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

MICHAEL ETZEL, individually and on behalf of all others similarly situated, Plaintiff, v. HOOTERS OF AMERICA, LLC, Defendant.	CIVIL ACTION FILE NO. 1:15-cv-01055-LMM

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT AND FINAL CERTIFICATION OF THE SETTLEMENT CLASS

The Plaintiff, Michal Etzel ("Plaintiff"), respectfully requests that the Court grant final approval of the class settlement and final certification of the settlement. After lengthy litigation and settlement discussions that began over one year ago, the parties have reached a Settlement that, if approved by the Court, will fully resolve this Action[1]. A proposed order is attached as Exhibit 2.

This Court previously granted preliminary approval of the Settlement in this case. [Dkt. 58]. Notice of the Settlement has been disseminated to Class Members

[1] All defined terms have the same meaning as in the Settlement Agreement.

pursuant to the Notice Program established by the Settlement and approved by the Court. [Ex. 1, Declaration of KCC]. After receiving notice, no Class Member has objected. Id. at para. 10. Thousands have submitted valid claims. Id. at para. 11.

The Settlement should be finally approved. It addresses the reasonable objectives of this litigation without the uncertainties Class Members would face in continued litigation. The essential terms are these:

1. HOA will make available up to One Million Two Hundred Ninety Nine Thousand Four Hundred Ten Dollars ($1,299,410.00) to fund Gift Cards to compensate Class Members for receipt of the text. Class Members, who submit valid claims, will receive a Gift Card in the amount of Fifty Dollars ($50) for Tier One Members, and Twenty Dollars ($20) for Tier Two Members. These Gift Cards are transferable, redeemable at all HOA restaurants (operated or franchised) for any items or combination of items (subject to laws concerning alcohol consumption), do not require any purchase for their activation, and have no expiration date.

2. HOA will be **forever enjoined** from sending a text message to the Class Members, without having received an express written consent for such contact **provided after the date of this Settlement Agreement**. This prohibits HOA from sending any further messages to the Class Members, which would include any illegal text communications that "(1) forc[e] the consumer to incur charges, (2) deplet[e] a

cell phone's battery, (3) inva[de] privacy, (4) intru[de] upon and occup[y] the capacity of the cell phone, and (5) wast[e] the consumer's time or caus[e] the risk of personal injury due to interruption and distraction." [Order Denying MTD, Dkt. 39, p. 7 *citing* Mey v. Got Warranty, Inc., 2016 WL 3645195 at *3 (N.D.W.Va. June 30, 2016)].

3. In addition, HOA will pay the costs of class notice, costs associated with administering the Settlement, and attorneys' fees and expenses.

The Settlement was reached as a result of arm's-length negotiations between Class Counsel and counsel for Defendants. The Settlement satisfies the requirements of Fed. R. Civ. P. 23. The Class has reacted positively to the Settlement. Accordingly, Plaintiff now moves the Court for entry of a final approval order.

Factual Background

I. The Alleged Infringing Text Message

On January 28, 2015, Defendant sent a text message to the Plaintiff and each of the Members of the Class. The text message stated as follows:

> Hooters Fans: Our mClub has moved! Don't worry, you'll still receive exclusive news, just from a new number. Reply STOP to unsubscribe Msg&Data Rates may apply.

[Dkt. 1-1] (the "Text Message").

The Plaintiff and Class Members received the Text Message. The Plaintiff was upset by the receipt of the Text Message, believed it infringed upon his privacy, and immediately emailed HOA to complain. [Dkt. 1, para. 28]. The Plaintiff contends that this message violated the TCPA.

II. Background as to the HOA Text Program

For over 6 years prior to the Text Message, Defendant HOA engaged in a marketing campaign, during which it requested at its restaurants and elsewhere that customers Opt-In to Short Code "36832" in exchange for receiving advertising or telemarketing text messages about periodic offers, discounts and updates on contests and promotions (the "HOA Text Program"). Id. at para. 21. At one point, the Plaintiff and the Class Members were Opted-In to the HOA Text Program. However, before January 28, 2015, the date of the infringing message, the Plaintiff and the Class Members claim that they Opted-Out of the HOA Text Program, revoking consent to receive the Text Message. Id. at para. 24-27. HOA denies that the message violated the TCPA, used an autodialer, or that HOA did not have requisite consent to send the message, as detailed in Section IV below.

Plaintiffs assert that there were two ways that Class Members Opted-Out of the HOA Text Program. *First*, some Class Member Opted-Out by sending a "STOP" message, revoking consent to receive future messages from HOA. Id. at para. 25.

The persons who Opted-Out in this manner and received the Text Message are labeled "Tier One" Class Members because HOA concedes that an Opt-Out in this manner revokes consent, if the message was autodialed (which HOA has not conceded). There are approx. 7,351 Tier One Class Members.[2]

Second, effective October 16, 2013, the Federal Communications Commission ("FCC"), which is responsible for establishing rules and regulations enforcing the TCPA, ruled that an automated call (such as a text message) could not be sent without the "prior express written consent" of the recipient to receive the text message advertisement. 27 F.C.C.R. 1830, 1837, para. 18, 20, 71 (2012). Accordingly, in October of 2013, HOA sent a message to all customers in the HOA Text Program requesting that they expressly consent to receive messages from the Text Program. Id. at para. 26-27. The persons who did not respond with consent, Opted-Out. The persons in this category who received the Text Message are labeled "Tier Two" Class Members. HOA disputes that an Opt-Out in this manner revokes

[2] For purposes of the Settlement, the Parties agreed to exclude persons who did not receive the message based on alleged "error codes" in the vendor's system. The Parties obtained the list of Class Members from HOA's prior vendor, State of Text, LLC ("SoT"), whose database of information was used to determine which recipients that had received the message were opted-out.

consent under the law (and further denies that it used an autodialer regulated by the TCPA to send the text message). There are approx. 46,593 Tier Two Class Members.

III. The TCPA

The TCPA makes it unlawful for "any person…(a) to make any call (other than a call for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system…(iii) to any telephone number assigned to a…cellular telephone service…." 47 U.S.C. § 227(b)(1)(A)(iii). Congress has conferred upon the FCC general authority to make rules and regulations necessary to carry out the provisions of the TCPA. 47 U.S.C. § 227(b)(3)(C).

In order for there to be a violation of the TCPA, the following elements must be present: (1) a "call" in the form of a text message (this is undisputed); (2) placed to cellular telephone numbers with an "automatic telephone dialing system" ("ATDS") as such is defined by the TCPA and FCC; and (3) without consent[3]. If

[3] Plaintiff contends that Defendant bears the burden of proving that it had obtained the requisite consent before the text message was issued. But, regardless, whether or not the Class Members had consented to receive the Text Message would be an issue of contention if the litigation persisted. See, e.g., Murphy v. DCI Biologicals Orlando, LLC, No. 6:12-cv-1459, 2013 U.S. Dist. LEXIS 181732 (M.D. Fl. Dec. 31, 2013)

the text message sent is an "advertisement," then the consent must be "express *written* consent." 2012 FCC Ruling, 27 F.C.C.R. 1830, 1837, para. 18, 20, 71 (2012).

IV. The Litigation

On April 8, 2015, after thorough research of the issues by Counsel, the Plaintiff filed a complaint, on behalf of himself and all others similarly situated, against HOA regarding the Text Message asserting two Counts. Count One asserted a claim for violation of the TCPA and seeking damages in the amount of $500 or $1,500, if found to be willful, knowing, or intentional, for each infringing message. Count Two asserted a claim for injunction, requesting that HOA be forever enjoined from contacting HOA or the Class Members again in a manner that violates the TCPA. Defendant denies liability and specifically denies that (a) it used an "automatic telephone dialing system," (b) did not have the requisite consent send the Text Message, (c) that the conduct violated the TCPA because of an alleged one call "safe harbor," (d) that Plaintiff has suffered any concrete injury, and (e) that Plaintiff can obtain class certification, among other defenses.

On June 3, 2015, HOA filed a Motion to Dismiss and Motion to Stay the Litigation. The Motion to Dismiss argued that (1) the Plaintiff's claims were "moot" because HOA had made an unaccepted offer of judgment; and, (2) the Plaintiff had not suffered a "concrete" injury. The Motion to Stay asked the Court to stay the

proceedings pending the Supreme Court's ruling in *Spokeo* and *Gomez* on these two issues. On June 19, 2015, the Plaintiff filed two briefs in response to the Defendant's motions, pointing out that the Eleventh Circuit had resolved both issues against Defendant and that the Supreme Court would likely follow suit.

On June 26, 2015, this Court held a telephone hearing on the motions and granted in part and denied in part the Motion to Stay. Specifically, the Court ruled that "A limited stay is entered until the United States Supreme Court's decision is rendered. Third-party discovery is allowed to move forward as to issuing subpoenas for documents." [Dkt. 17].

Plaintiff's Counsel immediately began negotiating with HOA to develop a Third-Party Discovery Plan, which was filed on August 21, 2015. [Dkt. 19]. On September 2, 2015, Plaintiff served subpoenas on SilverPop, State of Text, and mGage, the three known third-parties at that time. [Dkt. 20]. On September 11, 2015, the Plaintiff and Defendant filed a negotiated Stipulated Protective Order, to assist Plaintiff in obtaining documents that the third-parties may deem confidential. [Dkt. 24]. Plaintiff's counsel spent the next several months, working with, negotiating, and reviewing documents provided by the third-parties. In the course of discovery, Plaintiff learned of another third-party, Alchemy Worx, and engaged in discovery with it as well. [Dkt. 32].

On May 26, 2016, this Court lifted the Stay following the Supreme Court's rulings in *Gomez* and *Spokeo*. Accordingly, on June 30, 2016, HOA filed a second Motion to Dismiss and, in the alternative, Motion to Strike the class allegations. [Dkt. 33]. The motion argued that the TCPA violation was "procedural" only and, thus, not actionable under *Spokeo*. In addition, HOA argued that the class allegations must be struck because they demand individualized inquiries and include a fail-safe class. On July 29, 2016, Plaintiff filed a response detailing why the second Motion to Dismiss should be denied. On November 15, 2016, the Court denied the Defendant's Motion to Dismiss and Motion to Strike. On January 12, 2017, the Parties negotiated a discovery plan for party discovery. The parties served initial disclosures, and the Plaintiff served a notice of deposition and notice to produce to HOA. [Dkt. 43-35].

Throughout the course of the litigation, the Parties engaged in settlement negotiations. After preliminary phone discussions, on May 5, 2016, the Parties met for an in person settlement conference. Counsel for the Plaintiff made a presentation, and the Parties negotiated. After negotiations ended in a standstill, Counsel for the Parties continued to exchange settlement offers for months which culminated in the Proposed Settlement.

V. Summary of the Proposed Settlement

After months of arm's length settlement negotiations between Class Counsel and counsel for Defendant, Plaintiff, individually and on behalf of the members of the Class, reached a Settlement with the Defendant. On July 6, 2017, the Parties executed a Memorandum of Understanding ("MOU") outlining the basic points of the Settlement. On August 8, 2017, the Parties executed the Settlement Agreement, subject to Court approval. On August 22, 2017, the Court preliminarily approved the Settlement and the Notice Plan, and ordered Notice to the Class in accordance with the Plan. [Dkt. 58].

A. Stipulation as to Certification of Settlement Class

Pursuant to paragraph B1 of the Settlement Agreement, the parties stipulate that the requirements of Federal Rules of Civil Procedure 23(a) and (b)(3) are satisfied in this case and that the following Settlement Class should be certified by the Court.

> "Class" means the owners of the approximately 54,955 telephone numbers that are claimed to have been sent a text message without prior consent on behalf of Hooters' mClub on or about January 28, 2015. Excluded from the Class is the judge presiding over this matter, any members of her judicial staff, the officers and directors of HOA, and persons who timely and validly request exclusion from the Class.

[Dkt. 54-2, p. 10-11].

B. Consideration for Settlement

HOA has agreed to two key considerations for the Settlement: (1) to provide Gift Cards for Class Members that submit valid claims and (2) an injunction prohibiting HOA from sending any text message to the Class Members without express written consent obtained after the date of the Settlement Agreement. [Dkt. 54-2].

As to the Gift Card portion of the Settlement, HOA will make available up to One Million Two Hundred Ninety Nine Thousand Four Hundred Ten Dollars ($1,299,410.00) in Gift Cards to compensate Class Members for receipt of the text. Class Members, who submit valid claims, will receive a Gift Card in the amount of Fifty Dollars ($50) for Tier One Members, and Twenty Dollars ($20) for Tier Two Members. These gift cards are transferable, redeemable at all HOA restaurants (operated or franchised) for any items or combination of items (subject to laws concerning alcohol consumption), do not require any purchase for their activation, and have no expiration date. Id.

As to the Injunction portion of the Settlement, HOA will be forever enjoined from sending a text message to the Class Members, without having received an express written consent for such contact, provided after the date of this Settlement Agreement. [Dkt. 54-2-A]. This prohibits HOA from sending any further messages to the Class Members, including any illegal communications that "(1) forc[e] the

consumer to incur charges, (2) deplet[e] a cell phone's battery, (3) inva[de] privacy, (4) intru[de] upon and occup[y] the capacity of the cell phone, and (5) wast[e] the consumer's time or caus[e] the risk of personal injury due to interruption and distraction." [Order Denying MTD, Dkt. 39, p. 7 citing Mey v. Got Warranty, Inc., 2016 WL 3645195 at *3 (N.D.W.Va. June 30, 2016)]. The form of the proposed injunction is attached as Exhibit 1-A to the Settlement Agreement. [Dkt. 54-2-A].

C. Payment of Administrative and Notice Costs

In addition to the Gift Cards, HOA will place an additional $120,740 into an escrow account to cover the anticipated payment to the class representative ($10,000) and the costs of class administration (which, along with the administrator's affidavit summarizing the claims process and results, is expected to be no more than $90,000 based on proposals received to date, and which also includes payments to State of Text for its help in populating the class list). In the event that the administration costs are less than $120,740, the remainder will be paid to the Atlanta Union Mission for homeless woman and children. In the event that the administration costs exceed $120,740.00 (which is not anticipated), HOA will fund up to an additional $15,000 for the cost of administration. [Dkt. 54-2]. Through this cost of administration, HOA has funded the Notice Program, approved by the Court, and implemented by the Class Administrator (Section VI).

D. Attorneys' Fees and Costs

Plaintiff's counsel has applied, in a separate motion filed contemporaneously herewith, to the Court of an award of attorneys' fees, costs, and expenses. HOA agreed not oppose a request Plaintiff's counsel for attorney's fees and costs of up to $444,000.00. HOA has agreed to pay attorneys' fees, costs, and expenses awarded by the Court separately from the relief for the Settlement Class Members. [Dkt. 54-2 p. 28].

E. Service Award

Plaintiff's counsel has applied, in a separate motion filed contemporaneously herewith, to the Court, and HOA agreed not to oppose, service award of up to $10,000.00 for Mr. Etzel, which is intended to compensate Mr. Etzel for his efforts in the litigation and commitment on behalf of the Settlement Class. Id. Mr. Etzel's award will be from the class administration portion of class fund. Mr. Etzel was the sole representative of the class in this litigation.

F. Class Notice and Claims Process

With Court approval, Counsel implemented multiple types of notice to ensure the broadest possible reach, including notice by first-class mail to Class Members whose addresses could be obtained through reasonable effort. Fed. R. Civ. P. 23(c)(2). On September 6, 2017, the Claims Administrator created the Settlement

Website, with the Court approved Notice forms posted. [Ex. 1, KCC Declaration para. 7]. The website included a phone number lookup tool which allowed "visitors to enter their telephone number(s) as of January 28, 2015 to see if they are Class Members." Id.

In accordance with the Court approved notice plan, the Claims Administrator determined the addresses for Class Members using a historic reverse phone-number lookup. The Administrator was able to identify mailing addresses for 82.6% of the Class Members. Id. at para. 4. On September 21, 2017, the Administrator mailed the Court-approved notices to these Class Members. Id. at para. 5. This reverse phone-number lookup technology has been approved by numerous courts as a proper method of locating Class Members to send Class Notice. See, e.g., Bee, Denning, Inc. v. Capital Alliance Group, No. 13-cv-2654 (S.D. Cal. Sept. 24, 2015); Booth v. Appstack, Inc., 2015 U.S. Dist. LEXIS 40779 at *14 (W.D. Wash. Mar. 30, 2015); Kristensen v. Credit Payment Serv., 12 F. Supp. 3d 1292, 1303 (D. Nev. 2014); G.M. Sign, Inc. v. Finish Thompson, Inc., 2009 U.S. Dist. LEXIS 73869, at *11 (N.D. Ill. Aug. 20, 2009).

In addition, to ensure maximum possible outreach, the Claims Administrator "caused fifteen million banner impressions….including on the social media site

Facebook." Id. at para. 6. The total number of impressions provided was 15,882,580. Id. The Claims Administrator also established a Facebook page that class members could locate for information. Id.

The Settlement provided for a Class Member friendly process to submit claims online through the dedicated website, HOATCPASettlement.com. This website was open to receiving claims since September 21, 2017. Id. at para. 7. No objections were filed. 2,842 valid claims have been submitted (5.26%). Only one Member has opted out. There were no objections filed by the date for objections. Id. at para. 9-11.

G. Opt-Out and Objection Procedure

Any person within the Settlement Class definition was permitted to exclude himself or herself from the Settlement Class by mailing a written request to the Claims Administrator at the mailing address in the notice. [Dkt. 54-2-C]. Any Class Member who did not exclude themselves may object to the Settlement, Class Counsel's fee, cost, and expense application, or the requests for service awards. [Dkt. 58, p. 10-11; Dkt. 54-2-D].

H. Release

In exchange for the Settlement benefits, the Plaintiff and the Settlement Class Members will release HOA from any claims relating to the issues in this case. In

addition, HOA will release claims against the Settlement Class related to the claims in the Complaint. [Dkt. 54-2, p. 20-21].

ARGUMENT

I. The Settlement Should be Granted Final Approval.

The law favors the settlement of class actions. Bennett v. Behring Corp., 737 F.2d 982, 986 (11th Cir. 1984) ("our judgment is informed by the strong judicial policy favoring settlement as well as by the realization that compromise is the essence of settlement."). "[T]here is a strong judicial policy favoring settlement and…particularly in class action suits, there is an overriding public interest in favor of settlements." Meyer v. Citizens and Southern Nat'l Bank, 677 F. Supp. 1196, 1200 (M.D. Ga. 1988) (Elliott, R.) (citation and internal quotations omitted). "Settlements conserve judicial resources by avoiding the expense of a complicated and protracted litigation process and are highly favored by the law." In re Motorsports Merchandise Antitrust Litig., 112 F. Supp. 2d 1329, 1333 (N.D. Ga. 2000) (Thrash, T.).

This Court has broad discretion in approving a settlement. Id. "Rule 23(e) of the Federal Rules of Civil Procedure requires that a settlement or compromise of a class action be approved by the district court." Bennett v. Behring Corp., 737 F.2d 982, 985 (11th Cir. 1984). Under Eleventh Circuit precedent, a "proposed settlement

should be approved as long as [1] it is fair adequate and reasonable and [2] it is not the product of collusion between the parties." Borcea v. Carnival Corp., 238 F.R.D. 665, 672 (S.D. Fl. 2006) (quoting in part Bennett, 272 F.2d at 986).

A settlement is not the product of collusion when it is negotiated in arms-length and in good faith. Figueroa v. Sharper Image Corp., 517 F. Supp. 2d 1292, 1321 (M.D. F. 2007). Once it is determined that the settlement was not the result of fraud, the Court looks to whether the settlement is fair, adequate and reasonable. The Court reviews the six Bennett factors to make this determination:

> (1) the likelihood of success at trial; (2) the range of possible recoveries; (3) the point on or below the range of possible recoveries at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and degree of opposition to the settlement; and (6) the stage of the proceedings at which the settlement was achieved.

Bennett, 737 F.2d at 986 (11th Cir. 1984).

The Court should review the applicable factors, while being "mindful of the strong presumption in favor of finding a settlement fair." Velez v. Audio Excellence, Inc., 2011 U.S. Dist. LEXIS 111179 *3 (M.D. Fl. Sept. 21, 2011). At a settlement hearing, "the Court should not conduct a trial on the merits." In re Motorsports Merchandise Antitrust Litig., 112 F. Supp. 2d at 1333. Instead, a "district court may rely upon the judgment of experienced counsel for the parties...[and] [a]bsent fraud,

collusion, or the like, the district court 'should be hesitant to substitute its own judgment for that of counsel.'" Nelson v. Mead Johnson & Johnson Co., 484 F. App'x 429, 434 (11th Cir. 2012) (quoting Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977)); see also In re Motorsports, 112 F. Supp. 2d at 1333.

In this case, the Settlement should be granted final approval. As detailed below, it is the product of arm's length negotiations, fairly compensates the Class Members, and the Bennett factors weigh in favor of approval.

A. The Proposed Settlement is the Result of Good Faith, Arm's-Length Negotiations Conducted by Experienced Counsel.

This Court should preliminarily approve the proposed Settlement because it is the product of good faith, arm's length negotiations, by experienced counsel. "In determining whether there was fraud or collusion, the court examines whether the settlement was achieved in good faith through arms-length negotiations, whether it was the product of collusion between the parties and/or their attorneys, and whether there was any evidence of unethical behavior or want of skill or lack of zeal on the part of class counsel." Canupp v. Sheldon, 2009 U.S. Dist. LEXIS 113488 *26-27 (M.D. Fl. Nov. 23, 2009) (citing Bennett, 737 F.2d at 987 n.9).

Here, there was no fraud or collusion. The parties began seriously discussing settlement after briefing the First Motion to Dismiss, and conducting and reviewing

third-party discovery. Settlement discussions continued after briefing the Second Motion to Dismiss, the Court's ruling on the same, and formal discovery commenced. The settlement negotiations included an in-person conference and numerous telephone conferences. Thus, the parties had devoted significant time to investigating the facts and legal issues, at the time of settlement. [Dkt. 54-3].

Both the Settlement Class, as well as HOA, were represented by experienced class action counsel. Id. This Court is "entitled to rely upon the judgment of experienced counsel for the parties." Canupp, 2009 U.S. Dist. LEXIS 113488 at *13. There is no evidence, nor could there be, of any collusion between the parties. "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." T.A.N. v. PNI Digital Media, Inc., No. 2:16-cv-132, 2017 U.S. Dist. LEXIS 85058 (S.D. Ga. Jun. 2, 2017) (Wood, L.) (quoting MCL Third, § 30.42 (1995)). Given that there is no evidence of fraud or collusion (and no objectors even claim as much), this factor weighs in favor of approval.

B. The Settlement is Fair, Adequate, and Reasonable Under the *Bennett* Factors.

1. The Benefits Outweigh the Risks at Trial

The trial court weighs the first Bennett factor, the likelihood of success at trial, "against the amount and form of relief contained in the settlement." Saccoccio v. JP Morgan Chase Bank, N.A., 297 F.R.D. 683, 692 (S.D. Fla. 2014) (quotation omitted). This factor weighs in favor of approval where "success at trial is not certain for Plaintiff." Burrows v. Purchasing Power, LLC, No. 1:12-CV-22800, 2013 U.S. Dist. LEXIS 189397, at *14 (S.D. Fla. Oct. 7, 2013). Although Plaintiff is confident in the merits of the claims, the risks involved in prosecuting a class action through trial cannot be disregarded. Class certification is always challenging and, assuming the class is certified, Plaintiff risks losing on summary judgment, at trial, or on appeal. See In re Motorsports, 112 F. Supp. 2d at 1334 ("[T]he trial process is always fraught with uncertainty."). [Dkt. 54-3].

For TCPA cases, in particular, it is a complex and evolving area of law with a number of "divergent and conflicting decisions." Application of the TCPA to Intrastate Telemarketing Calls and Faxes, 52 Fed. Comm. L.J. 667, 669 (2000). There would be contentious argument on at least the following issues: (1) Whether the Defendant used an "ATDS" within the meaning of the TCPA, including the alleged level of "human intervention"; (2) Whether the Class Members had provided consent; (3) Whether the text message constituted an advertisement requiring express written consent; (4) Whether the Class is certifiable; and (5) Whether the

Class Members received the text message and whether receipt is a necessary element. The list goes on. While Plaintiff is confident in his position on each of the elements to be proven and defenses to be presented, the fact remains that the Defendant must win on only one issue, while the Plaintiff must prevail on all. The proposed Settlement avoids these uncertainties and provides the Class with meaningful and certain relief.

Uncertainties, such as these, weigh heavily in favor of settlement. As Judge Shoob explained: "The very uncertainty of outcome in litigation, as well as the avoidance of wasteful litigation and expense, lay behind the Congressional infusion of a power to compromise. This is a recognition of the policy of the law generally to encourage settlements." In re Air Transportation Antitrust Litigation, 148 F.R.D. 297, 325 (N.D. Ga. 1993) (Shoob M.). Accordingly, this factor weighs in favor of approval.

2. The Settlement is Within the Range of Possible Recoveries and is Fair, Adequate, and Reasonable

The second and third Bennett factors—whether the settlement is within the range of possible recoveries and is fair, adequate, and reasonable—can be considered together. Burrows, 2013 U.S. Dist. LEXIS 189397, at *14. "The Court's role is not to engage in a claim-by-claim, dollar-by-dollar evaluation, but to evaluate

the proposed settlement in its totality." Lipuma v. Am. Express Co., 406 F. Supp. 2d 1298, 1323 (S.D. Fl. 2005). The range of outcomes, including the possibility of a defense verdict and zero recovery, must be considered. In re Toys R. Us. FACTA Litig., 295 F.R.D. 438, 453 (C.D. Cal. 2014). "The proposed settlement is not to be judged against a hypothetical or speculative measure of what *might* have been achieved by the negotiators." Officers for Justice v. Civil Serv. Com., 688 F.2d 615, 625 (9th Cir. 1982). "[T]he very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" Id. at 624 (quoting Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977).

Accordingly, even a minimal settlement can be approved. See, Burrows, 2013 U.S. Dist. LEXIS 189397, at *14. "That the proposed settlement amounts to a fraction of potential recovery does not render the proposed settlement inadequate and unfair. 'In fact, there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery.'" In re Domestic Air Transp. Antitrust Litig., 148 F.R.D. at 325 (quoting in part City of Detroit v. Grinnell Corp., 495 F.2d 448, 455 (2d. Cir. 1974).

The Settlement is within the range of possible recoveries, considering the numerous potential issues (trial and appellate) in the case, which could result in a smaller recovery or no recovery at all. With the Settlement, Class Members can

receive a $50 Gift Card for Tier One and $20 Gift Card for Tier Two. Class Members will also be forever free from intrusive texts from HOA. These benefits compare favorably with settlements in recent TCPA cases. See, e.g., James v. JP Morgan Chase Bank, N.A., No. 8:15-cv-2424, 2016 U.S. Dist. LEXIS 167022 (M.D. Fl. Nov. 22, 2016) (approving settlement of $3-$5 per class member); Couser v. Comenity Bank, 125 F.Supp. 3d 1034, 1043 (S.D. Cal. 2015) (approving settlement of $13.75 per class member); In re Capital One Tel. Consumer Prot. Act Litig, 80 F. Supp. 3d 781, 789 (N.D. Ill. 2015) (approving settlement of $2.72 per violation, $34.60 for each class member that actually submitted claim); Mendez v. C-Two Grp., Inc., No. 13-cv-05914, 2017 U.S. Dist. LEXIS 44816 (N.D. Cal. Mar. 27, 2015) (approving settlement of $10.00 certificate per class member).

In addition to the monetary benefits, all of the Class Members (whether or not they submitted a claim form) are forever protected from future intrusive calls from HOA by the injunction. In the injunction, HOA agreed to put aside its arguments that its system was not an ATDS and that it had obtained requisite consent as to these Class Members, and agreed to not send any more texts to the Class Members absent their written consent obtained after the Settlement. [Dkt. 54-2-A]. As Judge Thrash noted when approving the settlement in the Home Depot Data Breach case, which included part injunctive and part monetary relief, "[**the Settlement**] **benefits the**

Settlement Class immensely because [**of**] **benefits designed to mitigate and prevent future harm including**…**injunctive relief.**" In re Home Depot Data Breach, 1:14-md-02583-TWT, Dkt. 260. p. 13-14 (N.D. Ga. Aug. 23, 2016) (emphasis supplied). There is "immense" benefit to the Class here in freedom from future texts.

3. Continued Litigation Would Be Complex, Expensive, and Lengthy.

A "[s]ettlement [that] will alleviate the need for judicial exploration of...complex subjects, reduce litigation costs, and eliminate the significant risk that individual claimants might recover nothing" merits approval. Lipuma, 406 F. Supp. 2d at 1324 (internal citation omitted). When considering this factor, courts "should consider the vagaries of litigation and compare the immediate recovery by way of compromise to the mere possibility of relief in the future after protected and expensive litigation." Id. at 1323.

In this case, there were a number of additional procedural hurdles, each fraught with risk to Plaintiff, at the time the parties reached agreement. While Plaintiff had prevailed at the motion to dismiss stage, this was not likely the last of Defendant's dispositive motion practice—with extensive briefing on summary judgment looming, after in depth discovery. The Plaintiff would have to move for class certification. The Plaintiff would also need to potentially present experts, for

example an expert on the ATDS system and/or an expert to locate Class Members. Assuming all goes well in discovery and motions practice (which is far from a certainty), the cost of trial itself and any appeals would be significant and would delay the resolution of this litigation without the guarantee of relief.

The Settlement, on the other hand, provides the Settlement Class with a guaranteed and immediate recovery. The Class members receive the benefit of monetary relief *and* an immediate injunction that prohibits any future illegal text from the Defendant. This factor weighs in favor of preliminary approval. Columbus Drywall, 258 F.R.D. at 559-60 (settlement merited approval when "Plaintiffs [would] not have any guarantee that they will receive a larger recovery from the Settling Defendants were they to forego the settlement offer.").

4. Degree of Opposition to Settlement

The deadline to opt-out of the settlement was November 20, 2017. Only one person has opted out of the settlement. [Ex. 1, KCC Decl. para. 9-10]. The deadline to object to the settlement was November 20, 2017, which has passed. No objections were submitted within this time period. Id. On the other hand, thousands of Class Members have submitted valid claims. Id. The positive reaction, thus far, supports the reasonableness of the Settlement. Ressler v. Jacobson, 822 F. Supp. 1551, 1556 (M.D. Fl. 1992) ("The fact that there are no objections to the settlement is excellent

evidence of the settlement's fairness and adequacy."); Lipuma, 406 F. Supp. 2d at 1324 ("a low percentage of objections points to the reasonableness of a proposed settlement and supports its approval.").

5. The Stage of Proceedings

This factor also supports approval. The purpose is "to ensure that Plaintiffs had access to sufficient information to adequately evaluate the merits of the case and weigh the benefits of settlement against further litigation." Lipuma, 406 F. Supp. 2d at 1324. This factor can support approval even when Settlement is reached before ruling on a motion to dismiss, when the pleadings demonstrate Plaintiff's counsel had an understanding of the issues. In re Home Depot Data Breach, 1:14-md-02583-TWT, Dkt. 260. at p. 16).

Before filing the Complaint, Plaintiff's Counsel devoted significant time to investigating the facts related to the Text Message. Plaintiff's Counsel also extensively researched the claims to be asserted, including under the TCPA, for an injunction, and for class certification. After filing the Complaint, Counsel opposed *two* motions to dismiss, engaged in third party discovery over a period of months, and began discovery with HOA. This gave Plaintiff's counsel necessary information as to the factual merits of the case.

Plaintiff's counsel spent significant resources analyzing the legal issues on dispositive early motions, in addition to formal discovery and informal discovery. As a result, combined with their experience in handling other class actions, Counsel can adequately analyze the strengths and weaknesses of the case. Accordingly, this factor also weights in favor of granting Final Approval.

II. The Court Should Confirm Certification of the Settlement Class.

When a settlement is reached before certification, a court must determine whether to certify the settlement class. See, e.g., Manual for Complex Litigation § 21.632 (4th ed. 2014); Amchem Products, Inc. v. Windsor, 521 U.S. 591, 613-14 (1997). Certification of a settlement class is proper when the requirements of Rule 23(a) and at least one subsection of Rule 23(b) are satisfied. See, e.g., Columbus Drywall, 258 F.R.D. at 553. Courts have "broad discretion" in applying Rule 23 to a settlement class. Walco Investments, Inc. v. Thenen, 168 F.R.D. 315, 323 (S.D. Fla. 1996).

The Court should certify the Settlement Class here. Courts routinely certify TCPA classes. See, e.g., Bee, Denning, Inc. v. Capital Alliance Group, No. 13-cv-2654 (S.D. Cal. Sept. 24, 2015); Physicians Healthsource, Inc. v. Doctor Diabetic Supply, LLC, No. 12-22330, 2014 U.S. Dist. LEXIS 177222 *9 (S.D. Fl. Dec. 23, 2014); C-Mart, Inc. v. Metro. Life Ins. Co., 299 F.R.D. 679, 688 (S.D. Fl. Feb. 4,

2014); Palm Beach Golf Center-Boca v. Sarris, No. 12-80178, 2015 U.S. Dist. LEXIS 167142 *11-12 (S.D. Fl. Aug. 4, 2015).

A. The Settlement Class Satisfies Rule 23(a)

Rule 23(a) requires proof that of numerosity, commonality, typicality and adequacy. Each element is met here.

1. Numerosity

Rule 23(a)(1) requires that a proposed settlement class be "so numerous that joinder of all class members is impracticable." The proposed class consists of 53,944 persons, so this requirement is easily met. Cox v. Am. Cast Iron Pipe Co., 784 F.2d 1546, 1553 (11th Cir. 1986) (numerosity is met with 40 class members).

2. Commonality

"The commonality requirement of Rule 23(a)(2) demands 'questions of law or fact common to the class." Legg v. Voice Media Group, Inc., 2015 U.S. Dist. LEXIS 61836 *11 (S.D. Fl. May 5, 2014). This is a "relatively light burden." Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1268 (11th Cir. 2009). "Commonality requires that there be at least one issue whose resolution will affect all or a significant number of the putative class members." Williams v. Mohawk Indus., 568 F.3d 1350, 1355 (11th Cir. 2009). "The commonality element is generally satisfied when a plaintiff alleges that defendants have engaged in a standardized course of conduct

that affects all class members." Morefield v. NoteWorld, LLC, NO. 1:10-CV-00117, 2012 U.S. Dist. LEXIS 54664 at *6 (S.D. Ga. April 18, 2012) (Hall. R.).

Here, the same general course of conduct applies to all class members: HOA sent a mass text message to all the members, to which the members contend they did not consent. The common issues include, but are not limited to: (a) whether an ATDS was used; (b) whether HOA acted intentionally; and (c) whether HOA had obtained the requisite level of consent. Courts routinely find the commonality element satisfied in TCPA cases. See Legg, 2015 U.S. Dist. LEXIS 61836 at *10; C-Mart, Inc., 299 F.R.D. at 688; Physicians Healthsource, Inc., 2014 U.S. Dist. LEXIS 177222 at *13-14; Palm Beach, 2015 U.S. Dist. LEXIS 167142 at *11-12.

3. Typicality

The typicality requirement primarily focuses on whether the named plaintiff's claims "have the same essential characteristics" as claims of other class members. See, e.g., Appleyard v. Wallace, 754 F.2d 955, 958 (11th Cir. 1985). The burden to meet typicality is also light. In re Disposable Contact Lens Anti. Lit., 170 F.R.D. 524, 532 (M.D. Fla. 1996). "Class members' claims need not be identical to satisfy the typicality requirement." Ault v. Walt Disney World Co., 692 F.3d 1212, 1216 (11th Cir. 2012). All that is required is a "sufficient nexus" between the named representative and the class members. Id. "This nexus exists if the claims or defenses

of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory." Id.

Here, the Plaintiff's claims are typical of those of the Class because they arise from the same conduct of HOA in sending the Text Message. They are also based on the same legal theory that HOA violated the TCPA by willfully sending the Text Message. Typicality is therefore met.

4. Adequacy of Representation

The adequacy requirement is satisfied when "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "This adequacy of representation analysis encompasses two separate inquiries: (1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representatives will adequately prosecute the action." Valley Drug Co. v. Geneva Pharms., Inc., 350 F.3d 1181, 1189 (11th Cir. 2003). In assessing this, courts primarily consider "the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class." Lyons v. Georgia-Pac. Corp. Sala-Ried Employees Ret. Plan, 221 F.2d 123, 1253 (11th Cir. 2000).

These requirements are clearly met here. The Plaintiff's interests are not antagonistic to, but are the same as, those of the absent class members because they

all seek to prove that HOA violated the TCPA by sending the Text Message. In addition, the Plaintiff has retained qualified and experienced counsel to pursue this action.

B. Rule 23(b)(3) is Satisfied

Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members," and that class treatment is "superior to other available methods for fairly and efficiently adjudicating the controversy." When "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems." Achem, 521 U.S. at 620.

1. Predominance

"Common issues of fact and law predominate 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." Carriuolo v. GM Co., 823 F.3d 977, 985 (11th Cir. 2016). Predominance does not require that all questions be common, but rather that "a significant aspect of the case...can be resolved for all members of the class in a single adjudication." Hanlon v. Chrysler Corp., 150 F.3d 1011, 1022 (9th Cir. 1998) (internal citations omitted). The requirement for predominance is met here because the overwhelming issues of law and fact are common to all class

members. This is why classes are routinely certified in TCPA cases. See Sec. II, *supra*.

2. Superiority

"The superiority inquiry focuses on 'the relative advantages of a class action suit over whatever other forms of litigation might be realistically available to the plaintiffs.'" Physicians Healthsource, Inc., 2014 U.S. Dist. LEXIS 177222 at *22-23 (quoting in part Sacred Heart Health Sys. v. Humana Military Healthcare Servs., 601 F.3d 1159, 1183-84 (11th Cir. 2010). It has been recognized that class actions are often superior to individual TCPA actions because the cap on statutory damages, and no fee shifting provision, makes it unlikely an individual would pursue the claim alone:

> As a general matter, TCPA classes are routinely certified as class actions because the large number of claims, along with the relatively small statutory damages, the desirability of adjudicating these claims consistent, and the probability that individual members would not have a great interest in controlling the prosecution of these claims, all point toward the superiority of a class action.

Id. at *22-23. Indeed, it is unlikely that a plaintiff would pay a $350 filing fee to bring an individual TCPA claim for $500. Mims v. Arrow Fin. Servs., LLC, 132 S.Ct. 740, 753 (2012). The same is true here, satisfying the superiority prong.

III. The Notice to the Settlement Class was Reasonable and Appropriate.

Rule 23(e)(1) provides that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the [proposed settlement]." For Rule 23(c)(2)(B) actions, "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." "[W]hat amounts to reasonable efforts under the circumstances is for the court to determine after examination of the available information and the possible methods of identification." In re Domestic Air, 141 F.R.D. 535, 539 (N.D. Ga.). The notice "must contain information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt out or remain a member of the class and be bound by the final judgment." Id. at 553. The Notice Program, as set by this Court's Order (Dkt. 58), easily meets this standard.

The Notice Program was carried out by the Claims Administrator, KCC, a nationally-recognized notice and claims administration firm. [Ex. 1, KCC Affidavit]. On September 6, 2017, the Claims Administrator created the Settlement Website, HOATCPASettlement.com, and posted the Court approved Notice forms. Id. The website included a phone number lookup tool which allowed "visitors to enter their telephone number(s) as of January 28, 2015 to see if they are Class Members." Id. at para. 7.

Following the creation of the website, the Claims Administrator provided notice by written mail to Class Members via post-card pursuant to addresses determined from a look-up on the text numbers using a historic look-up process. Id. at para. 4. Courts have found this methodology reliable for locating class members. See, e.g., Bee, Denning, Inc., 310 F.R.D. at 623 (holding "reverse look-up technology" was reliable and appropriate to identify class members); G.M. Sign, Inc., 2009 U.S. Dist. LEXIS 73869, at *11 ("[plaintiff] may use the log and fax numbers to 'work backwards' to locate and identify the exact entities to whom the fax was sent"). Once the addresses were located, notice was provided through First Class U.S. Mail via post-card, which is sufficient. Adams v. S. Farm Bureau Life Ins. Co., 493 F.3d 1276, 1287 (11th Cir. 2007); Markos v. Wells Fargo Bank, NA, 2016 U.S. Dist. LEXIS 12541, No. 1:15-cv-01156 (N.D. Ga. Sept. 7, 2016) (May, L.) (approving postcard as part of notice program); Cross v. Wells Fargo Bank, NA, 2016 U.S. Dist. LEXIS 114141, No. 1:15-cv-01270 (N.D. Ga. Aug. 18, 2016) (Story, R.) (same); T.A.N. v. PNI Digital Media, Inc., 2017 U.S. Dist. LEXIS 85058, No. 2:16-cv-132 (S.D. Ga. Wood, L.) (same). Id. at para. 5.

In addition to the written mail notice, the Claims Administrator ran an internet campaign advertising the settlement, causing a total of 15,882,580 "banner impressions….including on the social media site Facebook." Id. at para. 6. The

Claims Administrator also established a Facebook page that class members could locate for information. Id. at para. 7.

The Notice also described in plain language: "(1) the nature of the action; (2) the definition of the class certified; (3) the claims, issues or defenses; (4) that a class member may enter an appearance through an attorney if the member so desires; (5) that the court will exclude any member from the class who requests exclusion (6) the time and manner for requesting exclusion; and (7) the binding effect of a class judgment on members." Fed. R. Civ. P. 23(c)(2)(B). The notice forms with this information were approved by the Court, and these same notice forms were provided to the Class Members. [Ex. 1-A, KCC Declaration].

The Plaintiff and Claims Administrator has complied with the Court approved Notice Plan. [Ex. 1, KCC Declaration]. Accordingly, the Notice Program implemented in this action constitutes the best notice practicable under the circumstances and satisfies the requirements of due process and Rule 23.

CONCLUSION

The Settlement is the result of extensive good faith negotiations, after thorough factual investigation and legal analysis, and are, in the opinion of Plaintiff's Counsel, who are experienced in these matters, fair, reasonable, and adequate.

Therefore, Plaintiff respectfully requests that Plaintiff's Motion for Final Approval of the Settlement be granted.

Respectfully Submitted, this 20th day of December, 2017,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the within and foregoing **MEMORANDUM OF LAW IN SUPPORT OF FINAL APPROVAL OF SETTLEMENT** was served via the Court's ECF system, which automatically sends notice of such filing to the following:

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