

EXHIBIT A

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

LAUREN MILLER, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

URBAN OUTFITTERS, INC.,

Defendant.

C.A. No: 1:13-CV-12276-ADB

LAUREN MILLER, individually and on
behalf of all others similarly situated,

Plaintiff,

v.

FREE PEOPLE, LLC and FREE PEOPLE OF
PA LLC,

Defendants.

C.A. NO: 1:14-CV-12018-ADB

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY
APPROVAL OF PROPOSED SETTLEMENT, PRELIMINARY CLASS
CERTIFICATION, APPROVAL OF FORM AND MANNER OF NOTICE AND TO SET
A FAIRNESS HEARING**

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INTRODUCTION

Plaintiff Lauren Miller (“Plaintiff” or “Miller”), on behalf of the proposed Class and through her attorneys, Finkelstein, Blankinship, Frei-Pearson & Garber, LLP (“FBFG”), Pastor Law Office, LLP (“PLO”), and Leonard Law Office P.C. (“LLO”), respectfully submits this memorandum in support of her motion for preliminary approval of a proposed settlement (the “Settlement”) of this action (the “Action”) with Defendants Urban Outfitters, Inc., Free People, LLC and Free People of PA LLC (“Urban Outfitters and Free People” or “Defendants”) (together with Plaintiff and the Class, the “Settling Parties” or the “Parties”).¹

Plaintiff alleges that Defendants ask certain consumers using Credit Cards to provide Personal Identification Information (in the form of a ZIP code), which consumers do despite the fact that they are not required to do so in order to complete the Credit Card transaction. So even though Defendants are not required to collect their customers’ ZIP codes, they do so anyway and use a customer’s ZIP code and name to identify that customer’s address using commercially available databases. Defendants are thus able to use that address to send unwanted marketing material.

Plaintiff alleges that the collection of Personal Identification Information (in the form of ZIP codes) from consumers using Credit Cards violates Mass. Gen. Laws c. 93 § 105(a), and she brings these Actions on behalf of all Massachusetts customers who used a Credit Card at an Urban Outfitters Massachusetts store after August 15, 2009 or at a Free People Massachusetts store after March 26, 2010 and whose ZIP code was subsequently recorded. Urban Outfitters and Free People dispute the substance of these allegations and the legal theory upon which Plaintiff’s causes of action rely.

¹ This proposed Settlement resolves the two above-captioned actions, *Miller v. Urban Outfitters, Inc.*, No. 13-12276-ADB (the “*Urban Outfitters Action*”) and *Miller v. Free People LLC et al.*, No. 13-12018-ADB (the “*Free People Action*”), which have been consolidated by this Court.

The Action seeks to redress Defendants' alleged unlawful invasion of its customers' privacy and its alleged violation of the laws of the Commonwealth of Massachusetts designed to protect consumers' rights to be free from intrusive corporate data collection and marketing. The Settlement substantially achieves this goal.

The terms of the Settlement are set forth in the Amended Settlement Agreement and Release attached as Exhibit 1 to Declaration of Todd S. Garber In Support of Motion for Preliminary Approval of Proposed Settlement, Preliminary Class Certification, Approval of Form and Manner of Notice, and to Set Fairness Hearing ("Garber Dec.").² Under the Settlement Agreement, Defendants will provide merchandise certificates valued at twenty dollars (\$20.00) ("Certificates") to members of the First Time Collection Class. The First Time Collection Class includes 32,593 Urban Outfitters customers and 2,387 Free People customers to whom Defendants sent marking materials after collecting their zip codes for the first time following a credit card purchase transaction in a Massachusetts retail store between August 15, 2009 for Urban Outfitters or March 26, 2010 for Free People, and the date of entry of the Preliminary Approval Order, and who are not members of the Previous Collection Class. Defendants will provide Certificates valued at ten dollars (\$10.00) to members of the Previous Collection Class. The Previous Collection Class includes 2,916 Urban Outfitters customers and 242 Free People customers who provided their zip codes when they ordered merchandise over the telephone, internet, or by mail prior to providing their zip codes to Defendants following a credit card purchase transaction in a

² The Parties executed a prior Settlement Agreement and Release on December 16, 2014. After the execution of that Settlement Agreement, Urban Outfitters and Free People discovered a mistake in the number of Class Members in each sub-class. The Parties then executed the Amended Settlement Agreement and Release on February 11, 2014, in order to correct the number of Class Members identified in Section 2.2; in all other respects, the Amended Settlement Agreement and Release is identical to the prior Settlement Agreement and Release.

Massachusetts retail store between August 15, 2009 for Urban Outfitters or March 26, 2010 for Free People, and the date of entry of the Preliminary Approval Order, and to whom Defendants sent marketing materials. In return, Class Members release any claims arising from Defendants' alleged improper collection and use of their Personal Identification Information.

Plaintiff respectfully submits that preliminary approval of the Settlement is appropriate. The Settling Parties attended an in-person mediation before the Honorable Allan van Gestel (Ret.) of JAMS Alternative Dispute Resolution. While the initial mediation session provided a constructive forum for settlement discussions, it did not result in a settlement. Thereafter, the parties engaged in additional settlement discussions with the assistance of Judge van Gestel, and a settlement was ultimately reached. The Settlement thus represents the product of good faith, arm's-length negotiations among experienced counsel for the Settling Parties.

In entering into the Settlement, the Plaintiff was fully conversant with the strengths and weaknesses of her claims. Being thus well-positioned to evaluate the risks of continued litigation versus the fairness and prudence of a resolution at this time, Plaintiff believes the Settlement produces a fair and reasonable result. Preliminary approval of the Settlement will allow the parties to notify Class Members of the Settlement and of their right to request exclusion or object. Preliminary approval does not require the Court to rule on the ultimate fairness of the Settlement, but to make only a "preliminary determination" of the "fairness, reasonableness, and adequacy" of the proposed settlement. *See* Federal Judicial Center, Manual for Complex Litigation, § 21.632 (4th ed. 2004). As set forth herein, the Court should permit notice of the Settlement to be sent to Class Members, as the settlement is fair and reasonable.

Accordingly, Plaintiff requests that the Court enter an order, in the form of the

accompanying proposed Preliminary Approval Order: (1) granting preliminary approval of the proposed Settlement; (2) preliminarily certifying the Class; (3) approving the Settling Parties' proposed form and manner of notice and directing that notice be given to the Class; (4) naming Plaintiff Lauren Miller and her counsel, FBFG, PLO, and LLO as Class Representative and Class Counsel; (7) scheduling appropriate dates for requirements and/or obligations of the Settling Parties and Class Members as more fully described in the proposed Order filed concurrently herewith; and (8) scheduling a Fairness Hearing during which the Court will consider (a) the Plaintiff's request for final approval of the Settlement and entry of the proposed Final Order and Judgment, (b) Class Counsel's application for an award of attorneys' fees and reimbursement of expenses, and (c) dismissal of the Action pending before this Court.

Defendants assent to this motion.

STATEMENT OF FACTS

Background of Litigation

On or about May 10, 2013, pursuant to M.G.L. c. 93A § 9(3), Plaintiff sent a written demand for relief to Urban Outfitters and on or about May 17, 2013, Plaintiff sent a written demand for relief to Free People. Defendants failed to tender a reasonable offer of relief in response to Plaintiff's written demands. On August 15, 2013, Plaintiff filed her Class Action Complaint in Suffolk Superior Court, Business Litigation Session, alleging that Urban Outfitters violated M. G. L. c. 93 § 105(a) through its collection of ZIP codes from its customers when they made purchases using Credit Cards at Urban Outfitters' retail stores in Massachusetts ("Urban Outfitters Complaint"). On March 26, 2014, Plaintiff filed her Class Action Complaint in Suffolk Superior Court, Business Litigation Session, alleging that Free People violated Mass. Gen. Laws c. 93 § 105(a) through its collection of ZIP codes from its

customers when they made purchases using Credit Cards at Free People's retail stores in Massachusetts ("Free People Complaint") (collectively, the Urban Outfitters Complaint and the Free People Complaint are referred to herein as the "Complaints"). Garber Dec., ¶ 4.

The Complaints allege that Urban Outfitters and Free People employees do not ask customers for their ZIP codes because the Credit Card companies require that they do so, nor do Urban Outfitters and Free People's employees request ZIP codes for verification purposes. Rather, the Complaints allege that Urban Outfitters and Free People use a customer's ZIP code and name to identify that customer's address using commercially available databases. The Complaints allege that Urban Outfitters and Free People are thus able to use that address for intrusive marketing purposes, which include Urban Outfitters and Free People's own direct marketing, such as sending marketing mail directly to consumers' homes without their permission.³ Plaintiff contends that the Action has merit. Urban Outfitters and Free People contend that the Actions do not have merit and that Urban Outfitters and Free People have defenses that could eliminate or reduce liability and monetary recovery in this case.

On September 13, 2013, Urban Outfitters filed a Notice of Removal, removing the *Urban Outfitters* Action to this Court. Dkt. No. 1. On May 5, 2014, Free People filed a Notice of Removal, removing the *Free People* Action to this Court. Dkt. No. 1 in 14-12018-NMG.⁴ Garber Dec., ¶ 5.

In the *Urban Outfitters* Action, the Parties had their Rule 26(f) conference on November 26, 2013 and attended a court scheduling conference on December 17, 2013 after which the Court set a pre-trial schedule for the litigation. The Parties then exchanged initial disclosures

³ Urban Outfitters Complaint, ¶¶ 13-16; Free People Complaint, ¶¶ 14-17.

⁴ Plaintiff moved to remand the *Free People* Action to the Superior Court, but that motion was withdrawn after the parties reached a settlement.

and served and responded to written discovery, including interrogatories and document requests. Plaintiff pointed out certain deficiencies in Urban Outfitters' discovery responses, and the Parties met and conferred and were able to resolve their differences on these issues. Plaintiff served subpoenas on three third parties (identified in Urban Outfitters' answers to interrogatories) for production of documents and depositions and also noticed 6 depositions of Urban Outfitters personnel, individually named and pursuant to Fed. R. Civ. P. 30(b)(6). Garber Dec., ¶ 6.

In order to avoid the costs and uncertainties of lengthy litigation, the Settling Parties explored the possibility of resolving these actions. Counsel for Defendants and Plaintiff conferred numerous times via email and telephone, during which time they (and their clients) considered their claims and defenses, the potential for liability and the certification of a class, as well as the potential for a fair and reasonable class action settlement. *Id.*, ¶ 7. During these discussions, Plaintiff obtained from Defendants information and documents relating to Urban Outfitters and Free People's policies and practices with respect to its customers' ZIP codes, as well as the size and composition of the proposed Class. *Id.*, ¶ 8.

Because of the corporate relationship between Urban Outfitters and Free People as affiliated entities, and for other reasons referenced herein, the settlement discussions and the discovery provided to Plaintiff addressed both Defendants, and Plaintiff's claims against both Defendants, and both Actions were the subject of the mediation. As Urban Outfitters stated in its Memorandum of Law in Support of its Motion for Consolidation Pursuant to Federal Rule 42(a) ("Consolidation Memo") (Dkt. No. 21), Urban Outfitters and Free People "are, in essence, the same company" and "Free People is a wholly-owned subsidiary of Urban

Outfitters.”⁵ Urban Outfitters and Free People “are served by the same IT department, construction department, legal department, benefits department, production department, sourcing department, accounting department and CEO . . . [Urban Outfitters’ and Free People’s] point-of-sale registers and policies relating to the collection of zip codes in Massachusetts are also one and the same.” *Id.*⁶ Garber Dec., ¶ 9.

After conducting sufficient discovery such that each side was in a position to evaluate the merits, strengths and weaknesses of any claims or defenses, the parties agreed to engage in arms-length negotiations, concluding in an all-day mediation conducted by The Honorable Allan van Gestel (Ret.) on July 15, 2014. Leading up to and including the mediation, Plaintiff and Plaintiff’s counsel looked at the uncertainties of trial and the benefits to be obtained under the Settlement, and they have considered the costs, risks, and delays associated with the continued prosecution of this time-consuming litigation and the likely appeals of any rulings in favor of either Plaintiff or Urban Outfitters and Free People. Although the mediation was highly productive, the Settling Parties were unable to reach an agreement on July 15, 2014. After additional settlement discussions and with the assistance of Judge van Gestel, the Settlement was reached. The Parties executed a written Settlement Agreement and Release (“Settlement Agreement”) on December 16, 2014.⁷ Garber Dec., ¶ 10.

After the initial execution of the Settlement Agreement in December, 2014, the Parties exchanged drafts of, negotiated the language of, and edited, the various forms of notice to the

⁵ Consolidation Memo at 6.

⁶ Plaintiff opposed Urban Outfitters’ Motion to Consolidate, but that opposition was withdrawn after the Parties reached a settlement.

⁷ As noted above, the Parties, on February 11, 2015, executed an Amended Settlement Agreement and Release (“Amended Settlement Agreement”) on February 11, 2015, in order to correct a mistake as to the number of Class Members in each sub-class.

Class and the proposed orders in connection with court settlement approval. *Id.*, ¶ 21.

After the Parties reached a settlement, the Parties also agreed on the consolidation of the *Urban Outfitters* Action and the *Free People* Action before this Court, and the Court entered an order granting consolidation of the Actions. Dkt. No. 32. Garber Dec. ¶ 19.

Summary of Proposed Settlement

I. Class Benefits

Under the Amended Settlement Agreement, the Class is divided into two sub-classes: 1) the “First Time Collection Class” includes 32,593 Urban Outfitters customers and 2,387 Free People customers to whom Defendants mailed marketing materials after collecting their zip codes for the first time following a credit card purchase transaction in a Massachusetts Urban Outfitters retail store between August 15, 2009 and the date of the preliminary approval order or in a Massachusetts Free People retail store between March 26, 2010 and the date of the preliminary approval order; 2) the “Previous Collection Class” includes 2,916 Urban Outfitters customers and 242 Free People customers who provided their zip codes when they ordered merchandise over the telephone, internet, or by mail prior to providing their zip codes to Defendants in connection with a credit card purchase transaction in a Massachusetts Urban Outfitters retail store between August 15, 2009 and the date of the preliminary approval order or in a Massachusetts Free People retail store between March 26, 2010 and the date of the preliminary approval order and to whom Defendants mailed marketing materials. All Class members will receive Class Notice and merchandise certificates via email or direct U.S. Mail. Garber Dec., ¶¶ 11,12.

Class members in the First Time Collection Class will receive a Twenty Dollar (\$20.00) merchandise certificate which can be used on a single occasion at any Urban Outfitters or Free

People retail store to purchase any item or service available, with no minimum or maximum purchase amount. The \$20.00 Certificates are valid for 6 months from date of issue and can be combined with other discounts and promotions, and may be used on sale items. The total cash value of these \$20.00 merchandise certificates is approximately \$699,600.00. *Id.*, ¶ 13.

Class members in the Previous Collection Class will receive a Ten Dollar (\$10.00) merchandise certificate which can be used on a single occasion at any Urban Outfitters or Free People retail store to purchase any item or service available, with no minimum or maximum purchase amount. The \$10.00 Certificates are valid for 6 months from date of issue and can be combined with other discounts and promotions and may be used on sale items. The total cash value of these \$10.00 Certificates is approximately \$31,580.00. Based on the size of the two sub-classes, the total value of the Settlement is estimated to be \$731,180.00, exclusive of notice and administration expenses, and attorneys' fees. *Id.*, ¶¶ 14,15.

The Settlement also provides that Urban Outfitters and Free People will comply with all of the provisions of M. G. L., c. 93, § 105(a) in their Massachusetts retail stores.

II. Distribution Of The Class Benefits

Under the Settlement, Defendants will distribute the Certificates to Class members via email or U.S. mail within thirty (30) calendar days after Final Judicial Approval of the Settlement. If an email is returned as undeliverable, Defendants will distribute Class Notice and the Certificate to the Class Member by U.S. Mail, and if a mailing is returned with a forwarding address, Defendants will distribute the Class Notice to the forwarding address via U.S. Mail.

Id., ¶ 16.

III. Attorneys' Fees And Incentive Award

The Settling Parties have further agreed that Plaintiff will be entitled to an incentive award of Two Thousand Five Hundred Dollars (\$2,500.00) for the Urban Outfitters Matter and an incentive award of Two Thousand Five Hundred Dollars (\$2,500.00) for the Free People Matter in recognition of the time and effort spent by the Plaintiff as the Class Representative. Defendants have agreed to pay such incentive awards if approved by the Court. These amounts will be paid separate from and in addition to the amount that Defendants have agreed to pay to Class members, and will in no way diminish the Class recovery. *Id.*, ¶ 17.

Furthermore, the Settling Parties reached an agreement on attorneys' fees and costs to be paid by Defendants. Pursuant to the Settlement, Class Counsel may apply for attorneys' fees and costs up to Two Hundred Thousand Dollars (\$200,000.00) to which Defendants will not object. Subject to Court approval, Defendants have agreed to pay this amount. The attorneys' fees and expense reimbursement will in no way diminish the recovery of the Class. *Id.*, ¶ 18.

Final approval of the Settlement will result in the dismissal with prejudice of the Actions in their entirety.

IV. Class Notices And Procedures For Objections and Requests for Exclusion

The Amended Settlement Agreement and its supporting papers provide for the form and manner of Class Notice, the procedures for requesting exclusion from the Class or objecting to any terms of the Settlement, and the procedure by which Class Counsel shall apply for attorneys' fees and expenses, and the representative plaintiff's request for incentive awards.

All Class Members shall receive a Class Notice via email or U.S. mail. The Settlement also provides Class Members the opportunity to object to, or request exclusion from, the Settlement.

ARGUMENT

I. Preliminary Approval Of The Settlement Agreement Is Appropriate

A. Overview Of The Class Settlement Approval Process

Courts consistently recognize “the clear policy in favor of encouraging settlements,” especially in the class action context. *Durrett v. Housing Auth. Of City of Providence*, 896 F.2d 600, 604 (1st Cir. 1990) (reversing denial of approval of class action settlement as an abuse of discretion). Moreover, public policy in the First Circuit highly favors settlement as a means of resolving disputes. *See Hotel Holiday Inn de Isla Verde v. N.L.R.B.*, 723 F.2d 169, 173 (1st Cir. 1983) (settlement agreements “will be upheld whenever possible because they are a means of amicably resolving doubts and preventing lawsuits”); This is especially so in the context of complex class action litigation. *See, e.g., Lazar v. Pierce*, 757 F.2d 435, 440 (1st Cir. 1985) (“Last, we should point to the overriding public interest in favor of the voluntary settlement of disputes, particularly where class actions are involved”); *In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 88 (D. Mass. 2005) (“the law favors class action settlements”).

By favoring the settlement of complex class action litigation, the law seeks to minimize the litigation expense on both sides, and to reduce the strain on judicial resources. *See, e.g., Lazar*, 757 F.2d at 440.

In order to approve a proposed class action settlement, a court generally follows two steps:

[T]he judge is required to scrutinize the proposed settlement to ensure that it is fair to the persons whose interests the court is to protect. Those affected may be entitled to notice and an opportunity to be heard. This usually involves a two-stage procedure. First, the judge reviews the proposal preliminarily to determine whether it is sufficient to warrant public notice and a hearing. If so, the final decision on approval is made after the hearing.

In re Relafen Antitrust Litig., 231 F.R.D. 52, 57 (D. Mass. 2005) (quoting Manual For Complex

Litigation, Fourth (“MCL”) § 13.14).

At the preliminary approval stage, the Court is not required to undertake an in-depth consideration of the relevant factors for final approval. Instead, the “judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing.” MCL § 21.632. The Court need only find that there is “probable cause” to submit the [settlement] to class members and hold a full-scale hearing as to its fairness.” If the court finds a settlement proposal “within the range of possible approval,” it then proceeds to the second step in the review process, the fairness hearing. *See In re Gilat Satellite Networks, Ltd.*, 2007 WL 1191048, at *9 (E.D.N.Y. Apr. 19, 2007).

B. The Applicable Factors Favor Preliminary Approval

Applying the approach set forth above, the Court should preliminarily approve the Settlement because it is fair, reasonable and adequate, and thus it falls squarely within the range of possible approval.

First, the Settlement Agreement provides reasonable monetary relief and substantially fulfills the purposes and objectives of this class action. It provides a \$20.00 or \$10.00 distribution for each Class member, plus an additional payment for attorneys’ fees and costs and incentive awards and, therefore, is clearly beneficial to the Settlement Class. Class Members, as customers of Urban Outfitters and/or Free People, will value the \$20.00 or \$10.00 Certificates they will receive, and there are items at Urban Outfitters and Free People that can be purchased for the Certificate amounts (\$20 or \$10), so Class Members will be able to use the Certificates without having to spend additional funds. The Settlement also includes an agreement by Defendants for compliance with all provisions of M. G. L. c. 93, § 105(a) in their

Massachusetts retail stores.

While Plaintiff continues to believe in the merits of her claim, she recognizes that there are risks in continued litigation, including that: the Class might not be certified; class certification may not be maintained through trial; Plaintiff may not prevail at summary judgment or at trial; and a favorable judgment might be vacated or reversed on appeal. *See, e.g., In re Lupron*, 228 F.R.D. at 97 (“the present value of the damages plaintiffs would likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement.”) (internal quotation omitted); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 539-40 (D.N.J. 1997) (“Because establishing liability at trial and prevailing on appeal is not, and never can be, guaranteed, and because the Proposed Settlement is certain and avoids many of the obstacles potentially implicated by a trial, on balance the risks of establishing liability weigh in favor of approving the settlement.”). The proposed Settlement ensures the Class a substantial benefit, while eliminating further uncertainty, expense, and delay.

Second, the terms of the proposed Settlement are the product of arm’s length negotiations. The proposed Settlement is the result of intensive negotiation between the Settling Parties, arrived at after mediation before a respected former judge with significant mediation experience. These factors – the time and effort spent on the settlement negotiations, and the presence of a highly-regarded mediator – all militate in favor of preliminary approval of the Settlement because they strongly indicate that there was no collusion in the result achieved. *Hochstadt v. Boston Scientific Corp.*, 708 F. Supp. 2d. 95, 107 (D. Mass. 2000) (“[t]here is generally a presumption in favor of settlement ‘[i]f the parties negotiated at arm’s length and conducted sufficient discovery.’”) (quoting *In re Pharmaceutical Industry Average Wholesale*

Price Litig., 588 F.3d 24, 32-33 (1st Cir. 2009)). “A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm’s-length negotiations between experienced, capable counsel after meaningful discovery.” *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (quoting MCL (Third) § 30.42 (1995)) (internal quotations marks omitted).

Moreover, Plaintiff’s Counsel also have significant experience in class action litigation, including consumer litigation involving M. G. L. c. 93 § 105, and have negotiated many other substantial class action settlements throughout the country. Where a settlement is achieved through arm’s-length negotiations by experienced counsel and there is no evidence of fraud or collusion, “[courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement.” *In re EVCI Career Colleges Holding Corp. Sec. Litig.*, 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007). *See also In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 280-81 (S.D.N.Y. 1999) (“[A] presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery”) (internal quotation marks and citation omitted).

Third, the fact that the Settlement provides for a prompt payment to claimants favors approval of the settlement. *See Teachers’ Ret. Sys. of Louisiana v. A.C.L.N., Ltd.*, 2004 WL 1087261, at *5 (S.D.N.Y. May 14, 2004) (“[T]he proposed Settlement provides for payment to Class Members now, not some speculative payment of a hypothetically larger amount years down the road. Indeed, if the Settlement is approved, Class members will be sent the Certificates within 30 days after final judicial approval of the Settlement and will receive the Certificates without the necessity of having to submit a claim form. Given the obstacles and

uncertainties attendant to this complex litigation, the proposed Settlement is within the range of reasonableness, and is unquestionably better than the other likely possibility – little or no recovery.”). Here, Class members will be sent the Certificates within 30 days after final judicial approval of the Settlement and will receive the Certificates without the necessity of having to submit a claim form.

Finally, the Settling Parties agreed to the terms of the Settlement after conducting formal and informal discovery. There is a presumption in favor of a proposed settlement when the parties have conducted sufficient discovery to allow them to investigate the pertinent factual and legal issues and to assess the merits of their respective cases. *City P’ship Co. v. Atlantic Acquisition L.P.*, 100 F.3d 1041 (1st Cir. 1996); *Rolland v. Celluci*, 191 F.R.D. 3, 6 (D. Mass. 2000). In this case, Plaintiff’s counsel were not only provided sufficient discovery by Defendants such that Plaintiff could assess the extent to which Defendants’ practices violated Massachusetts law, but counsel investigated the claims against Defendants prior to the mediation. As a result of all of these efforts, Plaintiff was able to develop the facts concerning Defendants’ potential liability necessary to engage in settlement discussions, and the Settling Parties and their counsel were capable of making well-informed decisions regarding the Settlement.

The Settlement easily meets the standard for preliminary approval.

II. The Proposed Settlement Class Should Be Preliminarily Certified

In granting preliminary settlement approval, the Court should also preliminarily certify the Class for purposes of the Settlement.

In order to maintain a class action, plaintiff must demonstrate that the class meets all four requirements of Rule 23(a): (1) the class is so numerous that joinder of all members is

impracticable (numerosity); (2) there are questions of law or fact common to the class (commonality); (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality); and (4) the representative parties will fairly and adequately protect the interests of the class (adequacy). *See Smilow v. Southwestern Bell Mobile Svs.*, 323 F.3d 32, 38 (1st Cir. 2003). In addition, the case must fit into one or more of the categories enumerated in Rule 23(b). *See Mack v. Suffolk County*, 191 F.R.D. 16, 22 (D. Mass. 2000).

A. The Prerequisites Of Rule 23(a) Are Satisfied.

1. The Settlement Class Is Sufficiently Numerous.

Rule 23(a)(1) requires that the class be so numerous that joinder of all class members is impracticable. Fed. R. Civ. P. 23(a)(1); *see Guckenberger v. Boston Univ.*, 957 F. Supp. 306, 325 (D. Mass. 1997). Courts in this district have typically held that a “40-person class is ‘generally found to establish numerosity.’” *McLaughlin v. Liberty Mut. Ins. Co.*, 224 F.R.D. 304, 307 (D. Mass. 2004); *see also McAdams v. Mass. Mut. Life Ins. Co.*, 2002 WL 1067449, at *3 (D. Mass. May 15, 2002). According to information provided by Defendants, there are more than 38,000 Class Members,⁸ resulting in more than a sufficient number of Class Members. Joinder of all Class Members is impractical, and, accordingly, the numerosity standard is met in this case.

2. There Are Common Questions Of Law And Fact.

Rule 23(a)(2) requires the existence of questions of law or fact common to the class. Fed. R. Civ. P. 23(a)(2). This “commonality” requirement “is satisfied if common questions of law or fact exist and class members’ claims are not in conflict with one another.” *Mack*, 191

⁸ Total for both subclasses combined, with more than 34,000 members in the First Time Collection Class.

F.R.D. at 23. The commonality requirement “does not require that class members’ claims be identical,” *id.*, and “[a] single common legal or factual issue can suffice.” *Payne v. Goodyear Tire & Rubber Co.*, 216 F.R.D. 21, 25 (D. Mass. 2003) (citation omitted).

Here, there are numerous common legal and factual issues, and the same facts giving rise to Plaintiff’s claims give rise to the other Class members’ claims. Indeed, Class Members would have to prove identical facts and answer identical questions were they to pursue their claims individually. The common legal and factual issues include, among others: a) whether Defendants violated M. G. L. c. 93 § 105(a), thereby violating M. G. L. c. 93A § 2; b) whether Plaintiff and the Class have sustained damages and, if so, the proper measure thereof; and c) whether Defendants should be enjoined from collecting ZIP codes from consumers using Credit Cards.

**3. The Plaintiff’s Claims
Are Typical Of Those Of The Settlement Class.**

Rule 23(a)(3) requires that “the claims or defenses of the representative parties [be] typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a). “As with the commonality requirement, the typicality requirement does not mandate that the claims of the class representative be identical to those of the absent class members.” *Swack v. Credit Suisse First Boston*, 230 F.R.D. 250, 260 (D. Mass. 2005). Where the class representatives’ injuries “arise from the same events or course of conduct as do the injuries that form the basis of the class claims, and when the plaintiff’s claims and those of the class are based on the same legal theory,” the typicality requirement is satisfied. *Swack*, 230 F.R.D. at 260. Here, the claims of the Plaintiff involve questions of law and fact typical, if not identical, to the claims of other Class Members. The gravamen of Plaintiff’s claim is that she, like the rest of the Class, had her Personal Identification Information wrongfully collected by Defendants in violation of M. G. L.

c. 93 § 105(a) and c. 93A § 9.

The injuries to Plaintiff and the members of the Class are attributable to the same alleged course of conduct by the Defendants, and liability for this conduct is predicated on the same legal theories. As such, the Rule 23(a)(3) typicality requirement is satisfied.

4. Plaintiff And Class Counsel Will Fairly And Adequately Protect The Interests Of The Class.

Rule 23(a)(4) is satisfied if “the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). The Court must measure the adequacy of representation by two standards: (1) whether the plaintiff’s counsel are qualified, experienced, and generally able to conduct the litigation; and (2) whether the class representative has interests antagonistic to those of the class. *See In re Transkaryotic Therapies, Inc.*, 2005 WL 3178162, at *4 (D. Mass. Nov. 28, 2005).

It is clear that Plaintiff is an adequate representative of the Settlement Class, and that her counsel has adequately represented the interests of the Settlement Class. There is no conflict between Plaintiff and other Settlement Class Members. In fact, Plaintiff’s claims and legal theories are the same as those that would be asserted by other Settlement Class Members.

Plaintiff’s Counsel are highly experienced in class action and other consumer litigation, as demonstrated by the accompanying declarations of counsel and the attached resumes.⁹ Plaintiff’s Counsel have negotiated with Defendants at arm’s length and achieved for Plaintiff and the Class a substantial settlement. Accordingly, the adequacy requirement is satisfied.

B. The Class’s Claims Satisfy The Prerequisites Of Rule 23(b)(3).

Rule 23(b)(3) authorizes class certification if “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual

⁹ See discussion in Section IV below regarding the appointment of Class Counsel.

members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3).

1. Common Legal And Factual Questions Predominate.

“Class-wide issues predominate if resolution of some of the legal or factual questions that qualify each class member’s case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof.” *In re Livent, Inc. Noteholders Sec. Litig.*, 210 F.R.D. 512, 517 (S.D.N.Y. 2002) (common issues predominate where “each class member is alleged to have suffered the same kind of harm pursuant to the same legal theory arising out of the same alleged course of conduct [and] the only individualized question concerns the amount of damages”); *In re Transkaryotic Therapies*, 2005 WL 3178162, at *2 (“where . . . common questions predominate regarding liability, then courts generally find the predominance requirement to be satisfied even if individual damages issues remain.”) (citation omitted).

Here, Plaintiff’s claims and alleged injuries are the same as those experienced by other members of the Settlement Class. The legal theories on which Plaintiff’s claims rest are the same as those of the Settlement Class. At least one common question predominates over all other potential individual questions – whether Defendants violated M. G. L. c. 93A when it collected zip codes from Plaintiff and members of the Settlement Class. This common question outweighs any questions regarding individual proof of damages. Therefore, predominance is met.

2. A Class Action Is Superior To Other Methods Of Adjudication.

Rule 23(b)(3) sets forth the following non-exhaustive factors to be considered in making a determination of whether class certification is the superior method of litigation: “(A) the class

members' interests in individually controlling the prosecution . . . of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by . . . class members; (C) the desirability . . . of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3).

Considering these factors, this class action is clearly "superior to other available methods for the fair and efficient adjudication" of the claims of the vast numbers of Defendants' customers who were requested to provide and did provide their ZIP code to Defendants. Plaintiff is unaware of any other litigation already commenced by individual Class Members, which is not surprising given the tremendous costs associated with such litigation. Absent the class action device, "the very real risk [is] that potential class members with relatively small claims would not have the financial incentives or wherewithal to seek legal redress for their injuries." *In re Transkaryotic Therapies*, 2005 WL 3178162, at *2.

The size of Plaintiff's Class members' individual claims against Defendants, together with the disproportionate cost of individualized litigation, make it unlikely that the vast majority of Class Members would be able to seek relief without class certification. Moreover, it is clearly desirable to concentrate the claims of all Class Members in this forum, and Plaintiff does not foresee any difficulties in the management and settlement of this action as a class action.

Accordingly, the requirements of Rule 23(b)(3) are satisfied, and the Court should preliminarily certify this action as a class action on behalf of the proposed Class.

III. The Notice Plan Should Be Approved.

The Settling Parties believe that because, as described below, the Direct Mail and Email Notices fairly apprise Class Members of their rights with respect to the Settlement, they represent the best notice practicable under the circumstances and they comply with Rule 23 and

due process. Therefore, the Settling Parties respectfully request that the Court approve the proposed forms of, and manner of transmitting the notices.

A. The Proposed Form And Content Of The Proposed Notices Are Sufficient.

In order to afford class members the opportunity to object to a proposed class-wide settlement or opt-out of the settlement class, reasonable notice must be provided to those class members. *Durett*, 896 F.2d at 604. Where a proposed settlement is coupled with a request for class certification under Rule 23(b)(3) of the Federal Rules of Civil Procedure, class notice must meet the requirements of both Rules 23(c)(2) and 23(e). The content of a class notice is governed by Rule 23(c)(2)(B). Rule 23(c)(2)(B) requires that the notice:

clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

In the present case, the Notices, attached as Exhibits 2, 3, 4 and 5 to the Garber Dec., will advise Class Members of the essential terms of the Settlement. Class Members will be provided by email or mail a summary of the Settlement terms (the “Summary Notice”) (Garber Dec., Exhibits 2 and 3)¹⁰ and that a copy of a more detailed notice (the “Full Class Notice”) (Garber Dec, Exhibits 4 and 5)¹¹ is available on a website operated by Defendants or the notice administrator. The Full Class Notice to be published on the website sets forth the detailed procedure to object to the Settlement or to opt out of the settlement class; and provides specifics

¹⁰ There are two Summary Notices, one for the *Urban Outfitters* Action (Exhibit 2) and one for the *Free People* Action (Exhibit 3).

¹¹ There are two Full Class Notices, one for the *Urban Outfitters* Action (Exhibit 4) and one for the *Free People* Action (Exhibit 5).

on the date, time and place of the Fairness Hearing. *See* Garber Dec., ¶ 23. As such, both the form and the content of the proposed notices to the Class are sufficient and should be approved by the Court.

B. The Manner of Providing Notice Is Sufficient.

In terms of the manner of providing notice, Rule 23(e)(1) instructs courts to “direct notice in a reasonable manner to all class members who would be bound by the Proposal,” while Rule 23(c)(2)(B) requires the notice to be the “best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” “Rule 23 does not require the parties to exhaust every conceivable method of identifying the individual class members,” and “[f]or those whose names and addresses cannot be determined by reasonable efforts, notice by publication will suffice under Rule 23(c)(2) and under the due process clause.” *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 177 F.R.D. 216, 232 (D.N.J. 1997); *see also id.* at 231 (“[D]ue process does not require actual notice, but rather a good faith effort to provide actual notice.”).

The procedure for disseminating the Notices jointly proposed here satisfies each of these requirements. Class Members for whom Defendants have a valid email address will receive directly emailed Email Notice. Class Members for whom Defendants do not have a valid email address but have a valid U.S. Postal address will receive direct U.S. Mail Notice.¹² The emailing and mailing of the Email Notice and U.S. Mail Notice, and the posting of a more detailed Class Notice on a website is a well-established means of providing legally sufficient notice. *See, e.g., Fidel v. Farley*, 534 F.3d 508, 514-15 (6th Cir. 2008) (notice program “comported with the requirements of both due process and Rule 23(c)(2)(B)” where notice was

¹² *See* Garber Dec., ¶ 23.

mailed to brokerage houses and summary notice was published on the internet); *In re Warner Chilcott Ltd. Sec. Litig.*, 2008 WL 5110904, at *3 (S.D.N.Y. Nov. 20, 2008) (same); *In re AT&T Mobility Wireless Data Services Sales Tax Litigation*, 789 F.Supp.2d 935, 941 (N.D. Ill. 2001) (finding that email notice, U.S. Mail notice and publication notice satisfied the notice requirements of Rule 23); *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 2011 WL 4963103, at *1 (D. Me. Oct. 18, 2011) (finding supplemental notice, supplemental email notice and supplemental press release as adequate notice to class members); *Lane v. Facebook, Inc.*, 2010 WL 9013059, at *1 (N.D. Cal. March 17, 2010) (finding that email notice in addition to other forms of notice “fully and accurately informed the Settlement Class Members of all material elements of the proposed Settlement.”).

IV. Plaintiff’s Counsel Should Be Approved As Class Counsel.

Rule 23(g) governs the standards and framework for appointing class counsel for a certified class, and sets forth four criteria the district court must consider in evaluating the adequacy of proposed counsel: (1) the work counsel has done in identifying or investigating potential claims in the action; (2) counsel’s experience in handling class actions, other complex litigation, and claims of the type asserted in the action; (3) counsel’s knowledge of the applicable law; and (4) the resources counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(2). The Court may also consider any other matter pertinent to counsel’s ability to fairly and adequately represent the interests of the class. Fed. R. Civ. P. 23(g)(1)(B). “No single factor should necessarily be determinative in a given case.” Fed. R. Civ. P. 23(g) advisory committee note.

Information relevant to each of these criteria is set forth in the Garber Declaration and the accompanying declarations of David Pastor of PLO, and Preston Leonard of LLO, Plaintiff’s

counsel and proposed Class Counsel. Garber Dec. ¶¶ 25-31, Ex. 9; Pastor Dec. ¶¶ 2-6, Ex. A; Leonard Dec. ¶2, Ex. A. As the Garber declaration demonstrates, the attorneys at FBFG, including Mr. Garber, have had substantial experience in handling class actions and other complex litigation, including consumer fraud class actions. In addition, the attorneys at FBFG have played a leading role in the development of this area of law, having brought the first case under § 105(a) for unlawful collection of ZIP codes, and having successfully persuaded the Massachusetts Supreme Judicial Court to find that the collection of ZIP codes violates § 105(a) and that consumers can seek redress under Chapter 93A for non-fraud related injuries caused by violations of § 105(a). Garber Dec. ¶¶ 28-30. Finally, FBFG has demonstrated, and will continue to demonstrate, that it is committed to allocating the necessary financial and human resources to ensure that the case is successfully resolved for the benefit of the Class.

As the Pastor Declaration and attached firm resume demonstrates, Mr. Pastor has substantial experience in litigating class actions, including consumer class actions, in a variety of state and federal courts. Pastor Dec. ¶¶ 2-4. In addition to the substantial recoveries obtained in class actions, Mr. Pastor was involved in several significant reported decisions that established important points of law, as referenced in his declaration. *Id.*, ¶ 2. Mr. Leonard and his law firm also have experience in consumer class actions and can adequately represent the Class. Leonard Dec. ¶2.

V. Proposed Schedule Of Events

In connection with preliminary approval of the Settlement, the Court should set a Fairness Hearing date, as well as the following additional dates and deadlines. All of the following dates run from either the date of the entry of the Preliminary Approval Order or the date of the Fairness Hearing: dates for mailing and publication of the Notice, deadlines

for objecting to the Settlement and requesting exclusion, the date for filing papers in support of the Settlement, and the date for distributing Certificates to Class Members. The Preliminary Approval Order establishes the following schedule:

<u>Dates</u>	<u>Events</u>	<u>Settlement Agreement Citation</u>
No later than 30 days after entry of the Preliminary Approval Order	Defendants will send the Summary Notice to Class Members by email and U.S. Mail.	Amended Settlement Agreement ¶ 3.2
No later than 45 days after entry of the Preliminary Approval Order	Defendants will post the Full Class Notice on the Internet for 60 days.	Amended Settlement Agreement ¶ 3.2
No later than 15 court days before the Fairness Hearing	Defendants will file with the Court and serve upon Plaintiff's Counsel a declaration confirming that the Class Notice has been provided in accordance with Section 3.2 of the Settlement Agreement.	Amended Settlement Agreement ¶ 3.3
30 days after the Class Notice is Published	Deadline for Class members to file a written objection with Plaintiff's Counsel and deadline for Class Members to request for exclusion	Amended Settlement Agreement ¶ 3.4 & 3.5
14 days before the Fairness Hearing	All papers in support of settlement approval and Plaintiff's application for attorneys' fees and expenses to be filed	Amended Settlement Agreement, ¶ 4.2

Within 30 days following the Final Judicial Approval of the Settlement	Urban Outfitters and Free People, either by themselves or through the Notice Administrator, must email or mail via U.S. Mail the Certificates to Class Members.	Amended Settlement Agreement ¶ 3.7
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CONCLUSION

For all the foregoing reasons, Plaintiff respectfully requests that the Court grant preliminary approval of the proposed Settlement; preliminarily certify the proposed Class for settlement purposes; approve the form and manner of giving notice as proposed; approve the schedule for the final settlement approval process and set a date for the final fairness hearing; and enter the accompanying proposed Preliminary Approval Order.

Dated:

Respectfully submitted,

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