CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

STACEY BENBOW; TERESA HERBERT; DENNIS PHILIP; DAWAUN LUCAS; DAVID DOMINGUEZ HOOPER; METE TASIN; and REEJAUNTE SMITH, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

SMILEDIRECTCLUB, INC.; and SMILEDIRECTCLUB, LLC,

Defendants.

Case No. 2020CH07269

Calendar: 2

Hon. Raymond W. Mitchell

PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT & INCORPORATED MEMORANDUM OF LAW

Dated: January 27, 2021

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Representative Plaintiffs Stacey Benbow, Teresa Herbert, Dennis Philip, Dawaun Lucas, David Dominguez Hooper, Mete Tasin, and Reejaunte Smith ("Representative Plaintiffs") respectfully move on an unopposed basis for preliminary approval of the class-wide Settlement Agreement entered into between the Parties to this Action, a true and correct copy of which is attached as Exhibit 1 to the Declaration of Frank S. Hedin ("Hedin Decl.") filed concurrently herewith.[1]

INTRODUCTION

In this consumer class action, the Representative Plaintiffs allege that defendants SmileDirectClub, Inc. and SmileDirectClub, LLC ("Defendants") used an "automatic telephone dialing system" (or "ATDS") to transmit unsolicited text-message advertisements to their cellular devices and the cellular devices of numerous other similarly-situated consumers across the country, in violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. The operative Class Action Complaint (Dkt. 1 ("Complaint" or "Compl.")) seeks statutory damages for Plaintiffs and the Settlement Class.

After a year of contentious litigation, involving multiple cases proceeding first in federal court and now in state court, the Parties have reached a comprehensive class-wide resolution to this Action, subject to the Court's approval.[2] The cornerstone of the Settlement is the all-cash,

[1] Unless otherwise defined herein, all capitalized terms have the same force, meaning and effect as ascribed in Section 2 ("Definitions") of the Settlement Agreement.

[2] This case is a continuation of two related actions previously pending in the United States District Court for the Central District of California – *Philip v. SmileDirectClub, Inc.*, No. 2:20-cv-01111-VAP-E (C.D. Cal.) and *Lucas v. SmileDirectClub, Inc.*, No. 2:20-cv-06059-VAP-E (C.D. Cal.). *See* Hedin Decl. ¶¶ 13-23. As a negotiated term of the Settlement, the Parties agreed to re-file and effectuate the Settlement in the Circuit Court of Cook County, Illinois in light of the Supreme Court's March 31, 2019 decision in *Frank v. Gaos*, 139 S. Ct. 1041 (2019). As discussed in greater detail below, *see infra* "Background," Section IV., the Parties had concerns that, due to the nature of the claims alleged in this action, the Supreme Court's intervening decision in *Frank* might prevent a federal court from exercising subject-matter jurisdiction over this case, including for settlement approval purposes. Hedin Decl. ¶¶ 33-34. By refiling the action in this state-court forum, which is unconstrained by the jurisdictional limitations of Article III of the U.S. Constitution, the interests of the Parties — and, most important, of the unnamed members of the Settlement Class — are no longer susceptible to the potential ramifications of a federal court determining that it lacks jurisdiction to hear this dispute, and the Settlement Class will be able to obtain the substantial benefits provided by the Settlement as quickly as possible. *See id.*

settlement fund of up to $11,500,000.00 (eleven million and five hundred thousand dollars) that Defendants, through SmileDirectClub, LLC, have agreed to make available for the benefit of the Settlement Class. Each claiming Settlement Class member will receive a $10 cash payment from the settlement fund, paid either by check delivered to the Settlement Class Member's postal address or by electronic deposit into the Settlement Class Member's Venmo or Paypal account. Settlement Class Members may select either method of payment on the Claim Form. The Settlement also provides wide-ranging injunctive relief to all Settlement Class Members, requiring Defendants to institute TCPA-compliance training for marketing personnel at the company and to stop sending text messages or making phone calls to Settlement Class Members who make a Revocation Request on the claim form.

The Settlement is the product of a robust pre-filing investigation, lengthy and hard-fought litigation, and a comprehensive exchange of discovery concerning every aspect of this case. The considerable time and resources that the Representative Plaintiffs and their counsel devoted to this litigation, in advance of ever discussing settlement with Defendants, put them in a strong position to meaningfully assess the strengths and weaknesses of the Settlement Class's claims and the risks posed by continued litigation, and to ultimately negotiate a fair, reasonable, and adequate resolution on behalf of the Settlement Class. The Parties agreed to the principal terms of the Settlement after months of negotiation, including over ten (10) hours of contentious, arm's-length mediation before the Honorable Wayne R. Andersen (Ret.) of JAMS (formerly a U.S. District Judge for the Northern District of Illinois), and the formal Settlement Agreement was not executed until Class Counsel had carefully reviewed discovery to confirm the size and scope of the Settlement Class.

The Settlement provides meaningful monetary and non-monetary relief to Settlement Class Members in a timely and efficient manner, while avoiding several substantial risks of non-recovery that continued litigation would have posed. By any reasonable measure, the Settlement represents a fair, reasonable, and adequate resolution to this litigation. Accordingly, Representative Plaintiffs

respectfully request that the Court (1) preliminarily approve the proposed Settlement; (2) certify the Settlement Class; (3) approve the Notice Plan; and (4) schedule the Final Approval Hearing.

TELEPHONE CONSUMER PROTECTION ACT

The TCPA was enacted more than two decades ago in response to "[v]oluminous consumer complaints about abuses of telephone technology." *Mims v. Arrow Fin. Servs. LLC*, 132 S. Ct. 740, 744 (2012). In passing the statute, Congress specifically sought to prevent "intrusive nuisance calls" to consumers that it deemed "invasive of privacy," *see id.*, by entitling prevailing plaintiffs to a statutory damage award of $500 per violation (subject to trebling if the violation was committed willfully) as well as injunctive relief. *See* 47 U.S.C. § 227(b)(3)(A)–(C).

The TCPA and its implementing regulations specifically prohibit the transmission of marketing text messages to cellular phones via an "automatic telephone dialing system" (or "ATDS"), absent the "prior express written consent" of the called party. 47 U.S.C. § 227(b)(1)(A)(iii). To prove a violation of the TPCA, the plaintiff has the burden of demonstrating, inter alia, that the defendant's calls or text messages were sent via an ATDS, which is defined in the statute as any dialing equipment that "ha[s] the capacity . . . to store or produce telephone numbers to be called, using a random or sequential number generator." 47 U.S.C. § 227(a)(1) (emphasis added). The statutory meaning of the term ATDS is currently pending before the United States Supreme Court in *Facebook Inc. v. Duguid*, Case No. 19-511.

The Federal Communications Commission ("FCC") is vested with authority to issue certain interpretative regulations under the TCPA, to which courts must defer. *See, e.g., Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 674 (2016).

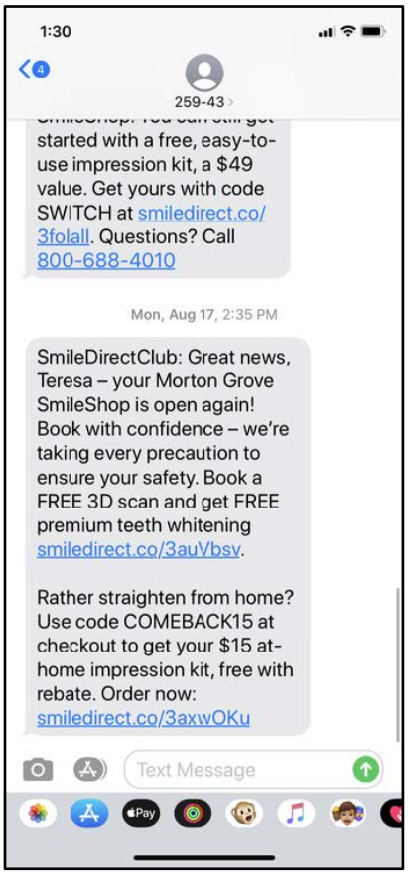
BACKGROUND

I. Nature of the Action[3]

Defendants own and operate an oral care company that created the first medtech platform for the delivery of orthodontic care. Among other products and services, Defendants provide

[3] This section includes allegations from Plaintiffs' Complaint.

dental practices and their affiliated dentists and orthodontists with dental support organization services, including the use of its telehealth platform. Compl. ¶ 11. One of the ways that Defendants' customers can begin seeking treatment using the Defendants' telehealth platform is by booking an appointment to have their initial information collected at one of their brick-and-mortar retail locations across the United States. *Id.* To build their business and market and sell the products and services that Defendants and their affiliated network of doctors provide, Defendants transmit text-message advertisements to their customers, an example of which (received by Plaintiff Herbert) is depicted below:

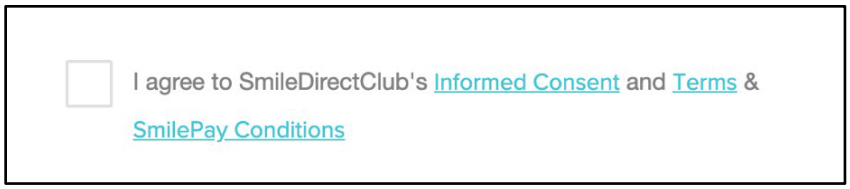


Id. ¶¶ 19, 23; *see also id.* ¶¶ 26, 29, 32, 35, 38 (other Representative Plaintiffs).

Transmitted on the Short Messages Service ("SMS") platform, Defendants' text messages are sent for "telemarketing purposes" and constitute "advertisements" as defined by 47 C.F.R. 64.1200(f). *Id.* ¶ 15. Defendants use various telephone numbers to send its text messages, including various five-digit short-code numbers. *Id.* ¶¶ 19, 23, 26, 29, 32, 35, 38. The Complaint

alleges that Defendants transmit their text messages to consumers using an "automatic telephone dialing system" ("ATDS") within the meaning of the TCPA, 47 U.S.C. § 227(b)(1)(A). *Id.* ¶ 63. Defendants dispute that they have used an ATDS.

Defendants sent these text-message advertisements to customers who, while creating an account on Defendants' platform, checked the box depicted in the screenshot below:



(*See Lucas v. SmileDirectClub Inc.*, No. 2:20-cv-06059-VAP-E (C.D. Cal.), ECF No. 17 at 3-4. Defendants argue that consumers who checked this box consented to receive their advertising and telemarketing text messages and agreed to arbitrate all claims against Defendants. These issues were pending in Defendants' Motion to Compel Arbitration, filed in the *Lucas* case, at the time of settlement. *Id.*

The Representative Plaintiffs contend that, by checking the box on the screen shown above, they did not provide Defendants with TCPA-compliant "express written consent" to send them advertisements and that Defendants therefore violated the TCPA when they sent autodialed "advertising" text messages to them and the other Settlement Class Members. Specifically, the Representative Plaintiffs contend that the checkbox depicted above does not strictly comply with the TCPA's regulatory provisions governing "express written consent," which require, inter alia, that consumers receive a notice that "clearly and conspicuously" discloses that an ATDS will be used to transmit "advertising" and/or "telemarketing" messages to their mobile numbers, and that consent to receive such messages is not a condition of purchasing goods or services. *See* 47 C.F.R. § 64.1200(f)(8). The Representative Plaintiffs also contend that they did not assent to the arbitration clause for similar reasons.

Defendants reject this theory and contend that the Representative Plaintiffs' claims are without merit. Throughout this litigation, Defendants have maintained, among other things, that

the checkbox shown in the screenshot above complied with the TCPA's requirements for obtaining "express written consent," and constituted valid agreement to the arbitration clause.

Thus, absent the Settlement, the outcome of this litigation would turn on whether an ATDS was used to send the text messages in question and on whether a consumer, by checking the box on the screen shown above, manifested his or her "express written consent" within the meaning of the TCPA and/or agreed to arbitrate his or her claims.

II. Pre-Filing Investigation

Plaintiffs' counsel conducted a comprehensive pre-filing investigation concerning every aspect of the factual and legal issues underlying the claims alleged in this matter. Hedin Decl. ¶ 11. These extensive pre-filing efforts included:

- Researching the nature of Defendants' business, including its online and brick-and-mortar stores, as well as the company's SMS text message marketing practices;
- Interviewing dozens of recipients of Defendants' text messages about their use of Defendants' products and services, the text messages they received from Defendants, and inspecting and analyzing these consumers' text-message transmission histories, the screenshots of text messages that they received from Defendants (extracted from their devices), and various other records reflecting their interactions with Defendants;
- Researching any changes in Defendants' business practices over the pertinent period of time, including historical postings from consumers on social media and online complaint websites concerning their receipt of Defendants' text messages, and hundreds of screenshots posted by these consumers depicting the text messages they received from Defendants over the statutory period;
- Performing research and analysis regarding Defendants' text messages and text-message transmission systems, and the short-code telephone numbers used to deliver Defendants' text messages to consumers;
- Performing an in-depth analysis of the various versions of the Defendants' Privacy Policy, Terms of Service, and other publicly accessible documents available on Defendants'

websites at various times during the statutory period;

- Researching the relevant law and examining the pertinent facts to assess the merits of potential TCPA claims against Defendants and defenses that Defendants might assert thereto, including any potential grounds for Defendants to seek to compel its customers to arbitrate such disputes;
- Investigating Defendants' financial condition in order to assess the likelihood of ultimately recovering a class-wide statutory damages award from Defendants; and
- Reviewing numerous FCC declaratory rulings and orders in effect during the statutory period, as well as then-pending FCC rulemaking proceedings and comment periods pertaining thereto, in order to gauge the likelihood of such proceedings being held applicable to claims for violation of the TCPA against Defendants.[4]

Id. ¶ 11(A)-(I).

As a result of this thorough pre-filing investigation, Plaintiffs' counsel was able to develop multiple potentially viable theories of liability for TCPA claims against Defendants, analyze the legal issues relevant to the merits of claims under each such theory, assess the likelihood of Defendants successfully compelling such claims to arbitration, and ultimately prepare complaints against Defendants aimed at maximizing the likelihood of certifying a class and recovering meaningful class-wide relief. Hedin Decl. ¶ 12.

III. Litigation in Federal District Court

On February 3, 2020, Plaintiff Philip filed a class action complaint against SmileDirectClub, Inc. in the U.S. District Court for the Central District of California, alleging that SmileDirectClub, Inc. had violated the TCPA by transmitting unsolicited telemarketing text

[4] *See, e.g.*, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-135, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015); *Petition for Reconsideration of Great Lakes Higher Education Corp.; Nelnet, Inc.*; *Pennsylvania Higher Education Assistance Agency; and the Student Loan Servicing Alliance*, CG Docket No. 02-278 (filed Dec. 16, 2016).

messages via an ATDS to him and numerous other consumers across the country. Hedin Decl. ¶ 14 (citing *Philip*, ECF No. 1).

On April 6, 2020, SmileDirectClub, Inc. moved to dismiss or transfer Plaintiff Philip's complaint pursuant to Fed. R. Civ. P. 12(b)(2). Hedin Decl. ¶ 15 (citing *Philip*, ECF No. 13). In response to the motion, on April 20, 2020, Plaintiff Philip filed a first amended complaint. *Id.* (citing *Philip*, ECF No. 14).

On May 4, 2020, SmileDirectClub, Inc. filed a renewed motion to dismiss and motion to transfer pursuant to Fed. R. Civ. P. 12(b)(2). Hedin Decl. ¶ 16 (citing *Philip*, ECF No. 16). On June 8, 2020, Plaintiff Philip filed a response in opposition to the motion. *Id.* ¶¶ 17-19 (citing *Philip*, ECF No. 20). On June 17, 2020, SmileDirectClub, Inc. filed a reply to the motion. *Id.* ¶ 20 (citing *Philip*, ECF No. 22).

On July 8, 2020, Plaintiffs Lucas, Dominguez Hooper, Tasin, and Smith filed a class action complaint against Defendants in the U.S. District Court for the Central District of California, alleging that Defendants had violated the TCPA by transmitting unsolicited telemarketing text messages via an ATDS to them and numerous other consumers across the country. Hedin Decl. ¶ 21 (citing *Lucas*, ECF No. 1).

On September 8, 2020, Defendants filed a motion to dismiss Plaintiff Hooper's and Tasin's claims pursuant to Fed. R. Civ. P. 12(b)(3), or in the alternative, to transfer the entire action to the Middle District of Tennessee. Hedin Decl. ¶ 22 (citing *Lucas*, ECF No. 16). That same day, Defendant also filed a motion to compel arbitration. *Id.* ¶ 23 (citing *Lucas*, ECF No. 17).

Shortly thereafter, the Parties agreed to explore potential resolution at a mediation before Judge Andersen, a JAMS mediator and former U.S. District Court Judge for the Northern District of Illinois, on October 20, 2020 in Chicago, Illinois. Plaintiffs' counsel negotiated certain parameters and terms for the mediation, including an agreement from Defendants to provide key information to Plaintiffs in advance. Hedin Decl. ¶¶ 25-26. On September 18, 2020, the Parties stipulated to stay both cases pending the completion of mediation. *Id.* ¶ 27 (citing *Lucas*, ECF No. 19).

IV. Settlement Negotiations

Several weeks before the mediation, Plaintiffs' counsel reviewed categories of supplemental materials, including business records and ESI pertaining to the merits of Plaintiffs' claims and Defendants' defenses (including issues of potential consent), issues of class certification, and the size and scope of potential settlement classes. Hedin Decl. ¶ 26.

Armed with these materials and the knowledge acquired through counsel's comprehensive pre-filing and post-filing investigations, Plaintiffs and their counsel were able to intelligently assess the strengths and weaknesses of the Settlement Class's claims and Defendants' defenses, the likelihood of prevailing at class certification, the size of the Settlement Class and the extent of potentially recoverable class-wide damages, and Defendants' ability to satisfy a judgment. Hedin Decl. ¶28. The Parties prepared and exchanged mediation statements detailing their respective views of the case and positions on settlement prior to the mediation. *Id*. ¶ 29.

On October 20, 2020, the Parties attended a full day of in-person mediation under the supervision of Judge Andersen of JAMS in Chicago, Illinois. Hedin Decl. ¶ 30. While the Parties negotiated at arms'-length for over ten (10) hours, they failed to reach an agreement that day. *Id.* However, the next day, Judge Andersen made a mediator's proposal to settle the case, which the Parties eventually accepted after further negotiations, both directly between themselves and with Judge Andersen's assistance. *Id*. ¶ 31. The Parties then executed a binding term sheet that would later be memorialized in the Settlement Agreement, the execution of which was conditioned upon negotiations over the remaining terms and confirmatory discovery regarding the size and composition of the Settlement Class, among other important details. *Id*. ¶32.

In light of the Supreme Court's decision in *Frank v. Gaos*, 139 S. Ct. 1041 (2019), which vacated a federal district court's approval of a class action settlement and remanded for the district court to consider the plaintiffs' standing under Article III of the U.S. Constitution and thus its own subject-matter jurisdiction, the Parties agreed that the most prudent course forward for each of their respective clients – and, most of all, for the members of the Settlement Class – was to seek approval of the Settlement in a state-court forum unconstrained by the jurisdictional limitations of

Article III of the U.S. Constitution, where it could be ensured that the presiding court has jurisdiction to approve the proposed Settlement and authorize the prompt disbursement of its substantial benefits to the members of the Settlement Class.[5] Hedin Decl. ¶ 33. Thus, on December 14, 2020, Plaintiffs Lucas, Dominguez Hooper, Tasin, and Smith, filed a notice of voluntary dismissal without prejudice of their case pending in the Central District of California. *Id.* (citing *Lucas,* ECF No. 27).

Also on December 14, 2020, the Representative Plaintiffs initiated this Action by filing the operative consolidated Class Action Complaint (hereinafter, the "Complaint") in the Circuit Court of Cook County, Illinois, County Department of the Chancery Division, alleging the same claims against Defendants as previously alleged in the actions in the Central District of California. Hedin Decl. ¶ 34.

Prior to executing the Settlement Agreement, Defendants produced to Plaintiffs' counsel materials for Plaintiffs' counsel to confirm the approximate size and scope of the proposed Settlement Class contemplated by the Settlement, among other merits and class-related details. Hedin Decl. ¶¶25-28.

Thereafter, the Parties held a competitive bidding process in which three (3) nationally recognized class-action settlement administration companies submitted bids to administer the Settlement. Hedin Decl. ¶36. After reviewing and comparing costs among the three proposals, and obtaining further follow-up information from each potential administrator, the Parties agreed to engage KCC, LLC ("KCC") to administer the Settlement. *Id.* Plaintiff's counsel worked with Defendants' counsel and KCC to ensure that all notice-related materials comply with due process and applicable law and are easily understood by Settlement Class Members. *Id.*

On December 21, 2020, after completing confirmatory discovery, selecting a Settlement Administrator, and negotiating the remaining details of the proposed Settlement, the Parties

[5] *See Frank*, 139 S. Ct. at 1046 ("We have an obligation to assure ourselves of litigants' standing under Article III. That obligation extends to court approval of proposed class action settlements. A court is powerless to approve a proposed class settlement if it lacks jurisdiction over the dispute, and federal courts lack jurisdiction if no named plaintiff has standing.").

executed the Settlement Agreement. Hedin Decl. ¶ 37. Plaintiffs' counsel firmly believe that the Settlement is fair, reasonable and adequate, and that it constitutes an excellent result for the Settlement Class. *Id.* ¶¶38-44.

TERMS OF THE SETTLEMENT

A copy of the Settlement Agreement is attached as Exhibit 1 to the Hedin Decl. (filed concurrently herewith), the key terms of which are summarized as follows:

I. Settlement Class Definition

Plaintiff requests that the Court preliminarily certify the following Settlement Class:

> All persons within the United States who receive one or more text messages that may include advertising or telemarketing under the TCPA, from Defendants between July 7, 2016 and the date of the Court's order granting preliminary approval of the Settlement.

Settlement Agreement § 2.1.49.[6]

II. Monetary Relief

Defendants, through SmileDirectClub, LLC, have agreed to make available up to $11,500,000.00 for the benefit of Settlement Class Members, which will be used to pay all Settlement costs, including all Settlement Shares to Settlement Class Members, all Settlement Administration Costs to KCC, and a Fee Award to Class Counsel and Service Awards to the Representative Plaintiffs, and will be in full satisfaction of all of Defendants' monetary obligations under the Settlement and Settlement Agreement. Settlement Agreement § 4.1.

Each Settlement Class Member who submits a valid claim will receive a cash payment of $10, regardless of Settlement Administration Costs and any Fee Award and Service Awards. *Id.* § 4.2.1.

[6] The following are excluded from the Settlement Class: (1) any trial judge and other judicial officers who may preside over this case; (2) the Mediator; (3) the Released Parties; (4) Plaintiffs' Counsel; (5) any Settlement Class Member who has timely submitted a Request for Exclusion by the Opt-Out Deadline; and (6) any person or entity who has previously given a valid release of the claims asserted in the Action. Settlement Agreement § 2.1.49.

III. Non-Monetary Relief

Finally, Defendants have agreed to implement and maintain changes to their practices going forward, to ensure compliance with the TCPA. Settlement Agreement § 11.1. Specifically, Defendants have agreed to institute TCPA awareness and oversight procedures for marketing personnel. *Id.* § 11.1.1. Additionally, Settlement Class Members will be afforded the opportunity to make a Revocation Request to ensure that they do not receive unwanted calls and/or text messages going forward. *Id.* § 11.1.2.

IV. Notice Plan and Claims Process

Defendants, through SmileDirectClub, LLC, have agreed to pay all Settlement Administration Costs. *See* Settlement Agreement §§ 5.1-5.2.

Within thirty (30) days of the Preliminary Approval Date, the Settlement Administrator will disseminate the Class Notice to all potential Settlement Class Members by e-mail. Settlement Agreement § 5.5.4. The proposed Claim Form is attached as Exhibit "A" to the Settlement Agreement and the proposed Class Notices are attached as Exhibit "B" and Exhibit "C" to the Settlement Agreement.

The Settlement Administrator will create and maintain the Settlement Website, to be activated in advance of the Notice Date, which will be located at the URL www.sdcitcpasettlement.com. *Id.* § 5.4.1. The Settlement Website will provide information about the Settlement and make case-related documents available for download, such as the Settlement Agreement, Long-Form Notice, Claim Form, Preliminary Approval Order, and the Fee and Cost Application and Application for Service Awards. *Id.* Settlement Class Members will be able to file claims electronically on a straightforward, easy-to-understand web-based form on the Settlement Website; on this form, each Settlement Class Member will be able to select the method of payment for their Settlement Share – either by Benefit Check or Electronic Payment – and provide the address to which their Benefit Check should be sent or the e-mail address associated with the Venmo or Paypal account into which their Electronic Payment should be deposited. *Id.*; *see also id.,* Ex. A (online claim form).

Claim Forms must be postmarked or submitted to the Settlement Administrator, either in hard copy form or electronically via the Settlement Website, by the Claims Deadline of one-hundred (100) days after the Notice Date. *Id.* §§ 2.1.8, 6.1. Approved Claimants will receive their Settlement Shares from the Settlement Administrator within sixty (60) days from the Effective Date or the Claims Deadline (whichever is later). *Id.* §§ 6.2-6.3.[7]

V. Service Awards and Fee Award

Defendants, through SmileDirectClub, LLC, have agreed to pay Court-approved Service Awards to the Representative Plaintiffs and Fee Award to Class Counsel. *Id.* §§ 4.2.2-4.2.3. Class Counsel must file any Applications for a Fee Award and for Service Awards by no later than twenty-one (21) days before the Opt-Out and Objection Deadline. *Id.*

Class Counsel intends to request Service Awards of no more than $2,500.00 to each of the Representative Plaintiffs, and a Fee Award to Class Counsel of no more than 32.7% of the $11.5 million settlement cap (inclusive of all out-of-pocket litigation costs expended by Class Counsel prosecuting this litigation). The Class Notices will inform Settlement Class Members of the maximum Service Awards and Fee Award that the Representative Plaintiffs and Class Counsel intend to request. *See* Settlement Agreement, Exs. B-C.

VI. Objection and Opt-Out Rights

Any Settlement Class Member who wishes to opt out of or object to the Settlement must do so on or before the Opt-Out or Objection Deadline, which the Parties propose be set for 45 days after the Notice Date. Settlement Agreement § 2.1.35; § 8.3. Any Settlement Class Member who wishes to object must do so by the Objection Deadline and in compliance with all of the requirements set forth in Section 8.2 of the Settlement Agreement. Any request for exclusion must be made by the Opt-Out Deadline and in compliance with all of the requirements set forth in Section 8.2.2 of the Settlement Agreement. The Class Notice will contain language consistent

[7] Further information concerning the Settlement Class Notice Plan and Claims Process is set forth in Sections 5 and 6 of the Settlement Agreement.

with the provisions of Sections 8.2 and 8.2.2 of the Settlement Agreement concerning objections and requests for exclusion. *See* Settlement Agreement, Exs. B-C.

VII. Release

Upon the Court's entry of the Final Approval Order and Judgment, the Representative Plaintiffs and all Settlement Class Members who have not excluded themselves will have fully, finally, and forever released, relinquished, and discharged Defendants and the other Released Parties from the Released Claims, i.e., all claims arising from or relating to text messages and phone calls by, from, and/or on behalf of Defendants. *See* Settlement Agreement §§ 2.1.41-2.1.43, 7.

CLASS ACTION SETTLEMENT APPROVAL PROCESS

Strong judicial and public policies favor the settlement of complex class action litigation, where the inherent costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *See Quick v. Shell Oil Co.*, 404 Ill. App. 3d 277, 282 (3rd Dist. 2010); *Lebanon Chiropractic Clinic, P.C. v. Liberty Mut. Ins. Co.*, 2016 IL App (5th) 150111-U, ¶ 41; *Isby v. Bayh*, 75 F.3d 1191, 1198 (7th Cir. 1996); *see also* 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11.41 (4th ed. 2002) (collecting cases) (hereinafter *Newberg*).

Courts review proposed class action settlements using a well-established two-step process. *Newberg* § 11.25, at 38-39; *see e.g.*, *Kaufman v. Am. Express Travel Related Servs. Co.*, 264 F.R.D. 438, 447 (N.D. Ill. 2009); *GMAC Mortg. Corp. of Pa. v. Stapleton*, 236 Ill. App. 3d 486, 492 (1st Dist. 1992). The first step is a preliminary, pre-notification hearing to determine whether the proposed settlement is "within the range of possible approval." *Newberg*, § 11.25, at 38–39; *Armstrong v. Bd. of Sch. Dirs. of City of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980), *overruled on other grounds*; *see e.g.*, *Lebanon*, 2016 IL App (5th) 150111-U, ¶ 11. The preliminary approval stage is an "initial evaluation" of the fairness of the proposed settlement based on the written submissions and informal presentation from the settling parties. *Manual for Complex Litigation,* § 21.632 (4th ed. 2004). If the Court finds the settlement proposal is "within the range of possible

approval," the case proceeds to the second step in the review process: the final approval hearing. *Newberg*, § 11.25, at 38–39. This procedure safeguards the due process rights of unnamed Settlement Class Members and allows the Court to fulfill its role as the guardian of Settlement Class members' interests. 4 *Newberg* § 11.25.

Representative Plaintiffs are presently at the first step of this two-step process.

ARGUMENT

The Settlement is a fair, reasonable, and adequate resolution to this litigation, the Settlement Class satisfies each of the class certification requirements of Section 2-801, and the Notice Plan is the best practicable under the circumstances. Accordingly, the Court should (I) preliminarily approve the Settlement, (II) preliminarily certify the Settlement Class, (III) approve the proposed Notice Plan, and (IV) schedule the Final Approval Hearing.

I. The Settlement Should Be Preliminarily Approved

Section 2-801 provides that a court may approve a proposed class settlement "on a finding that it is fair, reasonable, and adequate." 735 ILCS 5/2-801; *see also* Fed. R. Civ. P. 23(e)(2); *see also Lane v. Facebook, Inc.,* 696 F.3d 811, 818 (9th Cir. 2012) ("[A] district court's only role in reviewing the substance of [a] settlement is to ensure that it is 'fair, adequate, and free of collusion.'") (citing *Hanlon v. Chrysler Corp.,*150 F.3d 1011, 1026 (9th Cir. 1998)).

In assessing the fairness, reasonableness, and adequacy of a proposed class settlement, Illinois courts consider the following factors: "(1) the strength of the case for the plaintiffs on the merits, balanced against the money or other relief offered in settlement; (2) the defendant's ability to pay; (3) the complexity, length and expense of further litigation; (4) the amount of opposition to the settlement; (5) the presence of collusion in reaching a settlement; (6) the reaction of members of the class to the settlement; (7) the opinion of competent counsel; and (8) the stage of proceedings and the amount of discovery completed." *City of Chicago v. Korshak*, 206 Ill. App. 3d 968, 972 (1st Dist. 1990); *see also Armstrong*, 616 F.2d at 314. "Although this standard and the factors used to measure it are ultimately questions for the fairness hearing that comes after a court finds that a proposed settlement is within approval range, a more summary version of the same

inquiry takes place at the preliminary phase." *Kessler v. Am. Resorts Int'l*, 2007 U.S. Dist. LEXIS 84450, at *17 (N.D. Ill. Nov. 14, 2007) (citing *Armstrong*, 616 F.2d at 314).[8]

In this case, all eight factors weigh in favor of finding the Settlement fair, reasonable, and adequate, warranting its preliminary approval.

A. The Settlement Provides Substantial Relief

The first and most important factor in evaluating the fairness of a proposed class action settlement is the strength of the plaintiff's case on the merits balanced against the relief obtained in the settlement. *See City of Chicago*, 206 Ill. App. 3d at 972; *see also Steinberg v. Sys. Software Associates, Inc.*, 306 Ill. App. 3d 157, 170 (1st Dist. 1999); *Am. Int'l Grp., Inc. et al., v. ACE INA Holdings, et al.*, Nos. 07-cv-2898, 09-cv-2026, 2012 U.S. Dist. LEXIS 25265, at *17 (N.D. Ill. Feb. 28, 2012); *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006). In analyzing this factor, courts recognize that settlement is "an amalgam of delicate balancing, gross approximations and rough justice," *Officers for Justice v. Civil Serv. Comm'n of City & Cty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982), such that "the question whether a settlement is fundamentally fair . . . is different from the question whether the settlement is perfect in the estimation of the reviewing court." *Lane,* 696 F.3d at 819.

In this case, the amount offered by the Settlement – up to $11.5 million in cash to the Settlement Class – is substantial. The Settlement also provides injunctive relief for the benefit all Settlement Class Members, even those who do not submit claims.

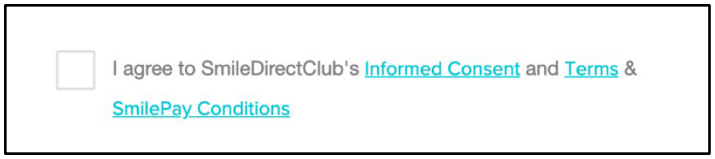
The $10 cash award provided by the Settlement compares more favorably with per-claimant recoveries in prior settlements in similar TCPA cases. *See, e.g., Goldschmidt v. Rack Room Shoes, Inc.*, No. 1:18-cv-21220-KMW (S.D. Fla. 2019) (approving TCPA class action settlement providing up to $5 cash and a $10 voucher per claiming settlement class member); *Wijesinha v. Susan B. Anthony List Inc*., Case No. 1:18-cv-22880-JEM (S.D. Fla. 2019) (approving

[8] Because Section 2-801 is modeled after Federal Rule of Civil Procedure 23, "federal decisions interpreting Rule 23 are persuasive authority with regard to questions of class certification in Illinois." *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill. 2d 100, 125 (2005).

TCPA class action settlement providing $5 per claiming settlement class member); *Poirier v. Cubamax Travel, Inc.*, Case No. 1:18-cv-23240-CMA (S.D. Fla. 2019) (approving TCPA class action settlement providing $7.00 per claiming settlement class member, less notice and administration costs, attorneys' fees and expenses); *Soukhaphonh v. Hot Topic, Inc.*, No. 16-cv-5124-DMG, ECF Nos. 253 & 244 at 2 (C.D. Cal. July 26, 2019) (approving TCPA class action settlement providing $2.44 to $6.17 per claiming settlement class member); *In re Jiffy Lube Int'l, Inc. Text Spam Litig.*, No. 3:11-md-02261 (S.D. Cal. Feb. 20, 2013) (approving TCPA class action settlement providing $12.97 cash or $17.29 voucher to each settlement class member); *Manouchehri v. Styles for Less, Inc.*, Case No. 14cv2521 NLS, 2016 WL 3387473, at *2, 5 (S.D. Cal. June 20, 2016) (approving TCPA class action settlement providing approximately $10.00 cash to each settlement class member). And indeed, approved settlements in similar cases do not even provide for cash recovery. *See, e.g.*, *Clark v. Payless ShoeSource, Inc.*, No. 2:09-cv-00915, ECF No. 61, at 7, 72 (W.D. Wash. May 22, 2012) ($10 merchandise certificate per claimant).

The reasonableness of the relief provided by the Settlement is further underscored by the many substantial risks of total non-recovery that continued litigation would have posed absent the Settlement. *See Smith v. CRST Van Expedited, Inc.*, No. 10-cv-1116, 2013 WL 163293, at *3 (S.D. Cal. Jan. 14, 2013) (where "the settlement avoids the risks of extreme results on either end, *i.e.,* complete or no recovery . . . it is plainly reasonable for the parties at this stage to find that the actual recovery realized and risks avoided here outweigh the opportunity to pursue potentially more favorable results through full adjudication," such that "[t]hese factors support approval").

First, Plaintiffs were at substantial risk that the court would grant Defendants' motion to compel arbitration. As detailed in Defendants' motion to compel arbitration, class members, including Plaintiffs Lucas and Tasin, were required to affirmatively check a box to agree to Defendants' "Informed Consent Agreement:"



Hedin Decl. ¶ 23. Included within that was an arbitration clause and an express class action waiver. *Id.* Thus, if Defendants prevailed on their motion to compel arbitration, the case could not proceed as a class action and Plaintiffs would be relegated to seeking relief in arbitration in only their individual capacity. This substantial risk alone supports preliminary approval of the settlement.

Second, Plaintiffs were also at risk that their claims would be subject to a consent defense. Through their highly qualified and experienced counsel, Defendants indicated that had the case not settled or been sent to arbitration, they would have moved for summary judgment arguing that by voluntarily providing their telephone numbers in this context, Plaintiffs can be deemed to have consented. Hedin Decl ¶ 40. Additionally, Plaintiffs may also have be deemed to have consented pursuant to the same Informed Consent referenced in connection with the motion to compel arbitration. *Id*.

Third, and perhaps most important, Plaintiffs were at substantial risk of losing the case based on the applicable definition of an ATDS. As aforementioned, the definition of ATDS is currently pending before the Supreme Court in *Duguid*. Hedin Decl. ¶ 41. There is currently a three-to-three Circuit split amongst the Circuit Court of Appeals on the issue. *Compare Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 460 (7th Cir. 2020); *Glasser v. Hilton Grand Vacations Co., LLC*, 948 F.3d 1301, 1312 (11th Cir. 2020); *Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 121 (3d Cir. 2018) (all holding that an ATDS is solely equipment with the present capacity to store or produce numbers using a random or sequential generator and to dial such numbers), *with Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1043 (9th Cir. 2018); *Duran v. La Boom Disco, Inc.*, 955 F.3d 279, 287 (2d Cir. 2020); *Allan v. Pennsylvania Higher Educ. Assistance Agency*, 968 F.3d 567, 576 (6th Cir. 2020) (all holding that an ATDS including equipment that merely dials from lists of numbers). Oral argument was held in December 2020, and a decision is expected this Term. If the Supreme Court adopts the narrow definition of the Seventh, Eleventh, and Third Circuits, Plaintiffs' case would be severely weakened, if not dead altogether. Indeed, Plaintiffs' counsel are unaware of a single other TCPA case that has settled on a class-wide basis since the Supreme Court granted certiorari in *Duguid*, other than cases that also involved pre-recorded calls (which were

not implicated by Facebook's appeal). This appears to be the only such settlement.

Fourth, the Parties disagree whether the Settlement Class could be certified on a contested motion for class certification. During the litigation and the Parties' settlement discussions, Defendants steadfastly maintained, inter alia, that individual issues among Settlement Class members would predominate and preclude class certification. For example, Defendants indicated that it would have opposed a contested motion for class certification by arguing that Settlement Class Members cannot be reliably identified in its records, and that variations across the content and context of its text messages present certain individualized issues among Settlement Class Members. While Plaintiffs disagree and believe the Settlement Class is well-suited for certification, including on a contested basis, the federal district court previously presiding over this litigation could easily have disagreed and denied class certification on any number of grounds.

Fifth, even if Representative Plaintiffs were to win class certification, there would remain a risk of losing a jury trial. And even assuming they prevailed at trial, any judgment or order granting class certification could be reversed on appeal and, even if they were not, any class-wide award could be devastating to Defendants. *See In re Capital One*, 80 F. Supp. 3d at 790. A pyrrhic victory for the Settlement Class at trial would be in no one's interest.

Finally, even assuming Defendants could satisfy a class-wide judgment in this case – which, given the estimated size of the Settlement Class, would amount to at least billions of dollars in the aggregate, measured at $500.00 (or $1,500.00 if trebled) per violation – any such judgment would likely be reduced on due process grounds. In *Golan v. Veritas Entm't, LLC*, No. 4:14CV00069 ERW, 2017 WL 3923162 (E.D. Mo. Sept. 7, 2017), for example, a class of TCPA plaintiffs won a judgment at trial for $1.6 billion ($500.00 for each of approximately 3.2 million violations), only to have the trial court remit the award to $32 million – or approximately $10.00 per violation – on the grounds that the $1.6 billion awarded by the jury was so annihilative as to violate the Due Process clause of the U.S. Constitution. *See Golan*, 2017 WL 3923162, at *2-3. The trial court's decision in *Golan* was recently affirmed, in its entirety, by the U.S. Court of Appeals for the Eight Circuit. *Golan v. FreeEats.com, Inc*., No. 17-3156, 2019 WL 3118582 (8th

Cir. July 16, 2019). In this case, each claiming Settlement Class Member will receive $10 – the same amount that class members ultimately recovered in *Golan*, after years of uncertain litigation and a total victory at trial. The possibility of the same outcome here, even if the Settlement Class were to prevail at trial years from now, further underscores the reasonableness of the immediate, certain, and meaningful relief provided by the Settlement.

Accordingly, the first and most important factor weighs heavily in favor of granting preliminary approval of the Settlement. *See In re Tableware Antitrust Litig*., 484 F. Supp. 2d 1078, 1079-80 (N.D. Cal. 2007) (preliminarily approval warranted where a settlement is free of "obvious deficiencies" and within range of approval).

B. A Class-Wide Judgment Would Be Devastating to Defendants

The second factor considers Defendants' ability to satisfy a judgment at trial. *See City of Chicago*, 206 Ill. App. 3d at 972. Although Defendants operate a profitable business, very few businesses could satisfy a judgment for billions of dollars — which, in Plaintiffs' view, is the amount potentially at stake on a class-wide basis at trial in this case. Accordingly, the second factor weighs in favor of granting preliminary approval.

C. Continued Litigation Would Be Complex, Costly, and Lengthy

The third factor asks whether the settlement allows the class to avoid the inherent risk, complexity, time, and cost associated with continued litigation. *See City of Chicago*, 206 Ill. App. 3d at 972; *see also Nat'l Rural Telecomm's Coop. v. DIRECTV, Inc*., 221 F.R.D. 523, 526 (C.D. Cal. 2004) ("The Court shall consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation.").

This would be lengthy and very expensive litigation if it were to continue, involving extensive motion practice, including, inter alia, a motion for class certification (and possibly a motion for decertification), motions for summary judgment, and various pretrial motions, as well as the retention of additional experts, preparation of expert reports, and conducting expert depositions. *See Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977) ("[C]lass action suits have

a well-deserved reputation as being most complex."). The case would probably not go to trial for over a year. And even if Settlement Class Members recovered a judgment at trial greater than the up to $11.5 million in cash that Defendants have agreed to make available through SmileDirectClub, LLC under the Settlement, post-trial motions and the appellate process would deprive them of any recovery for years, and possibly forever in the event of a reversal.

Rather than embarking on years of protracted and uncertain litigation, Plaintiffs and their counsel negotiated a Settlement that provides immediate, certain, and *meaningful* relief to all Settlement Class members. *See DIRECTV, Inc*., 221 F.R.D. at 526. Accordingly, the third factor weighs in favor of finding the Settlement fair, reasonable and adequate. *See City of Chicago*, 206 Ill. App. 3d at 972; *see also Borcea v. Carnival Corp*., 238 F.R.D. 664, 674 (S.D. Fla. 2006) (noting "[i]t has been held proper to take the bird in the hand instead of a prospective flock in the bush").

D. There is Presently no Opposition to the Settlement

The fourth and sixth factors consider the amount of opposition to the Settlement and the reaction of the Settlement Class to the Settlement. *See City of Chicago*, 206 Ill. App. 3d at 972.

Because the Representative Plaintiffs are presently at the preliminary approval stage, Notice has not yet been distributed to the Settlement Class and the Settlement Class has accordingly not yet had an opportunity to voice any opposition to (or support for) the Settlement. Thus, Representative Plaintiffs will address factors four and six in detail in their motion for final approval of the Settlement, after Notice has been disseminated and the Objection and Opt-Out Deadlines have passed. Nonetheless, the Representative Plaintiffs and Class Counsel strongly support the Settlement, which they believe is fair, reasonable, and adequate and in the best interest of the Settlement Class. *See infra* Section F (opinions of Class Counsel on Settlement's fairness).

Accordingly, even at this preliminary stage of the approval process, the fourth and sixth factors weigh in favor of finding the Settlement fair, reasonable, and adequate.

E. The Settlement Was Negotiated Free of any Collusion

The fifth factor considers the presence of any collusion by the Parties in reaching the proposed settlement. *City of Chicago*, 206 Ill. App. 3d at 972.

Where a proposed class settlement is the result of contentious, arm's-length negotiations before an experienced mediator, the settlement may be presumed fair and reasonable and entered into without any form collusion. *See Newberg*, § 11.42; *see also Coy v. CCN Managed Care, Inc.*, 2011 IL App (5th) 100068-U, ¶ 31 (no collusion where settlement agreement was reached as a result of "an arm's-length negotiation entered into after years of litigation and discovery, resulting in a settlement with the aid of an experienced mediator"); *Shaun Fauley, Sabon, Inc. v. Metro. Life Ins. Co.*, 2016 IL App (2d) 150236, ¶ 21 (approval warranted where there was "no evidence that the proposed settlement was not the product of 'good faith, arm's-length negotiations'").

Such is the case here. The Settlement was achieved after a year of contentious litigation, robust pre-filing and post-filing investigations, and arm's-length negotiations overseen by Judge Andersen. Hedin Decl. ¶¶ 11-32. Even after reaching an agreement in principle, the Parties engaged in further back-and-forth negotiations for several more months regarding confirmatory discovery, unresolved terms of the Settlement, the form of the Class Notice and attendant documents, and the appearance and functionality of the web-based form for submitting Claim Forms on the Settlement Website. *See id.* ¶¶ 32-37.

Because the Settlement is thus the product of contentious, lengthy, and collusion-free negotiations between the Parties, Hedin Decl. ¶¶ 25-32, 39, the fifth factor weighs in favor of finding the Settlement fair, reasonable and adequate.

F. Competent Counsel Strongly Endorse the Settlement

The seventh factor is the opinion of competent counsel as to the fairness, reasonableness, and adequacy of the proposed settlement. *See City of Chicago*, 206 Ill. App. 3d at 972. Courts rely on affidavits in assessing proposed class counsel's qualifications under this factor. *Id.*

Plaintiff's counsel and proposed Class Counsel, Hedin Hall LLP and Bursor & Fisher, P.A. have extensive experience in complex class action litigation, including serving as class counsel in similar TCPA class actions. *See* Hedin Decl. ¶¶ 3-9 & Ex. 2 (Hedin Hall LLP firm resume); Declaration of Philip L. Fraietta ("Fraietta Decl.") ¶¶ 3-8 & Ex. 1 (Bursor & Fisher, P.A. firm resume).

Plaintiffs' counsel strongly endorse the Settlement, which they believe is in the best interest of the Settlement Class. *See* Hedin Decl. ¶¶40-41; Fraietta Decl. ¶ 9. As explained by Plaintiffs' counsel, due to the defenses that Defendants had raised – and the resources that Defendants had committed to defending the case through trial and appeal – numerous risks of total non-recovery would loom over this case absent the Settlement. *See* Hedin Decl. ¶¶ 40-41. In light of the substantial benefits provided by the Settlement – including an immediate payment from the up to $11.5 million settlement to each Settlement Class Member who submits a simple Claim Form, without the need to await for the litigation and subsequent appeals to run their course – Class Counsel consider the Settlement an excellent outcome for the Settlement Class. *See Id.*; Fraietta Decl. ¶ 9.

Accordingly, the seventh factor weighs in favor of finding the Settlement fair, reasonable and adequate. *See GMAC*, 236 Ill. App. 3d at 497 (experienced and competent counsel's support for a proposed class settlement weighs in favor of approving the settlement); *Bellinghausen v. Tractor Supply Co*., 306 F.R.D. 245, 257 (N.D. Cal. 2015) ("The trial court is entitled to, and should, rely upon the judgment of experienced counsel for the parties."); *see also, e.g., Smith*, 2013 WL 163293, at *3 (finding "class counsel's endorsement weighs in favor of final approval" given counsel's "experience and understanding of the strengths and weaknesses of cases such as this").

G. The Settlement is the Product of Extensive Litigation and Discovery

The eighth and final factor considers the stage of the proceedings and the amount of discovery that has been completed at the time the settlement is reached. *City of Chicago*, 206 Ill. App. 3d at 972; *Lane,* 696 F.3d at 819.

Prior to commencing this litigation, Plaintiffs' counsel conducted a wide-ranging investigation into every aspect of the case. *See* Hedin Decl. ¶ 11. During the litigation, the Parties collectively prepared and filed multiple complaints, briefing on motions, and comprehensive pre-mediation briefs, among numerous other materials. *See generally* ¶¶ 13-31. The Parties engaged in informal discovery over the course of several months prior to entering into the proposed Settlement Agreement. *See id.* ¶¶ 26-29. Armed with this information, Plaintiffs and their counsel

had "a clear view of the strengths and weaknesses" of the case, *see In re Warner Commc'ns Sec. Litig*., 618 F. Supp. 735, 745 (S.D.N.Y. 1985), *aff'd* 798 F.2d 35 (2d Cir. 1986), and were in a strong position to negotiate a fair, reasonable, and adequate settlement on behalf of the Settlement Class, at mediation and beyond, *see* Hedin Decl. ¶ 28.

Settlement negotiations were also hard fought. The parties engaged in over ten hours of contentious, arm's-length negotiations before Judge Andersen in Chicago, Illinois. Hedin Decl. ¶ 30. And the Parties did not agree to the principal terms of the proposed Settlement until a few weeks after the mediation session, and in connection with a mediator's proposal by Judge Andersen. *Id.* ¶ 31.

Negotiations over the remaining terms continued for months, and the final Agreement was not executed until Class Counsel had obtained further discovery to confirm, inter alia, the size and scope of the Settlement Class. Hedin Decl. ¶35. Where, as here, a proposed settlement is the product of arm's-length negotiations between experienced counsel after significant discovery has occurred, the Court may presume the settlement to be fair, adequate, and reasonable. *See Rodriguez v. W. Publishing*, 563 F.3d 948, 965 (9th Cir. 2009) ("We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution."); *Newberg* § 11.41 (proposed class settlement may be presumed fair if it "is the product of arm's length negotiations, sufficient discovery has been taken to allow the parties and the court to act intelligently, and counsel involved are competent and experienced.").

Accordingly, the eighth and final factor weighs in favor of finding the Settlement fair, reasonable and adequate, warranting its preliminary approval.

II. The Settlement Class Should be Preliminarily Certified

The Court must next preliminarily certify the Settlement Class for settlement purposes. *Manual for Complex Litigation* (Fourth) § 21.632; *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Preliminary certification will allow the Settlement Class to receive notice of the Settlement and its terms, including the right of Settlement Class Members to submit a Claim Form

and recover a Settlement Share upon final approval, to be heard on the Settlement's fairness at the Final Approval Hearing, and to opt out of or object to the Settlement.

A class may be certified under Section 2-801 of the Illinois Code of Civil Procedure if the following "prerequisites" are satisfied: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members; (3) the representative parties will fairly and adequately protect the interest of the class; and (4) the class action is an appropriate method for the fair and efficient adjudication of the controversy. 735 ILCS 5/2-801; *CE Design Ltd. v. C & T Pizza, Inc.*, 2015 IL App (1st) 131465, ¶ 10, *reh'g denied* (June 4, 2015), *appeal denied*, 39 N.E.3d 1001 (Ill. 2015); *Travel 100 Grp., Inc. v. Empire Cooler Serv. Inc.*, No. 03-CH-14510, 2004 WL 3105679, at *2 (Ill. Cir. Ct. Oct. 19, 2004).

The Settlement Class is defined in the Settlement Agreement and in the section above titled "Terms of the Settlement," Part I., *supra*, and satisfies all prerequisites to certification under Section 801-2, as explained below.

A. The Settlement Class is so Numerous that Joinder is Impracticable

The first prerequisite to class certification is that "the class is so numerous that joinder of all members is impracticable." 735 ILCS 5/2-801(1). "Although there is no bright-line test for numerosity, a class of forty is generally sufficient[.]" *Hinman v. M & M Rental Center, Inc.*, 545 F. Supp. 2d 802, 805–06 (N.D. Ill. 2008).

The Settlement Class includes individuals dispersed throughout the United States. Given the scope of Defendants' text-message marketing operation and the number of records reflecting potential Settlement Class Members in Defendants' database, it is estimated that the Settlement Class is comprised of between 1.5 and 2 million members (*see* Hedin Decl. ¶ 28), rendering joinder of all Settlement Class Members obviously impracticable.

Accordingly, the numerosity requirement is satisfied. *See, e.g., Kulins v. Malco, A Microdot Co., Inc*., 121 Ill. App. 3d 520, 530 (1st Dist. 1984) (47 class members sufficient to

satisfy numerosity in Cook County, Illinois); *Travel 100 Grp.*, 2004 WL 3105679, at *2 (3,000 class members sufficiently numerous).

B. Common Questions of Law and Fact Predominate

Predominance of common questions, the second prerequisite to class certification, is met where there are "questions of fact or law common to the class" and those questions "predominate over any questions affecting only individual members." 735 ILCS 5/2-801(2). Such common questions of law or fact generally exist where the members of a proposed class have been aggrieved by the same or similar misconduct. *See Walczak v. Onyx Acceptance Corp.*, 365 Ill. App. 3d 664, 673–74 (2nd Dist. 2006); *Steinberg v. Chicago Med. Sch.*, 69 Ill. 2d 320, 340–42 (1977); *Ellerbrake v. Campbell-Hausfeld*, No. 01-L-540, 2003 WL 23409813, at *3 (Ill. Cir. Ct. July 2, 2003); *see also Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556 (2011).

In this case, it is Plaintiffs' position that all members of the proposed Class share a common statutory TCPA claim arising out of the same uniform conduct – the use of the same technology to transmit the same type of promotional text messages to persons who purchased Defendants goods and services – and that this uniform course of conduct presents numerous issues of law and fact common to the Settlement Class that predominate over any issues unique to individual Settlement Class Members, including whether the texts Defendants sent to Settlement Class members were "advertisements" within the meaning of the TCPA, whether the texts were transmitted to Settlement Class Members without their "express written consent," whether the texts were transmitted using an "ATDS," and whether that conduct violated the TCPA.

Accordingly, the commonality and predominance requirements are satisfied. *See* 735 ILCS 5/2-801(2); *Golon v. Ohio Savs. Bank*, No. 98-cv-7430, 1999 U.S. Dist. LEXIS 16452, at *13 (N.D. Ill. Oct. 15, 1999); *see also, e.g.*, *JT's Frames, Inc. v. Sunhill NIC Co.*, 2012 IL App (2d) 110676-U, at ¶ 23; *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 684 (7th Cir. 2013) (class certification of TCPA claims is "normal" because the main questions in such cases are "common to all class members"); *CE Design Ltd.*, 2015 IL App (1st) 131465, ¶¶ 13–14; *Travel 100 Grp.*,

2004 WL 3105679, at *3; *Sabon, Inc.*, 2016 IL App (2d) 150236, ¶ 7; *G.M. Sign, Inc. v. Finish Thompson, Inc*., No. 07 C 5953, 2009 U.S. Dist. LEXIS 73869, *12 (N.D. Ill. Aug. 20, 2009).

C. Plaintiffs Adequately Represent the Settlement Class

The third prerequisite to class certification under Section 2-801 is that "[t]he representative parties will fairly and adequately protect the interest of the class." 735 ILCS 5/2-801(3). "The purpose of the adequate representation requirement is to ensure that all class members will receive proper, efficient, and appropriate protection of their interests in the presentation of the claim." *Walczak*, 365 Ill. App. 3d at 678 (citing *P.J.'s Concrete Pumping Service, Inc. v. Nextel West Corp.*, 345 Ill. App. 3d 992, 1004 (2nd Dist. 2004)); *Purcell & Wardrope Chtd. v. Hertz Corp*., 175 Ill. App. 3d 1069, 1078 (1st Dist. 1988). The class representative's interests must be generally aligned with those of the class members, and class counsel must be "qualified, experienced and generally able to conduct the proposed litigation." *See Miner v. Gillette Co.*, 87 Ill. 2d 7, 14 (1981); *CE Design Ltd.*, 2015 IL App (1st) 131465, ¶ 16 (citing *Miner*, 87 Ill. 2d at 56)).

Both prongs of the adequacy requirement are satisfied in this case. First, Plaintiffs' interests in the litigation are aligned with, and not antagonistic to, those of the Settlement Class. Plaintiffs challenge the same uniform course of conduct that each Settlement Class Member challenges and seek the same monetary relief that is sought by each Settlement Class Member. Plaintiffs have retained competent counsel, provided substantial assistance to their counsel in advance of and during the litigation, vigorously prosecuted the case on behalf of the Settlement Class, and assisted their counsel in reaching the proposed Settlement. *See generally* Hedin Decl. ¶ 43. All of the Representative Plaintiffs strongly support the Settlement and believe that it constitutes a fair, reasonable, and adequate result for the Settlement Class. *See id.* Second, Plaintiffs' counsel have extensive experience in complex class action litigation, including from serving as class counsel in several prior similar cases involving the alleged unsolicited transmission of advertising and marketing text messages in violation of the TCPA. *See* Hedin Decl. ¶¶ 6-7; Fraietta Decl. ¶¶5-6. Accordingly, the Representative Plaintiffs and their counsel are adequate representatives of the Settlement Class. *See, e.g.*, *CE Design v. Beaty Const., Inc.*, No. 07-cv-3340, 2009 U.S. Dist.

LEXIS 5842, *13 (N.D. Ill. Jan. 26, 2009); *CE Design Ltd.*, 2015 IL App (1st) 131465, ¶ 17; *Travel 100 Grp.*, 2004 WL 3105679, at *7.

D. A Class Action Promotes Fairness and Efficiency

The final prerequisite to class certification is that "the class action is an appropriate method for the fair and efficient adjudication of the controversy." 735 ILCS 5/2-801(4). "In applying this prerequisite, a court considers whether a class action: (1) can best secure the economies of time, effort and expense, and promote uniformity; or (2) accomplish the other ends of equity and justice that class actions seek to obtain." *Gordon v. Boden*, 224 Ill. App. 3d 195, 203 (1st Dist. 1991).

As a threshold matter, because the proposed Settlement satisfies the numerosity, commonality, and adequacy of representation requirements, discussed above, it is "evident" that a class action is the appropriate method for the fair and efficient adjudication of this controversy. *See Gordon*, 224 Ill. App. 3d at 203 (explaining that a "holding that the first three prerequisites of section 2-801 are established makes it evident that the fourth requirement is fulfilled"); *Purcell & Wardrope Chtd*., 175 Ill. App. 3d at 1079.

Moreover, the U.S. Supreme Court has explained that a class action is the proper method for resolving a large-scale claim if the action will "achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem*, 521 U.S. at 615. This is especially true in TCPA actions, "where the costs of litigation are high, the likely recovery is limited," and individuals are unlikely to prosecute individual claims absent the cost-sharing efficiencies of a class action. *CE Design Ltd.*, 2015 IL App (1st) 131465, ¶¶ 27, 28; *see also Gordon*, 224 Ill. App. 3d at 203-04 (noting that a "controlling factor in many cases is that the class action is the only practical means for class members to receive redress – particularly where the claims are small"); *Eshaghi v. Hanley Dawson Cadillac Co.*, 214 Ill. App. 3d 995, 1004 (1st Dist.1991) ("In a large and impersonal society, class actions are often the last barricade of consumer protection."). And this is precisely the case here. Absent the Settlement, nearly all Settlement Class Members would find the cost of prosecuting individual TCPA claims prohibitive

because the statutory damages available under the TCPA are small in comparison to the costs of litigation.[9] By contrast, resolution of the Settlement Class Members' claims in a single proceeding promotes judicial efficiency and economies of scale and avoids inconsistent decisions. *See Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 155 (1982).

Accordingly, the final requirement for class certification is satisfied and the Court should preliminarily certify the Settlement Class.

III. The Notice Plan Should be Approved

Upon preliminarily certifying the Settlement Class, the Court may provide notice of the proposed Settlement to the Settlement Class pursuant to Section 2-803, *see* 735 ILCS 5/2-803; *Cavoto v. Chicago Nat. League Ball Club, Inc.*, No. 1-03-3749, 2006 WL 2291181, at *15 (Ill. App. 1st Dist. 2006), and must provide notice to the Settlement Class to the extent necessary to comport with the constitutional requirements of due process. *Cavoto*, 2006 WL 2291181, at *15 (citing *Frank v. Tchr's Ins. & Annuity Ass'n. of Am.*, 71 Ill.2d 583, 593 (1978)); *see also* Fed. R. Civ. P. 23(d)(2) (advisory committee note). The Due Process clause to the U.S. Constitution mandates providing the "best practicable" notice to the Settlement Class, *Sabon, Inc.*, 2016 IL App (2d) 150236, ¶ 36 (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)) – which means notice that 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).

In this case, the Settlement Agreement contemplates a multi-part Notice Plan designed to reach as many Settlement Class Members as possible. *See* Settlement Agreement § 5. First, the Class Notice will be provided directly by e-mail to all potential Settlement Class Members. *See*

[9] Because the Court is called upon to consider the propriety of certifying the Settlement Class in the settlement context, the Court need not address issues of manageability relating to trial. *See Amchem*, 521 U.S. at 620 (when "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"). By that same token, "the legal and factual questions" regarding certification of the proposed Settlement Class should not be judged by the same criteria as a proposed class on a contested motion for class certification. *See GMAC*, 236 Ill. App. 3d at 493.

Settlement Agreement § 5.5.4. The Settlement Administrator will also establish a Settlement Website where Claim Forms may be submitted electronically on a simple web-based form, where inquiries may be sent to the Settlement Administrator, and where copies of important court documents, including the Settlement Agreement, Class Notices, the Court's Orders, and the Applications for Fee Award and for Service Awards may be downloaded. *See* Settlement Agreement § 5.4. The proposed Claim Form and Class Notices (*see* Settlement Agreement, Exs. A-C), and the methods by which the Class Notices will be disseminated, readily comport with Due Process and the procedural requisites of Section 2-803.

Accordingly, Plaintiffs respectfully request that the Court, as set forth in the proposed order accompanying this Motion, find that the notice provided by the Settlement Class Notice Program: (i) is the best practicable notice; (ii) is reasonably calculated, under the circumstances, to apprise the Settlement Class of the pendency of the Action and of their right to object to or to exclude themselves from the proposed Settlement; (iii) constitutes due, adequate and sufficient notice to all Persons entitled to receive notice; and (iv) meets all requirements of applicable law.

IV. The Court Should Set a Final Approval Schedule

The last step in the approval process, after completion of the Notice Plan, is the Final Approval Hearing, where the Court will consider the fairness, reasonableness, and adequacy of the Settlement and the requested Fee and Service Awards. Plaintiffs respectfully request that the Court schedule the Final Approval Hearing and the other Settlement-related deadlines consistent with the following timetable (which assumes a Preliminary Approval Date of February 4, 2021 for the dates proposed in brackets):

1. **Notice Date:** Direct notice shall be sent to all Settlement Class Members, and the Settlement Website shall be created and operational, within thirty (30) days from the Preliminary Approval Date [Proposed date: March 6, 2021];

2. **Submission of Papers in Support of Attorneys' Fees and Expenses:** must be filed no later than twenty (21) days before the Opt-Out/Objection Deadline [Proposed date: March 30, 2021];

3. **Opt-Out / Objection Deadline**: any requests to opt-out or object must be submitted/postmarked no later than forty-five (45) days after the Notice Date [Proposed date: April 20, 2021];

4. **Submission of Papers in Support of Final Approval of Settlement**: must be filed no later than ten (10) days prior to the date of the Final Approval hearing [Proposed date: April 23, 2021];

5. **Final Approval Hearing**: will occur approximately ninety (90) days after the Preliminary Approval Date [Proposed date: May 5, 2021]; and

6. **Claims Deadline:** Claim forms must be postmarked or submitted to the Settlement Administrator within one-hundred (100) days after the Notice Date [Proposed date: June 14, 2021].

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant this Motion and enter an order (in the form of the proposed order attached hereto) that: (1) preliminarily approves the Settlement; (2) preliminarily certifies the Settlement Class; (3) approves the Class Notice, appoints KCC as Settlement Administrator, and orders that Notice be effectuated by KCC; (4) establishes a procedure and timetable, consistent with the procedure set forth in the Settlement Agreement, for Settlement Class members to object to the Settlement, exclude themselves from the Settlement Class, and file Claims in the Settlement; and (5) sets the Final Fairness Hearing.

Dated: January 27, 2021

Respectfully submitted,

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By: /s/ J. Dominick Larry

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that he caused a true and correct copy of the foregoing to be served upon the following parties by email on the date indicated below:

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Dated: January 27, 2021

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