IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JESSE PRATHER and JOHN W. PRATHER, on behalf of themselves and all others similarly situated,	:	
Plaintiffs,	:	Civil Action File No. 1:15-cv-04231-SCJ
v.	:	
WELLS FARGO BANK N.A., and WELLS FARGO EDUCATION FINANCIAL SERVICES,	:	
Defendants.	:	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF THE PARTIES' CLASS ACTION SETTLEMENT

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INTRODUCTION

In this proposed class action, Plaintiffs Jesse Prather and John W. Prather ("Plaintiffs") allege that Defendant Wells Fargo Bank, N.A ("Wells Fargo") violated the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, by using an automatic telephone dialing system ("ATDS" or "autodialer") to make student loan collection calls to cellular phones without prior express consent. Wells Fargo denies the material allegations in Plaintiffs' complaint; disputes that Wells Fargo made any calls using an ATDS without prior express consent; contend that the claims of Plaintiffs and the other members of the class are not amenable to class certification; and deny that Plaintiffs and the members of the class are entitled to damages.

Nevertheless, after good faith, contentious, arm's-length negotiations, with the assistance of an experienced and well-respected private mediator, Hunter R. Hughes, Plaintiffs obtained Wells Fargo's agreement to resolve this matter on a class-wide basis for an all-cash settlement totaling over $2 million ("Settlement").[1] Each Class Member who submits a qualified claim will receive a pro rata distribution from the Settlement Fund. No amount will revert to Wells Fargo. This

[1] The Settlement is attached to the Motion for Preliminary Approval as Exhibit A. Unless otherwise stated, all capitalized terms in this Memorandum carry the same meaning as defined in the Settlement.

is an excellent result considering the risks, uncertainties, burden, and expense associated with continued litigation.

Therefore, Plaintiffs respectfully move the Court for preliminary approval of the Settlement. Specifically, Plaintiffs respectfully request that this Court: (1) conditionally certify a settlement class, (2) conditionally approve the Settlement as fair, adequate, reasonable, and within the reasonable range of possible final approval, (3) appoint Plaintiffs as Class Representatives, (4) appoint Plaintiffs' counsel as Class Counsel, (5) approve the notice program proposed by the parties as the best practicable under the circumstances that satisfies due process and Rule 23, (6) set a date for a final approval hearing, and (7) set deadlines for Class Members to submit claims for compensation, and to object to or exclude themselves from the parties' settlement.

STRUCTURE OF THE SETTLEMENT

The Settlement is structured to provide relief to the following class of persons:

> [A]ll users or subscribers to a wireless or cellular telephone service within the United States who used or subscribed to a phone number to which Wells Fargo made or initiated any call from April 21, 2011 to December 19, 2015, in connection with a student loan, using any automated dialing technology or artificial or prerecorded voice technology, according to Wells Fargo's available records.

Id. at ¶ 2.31. Wells Fargo's preliminary estimate of the size of this class is

446,252; the parties are pursuing discovery to confirm the Final Class Size, including a Rule 30(b)(6) deposition of Wells Fargo. *See id.* ¶¶ 2.20, 2.27.

To provide relief to class members, Wells Fargo agrees to create a non-reversionary cash Settlement Fund of approximately $2,075,071.80, subject to modification in light of confimatory discovery. Based upon the size of the fund, the number of class members, and Class Counsel's experience with over a dozen similar large settlements, the expected per-class-member cash award, while dependent upon the number of claims, may be in the range of $20 to $60. The Class Period is April 21, 2011 through December 19, 2015. *Id.* at ¶ 2.13.

In return for a share of the Class Fund, Class Members who do not opt out of the Settlement Class will provide a release of claims specifically tailored to the practices that give rise to this matter. In particular, Class Members will release claims that arise out of or relate to Wells Fargo's use of an 'automatic telephone dialing system' or 'artificial or prerecorded voice' to contact or attempt to contact Class Members in connection with a student loan account during the Class Period. *Id.* at ¶¶ 2.13, 2.31.

To obtain compensation from the Settlement Fund, Class Members will need

to submit a claim to the settlement administrator[2] via a Settlement Website, by telephone, or by mail. *Id.* at ¶ 9.02. Each Class Member who submits a timely claim will be entitled to his or her pro rata share of the Settlement Fund, less Settlement Costs, which include the costs of notice and claims administration, and attorneys' fees, expenses, and Class Representative incentive awards that this Court may approve. Id. at ¶¶ 2.33, 4.05.[3]

ARGUMENT

I. This Court should preliminarily approve the Settlement.

"Under Rule 23(e) of the Federal Rules of Civil Procedure, a class-action settlement may be approved if the settlement is 'fair, reasonable, and adequate.'" *Melanie K. v. Horton*, No. 14-710, 2015 WL 1799808, at *2 (N.D. Ga. Apr. 15, 2015) (Duffey, Jr., J.) (quoting Fed. R. Civ. P. 23(e)(2)). "Approval is generally a two-step process in which a . . . determination on the fairness, reasonableness, and adequacy of the proposed settlement terms is reached." *Id.* (citation omitted).

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[2] Following a competitive bidding process, Plaintiffs recommend that the Court appoint KCC, LLC ("KCC") as the settlement administrator. *Id.* at ¶ 2.10. *See also* Ex. D (Declaration of Carla A. Peak) (describing KCC's proposed notice plan); Ex. E (Proposed Long-Form Notice); Ex. F (Proposed Post-Card Notice), Ex. G (Proposed Claim Form).

[3] Prior to the final fairness hearing in this matter, the Prathers will ask this Court for an incentive award not to exceed $15,000, and Plaintiffs' counsel will ask this Court for an award of attorneys' fees not to exceed 30% of the settlement fund. *Id.* at ¶¶ 5.02, 5.03.

The first step in the process is a preliminary fairness determination. Specifically, "counsel submit the proposed terms of settlement" to the Court so that it can make "a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms[.]" Manual for Complex Litigation § 21.632 (4th ed. 2004); *see also* 4 Alba Conte & Herbert B. Newberg, Newberg on Class Actions, § 11.25 (4th ed. 2002). If the Court preliminarily finds that the settlement is fair, adequate, and reasonable, it then "direct[s] the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing." *Id.*

The second step in the process is a final fairness hearing. *See* Manual for Complex Litigation, § 21.633-34; Newberg on Class Actions, § 11.25; *see also, e.g., Armstrong v. Bd. of Sch. Dirs. of City of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980) (explaining that once a district court finds a settlement proposal "within the range of possible approval, the second step in the review process is to conduct a fairness hearing"), *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998); *Hall v. Frederick J. Hanna & Assocs., P.C.*, No. 15-3948, 2016 WL 2866081 (N.D. Ga. May 10, 2016).

The preliminary fairness determination requires only that a district court evaluate whether the settlement was negotiated at arm's-length, and whether it is within the range of possible litigation outcomes such that "probable cause" exists

to disseminate notice and begin the formal fairness process. *See* Manual for Complex Litigation, § 21.632; *see also In re Checking Account Overdraft Litig.*, 275 F.R.D. 654, 661-62 (S.D. Fla. 2011) ("Preliminary approval is appropriate where the proposed settlement is the result of the parties' good faith negotiations, where there are no obvious deficiencies and the settlement falls within the range of reason.") (citation omitted).

To this end, "[t]he factors considered are (1) the influence of fraud or collusion on the parties' reaching a settlement, (2) 'the likelihood of success at trial,' (3) 'the range of possible recovery,' (4) 'the complexity, expense[,] and duration of litigation,' (5) 'the substance and amount of opposition to the settlement,' and (6) 'the stage of proceedings at which the settlement was achieved.'" *Melanie K.*, 2015 WL 1799808, at *2 (quoting *Bennet v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984)). The judgment of experienced counsel is also to be considered. *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 691 (N.D. Ga. 2001) (Story, J.).

A. The parties negotiated their settlement at arm's-length and with the assistance of a respected mediator.

"A settlement reached after a supervised mediation receives a presumption of reasonableness and the absence of collusion." 2 McLaughlin on Class Actions, § 6:7 (8th ed. 2011); *see also In re Checking Account Overdraft Litig.*, 275 F.R.D.

654, 662 (S.D. Fla. 2011) ("The Court finds that the Settlement was reached in the absence of collusion, is the product of informed, good-faith, arms'-length negotiations between the parties and their capable and experienced counsel, and was reached with the assistance of a well-qualified and experienced mediator[.]").[4]

Here, the parties negotiated their settlement with a respected mediator, Hunter R. Hughes; *see also Ingram*, 200 F.R.D. at 693 ("The fact that the entire mediation was conducted under the auspices of Mr. Hughes, a highly experienced mediator, lends further support to the absence of collusion."). Indeed, Mr. Hughes was instrumental in assisting the parties in this case. Accordingly, there can be no doubt that the parties negotiated their settlement at arm's-length, lacking any indicia fraud or collusion. *See Wilson v. Everbank*, No. 14-22264, 2016 WL 457011, at *6 (S.D. Fla. Feb. 3, 2016) (finding no evidence of fraud or collusion where the settlement was negotiated at arms' length, and where the mediation was

[4] *See also D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) ("[A] mediator[ ] . . . helps to ensure that the proceedings were free of collusion and undue pressure."); *Johnson v. Brennan*, No. 10-4712, 2011 WL 1872405, at *1 (S.D.N.Y. May 17, 2011) (The participation of an experienced mediator "reinforces that the Settlement Agreement is non-collusive."); *Sandoval v. Tharaldson Emp. Mgmt., Inc.*, No. 08-482, 2010 WL 2486346, at *6 (C.D. Cal. June 15, 2010) ("The assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive."); *Milliron v. T-Mobile USA, Inc.*, No. 08-4149, 2009 WL 3345762, at *5 (D.N.J. Sept. 14, 2009) ("[T]he participation of an independent mediator in settlement negotiation virtually insures that the negotiations were conducted at arm's length and without collusion between the parties.").

overseen by a nationally renowned mediator).

B. Plaintiffs face a variety of legal and factual defenses to their claims, which weigh in favor of settlement.

The Court must also consider "the likelihood and extent of any recovery from the defendants absent . . . settlement." *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 314 (N.D. Ga. 1993) (Shoob, J.); *see also Ressler v. Jacobson*, 822 F. Supp. 1551, 1555 (M.D. Fla. 1992) ("A Court is to consider the likelihood of the plaintiff's success on the merits of his claims against the amount and form of relief offered in the settlement before judging the fairness of the compromise.").

Plaintiffs acknowledge that Wells Fargo asserts a number of potentially case-dispositive defenses. For example, Wells Fargo contends that it had prior express consent to call members of the class. In support of its position, Wells Fargo references its form disclosures and standard policies and procedures applicable to its student loan line of business. Prior express consent is, of course, a defense to a claim under the TCPA. *See, e.g., Charvat v. Allstate Corp.*, 29 F. Supp. 3d 1147, 1149 (N.D. Ill. 2014) ("'[P]rior express consent' under the TCPA 'is an affirmative defense on which the defendant bears the burden of proof[.]'").

Plaintiffs also face the risk that Wells Fargo might succeed in arguing that, in light of the Supreme Court's recent decision in *Spokeo, Inc. v. Robins*, 136 S. Ct.

1540 (2016), Plaintiffs' statutory TCPA claims do not contemplate a harm sufficiently concrete to confer Article III standing.[5] Additionally, Wells Fargo has, in the past, made offers of judgment under Rule 68 and claimed that Plaintiffs' claims consequently were mooted. Although that specific proposition was rejected in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), there remains the possibility that a more complete tender might moot Plaintiffs' claims. Further, Wells Fargo suggests that a ruling from the D.C. Circuit in connection with a consolidated appeal of the Federal Communications Commission's July 10, 2015 Declaratory Ruling and Order could negatively affect Plaintiffs' claims, should the D.C. Circuit disagree with the FCC's clarification of what constitutes an ATDS or adopt the position that a "called party" under the TCPA refers to the intended recipient of a call, and not the person actually called. This position, if accepted, could not only undercut Plaintiffs' request for relief, but curtail the viability of all TCPA claims based on "wrong numbers" calls.

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[5] That said, the Northern District of Georgia has held that TCPA claims satisfy Article III's injury-in-fact requirement. S*ee Rogers v. Capital One Bank (USA), N.A.*, No. 15-4016, 2016 WL 3162592, at *2 (N.D. Ga. June 7, 2016) (Thrash, Jr., J.) ("Here, the Plaintiffs allege that the Defendant made unwanted phone calls to their cell phone numbers, in violation of the TCPA. As the Eleventh Circuit has held, a violation of the TCPA is a concrete injury. Because the Plaintiffs allege that the calls were made to their personal cell phone numbers, they have suffered particularized injuries because their cell phone lines were unavailable for legitimate use during the unwanted calls. The Plaintiffs have alleged sufficient facts to support standing.").

Wells Fargo also argues that Plaintiffs would not be able to certify the class. In particular, Wells Fargo asserts that the class Plaintiffs assert in their complaint is unascertainable, and that individual issues predominate over common questions of law and fact. Wells Fargo relies on decisions issued by various district courts to justify its reasoning. *See, e.g. Balschmiter v. TD Auto Finance, LLC,* 303 F.R.D. 508, 524-525 (E.D.Wisc. 2014) (holding that a proposed class that would be identified through "reverse look up" of phone numbers was unascertainable); *but see Mullins v. Direct Digital, LLC,* 795 F.3d 654, 658 (7th Cir. 2015) (rejecting a similar "heightened ascertainability" requirement). Plaintiffs dispute each and every one of these defenses. But their likelihood of success at trial is far from certain. Accordingly, Plaintiffs' decision to settle their claims, and the claims of Class members, is reasonable. *See Bennett*, 96 F.R.D. at 349-50 (noting that the plaintiffs faced a "myriad of factual and legal problems" that led to "great uncertainty as to the fact and amount of damage," which made it "unwise [for the plaintiffs] to risk the substantial benefits which the settlement confers . . . to the vagaries of a trial").

C. The terms of the parties' settlement fall well within the range of TCPA class action settlements approved by district courts in connection with similar matters.

Here, the parties agreed to resolve this matter for a non-reversionary, cash

Settlement Fund in excess of $2.07 million, or $4.65 per class member. This figure compares well with similar TCPA class action settlements that courts have recently approved. *See, e.g., Malta v. Fed. Home Loan Mortg. Corp.*, No. 10-1290, 2013 WL 444619 (S.D. Cal. Feb. 5, 2013) (approximately $4 per class member); *Wilkins v. HSBC Bank Nevada, N.A.*, No. 14-190, 2015 WL 890566 (N.D. Ill. Feb. 27, 2015) ($4.41 per class member); *In re Capital One TCPA Litig.*, 80 F. Supp. 3d 781 (N.D. Ill. 2015) ($4.31 per class member); *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 493 (N.D. Ill. 2015) ($1.20 per class member).

"In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." Newberg on Class Actions, § 11:50. This is, in part, because "the law should favor the settlement of controversies, and should not discourage settlement by subjecting a person who has compromised a claim to the hazard of having the settlement proved in a subsequent trial . . . ." *Grady v. de Ville Motor Hotel, Inc.*, 415 F.2d 449, 451 (10th Cir. 1969). It is also, in part, because "[s]ettlement is the offspring of compromise; the question we address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998); *see also In re Domestic Air Transp. Antitrust Litig.*, 148

F.R.D. at 319 ("In assessing the settlement, the Court must determine whether it falls within the range of reasonableness, not whether it is the most favorable possible result in the litigation.") (internal citation omitted).

In light of the benefits of settlement, the parties' settlement falls within "a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties of law and fact in a particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. at 323; *see also id.* at 326 (A court "should consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere probability of relief in the future, after protracted and expensive litigation."). Indeed, "it has been held proper to take the bird in the hand instead of a prospective flock in the bush." *Id.* (internal citation omitted).[6]

D. The parties' agreement reflects a full awareness of the risks and uncertainties associated with this complex matter.

Courts are also to consider "the degree of case development that class

[6] In determining whether a settlement is fair in light of the potential range of recovery, the fact that a proposed settlement amounts to only a fraction of the potential recovery does not mean the settlement is unfair or inadequate. *See In re Checking Overdraft Litig.*, 830 F. Supp. 2d 1330, 1350 (S.D. Fla. 2011). This is because a settlement must be evaluated in light of the attendant risks associated with litigation. *Id.*

counsel have accomplished prior to settlement" to ensure that counsel had an adequate appreciation of the merits of the case before negotiating." *In re Checking Overdraft Litig.*, 830 F. Supp. 2d at 1349 (internal quotation marks omitted). At the same time, "[t]he law is clear that early settlements are to be encouraged, and accordingly, only some reasonable amount of discovery should be required to make these determinations." *Ressler*, 822 F. Supp. at 1555.

Here, the parties entered into the settlement only after both sides were fully apprised of the facts, risks, and obstacles involved with continued litigation. Before mediating this matter, the parties exchanged thousands of pages of documents, and briefed for settlement purposes the strengths and weaknesses of their respective positions. Plaintiffs' counsel required information regarding the size and scope of the putative class as a condition precedent to mediation, and are pursuing confirmatory discovery under the Settlement; *see also* Settlement at ¶ 4.01. As a result, the parties "conducted enough discovery to be able to determine the probability of their success on the merits, the possible range of recovery, and the likely expense and duration of the litigation" before negotiating the settlement. *Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 660, 669 (M.D. Ala. 1988).

E. Counsel for Plaintiffs are convinced that the parties' agreement is fair, reasonable, adequate, and in the best interests of the members of the class.

Plaintiffs' counsel—whose qualifications include substantial experience with TCPA class actions—believe that the parties' settlement is fair, reasonable, and adequate, and in the best interests of the members of the class. Plaintiffs' counsel also believe that the benefits of the parties' settlement far outweigh the delay and considerable risk of proceeding to trial. *See* Exhibit A. "In a case where experienced counsel represent the class, the Court absent fraud, collusion, or the like, should hesitate to substitute its own judgment for that of counsel." *Ingram*, 200 F.R.D. at 691 (citing *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)); *see also In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. at 312-13 ("In determining whether to approve a proposed settlement, the Court is entitled to rely upon the judgment of the parties' experienced counsel.").

As discussed above, the Settlement is a strong result for members of the Settlement Class, providing real, non-reversionary relief to class members that is in line with similar settlements in similar contexts. Plaintiffs' counsel support the approval of this settlement.

II. The Settlement Class satisfies Rule 23.

Before a court may certify a class for settlement, it must ensure that the class

satisfies each requirement of Rule 23(a) and that it falls within one of the three categories permitted by Rule 23(b). *See, e.g.*, *Columbus Drywall*, 258 F.R.D. at 553-54. Here, each element of Rule 23(a) and Rule 23(b)(3) is satisfied.[7]

A. Numerosity.

Rule 23(a) requires that a class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "[A] plaintiff need not allege the exact number and identity of the class members, but must only establish that joinder is impracticable through some evidence or reasonable estimate of the number of purported class members." *In re Netbank, Inc. Sec. Litig.*, 259 F.R.D. 656, 664 (N.D. Ga. 2009) (citation omitted). Here, there are more than 445,000 members of the class. Settlement at ¶ 2.27. Joinder, therefore, is impracticable, and the Class satisfies Rule 23's numerosity requirement.

B. Commonality.

Rule 23(a) also requires that "there are questions of law or fact common to the class." Here, the claims of Class Members stem from the same factual

[7] Assuming that Rule 23 includes an ascertainability requirement, the requirement is met here because the vast majority of class members can be identified through Wells Fargo's records in an administratively feasible way. *See Karhu v. Vital Pharm., Inc.*, 621 F. App'x 945, 947-49 (11th Cir. 2015). For class members who do not appear in Wells Fargo's records, self-identification is "administratively feasible and not otherwise problematic" because claimants must corroborate their claims by providing the cell phone numbers that were allegedly called. *Id.*

circumstances—calls that Wells Fargo placed to cellular telephone numbers concerning student loan collection, and using an ATDS. Common questions, therefore, include whether Wells Fargo used an ATDS to make the calls at issue, and whether Wells Fargo's calls violate the TCPA. Consequently, the class satisfies Rule 23's commonality requirement. *See Gehrich*, 316 F.R.D. at 224 ("The proposed class also satisfies commonality . . . . Each class member suffered roughly the same alleged injury: receipt of at least one phone call or text message from Chase to her cell phone."); *Malta v. Fed. Home Loan Mortg. Corp.*, No. 10-1290, 2013 WL 444619, at *2 (S.D. Cal. Feb. 5, 2013) ("[T]he proposed class members' claims stem from the same factual circumstances, in that the calls were made by Wells Fargo to class members . . . using auto-dialing equipment or with a prerecorded voice message. There are also several common questions of law, including: (1) whether Wells Fargo negligently violated the TCPA; (2) whether Wells Fargo willfully or knowingly violated the TCPA; and (3) whether Wells Fargo had 'prior express consent' for the calls.").

C. Typicality.

Under Rule 23(a)(3), the claims or defenses of the representative party must be typical of the class. Here, Wells Fargo placed student loan collection calls to Plaintiffs' cell phones using an ATDS, just as it placed student loan collection calls

to the cell phones of absent Class Members using an ATDS. As a result, Plaintiffs' claims are typical of the claims of the members of the class. *See Gehrich*, 316 F.R.D. at 224 ("The proposed class also satisfies . . . typicality. Each class member suffered roughly the same alleged injury: receipt of at least one phone call or text message from Chase to her cell phone."); *accord Manno v. Healthcare Revenue Recovery Grp., LLC*, 289 F.R.D. 674, 687 (S.D. Fla. 2013) ("The Court also finds that Manno's claims are typical of the TCPA class.").

D. Adequacy.

Rule 23(a)(4) additionally requires that "the representative party must fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(a)(4). A plaintiff and … counsel are adequate if "counsel are qualified, experienced, and generally able to conduct the proposed litigation," and the "plaintiff[] [does not] have interests antagonistic to those of the rest of the class." *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 726 (11th Cir. 1987).

Here, Plaintiffs' claims are aligned with the claims of the other class members. They thus have every incentive to vigorously pursue the claims of the class, as they have done to date by remaining actively involved in this matter since its inception, participating in discovery, and involving themselves in the mediation and settlement process. In fact, Plaintiffs each rejected an early individual offer of

judgment, for a significant sum, because accepting it would have meant that there would have been no relief for the class.

In addition, Plaintiffs retained the services of law firms with extensive experience in litigating consumer class actions, and TCPA actions in particular. Plaintiffs' counsel includes the law firms who, collectively, have been involved in virtually every large nationwide class action involving banks and debt collection robocalls.

E. Predominance.

Rule 23(b)(3)'s predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 634 (1997). "Under Rule 23(b)(3) it is not necessary that all questions of law or fact be common, but only that some questions are common and that they predominate over the individual questions." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1254 (11th Cir. 2004). Indeed, "[p]redominance means that the issues in a class action must be capable of generalized proof such that the issues of the class predominate over those issues that are subject only to individualized proof." *Gaalswijk-Knetzke v. Receivables Mgmt. Servs. Corp.*, No. 08-493, 2008 WL 3850657, at *4 (M.D. Fla. Aug. 14, 2008).

Here, the predominance requirement is met because common questions

represent a significant aspect of the case and, through resolution in one stroke, will substantially advance the litigation. *See Gehrich*, 316 F.R.D. at 226 ("The common questions listed above are the main questions in this case, they can be resolved on a class-wide basis without any individual variation, and they predominate over any individual issues. The proposed class satisfies Rule 23(b)(3)."); *Malta*, 2013 WL 444619, at *4 ("The central inquiry is whether Wells Fargo violated the TCPA by making calls to the class members. Accordingly, the predominance requirement is met.").

F. Superiority.

Rule 23(b)(3) also requires that a district court determine that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." In determining whether the "superiority" requirement is satisfied, a court may consider: (1) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action. Fed. R. Civ. P. 23(b)(3).

Resolution of millions of low-value claims in one action is far superior to

individual lawsuits and promotes consistent and efficient adjudication. *See, e.g., Carriuolo*, 2016 WL at *8 (finding superiority met where "individual claims may be too small for a separate action by each class member"); *Kennedy v. Tallent*, 710 F.2d 711, 718 (11th Cir. 1983) ("Separate actions by each of the class members would be repetitive, wasteful, and an extraordinary burden on the courts.").

Because Plaintiffs seek to certify the Class in the context of a settlement, this Court need not consider any possible management-related problems as it otherwise would. *See Amchem Prods.*, 521 U.S. at 620 ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, see Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial.").[8]

As a result, the Court can consider the inherent advantages that come from adjudicating a large volume of similar claims in one consolidated action. These advantages are present here, as this action will provide good, meaningful relief for hundreds of thousands of Class Members, many of whom would achieve any meaningful relief on their own.

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[8] Even in the non-settlement context, proceeding with TCPA claims on behalf of a class is generally "superior to litigation of the issues by individuals." *Reliable Money Order, Inc. v. McKnight Sales Co.*, 281 F.R.D. 327, 339 (E.D. Wis. 2012); *see also, e.g., Palm Beach Golf Ctr.-Boca, Inc. v. Sarris*, 311 F.R.D. 688, 699 (S.D. Fla. 2015) (certifying a class action under the TCPA, finding superiority).

III. The notice plan satisfies the requirements of Rule 23 and due process.

Under Rule 23(e), a court must "direct notice in a reasonable manner to all class members who would be bound" by the proposed settlement. Fed. R. Civ. P. 23(e)(1). Notice of a proposed settlement to class members must be the "best notice practicable." Fed. R. Civ. P. 23(c)(2)(B). "[B]est notice practicable" means "individual notice to all members who can be identified through reasonable effort." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974).

As such, "[t]he adequacy of class notice is measured by reasonableness," and "[t]he notice must provide the class members with information reasonably necessary to make a decision whether to remain a class member and be bound by the final judgment or opt out of the action." *Roundtree v. Bush Ross, P.A.*, No. 14-357, 2015 WL 5559461, at *1 (M.D. Fla. Sept. 18, 2015) (quoting *Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1239 (11th Cir. 2011)).

Here, the parties agreed to a robust notice program,[9] to be administered by a well-regarded third-party claims administrator—KCC—with significant experience in the administration of TCPA class actions. As such, the parties' notice plan complies with Rule 23 and due process because it informs class members of: (1) the nature of the action; (2) the essential terms of the settlement, including the

[9] *See* Ex. D (Declaration of Carla A. Peak) (describing KCC's proposed notice plan); Ex. E (Proposed Long-Form Notice); Ex. F (Proposed Post-Card Notice).

definition of the class and claims asserted; (3) the binding effect of a judgment if the class member does not request exclusion; (4) the process to object to, or to be excluded from, the class, including the time and method for objecting or requesting exclusion and that class members may make an appearance through counsel; (5) information regarding class counsel's request for an award of attorneys' fees and expenses; (6) the procedure for submitting claims to receive settlement benefits; and (7) how to make inquiries and obtain additional information. Fed. R. Civ. P. 23(c)(2)(B); *Roundtree*, 2015 WL 5559461, at *1 ("The class notice provides reasonably adequate information about the nature of the action and the class settlement, and provides sufficient details for class members to determine whether to remain in the class or opt out. Accordingly, the form and content of the class notice are approved.").

In sum, the parties' notice plan ensures that class members' due process rights are amply protected, and it should be approved. Fed. R. Civ. P. 23(c)(2)(A).

CONCLUSION

Plaintiffs respectfully request that this Court (1) conditionally certify a settlement class, (2) conditionally approve the parties' settlement as fair, adequate, reasonable, and within the reasonable range of possible final approval, (3) appoint Plaintiffs as the class representative, (4) appoint Plaintiffs' counsel as class

counsel, (5) approve the notice program proposed by parties, and confirm that it is the best practicable under the circumstances and that it satisfies due process and Rule 23, (6) set a date for a final approval hearing, (7) set deadlines for members of the settlement class to submit claims for compensation, and to object to or exclude themselves from the parties' settlement, and (8) grant such further and other relief the Court deems reasonable and just.

Dated: February 22, 2017

Respectfully submitted,

By: */s/ Michael J. Boyle, Jr.*

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CERTIFICATE OF COMPLIANCE WITH L.R. 5.1.C & 7.1.D

Pursuant to L.R. 7.1.D, I certify that this document has been prepared with 14-point, Times New Roman font, approved by the Court in L.R. 5.1.C.

/s/ Michael J. Boyle, Jr.

CERTIFICATE OF SERVICE

I hereby certify that I have this day filed the within and foregoing motion, memorandum, and exhibits using the CM/ECF system, which shall serve such on all counsel of record.

/s/ Michael J. Boyle, Jr.