UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

RICHARD SWIFT, on behalf of himself and all others similarly situated,

Plaintiff,

v.

BANK OF AMERICA CORPORATION, NB HOLDINGS CORPORATION and FIA CARD SERVICES, N.A.,

Defendants.
_____/

Case No. 3:14-CV-1539-J-20PDB

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND CERTIFICATION OF SETTLEMENT CLASS

Plaintiff, Richard Swift ("**Plaintiff**" or "**Class Representative**"), respectfully submits this Memorandum of Law in Support of his Unopposed Motion for Preliminary Approval of Class Action Settlement and Certification of Settlement Class, which is filed concurrently herewith.

I. INTRODUCTION

This cases involves alleged violations of the Telephone Consumer Protection Act, 47 U.S.C. §227(b) ("**TCPA**"), which prohibits the use of automatic telephone dialing systems ("**ATDS**") to call or text cellular telephones unless the caller has the "prior express consent" of the called party to make such calls. *See* 47 U.S.C. § 227(b)(1)(A)(iii). Plaintiff alleges that Defendants, Bank of America Corporation, NB Holdings Corporation, and FIA Card Services, N.A. (collectively, "**Defendants**") violated the TCPA by calling and texting cellular telephones through the use of an ATDS or an artificial or prerecorded voice without the prior express consent of Plaintiff and Settlement Class Members. Plaintiff further alleges that Defendants

placed calls and sent text messages through the use of an ATDS or an artificial or prerecorded voice to cellular telephones belonging to consumers who were not the intended recipients of the calls and texts, and who did not provide prior express consent to receive such calls and text messages.

II. BACKGROUND

A. Nature of the Claims and Procedural History

On December 31, 2014, Plaintiff filed a class action Complaint against Defendants in the United States District Court for the Middle District of Florida. (Doc. 1). The Complaint alleged violations of the TCPA and sought class certification, statutory damages, injunctive relief, and an award of attorneys' fees and costs on behalf of Plaintiff and the proposed class. (Doc. 1). On March 10, 2015, Defendants filed a Motion to Dismiss or Stay This Action. (Doc. 16). On April 3, 2015, Plaintiff filed his Response to Defendants' Motion to Dismiss or Stay This Action. (Doc. 25). On June 18, 2015, the Court denied Defendants' Motion to Dismiss or Stay This Action, and on July 2, 2015, Defendants filed an Answer to Class Action Complaint. (Docs. 26 and 27).

Plaintiff proceeded to serve written discovery requests, including interrogatories and requests for production of documents. Plaintiff also engaged an experienced information technology expert well qualified to assist Plaintiff and the proposed Class with the investigation and analysis of Defendants' electronic data, as needed, in connection with the autodialed calls and text messages at issue in this case.

Subsequently, the parties began exploring the potential for resolution of Plaintiff's claims on a class-wide basis. These discussions were prompted by the parties' desire to avoid the expense, uncertainties, and burden of protracted litigation, and to put to rest any and all claims or

causes of action that have been, or could have been, asserted against Defendants arising out of the alleged TCPA violations.

The parties agreed to the appointment of Peter Woodin as a mediator. Peter Woodin is well known as a highly skilled and experienced mediator with JAMS in New York who has mediated many complex cases and class actions. On January 29, 2016, the settling parties conducted a mediation session in New York to explore settlement, followed by additional settlement discussions over the course of the next week with the assistance of Mr. Woodin. During the mediation session, the settling parties set forth and discussed their respective positions on the merits of the class claims and the potential for a settlement that would involve class-wide relief. The settling parties exchanged offers and counteroffers, and negotiated the points of each vigorously. Key aspects of the settlement discussions included the parameters of Defendants' business practice changes, the monetary relief for the class, and the parameters of the eligibility requirements. At all times, the settling parties' negotiations were adversarial, non-collusive, and conducted at arm's length. The mediation resulted in the Stipulation and Agreement of Settlement ("**Settlement**") presently before this Court for consideration.

B. Summary of the Settlement Terms

Following mediation, the parties, through their respective counsel, turned to the task of memorializing the terms of the settlement in the Stipulation and Agreement of Settlement, and the form and content of the class notice(s). Plaintiff and Defendants finalized the terms and details of the Settlement, which is attached hereto as Exhibit A. Following is a summary of the Settlement's material terms.

1. The Settlement Class. The Settlement Class is an opt-out class under Rule 23(b)(3) of the Federal Rules of Civil Procedure. It is defined to include all persons who,

between February 1, 2013 through April 19, 2016, received an auto-dialed and/or pre-recorded call or text message to their cellular telephone from Defendants about a Bank of America account (including, but not limited to, a mortgage, credit card, or auto loan account) other than their own Bank of America accounts, and who did not provide prior express consent to receive such calls or text messages ("**Settlement Class**").

2. Monetary, Prospective and Other Relief for the Benefit of the Class. The Settlement requires Defendants to pay $1,000,000.00 into a settlement fund ("**Settlement Fund**"), which is non-reversionary. Class Members will receive a check for their equal share of the Settlement Fund. The check received by each Class Member will not be less than $15 and not more than $25. In addition to the monetary payment, a significant aspect of the Settlement includes important prospective business practice changes. As a result of this action, Defendants have implemented enhancements to their servicing systems, which are designed to prevent the calling of a cellular telephone unless a business record is systemically coded to reflect the called party's prior express consent to call his or her cellular telephone. *See* Section 2.6 of the Settlement.

3. Class Release. In exchange for the benefits conferred by the Settlement, all Class Members who do not opt out will be deemed to have released all claims, whether known or unknown (including, but not limited to, unknown claims) that were asserted or could have been asserted in this case by Plaintiff or Class Members, directly against the Released Persons, as defined in the Settlement, including all claims arising out of, or relating to, in whole or in part, the claims or facts and circumstances asserted in this case, including, without limitation, any claims by Plaintiff or Class Members arising out of, or relating to, Defendants' alleged violations of the TCPA during the Class Period. *See* Section 4 of the Settlement.

4. The Notice Plan. The Notice Plan is designed to provide the best notice practicable. The settlement administrator is Epiq Systems, Inc. ("**Settlement Administrator**") a highly experienced and well regarded notice and class administrator. The administrative fees, costs, and expenses of the Settlement Administrator incurred in connection with the Notice Plan will be paid from the Settlement Fund. *See* Section 5 of the Settlement Agreement.

The Notice Plan is comprised of direct mail notice and Internet notice. Defendants will provide to the Settlement Administrator the contact information of Class Members maintained in their databases. The Settlement Administrator will also set up and administer a Settlement Website devoted to this case, located at www.SwiftBofASettlement.com, as well as a toll-free number that Class Members can utilize to obtain information about the case. Defendants will also provide the notification required by the Class Action Fairness Act, 28 U.S.C. § 1715, to the Attorneys General of each U.S. State in which Settlement Class Members reside, the Attorney General of the United States, and any other required government officials. *See* Sections 3 and 5 of the Settlement.

5. Class Representative Service Award. Class Counsel will seek and Defendants will not oppose a Service Award of $1,500.00 for Plaintiff (or in another lesser amount if set by the Court). If the Court approves the Service Award, the Service Award will be paid from the Settlement Fund, separate and apart from the monetary relief being made available to Plaintiff and Class Members. The Service Award will be in addition to the relief the Plaintiff will otherwise be entitled to under the terms of the Settlement. The Service Award will compensate the Class Representative for his time and efforts in prosecuting this Action, and for representing the Class Members. *See* Section 2 of the Settlement.

6. Attorneys' Fees and Costs. Subject to Court approval, Class Counsel will receive $250,000.00 for their attorneys' fees, costs and expenses, which shall be paid from the Settlement Fund subject to approval from the Court. Defendants have agreed not to oppose Class Counsel's motion so long they do not seek more than $250,000.00. The parties negotiated these attorneys' fees and costs only after reaching agreement on all of the material terms of the Settlement, and the amount thereof was ultimately proposed in a Mediator's proposal to which all parties subsequently agreed. In the event the Court grants preliminary approval of the Settlement, Class Counsel will file a motion seeking fees, costs and expenses, and propose that they do so no later than fourteen (14) days before the Objection Deadline. *See* Section 6 of the Settlement.

In addition to seeking preliminary approval of the Settlement, Plaintiff also seeks conditional certification of a nationwide class for purposes of providing the Class with notice of the Settlement and an opportunity to opt-out, object, or otherwise be heard. The Settlement satisfies all criteria for preliminary settlement approval under Eleventh Circuit law and is fair, reasonable and adequate.

III. ARGUMENT

A. Certification of the Settlement Class is Appropriate

Prior to granting preliminary approval of a proposed settlement, the Court should first determine that the proposed Settlement Class is appropriate for certification. *See* MANUAL FOR COMPLEX LITIG., § 21.632 (4th ed. 2004)); *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Class certification is proper if the proposed class, proposed class representative, and proposed class counsel satisfy the numerosity, commonality, typicality, and adequacy of representation requirements of Rule 23(a). Fed. R. Civ. P 23(a)(1)–(4); *see also Fabricant v.*

Sears Roebuck, 202 F.R.D. 310, 313 (S.D. Fla. 2001). Additionally, where (as in this case) certification is sought under Rule 23(b)(3), the plaintiff must demonstrate that common questions of law or fact predominate over individual issues and that a class action is superior to other methods of adjudicating the claims. Fed. R. Civ. P. 23(b)(3); *Amchem*, 521 U.S. at 615–16. District courts are given broad discretion to determine whether certification of a class action lawsuit is appropriate. *Walco Investments, Inc. v. Thenen*, 168 F.R.D. 315, 323 (S.D. Fla. 1996).

A court in a sister district has stated that "[a] class may be certified 'solely for purposes of settlement where a settlement is reached before a litigated determination of the class certification issue.'" *Burrows v. Purchasing Power, LLC*, No. 1:12-CV-22800, 2013 U.S. Dist. LEXIS 189397, at *3 (S.D. Fla. Oct. 4, 2013) (Hon. Ungaro, U.) (quoting *Lipuma v. American Express Co*., 406 F. Supp. 2d 1298, 1314 (S.D. Fla. 2005)). "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 . . . for the proposal is that there be no trial." *Amchem Products, Inc.*, 521 U.S. at 620. This case meets all of the Rule 23(a) and 23(b)(3) prerequisites, and for the reasons set forth below, certification is appropriate.

1. The Proposed Settlement Class Meets All of the Requirements for Certification of a Settlement Class Pursuant to Rule 23(a) of the Federal Rules of Civil Procedure.

a. The Settlement Class Satisfies the Numerosity Requirement of Rule 23(a)(1).

The first prerequisite to class certification is numerosity, which requires "the class [be] so numerous that joinder of all members is impractical." Fed. R. Civ. P. 23(a)(1). "While 'mere allegations of numerosity are insufficient,' Fed. R. Civ. P. 23(a)(1) imposes a 'generally low hurdle,' and 'a plaintiff need not show the precise number of members in the class.'" *Manno v. Healthcare Revenue Recovery Grp., LLC*, 289 F.R.D. 674, 684 (S.D. Fla. 2013) (citation

omitted). While the exact size of the putative class need not be specified, "'generally less than twenty-one is inadequate, more than forty adequate; with numbers between varying according to other factors.'" *Cox v. Am. Cast. Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986) (quoting 3B Moore's Federal Practice para. 23.05[1] n.7 (1978)).

In the present case, Defendants have identified approximately 30,000 people who are in the putative class. *See* Settlement attached hereto as Exhibit A. Thus, the numerosity requirement is satisfied.

b. The Settlement Class Satisfies the Commonality Requirement of Rule 23(a)(2).

The second prerequisite to class certification is commonality, which "requires the plaintiff to demonstrate that the class members 'have suffered the same injury,'" and the plaintiff's common contention "must be of such a nature that it is capable of classwide resolution–which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2545 (2011) (citation omitted). The commonality requirement presents a low hurdle, as commonality does not require that all questions of law and fact raised be common. *Muzuco v. Re$ubmitIt, LLC,* 297 F.R.D. 504, 514 (S.D. Fla. 2013). "[F]or purposes of Rule 23(a)(2) '[e]ven a single [common] question' will do." *Dukes*, 131 S. Ct. at 2556. Rule 23(a)(2) requires "only that there be at least one issue whose resolution will affect all or a significant number of the putative class members." *Sharf v. Financial Asset Resolution, LLC*, 295 F.R.D. 664, 669 (S.D. Fla. 2014) (internal citations omitted); *Williams v. Mohawk Indus., Inc*., 568 F.3d 1350, 1355 (11th Cir. 2009); *James D. Hinson Elec. Contr. Co. v. BellSouth Telecomms., Inc*., 275 F.R.D. 638, 642 (M.D. Fla. 2011) (citing *Williams*, 568 F.3d at 1355).

Here, the commonality requirement of Rule 23(a)(2) is readily satisfied. There are many questions of law and fact common to the Settlement Class that focus on Defendants' common practice of using an automated dialing system to contact persons in the Settlement Class on their cellular telephones. *See Manno*, 289 F.R.D. at 685. Plaintiff has alleged numerous questions of fact and law common to the Class, including, among others:

1. Whether Defendants used an automatic telephone-dialing system to contact Plaintiff and Settlement Class Members via their cellular telephones;

2. Whether Defendants are subject to the TCPA;

3. Whether Defendants obtained valid prior express consent from Plaintiff and Settlement Class Members to contact them via their cellular telephones using an automatic telephone-dialing system; and

4. Whether Defendants' conduct violates the TCPA.

c. The Settlement Class Satisfies the Typicality Requirement of Rule 23(a)(3).

The next prerequisite to certification, typicality, "measures whether a significant nexus exists between the claims of the named representative and those of the class at large." *Hines v. Widnall*, 334 F.3d 1253, 1256 (11th Cir. 2003); Fed. R. Civ. P. 23(a)(3). A class representative's claims are typical of the claims of the class if they "arise from the same event or pattern or practice and are based on the same legal theory." *Kornberg v. Carnival Cruise Lines, Inc*., 741 F.2d 1332, 1337 (11th Cir. 1984); *see also Cooper v. Southern Co*., 390 F.3d 695, 714 (11th Cir. 2004) ("Neither the typicality nor the commonality requirement mandates that all putative class members share identical claims, and . . . factual differences among the claims of the putative members do not defeat certification."). Simply put, when the same course of conduct is directed at both the named plaintiff and the members of the proposed class, the typicality requirement is met. *Kennedy v. Tallant*, 710 F.2d 711, 717 (11th Cir. 1983).

Here, the typicality requirement is satisfied for the same reasons that Plaintiff's claims meet the commonality requirement. Specifically, Plaintiff and Settlement Class Members were each subjected to the same conduct – Defendants contacted them via their cellular telephones without prior express consent regarding Bank of America accounts other than their own. All of the contacts at issue were made between February 1, 2013 and the present and were placed using an autodialer.

d. The Settlement Class Satisfies the Adequacy Requirement of Rule 23(a)(4).

Rule 23(a)(4) requires that the class representative "not possess interests which are antagonistic to the interests of the class." 1 Newberg on Class Actions § 3:21. Additionally, the class representative's counsel "must be qualified, experienced, and generally able to conduct the litigation." *Id.*; *Amchem*, 521 U.S. at 625-26. At the preliminary stage of the approval process, there is nothing to suggest that this requirement has not been satisfied. The Class Representative is a member of the Settlement Class and he does not possess any interests antagonistic to the Settlement Class. Mr. Swift has submitted a declaration in support of the Settlement. *See* Swift Declaration, attached hereto as Exhibit B. In addition, Proposed Settlement Class Counsel are experienced in class action litigation, including TCPA actions, and have submitted declarations establishing their skills and experience in handling class litigation around the country and in this District. *See* Declaration of John A. Yanchunis, attached as Exhibit C. Accordingly, the requirements of Rule 23(a) are satisfied.

2. The Proposed Settlement Class Meets the Predominance and Superiority Requirements of Rule 23(b)(3).

In addition to meeting the prerequisites of Rule 23(a), the proposed Settlement Class must also meet one of the three requirements of Rule 23(b). *In re Checking*, 286 F.R.D. at 650.

Here, Plaintiff seeks certification under Rule 23(b)(3), which requires that (i) questions of law and fact common to members of the class predominate over any questions affecting only individuals, and that (ii) the class action mechanism is superior to other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3). "'It is not necessary that all questions of fact or law be common, but only that some questions are common and that they predominate over individual questions.'" *BellSouth Telecomms., Inc*., 275 F.R.D. at 644 (quoting *Klay v. Humana, Inc.*, 382 F.3d 1241, 1254 (11th Cir. 2004)). The "inquiry into whether common questions predominate over individual questions is generally focused on whether there are common liability issues which may be resolved efficiently on a class-wide basis." *Agan*, 222 F.R.D. at 700. The proposed Settlement Class readily meets these requirements.

a. Common Questions of Law and Fact Predominate.

Rule 23(b)(3)'s predominance requirement focuses primarily on whether a defendant's liability is common enough to be resolved on a class basis, *see Dukes,* 131 S. Ct. at 2551-57, and whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. Common issues of fact and law predominate in a case "if they have a direct impact on every class member's effort to establish liability and on every class member's entitlement to injunctive and monetary relief." *BellSouth Telecomms., Inc*., 275 F.R.D. at 644 (citing Klay, 382 F.3d at 1255); *see also Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.,* 601 F.3d 1159, 1179 (11th Cir. 2010) (noting that "[t]he relevant inquiry [is] whether questions of liability to the class . . . predominate over . . . individual issues relating to damages. . . ."). Predominance does not require that all questions of law or fact be common, but rather, that a significant aspect of the case "can be resolved for all Settlement Class Members

of the class in a single adjudication." *Tornes v. Bank of America, NA* (In re Checking Account Overdraft Litig.), 275 F.R.D. 654, 660 (S.D. Fla. 2011). When ""one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members."" *Tyson Foods, Inc. v. Bouaphakeo*, 194 L. Ed. 2d 124, 134, 2016 U.S. LEXIS 2134, 84 U.S.L.W. 4142, 26 Fla. L. Weekly Fed. S 37, 2016 WL 1092414 (U.S. 2016) 7AA C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §1778, pp. 123-124 (3d ed. 2005) (footnotes omitted).

Common issues readily predominate here because the central liability question in this case — whether Defendants placed autodialed calls and sent text messages to the cellular telephones of Settlement Class Members without their consent — can be established through generalized evidence. *See Klay v. Humana, Inc.*, 382 F.3d 1241, 1264 (11th Cir. 2004) ("When there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position, the predominance test will be met.")

Because the claims are being certified for purposes of settlement, there are no issues with manageability, and resolution of thousands of claims in one action is far superior to individual lawsuits and promotes consistency and efficiency of adjudication. *Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997) ("Confronted with a request for settlement-only certification, a district court need not inquire whether the case, if tried, would present intractable management problems … for the proposal is that there be no trial.").

b. A Class Action Is the Superior Method for Adjudicating This Controversy.

Finally, a class action is superior to other methods available to fairly, adequately, and efficiently resolve the claims of the proposed Settlement Class. As courts have historically noted, "[t]he class action fills an essential role when the plaintiffs would not have the incentive or resources to prosecute relatively small claims in individual suits, leaving the defendant free from legal accountability." *In re Checking*, 286 F.R.D. at 659. At its most basic, "[t]he inquiry into whether the class action is the superior method for a particular case focuses on 'increased efficiency.'" *Agan*, 222 F.R.D. at 700 (quoting *Sikes v. Teleline, Inc*., 281 F.3d 1350, 1359 (11th Cir. 2002)).

Factors the Court may consider are: (A) the interests of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class. As noted earlier, any perceived difficulties managing the Settlement Class need not be considered in this settlement context. *Amchem*, 521 U.S. at 620; *Sullivan v. DB Invs., Inc.*, 667 F.3D 273,302-303 (3d Cir. 2011) (holding that potential variances in different states' laws would not defeat certification of a settlement-only class because trial management concerns were not implicated by a settlement-only class, as opposed to a litigated class). A class action settlement is superior to other means of resolution because a settlement affording Settlement Class Members an opportunity to receive compensation benefits *all* parties.

Here, resolution of thousands of claims in one action is far superior to individual lawsuits, because it promotes consistency and efficiency of adjudication. *See* Fed. R. Civ. P.

23(b)(3). Indeed, absent class treatment in the instant case, each Settlement Class Member will be required to present the same or essentially the same legal and factual arguments, in separate and duplicative proceedings, the result of which would be a multiplicity of trials conducted at enormous expense to both the judiciary and the litigants. Moreover, there is no indication that Members of the Settlement Class have an interest in individual litigation or an incentive to pursue their claims individually, given the small amount of damages likely to be recovered, relative to the resources required to prosecute such an action. *See In re Terazosin Hydrochloride Antitrust Litig*., 220 F.R.D. 672, 700 (S.D. Fla. 2004) (class actions are "particularly appropriate where . . . it is necessary to permit the plaintiffs to pool claims which would be uneconomical to litigate individually"). Additionally, the proposed Settlement will give the parties the benefit of finality, and because this case has now been settled, pending Court approval, the Court need not be concerned with issues of manageability relating to trial. *See Amchem*, 521 U.S. at 620 ("[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case . . . would present intractable management problems. . . .").

The Court should certify the Settlement Class, as the superiority requirement is satisfied, along with all other Rule 23 requirements.

B. Plaintiff's Counsel Should Be Appointed as Class Counsel.

Under Rule 23, "a court that certifies a class must appoint class counsel . . .[who] must fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B). In making this determination, the court must consider the proposed class counsel's (1) work in identifying or investigating potential claims, (2) experience in handling class actions or other complex litigation and the types of claims asserted in the case, (3) knowledge of the applicable law, and (4) resources committed to representing the class. Fed. R. Civ. P. 23(g)(1)(A)(i)-(iv).

As discussed above, and as fully explained in Class Counsel's Declaration and Firm

Biography, attached hereto as Exhibits C and C-1, proposed Class Counsel have extensive experience prosecuting similar class actions and other complex litigation. Further, proposed Class Counsel have diligently investigated and prosecuted the claims in this matter, have dedicated substantial resources to the investigation of those claims, and have successfully negotiated the Settlement of this matter to the benefit of Plaintiff and the proposed Settlement Class. *Id*. Accordingly, the Court should appoint John Allen Yanchunis Sr., Jonathan Cohen, and Rachel Soffin of Morgan & Morgan Complex Litigation Group as Class Counsel.

C. The Settlement Is Fundamentally Fair, Reasonable, Adequate and Warrants Preliminary Approval.

After determining that a proposed settlement class is appropriate for certification, courts consider whether the proposed settlement itself warrants preliminary approval. Under Rule 23(e), "the Court will approve a class action settlement if it is 'fair, reasonable, and adequate.'" *Burrows v. Purchasing Power, LLC*, No. No. 1:12-CV-22800, 2013 U.S. Dist. LEXIS 189397, at *13 (S.D. Fla. Oct. 4, 2013) (Hon. Ungaro, U.) (quoting Fed. R. Civ. P. 23(e)(2)). *Underwood v. Manfre*, 2014 WL 67644, at *21-22 (M.D. Fla. Jan. 8, 2014). ("If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies...the court should direct that notice under Rule 23(e) be given to the class members of a formal fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement.") (quoting William B. Rubenstein, Newberg on Class Actions § 11:25 (4th ed.) (citing The Manual for Complex Litigation § 30.41 (3d ed.)). The procedure for review of a proposed class action settlement is a well-established two-step process. ALBA & CONTE, 4 NEWBERG ON CLASS ACTIONS, §11.25, at 38–39 (4th ed. 2002). The first step is a preliminary, pre-notification hearing to determine whether the proposed settlement is "within the range of possible approval." *Id.* (quoting MANUAL FOR COMPLEX LITIG., §30.41 (3rd ed.

1995)); *Fresco v. Auto Data Direct, Inc.*, No. 03-cv-61063, 2007 WL 2330895, at *4 (S.D. Fla. May 14, 2007). "Preliminary approval is appropriate where the proposed settlement is the result of the parties' good faith negotiations, there are no obvious deficiencies and the settlement falls within the range of reason." *Smith v. Wm. Wrigley Jr. Co.,* No. 09-cv-60646, 2010 WL 2401149, at *2 (S.D. Fla. Jun. 15, 2010). Moreover, settlement negotiations that involve arm's length, informed bargaining with the aid of experienced counsel support a preliminary finding of fairness. *See* MANUAL FOR COMPLEX LITIG. at §30.42. ("A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.") (internal quotation marks omitted).

Further, it must be noted that there is a strong judicial and public policy favoring the voluntary conciliation and settlement of complex class action litigation. *In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992) ("Public policy strongly favors the pretrial settlement of class action lawsuits"); *Warren v. City of Tampa*, 693 F. Supp. 1051, 154 (M.D. Fla. 1998), *aff'd,* 893 F. 2d 347 (11th Cir. 1998); *Access Now, Inc. v. Claires Stores, Inc*., No. 00-cv-14017, 2002 WL 1162422, at *4 (S.D. Fla. May 7, 2002). This is because class action settlements ensure class members a benefit, as opposed to the "mere possibility of recovery at some indefinite time in the future." *In re Domestic Air Transport.*, 148 F.R.D. 297, 306 (N.D. Ga. 1993); *see also*, *e.g.*, *Ass'n for Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 466 (S.D. Fla. 2002) (finding that the policy favoring settlement is especially relevant in class actions and other complex matters, where the inherent costs, delays and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain). Thus, while district courts have discretion in deciding whether to approve a proposed settlement, deference

should be given to the consensual decision of the parties. *Warren*, 693 F. Supp. at 1054 ("affording great weight to the recommendations of counsel for both parties, given their considerable experience in this type of litigation").

Here, there should be no question that the proposed Settlement is "within the range of possible approval." To start, the process used to reach the Settlement was exceedingly fair. That is, the Settlement is the result of intensive, arm's length negotiations between experienced attorneys who are familiar with class action litigation and with the legal and factual issues in these cases. As discussed above, the parties engaged in formal in-person mediation before an experienced and respected mediator, Peter Woodin. S*ee Perez v. Asurion Corp*., 501 F. Supp. 2d 1360, 1384 (S.D. Fla. 2007) (concluding that class settlement was not collusive in part because it was overseen by "an experienced and well-respected mediator"); *Lipuma*, 406 F. Supp. 2d at 318-19 (approving class settlement where the "benefits conferred upon the Class are substantial, and are the result of informed, arms-length negotiations by experienced Class Counsel"). Moreover, while the settlement of the case did occur at a relatively early stage in the litigation, Class Counsel nevertheless obtained sufficient information needed to confidently evaluate the strengths and weaknesses of Plaintiff's claims and prospects for success at class certification, summary judgment, trial, and on appeal.

As discussed above, pursuant to the Settlement, Defendants will pay $1,000,000.00 into a Settlement Fund. Settlement Class Members will each receive a check for his, her or its equal share of the Settlement Fund. The check received by each Class Member will not be less than $15 and not more than $25. This relief is consistent with the relief provided to class members, as approved by courts, in similar TCPA class actions across the country. *See* Recently Approved TCPA Class Settlements Chart, attached hereto as Exhibit D. In addition to the monetary relief,

Defendants have implemented enhancements to their servicing systems, which are designed to prevent calling or texting a cellular telephone unless a business record is systemically coded to reflect the recipient's prior express consent to call his or her cellular telephone. Given these various forms of relief offered under the Settlement, coupled with the robust notice plan (i.e., postcard notice provided by direct mail to Settlement Class Members and the creation of a Settlement Website and toll-free number), Class Counsel believe that the results achieved are well within the range of possible approval.

Nevertheless, and despite the strength of the Settlement, Plaintiff is pragmatic in his awareness of the various defenses available to Defendants, as well as the risks inherent to continued litigation. For example, Defendants have consistently denied the allegations raised in the Complaint and made clear at the outset that they would vigorously defend this case through trial as needed.

D. The Form and Method of Class Notice Are Adequate and Satisfy the Requirements of Rule 23.

"Rule 23(e)(1)(B) requires the court to direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise regardless of whether the class was certified under Rule 23(b)(1), (b)(2), or (b)(3)." MANUAL FOR COMPL. LITIG. § 21.312 (internal quotation marks omitted). The best practicable notice is that which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950). To satisfy this standard, "[n]ot only must the substantive claims be adequately described but the notice must also contain information reasonably necessary to make a decision to remain a class member and be bound by the final judgment or opt out of the action." *Twigg v. Sears, Roebuck & Co*., 153 F.3d 1222,

1227 (11th Cir. 1998) (internal quotation marks omitted); *see also* MANUAL FOR COMPL. LITIG., § 21.312 (listing relevant information).

The Notice Plan here satisfies all of these criteria and is designed to provide the best notice practicable. Foremost, the Notice Plan is reasonably calculated under the circumstances to apprise the Settlement Class of the pendency of the case, class certification (for settlement purposes), the terms of the Settlement, Class Counsel's Fee Application and the Class Representative's Service Award, their rights to opt-out of or object to the Settlement, as well as the other information required by Fed. R. Civ. P. 23(c)(2)(B). Additionally, the Notice Plan is comprised of both direct mail notice and Internet notice.

The form of the Order Preliminarily Approving Class Action Settlement, Conditionally Certifying a Class and Granting Other Relief, attached hereto as Exhibit A-2, has been drafted and approved by counsel for Plaintiff and counsel for Defendants. The proposed forms of Notice, attached hereto as Exhibits A-3 and A-4, satisfy all of the criteria above. The Notice Plan provides for direct, individual notice via either e-mail or U.S. Mail. Skip tracing will be performed for returned mail and direct mail notice as needed. Also, notice will be provided to Settlement Class Members online through the dedicated Settlement website that the Settlement Administrator will maintain. Additionally, the Settlement Administrator has designed a Publication Notice plan, which will satisfy due process and is presented to the Court as set forth in the attached Declaration from Cameron Azari. *See* Declaration of Cameron Azari, attached hereto as Exhibit E. Finally, Defendants will provide the notification required by the Class Action Fairness Act, 28 U.S.C. § 1715, to the Attorneys General of each U.S. State in which Settlement Class Members reside, the Attorney General of the United States, and any other required government officials. *Id.* § 4.2(e).

Therefore, the Notice and Notice Plan satisfy all applicable requirements of the law, including, but not limited to, Rule 23 of the Federal Rules of Civil Procedure and applicable Due Process. The Court should therefore approve the Notice Plan and the form and content of the Notices attached hereto as Exhibits A-3 and A-4.

E. The Court Should Schedule a Final Approval Hearing.

The last step in the preliminary approval process is to schedule a Final Approval Hearing, at which the Court will hear evidence and argument necessary to make its final evaluation of the Settlement. The Court will determine at or after the Final Approval Hearing whether the Settlement should be approved; whether to enter the Final Approval Order under Rule 23(e); and whether to approve Class Counsel's Fee Application, and request for Service Award for the Class Representative. Plaintiff and Class Counsel request that the Court schedule the Final Approval Hearing at a date convenient for the Court, and in compliance with the provisions of the Class Action Fairness Act of 2005, 28 U.S.C. § 1715. Plaintiff and Class Counsel will file the motion for Final Approval and Fee Application and request for Service Awards at least fourteen (14) days before the Objection Deadline.

IV. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that the Court enter an order: (1) certifying, for settlement purposes, the proposed Settlement Class, pursuant to Rules 23(a), (b)(3) and (e) of the Federal Rules of Civil Procedure; (2) granting Preliminary Approval of the Settlement; (3) approving the Notice Plan set forth in the Settlement and the form and content of the Notices attached as Exhibits A-3 and A-4 hereto; (4) approving and ordering the opt-out and objection procedures set forth in the Settlement; (5) appointing Plaintiff Richard Swift as Class Representative; (6) appointing John A. Yanchunis, Sr., Jonathan Cohen, and Rachel Soffin of

Morgan & Morgan Complex Litigation Group as Class Counsel; (7) scheduling a Final Approval Hearing at a date convenient for the Court, and in compliance with the provisions of the Class Action Fairness Act of 2005, 28 U.S.C. § 1715. A [Proposed] Order Preliminarily Approving Class Settlement and Certifying Settlement Class is attached hereto as Exhibit A-2.

Dated: April 21, 2016

Respectfully submitted,

MORGAN & MORGAN
COMPLEX LITIGATION GROUP

/s/ Jonathan B. Cohen

Jonathan B. Cohen (Florida Bar No. 027620)
Rachel Soffin (Florida Bar No. 018054)
John A. Yanchunis (Florida Bar No. 324681)
201 North Franklin Street, 7th Floor
Tampa, Florida 33602
Telephone: (813) 223-5505
Facsimile: (813) 223-5402
jcohen@forthepeople.com
rsoffin@forthepeople.com
jyanchunis@forthepeople.com

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of April 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to all attorneys of record in this matter.

/s/ Jonathan B. Cohen
Jonathan B. Cohen