UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA

Ben Hawkins, *on behalf of himself and all others similarly situated,*	:	Case No. 1:19-cv-01186
Plaintiff,	:	
v.	:	Hon. Judge Leonie M. Brinkema
Navy Federal Credit Union,	:	
Defendant.	:	

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Rules

Plaintiff Ben Hawkins ("Plaintiff") submits this Memorandum in Support of his Unopposed Motion for Preliminary Approval of Class Action Settlement. The settlement ("Settlement") was reached after an arm's-length, contentious negotiation before an experienced mediator, represents an excellent result for the Class, and easily falls within the range of settlements approved in similar cases. *See* Settlement Agreement and Release ("Agreement" or "Agr."), attached hereto as Exhibit 1. The Court should therefore grant preliminary approval, direct that notice be sent to the class, and establish a schedule for Final Approval proceedings.

I. INTRODUCTION

This case arises from nonconsensual, autodialed wrong-number text messages Defendant Navy Federal Credit Union ("Navy Federal" or "NFCU") allegedly sent to the cell phone numbers of Plaintiff and other non-members, which Plaintiff asserts violated the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227(b). NFCU disputes that the texts were improper. Although the Parties disagree as to the merits of the case, they have agreed to resolve Plaintiff's claims on a class-wide basis.

The proposed Settlement calls for NFCU to pay $9,250,000 into a non-reversionary common fund for the benefit of a Settlement Class comprised of all nonmembers of NFCU who received non-fraud related text messages from NFCU on their cellular telephones since September 15, 2015. Under the Settlement, no money whatsoever will revert to NFCU.

As explained below, this is an excellent result, considering the risks, burden, and expense of further litigation, and there is substantial reason for this Settlement to be approved and for the Settlement Class to be certified for purposes of implementing this Settlement. Plaintiff thus asks that the Court preliminarily approve the Settlement, conditionally certify the Settlement Class, and authorize notice to be issued pursuant to the terms of the Agreement, as detailed herein.

II. BACKGROUND

The Telephone Consumer Protection Act prohibits, among other things, making any non-emergency, autodialed call (including a text message call) to a cellular telephone number without the called party's prior express consent. 47 U.S.C. § 227(b)(1)(A)(iii); *In re Rules & Regs. Implementing the TCPA*, 18 FCC Rcd. 14014, 14115 ¶ 165 (2003).

Plaintiff initiated this action on September 13, 2019, seeking redress on behalf of himself and others for NFCU's nonconsensual, autodialed text messages to their cell phones in violation of the TCPA. Doc. 1, Compl. ¶ 1. After holding a Fed. R. Civ. P. 26(f) conference, the parties exchanged initial disclosures and Plaintiff served requests for production, interrogatories, and requests for admission on October 18, 2019. NFCU served its objections pursuant to Local Rule 26(C) on November 4, 2019. Ex. 2, Burke Decl. ¶ 13.

With formal discovery ongoing, the parties agreed to attempt to resolve the case through mediation: On November 15, 2019, the parties jointly moved the Court to stay the action pending a mediation scheduled to take place on January 7, 2020. Doc. 18. The Court ordered the action stayed until January 21, 2020. Doc. 20. The parties thereafter engaged in informal discovery, focused on information relevant to the settlement process. Ex. 2, Burke Decl. ¶¶ 13-14. Informal discovery revealed – and confirmatory discovery has confirmed – that NFCU does not have direct documents or data that would demonstrate which, or how many, text messages went to non-members. *Id.* ¶ 14. Although NFCU was able to account for text messages having been sent to approximately 5.9 million unique cellular telephones, certain of its outbound texting data was permanently deleted when it terminated its relationship with texting vendor Monitise n/k/a Fiserv. *Id.* This data was reportedly lost less than two weeks before the case was filed. *Id.* After substantial meet and confer on the subject of determining how many non-members might have

been texted, NFCU disclosed that its applicable database contained approximately 66,000 unique phone numbers that had been coded as "wrong numbers" and which received texts from NFCU. *Id.* While not precise, under these circumstances, this 66,000 figure is the best practicable analogue to the number of non-member cell phones texted. *Id.*

With relevant information concerning the nature and scope of the class, as well as substantial policy and practice documents and an exchange of pre-mediation briefs, the parties mediated on January 7, 2020, with Hon. Morton Denlow (ret) of JAMS Chicago, during which they reached a settlement in principle. *Id.* ¶ 15. The Settlement was reached as the result good-faith, contentious, arms-length negotiations. *Id.* Settlement discussions took place under the direction of Judge Denlow, an experienced and well-respected private mediator, and the parties made extensive presentations setting forth their respective positions. *Id.* At the end of the mediation, the parties signed a term sheet containing the principal terms of settlement. *Id.*

On January 21, 2020, Plaintiff's counsel notified the Court that the parties' mediation was successful and that the parties were engaged in confirmatory discovery while trying to finalize the terms of the Settlement Agreement. Doc. 21. The parties continued to work over the next months finalizing the terms of the Settlement Agreement, assembling a list of Settlement Class Members for notice, finalizing the notices, and engaging a Settlement Administrator. Ex. 2, Burke Decl. ¶ 15. Plaintiff now asks for the Court's preliminary approval of the Settlement.

III. SUMMARY OF THE SETTLEMENT

A. Class Definition

The Settlement Class is defined as follows:

> All nonmember persons of Navy Federal who received text messages (other than text messages concerning fraud) on their cellular telephone from Navy Federal, or anyone on its behalf, between September 15, 2015 through the date of Preliminary Certification. Excluded from the Class are all current employees, officers, and

> directors of Navy Federal; federal, state, and local governments and all agencies and subdivisions thereunder; and the Judges and mediators to whom this Action is or has been assigned and any member of his or her immediate family.

Agr. ¶ 38. NFCU does not have reliable records that would show class membership, because these text messages were aimed at reaching members. The closest practicable analogue available is to look at NFCU's other databases for information concerning "wrong numbers" that might have been texted. Discovery shows that there were approximately 66,000 unique cell numbers logged as "wrong number" in NFCU's debt collection computer system that also received at least one text message, Ex. 2, Burke Decl. ¶ 14, although this dataset is likely underinclusive – because not all wrong number text recipients also received debt collection calls – and overinclusive because debt collection call recipients may tell callers they have reached the "wrong number" in order to make those calls cease. *Id.*

B. Class Relief

The Settlement Agreement requires NFCU to fund a non-reversionary cash Settlement Fund of $9,250,000, from which payments to Settlement Class Members, notice, administrative costs, service awards, attorneys' fees, and expenses shall be paid. Agr. ¶¶ 41, 46. After a competitive bidding process, the parties have agreed that Kurtzman Carson Consultants LLC ("KCC") will serve as Settlement Administrator, subject to Court approval. Agr. ¶ 37.

C. Class Notice and Claims Process

Within 10 days of preliminary approval, NFCU will provide the Settlement Administrator the Notice Database containing the roughly 66,000 phone numbers associated with a "wrong number" code in NFCU's records during the Class Period, i.e., September 15, 2015 through Preliminary Certification. Agr. ¶¶ 22, 53(a). When the Settlement Administrator receives the Notice Database, it will perform a reverse lookup of the telephone numbers within the Notice

Database to identify the name and address of individuals who have been the user or subscriber of the phone number during the Class Period. Agr. ¶ 53(c). The Settlement Administrator will then send Mail Notice in the form provided as Exhibit A to the Settlement Agreement to all Settlement Class Members whose names and addresses are identified, as well as Email Notice in the form provided as Exhibit B to the Agreement to the extent such information is available. *Id.* Additional notice intended to capture Settlement Class Members who may not have viewed or received the mailed short-form notice will be effectuated through internet publication notice. Agr. ¶ 31, 54, Ex. D. The Settlement Administrator will also create a dedicated website containing detailed information about the Settlement, and a toll-free number will be established for Class Members to call for additional information about the Settlement. Agr. ¶¶ 44, 51, 54. The Settlement Administrator must distribute the Mail/Email Notice and place the Publication Notice online by the Notice Deadline, i.e., 75 days after Preliminary Certification. Agr. ¶ 23.

To obtain compensation, Class Members must submit a timely claim to the Settlement Administrator by mail or through the settlement website by the Claim Deadline.[1] Agr. ¶ 67. Any Settlement Class Member who certifies that he or she received one or more text messages from NFCU will receive one Claim Credit (i.e., a "Basic Claim"). Agr. ¶ 66(a). However, any Class member who submits proof of receipt of texts in addition to certification that he or she received one or more text messages from NFCU will receive one Claim Credit for each text message received as established by the documentation (i.e., a "Proof of Receipt Claim"). Agr. ¶ 66(a).

When the Claim Deadline passes, the Settlement Administrator will subtract the Non-

[1] To be valid, a Claim must be postmarked or submitted online by the Claim Deadline, which shall be 90 days after the Notice Deadline. Agr. ¶ 7.

Claim Costs[2] from the Settlement Fund, and the remaining amount shall be divided by the number of approved Claim Credits to calculate the Claim Credit Amount. Agr. ¶ 75. Each Claimant with one or more Claim Credits will receive a Settlement Fund Payment equal to the number of his or her Claim Credits multiplied by the Claim Credit Amount. *Id.*

If any funds remain in the Settlement Fund Account after 180 days from when the Settlement Administrator mails the last Settlement Fund Payment, such funds shall be divided by the number of approved claims and disbursed to Claimants in a second disbursement, provided there are sufficient residual funds in the Settlement Fund Account to make the cost of such a second disbursement administratively feasible. Agr. ¶ 79. If there are any unclaimed funds left after the second distribution, the same process will be used for additional distributions until they are no longer administratively feasible, at which time the remaining funds shall be distributed through a residual *cy pres* program to a Court-approved recipient. Agr. ¶ 80.

D. Opt-Outs, Objections, and Release

Any Settlement Class Member may exclude himself or herself from the Settlement, by sending to the Settlement Administrator, postmarked by the Opt-Out Deadline,[4] a written request to be excluded from the Settlement following the instructions in the Notice. Agr. ¶ 57. The Settlement Administrator shall provide the parties with copies of all completed opt-out requests, and Class Counsel shall file a list of Settlement Class Opt-Outs with the Court no later than seven days prior to the Final Approval Hearing. *Id.* Any Settlement Class Member who does not

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[2] Non-Claim Costs include (1) any Court-awarded attorneys' fees and costs to Class Counsel; (2) any Court-awarded Service Award to Plaintiff; (3) costs of settlement administration and the Notice Program; (4) taxes, if any; and (5) any other cost and/or expense incurred in connection with the Settlement. Agr. ¶ 74.

[4] The Opt-Out Deadline shall be 60 days after the Notice Deadline. Agr. ¶ 26.

timely and validly request to opt out shall be bound by the terms of the Agreement. *Id.*

Any Settlement Class Member who does not opt out of the Settlement may object to any aspect of the Settlement. Agr. ¶ 58. Objections must be electronically filed with the Court, or mailed to the Clerk of the Court, with copy sent to Class Counsel and NFCU's counsel, pursuant to the instructions in the Notice, by no later than the Objection Deadline.[5] Agr. ¶¶ 58-59.

Those who do not exclude themselves will release claims against NFCU and those that sent texts on its behalf, which are narrowly tailored to the acts that gave rise to this case, i.e., "for alleged or actual violations of the [TCPA] and related state analogue claims arising out of or relating to non-fraud text messages sent by Navy Federal or any third party on its behalf, between September 15, 2015 and Preliminary Certification. Voice calls and fraud text messages are excluded from this release." Agr. ¶¶ 33, 81.

E. Attorney's Fees, Expenses, and Service Award

Before the objection deadline, and as stated in the Notice, Class Counsel will apply to the Court for an award of reasonable attorneys' fees not to exceed one-third of the Settlement Fund, as well as reasonable expenses incurred in the action, not expected to exceed $20,000. Agr. ¶ 84, Ex. A-C. Class Counsel will also seek a Service Award not to exceed $15,000, which shall be paid to Plaintiff in addition to Plaintiff's Settlement Fund Payment. Agr. ¶¶ 35, 87.

IV. ARGUMENT

"There is a strong judicial policy in favor of settlement to conserve scarce resources that would otherwise be devoted to protracted litigation." *Robinson v. Carolina First Bank NA*, No. 18-2927, 2019 WL 719031, at *8 (D.S.C. Feb. 14, 2019). Indeed, courts recognize that voluntary

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[5] The Objection Deadline shall be 60 days after the Notice Deadline. Agr. ¶ 25.

resolution of litigation through settlement is particularly appropriate in class actions. *Lomascolo v. Parsons Brinckerhoff, Inc*., No. 08-1310, 2009 WL 3094955, at *10 (E.D. Va. Sept. 28, 2009).

Nevertheless, Rule 23(e) requires court approval of any class action settlement to ensure that the rights of absent class members are adequately protected. *See In re Jiffy Lube Sec. Litig*., 927 F.2d 155, 158 (4th Cir. 1991). A court may only approve a proposed settlement upon finding that it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Ultimately, the approval of a proposed settlement rests in the sound discretion of the court. *Strang v. JHM Mortgage Sec. Ltd. P'ship*, 890 F. Supp. 499, 501 (E.D. Va. 1995). But "there is a strong initial presumption that the compromise is fair and reasonable." *In re MicroStrategy, Inc. Sec. Litig*., 148 F. Supp. 2d 654, 663 (E.D. Va. 2001).

Court approval of a class action settlement entails a two-step process. First, the court conducts a preliminary approval evaluation to determine whether there is "probable cause" to notify the class of the proposed settlement. *ADESSO Homeowners' Ass'n v. Holder Properties, Inc.*, No. 16-710, 2017 WL 11272589, at *8 (D.S.C. May 23, 2017). Second, assuming the court grants preliminary approval and notice is sent to the class, it conducts a "fairness" hearing at which all interested parties are afforded an opportunity to be heard on the proposal. *Id*.

At this first step of the approval process, a court should grant preliminary approval of a settlement and authorize notice if it determines that it will "likely be able to: (i) approve the proposal [as fair, reasonable, and adequate]; and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(2). As further detailed herein, because the Rule 23(e)(1)(2) requirements are met, the Court should preliminarily approve the Settlement.

A. <u>The Court will likely be able to approve the Settlement as fair, reasonable, and adequate.</u>

Prior to December 2018, Rule 23 was silent as to what factors courts should consider in

determining whether a settlement is "fair, reasonable, and adequate." As a result, courts developed their own individual tests, with some judicial circuits adopting a dozen or more factors. In the Fourth Circuit, courts have traditionally used a "bifurcated analysis, separating the inquiry into a settlement's 'fairness" from the inquiry into a settlement's 'adequacy.'" *In re MicroStrategy, Inc. Sec. Litig*., 148 F. Supp. 2d at 663. A court assessing the "fairness" of a proposed settlement would consider "(1) the posture of the case at the time the settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel in the area of securities class action litigation." *In re Jiffy Lube Sec. Litig.*, 927 F.2d at 159. A court assessing the adequacy of a proposed settlement would consider "(1) the relative strength of the plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration and expense of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment,[6] and (5) the degree of opposition to the settlement." *Id*.

However, Rule 23 was amended in December 2018 to provide a simpler and more uniform approach to determining whether a settlement is fair, reasonable, and adequate.[7] The

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[6] Although there is nothing in the record suggesting that NFCU is at risk for insolvency, courts in this circuit agree while a risk of insolvency weighs heavily in favor of approving a settlement, the lack of such a risk is no impediment to settlement approval. *See, e.g., Gray v. Talking Phone Book*, No. 08-1833, 2012 WL 12978113, at *6 (D.S.C. Aug. 13, 2012) ("The Defendants' ability to pay is not in question and does not raise questions about the circumstances or adequacy of the Settlement."); *Clark v. Experian Info. Sols., Inc.*, No. 00-1217, 2004 WL 256433, at *9 (D.S.C. Jan. 14, 2004) ("The court has also considered but given little weight to the fourth *Jiffy Lube* factor…. This factor is either neutral or slightly favors settlement.").

[7] *See* Fed. R. Civ. P. 23(e)(2) Advisory Committee's Note (2018 Am.) (purpose of amendment was to "direct[] the parties to present the settlement to the court in terms of a shorter

new factors include whether:

> (A) the class representatives and class counsel have adequately represented the class;
>
> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).

The Fourth Circuit has not yet applied the 2018 amendment to Rule 23(e)(2).[8] However, because the factors now articulated in Rule 23(e)(2) generally encompass the same substantive and procedural considerations encompassed by the *Jiffy Lube* factors,[9] the result is the same regardless of which rubric is applied: Preliminary approval is warranted.

1. The fairness/procedural factors weigh in favor of approval.

The first two Rule 23(e)(2) factors – (1) whether the proposed class was adequately represented and (2) whether the proposed settlement was reached through arms'-length negotiation – address "procedural concerns" that focus on the "conduct of the litigation and of

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list of core concerns, by focusing on the primary procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal").

[8] *E.g.*, *In re Zetia Antitrust Litig*., No. 18-2836, 2019 WL 6122038, at *3 (E.D. Va. Oct. 1, 2019); *Geissler v. Stirling*, No. 17-1746, 2019 WL 3561875, at *3 (D.S.C. Aug. 5, 2019).

[9] *See In re: Lumber Liquidators Chinese-Manufactured Flooring Prod. Mktg., Sales Practices & Prod. Liab. Litig.*, No. 15-2627, 2020 WL 1140842, at *7 (4th Cir. Mar. 10, 2020) (noting that "[w]e have ... continued to apply our own multifactor standards when reviewing settlements approved by district courts prior to the amendments to Rule 23(e)(2)[,]" and that, in any event, "our factors for assessing class-action settlements almost completely overlap with the new Rule 23(e)(2) factors").

the negotiations leading up to the proposed settlement…." Fed. R. Civ. P. 23(e)(2) Advisory Committee's Note (2018 Amendment). These factors correspond closely with the four *Jiffy Lube* fairness factors (i.e., posture of the case, extent of discovery, circumstances surrounding negotiations, and experience of counsel). According to the Advisory Committee, "[a]ttention to these matters is an important foundation for scrutinizing the substance of the proposed settlement." *Id*. These factors focus on *how* the settlement was reached in order to uncover evidence of collusion. The Advisory Committee identifies the following subtopics as potentially relevant to the Court's analysis: (a) the nature and amount of discovery, (b) pendency of other litigation about the same general subject on behalf of class members; (c) whether a neutral mediator was used and whether negotiations were conducted in a manner that would protect and further the class interests; (d) and the "treatment of any award of attorney's fees, with respect to both the manner of negotiating the fee award and its terms." Fed. R. Civ. P. 23(e)(2) Advisory Committee's Note (2018 Amendment).

***Adequacy of Representation*.** Plaintiff has vigorously prosecuted this action on behalf of the class through active participation, gathering information and materials, staying apprised of the proceedings, and considering and ultimately entering into the Settlement. Ex. 2, Burke Decl. ¶ 16. Plaintiff's interest in obtaining redress for Defendant's nonconsensual text messages are fully aligned with those of the class, and there is no indication that Plaintiff has a conflict of interest with any Settlement Class Member. *Id.*

Furthermore, Plaintiff has retained highly experienced counsel with expertise in class action litigation, including under the TCPA. *Id.* ¶¶ 2-11; Ex. 3, Goldenberg Decl. ¶¶ 1-4, Ex. 1; Ex. 4, Lyon Decl. ¶¶ 2-3, Ex. 1. Plaintiff's attorneys have vigorously prosecuted this action on a contingency basis, obtained critical discovery necessary to litigate and negotiate an informed

settlement, and have the means and readiness to continue to advocate for the Class' best interests. Ex. 2, Burke Decl. ¶ 12; Ex. 3, Goldenberg Decl. ¶ 10; Ex. 4, Lyon Decl. ¶ 4. Accordingly, Plaintiff and his counsel have and will continue to adequately represent the Class.

Notably, Courts in this circuit give "substantial weight to the experience of the attorneys who prosecuted and negotiated the settlement." *In re Bldg. Materials Corp. of Am. Asphalt Roofing Shingle Prod. Liab. Litig.*, No. 11-2000, 2014 WL 12621614, at *4 (D.S.C. Oct. 15, 2014) (collecting cases); *see also In re MicroStrategy*, 148 F. Supp. 2d at 665 ("[I]t is appropriate for the court to give significant weight to the judgment of class counsel that the proposed settlement is in the interest of their clients and the class as a whole, and to find that the proposed partial settlement is fair.") (internal quotes omitted). Here, Plaintiff's counsel believe that the terms of the Settlement are in the best interest of the class, because they avoid the risks, uncertainties, and loss of time and resources involved in continued litigation. Ex. 2, Burke Decl. ¶ 17; Ex. 3, Goldenberg Decl. ¶ 7; Ex. 4, Lyon Decl. ¶ 6.

***Arm's-Length Negotiation*.** "A settlement reached after a supervised mediation receives a presumption of reasonableness and the absence of collusion." 2 McLaughlin on Class Actions, § 6:7 (8th ed. 2011). Here, the parties negotiated their settlement at arm's-length before and after a formal mediation with a third-party neutral, Hon. Morton Denlow (ret.). Ex. 2, Burke Decl. ¶ 15; *see Temp. Servs., Inc. v. Am. Int'l Grp., Inc.*, No. 08-271, 2012 WL 4061537, at *12 (D.S.C. Sept. 14, 2012). After Defendant's production of an agreed sample of applicable data, an exchange of pre-mediation briefs, and an all-day mediation before Judge Denlow on November 15, 2019, the parties took two further months to finalize the terms of the Agreement through numerous back-and-forth calls and emails, and to permit Plaintiff to conduct confirmatory discovery, including Rule 30(b)(6) depositions of Navy Federal and its vendor Fiserv. Ex. 2,

Burke Decl. ¶ 15.

Importantly, "[t]here is a presumption that no fraud or collusion occurred between counsel, in the absence of any evidence to the contrary." *Dominguez v. Microfit Auto Parts, Inc*., No. 18-0534, 2019 WL 423403, at *2 (D. Md. Feb. 4, 2019). Here, nothing remotely hints of collusion. The fact that negotiations were adversarial and conducted at arm's length before an experienced mediator dispels any concern that counsel might have colluded.

Posture of the Case and Discovery. The parties entered into the Settlement only after both sides were apprised of the facts, risks, and obstacles involved with continued litigation. Ex. 2, Burke Decl. ¶ 15. Before mediating, the parties engaged in both formal and informal discovery, including the production by Defendant of data and information concerning the extent and nature of the wrong-number texting at issue, and exchanged pre-mediation briefs presenting the strengths and weaknesses of the parties' respective positions. *Id.*; *see Singleton v. Domino's Pizza, LLC*, 976 F. Supp. 2d 665, 678 (D. Md. 2013) (finding fairness requirement satisfied where parties exchanged pre-mediation briefs, conducted all-day mediation before an experienced mediator, engaged in confirmatory discovery after mediation, and vigorously negotiated all aspects of the settlement).

Although the Settlement was reached relatively early in the litigation, "courts within the Fourth Circuit have found that even when cases settle early in the litigation after only informal discovery has been conducted, the settlement may nonetheless be deemed fair." *Temp. Servs., Inc.*, 2012 WL 13008138, at *10; *see also Robinson*, 2019 WL 719031, at *8 (granting preliminary approval to settlement reached prior to commencement of action where class counsel thoroughly investigated claims before filing suit, analyzed public information about the defendant's practices, and assessed damages based on information provided by defendant during

mediation); *Grice v. PNC Mortg. Corp. of America*, No. 97-3084, 1998 WL 350581 (D. Md. May 21, 1998) (preliminarily approving a settlement that was reached weeks after suit was filed since it contained favorable results for both parties and reflected mutual concessions); *Strang*, 890 F. Supp. at 501-02 (holding settlement was fair where parties reached settlement agreement shortly after complaint was filed because plaintiffs conducted "sufficient informal discovery and investigation to fairly evaluate the merits of [the d]efendants' positions during settlement negotiations").

Negotiation of Attorneys' Fees. The Settlement contains no "clear sailing" provision, and the Settlement is not contingent on any particular amount being awarded to Class Counsel. Agr. ¶¶ 84-85. *See Dominguez,* 2019 WL 423403, at *2 (fact that attorneys' fees and costs were negotiated "after a resolution was reached with respect to the Plaintiffs' settlement outcomes" weighed in favor of approval).

2. The adequacy/substantive factors weigh in favor of approval.

The Advisory Committee describes Rule 23(e)(2)(C) and (D) as the "substantive" factors, because their "central concern" is the relief provided by the settlement. Fed. R. Civ. P. 23(e)(2) Advisory Committee's Note (2018 Amendment). Rule 23(e)(2)(C) requires the Court to consider whether "the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required

to be identified under Rule 23(e)(3)."[10] These correspond closely with the first four *Jiffy Lube* "adequacy" factors (i.e., strength of case, defenses, delay and expense of litigation, and likelihood of recovery judgment). Rule 23(e)(2)(D) requires the Court to consider whether "the proposal treats class members equitably relative to each other," which is closely related to the fifth *Jiffy Lube* factor (i.e., degree of opposition to the settlement).[11]

Settlement Provides Substantial Relief. The Settlement creates a non-reversionary cash Settlement Fund of $9,250,000 to compensate Settlement Class Members. Agr. ¶ 41. According to NFCU's records, there are roughly 66,000 possible Class Members associated with a cell number that has "wrong number" flag (and to whom direct Mail Notice will be provided), although the actual Class size may be smaller or larger than this amount, for example, if the wrong-number call recipient never informed Navy Federal that it was a wrong number. Ex. 2, Burke Decl. ¶ 14. Although the amounts that each Settlement Class Member will receive under the Settlement cannot be determined with precision until the claims period is complete and the total number of valid claimants is known, Plaintiff's counsel estimates based on past experience with TCPA settlements that each claimant will likely receive $100 or more. Ex. 2, Burke Decl. ¶ 17. Such payments are supported by those approved in other TCPA cases. *E.g.*, *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 228 (N.D. Ill. 2016) (approving TCPA settlement estimated at $52.50/claimant); *In re Capital One TCPA Litig.*, 80 F. Supp. 3d 781, 790 (N.D. Ill.

[10] Rule 23(e)(3) requires parties seeking approval to identify "any agreement made in connection with the proposal." Here, the only agreement between the parties is the Agreement.

[11] Because the Court is reviewing this issue at the preliminary approval, pre-notice stage, this factor does not apply at the preliminary approval stage. *See Robinson*, 2019 WL 719031, at *11 ("Does to the preliminary nature of this motion, the Court is unaware of any opposition to this settlement. Class members will have the opportunity to opt out or object to the terms of the Settlement Agreement at the final fairness hearing.").

2015) (approving TCPA settlement estimated at $34.60/claimant); *Estrada v. iYogi, Inc.*, No. 13-1989, 2015 WL 5895942, at *7 (E.D. Cal. Oct. 6, 2015) (preliminarily approving TCPA settlement estimated at $40/class member); *Steinfeld v. Discover Fin. Servs.*, No. 12-01118, Doc. 96 at ¶ 6 (N.D. Cal. Mar. 10, 2014) ($46.98 each); *Adams v. AllianceOne Receivables Mgmt., Inc.*, No. 08-248, Doc. 137 (S.D. Cal. Sept. 28, 2012) ($40 each); *Hashw v. Dep't Stores Nat'l Bank*, 182 F. Supp. 3d 935, 944 (D. Minn. 2016) ($33.20 each); *Couser v. Comenity Bank*, 125 F. Supp. 3d 1034, 1044–45 (S.D.Cal.2015) ($13.75 each); *Rose v. Bank of Am. Corp.*, No. 11-2390, 2014 WL 4273358, at *5 (N.D. Cal. Aug. 29, 2014) (between $20 and $40).

***Costs, Risks, and Delay of Trial and Appeals*.** The costs, risks, and delay in continued litigation support notice and ultimate approval of the Settlement. Although Plaintiff strongly believes in his claims, NFCU could assert numerous potentially case-dispositive defenses that pose considerable risk to Plaintiff's ability to certify a litigation class or ultimately obtain relief. For example, NFCU contends that the phone numbers texted were provided to it by a Navy Federal member at one point, and that it thus had prior express consent to call some or all of the Class Members. Ex. 2, Burke Decl. ¶ 17. Moreover, NFCU could challenge class certification on the grounds that the class members are not sufficient ascertainable and that individual issues predominate of common issues. For instance, some courts have viewed individualized "consent" issues as foreclosing class certification on a non-settlement basis. *E.g.*, *Ginwright v. Exeter Fin. Corp.*, 280 F. Supp. 3d 674, 688 (D. Md. 2017) (finding that individualized issues relating to consent and revocation precluded finding of predominance); *but see, e.g., Toney v. Quality Res., Inc.*, 323 F.R.D. 567, 586-89 (N.D. Ill. 2018) (rejecting defense consent-based predominance arguments in certifying adversarial TCPA class).

Further, the law relevant to the TCPA is in a state of flux, and there is no guarantee that it

would not change drastically before trial. For example, the D.C. Circuit overturned part of a major FCC ruling on the TCPA in *ACA Int'l v. FCC,* 885 F.3d 687 (D.C. Cir. 2018), and the FCC is currently weighing new interpretations of the statute in response—including as to the definition of an "automatic telephone dialing system" applicable to the text messaging at issue here. Several circuits have determined as a matter of law that an autodialer must "generate" phone numbers on its own in order to be covered by the TCPA.[12] Proving this standard for the system NFCU used would be daunting, if not impossible. And at least some courts view awards of aggregate statutory damages with skepticism, and there is a real risk that any such award could be reduced on due process grounds, either in this Court or on appeal. *See, e.g., Aliano v. Joe Caputo & Sons--Algonquin, Inc*., No. 09-910, 2011 WL 1706061, at *4 (N.D. Ill. May 5, 2011) ("[T]he Court cannot fathom how the minimum statutory damages award for willful FACTA violations in this case—between $100 and $1,000 per violation—would not violate Defendant's due process rights…. Such an award, although authorized by statute, would be shocking, grossly excessive, and punitive in nature").

Plaintiff disputes Defendant's defenses and opposition to the certifiability of a litigation class, and thinks he would prevail. *See, e.g., Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 663 (4th Cir. 2019) (affirming judgment trebling TCPA class damages against defendant after $21 million jury verdict). But his likelihood of success at class certification, summary judgment,

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[12] *See Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458 (7th Cir. 2020) (holding that an ATDS must have the "capacity to generate random or sequential numbers," but noting that its interpretation is "admittedly imperfect"); *cf. Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301, 1307 (11th Cir. 2020); *Dominguez v. Yahoo, Inc.*, 894 F.3d 116, 121 (3d Cir. 2018); *but see Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1053 (9th Cir. 2018) (defining ATDS as equipment that has the capacity "(1) to store numbers to be called **or** (2) to produce numbers to be called, using a random or sequential number generator—and to dial such numbers automatically") (emphasis added).

or trial is far from certain. Litigation would continue to be lengthy and expensive if this action were to proceed. Although the parties have conducted discovery applicable to the Settlement Class, absent approval of the Settlement, substantial additional work—including further adversarial and third party discovery, class certification briefing, summary judgment briefing, and trial—would remain. A Rule 23(f) appeal would almost certainly follow any adversarial certification ruling, which would further delay any judgment in favor of the Class. Absent settlement, this case could conceivably continue to drag on for years without any guarantee that the class members would ever obtain redress for NFCU's alleged TCPA violations. The Settlement avoids these risks and provides immediate and certain relief.

Method of Providing Relief. According to the Committee Notes on Rule 23 (2009 Am.), this factor is intended to ensure that the settlement "facilitates filing legitimate claims. A claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding." Here, the Settlement offers the gold-standard in class member relief: cash payments. Use of dialer technology is not *per se* illegal, and calls (including text message calls) to consumers who have consented to receive them are permissible. *See* 47 U.S.C. § 227(b)(1)(A). The parties therefore propose a simple claims process that permits persons who received nonconsensual texts to self-identify by affirming as such in their claim form. The claims process was designed to be accessible and straightforward, but at the same time deter unjustified claims without placing undue burdens on Settlement Class Members.

To make a claim, Class Members need only submit a simple, 1-page claim form, either via mail or the settlement website. Agr. ¶ 67, Exs. A, E. Any Class Member who submits a valid and timely Basic Claim Form will receive one Claim Credit worth one *pro rata* share of the Settlement Fund less Non-Claim Costs. Agr. ¶¶ 66(a), 75. Claimants do not need to attach any

documentary proof for claims to be approved. *Id.* However, any Class Member who submits proof of text messages received with the Claim Form will receive one Claim Credit for each text message received as shown by the documentation. Agr. ¶ 66(b). The Claim Forms will be reviewed for completeness, timeliness, and correctness by the Settlement Administrator, and may provide a written notice with an opportunity to cure to rejected claimants. Agr. ¶¶ 68-69, 105.

Within the later of 60 days after the Effective Date or 10 days after the resolution of any and all claims, checks will automatically be distributed to all valid claimants, with any residual funds (i.e., in uncashed checks) being redistributed to the extent administratively feasible, before going on to a Court-approved *cy pres* recipient. Agr. ¶¶ 73, 79-80. This claims and relief distribution process is thus simple, straightforward, and accessible, while appropriately discouraging fraudulent claims by requiring a signed certification and, in the case of Proof of Receipt Claims, documentation. Agr. ¶¶ 66-71.

Attorney's Fees. Under the Settlement, Class Counsel will apply to the Court for an award of reasonable attorneys' fees not to exceed one-third of the Settlement Fund, and the Settlement Administrator will pay all Court-approved attorneys' fees to Class Counsel no later than 30 days after the Settlement's Effective Date.[13] Agr. ¶¶ 84-85. Class Counsel anticipated fee request is consistent with other fee awards in the Fourth Circuit. *See, e.g., Thomas v. FTS*

[13] "Effective Date" means the fifth business day after which all of the following events have occurred: (a) All Parties, NFCU's counsel, and Class Counsel have executed this Agreement; (b) The Court has entered without material change the Final Approval Order; and (c) The time for seeking rehearing or appellate or other review has expired, and no appeal or petition for rehearing or review has been timely filed; or the Settlement is affirmed on appeal or review without material change, no other appeal or petition for rehearing or review is pending, and the time period during which further petition for hearing, review, appeal, or certiorari could be taken has finally expired and relief from a failure to file same is not available. Agr. ¶ 13. However, in no event shall the Effective Date be earlier than 35 days after Final Approval. *Id.*

USA, LLC, No. 13-825, 2017 WL 1148283, at *6 (E.D. Va. Jan. 9, 2017) (awarding 33% of common fund as "consistent with that awarded in other cases"). It would also fall squarely in line with awards approved in other TCPA class settlements. *See, e.g., Todd S. Elwert, Inc., DC v. All. Healthcare Servs., Inc*., No. 15-2673, 2018 WL 4539287, at *4 (N.D. Ohio Sept. 21, 2018) (awarding fees of one-third of fund in TCPA case); *Wreyford v. Citizens for Transp. Mobility, Inc*., No. 12-2524, 2014 WL 11860700, at *1 (N.D. Ga. Oct. 16, 2014) (same); *Schwyhart v. AmSher Collection Servs., Inc*., No. 15-1175, 2017 WL 1034201, at *3 (N.D. Ala. Mar. 16, 2017) ("attorneys' fees … of one-third of the Settlement Fund ... is fair and reasonable").[14] Plaintiff's counsel achieved an excellent result for the Class despite substantial risk in prosecuting this action on a contingency basis, and they should be fairly compensated.

Importantly, the Settlement creates an entirely non-reversionary fund—meaning that no money is going back to NFCU. Accordingly, there is no difficulty in evaluating the value of the benefit created by Class Counsel's efforts – it is $9,250,000. *Cf*. Fed. R. Civ. P. 23 Notes ("Settlement regimes that provide for future payments, for example, may not result in significant actual payments to class members…. In some cases, it may be appropriate to defer some portion of the fee award until actual payouts to class members are known."). Moreover, the fee and costs request will be clearly stated in the Class Notice, so Class Members will have an opportunity to address with the Court any concerns they may have regarding Class Counsel's attorneys' fees.

***Equitable Treatment of Class Members*.** The Settlement provides meaningful relief to the Settlement Class, and treats all Class Members equitably relative to each other. All Class

[14] *See also* Theodore Eisenberg & Geoffrey P. Miller, Attorney Fees in Class Action Settlements: An Empirical Study, 1 J. OF EMPIRICAL LEGAL STUDIES, 27, 31, 33 (2004) (finding that courts consistently award between 30% and 33% of the common fund).

Members have an equal opportunity to submit a simple, one-page Claim Form in order to obtain one share of the Settlement Fund, less notice and administration costs, attorneys' fees and expenses, and any incentive award. Agr. ¶¶ 74-75, Ex. A, E. Those Claimants who can produce evidence of receiving multiple text messages (i.e., violations) will be entitled to a proportionately larger share of the Settlement Fund. Agr. ¶ 75; s*ee Jordan v. Nationstar Mortgage, LLC*, No. 14-175, 2019 WL 1966112, at *5 (E.D. Wash. May 2, 2019) (equitable treatment of class members factor satisfied where "[t]he variation in awards primarily turns on the relative strength or weakness of the evidence supporting each class member's claim for damages"). Claims may be easily submitted by mail, or online, within a reasonable, 90-day claims period. Agr. ¶¶ 7. 67. There will even be further redistributions of any uncashed check amounts to the extent feasible. Agr. ¶ 79. This straightforward claim process reflects the fairness of the Settlement.

The release is also applied equitably among the Settlement Class Members. Under the Agreement, all Class Members will provide a release of TCPA and state analog claims arising from non-fraud text messages sent by NFCU between September 15, 2015 and preliminary approval. Agr. ¶ 81. This release is thus narrowly tailored to the claims at issue in this case. The release does not favor or disfavor certain Class Members over others, since they were all subjected to NFCU's automated texts.

In summation, the Settlement as fair, reasonable, and adequate under Rule 23(e)(2), and the Court should thus preliminarily approve the Settlement and direct notice to the Class.

B. <u>The Court will likely be able to certify the class for purposes of judgment on the proposal.</u>

Sending notice of the Settlement is also justified because the Court will likely be able to certify the Class for purposes of judgment on the proposal. Fed. R. Civ. P. 23(e)(1)(B)(ii). As detailed below, the Class meets the requirements for certification under Rule 23(a) and (b)(3).

Notably, federal courts should "give Rule 23 a liberal rather than a restrictive construction, adopting a standard of flexibility in application which will in the particular case best serve the ends of justice for the affected parties and promote judicial efficiency." *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 424 (4th Cir. 2003) (internal quote omitted).

1. The members of the Class are so numerous that joinder is impracticable.

Fed. R. Civ. P. 23(a)(1) requires that a class be "so numerous that joinder of all members is impracticable." "Generally, classes consisting of forty or more members are considered sufficiently large to satisfy the impracticability requirement, though some courts have certified classes with fewer members." *In re Zetia Antitrust Litig.*, 2019 WL 6122038, at *2. In fact, the Fourth Circuit has affirmed a trial court's decision to certify a class of eighteen members. *See Cypress v. Newport News Gen. & Nonsectional Hosp. Ass'n*, 375 F.2d 648, 653 (4th Cir. 1967).

Here, there were 66,000 unique cell numbers associated with an affirmative "wrong number" flag in Defendant's records during the Class Period that were texted. Ex. 2, Burke Decl. ¶ 14. While this number is likely over-inclusive because some texts may have been miscoded, and under-inclusive because some call recipients may not have told NFCU that they were nonmembers, 66,000 is easily shows joinder is impracticable. *See Knapper v. Cox Commc'ns, Inc.*, 329 F.R.D. 238, 241 (D. Ariz. 2019) (certifying "wrong number" TCPA class, even though the precise number of class members was not known); *Lavigne v. First Cmty. Bancshares, Inc.*, No. 15-934, 2018 WL 2694457, at *2-3 (D.N.M. June 5, 2018) (same); *Reyes v. BCA Fin. Servs., Inc.*, No. 16-24077, 2018 WL 3145807 (S.D. Fla. June 26, 2018), *reconsideration denied*, 2018 WL 5004864 (S.D. Fla. Oct. 15, 2018); *West v. Cal. Servs. Bureau, Inc.*, 323 F.R.D. 295, 302 (N.D. Cal. 2017) (same); *Johnson v. Navient Solutions, Inc.*, 315 F.R.D. 501, 503 (S.D. Ind. 2016) (same); *Abdeljalil v. Gen. Elec. Capital Corp.*, 306 F.R.D. 303 (S.D. Cal. 2015) (same).

The fact that the Class Members are dispersed geographically further demonstrates that joinder is impracticable. *ADESSO Homeowners Assoc.*, 2017 WL 11272589, at *2.

2. Questions of law or fact are common to the members of the Class.

Rule 23(a) also requires that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "A common question is one that can be resolved for each class member in a single hearing" and does not "turn[ ] on a consideration of the individual circumstances of each class member." *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 319 (4th Cir. 2006). "[F]or purposes of Rule 23(a)(2) even a single [common] question will do." *Wal-Mart Stores Inc. v. Dukes*, 564 U.S. 338, 359 (2011). Such a common question of law or fact "must depend upon a common contention ... of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id*. at 350.

Here, the claims of the members of the Settlement Class stem from the same factual circumstances—i.e., text messages sent via the same automated system. The most important question in the litigation is thus common to each and every Settlement Class Member: whether the system NFCU used to send those texts constitutes an ATDS under the TCPA. Consequently, the Settlement Class satisfies Rule 23's commonality requirement. *See Gehrich*, 316 F.R.D. at 224 ("The proposed class also satisfies commonality…. Each class member suffered roughly the same alleged injury: receipt of at least one phone call or text message from Chase to her cell phone."); *Malta v. Fed. Home Loan Mortg. Corp*., No. 10-1290, 2013 WL 444619, at *2 (S.D. Cal. Feb. 5, 2013) (finding commonality under similarly circumstances in TCPA case).

3. Plaintiff's claims are typical of the claims of the Class.

Under Fed. R. Civ. P. 23(a)(3), the claims or defenses of the representative party must be

typical of the class. The typicality and commonality requirements are similar, as "[b]oth serve as guideposts for determining whether ... the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected." *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). But the typicality requirement specifically ensures that named class representatives are appropriately part of the class and "possess the same interest[s] and suffer the same injury as the class members." *Broussard v. Meineke Disc. Muffler Shops, Inc*., 155 F.3d 331, 338 (4th Cir. 1998). "The essence of the typicality requirement is captured by the notion that 'as goes the claim of the named plaintiff, so goes the claims of the class.'" *Deiter v. Microsoft Corp*., 436 F.3d 461, 466 (4th Cir. 2006). "As a general matter, the 'typicality' prerequisite is satisfied in instances where plaintiffs' claims arise out of the common course of conduct of one or more defendant." *ADESSO Homeowners' Ass'n*, 2017 WL 11272589, at *4. "Whether each potential member of the Class has suffered the same degree of harm, or each and every type of harm, does not preclude a finding of typicality." *Id*. (internal quotes omitted). Where "the claims of the representative parties are the same as the claims of the class, the typicality requirement is satisfied." *Thorn,* 445 F.3d at 339.

Here, NFCU sent texts to Plaintiff's cell phone just like it did as to all Class Members using an alleged automated texting system. And Plaintiff, like all Class Members, is a non-member and thus did not consent. *See Breslow v. Wells Fargo Bank, N.A.*, 755 F.3d 1265, 1267 (11th Cir. 2014) (calls to non-customer not consensual). Plaintiff's claims are thus typical of the claims of the members of the Class, as they rise and fall on the same facts and circumstances: They were non-members who received text messages sent through NFCU's allegedly illegal texting system. *See Gehrich*, 316 F.R.D. at 224 ("The proposed class also satisfies … typicality. Each class member suffered roughly the same alleged injury: receipt of at least one phone call or

text message from Chase to her cell phone."); *Bellows v. NCO Fin. Sys., Inc*., No. 07-1413, 2008 WL 4155361, at *6 (S.D. Cal. Sept. 5, 2008) ("[T]he typicality requirement is met here. Plaintiff alleges that NCO violated the TCPA by calling his cellular telephone, without 'prior express consent,' using an 'automatic telephone dialing system' or an 'artificial or prerecorded voice.' Plaintiff's claims are identical to the claims of the Class Members."); *Manno v. Healthcare Rev. Recovery Grp*., 289 F.R.D. 674, 687 (S.D. Fla. 2013) (similar).

4. Plaintiff and her counsel will fairly and adequately protect the interests of the members of the Class.

The final requirement under Rule 23(a) is that the parties representing the proposed class be able to "fairly and adequately ... protect the interests" of all members of the class. Fed. R. Civ. P. 23(a)(4). The requirement "involves two issues: (i) whether plaintiffs have any interest antagonistic to the rest of the [C]lass; and (ii) whether plaintiffs' counsel are qualified, experienced and generally able to conduct the proposed litigation." *ADESSO Homeowners' Ass'n*, 2017 WL 11272589, at *5 (internal quotes omitted). The inquiry "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prod., Inc., v. Windsor*, 521 U.S. 591, 625 (1997) (citing *Falcon*, 457 U.S. at 157-58 n.13). However, for a conflict to defeat class certification, the conflict "must be more than merely speculative or hypothetical," but rather "go to the heart of the litigation." *Gunnells*, 348 F.3d at 430-31.

The adequacy of representation requirement is met here. Plaintiff understands and has accepted the obligations of a class representative, has adequately represented the interests of the Settlement Class, and has retained experienced counsel who have handled numerous consumer-protection and TCPA class actions. Ex. 2, Burke Decl. ¶ 16. Plaintiff's claims are also fully aligned with the claims of the Class. *Id.* He thus has every incentive to vigorously pursue the claims of the Class, as he has done to date by remaining actively involved in this matter since its

inception, participating in discovery, and involving himself in the settlement process. *Id.* In addition, Plaintiff retained the services of law firms with extensive experience in litigating consumer class actions, including under the TCPA.[15]

5. The questions of law or fact common to the members of the Class predominate over any potential individualized questions.

Rule 23(b)(3)'s predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc.*, 521 U.S. at 634. Plaintiffs are not required "to prove that each 'elemen[t] of [their] claim [is] susceptible to classwide proof,'" but only that "common questions 'predominate over any questions affecting only individual [class] members.'" *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 469 (2013) (quoting Fed. R. Civ. P. 23(b)(3)). When common questions present a significant aspect pf the case and they can resolved for all class members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1778 (2d ed. 1986). "Predominance is a test readily met in … cases alleging consumer or securities fraud." *Amchem Prod., Inc*., 521 U.S. at 625.

Here, there are several questions of law or fact common to all Class Members, including whether NFCU's dialer-made texts constituted use of an ATDS under the TCPA, whether the calls were nonconsensual, and whether the violations were "willfully or knowingly" committed. *See* 47 U.S.C. §§ 227(b)(1)(A)(iii) and 227(b)(3). These questions can all be answered on a class-wide basis: Either the dialer NFCU used falls under the auspices of the TCPA, or it does not; either NFCU has consent to call non-members, or it does not; and either NFCU acted

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[15] Ex. 2, Burke Decl. ¶¶ 2-11; Ex. 3, Goldenberg Decl. ¶¶ 1-4; Ex. 4, Lyon Decl. ¶¶ 2-3.

willfully, or it did not. These key common issues far outweigh the importance of any individual issues particular to the Settlement Class members. Therefore, predominance is satisfied. *See Gehrich*, 316 F.R.D. at 226 ("The common questions listed above are the main questions in this case, they can be resolved on a class-wide basis without any individual variation, and they predominate over any individual issues. The proposed class satisfies Rule 23(b)(3)."); *Malta*, 2013 WL 444619, at *4 ("The central inquiry is whether Wells Fargo violated the TCPA by making calls to the class members. Accordingly, the predominance requirement is met.").

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

Rule 23(b)(3) also requires that a district court determine that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." In determining whether the "superiority" requirement is satisfied, a court may consider: (1) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action. Fed. R. Civ. P. 23(b)(3).

Because Plaintiff seeks to certify the class in the context of a settlement, this Court need not consider any possible management-related problems as it otherwise would. *See Amchem Prods.*, 521 U.S. at 620. Even in the non-settlement context, courts routinely find that proceeding with TCPA claims on a classwide basis is "superior to litigation of the issues by individuals." *Reliable Money Order, Inc. v. McKnight Sales Co.*, 281 F.R.D. 327, 339 (E.D. Wis. 2012); *see also, e.g., Palm Beach Golf Ctr.-Boca, Inc. v. Sarris*, 311 F.R.D. 688, 699 (S.D. Fla. 2015) (certifying a class action under the TCPA).

"Class actions are particularly appropriate where multiple lawsuits would not be justified because of the small amount of money sought by individual plaintiffs." Fed. R. Civ. P. 23 Advisory Committee's Note (1996 Amendment). Here, the expense of individual actions, weighed against the potential individual recoveries of class members, would be prohibitive. Moreover, the burden on the courts of adjudicating hundreds of separate actions would be significant. Thus, certification of these claims as a class action would be superior to any other available method for the fair and efficient adjudication of the controversy—particularly in light of the pending settlement. As the Supreme Court has explained, "[c]lass actions also may permit the [plaintiffs] to pool claims which would be uneconomical to litigate individually ... [because] most of the plaintiffs would have no realistic day in court if a class action were not available." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985).

Moreover, the interests of Settlement Class Members in individually controlling the prosecution of separate claims is small because, given the statutory basis of their claims and limited, statutorily-set recovery of $500 per violation (or up to $1,500 at the Court's discretion upon a finding of willfulness), *see* 47 U.S.C. § 227(b)(3), many Settlement Class Members are likely to be unaware of their rights or have damages too low to justify induvial suit. *See In re Sandusky Wellness Ctr., LLC*, 570 F. App'x 437 (6th Cir. 2014) (vacating order denying class certification in TCPA action and explaining that "denial of a plaintiff class sometimes defeats the case as a practical matter because the stakes are too small and the litigations costs are too high for the individual plaintiff to go forward"). Alternatives to a class action are either no recourse for thousands of individuals, or a multiplicity of suits resulting in an inefficient and possibly disparate administration of justice.

Because all relevant factors support approval of the Settlement and issuing notice to the

Class, Plaintiff's motion should, respectfully, be granted.

C. Plaintiff's counsel should be appointed as Class Counsel.

The Court should appoint Plaintiff's counsel as Class Counsel. Rule 23(g) sets forth four criteria the district court must consider in evaluating the adequacy of proposed class counsel: "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A). The Court may also "consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B).

Plaintiff's counsel satisfy these criteria. They have done substantial work identifying, investigating, negotiating, and settling Plaintiff's and the Class' claims.[16] Plaintiff's counsel also have substantial experience prosecuting and settling consumer protection and TCPA class actions, and numerous courts have appointed them as class counsel in other class actions.[17]

D. The notice plan satisfies the requirements of Rule 23 and due process.

The Federal Rules require that the Court direct to Class Members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. Fed. R. Civ. P. 23(c)(2)(B).

Here, the parties propose a robust notice program involving direct mail and email notice to Class Members after a reverse-lookup, a dedicated settlement website, and publication notice, with a toll-free hotline, to be administered by a well-regarded, third-party administrator. Agr. ¶¶

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16 Ex. 2, Burke Decl. ¶ 12; Ex. 3, Goldenberg Decl. ¶ 6; Ex. 4, Lyon Decl. ¶¶ 4-5.

17 Ex. 2, Burke Decl. ¶¶ 2-11; Ex. 3, Goldenberg Decl. ¶¶ 1-4; Ex. 4, Lyon Decl. ¶¶ 2-3.

52-54. The parties' proposed Notice and Notice Plan were designed to satisfy all the requirements of Rule 23(c)(2)(B): The Notice accurately summarizes the settlement terms and advises the Settlement Class of its benefits, rights, and limitations under the proposed Settlement. Additionally, the Notice covers all relevant topics—the nature of the action; the class claims, issues, or defenses; the Class definition; the substantive terms of the proposed Settlement; the binding effect of the proposed settlement and release of claims; an explanation that a class member may enter an appearance through an attorney; what Class Members must do to exclude themselves from the Class; what they must do if they wish to object to the Settlement; and how to receive benefits under the Settlement. Agr. Exs. A-C. The Notice, importantly, is written and formatted to communicate this information in a clear and concise manner that will be easily understood by members of the Class, who, presumably, are not lawyers.

In sum, the Parties' notice plan ensures that Class Members' due process rights are amply protected, and it should be approved. Fed. R. Civ. P. 23(c)(2)(B).

V. CONCLUSION

Plaintiff respectfully requests that this Court (1) conditionally certify the Settlement Class, (2) conditionally approve the parties' Settlement as fair, adequate, reasonable, and within the reasonable range of possible final approval, (3) appoint Plaintiff as the Class Representative, (4) appoint Plaintiff's counsel as Class Counsel, (5) approve the Parties' proposed notice program, confirm that it is the best practicable under the circumstances and that it satisfies due process and Rule 23, and direct that it be implemented, (6) set a date for a final approval hearing, (7) set deadlines for members of the Class to submit claims for compensation, and to object to or exclude themselves from the Settlement, and (8) grant such further and other relief the Court deems reasonable and just. A proposed order is attached hereto as Exhibit 5.

Respectfully submitted,

BEN HAWKINS, on behalf of himself and all others similarly situated

Dated: March 12, 2020

By: */s/ David J. Dickens*

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CERTIFICATE OF SERVICE

I hereby certify that, on March 12, 2020, I electronically filed the foregoing with the Clerk of the Court, using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ David J. Dickens