

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

DIANNA KHUN, on behalf of herself and all  
others similarly situated,

Plaintiff

v.

SLEEPY'S, LLC and CMC ACQUISITION  
CORPORATION, d/b/a CAPITOL  
MARKETING CONCEPTS, INC.,

Defendants.

**Case No. 1:17-cv-10110**

**UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION  
SETTLEMENT AND INCORPORATED MEMORANDUM OF LAW**

Plaintiff, Dianna Khun ("Plaintiff" or "Khun"), by and through her counsel, hereby respectfully moves the Court for approval of this Motion for Preliminary Approval of Class Action Settlement ("Motion for Preliminary Approval"). Specifically, Plaintiff respectfully requests that the Court enter an Order:

- 1) Provisionally certifying the proposed settlement classes under Rule 23 of the Federal Rules of Civil Procedure in connection with the settlement process, as outlined in the exhibits hereto and below;
- 2) Granting preliminary approval of the Settlement Agreement, Release, and Waiver ("Settlement Agreement"), attached as Exhibit A hereto;
- 3) Appointing Forrest, LaMothe, Mazow, McCullough, Yasi & Yasi, P.C. as Class Counsel;
- 4) Directing distribution of the proposed Notice(s) of Settlement of Class Action Lawsuit and Fairness Hearing ("Notice"), attached as Exhibit A and Exhibit B to the Settlement Agreement, in accordance with this Motion for Preliminary Approval;
- 5) Approving KCC LLC as the Settlement Administrator; and
- 6) Setting the final fairness hearing for a date no later than one hundred and twenty (120) days after the date of the entry of the Preliminary Approval Order.

In support of her Motion for Preliminary Approval, Plaintiff submits the following incorporated memorandum.

**I. INTRODUCTION AND PROCEDURAL HISTORY**

Dianna Khun filed this putative class action on November 7, 2016 in the Suffolk County Superior Court, Massachusetts against Defendants, Sleepy's LLC ("Sleepy's") and CMC Acquisition Corporation d/b/a Capitol Marketing Concepts, Inc. ("Capitol") (collectively "Defendants") (Khun, Sleepy's and Capitol are collectively referred to herein as the "Parties").

On or about November 1, 2016, and pursuant to M.G.L. c. 93A, Khun served both Defendants with class-wide consumer protection demands.

Thereafter, on or about December 12, 2016, Plaintiff filed a First Amended Class Action Complaint and Demand for Jury Trial with added claims for purported violations of M.G.L. c. 93A.

On or about January 23, 2017, Defendant, Sleepy's LLC, removed this case to the United States District Court for the District of Massachusetts. Thereafter, both Defendants filed their respective answers and affirmative defenses to Khun's First Amended Class Action Complaint on January 30, 2017.

On April 3, 2017, the Parties appeared for the Rule 16 and Rule 26 Joint Scheduling Conference and filed their associated statements. Following the conference, the Parties agreed to and executed a joint motion for entry of protective order.

On June 16, 2017, the Parties appeared for a status conference. At the conference, the Parties reported that they had reached an agreement to proceed to private mediation.

Thereafter, on September 27, 2017, the Parties engaged Eric D. Greene, Esq. of Resolutions, LLC and held a full-day private mediation session. However, at the time of the mediation the Parties were not able to fully resolve the alleged claims.

On October 11, 2017, the Parties appeared for a further status conference and proposed an amended scheduling order.

Thereafter, on January 11, 2018, the Parties appeared for a further status conference and discussed the Parties' amended scheduling order. Said amended scheduling order was entered by this Court on January 11, 2018.

On March 26, 2018, the Parties appeared for a further status conference and reported to the Court that they had reached an agreement on general terms of a class-wide settlement. The Parties reported that there was a need for a brief confirmatory discovery process and requested a further status conference date.

Thereafter, on May 4, 2018, the parties appeared before this Court with confirmation of settlement.

The Court set the matter on for hearing June 20, 2018.

The Parties now hereby jointly move for preliminary approval of this class action settlement, which has been reached after extensive arms-length and good faith negotiations. The Parties contend the settlement will provide a fair and reasonable recovery to members of the putative class.

Moreover, the Parties represent that since the filing of this lawsuit, they have voluntarily exchanged extensive information, including records related to putative class size and information.

The Parties' negotiations resulted in an agreement to settle the action on the terms set forth in the Settlement Agreement, attached hereto as Exhibit A.

The terms of the settlement are presumptively fair and well within the range of reasonableness for class and collective action settlements of this kind and are the product of arm's-length negotiations.

## **II. SUMMARY OF CLAIMS AND DEFENSES**

Khun alleges that Sleepy's and Capitol have engaged in an unlawful scheme whereby Defendants advertised and made certain representations to Massachusetts consumers who bought certain qualifying Sleepy's products. More precisely, the Plaintiff alleged Defendants represented that Massachusetts customers would be entitled to a promotional gift card of varying yet significant value; however, Plaintiff alleges that such representations failed to clearly and conspicuously disclose certain terms, conditions and restrictions related to the promotional gift cards redemption and use.

That is, Khun alleges that despite Defendants' advertising and representations to consumers at large, Sleepy's and Capitol failed to disclose all of the relevant material conditions, limitations and restrictions associated with the use and redemption of the promotional gift cards (in violation of federal regulation and Massachusetts statutory and regulatory law). As such, Khun alleges Defendants' acts and omissions constituted purported violations of Massachusetts General Law chapter 93A, § 2; Massachusetts regulation 940 CMR 6.05 (retail advertising regulation); Massachusetts regulation 940 CMR 3.02 (Massachusetts false advertising regulation); Massachusetts regulation 940 CMR 3.05 (General Misrepresentations); Massachusetts regulation 940 CMR 3.16 (violation of consumer regulations); and 12 CFR 205.20 (Federal gift card regulation). Further, Khun alleges claims of breach of contract; negligent misrepresentation; fraud and deceit; and unjust enrichment.

Finally, Khun seeks declaratory relief with regard to the acts and practices of Defendants as set forth in her First Amended Complaint.

Sleepy's denies it engaged in any unfair, illegal or deceptive act and maintains that Sleepy's promotional card campaign was legal and proper. Sleepy's contends that it informed all customers who qualified for the promotion that terms and conditions apply. Sleepy's asserts that its actions complied with all state and national statutes and that each customer who qualified for a promotional gift card was sent a packet to the address provided for delivery and each packet contained all terms and conditions of the promotional gift card in clear and conspicuous language.

Likewise, Capitol denies violating any state or federal statutes as alleged in Plaintiff's First Amended Complaint. Capitol contends that in connection with the promotion under which Plaintiff alleges she was entitled to promotional gift cards, Capitol's role was solely limited to providing vouchers for promotional gift cards to Sleepy's customers. Capitol maintains that it had no involvement in any advertising for the promotion offered by Sleepy's, had no involvement in determining who was eligible for the promotional gift card, and had no communications with any of Sleepy's customers until after a qualifying purchase was made.

### **III. SUMMARY OF THE TERMS OF THE SETTLEMENT AND RELIEF SOUGHT**

The Settlement Agreement defines the Settlement Class into two subclasses.

The first subclass ("Subclass A") consists of all persons in Massachusetts who were issued promotional gift card vouchers and who redeemed said promotional gift card.

The second subclass ("Subclass B") consists of all person in Massachusetts who were issued promotional gift card vouchers but who did not redeem said voucher.

As part of the settlement of the claims, the Parties have agreed that Subclass A shall receive \$25.00 in statutory damages per promotional gift card voucher, and Subclass B shall receive the actual value of the promotional gift card voucher to which they were allegedly entitled.

<b>Class</b>	<b>Number of Promotional Gift Card Vouchers Issued</b>	<b>Settlement Relief per Promotional Gift Card Voucher</b>	<b>Total Settlement Relief</b>
Subclass A	5,283	\$25.00	\$132,075.00
Subclass B	1,870	\$110.33	\$206,325.00
		<b>Total:</b>	<b>\$338,400.00</b>

Defendants have further agreed to cover all costs associated with administration of the settlement including providing notice to settlement class members and issuing settlement checks.

In addition, Defendants have agreed to make a one-time service payment to the named Plaintiff in an amount not to exceed \$6,300.

Finally, the Defendants have agreed to pay the court approved amount of attorneys' fees and costs to Class Counsel separate and apart from the class member settlement relief, in an amount not to exceed \$250,000.00.

The settlement provides that each individual who is a member of one of the subclasses shall be sent a Notice and will be notified of their opportunity to exclude themselves from said settlement and/or object to said settlement.

Defendants, through the Settlement Administrator, will make all reasonable efforts to best ensure that each potential class member receives full and adequate notice of the settlement, which shall set forth the material settlement terms; instructions on how to submit objections to the settlement and when and where to appear at the final fairness hearing; and how to request exclusion from the settlement. See, proposed Notices attached to the Settlement Agreement as Exhibit A (Postcard Notice) and Exhibit B (Long Form Notice).

Upon final approval, Defendants' Counsel will ensure distribution of the settlement funds to the class.

The Parties propose that, along with granting preliminary approval of the settlement, the Court adopt the schedule set forth below, for the parties to effectuate the various steps in the settlement approval process under the Settlement Agreement:

	<i><b>Event</b></i>	<i><b>Timing</b></i>
1	Notice Date	No more than thirty (30) days after the entry of Order preliminarily approving the settlement.
2	Deadline for filing Objections	Seventy-five (75) days after the entry of the Order preliminarily approving the settlement.
3	Deadline for filing Requests for Exclusion	Seventy-five (75) days after the entry of the Order preliminarily approving the settlement.
3	Final Approval Hearing Date	One Hundred and Twenty (120) days after the entry of the Order preliminarily approving the settlement.

Accordingly, at this preliminary stage of the settlement process, Plaintiff respectfully requests that the Court enter an Order: (1) provisionally certifying the proposed Settlement Class under Rule 23 of the Federal Rules of Civil Procedure with respect to the claims brought against Defendants; (2) granting preliminary approval of the Settlement Agreement; (3) appointing Forrest, LaMothe, Mazow, McCullough, Yasi & Yasi, P.C. as Class Counsel; (4) directing distribution of the proposed Postcard Notice to all class members in accordance with the terms of the Settlement Agreement; approving KCC LLC as the Settlement Administrator; and (5) setting the final fairness hearing for one hundred and twenty (120) days after the entry of the Order preliminarily approving the settlement.

Plaintiff submits that the proposed Settlement Agreement satisfies all the criteria for preliminary settlement approval under federal and state law and falls well within the range of possible approval. Accordingly, Plaintiff requests that the Court grant the requested relief.

#### IV. Legal Argument

##### A. **Standard of Review and Procedures for Preliminary Approval.**

By this Motion for Preliminary Approval, the Parties seek preliminary approval of the Settlement Agreement. “Compromises of disputed claims are favored by the courts.” Williams v. First Nat’l Bank, 216 U.S. 582, 595 (1910); see also, Durett v. Housing Auth. of Providence, 896 F.2d 600, 604 (1st Cir. 1990); In re Viatron Computer Sys. Corp., 614 F.2d 11, 15 (1st Cir. 1980); and In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 317 (3d Cir. 1998) (“Prudential II”).

Settlement spares the litigants the uncertainty, delay and expense of a trial, while simultaneously reducing the burden on judicial resources. Federal Rule 23(e) provides that the Court must approve any settlement of a class action.

In a class action, the “court plays the important role of protector of the [absent members’] interests, in a sort of fiduciary capacity.” In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 785 (3rd Cir. 1995) (“GM Trucks”). The ultimate determination. The ultimate determination though of whether a proposed class action settlement warrants approval resides in the Court’s discretion. Protective Comm. for Indep. S’holders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424-25 (1968).

As discussed more fully below, at this stage of preliminary approval, there is clear evidence that the Settlement Agreement is a benefit to the putative Settlement Class, particularly given the evidentiary and legal issues discussed below and the full statutory amount agreed to that is well within the range of possible approval and thus should be preliminarily approved.

Rule 23(e) of the Federal Rules of Civil Procedure provides the mechanism for settling a class action, including, as here, through a class certified for settlement purposes:

The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed,



or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

- (1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.
- (2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.
- (3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.
- (4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.
- (5) Any class member may object to the proposal if it requires court approval under Federal Rule of Civil Procedure 26(e); the objection may be withdrawn only with the court's approval.

FED. R. CIV. P. 23(e); see also, Amchem Prods. v. Windsor, 521 U.S. 591, 617 (1997); and Durett, 896 F.2d at 604.

In determining whether preliminary approval is warranted, the primary issue before the Court is whether the proposed settlement is within the range of what might be found fair, reasonable and adequate, so that notice of the proposed settlement should be given to class members, and a hearing scheduled to determine final approval. See, Manual for Complex Litigation, Fourth, § 13.14, at 172-73 (2004) ("Manual Fourth"). The Court reviews the settlement proposal preliminarily to determine whether it is sufficient to warrant public notice and a hearing. Id.

If so, the final decision on approval is made after the hearing. At the hearing on this Motion for Preliminary Approval, the Court is not required to make a final determination. 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.

Id. at § 21.632, at 321. Preliminary approval is the first step in a two-step process required before a class action may be finally settled. Id. at 320. At step one, courts make a preliminary evaluation of the fairness of the settlement, prior to notice. Id. at 320-21. In some cases, this initial assessment can be made on the basis of information already known to the court and then supplemented by briefs, motions and an informal presentation from the settling parties. Id. There is an initial strong presumption that a proposed class action settlement is fair and reasonable when it is the result of arm's length negotiations. Durett, 896 F.2d at 604 (reversing denial of approval of settlement as an abuse of discretion and noting that "district court's discretion [in denying approval of settlements] is restrained by 'the clear policy in favor of encouraging settlements'").

In deciding whether a settlement should be approved under Rule 23, courts look to whether there is a basis to believe that the more rigorous, final approval standard will be satisfied. "Once the judge is satisfied as to the certifiability of the class and the results of the initial inquiry into the fairness, reasonableness, and adequacy of the settlement, notice of a formal Rule 23(e) fairness hearing is given to the class members." MANUAL FOURTH at § 21.633, at 321. Preliminary approval permits notice of the hearing on final settlement approval to be given to the class members, at which time class members and the settling parties may be heard with respect to final approval. Id. at 322. The standard for final approval of a settlement consists of showing that the settlement is fair, reasonable, and adequate. See e.g., Durett, 896 F.2d at 604; Prudential II, 148 F.3d at 316-17; In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 785 (3rd Cir. 1995) ("GM Trucks").

**1. The Settlement Agreement reached in this case is fair, reasonable and adequate.**

Before granting approval of a proposed class action settlement, the Court must find that the settlement is fair, reasonable, and adequate. See e.g., FED. R. CIV. P. 23(e); MASS. R. CIV. P. 23(c); Durett, 896 F.2d at 604; and Sniffin v. Prudential Ins. Corp., 395 Mass. 415 (1985).

A “strong initial presumption” of fairness arises where the parties can show that “the settlement was reached after arms-length negotiations, that the proponents’ attorneys have experience in similar cases, that there has been sufficient discovery to enable counsel to act intelligently, and that the number of objectors or their relative interest is small.” Rolland v. Cellucci, 191 F.R.D. 3, 6 (D. Mass. 2000); see also, City P’ship Co. v. Atlantic Acquisition Ltd. P’ship, 100 F.3d 1041, 1043 (1st Cir. 1996).

“[T]here is no single test in the First Circuit for determining the fairness, reasonableness and adequacy of a proposed class action settlement.” In re Relafen Antitrust Litig., 231 F.R.D. 52, 71-72 (D. Mass. 2005) (internal quotations omitted).

As a result, the courts of the First Circuit rely on a number of factors, the most common of which include: (1) the complexity, expense, and duration of litigation, if the agreement is denied; (2) the amount of the proposed settlement compared to the amount at issue; (3) reaction of the class to the settlement; (4) the stage of proceedings and the amount of discovery completed; (5) the plaintiffs’ likelihood of success on the merits and recovering damages on their claims; (6) whether the agreement provides benefits which the plaintiffs could not achieve through protracted litigation; (7) good faith dealings and the absence of collusion; and (8) the settlement’s terms and conditions. See, e.g., Rolland v. Patrick, 562 F. Supp. 2d 176 (D. Mass. 2008); In re Relafen Antitrust Litig., 231 F.R.D. at 72; In re Lupron Mktg. & Sales Practices

Litig., 228 F.R.D. 75, 93 (D. Mass. 2005); Celluci, 191 F.R.D. at 8-9; and M. Berenson Co. v. Faneuil Hall Marketplace, Inc., 671 F. Supp. 819, 822-833 (D. Mass. 1987).

In the case at bar, an examination of each of these factors demonstrates that the proposed settlement is fair, reasonable, and adequate to the members of the class, and should be preliminarily approved by the Court.

First, with respect to complexity, expense, and duration of litigation, it is clear that the prosecution of this case would be lengthy and expensive. If this settlement is not approved, the Parties could face extended and expensive litigation regarding both the certifiability of the two proposed subclasses and the merits of whether the promotional gift card voucher program violated any state or federal laws, including M.G.L. c. 93A.

In addition, the Parties would have to conduct costly and extensive additional discovery in preparation for trial and would potentially face a lengthy and costly class action trial. Further, if this case does not settle, it would likely take years to resolve, generating enormous legal fees before reaching final resolution, including exhaustion of all appeals.

Second, with respect to the amount of the proposed settlement compared to the amount at issue, the Parties agree that the value of the settlement is fair and reasonable given the various challenges facing the parties. That is, the terms of the settlement entitle all class members who were able to redeem their promotional gift card vouchers \$25.00, which amount represents the **full statutory award** said class member would be entitled to pursuant to M.G.L. c. 93A. In addition, the terms of the settlement entitle all class members who were unable to redeem their promotional gift card vouchers the **full** amount of the unredeemed value of the promotional gift card promised.

Further, given the very real risk that Plaintiff and the putative class could recover nothing if this litigation were to proceed, the Parties agree that this settlement amount is entirely appropriate and very favorable to the Plaintiff and the putative class members.

Third, with respect to the reaction of the class to the settlement, the Court will be able to evaluate this factor after the notice period has expired and all potential objections and/or opt-outs have been analyzed.

Fourth, with respect to the stage of proceedings and the amount of discovery completed, Class Counsel received all requested information they determined necessary in order to estimate the aggregate class damages for all claims in the case in relation to the agreed upon terms of the Settlement Agreement, thus allowing them to assess the fairness of the settlement.

Further, the Parties have engaged in extensive arm's-length discussions about the relevant facts and legal merits of the claims asserted in the case. These discussions have focused on a number of practical and legal issues presented by this case, and this settlement will resolve the risks which the Parties fully appreciate at this point in the litigation.

Fifth, with respect to the Plaintiff's likelihood of success in obtaining class certification and in recovering on the merits of the case, Plaintiff believes strongly in her case, but recognizes that the agreed upon settlement figures are possibly the maximum amount the classes might be able to recover and there is the possibility that should the matter proceed to trial the class members may receive significantly less than the agreed to amounts or could receive nothing. Finally, Plaintiff recognizes that surviving summary judgment is not guaranteed nor is avoiding a significant reduction in available damages to each settlement class member.

Sixth, with respect to whether the agreement provides benefits which Plaintiff could not achieve through protracted litigation, the settlement provides the benefit of a prompt and fair

resolution to all claims in the Amended Complaint, and the avoidance of delay of the class members' receiving their portion of the settlement amount.

Seventh, with respect to whether the settlement was reached as the result of good faith dealings and the absence of collusion, the Parties submit that the settlement was the result of good faith negotiations and involved no collusion. Both Plaintiff and Defendants are represented by experienced counsel in consumer protection litigation, who have litigated similar cases aggressively and successfully on behalf of their respective clients. The settlement was negotiated on behalf of Plaintiff by a team of attorneys who have successfully represented numerous class representatives and putative classes in class action litigation, including other court approved settlements of consumer protection class actions.<sup>1</sup> See, e.g., Cotton v. Hinton, 559 F.2d 1326 (5th Cir. 1977); In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 410 F.Supp. 659 (D. Minn. 1974) ("The recommendation of experienced antitrust counsel is entitled to great weight."); Fisher Brothers v. Phelps Dodge Industries, Inc., 604 F. Supp. 446 (E.D. Pa. 1985) ("The professional judgment of counsel involved in the litigation is entitled to significant weight.").

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<sup>1</sup> See e.g., Doe et al. v. The Medical Treatment Center of Revere, et al., CA No. SUCV-2014-3487A (Allowed May 15, 2018, Campo, J.); Butler et al. v. Salisbury Five C's, Inc., et al., CA No. ESCV-1777-CV-1127C (Allowed April 17, 2018, Lu, J.); Topham et al. v. Roberts Towing, Inc. d/b/a Roberts Towing, CA No. SUCV-2017-0386-BLS1 (Allowed February 21, 2018, Kaplan, J.); Cabrera v. Progressive Direct Ins. Co., CA No. SUCV-2016-03716-BLS2 (Allowed February 14, 2018, Salinger, J.); Polanik et al. v. Boston Hill Donuts, LLC, et al., CA No. 1784CV00914-BLS2 (Allowed, September 28, 2017, Leibensperger, J.); Hyman et al. v. Metropolitan Property & Casualty Ins. Co., et al., CA No. SUCV-1684CV00488-BLS2 (Allowed, August 23, 2017, Sanders, J.); Kappotis et al. v. Bertucci's, Inc. et al., CA No. SUCV-1584CV03821-BLS1 (Allowed, February 24, 2017, Kaplan, J.); Reis et al. v. Knight's Airport Limousine Service, Inc., et al., CA No. WOCV2014-01558C (Allowed, November 10, 2015); Fama et al. v. Bactes Imaging Solutions, Inc., Suffolk Superior Court, C.A. No.: 13-01435-BLS1, consolidated with 13-00681-BLS1; 13-04165-BLS1; and 14-00352-BLS1 (Allowed, May 4, 2015, Kaplan, J.); Figueroa, et al. v. Plymouth Rock Assurance Corp., CA No.: 13-1829 BLS-2 (Allowed, June 14, 2014, Roach, J.); Duran v. Liberty Mutual Ins. Co., CA No. 12-0367 (Allowed, September 23, 2014, Billings, J.); Flores, et al. v. Government Employees Ins. Co., Suffolk Superior Court C.A. No.: 13-2125A (Allowed, December 17, 2014, Billings, J.); and Garian, et al. v. Metropolitan Prop. & Cas. Ins. Co., C.A. No. 12-1465 (Allowed, September 27, 2013, Welch, J.).

This settlement was specifically negotiated by experienced counsel to assure all class members their rights under the applicable laws, and was not the product of collusive dealings, but, rather, was informed by the vigorous prosecution of the case by experienced and qualified counsel. Further, continued litigation would be long, complex and expensive, and a burden to court dockets.<sup>2</sup>

As stated, the proposed Settlement Agreement was the result of protracted, good faith, arm's length negotiations between experienced and informed counsel on both sides, and the Settlement Agreement and its material terms were negotiated among counsel upon the review of extensive records and after a full day of in person mediation as well as many telephone conferences to negotiate the proposed Settlement Agreement. The \$338,400.00 Common Fund amount is a substantial result for the affected settlement class.

The result is well within the reasonable standard. Plaintiff's counsel also believes that the result is appropriate when considering the difficulty and risks involved in litigating class claims as to the alleged consumer protection issues related to the promotional gift card voucher programs.

Accordingly, the standards for preliminary approval are met in this case and the parties request the Court grant preliminary approval.

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<sup>2</sup> Litigating Plaintiff's claims would require substantial additional preparation and discovery. It ultimately would involve the deposition and presentation of numerous witnesses; the consideration, preparation and presentation of documentary evidence; and the preparation and analysis of expert reports and oppositions to such reports. In addition, because Defendants deny that any violations of law have occurred, Defendants would possibly appeal any adverse ruling. Similarly, Plaintiff would possibly appeal any adverse ruling. In contrast, the Settlement Agreement will yield a prompt, certain, and very substantial recovery for the class. Such a result will benefit the Parties and the court system. Certainly, putting the matter out for notice in order to determine the reaction of the classes as a whole is warranted.

**B. Provisional Certification of the Settlement Classes is Appropriate.**

Both the Supreme Court and various circuit courts have recognized that the benefits of a proposed settlement can only be realized through the certification of a settlement class. See e.g., Amchem, 521 U.S. at 591; In re Lupron Marketing and Sales Practices Litigation, 345 F. Supp. 2d 135, 137 (D. Mass. 2004) (citing MANUAL FOURTH); see also, Hanlon v. Chrysler Corp., 150 F.3d 1011 (9<sup>th</sup> Cir. 1998); and Prudential II, 148 F.3d at 283.

Specifically, the First Circuit has established that where there is a “common disputed issue,” courts should “view the issue . . . in favor of class action status.” Tardiff v. Knox County, 365 F.3d 1, 5 (1st Cir. 2004); see also, In re New Motor Vehicles Canadian Export Antitrust Litigation, 522 F.3d 6, 23 (1st Cir. 2008) (noting “existence of a common disputed issue weighs in favor of class certification, not against it). This is also the preference in other circuits. See e.g., Eisenberg v. Gagnon, 766 F.2d 770 (3d Cir.1985) (“[t]he interests of justice require that in a doubtful case . . . any error, if there is to be one, should be committed in favor of allowing a class action”). Here, as set forth below, all the elements of Rule 23 are met with respect to the proposed settlement, which, accordingly, merits class certification.

**1. The Elements of Rule 23(a) are Satisfied in the Present Case.**

In order for a lawsuit to be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure, a named plaintiff must establish each of the four threshold requirements of subsection (a) of the Rule, which provides:

One or more members of a class may sue or be sued as representative parties on behalf of all only 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.



Fed. R Civ. P. 23(a). See e.g., Key v. Gillette Co., 782 F.2d 5, 7 (1st Cir. 1986) (“all four requirements of Rule 23(a) must be met in order for certification of a class to be proper”); Barnes v. American Tobacco Co., 161 F.3d 127 (3d Cir. 1998); Prudential II, 148 F.3d at 308-

09. Here, for purposes of settlement, all four elements are easily satisfied. Specifically, the proposed settlement class consists of the following subclasses:

- a. **Subclass A** – all persons who made a qualifying promotional purchase during the class period at a Sleepy’s retail location in Massachusetts, or an online purchase for a Massachusetts delivery, who were entitled to a promotional gift card, were issued a voucher, and who redeemed said voucher.
- b. **Subclass B** – all persons who made a qualifying promotional purchase during the class period at a Sleepy’s retail location in Massachusetts, or an online purchase for a Massachusetts delivery, who were entitled to a promotional gift card, were issued a voucher, but who did not redeem said voucher.

## **2. The Requirements of Numerosity Are Met Under Rule 23(a)(1).**

Rule 23(a)(1) requires that the class be “so numerous that joinder of all members is impracticable.” Plaintiff is not required to come before the Court and detail, to the person, the exact size of the class or to demonstrate that joinder of all class members is impossible. “‘Impracticability’ does not mean ‘impossibility,’ but only the difficulty or inconvenience of joining all members of the class.” Advertising Special. Nat. Ass’n v. Federal Trade Comm’n, 238 F.2d 108, 119 (1st Cir. 1956) (citing 3 MOORE’S FEDERAL PRACTICE 3423 (2d ed. 1948).; see also Liberty Lincoln Mercury, Inc. v. Ford Mktg. Corp., 149 F.R.D. 65, 73 (D.N.J. 1993) (stating that “[i]mpracticability does not mean impossibility” and “precise enumeration of the members of a class is not necessary”). Furthermore, “numbers alone” are not determinative of numerosity, but rather, “the facts and circumstances of each case are to be taken into account to determine numerosity under Rule 23(a)(1).” Andrews v. Bechtel Power Corp., 780 F.2d 124, 131-32 (1st Cir. 1985).

For settlement purposes numerosity is achieved here because Subclass A consists of 5,283 members and Subclass B consists of 1,870 members. Further, it is not practicable for all members of the putative class to be joined in this action given their varying geographic locations throughout Massachusetts.

### **3. The Requirements of Commonality Are Met Under Rule 23(a)(2).**

Rule 23(a)(2) requires that there be “questions of law or fact common to the class.” The commonality requirement is met if the plaintiff’s grievances demonstrate “that there are common questions of law or fact in the case.” So. States Police Benevolent Ass’n, Inc. v. First Choice Armor & Equip., Inc., 241 F.R.D. 85, 87 (D. Mass. 2007) (characterizing commonality requirement as a “low hurdle” that “can be met by even a single common legal or factual issue”).<sup>3</sup>

Here, for settlement purposes commonality is met insofar as the claims of the class representative and all class members are all predicated on the core common issue as to whether Defendants’ promotional gift card voucher program violated the Massachusetts consumer protection laws and/or failed to clearly and conspicuously disclose the relevant terms and conditions of redemption and use. See e.g., Overka v. Am. Airlines, Inc., 265 F.R.D. 14, 18 (D.

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<sup>3</sup> Rather than requiring that all questions of law or fact be common, Rule 23 only requires that “the questions of law or fact common to the members of the class predominate over any questions affecting only individual members.” FED. R. CIV. P. 23(b)(3). Plaintiff is not required to show that all class members’ claims are identical to each other as long as there are common questions at the heart of the case; “despite some factual differences between the members of the class, commonality can still exist for purposes of 23(a)(2).” In re Dehon, Inc., 298 B.R. 206, 214 (Bankr. D. Mass. 2003) (holding that because one “can reasonably infer that certain defenses of the individual members of the putative class to Dehon’s subordination strategy will be available to every other member...is established”).

Indeed, only a single common question is sufficient to satisfy the requirements of Rule 23(a)(2). See, e.g., 1 Robert Newberg, NEWBERG ON CLASS ACTIONS, § 3.10; accord So. States Police Benevolent Ass’n, 241 F.R.D. at 87. “The test or standard for meeting the Rule 23(a)(2) prerequisite is qualitative rather than quantitative; that is, there need be only a *single issue common* to all members of the class. Therefore, this requirement is easily met in most cases.” Natchitoches Parish Hosp. Servs. Dist. v. Tyco Int’l, Ltd., 247 F.R.D. 253, 264 (D. Mass. 2008) (quoting 1 Newberg, NEWBERG ON CLASS ACTIONS, § 3.10) (emphasis added).

Mass.2010) (“Commonality is satisfied where the lawsuit challenges a systemwide practice or policy that affects all of the putative class members.”); George v. Nat’l Water Main Cleaning Co., 286 F.R.D. 168, 175 (D. Mass. 2012) (“[H]ere the allegations against the Corporate Defendants are that their wage policies facially violated state law, which requires little individual inquiry.”); see also Kirby v. Cullinet Software, Inc., 116 F.R.D. 303, 306 (D. Mass. 1987) (stating evidence of commonality need not be “exhaustive,” but only “illustrative” (quoting Berenson v. Fanueil Hall, 100 F.R.D. 468, 470 (D. Mass. 1984))).

Here, all claims are based upon Defendants’ offering of the promotional gift card voucher. The differences between the subclasses relate only to whether a class member redeemed said voucher for any amount of money or whether a class member did not redeem the voucher such that they did not access the funds. Accordingly, the class claims satisfy the commonality element of Fed. R. Civ. P. 23(a)(2).

#### **4. The Requirements of Typicality Are Met Under Rule 23(a)(3).**

Rule 23(a)(3) requires that a representative of plaintiff’s claims be “typical” of those of other class members.<sup>4</sup> The typicality requirement is satisfied when the class members’ claims “arise[] from the same event or practice or course of conduct that gives rise to the claims of other class members, and . . . are based on the same legal theory.” Garcia-Rubiera v. Calderon, 570 F.3d 443, 460 (1st Cir. 2009) (quoting In re Am. Med. Sys., Inc., 75 F.3d 1069, 1082 (6th Cir. 1996); see also Marisol A. v. Giuliani, 126 F.3d 372 (2d Cir. 1997) (typicality requirement “is

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<sup>4</sup> The commonality and typicality requirements of Rule 23(a) “tend to merge.” Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 157 n. 13 (1982). The requirement of this subdivision of the rule, along with the adequacy of representation requirement set forth in subsection (a)(4), is designed to assure that the interests of unnamed class members will be protected adequately by the named class representative. See e.g., Id.; In re Screws Antitrust Litigation, 91 F.R.D. 52, 56 (D. Mass. 1981) (highlighting requirement that class interests be adequately protected); Prudential II, 148 F.3d at 311; Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3d Cir. 1977); Asbestos School Litig., 104 F.R.D. at 429-30.

satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability"). Notably, a "finding of typicality will generally not be precluded even if there are 'pronounced factual differences' where there is a strong similarity of legal theories." In re Carbon Black Antitrust Litig., 2005 WL 102966, \*12 (D. Mass. Jan. 18, 2005) (quoting In re Linerboard Antitrust Litig., 203 F.R.D. 197, 207 (E.D. Pa. 2001)); see also, Hayworth v. Blondery Robinson & Co., 980 F.2d 912, 923 (3d Cir. 1992) ("Factual differences will not render a claim atypical if the claim arises from the same event or practice of course of conduct that gives rise to the claims of the class members, and it is based on the same legal theory.").<sup>5</sup>

For settlement purposes Plaintiff has met this requirement because her claims are typical of the claims of all members of the Settlement Class as Plaintiff made a qualifying promotional purchase, was entitled to a promotional gift card voucher, received a promotional gift card voucher, but did not redeem said promotional gift card.

Thus, Plaintiff's claims are "typical" with regard to the entire class. Further, this requirement is met by the proposed settlement class as Plaintiff seeks to allege that the claims allegedly all arise from a common course of conduct by Defendants.

Accordingly, Plaintiff submits that for the purpose of settlement, the typicality requirement for class certification is satisfied.

## **5. The Requirements of Adequacy Are Met Under Rule 23(a)(4).**

The final requirement of Rule 23(a) is set forth in subsection (a)(4), which requires that "the representative parties will fairly and adequately protect the interests of the class." In the

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<sup>5</sup> In other words, "[t]he 'typicality' requirement focuses less on the relative strengths of the named and unnamed plaintiffs' case than on the similarity of the legal and remedial theories behind their claims." In re Relafen Antitrust Litig., 231 F.R.D. 52, 69 (D. Mass. 2005) (quoting Jenkins v. Raymark Indus., 782 F.2d 468, 472 (5th Cir. 1986)); Weiss v. York Hosp., 745 F.2d 786, 809-10 (3d Cir. 1984).

First Circuit, “[t]he requirement of adequate representation is met [where] [1] the named plaintiffs’ interests are not antagonistic with those of the rest of the class but rather involve the identical legal issue, and [2] the plaintiffs’ attorneys are qualified to conduct the litigation.” Bouchard v. Sec. of Health & Human Servs., No. Civ.A. 78-0632-F, 1982 WL 594675, at \*7 (D. Mass. Jan. 11, 1982); see also Andrews v. Bechtel Power Co., 780 F.2d 124, 130 (1st Cir. 1985) (stating Rule 23(a)(4) requires “that counsel chosen by the representative party is qualified, experienced and able to vigorously conduct the proposed litigation”). These two components are designed to ensure that absentee class members’ interests are fully pursued.

For settlement purposes adequacy is met in the instant action as plaintiff’s attorneys, proposed Class Counsel, are experienced in complex litigation and have an established track record in consumer protection law and class actions. See, fn. 1, supra

In turn, the class representative has no interests that are antagonistic to the class and has demonstrated her allegiance to this litigation through her patience and participation in the settlement process on behalf of all of the putative class members.

Having demonstrated that each of the mandatory requirements of Rule 23(a) are satisfied here, Plaintiff now turns to consideration of the factors which, independently, justify class treatment for settlement purposes of this action under subdivision 23(b)(3) of the rule.

#### **6. The Predominance Requirements of Rule 23(b)(3) Are Met in the Settlement Context.**

Plaintiff’s proposed settlement class also meet the requirements of Rule 23(b)(3). Under 23(b)(3) a class action may be maintained if:

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 fairly and efficiently adjudicating the controversy. The matters pertinent to the findings include: (A) the class members’ interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the

controversy already begin by or against class members; (C) the desirability or undesirability 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).

“The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” Amchem, 521 U. S. at 623. Although Rule 23(b)(3) requires that common issues of law and fact predominate, it does not require that there be an absence of any individual issues. Smilow v. Sw. Bell Mobile Sys., Inc., 323 F.3d 32, 39 (1st Cir. 2003) (noting “courts have usually certified Rule 23(b)(3) classes even though individual issues were present”); In re Sugar Ind. Antitrust Litig., 73 F.R.D. 322, 344 (E.D. Pa. 1976).

The Court must find that “the group for which certification is sought seeks to remedy a common legal grievance.” Hochschuler v. G.D. Searle & Co., 82 F.R.D. 339 (N.D. Ill. 1978); see also, In re TJX Cos. Retail Sec. Breach Litig., 246 F.R.D. 389, 398 (D. Mass. 2007) (“Need for individualized damages decisions does not ordinarily defeat predominance requirement for class certification where there are disputed common issues as to liability.”); Dietrich, 192 F.R.D. at 119 (in determining whether common issues of fact predominate, “a court’s inquiry is directed primarily toward whether the issue of liability is common to members of the class”). Rule 23(b)(3) does not require that all questions of law or fact be common. See e.g., Smilow, 323 F.3d at 39 (1st Cir. 2003) (pointing out Rule 23(b)(3) “requires merely that common issues predominate”); In re Telectronics Pacing Systems, 172 F.R.D. 271, 287-88 (S.D. Ohio 1997). In this regard, courts generally focus on the liability issues and whether these issues are common to the class. If so, particularly in the settlement context, common questions are held to predominate over individual questions. See, Id.

Plaintiff asserts that common questions of law and fact predominate. All of Plaintiff's claims are alleged to arise out of common advertisements and promotional gift card voucher programs. According to Plaintiff, this presents common operative facts and common questions of law which predominate over any factual variations as they relate to individual putative class members.

These common questions of law and fact include, without limitation: (a) whether Defendants' promotional gift card promotion is proper under applicable federal and state laws; and (b) whether Defendants have violated applicable state laws by allegedly failing to provide adequate notice and information to Sleepy's customers regarding what are alleged to be the material limitations alleged to have been placed on the program; and (c) whether class members were damaged by Defendants' actions. These common questions of law and fact suffice in this settlement class to present a predominance of common issues for the purpose of settlement.

Plaintiff also asserts that superiority is likewise met in the settlement context because this settlement will resolve the pending lawsuit against Defendants in a single, consolidated proceeding which will obviate the need for multiple, parallel lawsuits. Further, given the commonality of claims relating to the promotional gift card voucher programs, there would be little or no interest for each class member to proceed with their own case. Finally, the plan for distribution of payments treats all class members equitably by providing payments based upon their statutory or actual damages.

Accordingly, strictly for the purposes of settlement, the Parties agree that any individual variations, type or magnitude of damage suffered by individual class members will not affect predominance, because each class member will recover either the actual amount of money they

did not receive because they failed to redeem their voucher or the statutory damages for those class members who were able to redeem and use their promotional gift cards.

Finally, resolution of this litigation by class settlement is superior to the individual adjudication of class members' claims for compensatory relief. In particular, the settlement provides class members with an ability to obtain prompt, predictable and certain relief, whereas individualized litigation carries with it great uncertainty, risk and costs, and provides no guarantee that the allegedly injured parties will obtain necessary and timely relief at the conclusion of the litigation process. Settlement also would relieve judicial burdens that would be caused by adjudication of the same issues in multiple trials, including trials in each of the potential lawsuits being settled herein.

Accordingly, strictly in the settlement posture in which the case now stands, the matter is appropriate and should be certified for settlement purposes.

**7. The Requirements for Certification Under M.G.L. c. 93A Have Been Met**

The standards governing certification of a M.G.L. c. 93A class action require findings that: "the use or employment of the unfair or deceptive act or practice has caused similar injury to numerous other persons similarly situated"; the class representative "adequately and fairly represents such other persons"; and the class representative brings "the action on behalf of himself and such other similarly injured and situated persons." Aspinall v. Philip Morris Companies, Inc., 442 Mass. 381, 391(2004).

The Massachusetts Supreme Judicial Court has held that the standard for class certification under M.G.L. c. 93A is less stringent than under Rule 23. See e.g., Baldassari v. Pub. Fin. Trust, 369 Mass. 33, 40 (1975); and Fletcher v. Cape Cod Gas Co., 394 Mass. 595, 605 (1985).



This less stringent certification standard is so because M.G.L. c. 93A § 9(2) omits “[t]he predominance and superiority requirements [of Rule 23 which] introduce[s] a highly discretionary element” to the analysis.” Baldassari, 369 Mass. at 40.

Furthermore, when making a certification determination under M.G.L. c. 93A, “...a judge must bear in mind that our consumer protection statute ‘was designed to meet a pressing need for an effective private remedy’ for consumers, and that ‘traditional technicalities are not to be read into the statute in such a way as to impede the accomplishment of substantial justice.’” Fletcher, 394 Mass. at 605-606; see also, Aspinall, 442 Mass. at 391-92.

As stated above, the proposed Class meets all the requirements of Fed.R.Civ.P. 23(a), and further, Plaintiff has alleged that Defendants’ promotional gift card program was an unfair or deceptive act (an alleged violation of the law) that has caused similar injury to numerous other persons similarly situated.

Accordingly, strictly for the purposes of settlement, the settlement class is appropriate and should be certified pursuant to M.G.L. c. 93A.

**C. The Proposed Notice Provides Adequate Notice to the Class of the Settlement.**

**1. The Class Action Notice Satisfies Due Process.**

The Parties propose that Defendants, through the Settlement Administrator, send, by first class mail, to each member of the Settlement Class, as defined in the Settlement Agreement, the Class Action Notice attached to the Settlement Agreement as Exhibit A. The Class Action Notice attached to the Settlement Agreement as Exhibit A and the Long Form Notice attached to the Settlement Agreement as Exhibit B will both be made available on the Settlement Website.

The Parties propose that the Notice be sent to all known and reasonably ascertainable class members based on Defendants’ records. This notice plan is consistent with class

certification notices approved by numerous state and federal courts, and is, under the circumstances of this case, the best notice practicable. See e.g., Wright v. Linkus Enters., Inc., No. 2:07-cv-01347-MCE-CMK, 2009 WL 2365436, at \*7-8 (E.D. Cal. July 29, 2009) (holding notice involving same mail procedures as here meets both Rule 23(e) requirement that “proposed settlement is fundamentally fair, adequate, and reasonable” and “Rule 23(c)(2)(B) requirement that the Court direct ‘best notice that is practicable under the circumstances’”) (quoting FED. R. Civ. P. 23(c)(2)(B), (e)); Davis v. Abercrombie & Fitch Co., No. 08 CV 01859(PKC)(AJP), 2009 WL 1542552, at \*1-4 (S.D.N.Y. June 2, 2009) (approving issuance of notice to class using same method as applied here); In re M.L. Stern Overtime Litig., No. 07-CV-0118-BTM (JMA), 2009 WL 995864, at \*6-7 (S.D. Cal. Apr. 13, 2009) (finding same mail procedure as applied here to be the “best notice practicable”); and Adams v. Inter-Con Security Sys., Inc., No. C-06-5428 MHP, 2007 WL 3225466, at \*3-4 (N.D. Cal. Oct. 30, 2007) (finding that notice using same mail procedure as here “satisfies the notice requirements of Rule 23(e), and . . . all other legal and due process requirements”).

## **2. The Proposed Class Action Notice is Accurate, Informative and Easy to Understand.**

Under Fed. R. Civ. P. 23(e), class members are entitled to notice of any proposed settlement before it is ultimately approved by the Court. Under Rule 23(e) and the relevant due process considerations, adequate notice must be given to all absent class members and potential class members to enable them to make an intelligent choice as to whether they wish to opt-out of the settlement. See e.g., Weinberger v. Great Northern Nekoosa Corp., 925 F.2d 518, 523 (1st Cir. 1991) (stating “the court’s power to approve or reject a settlement under Rule 23(e) enables the court to ensure fairness for the class members” (quoting 3B MOORE’S FEDERAL PRACTICE ¶

23.91 at 23-533 to 23-534)); Prudential II, 148 F.3d at 326-27; and Valentino v. Carter-Wallace, Inc., 97 F.3d 1227 (9th Cir. 1996).

Here, the proposed Notice provides information on the nature of the proposed settlement, the principal terms and provisions of the Settlement Agreement, the monetary and other relief the settlement will provide class members, the procedures and deadlines for opting-out of the settlement and submitting objections, the consequences of taking or foregoing the various options available to class members, and the date, time and place of the final settlement approval hearing.

Pursuant to FED. R. CIV. P. 23(h), the proposed class notice sets forth the maximum amount of attorneys' fees and costs which may be sought by present party plaintiffs and their counsel.

The Parties also agree that the Notice fulfills the requirement of neutrality in class notices. See, 4 NEWBERG ON CLASS ACTIONS at § 8.39. It summarizes the proceedings necessary to provide context for the Settlement Agreement and summarizes the terms and conditions of the settlement in an informative, coherent and easy-to-understand manner, all in compliance with the Manual for Complex Litigation's requirement that "the notice contain a clear, accurate description of the terms of the settlement." MANUAL FOURTH at §21.312.

The Notice clearly states that the settlement does not constitute an admission of liability by Defendants, and it makes clear that the final settlement approval decision has yet to be made. Accordingly, the Notice complies with the standards of fairness, completeness, and neutrality required of a settlement class notice disseminated under authority of the Court. See e.g., 4 NEWBERG ON CLASS ACTIONS at §§8.21, 8.39; MANUAL FOURTH at §§21.311-21.312.

**D. Settlement Administrator**

The estimated fees and costs for the Settlement Administrator are \$55,000. The Settlement Administrator's duties will include expenses relating to identifying the members of the proposed settlement subclasses, providing Notice, mailing settlement payments, hosting a settlement website, as well as any others expenses reasonably incurred. Plaintiff requests that the Court appoint KCC LLC to serve as the Settlement Administrator.

**E. A Final Fairness Hearing Should be Scheduled.**

The Court should schedule a final fairness hearing to determine that class certification is proper for settlement purposes and to approve the settlement. The fairness hearing will provide a forum to explain, describe or challenge the terms and conditions of the class certification and settlement, including the fairness, adequacy and reasonableness of the settlement. At that time, moreover, Class Counsel will present their application for their fees and expenses pursuant to Rule 23(h).

Accordingly, the Parties request that the Court schedule the final fairness hearing for no later than one hundred and twenty (120) days after the date of the entry of the preliminary approval Order at the United States District Court for the District of Massachusetts, Boston Division.

**V. Conclusion**

For the foregoing reasons, Plaintiff respectfully requests that this Court enter an Order: (1) provisionally certifying the proposed settlement subclasses under Rule 23 of the Federal Rules of Civil Procedure with respect to the claims brought against Defendants; (2) granting preliminary approval of the class Settlement Agreement; (3) appointing Forrest, LaMothe, Mazow, McCullough, Yasi & Yasi, P.C. as Class Counsel; (4) directing distribution of the proposed Notice to all class members regarding settlement of the claims against Defendants on a

final and complete basis, in accordance with this Motion for Preliminary Approval; (5) approving KCC LLC as the Settlement Administrator; and (6) setting the final fairness hearing for a date no later than one hundred and twenty (120) days after the date of the entry of the Preliminary Approval Order.

Respectfully submitted,

Plaintiff,  
By his attorneys,

/s/ Kevin J. McCullough, Esq.

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DATED: July 23, 2018.

# **EXHIBIT A**

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

DIANNA KHUN, on behalf of herself and all  
others similarly situated,

Plaintiff,

v.

SLEEPY'S, LLC and CMC ACQUISITION  
CORPORATION, d/b/a CAPITOL  
MARKETING CONCEPTS, INC.,

Defendants.

**Case No. 1:17-cv-10110**

**SETTLEMENT AGREEMENT, RELEASE, & WAIVER**

This Settlement Agreement, Release and Waiver ("Agreement") is made by and between Plaintiff, Dianna Khun ("Plaintiff"), on behalf of herself individually and on behalf of the class of persons she seeks to represent, and Defendant, Sleepy's LLC as defined herein ("Sleepy's") and CMC Acquisition Corporation d/b/a Capital Marketing Concepts, Inc. as defined herein ("Capitol") (collectively, "Defendants"), (Defendants and Plaintiff are collectively referred to herein as the "Parties").

WHEREAS, Plaintiff commenced litigation against Defendants in Suffolk County Superior Court, in an action captioned, *Dianna Khun, on behalf of herself and all others similarly situated v. Sleepy's, LLC and CMC Acquisition Corporation d/b/a Capital Marketing Concepts, Inc.*, Civil Action SUCV2016-03409-BLS1 ("State Court Action"), in which Plaintiff asserted purported claims for violation of M.G.L. c. 93A, § 2; breach of contract; negligent misrepresentation; fraud and deceit; unjust enrichment and declaratory judgment, arising out of an alleged promotional gift card campaign in which the Defendants were alleged to have engaged; and

WHEREAS, Plaintiff and her counsel, the law firm of Forrest, LaMothe, Mazow, McCullough, Yasi & Yasi, P.C., brought the claims asserted in the State Court Action as a putative class action pursuant to Massachusetts Rule of Civil Procedure 23 and Massachusetts General Laws Ch. 93A on behalf of Plaintiff and other persons who purchased certain qualifying products from Sleepy's which purchases were alleged to have entitled Plaintiff and other such persons to participate in a promotional gift card program ("Program"); and

WHEREAS, Defendant Sleepy's removed the State Court Action to the United States District Court for the District of Massachusetts pursuant to 28 U.S.C. § 1332 ("Action"), where the Action is currently pending; and

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WHEREAS, Defendants expressly deny and dispute, and continue to deny and dispute, each of the allegations in the Action and any and all liability to Plaintiff, and admit no wrongdoing of any kind nor any liability, nor acknowledge any breach of any agreement, warranty, statute, or law; and

WHEREAS, the Parties have engaged in the exchange of extensive discovery and information regarding the Program and the putative class, including the exchange and analysis of documentation related to the Program as it applies to Massachusetts consumers in order to reach this settlement, which is the product of arm's length negotiations among the Parties; and

WHEREAS, in order to avoid the risk, expense and burden of further litigation, the Parties desire to resolve: (i) all Massachusetts claims that were or could have been asserted based on the allegations against Defendants relating to the Program, on behalf of all individuals who are or were customers of Sleepy's and who are members of the putative class in the Commonwealth of Massachusetts during the applicable statute of limitations period; (ii) all claims that were or could have been asserted under M.G.L. c. 93A by members of the Massachusetts putative class; and (iii) all claims that were or could have been asserted by members of the Massachusetts putative class in relation to the Program based on contract or Massachusetts common law; and

NOW, THEREFORE, in consideration of the foregoing premises and the mutual promises hereinafter set forth, the Parties agree as follows:

**1. Definitions.**

As used in this Agreement and the related documents attached hereto as Exhibits, the following terms shall have the meanings set forth below:

- A. "**Action**" means the civil action entitled; Dianna Khun, on behalf of herself and all others similarly situated v. Sleepy's, LLC and CMC Acquisition Corporation d/b/a Capital Marketing Concepts, Inc.; United States District Court District of Massachusetts; Case No. 1:17-cv-10110.
- B. "**Agreement**," "**Settlement Agreement**" or "**Settlement**" means this Class Action Settlement Agreement, Release and Waiver, including attached Exhibits.
- C. "**Asserted Claims**" means claims as alleged in Plaintiff's First Amended Class Action Complaint, including but not limited to the putative class-action claims against Defendants alleging: (i) violations of M.G.L. c. 93A, § 2; (ii) violations of 940 CMR 6.05; (iii) Violations of 940 CMR 3.02; (iv) Violations of 940 CMR 3.05; (v) Violations of 940 CMR 3.16; (vi) Violations of 12 CFR 205.20; (vii) Breach of Contract; (viii) Negligent Misrepresentation; (ix) Fraud and Deceit; (x) Unjust Enrichment; and (xi) Declaratory Relief.
- D. "**Attorney's Fees and Costs**" means all fees, costs, and expenses to be awarded to Class Counsel, if any, pursuant to the Fees and Expense Application to be filed by Class Counsel. The Attorney's Fees and Costs shall be paid exclusively from the Settlement



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Fund and shall not exceed Two Hundred Fifty Thousand Dollars (\$250,000.00).

- E. **"Benefit Check"** means the negotiable instrument to be sent to the Settlement Class Members by the Settlement Administrator pursuant to Section 14 of this Settlement Agreement.
- F. **"CAFA Notice"** means the notice contemplated by the Class Action Fairness Act, 28 U.S.C. § 1715(b) to be provided by the Settlement Administrator pursuant to Section 9 of this Settlement Agreement.
- G. **"Capitol"** means CMC Acquisition Corporation, d/b/a Capitol Marketing Concepts, Inc., and its present, former, or subsequent predecessors, administrators, successors, assigns, heirs, executors, agents, partners, representatives, employees, insurers, insureds, attorneys, servants, subsidiaries, parents, affiliates, divisions, joint ventures and entities in which CMC Acquisition Corporation, d/b/a Capitol Marketing Concepts, Inc. has and/or had a controlling interest, and any and all of its respective officers, directors, partners, managers, members, principals, insurers, insureds, employees, shareholders, attorneys, servants, assigns, representatives, agents and any other person acting by or on its behalf.
- H. **"Capitol's Counsel"** means Beth-Ann Krinsky, Esq. and Jessica B. Alhalel, Esq. of Greenspoon Marder, LLP, along with local counsel, Benjamin Davis, Esq. of Locke Lord LLP.
- I. **"Class Counsel"** means the attorneys of Forrest, LaMothe, Mazow, McCullough Yasi & Yasi P.C.
- J. **"Class Period"** means November 7, 2012 to the date of the execution of this Agreement.
- K. **"Class Representative"** means Plaintiff Dianna Khun.
- L. **"Common Fund"** means the portion of the Total Settlement Amount that will be used as a class relief common fund of Three Hundred Thirty Eight Thousand Four Hundred Dollars (\$338,400.00), which Defendants represent constitutes relief Class Members may have received as single damages if they proved a case which amount is made up of the following categories: (i) payments to every Class Member who was unable to redeem their promotional gift card voucher(s), in the amount of 100% of the value of an Unredeemed Voucher ("Unredeemed Voucher"); and (ii) payments in the amount of Twenty-Five Dollars (\$25.00) to every Class Member who did redeem their promotional gift card voucher(s) ("Redeemed Voucher").
- M. **"First Amended Complaint"** means Plaintiff's First Amended Class Action Complaint.
- N. **"Court"** means the United States District Court for the District of Massachusetts.
- O. **"Cy-Pres Recipient"** means any third party nominated by the Court to receive the amounts left from any uncashed Benefit Checks. The Parties agree that they will

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propose to the Court the Consumer Unit of Greater Boston Legal Services.

- P. **"Defendants"** means collectively Defendants Sleepy's and Capitol.
- Q. **"Defendants' Counsel"** means collectively Capitol's Counsel and Sleepy's Counsel.
- R. **"Effective Date"** means the date the Final Approval Order is affirmed by the Court in its entirety, either; (i) thirty (30) days after the issuance of such order, if no appeal of said order is filed within that 30-day period; or (ii) upon the final disposition of any appeal.
- S. **"Escrow Account"** means an account established and maintained by the Settlement Administrator for the deposit of any and all amounts of the Settlement Fund by Defendants. At all times, the Escrow Account shall be held *in custodia legis*, subject to the approval of the Court.
- T. **"Fees and Expense Application"** means a written motion or application by which Plaintiff will request that the Court award Attorney's Fees and Costs to Class Counsel.
- U. **"Final Approval"** shall be deemed to occur (i) thirty (30) days after the issuance of a Final Approval Order, if no appeal of said order is filed within that 30-day period, or (ii) upon the final disposition of any appeal that has the effect of affirming the order in its entirety.
- V. **"Final Approval Hearing"** means the hearing at which the Court shall: (i) determine whether to grant final approval of this Agreement; (ii) consider any timely filed objections to this Settlement and all responses to objections by the Parties; (iii) rule on the Fee and Expense Application; and (iv) dismiss the Action with prejudice.
- W. **"Final Approval Order"** means an order fully granting the Parties' motion for approval of their Settlement, and extinguishing claims against Defendants.
- X. **"Notice"** or **"Notices"** means the notices of class action Settlement, substantially in the same form as attached hereto as Exhibits A and B.
- Y. **"Objection/Exclusion Deadline"** means the date no later than seventy five (75) calendar days after entry of the Preliminary Approval Order, or such other date as may be ordered by the Court, by which (i) a written objection to this Settlement Agreement must be filed in the Action, or (ii) a Request for Exclusion must be postmarked.
- Z. **"Order and Judgment"** means the order in which the Court grants final approval of this Agreement and authorizes the entry of a final judgment and dismissal of the Action.
- AA. **"Parties"** means Plaintiff, the Settlement Class and Defendants, collectively.
- BB. **"Plaintiff"** means Dianna Khun.

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- CC. ***"Preliminary Approval"*** means the issuance of a Court order preliminarily approving the Settlement for purposes of providing notice to the Class Members.
- DD. ***"Preliminary Approval Order"*** means the order, substantially in the form as attached hereto as Exhibit C, in which the Court grants its preliminary approval of this Agreement and authorizes dissemination of Notice to the Class.
- EE. ***"Redeemed Voucher"*** means a voucher for a promotional gift card which was redeemed in connection with the Program.
- FF. ***"Released Claims"*** means the claims released pursuant to Section 19 of this Settlement Agreement.
- GG. ***"Request for Exclusion"*** means the written submission submitted by any person in the Settlement Class to opt out of the Settlement pursuant to Section 15 of this Settlement Agreement.
- HH. ***"Settlement Administration Expenses"*** means any and all fees, costs, and expenses incurred by the Settlement Administrator, including, but not limited to, such fees, costs, and expenses incurred in disseminating Notice, publishing Notice, creating, administering, maintaining, and hosting the Settlement Website, and providing checks to Settlement Class Members. Settlement Administration Expenses shall be paid exclusively from the Settlement Fund.
- II. ***"Settlement Administrator"*** means KCC, LLC.
- JJ. ***"Settlement Class," "Class Members" or "Settlement Class Members"*** means:  
  
All persons who made a qualifying promotional purchase during the class period at a Sleepy's retail location located in Massachusetts, or an online purchase for a Massachusetts delivery, and were entitled to a promotional gift card to be provided by Sleepy's as part of their purchase.  
  
Excluded from the Class are all past and present employees, agents, officers, and directors of Sleepy's or Capitol and persons who have released Sleepy's or Capitol from liability for claims associated with the distribution and redemption of promotional gift cards.
- KK. ***"Service Award"*** means the payment to the Class Representative pursuant to Section 7 of this Settlement Agreement. The Service Award shall be paid exclusively from the Settlement Fund.
- LL. ***"Sleepy's"*** means Sleepy's, LLC, and its present, former, or subsequent predecessors, administrators, successors, assigns, heirs, executors, agents, partners, representatives, employees, insurers, insureds, attorneys, servants, subsidiaries,

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parents, affiliates, divisions, joint ventures and entities in which Sleepy's, LLC has and/or had a controlling interest, and any and all of its respective officers, directors, partners, managers, members, principals, insurers, insureds, employees, shareholders, attorneys, servants, assigns, representatives, agents and any other person acting by or on its behalf.

- MM. **"Sleepy's Counsel"** means Christopher B. Parkerson, Esq. of Campbell, Campbell, Edwards & Conroy, P.C.
- NN. **"Total Settlement Amount"** or **"Settlement Fund"** means a total sum not to exceed six hundred and fifty thousand dollars (\$650,000.00) which includes the Common Fund, Attorney's Fees and Costs, Settlement Administration Expenses and the Service Award.
- OO. **"Unopposed Motion for Preliminary Approval"** means the Unopposed Motion for Preliminary Approval of Class Action Settlement and Incorporated Memorandum of Law to be filed by Plaintiff, with this Agreement as an attachment, seeking Preliminary Approval of the Settlement.
- PP. **"Unredeemed Voucher"** means a voucher for a promotional gift card which was not redeemed in connection with the Program.

**2. No Admission of Liability or Concession as to the Merits.**

Defendants expressly deny any wrongdoing or any violation of state or federal law as alleged in the Action. Nothing contained in this Agreement shall be construed as an admission of any liability or concession as to the merits of any claim by any Party, and all Parties agree not to offer this Agreement as evidence or otherwise use it in any judicial or administrative proceeding, except that this Agreement may be introduced in any proceeding for the sole purpose of enforcing its terms.

**3. Approval of Settlement.**

- a. All terms of this Agreement are contingent upon the approval of the Parties' Settlement and certification by the Court of the Settlement Class (as defined in herein) for settlement purposes only.
  - i. For purposes of this Agreement, "Preliminary Approval" shall be deemed to occur upon the issuance of a Court order conditionally certifying the Settlement Class for purposes of providing Notice to the affected individuals (the "Preliminary Approval Order"). The Preliminary Approval Order shall also, among other things, require any requests for exclusion from the Rule 23 Settlement Class or objections to the Settlement as per this Agreement to be postmarked or received no later than seventy five (75) days after entry of the Preliminary Approval Order.

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- ii. If the Court grants a final order which fully, finally, and unconditionally (1) grants the Parties' motion for approval of their Settlement; (2) grants final certification of the Settlement Class for settlement purposes only; (3) authorizes payments to Class Counsel and members of the Settlement Class; and (4) extinguishes claims against Defendants as specified in Section 17; then the (5) Action will be dismissed with prejudice as of the Effective Date.
- iii. The Parties agree to cooperate and take all steps necessary and appropriate to obtain a Preliminary Approval and Final Approval, and otherwise effectuate all aspects of this Agreement.
- b. Defendants stipulate for settlement purposes only to the certification of the Settlement Class but do not waive, and instead expressly reserve, their right to challenge the propriety of conditional or class certification for any purpose as if this Agreement had not been entered into by the Parties in the event that the Court does not approve the Settlement, or the Effective Date does not occur.
- c. The Parties and their counsel agree that Plaintiff will, contemporaneously with the execution of this Agreement, endeavor to execute a copy of the Unopposed Motion for Preliminary Approval. Plaintiff shall file the Unopposed Motion for Preliminary Approval with the Court within ten (10) days of the full execution of this Agreement.
- d. The Parties agree that if the Court does not approve any material term in the Unopposed Motion for Preliminary Approval or requires as a condition to granting the Unopposed Motion for Preliminary Approval any term that effects a material change in this Agreement, then this Agreement may be voided at either Party's option. The Parties further agree that the Court conditioning the granting of the Unopposed Motion for Preliminary Approval on Defendants being required to pay any amount greater than the amount specified in this Agreement, shall be deemed a material change. The Parties further agree that any ruling that the Court may make regarding Class Counsel's Fee and Expense Application pursuant to this Agreement shall not constitute a material change in this Agreement, unless such award exceeds Two Hundred Fifty Thousand Dollars (\$250,000.00).
- e. In conjunction with the filing of the Unopposed Motion for Preliminary Approval, Plaintiff will request that the Court hold a fairness hearing regarding the request for approval of the Parties' proposed Settlement not more than sixty (60) days after the filing of the Unopposed Motion for Preliminary Approval. Counsel for the Parties will communicate with the Clerk of the Court and make any further filings necessary to secure the approval of this request. The Parties also agree to request that counsel for the Parties be permitted to participate telephonically in the fairness hearing given the relatively small size of this class and the costs incurred by both sides in reaching this Agreement.



**4. Settlement Class.**

The Settlement Agreement applies to all persons who made a qualifying promotional purchase during the Class Period at a Sleepy's retail location located in Massachusetts, or an online purchase for a Massachusetts delivery, and were entitled to a promotional gift card to be provided by Sleepy's as part of their purchase.

- a. The Redeemed Voucher Subclass (Subclass A): shall include all persons who made a qualifying promotional purchase during the class period at a Sleepy's retail location located in Massachusetts, or an online purchase for a Massachusetts delivery, and were entitled to a promotional gift card to be provided by Sleepy's as part of their purchase, who were provided with a voucher, and who did redeem said voucher.
- b. The Unredeemed Voucher Subclass (Subclass B): shall include all persons who made a qualifying promotional purchase during the class period at a Sleepy's retail location located in Massachusetts, or an online purchase for a Massachusetts delivery, and were entitled to a promotional gift card to be provided by Sleepy's as part of their purchase, who were not provided with a voucher, but who did not redeem said voucher.

In the event that, for any reason, the Court does not enter a Final Approval Order or the Effective Date cannot occur, the Court's certification of the Settlement Class shall be void, have no effect, and shall not be used for any purpose whatsoever in any further proceeding(s) in any of the above-referenced lawsuits or in any other lawsuit asserting the same or similar claims and causes of action and the Parties will be returned to their respective positions *nunc pro tunc* as of the date on which they reached an agreement in principle to settle this litigation.

**5. Settlement Payment.**

Contingent on final approval of this Agreement by the Court, Defendants agree to pay a Total Settlement Amount not to exceed Six Hundred Fifty Thousand Dollars (\$650,000.00) in order to fully and finally resolve the Asserted Claims in their entirety. The Total Settlement Amount includes a Common Fund of Three Hundred Thirty Eight Thousand Four Hundred Dollars (\$338,400.00), Attorney's Fees and Costs of up to Two Hundred Fifty Thousand Dollars (\$250,000.00), a Service Award of Six Thousand Three Hundred Dollars (\$6,300.00) and Settlement Administration Expenses of up to Fifty Five Thousand Dollars (\$55,000.00).

It is understood and agreed that Defendants' monetary obligations under this Settlement Agreement will be fully discharged by payment of no more than the Total Settlement Amount, and that Defendants shall have no other monetary obligations to the Settlement Class, or obligations to make any other payments to Settlement Class Members under this Agreement or otherwise.

**6. Attorneys' Fees and Costs.**

- a. Class Counsel may petition the Court for an award of Attorney's Fees and Costs in conjunction with the Parties' Settlement. Any such petition shall be filed no later than ten (10) days prior to the date of the Final Approval Hearing.
- b. Defendants shall agree not to oppose Class Counsel's right to petition the Court for an award of Attorney's Fees and Costs in an amount not to exceed Two Hundred Fifty Thousand Dollars (\$250,000.00).
- c. Any Attorney's Fees and Costs awarded in conjunction with the Parties' Settlement shall be paid in addition to the Common Fund; and accordingly, shall not diminish or disturb the Common Fund relief obtained on behalf of the Settlement Class.

**7. Service Payment to Class Representative**

- a. Class Counsel may petition for an award of a Service Award to the Class Representative. Any such petition shall be filed no later than ten (10) days prior to the date of the Final Approval Hearing. Class Counsel's petition for a Service Award may be submitted in conjunction with, or as part of, Class Counsel's Fee and Expense Application.
- b. Any Service Award awarded to the Class Representative shall be in addition to the payment that she shall receive as a member of the Settlement Class pursuant to this Agreement. Any such Service Award awarded by the Court shall be distributed in a separate check mailed contemporaneously with the mailing of checks pursuant to the terms of this Agreement. Defendants will not oppose any request by Class Counsel for a Service Award to the Class Representative in an amount not to exceed Six Thousand Three Hundred Dollars (\$6,300.00).

**8. Settlement Administration.**

The Parties agree that as part of the Settlement Fund Defendants shall be responsible for payment of all Settlement Administration Expenses necessary to administer the class Settlement of Plaintiff's and the Settlement Class' claims. The Settlement Administrator shall be responsible for: (i) dissemination of Notices to Settlement Class Members in accordance with the provisions of this Agreement; (ii) determining and finalizing calculation of the individual settlement payments to each Settlement Class Member; (iii) distribution of awards from the Common Fund to Settlement Class Members; (iv) set up and administer the Settlement Website; (v) and mailing of the CAFA Notice.

**9. CAFA Notice.**

Not later than ten (10) days after the filing of the Unopposed Motion for Preliminary Approval, Defendants shall use the services of the Settlement Administrator under the terms herein to comply with the notice requirements of 28 U.S.C. § 1715.

**10. Distribution of Notice**

**a. Mailing of Notices.**

Within thirty (30) days after the Court grants Preliminary Approval of the Parties' proposed Settlement, the Settlement Administrator shall compile and mail to Settlement Class Members notice of the Parties' proposed Settlement in the form of the postcard Notice attached as Exhibit A.

The Settlement Administrator shall send Notice [Exhibit A] by certified First Class U.S. Mail to each member of the Settlement Class at such individuals' last known address. If Notice is returned as undeliverable, the Settlement Administrator shall promptly attempt to locate such Settlement Class Member by an electronic background search through a recognized database, such as Accurant, and shall re-mail the Notice once to such address obtained from the electronic background search within ten (10) days of receipt of the undeliverable notice.

A copy of the long form Notice attached hereto as Exhibit B shall be made available on the Settlement Website identified in Section 11 below.

**11. Settlement Website.**

Within thirty (30) days following the entry of the Preliminary Approval Order, both the postcard Notice [Exhibit A] and long form Notice [Exhibit B] shall be published on a website administered by the Settlement Administrator. The website shall: (i) provide instructions on how to contact Class Counsel for assistance; (ii) contain copies of the Notices, the Settlement Agreement, the Unopposed Motion for Preliminary Approval, the Fee and Expense Application, and other pertinent documents; (iii) provide Settlement Class Members with the ability to provide and/or update their mailing addresses; and (iv) contain other information Defendants' Counsel and Class Counsel mutually agree is relevant for dissemination to Class Members regarding the proposed Settlement. All costs associated with the creation, operation, maintenance, and hosting of the Settlement Website, including the preparation of all documents provided therein, shall be considered Settlement Administrative Expenses to be exclusively paid from the Settlement Fund.

**12. Declaration of Compliance.**

The Settlement Administrator shall prepare and execute a declaration attesting to compliance with the Notice requirements of this Agreement and the Preliminary



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Approval Order. Such declaration shall be provided to Class Counsel and Defendants' Counsel and filed with the Court no later than ten (10) calendar days prior to the Final Approval Hearing.

**13. Amount of Individual Awards.**

Each individual class member will receive an award based upon the subclass of which they are a part. The awards shall be computed as follows (his or her "Claim Amount"):

- (1) Using Defendants records, the Parties will determine which Subclass each class member falls into;
- (2) The Unredeemed Voucher Subclass shall be entitled to the exact value of the voucher(s) to which they were entitled.
- (3) The Redeemed Voucher Subclass shall be entitled to \$25.00 in statutory damages.

**14. Payments to Class Members.**

Once the Court has issued the Final Approval Order, the Settlement Administrator shall calculate the total amount of individual payments of the Claim Amount due to each member of the Settlement Class who received Notice and who did not request to be excluded from the Settlement Class. Any portion of the Common Fund not allocated for distribution to the Settlement Class Members shall be distributed to an agreed upon designated *cy pres*: Consumer Unit of Greater Boston Legal Services.

Payment of the Claim Amount due to Settlement Class Members, along with any Service Award to Plaintiff, shall be made via check, mailed by the Settlement Administrator to the Settlement Class Members within ten (10) business days of the Effective Date.

- a. Checks issued pursuant to the preceding paragraph shall expire sixty (60) days after they are issued, but a failure by any Settlement Class Member to deposit or cash a check within the time period allotted shall have no effect on that individual's release of claims pursuant to this Agreement.
- b. Any Claim Amount that goes unclaimed shall be distributed to an agreed upon designated *cy pres*: Consumer Unit of Greater Boston Legal Services.

**15. Requests for Exclusion by Settlement Class Members.**

Any Class Member may make a Request for Exclusion by mailing or delivering such request in writing to the Settlement Administrator at the addresses set forth in the Notice. Any Request for Exclusion must be postmarked or delivered by the Objection/Exclusion Deadline, seventy-five (75) days after entry of the Preliminary Approval Order or such other date specified in the Court's Preliminary Approval Order. The Request for Exclusion shall (i) state the Class Member's full name and current address, (ii)

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specifically state his or her desire to be excluded from the Settlement Agreement and from the Settlement Class; (iii) specifically state that he or she understands that by requesting exclusion from the Settlement, he or she will not receive any funds in connection with the Action. Copies of Requests for Exclusion and a report of the names and addresses of persons whose Requests for Exclusion have been mailed timely shall be provided by the Settlement Administrator to Class Counsel and Defendants' Counsel no later than seven (7) calendar days after the Objection/Exclusion Deadline. The Requests for Exclusion shall be filed with the Court by the Settlement Administrator in connection with Plaintiff's motion seeking the Final Approval Order and Judgment.

Any person in the Settlement Class who does not properly and timely submit a Request for Exclusion will be bound by this Settlement Agreement and the Final Approval Order, including the Release described in this Settlement Agreement. Any Person in the Settlement Class who submits a valid and timely Request for Exclusion shall not be a Settlement Class Member, bound by this Agreement or the Final Approval Order, entitled to any Settlement Class recovery, or otherwise gain any rights by virtue of this Agreement.

**16. Objections by Settlement Class Members.**

The Parties will request that the Court enter an order requiring any Class Member who wishes to be heard orally at the Final Approval Hearing, or who wishes for any objection to be considered, to file a written notice of objection by the Objection/Exclusion Deadline, seventy-five (75) days after entry of the Preliminary Approval Order or such date as otherwise ordered by the Court, and mail a copy to Class Counsel and Defendants' Counsel at the addresses provided herein. To state a valid objection to the Settlement, an objecting Class Member must file a written notice of objection containing the following information: (i) full name, current address, and current telephone number; (ii) a statement of the position(s) the objector wishes to assert, including the factual and legal grounds for the position; and (iii) provide copies of any other documents that the objector wishes to submit in support of his/her position. The objector must also include in its objection the name of the case *Dianna Khun v. Sleepy's LLC, CMC Acquisition Corp. d/b/a Capital Marketing Concepts, Inc.* Civil Action No. 1:17-CV-10110. Subject to approval of the Court, any objecting Class Member may appear, in person or by counsel, at the Final Approval Hearing held by the Court, to show cause why the proposed Settlement should not be approved as fair, adequate, and reasonable, or object to any petitions for attorneys' fees, Service Awards, and reimbursement of reasonable litigation costs and expenses. The objecting Class Member must file with the Clerk of the Court and serve upon all counsel designated in the Notice, a notice of intention to appear at the Final Approval Hearing ("Notice of Intention to Appear") by the Objection/Exclusion Deadline. The Notice of Intention to Appear must include copies of any papers, exhibits, or other evidence that the objecting Class Member (or his/her counsel) will present to the Court in connection with the Final Approval Hearing. Any Class Member who does not provide a Notice of Intention to Appear in complete accordance with specifications set forth in the Notice, subject to approval by the Court,

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may be deemed to have waived any objections to the Settlement and may be barred from speaking or otherwise presenting any views at the Final Approval Hearing.

The agreed-upon procedures and requirements for filing objections in connection with the Final Approval Hearing are intended to ensure the efficient administration of justice and the orderly presentation of any Class Member's objection to the Settlement Agreement, in accordance with the due process rights of all Class Members. The Preliminary Approval Order and Notice will require all Class Members who have any objections to file such notice of objection or request to be heard with the Court and serve by mail or hand delivery such notice of objection or request to be heard to the Settlement Administrator at the addresses set forth in the Notice, by no later than the Objection/Exclusion Deadline. The Preliminary Approval Order will further provide that objectors who fail to properly or timely file their objections with the Court, along with the required information and documentation set forth above, or to serve them as provided above, may not be heard during the Final Approval Hearing, their objections may be waived, and their objections may not be considered by the Court, at the Court's discretion. If an individual is represented by an attorney, his/her attorney must file a Notice of Appearance with the Clerk of the United States District Court, District of Massachusetts, and deliver a copy to Class Counsel and Defendants' Counsel.

**17. Final Approval Order.**

- a. Upon all conditions precedent to the Settlement having been satisfied, including, but not limited to, the issuance of the Preliminary Approval Order, not later than ten (10) calendar days prior to the Final Approval Hearing:
  1. All Parties will request, individually or collectively, that the Court enter a Final Approval Order;
  2. Class Counsel shall file a memorandum of points and authorities in support of a motion seeking the Final Approval Order, no later than thirty-five (35) days prior to the Final Approval Hearing; and
  3. Class Counsel and/or Defendants' Counsel may file a memorandum addressing any objections filed with the Court and submitted to the Settlement Administrator as described in this Settlement Agreement no later than twenty-eight (28) days prior to the Final Approval Hearing.
  4. At the Final Approval Hearing, the Court will consider the proposed Final Approval Order, which shall, among other things:
    - (a) find that the Court has personal jurisdiction over all Settlement Class Members;

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- (b) find that the Court has subject matter jurisdiction over the Action and the Released Claims such that the Court may approve this Agreement and all exhibits hereto;
- (c) find final approval of this Settlement Agreement and the Settlement to be fair, reasonable and adequate as to, and in the best interests of, the Settlement Class Members, and that each Settlement Class Member shall be bound by this Settlement Agreement, including the Released Claims and the covenant not to sue as described in this Settlement Agreement, and that this Settlement Agreement should be and is approved;
- (d) direct the Parties and their counsel to implement this Agreement according to its terms and provisions;
- (e) declare this Agreement to be binding on, and have preclusive effect on, all pending and future lawsuits or other proceedings maintained by or on behalf of Plaintiff and the Settlement Class Members;
- (f) find that the Notice as described in this Agreement satisfies the requirements of the Federal Rules of Civil Procedure, the Due Process Clause of the United States Constitution, and all applicable rules of the Court, constitutes the best practicable notice under the circumstances, constitutes notice that is reasonably calculated to apprise the Settlement Class Members of the pendency of the Action, their right to object to or exclude themselves from the proposed Settlement, and to appear at the Final Approval Hearing, and is reasonable and constitutes due, adequate, and sufficient notice to all Persons entitled to receive notice of the Settlement;
- (g) find that the Class Representative and Class Counsel adequately represented the Settlement Class for purposes of entering and implementing the Agreement;
- (h) dismiss the Action, including without limitation all Released Claims against the Parties on the merits and with prejudice, without fees or costs to any Party except as provided in this Settlement Agreement;
- (i) approve and incorporate the releases described in this Agreement, make such releases effective as of the date of entry of the Final Approval Order, and forever discharge Defendants from the Released Claims as described in this Agreement;
- (j) without affecting the finality of the Final Approval Order, retain jurisdiction as to all matters relating to administration, consummation, enforcement, and interpretation of this Settlement Agreement; and

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(k) permanently enjoin each Settlement Class Member from bringing, joining, or continuing to prosecute any Released Claims against Defendants.

**18. Non-Disclosure.**

- a. Plaintiffs, Defendants, and counsel for the respective Parties agree not to disclose or publicize this Settlement or its terms and conditions other than as required for Court approval of the Settlement and Notice to Class Members.
- b. To the extent the Parties are approached by media for public statements, they will only make statements consistent with any prior public statements and the Notice disseminated to members of the Settlement Class, concerning the Settlement approval proceedings.
- c. Nothing in this Agreement shall prohibit any Party or counsel for any Party from responding with truthful information to any disparaging statement regarding the Parties or the Settlement made in any print or electronic media outlet.
- d. Defendants also may respond to inquiries from media outlets regarding the Settlement by stating, in substance, that the company denies any liability in the action and settled the case in order to avoid the burden of continued litigation.
- e. Class Counsel may not disclose or publicize this Settlement and/or its terms and conditions as set forth herein except to the extent permitted by the Court. Notwithstanding the foregoing, Class Counsel may publicize the successful result obtained on behalf of the Settlement Class so long as such publication does not identify the Defendants by name.
- f. Notwithstanding the foregoing, nothing herein shall prevent Class Counsel from communicating with Settlement Class Members with regard to this Agreement or for any other issue they might seek legal guidance as permitted by the application Bar Rules.

**19. Releases.**

- a. Upon Final Approval, Plaintiff and the Class Members, on behalf of themselves and their respective, current, former, and subsequent heirs, predecessors, assigns, spouses, executors, successors, administrators, agents, partners, representatives, insurers, insureds, employees and attorneys will fully release and discharge Defendants, and all their respective present, former, or subsequent predecessors, administrators, successors, assigns, heirs, executors, agents, partners, representatives, employees, insurers, insureds, attorneys, servants, subsidiaries, parents, affiliates, divisions, joint ventures and entities in which Defendants has and/or had a controlling interest, and any and all of their respective officers, directors, partners, managers, members, principals, insurers, insureds, employees,



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shareholders, attorneys, servants, assigns, representatives, agents and any other person acting by or on their behalf with respect to claims against Defendants as set forth in the First Amended Complaint arising from the acts or omissions of Defendants from the Asserted Claims, any claims that were or could have been asserted in the Action, and any claims during the Class Period arising from alleged violations relating to the issuance of promotional gift cards (or vouchers for promotional gift cards) to Class Members during the Class Period.

- b. Upon Final Approval, Defendants, on behalf of themselves and all their respective present, former, or subsequent predecessors, administrators, successors, assigns, heirs, executors, agents, partners, representatives, employees, insurers, insureds, attorneys, servants, subsidiaries, parents, affiliates, divisions, joint ventures and entities in which Defendants has and/or had a controlling interest, and any and all of their respective officers, directors, partners, managers, members, principals, insurers, insureds, employees, shareholders, attorneys, servants, assigns, representatives, agents and any other person acting by or on their behalf will fully release and discharge Plaintiff, Class Members, and their respective, current, former, and subsequent heirs, predecessors, assigns, spouses, executors, successors, administrators, agents, partners, representatives, insurers, insureds, employees and attorneys with respect to claims Defendants could have alleged as counter claims in the above captioned Action, or otherwise, arising from transactions involving the issuance of promotional gift cards (or vouchers for promotional gift cards) to Class Members during the Class Period.
  
- c. Upon Final Approval, Sleepy's on behalf of themselves and all their respective present, former, or subsequent predecessors, administrators, successors, assigns, heirs, executors, agents, partners, representatives, employees, insurers, insureds, attorneys, servants, subsidiaries, parents, affiliates, divisions, joint ventures and entities in which Sleepy's has and/or had a controlling interest, and any and all of their respective officers, directors, partners, managers, members, principals, insurers, insureds, employees, shareholders, attorneys, servants, assigns, representatives, agents and any other person acting by or on their behalf will fully release and discharge Capitol and their respective present, former, or subsequent predecessors, administrators, successors, assigns, heirs, executors, agents, partners, representatives, employees, insurers, insureds, attorneys, servants, subsidiaries, parents, affiliates, divisions, joint ventures and entities in which Capitol has and/or had a controlling interest, and any and all of their respective officers, directors, partners, managers, members, principals, insurers, insureds, employees, shareholders, attorneys, servants, assigns, representatives, agents and any other person acting by or on their behalf with respect to claims as set forth in the First Amended Complaint, arising from the acts or omissions of Capitol from the Asserted Claims, any claims that were or could have been asserted in the Action, including but not limited to claims for indemnification and/or

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contribution, and any claims during the Class Period arising from or related to the issuance of promotional gift cards (or vouchers for promotional gift cards) during the Class Period as it relates to the Class Members. Sleepy's reserves all rights related to indemnification and/or contribution for any and all claims related to promotional gift cards (or vouchers for promotional gift cards) related to claims other than those for the Class Members.

- d. Upon Final Approval, Capitol on behalf of themselves and all their respective present, former, or subsequent predecessors, administrators, successors, assigns, heirs, executors, agents, partners, representatives, employees, insurers, insureds, attorneys, servants, subsidiaries, parents, affiliates, divisions, joint ventures and entities in which Capitol has and/or had a controlling interest, and any and all of their respective officers, directors, partners, managers, members, principals, insurers, insureds, employees, shareholders, attorneys, servants, assigns, representatives, agents and any other person acting by or on their behalf will fully release and discharge Sleepy's and their respective present, former, or subsequent predecessors, administrators, successors, assigns, heirs, executors, agents, partners, representatives, employees, insurers, insureds, attorneys, servants, subsidiaries, parents, affiliates, divisions, joint ventures and entities in which Sleepy's has and/or had a controlling interest, and any and all of their respective officers, directors, partners, managers, members, principals, insurers, insureds, employees, shareholders, attorneys, servants, assigns, representatives, agents and any other person acting by or on their behalf with respect to claims as set forth in the First Amended Complaint, arising from the acts or omissions of Sleepy's from the Asserted Claims, any claims that were or could have been asserted in the Action, including but not limited to claims for indemnification and/or contribution, and any claims during the Class Period arising from or related to the issuance of promotional gift cards (or vouchers for promotional gift cards) during the Class Period as it relates to Class Members. Capitol reserves all rights related to indemnification and/or contribution for any and all claims related to promotional gift cards (or vouchers for promotional gift cards) related to claims other than those for the Class Members.

**20. Covenant Not to Sue.**

Plaintiff and the Settlement Class Members agree and covenant not to sue Defendants with respect to any of the Released Claims, and agree not to otherwise assist others in doing so, and agree forever to be barred from filing, instituting, maintaining, collecting, proceeding against, or seeking to establish liability against any Defendants in any federal, state, or local court or forum, in or before any administrative agency, or in any other proceeding in any forum based upon, arising out of, related to, or otherwise in connection with, in whole or in part, the Released Claims.

**21. Non-Waiver.**

No delay or omission by any Party in exercising any right under this Agreement shall operate as a waiver of that or any other right. A waiver or consent given by a Party on any one occasion shall be effective only in that instance and shall not be construed as a bar or waiver of any right on any other occasion.

**22. Complete Agreement.**

Other than as stated herein, the Parties warrant that no representation, promise, or inducement has been offered or made to induce any Party to enter into this Agreement and that they are competent to execute this Agreement and accept full responsibility therefore. This Agreement contains and constitutes the entire understanding and agreement between the Parties and supersedes all previous oral and written negotiations, agreements, commitments, and writings in connection therewith. This Agreement may not be amended or modified except by a writing signed by authorized representatives of all Parties.

**23. Knowing and Voluntary Agreement.**

Plaintiff agrees that she is entering into this Agreement knowingly, voluntarily, and with full knowledge of its significance. Plaintiff further affirms that she has not been coerced, threatened, or intimidated into signing this Agreement; that she has been advised to consult with an attorney; and that she in fact has consulted with an attorney before signing this Agreement.

Defendants each agree that they are entering into this Agreement knowingly, voluntarily, and with full knowledge of its significance. Defendants further affirm that they have not been coerced, threatened, or intimidated into signing this Agreement; that they have been advised to consult with an attorney; and that they in fact have consulted with an attorney before signing this Agreement.

Class Counsel represents that they have conducted a thorough investigation into the facts of the Action and have diligently pursued an investigation of the Claims asserted on behalf of members of the Settlement Class against Defendants. Based on their own independent investigation, analysis of information, including documents and communications, Class Counsel states that they are of the opinion that the Settlement with Defendants is fair, reasonable, and adequate and is in the best interest of the members of the Settlement Class, in light of all known facts and circumstances, including the risks of significant delay and claims asserted by Defendants.

**24. Notices.**

Any notices issued pursuant to the terms of this Agreement (other than the Notice as defined herein) shall be sent to all Parties at the addresses of their respective counsel as follows:



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For Plaintiffs to:

Michael C. Forrest, Esq.  
Brian P. McNiff, Esq.  
Forrest, LaMothe, Mazow,  
McCullough, Yasi & Yasi, P.C.  
1 Salem Green, Suite 2  
Salem, MA 01970

For Defendants to:

Beth-Ann Krinsky, Esq.  
Jessica B. Alhalel, Esq.  
GreenspoonMarder, LLP  
200 East Broward Blvd., Suite 1800  
Fort Lauderdale, FL 33301

AND

Christopher B. Parkerson, Esq.  
Campbell Campbell Edwards & Conroy, P.C.  
One Constitution Center  
3rd Floor  
Boston, MA 02129

**25. Severability.**

If any part of this Agreement is found to be illegal, invalid, inoperative or unenforceable in law or equity, such finding shall not affect the validity of any other provisions of this Agreement, which shall be construed, reformed and enforced to effect the purposes thereof to the fullest extent permitted by law. If one or more of the provision contained in the Agreement shall for any reason be held to be excessively broad in scope, subject matter or otherwise, so as to be unenforceable at law, the Parties agree that such provision(s) shall be construed to be limited or reduced so as to be enforceable to the maximum extent under the applicable law.

**26. Governing Law.**

This Agreement shall be governed by Massachusetts law, without regard to the Commonwealth's or any other state's choice of law provisions. The Parties also hereby submit to the jurisdiction of the Court for all purposes relating to the review, approval and enforcement of the terms of this Agreement.

**27. Counterparts.**

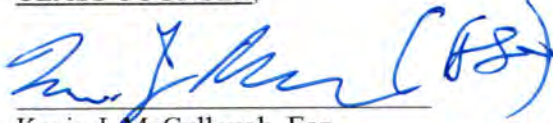
This Agreement may be executed by the Parties in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument. Facsimile signatures or scanned and e-mailed signatures shall be treated as original signatures and shall be binding.

REMAINDER OF PAGE INTENTIONALLY LEFT BLANK  
SIGNATURE PAGE TO FOLLOW

*Khun v. Sleepy's, LLC and CMC Acquisition Corporation*  
Class Action Settlement Agreement

**IN WITNESS WHEREOF**, the Parties and Class Counsel each voluntarily and without coercion have caused this Agreement to be signed and entered under seal as of the respective dates written below as their free acts and deeds.

CLASS COUNSEL,

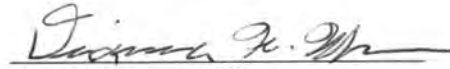


Kevin J. McCullough, Esq.,  
Forrest, LaMothe, Mazow, McCollough,  
Yasi & Yasi, P.C.

COUNSEL FOR SLEEPY'S

Christopher B. Parkerson, Esq.  
Campbell Campbell Edwards & Conroy, P.C.

PLAINTIFF, on behalf of herself and  
others similarly situated,



Plaintiff: Dianna Khun  
Dated: 7/20/18

DEFENDANT: SLEEPY'S, LLC,

Defendant

Dated: \_\_\_\_\_

COUNSEL FOR CMC ACQUISITION  
CORPORATION d/b/a CAPITAL MARKETING  
CONCEPTS, Inc.

\_\_\_\_\_  
Jessica B. Alhalel, Esq.  
Greenspoon Marder, LLP  
Dated: \_\_\_\_\_

DEFENDANT: CMC ACQUISITION  
CORPORATION d/b/a CAPITAL MARKETING  
CONCEPTS, Inc.

\_\_\_\_\_  
Defendant:  
Dated: \_\_\_\_\_

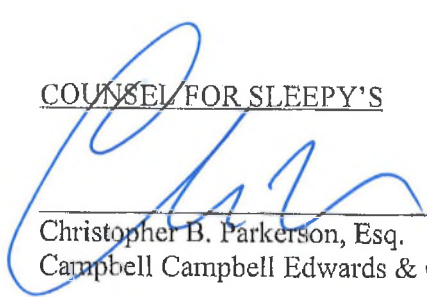
*Khun v. Sleepy's, LLC and CMC Acquisition Corporation*  
Class Action Settlement Agreement

IN WITNESS WHEREOF, the Parties and Class Counsel each voluntarily and without coercion have caused this Agreement to be signed and entered under seal as of the respective dates written below as their free acts and deeds.

CLASS COUNSEL,

\_\_\_\_\_  
Kevin J. McCullough, Esq.,  
Forrest, LaMothe, Mazow, McCollough,  
Yasi & Yasi, P.C.

COUNSEL FOR SLEEPY'S

  
\_\_\_\_\_  
Christopher B. Parkerson, Esq.  
Campbell Campbell Edwards & Conroy, P.C.

PLAINTIFF, on behalf of herself and  
others similarly situated,

\_\_\_\_\_  
Plaintiff: Dianna Khun  
Dated: \_\_\_\_\_

DEFENDANT: SLEEPY'S, LLC,

  
\_\_\_\_\_  
Defendant

Dated: 7/20/18

COUNSEL FOR CMC ACQUISITION  
CORPORATION d/b/a CAPITAL MARKETING  
CONCEPTS, Inc.

\_\_\_\_\_  
Jessica B. Alhalel, Esq.  
Greenspoon Marder, LLP  
Dated: \_\_\_\_\_

DEFENDANT: CMC ACQUISITION  
CORPORATION d/b/a CAPITAL MARKETING  
CONCEPTS, Inc.

\_\_\_\_\_  
Defendant:

Dated: \_\_\_\_\_

*Khun v. Sleepy's, LLC and CMC Acquisition Corporation*  
Class Action Settlement Agreement

IN WITNESS WHEREOF, the Parties and Class Counsel each voluntarily and without coercion have caused this Agreement to be signed and entered under seal as of the respective dates written below as their free acts and deeds.

CLASS COUNSEL,

COUNSEL FOR SLEEPY'S

\_\_\_\_\_  
Kevin J. McCullough, Esq.,  
Forrest, LaMothe, Mazow, McCollough,  
Yasi & Yasi, P.C.

\_\_\_\_\_  
Christopher B. Parkerson, Esq.  
Campbell Campbell Edwards & Conroy, P.C.

PLAINTIFF, on behalf of herself and  
others similarly situated,

DEFENDANT: SLEEPY'S, LLC,

\_\_\_\_\_  
Plaintiff: Dianna Khun  
Dated: \_\_\_\_\_

\_\_\_\_\_  
Defendant  
Dated: \_\_\_\_\_

COUNSEL FOR CMC ACQUISITION  
CORPORATION d/b/a CAPITAL MARKETING  
CONCEPTS, Inc.

\_\_\_\_\_  
Jessica B. Alhalel, Esq.  
Greenspoon Marder, LLP  
Dated: 7/20/18

DEFENDANT: CMC ACQUISITION  
CORPORATION d/b/a CAPITAL MARKETING  
CONCEPTS, Inc.

\_\_\_\_\_  
Defendant:  
Dated: 7/19/18

*President for CMC*

# **EXHIBIT A**

OFFICIAL COURT NOTICE OF  
SETTLEMENT OF CLASS ACTION

**You could get \$25 or  
more from a class-action  
settlement involving  
promotional gift cards  
offered in conjunction  
with certain  
Sleepy's purchases.**

*www.[XXXX].com  
1-800-XXX-XXXX*

**XXX**

*Khun v. Sleepy's, LLC*  
Settlement Administrator  
P.O. Box xxxx  
City, State xxxx-xxxx

<<ScanString>>

Postal Service: Please do not mark barcode

Claim#: XXX - <<AccountID>>-

<<NoticeID>>

<<First Name>> <<LastName>>

<<Address1>>

<<Address2>>

<<City>>, <<State>> <<Zip>>

A Settlement has been reached with Sleepy's, Inc. (Sleepy's) and CMC Acquisition Corporation d/b/a Capital Marketing Concepts, Inc. (together "Defendants") in a class action involving promotional gift cards offered as part of qualifying purchases made at Sleepy's retail locations in Massachusetts and online for delivery in Massachusetts. The lawsuit alleges that the Defendants' promotion failed to properly identify certain use and redemption conditions for the promotional gift cards, and imposed material terms and conditions related to the promotion that were not disclosed. Defendants deny Plaintiff's allegations and assert that all of their promotional practices complied with all state and federal legal requirements.

**Who is Included?** Defendants' records show that you may be included. Specifically, the Settlement includes: all persons who made a qualifying promotional purchase between November 7, 2012 to July 23, 2018 at a Sleepy's retail location located in Massachusetts, or an online purchase for a Massachusetts delivery, and were entitled to a promotional gift card to be provided by Sleepy's as part of their purchase ("Settlement Class Members"); and (a) were provided with and redeemed a Voucher ("Redeemed Voucher Subclass"), or (b) were not provided with and did not redeem a Voucher ("Unredeemed Voucher Subclass").

**The Settlement:** Defendants will pay up to \$650,000 to settle the lawsuit; of this, up to \$338,400 will be distributed in payments to Settlement Class Members, up to \$250,000 will be paid to Class Counsel as fees and costs; up to \$6,300 will be paid to the named Plaintiff (Dianna Khun) as a Service Award; and up to \$55,000 will be used for Settlement Administration Expenses.

**What Can I Get?** If the Court finally approves the Settlement, members of the Redeemed Voucher Subclass will receive \$25.00 for each Voucher they were entitled to and redeemed. Members of the Unredeemed Voucher Subclass will receive the actual value of the Voucher(s) they were entitled to but did not redeem. The average value of the Voucher is \$110.33, but your Voucher may be worth more or less than that depending on your particular Sleepy's purchase.

**How Do I Get a Payment?** You do not need to do anything to get a Settlement Payment. Payments will be issued if Court finally approves the Settlement and any appeals are resolved.

**Your Rights:** If you do nothing, you will receive a Settlement Payment and your rights will be affected. If you do not want to be legally bound by the Settlement or receive a Settlement Payment, you must exclude yourself from the Settlement **no later than [redacted], 2018**. Unless you exclude yourself, you will not be able to sue or continue to sue the Defendants for any of the legal issues resolved by this Settlement and released by the Settlement Agreement. If you stay in the Settlement (do not exclude yourself), you may object to it and notify the Court that you or your lawyer intend to appear at the Court's Fairness Hearing. Objections must be filed with the Court and mailed to Counsel **no later than [redacted], 2018**.

**Court's Fairness Hearing:** The Court will hold a hearing in this case on **[date]** at the U.S. District Court for the District of Massachusetts, 1 Courthouse Way, Boston, MA 02210. At the hearing, the Court will decide whether to approve the Settlement, Class Counsel's fees and costs, and the service fee payment.

**Please see the Settlement Website at \_\_\_\_\_ for more information and the full settlement terms.**

# **EXHIBIT B**



UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

Dianna Khun v. Sleepy's LLC, CMC Acquisition Corp. d/b/a Capital Marketing Concepts, Inc.  
Civil Action No. 1:17-CV-10110

**OFFICIAL COURT NOTICE OF SETTLEMENT OF CLASS ACTION**

To: Certain Customers of Sleepy's LLC Who Made Certain Qualifying Promotional Purchases  
Re: Settlement of Class Action Lawsuit  
Date: [REDACTED]

**INTRODUCTION**

This Notice explains the above-referenced lawsuit and the terms of the settlement and explains your rights and obligations. The Notice should not be understood as an expression of any opinion by the Court as to the merits of any of the claims or defenses asserted by the parties. The Notice contains information about the following topics:

1. What is the Lawsuit About and Why Was This Notice Sent?
2. Who is Affected by the Proposed Settlement?
3. What are the Terms of the Proposed Settlement and How Much Can You Expect to Receive?
4. Who Represents the Parties and How Will the Attorneys for the Class Get Paid?
5. What are Your Options?
6. What If You Do Nothing?
7. How Can you Exclude Yourself or Opt-Out of the Settlement?
8. How Can you Object to the Settlement?
9. What to do if You Have Questions?

**1. What Is the Lawsuit About and Why Was This Notice Sent?**

A class action lawsuit was filed by Plaintiff Dianna Khun alleging that the Defendants Sleepy's, LLC ("Sleepy's") and CMC Acquisition Corporation d/b/a Capitol Marketing Concepts, Inc. ("Capitol") offered promotional gift cards as part of certain qualifying purchases made at Sleepy's retail locations in Massachusetts and online for delivery in Massachusetts. The lawsuit alleges that the Defendants' promotion failed to properly identify certain use and redemption conditions for the promotional gift cards, and imposed material terms and conditions related to the promotion that were not disclosed. Defendants deny Plaintiff's allegations and assert that all of their promotional practices complied with all state and federal legal requirements.

The lawsuit is now before the Honorable Judge Saylor, United States District Court Judge for the United States District Court for the District of Massachusetts.

The parties have reached a proposed settlement of all claims in the lawsuit as to the Settlement Class after a thorough review of promotional materials and customer records.

The Court has granted preliminary approval of the settlement and has scheduled a hearing on [REDACTED] at [REDACTED] in the United States District Courthouse in Boston, Massachusetts to determine whether to grant final approval of the proposed settlement.

This Notice explains the lawsuit, the settlement, your legal rights, what benefits are available, who is eligible for them, and how to get them.

## 2. Who is Affected by the Proposed Settlement?

The proposed settlement affects those individuals who made qualifying promotional purchases at a Sleepy's retail location in Massachusetts or an online purchase for a Massachusetts delivery between November 7, 2012 to July 23, 2018. The Court has certified, for settlement purposes only, the following Settlement Class:

All persons who made a qualifying promotional purchase during the class period at a Sleepy's retail location located in Massachusetts, or an online purchase for a Massachusetts delivery, and were entitled to a promotional gift card to be provided by Sleepy's as part of their purchase.

Excluded from the Class are all past and present employees, agents, officers, and directors of Sleepy's and Capitol and persons who have released Sleepy's or Capitol from liability for claims associated with the distribution and redemption of promotional gift cards.

Moreover, the Settlement Class is comprised of the following two (2) subclasses:

The Redeemed Voucher Subclass (Subclass A): shall include all persons who made a qualifying promotional purchase during the class period at a Sleepy's retail location located in Massachusetts, or an online purchase for a Massachusetts delivery, and were entitled to a promotional gift card to be provided by Sleepy's as part of their purchase, who were provided with a Voucher, and who did redeem said Voucher.

The Unredeemed Voucher Subclass (Subclass B): shall include all persons who made a qualifying promotional purchase during the class period at a Sleepy's retail location located in Massachusetts, or an online purchase for a Massachusetts delivery, and were entitled to a promotional gift card to

be provided by Sleepy's as part of their purchase, who were not provided with a Voucher, but who did not redeem said Voucher.

**3. What are the Terms of the Proposed Settlement and How Much Can You Expect to Receive?**

How much you will receive will depend on which of the two subclasses of which you are a part.

If the Court finally approves of the Settlement Agreement, members of Subclass A will receive \$25.00 for each Voucher to which the class member was entitled and for which Voucher redemption was made.

If the Court finally approves of the Settlement Agreement, members of Subclass B will receive the actual value of the Voucher to which the class member was entitled and for which no Voucher redemption was made. The average value of the Voucher is \$110.33, but your Voucher may be worth more or less than the average depending on your particular Sleepy's purchase.

The Settlement funds will generally be distributed as follows: (1) simultaneous payment to subclasses A and B, (2) payment of the Court approved Fees and Costs for Class Counsel, and (3) payment of the service fee payment to the named Plaintiff in an amount not to exceed \$6,300.00.

Any funds remaining or uncollected from the Common Fund will be distributed to an agreed upon charitable *cy pres* once all approved disbursements have been made.

**4. Who Represents the Parties and How Will the Attorneys for the Class Get Paid?**

Attorneys for the Plaintiff and the Class:

John R. Yasi, Esq.  
Michael C. Forrest, Esq.  
Kevin J. McCullough, Esq.  
Brian P. McNiff, Esq.  
Forrest, LaMothe, Mazow McCullough, Yasi & Yasi, P.C.  
2 Salem Green, Suite 2  
Salem, MA 01970

Class Counsel will apply to the Court for legal fees and reimbursement of litigation costs in an amount not to exceed \$250,000.00. Class Counsel will also request a representative service award for the named Plaintiff of an amount not to exceed \$6,300.00. The actual

amount awarded will be determined by the Court to ensure that the amount of attorneys' fees and costs is reasonable.

### 5. What are Your Options?

You have three options with regard to this Settlement. You can:

1. Do nothing.
2. Request to be excluded from the settlement entirely; or
3. Object to any portion of the settlement agreement.

Details about how each option would affect your rights are explained below.

### 6. What If You Do Nothing?

If you are identified as a Settlement Class member and receive this Notice and if you do nothing more, you will be bound by the terms of the Settlement and will, upon approval of the Settlement by the Court and that approval becoming final, be deemed to have released all of the federal and/or state claims you may have against both Defendants.

If you are identified as a Settlement Class member and receive this Notice and if you do nothing more, you will receive a check in the mail which will be for the amounts identified in Section 3, above upon final approval of the Settlement.

### 7. How Can You Exclude Yourself or Opt-out of the Settlement?

You may exclude yourself from the Class Settlement by submitting a 'Request for Exclusion' to the Settlement Administrator at [REDACTED]. If you exclude yourself, you will not participate in these proceedings, nor will you receive any money from the net settlement fund. You will also retain the right to assert any of the claims you may have against either Defendant.

To exclude yourself from the Class, you must submit a "*Request for Exclusion from the Settlement Class*" in writing to the Settlement Administrator at the address above with a postmark date of no later than [REDACTED] [60 DAYS AFTER ENTRY OF PRELIMINARY APPROVAL].

This Request for Exclusion shall include your name and current address and shall specifically state your desire to be excluded from the Settlement Agreement and from the Settlement Class in the case of *Dianna Khun v. Sleepy's LLC, CMC Acquisition Corp. d/b/a Capital Marketing Concepts, Inc.* Civil Action No. 1:17-CV-10110, and that you understand that by excluding yourself from the Settlement, you will receive no funds in connection with this case.

## 8. How Can You Object to the Settlement?

If you're a Class Member, you can object to the settlement if you do not like any part of it.

In order to object to the Settlement, you must file a copy of your written objection with the Court at the United States District Court for the District of Massachusetts, 1 Courthouse Way, Boston, MA, and mail a copy of your written objection to Counsel for the parties, identified below, no later than \_\_\_\_\_ **[WITHIN 75 DAYS AFTER ENTRY OF PRELIMINARY APPROVAL].**

To state a valid objection to the Settlement, your objection must contain the following information: (i) full name, current address, and current telephone number; (ii) a statement of the position(s) you wish to assert, including the factual and legal grounds for your position; and (iii) provide copies of any other documents that you wish to submit in support of your position. You must also include the name of the case *Dianna Khun v. Sleepy's LLC, CMC Acquisition Corp. d/b/a Capital Marketing Concepts, Inc.* Civil Action No. 1:17-CV-10110 in your objection.

### ***PLEASE DO NOT TELEPHONE THE COURT.***

If you submit a timely objection, you may also appear, at your own expense, at the Final Approval Hearing. However, to appear at the Final Approval Hearing in Court, you must first file and serve upon Counsel for the parties a "Notice of Intention to Appear at the Final Approval Hearing" which is set to occur on \_\_\_\_\_, at United States District Court for the District of Massachusetts, 1 Courthouse Way, Boston, MA. You may represent yourself or appear through your own attorney. To do so, you or your attorney must also file a "notice of Appearance" with the Clerk of the United States District Court for the District of Massachusetts and deliver copies of each to the Counsel listed below, no later than \_\_\_\_\_ **[WITHIN 60 DAYS AFTER ENTRY OF PRELIMINARY APPROVAL].**

**You must mail the objection or request for exclusion to all of the following no later than DATE [75 DAYS AFTER ENTRY OF PRELIMINARY APPROVAL]:**

<b>To the Court:</b> United States District Court for the District of Massachusetts Attn: Khun Settlement Civil Action No. 1:17-CV-10110 1 Courthouse Way Boston, MA 02210	<b><u>And to Counsel:</u></b> Kevin J. McCullough, Esq. Brian P. McNiff, Esq. Attn: Khun Settlement Forrest, LaMothe, Mazow, McCullough, Yasi & Yasi, P.C. Attn: Khun Settlement 2 Salem Green, Suite 2 Salem, MA 01970
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	<p>Jessica Alhalel, Esq. Attn: Khun Settlement Greenspoon Marder, LLP PNC Building 200 East Broward Blvd, Suite 1800 Fort Lauderdale, FL 33301</p> <p>Benjamin R. Davis, Esq. Attn: Khun Settlement Locke Lord, LLP 2800 Financial Plaza Providence, RI 02903</p> <p>Christopher B. Parkerson, Esq. Erica L. Larence, Esq. Attn: Khun Settlement Campbell, Campbell, Edwards &amp; Conroy, P.C. One Constitution Center, 3<sup>rd</sup> Floor Boston, MA 02129</p>
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#### 9. What To Do If You Have Questions?

This notice summarizes the proposed settlement. More details are in a settlement agreement. You can get a copy of the settlement agreement by writing to Forrest, LaMothe, Mazow, McCullough, Yasi & Yasi, P.C., 2 Salem Green, Salem, MA 01970, or by visiting [the Settlement Website at \\_\\_\\_\\_\\_](#). You can also call Class Counsel at 877-599-8890.

***PLEASE DO NOT TELEPHONE THE COURT, DEFENDANTS OR DEFENDANTS' COUNSEL.***

# **EXHIBIT C**

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

DIANNA KHUN, on behalf of herself and all  
others similarly situated,

Plaintiff

v.

SLEEPY'S, LLC and CMC ACQUISITION  
CORPORATION, d/b/a CAPITOL  
MARKETING CONCEPTS, INC.,

Defendants.

**Case No. 1:17-cv-10110**

**[PROPOSED]**  
**PRELIMINARY APPROVAL ORDER**

WHEREAS, Plaintiff, Dianna Khun ("Plaintiff" or "Khun"), filed the above-captioned class action (the "Action") on behalf of herself and members of the Class (as defined herein) against Defendants Sleepy's LLC ("Sleepy's") and CMC Acquisition Corporation d/b/a Capital Marketing Concepts, Inc. ("Capital") (together "Defendants");

WHEREAS, Plaintiff, on behalf of herself and the members of the Class, and Defendants, by and through their respective attorneys, entered into and filed a settlement agreement dated July 23, 2018 (the "Settlement Agreement"), which, together with the exhibits attached thereto, sets forth the terms and conditions for the proposed settlement (the "Settlement") of the Action;

WHEREAS, the Preliminary Approval Order seeks to certify, for settlement purposes, pursuant to Rule 23 of the Federal Rules of Civil Procedure and M.G.L. c. 93A, a settlement class consisting of ("Settlement Class"):



All persons who made a qualifying promotional purchase during the class period at a Sleepy's retail location located in Massachusetts, or an online purchase for a Massachusetts delivery, and were entitled to a promotional gift card to be provided by Sleepy's as part of their purchase.

Excluded from the Class are all past and present employees, agents, officers, and directors of Sleepy's or Capitol and persons who have released Sleepy's or Capitol from liability for claims associated with the distribution and redemption of promotional gift cards.

**NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:**

1. This Court has jurisdiction over the subject matter of the Action and, for the purposes of the Settlement of the Action has jurisdiction over Plaintiff, all Class Members, and Defendants.
2. Except for terms defined herein (with the definitions to be applicable to both the singular and the plural forms of each term defined if both such forms of such term are used herein), the Court adopts and incorporates the definitions in the Settlement Agreement for purposes of this Order.
3. Notices are to be provided to the Settlement Class pursuant to, and in the manner directed by, the Settlement Agreement. The form and manner of the Notices as set out in the Settlement Agreement adequately satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure, due process and applicable law, constitutes the most appropriate notice practicable under the circumstances and constitutes due and sufficient notice of the Settlement and Final Approval Hearing (as defined below) and all other matters referred to in the Notices to all Persons entitled to receive such Notices.
4. The Court finds that each of the requirements of Rule 23 of the Federal Rules of Civil Procedure and M.G.L. c. 93A have been satisfied with respect to certification of a class for settlement purposes, in that: (a) the class is so numerous that joinder of all members is

impracticable, (b) there are questions of law or fact common to the class, (c) the claims or defenses of the Class Representative (as defined below) are typical of the claims or defenses of the Class, (d) the Class Representative will fairly and adequately protect the interests of the Class, (e) the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and (f) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

5. Plaintiff, Dianna Khun, is hereby conditionally certified as the settlement class representative (the “Class Representative”), and her counsel, Forrest, LaMothe, Mazow, McCullough, Yasi & Yasi, P.C. are conditionally appointed as class counsel of the settlement class (“Class Counsel”). The Court finds that the Class Representative and Class Counsel have fairly and adequately represented the interests of the Class.
6. The Court finds that the Settlement as set forth in the Settlement Agreement is fair, reasonable, and adequate and in the best interests of the Class and should be preliminarily approved. The Court further finds that the Settlement set forth in the Settlement Agreement is the result of arm’s-length negotiations between experienced counsel representing the interests of the Class, on the one hand, and Defendants, on the other hand. Accordingly, the Settlement Agreement and the terms of the Settlement as described in the Settlement Agreement are hereby preliminarily approved in their entirety, pursuant to Rule 23 of the Federal Rules of Civil Procedure and M.G.L. c. 93A.
7. The Court approves KCC LLC as the Settlement Administrator, to perform the duties set forth in the Settlement Agreement.

8. Final Approval Hearing. A hearing (the “Final Approval Hearing”) shall be held before this Court on \_\_\_\_\_, 2018, at \_\_\_\_\_, in the United States District Court, District of Massachusetts, 1 Courthouse Way, Boston, Massachusetts to determine whether:
- A. For settlement purposes only, the Court’s conditional certification of the Settlement Class, pursuant to Rule 23 of the Federal Rules of Civil Procedure and M.G.L. c. 93A, should be made final;
  - B. Determine whether to grant final approval of the Settlement Agreement;
  - C. Consider any timely objections made to the Settlement Agreement and all responses to the objections filed by the Parties;
  - D. Determine whether judgment should be entered pursuant to the Settlement Agreement, *inter alia*, dismissing the Action with prejudice;
  - E. Rule on Plaintiff’s Fee and Expense Application (“Fee and Expense Application”);
  - F. Rule of Plaintiff’s Service Award request; and
  - G. Hear and determine other matters relating to the proposed Settlement.
9. Reservation by the Court. The Court reserves the right to adjourn and reconvene the Final Approval Hearing, including with respect to Plaintiff’s Fee and Expense Application, without further notice to the Members of the Class other than an oral announcement at the Final Approval Hearing or any adjournment thereof. Papers in support of Final Approval and Plaintiff’s Fee and Expense Application and papers in opposition to any objections, may be filed with the Court and served upon all Parties, and on the Persons filing objections or, if they are represented by an attorney, their attorney. The Court may approve the Settlement at or after the Final Approval Hearing with such modifications as may be consented to by the Parties and without further notice to the Members of the Class.

10. Appearance at the Final Approval Hearing and Objections to Settlement. Any Member of the Class may appear and show cause, if he, she or it has any reason why the Settlement should or should not be approved, or why the Order and Final Judgment should or should not be entered, or to request exclusion from the Action, provided, however, that no Member of the Class shall be heard or entitled to contest the approval of the terms and conditions of the proposed Settlement or, if approved, the Order and Final Judgment to be entered thereon, unless that Person serves on counsel for the Parties and files with the Court a notice in accordance with the terms of the Settlement Agreement. Any objection or request for exclusion which must be submitted in accordance with the Notice and Settlement Agreement. In order to object to the Settlement and/or Request for Fees and Expenses, a Person must file a copy of his/her written objection with the Court and mail a copy of their written objection to counsel for the Parties in accordance with the Notice and Settlement Agreement. Any written objection filed by an objecting Class Members must contain the following information: (i) full name, current address, and current telephone number; (ii) a statement of the position(s) the objector wishes to assert, including the factual and legal grounds for the position; and (iii) provide copies of any other documents that the objector wishes to submit in support of his/her position. The objector must also include in its objection the name of the case *Dianna Khun v. Sleepy's LLC, CMC Acquisition Corp. d/b/a Capital Marketing Concepts, Inc.* Civil Action No. 1:17-CV-10110. If an individual submits a timely objection, he/she may also appear, at their own expense, at the Final Approval Hearing. However, to appear at the Final Approval Hearing in Court, the individual must first submit a 'Notice of Intention to Appear' at the Final Approval Hearing. An objecting Member of the Classes can represent him/herself or appear through their own attorney. If an individual is represented by

an attorney, his/her attorney must file a 'Notice of Appearance' with the Clerk of the United States District Court, District of Massachusetts, and deliver copy to counsel for the Parties as provided in the Notice and Settlement Agreement.

11. Stay of Proceedings. All proceedings in the Action or claims by any of the putative Class Members related to the claims set forth in this Action, other than such proceedings as may be necessary to carry out the terms and conditions of the Settlement or proceedings in connection with Plaintiff's Fee and Expense Application, are hereby stayed and suspended until further order of this Court. Pending final determination of whether the Settlement provided for in the Settlement Agreement should be approved, Plaintiff and all members of the Classes, or any of them, are barred and enjoined from commencing, prosecuting, instigating or in any way participating in the commencement or prosecution of any action asserting any Released Claims against any of the Released Parties.
12. Termination of Settlement. If the Settlement is not approved by the Court or shall not become effective for any reason whatsoever, the Settlement, any Class certification herein and any actions taken or to be taken in connection therewith (including this Order and any judgment entered thereafter) shall be terminated and shall become null and void and of no further force and effect. In such event, the Parties shall be restored to their respective positions in the Action prior to the execution of the Settlement Agreement and its predecessor Memorandum of Understanding entered into by the Parties.
13. No Admissions by the Parties. The provisions contained in the Settlement Agreement shall not be deemed or constitute a presumption, concession or an admission by any Party in the Action of any fault, liability or wrongdoing or lack of any fault, liability or wrongdoing, as to any facts or claims alleged or asserted in the Action, or any other actions or proceedings, and

shall not be interpreted, construed, deemed, involved, offered, or received in evidence or otherwise used by any Person in the Action, or in any other action or proceeding, whether civil, criminal or administrative, except in connection with any proceeding to enforce the terms of the Settlement.

14. Retention of Exclusive Jurisdiction by the Court. The Court retains exclusive jurisdiction over the Action to consider all further applications arising out of or in connection with with the Settlement.

BY THE COURT:

Dated: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_, J.