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

REPRESENTATIVE PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT & INCORPORATED MEMORANDUM OF LAW

Dated: May 7, 2021

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Pursuant to the Court's Orders dated February 4, 2021 and March 3, 2021, Representative Plaintiffs Stacey Benbow, Teresa Herbert, Dennis Philip, Dawaun Lucas, David Dominguez Hooper, Mete Tasin, and Reejaunte Smith ("Representative Plaintiffs") respectfully move for final 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] Defendants do not oppose the relief sought herein.

INTRODUCTION

In this consumer class action, the Representative Plaintiffs alleged that Defendants SmileDirectClub, Inc. and SmileDirectClub, LLC (collectively, "SmileDirectClub") sent text-message advertisements to their cellular devices and those of numerous other similarly-situated consumers using an "automatic telephone dialing system," ("ATDS"), without the requisite consent, in violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227.

After over a year of litigation, involving multiple cases proceeding first in federal court and now in state court, the Parties reached a comprehensive class-wide resolution to this Action, which the Court preliminarily approved in its order dated February 4, 2021. The preliminarily approved Settlement establishes an all-cash, settlement fund of up to $11,500,000.00 that Defendants, through SmileDirectClub, LLC, have agreed to make available for the benefit of the Settlement Class; the settlement fund will be used to pay all cash-awards to Settlement Class Members, Settlement Administration Costs, Service Awards to the Representative Plaintiffs, and a Fee Award to Class Counsel. The Settlement also provides meaningful injunctive relief to the Settlement Class, requiring SmileDirectClub to institute TCPA awareness and oversight procedures for marketing personnel at the company as a means of preventing future transmissions

[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.

of text messages via an ATDS absent the requisite consent.

Notably, this is the only TCPA autodialing-restriction case in the country to have settled class-wide after the Supreme Court granted certiorari in *Facebook Inc. v. Duguid,* 141 S. Ct. 1163, 2021 WL 1215717 (U.S. Apr. 1, 2021). That is not surprising: after certiorari was granted in *Facebook*, TCPA defendants nationwide recognized that a victory for the appellant on the question the Supreme Court had agreed to decide – namely, whether dialing technology must randomly or sequentially generate or store telephone numbers in order to constitute an "automatic telephone dialing system" covered by the statute, or whether merely dialing telephone numbers from lists would suffice – would absolve nearly all of them from potential liability under the TCPA. And in fact, just last month the Supreme Court issued a unanimous decision holding that "[t]o qualify as an 'automatic telephone dialing system,' a device must have the capacity either to store a telephone number using a random or sequential generator or to produce a telephone number using a random or sequential number generator." *Facebook Inc.*, 2021 WL 1215717, at *1. In so ruling, the Supreme Court rejected the statutory interpretation, advanced by the Plaintiffs in this case, that dialing technology constitutes an ATDS if it "receive[s] and store[s] telephone numbers and then automatically dial[s] such numbers." (Compl. ¶ 44.) Thus, had Class Counsel not settled this case when it did, Settlement Class Members would be unable to establish SmileDirectClub's liability under the TCPA and unable to recover any relief whatsoever.

Moreover, even in the unlikely event that Settlement Class Members could establish that SmileDirectClub was utilizing an ATDS post *Facebook*, their claims may have been sent to individual arbitration based on the arbitration agreement included in SmileDirectClub's terms of service. Or worse, the court might well have held that Settlement Class Members provided their "express written consent" to receive the text messages at issue. SmileDirectClub had raised both

arguments at the time of settlement, and an adverse decision on either one would have left the class without any recovery. Simply put, the Settlement Class faced several significant risks of total non-recovery in this litigation, both at the outset and when it settled.

The Settlement's Notice Plan commenced on March 20, 2021 and Notice was disseminated to the approximately 1.8 million potential Settlement Class Members. To date, over 22,000 Settlement Class Members have already submitted claims and more continue to submit claims each day.[2] Only seven Settlement Class Members filed requests for exclusion from the Settlement, and zero Settlement Class Members objected to the Settlement.[3]

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

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[2] Settlement Class Members have until June 28, 2021 to submit claims. In addition to the Class Notice plan set forth in the Settlement Agreement, Class Counsel has also paid the Settlement Administrator to send reminder e-mails to all Settlement Class Members without gmail.com email accounts, and those with gmail.com accounts will be sent reminder emails on May 7, 2021; Class Counsel believes that a significant number of the initial Class Notice emails were diverted into gmail.com users' "spam" folders, and is presently working with Google, LLC to ensure that Settlement Class Members who have gmail.com accounts receive the Class Notice in their "inbox" rather than their "spam" folder when the reminder emails are sent. Class Counsel has also paid the Settlement Administrator to send postcards to the approximately 100,000 Settlement Class members who were unable to receive the email notice; these postcards notify Settlement Class Members of the Settlement and advise them of their rights under it. Finally, Class Counsel has also recently provided the Class List to a marketing firm retained to disseminate postings on Facebook about the Settlement (and which direct to the Settlement Website when clicked) directly to Settlement Class Members on Facebook; those Facebook ads will begin to be displayed this week to Settlement Class Members and will continue to be displayed through the Claims Deadline.

[3] The Parties received a purported objection to the Settlement from Mr. Chad Watson. *See* Geraci Decl., Ex. F. However, a cursory review of Mr. Watson's "objection" indicates that it was intended to be a request for exclusion. Mr. Watson simply states, "I object to this settlement as I have never received any texts that have included advertising or telemarking, inside of nor outside of the dates between July 7, 2016 and February 4, 2021." Mr. Watson provides no legal bases for his "objection." In any event, because Mr. Watson did not receive any text messages from SDC during the pertinent time period, Mr. Watson is not a Settlement Class Member, will not be bound by any judgment in this action, and thus has no basis on which to object.

to meaningfully assess the strengths and weaknesses of the Settlement Class's claims and the risks posed by continued litigation, and to negotiate a resolution on behalf 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 grant final approval to the Settlement and approve their unopposed request for attorney's fees, expenses, Service Awards, and *cy pres* awards.

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). 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 "express written consent." 47 U.S.C. § 227(b)(1)(A)(iii).

BACKGROUND

I. NATURE OF THE ACTION[4]

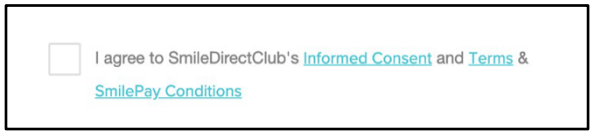
Defendants own and operate an oral care company that created the first medtech platform for the delivery of orthodontic care. Among other products and services, Defendants provide dental practices and their affiliated dentists and orthodontists with dental support organization services, including the 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-

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

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. (*See, e.g., 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 their 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 that they did not use an ATDS and that the checkbox shown 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 texts in question and whether a consumer, by checking the box shown above, provided "express written consent" within the meaning of the TCPA and/or agreed to arbitrate his or her claims.

II. PRE-FILING INVESTIGATION

Class 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. ¶¶ 11-12). 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.[5]

(Hedin Decl. ¶ 11.)

As a result of this thorough pre-filing investigation, Class 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

[5] *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).

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 messages via an ATDS to him and numerous other consumers. (Hedin Decl. ¶¶ 13-14.)

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. (Hedin Decl. ¶ 17 (citing *Philip*, ECF No. 20).). On June 17, 2020, SmileDirectClub, Inc. filed a reply to the motion. (Hedin Decl. ¶ 20 (citing *Philip*, ECF No. 22).).

On July 8, 2020, Plaintiffs Lucas, Dominguez Hooper, Tasin, and Smith filed a complaint in the U.S. District Court for the Central District of California, alleging class-wide claims for violation of the TCPA against Defendant. (Hedin Decl. ¶ 21 (citing *Lucas*, ECF No. 1).)

On September 8, 2020, Defendants moved to dismiss Plaintiff Hooper's and Tasin's claims under Fed. R. Civ. P. 12(b)(3), or in the alternative, to transfer the action to the Middle District of Tennessee, and to compel arbitration (Hedin Decl. ¶¶ 22–23 (citing *Lucas*, ECF Nos. 16, 17)).

Shortly thereafter, the Parties agreed to explore resolution at mediation before Judge Andersen, JAMS mediator and former U.S. District Judge for the Northern District of Illinois, on October 20, 2020 in Chicago, Illinois. Class Counsel negotiated terms for the mediation, including

Defendants' agreement to provide key data to Plaintiffs in advance. (Hedin Decl. ¶¶ 25-26.)

IV. SETTLEMENT NEGOTIATIONS

Several weeks before the mediation, Class 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, ¶ 28.)

Armed with these materials and the knowledge acquired through Class 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 settlement positions prior to mediation. (Hedin Decl. ¶ 29.)

On October 20, 2020, the Parties attended a full day of 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.* The next day, Judge Andersen made a mediator's proposal to settle the case, which the Parties eventually accepted after further negotiations with Judge Andersen. (Hedin Decl. ¶ 31.) The Parties then executed a binding term sheet to be later memorialized in the Settlement Agreement, conditioned upon further negotiations over remaining terms and confirmatory discovery. (Hedin Decl. ¶ 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.[6] (Hedin Decl. ¶ 33.) Thus, Plaintiffs filed a notice of voluntary dismissal without prejudice of their case pending in the Central District of California. (*Id.* (citing *Lucas,* ECF No. 27).)

On December 14, 2020, the Representative Plaintiffs initiated this Action by filing a consolidated Class Action Complaint (hereinafter, the "Complaint") in this Court, alleging the same claims against Defendants as alleged in the prior federal actions. (Hedin Decl. ¶ 34.)

Prior to executing the Settlement Agreement, Defendants produced to Class Counsel materials for Class Counsel to confirm the approximate size and scope of the Settlement Class contemplated by the Settlement, among other merits and class-related details. (Hedin Decl. ¶ 35.) Thereafter, the Parties procured administration estimates from three (3) nationally recognized class-action settlement administration companies to administer the Settlement, and ultimately agreed to engage KCC, LLC ("KCC") as Settlement Administrator. (Hedin Decl. ¶ 36.) Class Counsel worked 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, the Parties signed the Settlement Agreement. (Hedin Decl. ¶ 37.) On February 4, 2021, the Court granted preliminary approval to the Settlement. (Hedin Decl.

[6] *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.").

¶ 38.) On March 20, 2021, the Settlement's Notice Plan commenced, and Notice was disseminated to the approximately 1.8 million Settlement Class Members. (Hedin Decl. ¶ 45.)

TERMS OF THE SETTLEMENT

A copy of the preliminarily approved 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

In its February 4, 2021 Preliminary Approval order, the Court certified the following Settlement Class:

> All persons within the United States who received 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.

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. Each Settlement Class Member who submits a valid claim will receive a cash payment of $10 if the Settlement is approved. *Id.* § 4.2.1.

III. NON-MONETARY RELIEF

Defendants have also agreed to implement and maintain changes to their practices going forward, to ensure compliance with the TCPA, including by instituting TCPA awareness and oversight procedures for marketing personnel. *Id.* § 11.1.1. Additionally, Settlement Class Members have been 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.

The Claim Form is attached as Exhibit "A" and the proposed Class Notices are attached as Exhibit "B" and Exhibit "C" to the Settlement Agreement. The Class Notice was disseminated to the Settlement Class by e-mail in advance of the Notice Date. Settlement Agreement § 5.5.4.

The Settlement Administrator has created and is maintaining the Settlement Website, which was activated in advance of the Notice Date, at the URL www.sdcitcpasettlement.com. *Id.* § 5.4.1. The Settlement Website provides information about the Settlement and makes all relevant case-related documents available for download. *Id.* Settlement Class Members are able to file claims electronically on an easy-to-understand web-based form on the Settlement Website, where they may select the method of payment for their Settlement Share (Benefit Check or Electronic Payment) and the address where payment should be sent. *Id.*; *see also id.,* Ex. A (online form).

Claim Forms must be submitted to the Settlement Administrator by the Claims Deadline. *Id.* §§ 2.1.8, 6.1. Approved Claimants will receive their payments within sixty (60) days from the Effective Date or the Claims Deadline (whichever is later). *Id.* §§ 6.2-6.3.

In addition to the Class Notice plan set forth in the Settlement Agreement, Class Counsel has also paid the Settlement Administrator to send reminder e-mails to all Settlement Class Members and postcards to the approximately 100,000 Settlement Class Members who were unable to receive the Class Notice emails, and has retained a digital marketing firm to display Facebook postings to Settlement Class Members notifying them of the Settlement and directing them to the Settlement Website. (Hedin Decl. ¶ 46.) Reminder emails and Facebook postings will continue

to be sent and displayed to Settlement Class Members between now and the Claims Deadline. *Id.*

Thus far, over 22,000 Claim Forms have been submitted and more continue to be submitted each day. (Hedin Decl. ¶ 48.) Class Counsel anticipates that a significant number of additional Claim Forms will be filed between now and the June 28, 2021 Claims Deadline due to the robust independent publication plan that counsel has implemented and paid for out of pocket. Indeed, reminder emails to Settlement Class Members without Gmail e-mail addresses have already resulted in an increase in claims by approximately 50% in just over a week. And Class Counsel anticipates that number will grow substantially after reminder emails to Gmail users are sent on May 7, 2021, and after Facebook postings directed to Settlement Class Members go live next week.

V. SERVICE AWARDS AND FEE AWARDS

Defendants, through SmileDirectClub, LLC, have agreed to pay Service Awards to the Representative Plaintiffs and Fee Award to Class Counsel in the amounts requested herein. *Id*. §§ 4.2.2-4.2.3. The Class Notices informed the Settlement Class of these amounts. *See id*., 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 before the Opt-Out or Objection Deadline and in compliance with all of the requirements set forth in Section 8.2 of the Settlement Agreement. Settlement Agreement § 2.1.35; § 8.3.

Only seven Settlement Class Members filed requests for exclusion from the Settlement, and zero Settlement Class Members objected to the Settlement. (Hedin Decl. ¶¶49-50.)

VII. RELEASE

Upon the Court's entry of the Final Approval Order and Judgment, the Representative Plaintiffs and Settlement Class Members who have not excluded themselves will have fully, finally, and forever released, relinquished, and discharged Defendants and 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); *see also* 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 11.41 (4th ed. 2002) (hereinafter *Newberg*).

Courts review proposed class action settlements using a well-established two-step process. *Newberg* § 11.25, at 38-39; *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*. 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.

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

ARGUMENT

Upon final approval, the Settlement reached in this matter will provide Settlement Class Members with substantial financial compensation and non-monetary relief that they otherwise would be unable to obtain. Because the Settlement reached by the Parties is fair, reasonable, and provides adequate compensation to the Settlement Class, and because the Notice Program effectively notified class members of their rights under the Settlement Agreement, the Settlement

warrants final approval by the Court.

I. THE SETTLEMENT SHOULD BE FINALLY 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).

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.

In this case, as the Court has already found in granting preliminary approval of the Settlement, all eight factors weigh in favor of finding the Settlement fair, reasonable, and adequate, warranting its final 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. 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 v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012).

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 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 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 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).

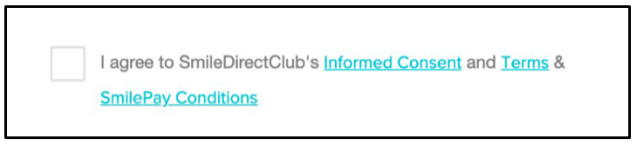
The reasonableness of the relief provided by the Settlement is further underscored by the

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, when the Settlement was reached in this case, an appeal concerning the proper interpretation of the statutory term ATDS was pending before the Supreme Court in *Facebook*. At that time, there was 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). Class Counsel is unaware of any other TCPA case, besides this one, that settled on a class-wide basis after the Supreme Court granted certiorari in *Facebook* (other than cases that also involved pre-recorded calls, which were not implicated by Facebook's appeal); this is not surprising given that the Supreme Court's decision in *Facebook* had the potential to absolve TCPA defendants of liability across the board in autodialing-restriction cases such as this one. And that is exactly what happened. On April 1, 2021, the Supreme Court issued a unanimous decision holding that "[t]o qualify as an 'automatic telephone dialing system,'

a device must have the capacity either to store a telephone number using a random or sequential generator or to produce a telephone number using a random or sequential number generator." *Facebook Inc.*, 141 S. Ct. 1163, 2021 WL 1215717, at *1. In so ruling, the Supreme Court rejected the statutory interpretation, advanced by the Representative Plaintiffs in this case, that dialing technology constitutes an ATDS if it "receive[s] and store[s] telephone numbers and then automatically dial[s] such numbers." (Compl. ¶ 44.) Thus, had Class Counsel not settled this case when it did, Settlement Class Members would have been unable to establish SmileDirectClub's liability under the TCPA and would not be entitled to any relief.

Second, 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 left seeking individual relief in arbitration.

Third, 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 been bound by the same Informed Consent referenced in connection with the motion to compel arbitration. *Id.*

Fourth, the Parties disagree whether the Settlement Class could be certified on a contested motion for class certification. (Hedin Decl. ¶ 41.) 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. *Id.* 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. *Id.* 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 Cap. One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 790 (N.D. Ill. 2015). A victory for the Settlement Class at trial would be pyrrhic.

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 final approval of the Settlement.

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 final approval.

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

The third factor asks whether the settlement avoids the inherent risk, complexity, time, and cost associated with continued litigation. *See City of Chicago*, 206 Ill. App. 3d at 972.

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 Nat'l Rural Telecommunications Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004). Accordingly, the third factor weighs in favor of granting final approval. *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 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.

Following the implementation of the Class Notice plan set forth in the Settlement Agreement, the Settlement Class's reaction to the Settlement has been overwhelmingly favorable. Thus far, over 22,000 Claim Forms have been submitted and more continue to be submitted each day. (Hedin Decl. ¶ 48.). Class Counsel anticipates that a significant number of additional Claim Forms will be filed between now and the June 28, 2021 Claims Deadline due to the robust independent publication plan that counsel has implemented and paid for out of pocket. Notably, only seven Settlement Class Members filed requests for exclusion from the Settlement, and zero

Settlement Class Members objected to the Settlement. (Hedin Decl. ¶ ¶ 49-50.) Finally, the Representative Plaintiffs and Class Counsel all strongly support the Settlement, which they believe is in the best interest of the Settlement Class. (Hedin Decl. 43.)

Accordingly, the fourth and sixth factors weigh in favor of granting final approval.

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 class settlement is the result of contentious, arm's-length negotiations before an experienced mediator, the settlement may be presumed fair and reasonable and free of any collusion. *See Newberg*, § 11.42; *see also 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 negotiations for several months regarding confirmatory discovery, unresolved Settlement terms, the form of the Class Notice and attendant documents, and the 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, the fifth factor weighs in favor of granting final approval.

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 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).

Class Counsel all strongly endorse the Settlement. *See* Hedin Decl. ¶¶ 40-41; Fraietta Decl. ¶ 9. As explained by Plaintiffs' counsel, Settlement Class Members would likely lose on the merits and be entitled to no relief based on the recent *Facebook* ATDS decision (as well as face numerous additional risks of nonrecovery) 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 wait for the litigation and 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 granting final approval. *See 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.").

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 discovery, 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. Accordingly, the final factor weighs in favor of granting final approval.

H. The Unopposed Motion for Service Awards and Fee Award Should be Approved

Because no objections were filed in opposition to the Representative Plaintiffs' and Class Counsel's Motion for Service Awards and Fee Award, and because all factors in favor of granting final approval of the Settlement have been met, the Court should also approve the requested

Service Awards to the Representative Plaintiffs, the Fee Award to Class Counsel, and the *cy pres* distributions to two legal aid societies in the greater Chicago area.

The Motion for Service Awards and Fee Award was filed 21 days in advance of the deadline for objections and exclusion requests, and was uploaded to the Settlement Website that same day. In addition, the Class Notice was sent to all Settlement Class Members even before the Motion for Service Awards and Fee Award was filed and fully informed the Settlement Class Members of the maximum amount of the Service Awards and Fee Award that Class Counsel and the Representative Plaintiffs would seek. Accordingly, Settlement Class Members had ample opportunity to consider the merits of the Motion for Service Awards and Fee Award. However, no objections to the Motion for Service Awards and Fee Award were filed, and no Settlement Class Members even informally expressed any dissatisfaction with the requested Service Awards or Fee Award. The lack of any opposition is not surprising because, as discussed above, the Settlement provides substantial cash benefits to the Settlement Class and will result in meaningful changes to SmileDirectClub's text messaging operation going forward.

For the reasons stated in the unopposed Motion for Service Awards and Fee Award, and because no Settlement Class Member has voiced any opposition or objection to the requested Fee Award or Service Awards, Representative Plaintiffs and Class Counsel respectfully request that the Court approve the requested and Service Awards and Fee Award.

CONCLUSION

For the reasons stated above and in the unopposed Motion for Service Awards and Fee Award, Representative Plaintiffs respectfully request that the Court enter an Order granting final approval of the Settlement and approving the requested Service Awards and Fee Award. A proposed Agreed Final Order and Judgment will be submitted to chambers forthwith.

Dated: May 7, 2021

Respectfully submitted,

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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: May 7, 2021

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