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

FREDERICK LUSTER, on behalf of himself and all others similarly situated,	:	
Plaintiff,	:	Civil Action File No. 1:15-cv-01058-TWT
v.	:	
WELLS FARGO DEALER SERVICES, INC.,	:	
Defendant.	:	

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

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INTRODUCTION

The Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, prohibits using an automatic telephone dialing system ("ATDS" or "autodialer") to make nonconsensual calls to cellular telephones. This case alleges that Defendant Wells Fargo Dealer Services, Inc. and its corporate parent, Wells Fargo Bank, N.A. (together, "Wells Fargo"), used an autodialer to call consumers without consent. Wells Fargo denies the material allegations in the complaint, disputes that it made any calls using an ATDS without consent, contends that the claims of Plaintiff and the other members of the class are not amenable to class certification and denies that Mr. Luster and the members of the class are entitled to damages.

Recognizing the risks of protracted litigation, the parties mediated the case with respected mediator Hunter Hughes. The mediation was successful, and the parties agreed to request approval of an all-cash, non-reversionary settlement totaling over $15.7 million. Each class member who submits a qualified claim will receive a pro rata distribution from the settlement fund. This is an excellent result, considering the risks, uncertainties, burden, and expense associated with continued litigation. Pursuant to the parties' agreement, Plaintiff now respectfully requests 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 Mr. Luster as the class representative, (4) appoint Plaintiff's counsel as class counsel, (5) approve the proposed notice program 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 members of the settlement class to submit claims for compensation, and to object to or exclude themselves from the parties' settlement.

SUMMARY OF THE SETTLEMENT

The settlement calls for Wells Fargo to create a non-reversionary cash settlement fund of approximately $15,740,473.20, *see* Settlement Agreement and Release ("Agr."), ¶ 4.03, attached to the declaration of Alexander H. Burke, Exhibit 1, to compensate an estimated 3,385,048 members, *id.*, ¶ 2.27, of the following class:

> [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 Dealer Services made or initiated any collection Call during the Class Period, in connection with an automobile retail installment sale contract, using any automated dialing technology or artificial or prerecorded voice technology, according to Wells Fargo's available records.

Id., ¶ 2.31.[1] The Class Period is April 1, 2011 through March 30, 2016. *Id.*, ¶ 2.13.

[1] The parties are engaging in confirmatory discovery to confirm the final class size, *Id.* ¶ 2.20, including a Rule 30(b)(6) deposition of Wells Fargo.

To obtain compensation from the settlement fund, members of the class will need to submit a claim to the settlement administrator[2] via a designated settlement website, by telephone, or by mail. *Id.* at ¶ 9.02.[3] Each member of the class 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, attorneys' fees and expenses that this Court may approve, and an incentive award to Mr. Luster that this Court may approve. *Id.* at ¶¶ 2.33, 4.05.[4]

Class Members who do not exclude themselves will release claims specifically tailored to the practices that give rise to this matter. In particular, members of the class will release non-telemarketing claims "that arise out of or relate to the Released Parties' use of an 'automatic telephone dialing system' or 'artificial or prerecorded voice' to contact or attempt to contact Settlement Class Members in connection with an automobile retail installment sale contract during the Class Period." *Id.* at ¶ 13.01. This release is crafted to calls made in connection

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[2] Following a competitive bidding process, the parties recommend the appointment of KCC Class Action Services, LLC ("KCC") as the claims administrator. *Id.* at ¶ 2.10.

[3] A summary of the parties' proposed notice plan is set forth in a declaration from KCC, attached as Exhibit 2.

[4] Prior to the final fairness hearing in this matter, Mr. Luster will ask this Court for an incentive award not to exceed $20,000, and Plaintiff's 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.

with non-telemarketing automobile financing during the applicable class period in alleged violation of the TCPA, only. *Id.* at ¶¶ 2.13, 2.31.

ARGUMENT

I. This Court should preliminarily approve this proposed 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).

The first step in the process is a preliminary fairness determination. Specifically, "counsel submit the proposed terms of settlement" to the district 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 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). Judges May and Story recently finally approved class action settlements similar to this one, involving different Wells Fargo business lines. *Markos v. Wells Fargo Bank, N.A.*, No. 1:15-cv-01156-LMM, Docket Item 90 (N.D. Ga. Jan. 30, 2017) (mortgage); *Cross v. Wells Fargo Bank, N.A.*, No. 1:15-cv-01270-RWS, Docket Item 100 (N.D. Ga. Feb. 7, 2017) (deposit account).

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 Lucas v. Kmart Corp.*, 234 F.R.D. 688, 693 (D. Colo. 2006) ("The purpose of the preliminary approval process is to determine whether there is any reason not to notify the class members of the proposed

settlement and to proceed with a fairness hearing.").

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 settlement was negotiated at arm's-length by vigorous advocates, and there has been no fraud or collusion.

"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[.]").[5]

Here, the parties negotiated their settlement at arm's-length through mediator, Hunter R. Hughes. Agr., at ¶ 1.04; *see 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, and the terms of the Settlement have only been finalized after months of substantive back-and-forth. Exhibit 1, Burke Decl. ¶ 14. Accordingly, there can be no doubt that the parties negotiated their settlement at arm's-length, and absent 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 overseen by a nationally renowned mediator).

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[5] *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.").

B. Diverse and substantial legal and factual risks 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); *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.").

With this in mind, while Mr. Luster strongly believes in his claims, Plaintiff understands that Wells Fargo asserts a number of potentially case-dispositive defenses to them. 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 auto financing line of business. Prior express consent is, of course, a defense to a claim under the TCPA. *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[.]'").

Wells Fargo also argues that Mr. Luster would not be able to certify the class he defines through his class action complaint. In particular, Wells Fargo asserts that the class Plaintiff asserts in his 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.

Additionally, Wells Fargo suggests that a litigation class could not be certified in this action due to borrowers purportedly agreeing to arbitrate their claims, citing its form agreements applicable to its auto financing line of business. *See Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 228 (N.D. Ill. 2016) (considering that defendant "might have been able to show that ... class members had signed an arbitration clause barring their claims" as risk of further litigation).

Plaintiff also faces 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), Mr. Luster's statutory TCPA claims do not contemplate a harm sufficiently concrete to confer Article III standing.[6]

Further, Wells Fargo suggests that a ruling from the D.C. Circuit Court of Appeals in connection with a consolidated appeal of the Federal Communications

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[6] That said, the Court 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.").

Commission's July 10, 2015 Declaratory Ruling and Order could negatively affect Mr. Luster's 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 Plaintiff's request for relief, but curtail the viability of all claims based on "wrong numbers" calls.

Plaintiff disputes each and every one of these defenses. But it is obvious that his likelihood of success at trial is far from certain. Accordingly, Plaintiff's decision to settle his claims, and the claims of the members of the class, 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 monetary terms of this proposed settlement fall favorably within the range of prior TCPA class action settlements.

"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).

Here, the parties agree to resolve this matter for a settlement fund in excess of $15.7 million, or $4.65 per class member. This figure compares well with similar TCPA class action settlements that courts have 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). Additionally, Judges May and Story have recently finally approved similar settlements to the one presented here.

The parties' settlement, therefore, 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).[7]

D. The parties reached their agreement in connection with this complex matter only after being fully apprised of the risks and uncertainties associated with it.

By their very nature, because of the many uncertainties of outcome, difficulties of proof, and lengthy duration, class actions readily lend themselves to compromise. Indeed, "[t]here is an overriding public interest in favor of settlement, particularly in class actions that have the well-deserved reputation as being most complex." *Ass'n For Disabled Ams., Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 466

[7] In determining whether a settlement is fair in light of the potential range of recovery, important is the maxim that 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.*

(S.D. Fla. 2002); *accord 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."). This matter is no exception.

Against this backdrop, courts consider "the degree of case development that class 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. In fact, before mediating, the parties exchanged thousands of pages of documents, and briefed for settlement purposes the strengths and weaknesses of their respective positions. Plaintiff's counsel required information regarding the size and scope of the putative class as a condition precedent to mediation, which itself is subject to confirmatory discovery under the settlement. Exhibit 1, Burke Decl. ¶ 13. As such, 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. Proposed Class Counsel firmly believe that the parties' agreement is fair, reasonable, adequate, and in the best interests of the members of the class.

"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.").

Here, Plaintiff's 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. Mr. Luster's counsel also believe that the benefits of the parties' settlement far outweigh the delay and considerable risk of proceeding to trial. *See* Exhibit 1.

II. The settlement class satisfies Rule 23.

A. The members of the class are so numerous that joinder of all of them is impracticable.

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). And "while there is no fixed numerosity rule, generally less than twenty-one is inadequate, more than forty adequate, with numbers between varying according to other factors." *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986).

Here, there are more than 3.3 million members of the class. Agr., at ¶ 2.27. Joinder, therefore, is impracticable, and the class thus satisfies Rule 23's numerosity requirement.

B. Questions of law and fact are common to the members of the class.

Rule 23(a) also requires that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "A 'common' issue is one that may be proved through the presentation of generalized proof applicable to the class as a whole. *In re Netbank, Inc. Sec. Litig.*, 259 F.R.D. at 664 (citing *Murray v. Auslander*, 244 F.3d 807, 811 (11th Cir. 2001)). "Rule 23 does not[,] [however,] require that all the questions of law and fact raised by the dispute be common." *Cox*, 784 F.2d at 1557; *see also Carriuolo v Gen. Motors Co.*, 823 F.3d 977, 984 (11th Cir. 2016) ("For purposes of Rule 23(a)(2) even a single common question will do.") (internal

quotation marks and alteration omitted).

Here, the claims of the members of the class stem from the same factual circumstances—calls that Wells Fargo placed to cellular telephone numbers in connection with automobile financing, 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."); *Bellows v. NCO Fin. Sys., Inc.*, No. 07-01413, 2008 WL 4155361, at *6 (S.D. Cal. Sept. 5, 2008) ("[T]he commonality requirement is met here. The putative class claims stem from the

same alleged conduct, *i.e.*, NCO allegedly calling consumers on their cellular telephones, or other wireless devices, without 'prior express consent,' using an 'automatic telephone dialing system' or an 'artificial or prerecorded voice.'").

C. Plaintiff's claims are typical of the claims of the members of the class.

Under Rule 23(a)(3), the claims or defenses of the representative party must be typical of the class. Fed. R. Civ. P. 23(a)(3). The "typicality" requirement seeks to ensure that a representative plaintiff "possess[es] the same interest and [has] suffer[ed] the same injury shared by all members of the class [s]he represents." *In re Netbank, Inc. Sec. Litig.*, 259 F.R.D. at 665.

Here, Wells Fargo Dealer Services placed calls concerning auto financing to Mr. Luster's cell phone using an ATDS, just as it placed calls concerning auto financing to the cell phones of the other members of the class using an ATDS. As a result, Mr. Luster's 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."); *Bellows*, 2008 WL 4155361, at *6 ("Also, in my judgment, the typicality requirement is met here. Plaintiff alleges that NCO violated the TCPA by calling his cellular telephone, without 'prior express consent,' using an 'automatic telephone dialing system' or

an 'artificial or prerecorded voice.' Plaintiff's claims are identical to the claims of the Class Members."); *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. Mr. Luster and his counsel will fairly and adequately protect the interests of the members of the class.

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, Plaintiff's claims are aligned with the claims of the other class members. He thus has every incentive to vigorously pursue the claims of the class, as he has done to date by remaining actively involved in this matter since its inception, participating in discovery, and involving himself in the mediation and settlement process. In fact, Mr. Luster rejected an early individual offer of judgment, for a significant sum, because it did not provide any relief to the class.

In addition, Mr. Luster retained the services of law firms with extensive experience in litigating consumer class actions, and TCPA actions in particular.

E.g., Exhibit 1, Burke Decl. ¶¶ 2-10.

E. The questions of law and fact common to the members of the class predominate over any questions potentially affecting only individual members.

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). "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Hanlon*, 150 F.3d at 1022; *see also Carriuolo*, 823 F.3d at 985.

Here, the central legal issue is whether the calls Wells Fargo made using an ATDS violated the TCPA. This is sufficient to satisfy the predominance

requirement. *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. A class action is superior to other available methods for the fair and efficient adjudication of the claims of Plaintiff and the class.

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).

Because Plaintiff seeks 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]

In any event, no one member of the class has an interest in controlling the prosecution of this action because Mr. Luster's claims and the claims of the members of the class are the same. Alternatives to a class action are either no recourse for millions of individuals, or a multiplicity of suits resulting in an inefficient and possibly disparate administration of justice.

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

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,"

[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).

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 involving direct mail notice to class members, a dedicated settlement website and toll-free telephone number, and a press release and targeted internet notice campaign, *see* Exhibit 2, to be administered by a well-regarded third-party claims administrator— KCC Class Action Services, LLC ("KCC") —which has significant experience in the administration of TCPA class actions. As such, the parties' notice plan complies with Rule 23 and due process because, inter alia, it informs class members of: (1) the nature of the action; (2) the essential terms of the settlement, including the 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

Plaintiff Frederick Luster respectfully requests 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 Mr. Luster as the class representative, (4) appoint Plaintiff's counsel as class counsel, (5) approve the parties' proposed notice program, 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 settlement, and (8) grant such further and other relief the Court deems reasonable and just.

Dated: February 21, 2017

Respectfully submitted,

FREDERICK LUSTER, on behalf of himself and others similarly situated

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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/ Alexander H. Burke

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/ Alexander H. Burke