation has occurred: (i) the expiration of three business days after the time to file a motion to alter or amend the Final Approval Order under Federal Rule of Civil

Procedure 59(e) has passed without any such motion having been filed; (ii) the expiration of three business days after the time in which to appeal the Final Approval Order has passed without any appeal having been filed (which date shall be deemed to be 33 days following the entry of the Final Approval Order, unless the date to take such an appeal shall have been extended by Court order or otherwise, or unless the 33rd day falls on a weekend or a Court holiday, in which case the date for purposes of this Stipulation shall be deemed to be the next business day after such 33rd 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.

1.8 "Final Approval" means the approval of this Stipulation and the Settlement by the Court at or after the Final Fairness Hearing, and entry of the Final Approval Order.

1.9 "Final Approval Order" means the order entered by the Court giving Final Approval of this Stipulation and dismissing all claims.

1.10 "Final Fairness Hearing" means the hearing at which this Stipulation and the Final Approval Order are presented by the Settling Parties for Final Approval and entry by the Court.

1.11 "Preliminary Approval" means the preliminary approval of this Stipulation by the Court and conditional certification of the Settlement Class.

1.12 "Settlement" means the settlement entered into by the Settling Parties as set forth and embodied by this Stipulation.

1.13 "FDCPA Settlement Class" means all persons with addresses in the United States of America who received a voice message left by Defendant on a telephone answering device, or who engaged in a telephone communication with Defendant, wherein the Defendant failed to identify itself by its company name as the caller, state the purpose or nature of the

communication, or disclose that the communication was from a debt collector and which message was left after one-year immediately preceding the filing of the initial complaint up through and including the date of order granting preliminary certification of the Settlement Class.

1.14 "RFDCPA Settlement Class" means all persons with addresses in the State of California who received a voice message left by Defendant on a telephone answering device, or who engaged in a telephone communication with Defendant, wherein the Defendant failed to identify itself by its company name as the caller, state the purpose or nature of the communication, or disclose that the communication was from a debt collector and which message was left after one-year immediately preceding the filing of the initial complaint up through and including the date of order granting preliminary certification of the Settlement Class.

1.15 "Settlement Class" means the FDCPA Settlement Class and RFDCPA Settlement Class collectively.

1.16 "Settlement Class Counsel" means counsel of record for the Settlement Class Representative Plaintiffs.

1.17 "Settlement Class Member" means a person who falls within the definition of the Settlement Class as defined in Paragraph 1.15 of this Stipulation.

1.18 "Settlement Class Period" means the period extending from one year immediately prior to the filing of the initial complaint in this Action up through and including the date of Final Approval.

1.19 "Settlement Class Representative Plaintiffs" means Joann Gravina and Anthony Felix.

1.20 "Settlement Fund" means the amount paid by Defendant pursuant to Paragraph 2.3 herein.

1.21 "Settling Parties" means, collectively, the Defendant, as defined herein, by and through its counsel of record, and the Settlement Class Representative Plaintiffs on behalf of themselves and all Settlement Class Members, by and through Settlement Class Counsel.

1.22 "Stipulation" means this Stipulation of Settlement.

1.23 "Ultimate Approval" means that the Final Approval Order has become Final, as defined herein.

1.24 "Unknown Claims" means all claims, demands, rights, liabilities, and causes of action for damages arising out of, or relating to, claims involving the identical factual predicate alleged in the Action, which any person does not know or suspect to exist in his, her, or its favor at the time of the release of claims which, if known by him, her, or it, might have affected his, her, or its settlement and release of claims for damages. With respect to any and all claims for damages, the Settling Parties stipulate and agree that, upon Ultimate Approval, all Settling Parties will have expressly waived and, by operation of the Final Approval Order, each of the Settlement Class Members will be deemed to have waived the provisions, rights, and benefits of California Civil Code § 1542, which provides:

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

The Settling Parties acknowledge, and the Settlement Class Members shall be deemed by operation of the Final Approval Order to have acknowledged, that the foregoing waiver was separately bargained for and a key element of the Settlement of which this release is a part.

## 2. TERMS OF THE SETTLEMENT

In consideration of the foregoing and the mutual promises and obligations under this Stipulation, it is stipulated and agreed by and between Settlement Class Representative Plaintiffs, Settlement Class Counsel, Defendant, and Defendant's Counsel that, subject to the approval of the Court, the Action be, and hereby is, settled upon the following terms and conditions:

2.1 **Effective Date.** This Settlement will be effective upon the Effective Date, which is the date the settlement becomes Final as defined in Paragraph 1.7 above.

2.2 **Certification of Settlement Class.** Defendant stipulates to the certification of a Settlement Class as defined in Paragraph 1.15 under Rules 23(b)(1)(B) and 23(b)(2) of the Federal Rules of Civil Procedure.

2.3 **Settlement Fund.** Defendant shall pay the total sum $121,508.02 to be allocated as follows:

(a) *Settlement Class Representative Plaintiffs' Individual Relief.* With respect to their claims under the FDCPA, Settlement Class Representative Plaintiffs shall each receive $1,000.00, to be paid from the Settlement Fund, as statutory damages pursuant to 15 U.S.C. § 1692k(a)(2)(B)(i). With respect to his claims under the RFDCPA, Settlement Class Representative Plaintiff, ANTHONY FELIX, shall receive an additional $1,000.00, to be paid from the Settlement Fund, as statutory damages pursuant to Cal. Civ. Code § 1788.30(b). Settlement Class Representative Plaintiffs shall also each receive $1,500.00, to be paid from the Settlement Fund, in recognition for their services to the Settlement Class Members.

(b) *Class Relief.* $13,254.01, which represents the maximum class recovery permitted under the FDCPA (i.e. 1% of Defendant's net worth), shall be paid from the Settlement Fund as a *cy pres* payment to one or more national charitable organizations

without any religious or political affiliations. The recipient(s) of the *cy pres* payment will be designated by mutual agreement of the Settling Parties with the approval of the Court, the identities of which will be disclosed to the Court no later than the Final Fairness Hearing. If the Settling Parties are unable to agree on the recipient(s), the Court will identify the recipient(s).

(c) *Class Relief.* $13,254.01, which represents the maximum class recovery permitted under the RFDCPA (i.e. 1% of Defendant's net worth), shall be paid from the Settlement Fund as a *cy pres* payment to one or more California charitable organizations without any religious or political affiliations. The recipient(s) of the *cy pres* payment will be designated by mutual agreement of the Settling Parties with the approval of the Court, the identities of which will be disclosed to the Court no later than the Final Fairness Hearing. If the Settling Parties are unable to agree on the recipient(s), the Court will identify the recipient(s).

(d) *Injunctive Relief.* Defendant shall consent to entry of a stipulated injunction mandating that Defendant use its "best efforts" to ensure that, in all telephone communications it has with consumers, including the leaving of voice messages, the Defendant identifies itself by its legal name and that it further discloses the communication is from a debt collector and concerns the collection of a debt.

(e) *Counsel Fees.* Settlement Class Counsel shall be entitled to receive up to $90,000.00 from the Settlement Fund, which is intended to cover all fees and all expenses arising out of this lawsuit. Settlement Class Counsel will accept the amount of fees and expenses awarded by the Court in full satisfaction of reasonable attorney's fees and costs and will not request additional fees from Defendant, Class Representative Plaintiffs, or

any Settlement Class Member. Defendant will not oppose or cause to be opposed an attorney fee application, so long as such application does not exceed $90,000.00.

Any fee and expense application, any fee and expense award, and any and all matters related thereto, shall not be considered part of this Stipulation, and shall be considered by the Court separately from the Court's consideration of the fairness, reasonableness, and adequacy of the Settlement, and shall not operate to terminate or cancel this Stipulation or Settlement, and shall not affect or delay the finality of any Final Approval Order approving this Stipulation and the Settlement of the Action.

2.4 **Payment.** Within ten calendar days after Final Approval, Defendant will deliver the sum of $121,508.02 to the Law Office of William F. Horn, payable to "William F. Horn, IOLA Account". Upon delivery of these funds, Settlement Class Counsel agree to indemnify and hold Defendant, its agents, servants, employees, officers, directors, attorneys, and insurers harmless with respect to Defendant's payment obligations under this Agreement. Upon delivery of the funds, no person shall have a claim against Defendant based on, arising from, or relating to the distribution of benefits from the Settlement Fund. Settlement Class Counsel shall hold all Settlement Funds in trust and make no disbursements until three calendar days after Ultimate Approval. Thereafter, Settlement Class Counsel shall have twenty-one calendar days to disburse the Settlement Funds in accordance with this Stipulation and will provide Defendant's counsel with proof of distribution of the *cy pres* settlement funds.

3. **RELEASE AND RETENTION OF CERTAIN RIGHTS AND CLAIMS.** All releases set forth below are void if the Settlement does not receive Ultimate Approval. The releases under this Paragraph are conditioned upon Defendant's full performance of all of its obligations under this Stipulation of Settlement, including confirmatory discovery.

3.1 **Settlement Class Representative Plaintiffs**: Upon Final Approval of the Settlement, Settlement Class Representative Plaintiffs will be deemed to have released, and by operation of the Final Approval Order shall have fully, finally, and forever released, relinquished and discharged Defendant, Defendant's Related Parties, and Defendant's insurers 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.

3.2 **Other Settlement Class Members.** Pursuant to Rules 23(b)(1)(B) and 23(b)(2) of the Federal Rules of Civil Procedure, upon Final Approval of the Settlement, all Settlement Class Members will be deemed to have released, and by operation of the Final Approval Order shall have fully, finally, and forever released, relinquished, and discharged Defendant, Defendant's Related Parties, and Defendant's insurers from any and all claims for damages or injunctive relief for its violations of 15 U.S.C. §§ 1692d(6), 1692e(10), and 1692e(11), which arise out of, or are related to the identical factual predicate asserted in the Action arising out of state or federal law, including any and all such claims relating to Defendant's use of voice messages on telephone answering devices and other telephone communications with consumers.

**4. RELEASE OF ATTORNEY'S LIEN.**

In consideration of the Settlement, Settlement Class Counsel hereby waives, discharges and releases Defendant, its officers, directors, shareholders, agents, employees, attorneys, successors, beneficiaries, parents, subsidiaries, representatives, divisions, affiliates, customers, clients, and assigns of and from any and all claims for attorneys' fees and costs, by lien or otherwise, for legal services rendered by Settlement Class Counsel in connection with the Action. Settlement Class Counsel further represents and certifies that no other person is entitled to any sum for attorney's fees and costs in connection with the Action, and the undersigned attorneys agree to indemnify, defend, and save harmless Defendant and its officers, directors,

shareholders, agents, employees, attorneys, successors, beneficiaries, parents, subsidiaries, representatives, divisions, affiliates, clients, customers, and assigns, from any claim for attorney's fees and costs in connection with this action.

**5. EFFECT OF DISAPPROVAL, CANCELLATION OR TERMINATION.**

5.1 If the Settlement does not receive Ultimate Approval, then the Settlement and this Stipulation shall become null and void; the effects of such event include, without limitation, that the Defendant shall not be prejudiced in any way from opposing the certification of a class or classes in the Action or in any other litigation, and Settlement Class Counsel will return the Settlement Funds to Defendant. The Defendant expressly states that it would oppose class certification were the matter not to be settled. The Settling Parties acknowledge that the possibility of a grant or denial of class certification is one of the risks being compromised as part of the Settlement. Furthermore, the Settlement Funds shall be returned to the Defendant if an Order of the Court granting Final Approval to the Settlement is overturned after exhaustion of all appeals, and a revised settlement is not submitted to the Court within 180 days following the exhaustion of such appeals.

5.2 In the event that the Settlement does not receive Ultimate Approval, or this Stipulation is terminated, or fails to become effective in accordance with its terms, the Settling Parties and the Settlement Class Members shall be restored to their respective positions in the Action as of the business day immediately preceding the signing of this Stipulation.

**6. PRELIMINARY APPROVAL.**

As soon as practical after the execution of this Agreement, Settlement Class Counsel will file a Motion For Class Certification and Preliminary Approval of Class Settlement Agreement ("Motion"), which will include a copy of this Agreement attached to the Motion as Exhibit A, a proposed Preliminary Approval Order in the form attached to the Motion as Exhibit B, a

proposed Final Order in the form attached to the Motion as Exhibit C, and will seek entry of the Preliminary Approval Order including:

(a) Defining the Settlement Class;

(b) Defining the Settlement Class Claims;

(c) Appointing Settlement Class Counsel;

(d) Preliminary approval of this Settlement;

(e) Directing notice to the Class as set forth in this Agreement; and

(f) Setting a date for a hearing pursuant Rule 23(e)(1)(C) of the Federal Rules of Civil Procedure to determine whether the settlement is fair, reasonable, and adequate.

**7. MISCELLANEOUS PROVISIONS**

7.1 The Settling Parties acknowledge that it is their intent to consummate this Settlement, and agree to cooperate fully with one another in taking whatever steps are necessary and appropriate to complete the Settlement, including seeking both Preliminary, Final, and Ultimate Approval of the Settlement, and to use their best efforts to effectuate the full performance of the terms of the Settlement, and to protect the Settlement by applying for appropriate orders enjoining others from initiating or prosecuting any action arising out of or related to the facts or claims alleged in the Action, if so required.

7.2 To the extent that any disputes or issues arise with respect to documenting the Settlement, the Settling Parties agree to use their best efforts to informally resolve any such disputes or issues; but, in the event any such dispute or issue cannot be resolved informally, to bring any such dispute or issue to the Court for resolution.

7.3 The Settling Parties intend the Settlement to be a final and complete resolution of all disputes between them with respect to the Action, except as specifically provided for herein.

The Settlement compromises claims which are contested and shall not be deemed an admission by any Settling Party as to the merits of any claim or defense. The Settling Parties agree that the amount paid to the Settlement Fund and the other terms of the Settlement were negotiated at all times at arm's length and in good faith by the Settling Parties, and reflect a settlement that was reached voluntarily after consultation with competent and experienced legal counsel.

7.4 Neither this Stipulation nor the Settlement contained herein, nor any act performed or document executed pursuant to or in furtherance of this Stipulation or the Settlement:

(a) is, or may be deemed to be, or may be used as an admission or evidence of, the validity of any claims asserted in the Action, or of any wrongdoing or liability on the part of Defendant; or

(b) is, or may be deemed to be, or may be used as an admission or evidence of any fault or omission of the Defendant in any civil, criminal, or administrative proceeding in any court, administrative agency, or other tribunal. Defendant may file this Stipulation and/or the Final Approval Order in any action that has been or may be brought against them in order to support a defense or counterclaim based on principles of *res judicata*, collateral estoppel, release, good faith settlement, judgment bar, reduction, or any other theory of claim preclusion or issue preclusion, or any similar defense or counterclaim.

7.5 No person shall have any claim against Settlement Class Counsel based on distribution of benefits made substantially in accordance with this Stipulation or any Settlement-related order(s) of the Court.

7.6 This Stipulation may be amended or modified only by a written instrument signed by Defendant's Counsel and Settlement Class Counsel, or their respective successors-in-interest.

7.7 This Stipulation constitutes the entire agreement among the Settling Parties, and no representations, warranties, or inducements have been made to any Settling Party concerning this Stipulation, other than those contained here. This Stipulation replaces and voids any and all previous agreements concerning the settlement of the Action. Except as provided for with respect to Settlement Class Counsel's fees, each Settling Party bears its own costs.

7.8 Settlement Class Counsel, on behalf of the Settlement Class, are expressly authorized by Settlement Class Representative Plaintiffs to take all appropriate action required or permitted to be taken by the Settlement Class Representative Plaintiffs pursuant to this Stipulation to effectuate its terms, and also are expressly authorized to enter into any modifications or amendments to this Stipulation on behalf of the Settlement Class that they deem necessary or appropriate.

7.9 Each attorney executing this Stipulation on behalf of any Settling Party warrants that such attorney has the full authority to do so. Settlement Class Counsel shall obtain the original signature of Settlement Class Representative Plaintiffs.

7.10 This Stipulation may be executed in one or more counterparts. All executed counterparts and each of them shall be deemed to be one and the same instrument. Facsimile signatures shall deemed originals. A complete set of executed counterparts shall be filed with the Court.

7.11 This Stipulation is binding upon, and inures to the benefit of, the successors and assigns of the Settling Parties.

7.12 The Court shall retain jurisdiction with respect to implementation and enforcement of the terms of this Stipulation, and the Settling Parties submit to the jurisdiction of the Court for purposes of implementing and enforcing the Settlement embodied in this

Stipulation. The Settling Parties shall present the Court with proposed Orders that allow for such retention of jurisdiction, in accordance with applicable law.

7.13 This Stipulation shall be considered to have been negotiated, executed and delivered, and to be wholly performed, in the State of New York, and the rights and obligations of the parties to this Stipulation shall be construed and enforced in accordance with, and governed by the internal, substantive, laws of the State of New York without giving effect to that State's choice-of-law principles.

7.14 Settlement Class Counsel represent that they have no other individual clients who have currently engaged them to pursue claims brought in the Action against Defendant.

7.15 If any Settling Party commences any action arising out of this Stipulation, including, without limitation, any action to enforce or interpret this Stipulation, the prevailing party or parties in such action shall be entitled to recover its reasonable attorneys' fees and other expenses incurred in such action. Any award of attorneys' fees hereunder shall not be computed according to any court schedule, but, instead, shall be in such amount as to fully reimburse all attorneys' fees actually incurred in good faith, regardless of the size of the judgment, since it is the intention of all Settling Parties to compensate fully the prevailing party for all attorneys' fees paid or incurred in good faith.

**IN WITNESS WHEREOF**, the Settling Parties hereto, acting by and through their respective counsel of record, have so agreed.

**Defendant:**
UNITED COLLECTION BUREAU, INC.

By: _____
Its, Assistant General Counsel
Dated: July 30, 2010

**Plaintiffs:**

_____
JOANN GRAVINA
Dated: July 30, 2010

ANTHONY FELIX
Dated: July 30, 2010

**Attorneys for Defendant:**
ABRAMS, GORELICK, FRIEDMAN & JACOBSON, P.C.

Barry Jacobs
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New York, NY 10004
Telephone: (212) 422-1200
Facsimile: (212) 968-7573
Dated: July 30, 2010

**Attorneys for Plaintiffs:**
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Facsimile: (866) 596-9003
Dated: July 30, 2010

LAW OFFICE OF ROBERT L. ARLEO

Robert L. Arleo, Esq.
164 Sunset Park Road
Haines Falls, NY 12436
Telephone: (518) 589-5264
Facsimile: (518) 751-1801
Dated: July 30, 2010

CM

**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

| | |
|---|---|
| JOANN GRAVINA, an individual; ANTHONY FELIX, an individual; on behalf of themselves and all others similarly situated,<br><br>Plaintiffs,<br><br>vs.<br><br>UNITED COLLECTION BUREAU, INC., an Ohio Corporation; and JOHN AND JANE DOES NUMBERS 1 THROUGH 25,<br><br>Defendants. | CASE NO.: 2:09-cv-04816-LDW-AKT<br><br>**FINAL ORDER** |

**WHEREFORE**, It appearing to the Court that:

A. On September 7, 2010, this Court entered a Preliminary Approval Order which, among other things, certified this lawsuit to proceed as a class action for settlement purposes only, defined the Settlement Class and Settlement Class Claims, appointed Settlement Class Counsel, preliminarily approved the proposed Stipulation of Settlement which would be binding on the Settlement Class, provided for notice to the Settlement Class including an opportunity for Settlement Class members to request exclusion from the Settlement Class and to object to the proposed Stipulation of Settlement, and scheduled a hearing ("Final Hearing") for October 14, 2010, at 10:30 a.m. to consider any objections and to determine whether the proposed settlement is fair, reasonable, and adequate [Doc. 29];

B. On September 15, 2010, this Court entered an amended Preliminary Approval Order which, rescheduled the Final Hearing for November 9, 2010, at 10:00 a.m. to consider any objections and to determine whether the proposed settlement is fair, reasonable, and

***Exhibit F to Memorandum***

adequate [Doc. 32];

C. On September 20, 2010, the class notice approved by the Court in the Preliminary Approval Order and directed to members of the Settlement Class was published in accordance with that Order in the Monday edition of *USA Today*, which is a newspaper with national distribution;

D. To date, no Settlement Class members have elected to opt-out of, or object to, the proposed Class Settlement;

E. In satisfaction of Fed. R. Civ. P. 23(e)(3), a copy of the Stipulation of Settlement was provided to the Court with the Parties Joint Motion seeking the entry of the Preliminary Approval Order;

F. In the Stipulation of Settlement, Defendant, United Collection Bureau, Inc., consented to the entry of an injunction;

G. On November 9, 2010, in accordance with the amended Preliminary Approval Order [Doc. 32] and Fed. R. Civ. P. 23(e)(2), counsel for the Parties timely appeared for the Final Hearing and no other objectors nor anyone else appeared, and the Court having concluded that the proposed settlement is fair, reasonable, and adequate; and

H. The Court being duly advised in the premises, and for good cause;

**IT IS HEREBY ORDERED AND ADJUDGED:**

1. The Court confirms its certification in the Certification of Settlement Class and Preliminary Approval Order of this lawsuit as a class action for settlement purposes only and, in accordance with Fed. R. Civ. P. 23(c)(1)(B):

(a) defines the "Settlement Class" as all persons with addresses in the United States of America who received a message left by Defendant 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 collector and which message was left after one-year immediately preceding the filing of the initial complaint up through and including the date of this Order; and

(b) defines the "Settlement Class Claims" as those claims arising from messages left by Defendant for Class members on telephone answering devices, and other telephone communications with consumers, which failed to meaningfully identify the Defendant by name as the caller, state the purpose or nature of the communication, or disclose that the communication was from a debt collector.

2. The Court declares that the notice to the Settlement Class satisfies the requirements of Fed. R. Civ. P. 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.

(a) The Court approves the disbursement of the *cy pres* payment as provided for in Paragraph 2.3(b) of the Stipulation of Settlement to the following charitable institution, Make-A-Wish Foundation of Suffolk County, 1 Comac Loop, 1A1, Ronkonkoma, NY 11779 J.D.L in the amount of $13,254.01.

(b) The Court approves the disbursement of the *cy pres* payment as provided for in Paragraph 2.3(b) of the Stipulation of Settlement to the following charitable institution, Western Center on Law and Poverty F.D.L. in the amount of $13,254.01.

4. The Court approves the award of attorneys' fees and costs to Settlement Class Counsel as provided for in the Stipulation of Settlement and declares such fees and costs to be fair and reasonable.

5. The parties are directed to implement the settlement in accordance with the Stipulation of Settlement.

6. In accordance with the Stipulation of Settlement:

(a) "Released Parties" means Defendant and Defendant's past or present officers, directors, partners, agents, employees, attorneys, accountants or auditors, consultants, legal representatives, insurers, predecessors, successors, assigns, parents, subsidiaries, divisions, and any entity that controls the Defendant;

(b) as of the "Effective Date" (as defined in the Stipulation of Settlement), each member of the Settlement Class is deemed to release and forever discharge the Released Parties from the Settlement Class Claims; and

(c) as of the "Effective Date" (as defined in the Stipulation of Settlement), each Settlement Class Representative is deemed to release and forever discharge the Released Parties from all causes of action, controversies, actions, demands, torts, damages, costs, attorneys' fees, moneys due on account, obligations, judgments, alleged violations of the FDCPA and liabilities of any kind whatsoever in law or equity, arising out of the Stipulation of Settlement or imposed by federal or state statute, common law, or otherwise, from the beginning of time to the date the Stipulation of Settlement was signed, whether or not known now, anticipated, unanticipated, suspected or claimed, fixed or contingent, whether yet accrued or not and whether damage has resulted from such or not.

7. Defendant, United Collection Bureau, Inc., is permanently enjoined as follows:

(a) In all telephone voice messages left by Defendant for consumers on telephone answering devices, the Defendant will use its best efforts to ensure that it meaningfully identifies itself by stating its company name as the caller, accurately stating the purpose or nature of the communication, and disclosing that the communication is from a debt collector;

(b) In accordance with Fed. R. Civ. P. 65(d)(2), this injunction is binding on Defendant, its officers, agents, servants, employees and attorneys, as well as all those in active concert or participation with any of them; and

(c) 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).

8. The Court retains jurisdiction over the interpretation, enforcement, and implementation of the Stipulation of Settlement and this Final Order. Except as retained, all claims against all Defendants are dismissed with prejudice and without taxing costs.

**IT IS SO ORDERED:**

HONORABLE LEONARD D. WEXLER
Senior Judge, United States District Court

Dated: November 29, 2010
Central Islip, N.Y.

# Exhibit G to Memorandum

2011 WL 841322
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.

**Attorneys and Law Firms**

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.

**Opinion**

***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). United Collection is an Ohio-based debt collector. On July 22, 2010, [1] 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. [2]

1 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.

2 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 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;[3] 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.

3 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* 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, 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 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.[4] "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.

4 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 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 actions 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.[5] 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.

5 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 allegations 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.

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