UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DARRELL ROGERS, individually,
and on behalf of all others similarly situated,

Plaintiff,

vs. Case No. 1:18-cv-01567

VIVINT SOLAR, INC., *et al.*,

Defendants.
_____/

JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

and incorporated

MEMORANDUM OF LAW

The Parties respectfully submit this motion and memorandum in support of preliminary approval of the proposed settlement ("Agreement") reached between the Plaintiff, Darrell Rogers (hereinafter "Plaintiff" or "Representative Plaintiff"), and Defendants, Vivint Solar, Inc., Vivint Solar Holdings, Inc., and Vivint Solar Developer, LLC (collectively, "Defendants") (collectively the "Parties"). This Agreement was reached after arms-length negotiations by experienced counsel over the course of several months. As demonstrated below, the proposed Agreement plainly "falls within the range of possible judicial approval" and is "sufficiently within the range of reasonableness" that notice to the class and a hearing on final approval is warranted. *See Richardson v. L'Oreal USA*, 951 F. Supp. 2d 104, 107 (D.D.C. 2013); *In re Vitamins Antitrust Litig*., 1999 WL 1335318, at *5 (D.D.C. Nov. 23, 1999).

Plaintiff hereby moves the Court, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, for an Order (1) preliminarily approving the Agreement, appended as Exhibit 1

hereto; and (2) scheduling a hearing to determine whether to finally approve the Settlement and enter Judgment (the "Final Approval Hearing").

I. SUMMARY OF THE LITIGATION

1) Plaintiff brought this action, individually and on behalf of a group of similarly situated persons, alleging that Defendants violated the Telephone Consumer Protection Act ("TCPA"), and the regulations promulgated under the TCPA, by using an automatic telephone dialing system ("ATDS"), an artificial voice, or a prerecorded voice when they called Plaintiff and the putative class members in order to promote their solar energy business without obtaining Prior Express Written Consent; or by calling Plaintiff and other putative class members on the National Do-Not-Call Registry to promote their solar energy business without obtaining Requisite Do-Not-Call Permission.

2) Specifically, Plaintiff alleged that Defendants, or one or more third parties on Defendants' behalf, called Plaintiff and the putative class members without first obtaining a written agreement signed by the person or entity being called that states: "By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice." 47 C.F.R. 64.1200(f)(8) ("Prior Express Written Consent").

3) Plaintiff further alleged that Defendants, or one or more third parties on Defendants' behalf, called Plaintiff and other putative class members whose phone numbers were registered with the National Do-Not-Call Registry at least 30 days prior to being contacted more than once within a 12-month period to promote their solar energy business without obtaining prior express invitation or permission evidenced by a signed, written agreement between the consumer and seller which states that the consumer agrees to be contacted by this

seller and includes the telephone number to which the calls may be placed. 47 C.F.R. 64.1200(c) ("Requisite Do-Not-Call Permission").

4) Defendants have denied and continue to deny these allegations. As such, the litigation in this matter has been intensive and hard-fought, and has included extensive discovery on Plaintiff's allegations over the past twelve months, including the exchange of documents, preparation and responses to requests for production of documents and interrogatories, subpoenas on multiple relevant third parties, the depositions of dozens of current and former representatives of Defendants, as well as multiple briefed and litigated discovery disputes that were heard by this Court over the course of the past year. *See* Exhibit 2, Heller Decl. at ¶¶ 3-4.

5) Plaintiff contends that this discovery establishes that sales representatives of Defendants contracted with a lead generation company named Virtual Sales Solutions ("VSS") to place robocalls from a call center in the Philippines to individuals in the United States, in order to solicit interest in Defendants' products and to set appointments with Defendants' sales representatives. *Id*. at ¶ 5. Plaintiff further contends that discovery establishes that Defendants' employees were involved in many facets of VSS's marketing efforts including selecting the zip codes to which calls were placed, mandating the times and dates during which sales appointments could be set, dictating the prequalification information that VSS's agents were to obtain from the called parties, and helping to generate the information used in the robocalling scripts. *Id*. Finally, Plaintiff contends that discovery has produced unique identifying information for approximately 112,000 individuals who were called through VSS's marketing efforts on behalf of Defendants, as well as evidence that other third-party lead generators may have made additional robocalls on behalf of Defendants as well. *Id*.

6) Defendants deny these allegations, deny all liability for the claims made in the litigation, and further deny violating the TCPA and the regulations promulgated under the TCPA. Specifically, Defendants deny that VSS or any other third-party lead generators had actual or apparent authority to place calls on Defendants' behalf, and further deny that Defendants would have liability for the actions of those sales agents who used such lead generation services, or that those sales agents would have liability for VSS's telemarketing practices. Finally, Defendants allege that discovery establishes that Defendants' corporate policies expressly prohibit the use of outside lead generation, and that Defendants' sales agents utilized VSS's telemarketing services without Defendants' knowledge or consent.

7) Against this contentious and unsettled backdrop, the Parties simultaneously engaged in arms' length negotiations for a comprehensive resolution of this litigation. Counsel for the Parties first discussed settlement in early 2019. These negotiations included informal settlement discussions between counsel, followed by a formal, all-day mediation in front of a retired judge who has significant experience regarding the litigation and settlement of claims brought under the TCPA (Hon. Morton Denlow of the mediation firm JAMS) on July 23, 2019, and several months of continuing negotiations between counsel following formal mediation. *See* Exhibit 2, Heller Decl. at ¶ 6. Defendants' counsel, who are highly experienced and capable, vigorously advocated their clients' positions in the settlement negotiations. Heller Decl. at ¶ 7. Plaintiff's counsel, who were well-informed of the facts and issues concerning liability and damages, and the relative strengths and weaknesses of each side's litigation position, vigorously advocated Plaintiff's positions. *Id*.

8) Although the day-long formal mediation did not result in a final resolution of all claims, after significant additional efforts by counsel and Judge Denlow, the Parties reached a

framework for resolution believed by them to be a fair settlement of this dispute, including the creation of a non-reversionary common fund of $975,000 from which claims, administration costs, attorneys' fees, and an incentive award to the named plaintiff would be paid. *Id*. at ¶ 8. As a result of these efforts and negotiations, the Parties have agreed to a resolution of all claims brought against the Defendants in this action, as set forth in the attached Agreement. *Id*.

9) As set forth more fully below, the proposed Agreement is exceedingly fair and represents an excellent result for the Settlement Class. Given the regulatory and legal uncertainty surrounding certain aspects of the underlying TCPA statute and its implementing regulations, Plaintiff acknowledges that he faced potentially significant hurdles at class certification, summary judgment and/or trial. Given these challenges, coupled with the ability and willingness of Defendants to continue their vigorous defense, the proposed Agreement provides significant and certain recovery for the Settlement Class.

10) As further support for the reasonableness of the proposed Agreement, this Agreement was reached only after substantial litigation, discovery, and arms-length negotiations between experienced counsel, with the guidance and assistance of a well-respected mediator with significant experience regarding the litigation and settlement of claims brought under the TCPA.

11) The attached Agreement constitutes a fair, reasonable, and adequate resolution for the Plaintiff and the Settlement Class, pursuant to Rule 23(e)(2) of the Federal Rules of Civil Procedure, and the terms of the resolution, as set forth in the attached Agreement, are in the best interests of the Parties.

12) In exchange for the consideration above, Plaintiff and members of the class will release Defendants from any and all claims that were or could have been alleged in this action.

The full text of the proposed release, including the limitations thereof, is set forth in the Agreement.

13) The Parties therefore request that the Court enter an order: (1) granting preliminary approval of the proposed settlement as set forth in the attached Agreement; (2) preliminarily certifying the proposed settlement class pursuant to Federal Rule of Civil Procedure 23(b)(3); (3) directing that members of the settlement class be given notice of the pendency of this action and the proposed settlement in the form and manner proposed by the Parties in the attached Agreement (Exhibit 1) and Class Notice (Exhibit 1-B and Exhibit 1-C); and (4) scheduling a hearing at which the Court will consider final approval of the settlement and entry of the attached Agreement.

14) A proposed preliminary order approving the Agreement and ordering the Class Notice to be transmitted to each member of the Settlement Class, in the form and manner proposed by the Parties, is attached as Exhibit 1-D (proposed preliminary order), for the Court's convenience and consideration.

II. OUTLINE OF PROPOSED SETTLEMENT

A. The Settlement Class

The proposed settlement has been reached on behalf of the "Settlement Class," which is defined as follows:

> All persons and entities whose telephone numbers were called by third parties that marketed solar energy products and services on behalf or for the benefit of Defendants on or after July 1, 2014 where:
>
> > (1) The third-party initiated a call using an artificial voice, or a prerecorded voice, to (i) advertise the commercial availability or quality of any property, goods, or services; or encourage the purchase or rental of property, goods, or services; (ii) where such persons' and entities' telephone numbers were assigned to a cellular phone service or residential line; and (iii) where the third-party failed to obtain Prior Express Written Consent from those persons and entities called; or

> (2) The third-party initiated a call using an ATDS to (i) advertise the commercial availability or quality of any property, goods, or services; or encourage the purchase or rental of property, goods, or services; (ii) where such persons' and entities' telephone numbers were assigned to a cellular phone service; and (iii) where the third-party failed to obtain Prior Express Written Consent from those persons and entities called; or
>
> (3) The third-party initiated more than one call within a 12-month period (i) to persons and entities who were registered with the National Do-Not-Call Registry for at least 30 days prior to being called; (ii) encouraging the purchase or rental of property, goods, or services; (iii) where such persons' and entities' telephone numbers were assigned to a cellular phone service; and (iv) where the third-party failed to obtain Requisite Do-Not-Call Permission from those persons and entities called.

The calls referenced in the class definition shall be collectively referred to as "Covered Calls."

Excluded from the Settlement Class are Defendants, any parent, subsidiary, affiliate or controlled person of Defendants, as well as the officers, directors, agents, servants or employees of Defendants and the immediate family members of such persons, the named counsel in this litigation, and any member of their office and/or firm. Direct notice will be provided to each of the approximately 112,000 Settlement Class members that have been successfully identified from records obtained throughout discovery. This notice will be supplemented by the publication notice outlined below.

B. Benefits to Class Members

Defendants, solely for the purposes of settlement and without admitting or conceding any fault, wrongdoing or liability, and in order to avoid the inconvenience and expense of further litigation, have agreed to the establishment of a non-reversionary $975,000 common fund that will be used to make class member claimant payments, and pay notice and administration costs, attorneys' fees, costs, and expenses, and an incentive award to the named plaintiff ("Settlement

Fund"). A class member must submit a timely and valid proof of claim form, which is attached to the Class Notice, in order to receive a share of the Settlement Fund. The Settlement Administrator selected by the Parties, Kurtzman Carson Consultants ("KCC"), will mail each member of the Settlement Class who submits a timely and valid proof of claim form a *pro rata* distribution of all amounts remaining in the Settlement Fund - with no cap or other limit on payment per claimant - after the deduction of fees and costs as outlined below.

C. Notice

The Parties have agreed that KCC will provide notice of the settlement to Settlement Class members through both nationwide media and publication notice as well as direct notice that will be sent by first-class U.S. Mail to those identifiable from records obtained in discovery.

i. Direct Notice

With regards to direct notice, the Parties have agreed that within 30 days of preliminary approval of the attached Settlement Agreement (Exhibit 1) and Class Notice (Exhibit 1-B and Exhibit 1-C) by the Court, KCC will send the Class Notice on a postcard by U.S. Mail to those approximately 112,000 Settlement Class members for whom the Parties' records presently contain a corresponding address, as well as to those Settlement Class members whose address KCC is able to identify through a "Reverse Append" address look-up of their telephone number and comparison with the U.S. Post Office's National Change of Address database. Reverse Append matches telephone numbers to a proprietary consumer database, which contains more than 150 million individuals in the United States, including more than 89 million households, which is over 90% of all U.S. households.

The Class Notice contains a proof of claim form to be returned by Settlement Class members in order to qualify for payment, directs Settlement Class members to a website

application where they can alternatively submit a proof of claim form in order to qualify for electronic payment, and provides contact information for toll-free customer service support. Settlement Class members will have 60 days from the date the Class Notice is sent to return the proof of claim form, file objections, or opt out of the settlement.

ii. Media and Publication Notice

The Parties have further agreed to a robust, nationwide media and publication notice program. Within 14 days of preliminary approval of the attached Settlement Agreement (Exhibit 1) and Class Notice (Exhibit 1-B and Exhibit 1-C) by the Court, KCC will supplement the direct notice described above with Internet banner ads that target adults, age 18 and over, nationwide on both desktop and mobile devices via the Google Display Network and the social media platform Facebook. These ads will run for a one-month period, and are targeted to generate 340 million impressions, sufficient to achieve notice reach to over 70% of potential Settlement Class members.

In addition, KCC will send an informational press release at the beginning of the media outreach campaign to local, national, and syndicated news organizations, delivering information regarding the settlement to numerous print, broadcast, and online press outlets.

Finally, KCC will establish a settlement website with downloadable case documents, including the detailed notice, online claims filing, frequently asked questions with responses, contact information for Class Counsel and KCC, and other pertinent information. A link to the settlement website will be disseminated in both the direct notice and the media and publication notice described above.

D. Opt-Out and Objections Procedure

After receiving notice, Settlement Class members will have an opportunity to exclude themselves from the settlement or object to its approval. The deadlines for filing opt-out requests and objections will be conspicuously listed in the Class Notice as well as on KCC's website. The process for filing exclusions and objections will also be explained in the Class Notice and on the website. With regard to objections, the Class Notice will inform Settlement Class members of the date, time and location of the Final Approval Hearing, and that the Final Approval hearing provides them with an opportunity to appear and have their objections heard.

E. Release of Claims

Subject to final approval by the Court, all members of the Settlement Class, who do not opt out of the proposed Settlement Class as required in the Class Notice, for and in consideration of the terms and undertakings outlined in the attached Agreement (Exhibit 1), the sufficiency and fairness of which are acknowledged, will release and forever discharge Defendants (and each of its current and former parents, subsidiaries, affiliates, controlled companies, officers, directors, managers, shareholders, members, partners, employees, predecessors, successors, assigns, agents and attorneys) from any and all claims, demands, debts, liabilities, actions, causes of action of every kind and nature, obligations, damages, losses, and costs, whether known or unknown, actual or potential, suspected or unsuspected, direct or indirect, contingent or fixed, that have been, could have been, or in the future might be asserted, arising out of or relating to the Covered Calls described above, including, but not limited to, the claims asserted in the Litigation.

F. Incentive Award and Attorneys' Fees

Subject to final approval by the Court and the Parties' Agreement, Plaintiff requests to be awarded $20,000.00 from the Settlement Fund as compensation for his role as Class Representative. Subject to final approval by the Court and the Parties' Agreement, Plaintiff

requests to be awarded attorneys' fees in the amount of $325,000, an amount equal to one-third of the Settlement Fund, in addition to reimbursement of reasonable litigation costs and expenses (which, as of the date of this Agreement, are $27,160.74, and are expected to increase modestly through the date of Final Approval). Defendants have agreed not to object to a request for these amounts.

G. Court Adoption and Jurisdiction

The attached Agreement is contingent upon entry of an order giving approval to the terms of this Agreement. If the Court refuses to grant approval and/or modifies any of the terms of the Agreement or requests made therein, or if the Court's Approval Order is reversed or materially modified on appeal, then the attached Agreement shall be terminated (unless the Parties agree otherwise in writing) and neither the fact that this Agreement was made nor any stipulation, representation, agreement or assertion made in the attached Agreement may be used against any Party.

Moreover, the Court shall retain continuing jurisdiction over this matter and the Parties, including all members of the Settlement Class, the administration and enforcement of the attached Agreement, and the benefits to the Settlement Class. Any dispute or controversy with respect to the interpretation, enforcement, or implementation of the attached Agreement shall be presented by motion to the Court.

III. LEGAL STANDARD

Federal Rule of Civil Procedure 23(e) requires judicial review and approval of any proposed settlement of claims brought on a class basis. Review of a proposed class action settlement generally involves a two-step process: preliminary approval and a fairness hearing. *See Manual for Complex Litigation, Fourth*, § 21.632 (West 2004). First, the court reviews the

proposed terms of settlement and makes a preliminary determination on the fairness, reasonableness and adequacy of the settlement terms. *See id.* Approval of a proposed settlement is a matter within the broad discretion of the district court. *See Richardson v. L'Oreal USA, Inc.*, 2013 WL 3216061, *2 (D.D.C. Jun. 27, 2013) (quoting *In re Vitamins Antitrust Litig.*, 1999 WL 1335318 at *5.) *See also Hubbard v. Donahoe*, 2013 WL 3943495, *2 (D.D.C. July 31, 2013) (same) (citing *Vista Healthplan v. Warner Holdings Co. III*, 246 F.R.D. 349, 357 (D.D.C. 2007)).

A "presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arm's length negotiations between experienced, capable counsel after meaningful discovery." *In re Vitamins Antitrust Litig*., 305 F. Supp. 2d 100, 104 (D.D.C. 2004). While the court generally has discretion to decide whether to approve or reject a proposed settlement, the court's decision is constrained by the "principle of preference" favoring and encouraging settlements in appropriate cases. *Id*. at 103 (quoting *Pigford v. Glickman*, 185 F.R.D. 82, 103 (D.D.C. 1999)). This preferential treatment is a matter of public policy in this Circuit, which strongly favors and encourages settlements, particularly in the context of a class action, to avoid the inherent costs, delays and risks of continued litigation. *See Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977); *see also Newberg on Class Actions* § 11:41, at 87 (4th ed. 2002) ("The compromise of complex litigation is encouraged by the courts and favored by public policy."); *In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992) ("Public policy strongly favors the pretrial settlement of class action lawsuits"). As this Court recently stated in an opinion granting preliminary approval of a class settlement, "[t]here is a longstanding judicial attitude favoring class action settlements." *Prince v. Aramark Corp*., No. 16-cv-1477, Dkt. 33 at 9 (D.D.C., March 14, 2017).

After determining whether to approve a settlement, a court must analyze whether to certify a settlement class under Federal Rule of Procedure 23. *See Thomas v. Albright*, 139 F.3d 227, 234 (D.C. Cir. 1998) ("A 'settlement-only class certification' does . . . depend upon compliance with all of the requirements of Rule 23(a) and (b)."). However, the Court need not apply the Rule 23 requirements as stringently as it would in reviewing an opposed class certification motion. *See Stewart v. Rubin*, 948 F. Supp. 1077, 1091 (D.D.C. 1996) (recognizing that "manageability and efficiency of a class action settlement is quite different than that in a litigated case"). The court's primary concern should be whether the proposed settlement is fair, reasonable and adequate. *See Cotton*, 559 F.2d at 1331. If there are no obvious deficiencies, and the settlement falls within the range of possible approval, it should be preliminarily approved. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1017 (9th Cir. 2008).

IV. THE COURT SHOULD APPROVE THE AGREEMENT

The determination of a settlement's fairness "calls for a comparative analysis of the treatment of class members vis-à-vis each other and vis-à-vis similar individuals with similar claims who are not in the class." Manual at § 21.62. A trial court has a duty under Fed. R. Civ. P. 23(e) to make sure that a proposed settlement is "fair, adequate, and reasonable and not the product of collusion between the parties." *In re Vitamins Antitrust Class Actions*, 215 F.3d 26, 30 (D.C. Cir. 2000) (citations omitted). *Cf. United States ex rel. Schweizer v. Océ North Am., Inc.* 2013 WL 3776260, *8 (D.D.C. July 19, 2013). Generally, a court should grant preliminary approval of a class action settlement if it appears to fall "within the range of possible approval" and "does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive

compensation for attorneys." *Trombley v. Nat'l City Bank*, 759 F.Supp.2d 20, 23 (D.D.C. 2011) (quoting *Newberg on Class Actions*, § 11:25 (4th ed. 2010)).

Courts look to a number of factors in this analysis, including: "(1) whether the settlement is the result of arm's-length negotiations; (2) the terms of the settlement in relation to the strength of Plaintiffs' case; (3) the stage of the litigation proceedings at the time of settlement; (4) the reaction of the class; and (5) the opinion of experienced counsel." *Hubbard* at *2 (quoting *Vista Healthplan*, 246 F.R.D. at 360); *Schweizer, supra*, at *8 (same) (quoting *In re LivingSocial Mktg. & Sales Practice Litig.*, 2013 WL 1181489, *7 (D.D.C. Mar. 22, 2013)). As discussed in more detail below, the proposed Agreement satisfies these factors.

a. The Settlement is the Result of Arm's Length Negotiations

A "presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arms' length negotiations between experienced, capable counsel after meaningful discovery." *In re Vitamins Antitrust Litig*., 305 F. Supp. 2d at 104 (quoting *Manual for Complex Litig.*, at § 30.42). The attached Agreement is the result of wide-ranging discovery ranging over twelve (12) months and is the product of extensive, arms-length negotiations between experienced counsel, reached with the assistance of a former judge and neutral, third-party mediator (Hon. Morton Denlow (Ret.) of the mediation firm JAMS) with particular expertise regarding the litigation and settlement of actions brought under the TCPA. *See Thieriot v. Celtic Ins. Co.*, 2011 WL 1522385 at *5 (N.D. Cal. Apr. 21, 2011) ("[T]he settlement is the product of serious, non-collusive, arms' length negotiations by experienced counsel with the assistance of an experienced mediator at JAMS … In sum, the court finds that viewed as a whole, the settlement is sufficiently 'fair, adequate, and reasonable' such that approval of the settlement is warranted").

Accordingly, this Court should apply a presumption that the settlement reached by the Parties is fair and reasonable. *See Equal Rights Center v. Washington Metropolitan Area Transit Authority*, 573 F. Supp. 2d 205, 212 (D.D.C. 2008) (class action settlement presumed reasonable where the parties engaged in six months of vigorous negotiations and the litigation was contentious); *see also Reed v. General Motors Corp.*, 703 F.2d 170, 175 (5th Cir. 1983) ("[T]he value of the assessment of able counsel negotiating at arm's length cannot be gainsaid. Lawyers know their strengths and they know where the bones are buried."); *see also In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 330, 351 (N.D. Ohio 2001) ("[W]hen a settlement is the result of extensive negotiations by experienced counsel, the Court should presume it is fair."); *In re NASDAQ Market-Makers Antitrust Litig*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997) (citing *Manual for Complex Litigation, Third*, § 30.41 (West 1995)) ("Where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted.").[1]

b. The Terms of Settlement Reflect the Strength of the Parties' Positions and the Risks of Continued Litigation

The proposed Agreement is in the best interests of Plaintiff, the Settlement Class as a whole and Defendants. It strikes a reasonable balance between the benefits the Settlement Class will receive under this settlement, the fact that Defendant will vigorously oppose the claims

[1] Plaintiff's counsel further represent that, consistent with controlling law and the ethical standards promulgated by the District of Columbia Bar, no plaintiff's attorney has requested or been offered any compensation, appointment, or benefit by defendant during negotiations related to the settlement of this case other than the proposed attorneys' fees and costs outlined above, which are subject to court approval.

asserted in the litigation if the settlement is not approved, and the attendant risks, costs, uncertainties and delays of litigation.

"The most important factor in the Court's evaluation of a proposed class action settlement is how the relief secured by the settlement compares to the class members' likely recovery had the case gone to trial." *Blackman v. District of Columbia*, 454 F. Supp. 2d 1, 9-10 (D.D.C. 2006). The benefits to the class members must be "considered in juxtaposition with the risks attendant to continued litigation of this matter." *Schweizer, supra*, at *12 (quoting *In re LivingSocial Mktg.*, 2013 WL 1181489, at *9).

Here, because there is risk to both Parties in proceeding with the litigation, and costs in doing so, the proposed Agreement should be approved. If the case proceeded to litigation, Plaintiffs would have to overcome class certification, summary judgment, Defendants' potential liability for the actions of third-party lead generators, the proper interpretation and effect of the TCPA's implementing regulations, trial and appeals – all of which offer potential stumbling blocks to securing a recovery for the Settlement Class. The parties have extensively analyzed the strengths and weaknesses of their respective positions and the risks, time, and costs of continued litigation.

As discussed more fully below, the *pro rata* distribution of the non-reversionary $975,000 common fund created by the Parties' Agreement to every Class Member who submits a timely and complete claims form that is verified and approved is considerable and there is a material risk that continued litigation would result in a less favorable outcome for the Class Members or increased liabilities for Defendant. Providing $975,000 now through this Agreement avoids the potential barriers described above and offers the Settlement Class a sure recovery. For this reason, courts recognize that prompt payments in light of the obstacles

inherent in litigation class actions weighs in favor of approving settlements." *See, e.g., Stephens v. US Airways Group*, 102 F. Supp. 2d 222, 227 (D.C. 2015) ("The delay in providing relief to the class if this case were to be litigated is a factor strongly supporting the compromise reached by the parties."); *Trombley v. Nat'l City Bank*, 826 F. Supp. 2d 179, 195 (D.D.C. 2011) (same).

c. Settlement was only Reached after Meaningful Litigation and Negotiation

Settlement should come at a time when counsel has "sufficient information to adequately assess the risks of [continued] litigation." *In re Lorazepam Clorazepate Antitrust Litig.*, 2003 WL 22037741,*5 (D.D.C. June 16, 2003); *see also Meijer, Inc. v. Warner Chilcott Holdings Co. III, Ltd.*, 565 F. Supp. 2d 49, 57-58 (D.D.C. 2008). As a result of the discovery described above, counsel for both Parties had ample foundation upon which to evaluate the proposed Agreement. Each party, therefore, possessed the necessary information to evaluate the strengths and weaknesses of their respective cases in order to discuss settlement effectively. Armed with this information, the Parties were able to reach the present Agreement only after extensive discovery, lengthy settlement discussions, and further negotiations over settlement terms and language. As such, the uncertainty of these legal issues necessitates resolution, and the attached Agreement represents a fair, reasonable, and adequate resolution that is in the best interests of all Parties and the Settlement Class.

d. The Settlement Is Fair And Reasonable

The opinion of experienced counsel "should be afforded substantial consideration by a court in evaluating the reasonableness of a proposed settlement." *In re Lorazepam*, 2003 WL 22037741 at *6; *see also Radosti*, *Envision Emi, LLC*, 717 F. Supp. 2d 37, 57 (D.D.C. 2010). The Parties' counsel have substantial experience litigating TCPA class actions, and significant experience litigating class action matters of similar size, scope, and complexity to the instant

action. *See* Exhibit 2, Heller Decl. at ¶¶ 9-11. Counsel strongly believe and represent that, given the risks attendant to further litigation, the terms of the proposed settlement are fair and reasonable and in the best interest of the class. *See Equal Rights Center*, 573 F. Supp. 2d at 213. *Id*. at ¶¶ 10-11.

The attached Agreement provides Settlement Class members with a substantial monetary recovery, as long as they submit a valid and timely claim. While the exact per-claimant recovery will not be known until the conclusion of the claims period, given historical claims rates in TCPA cases, each participating class member is likely to receive between $40 and $100, after deducting requested attorneys' fees and expenses, administration costs, and an incentive award to the named plaintiff. This recovery on behalf of Settlement Class Members equals or exceeds amounts approved by courts in analogous TCPA cases, and should be similarly approved here. *See, e.g., Mahoney v. TT of Pine Ridge, Inc.*, Case No. 17-80029-CIV, 2017 U.S. Dist. 13 LEXIS 217470, at *18 (S.D.Fla. Nov. 17, 2017) (giving final approval to TCPA settlement where class members had the option to choose between a $4.00 cash award or a $15.00 voucher"); *Kolinek v. Walgreen Co.*, 311 F.R.D. 483 (N.D. Ill. 2015) (finally approving TCPA settlement where the individual settlement award was approximately $30.00); *Amadeck v. Capital One Fin. Corp. (In re Capital One Tel. Consumer Prot. Act Litig.)*, 80 F. Supp. 3d 781, 787 (N.D. Ill. 2015) (awarding $34.60 per claiming class member); *Jiffy Lube International, Inc. Text Spam Litigation*, 11-MD-02261-JM-JMA (finally approving TCPA class settlement where class members received a single voucher for an oil change, valued at $20.00); *Wojcik v. Buffalo Bills, Inc.*, Case No. 8:12-cv-2414-T-23TBM (M.D. Fla. Aug. 25, 2014) (each class member received store credit usable at the defendant's retail store and valued between $57.50 and $75.00);

Knutson v. Schwan's Home Serv., 2014 U.S. Dist. LEXIS 99637 (S.D. Cal. 2014) ($20 per class member).

The proposed incentive award that is payable to the Class Representative is similarly in line with those awarded by courts in analogous class action and TCPA cases. Throughout this case and even prior to its inception, Mr. Rogers has expended substantial time and effort on behalf of the Settlement Class and to its benefit. *See* Exhibit 2, Heller Decl. at ¶ 12. Mr. Rogers performed the initial investigation that led to the identification of Defendants and the discovery of the telemarketing practices that underlie this lawsuit, which included an in-person meeting with a sales representative of Defendants and subsequent investigation and research. *Id*. Throughout discovery, Mr. Rogers sat for a deposition, reviewed deposition testimony and records obtained by Plaintiff's counsel, and responded to Interrogatories and Requests for Production of Documents. *Id*. Throughout the Parties' attempts at settlement, Mr. Rogers was consulted and had input in the eventual successful negotiation of favorable terms for Settlement Class members. *Id*.

Plaintiff's incentive award promotes a public policy of encouraging individuals to undertake the responsibility of representative lawsuits, reflects the time, cost, and effort that he has committed to this matter in order to bring relief to the class, and is comparable to similar incentive awards in TCPA cases. *See, e.g., Benzion v. Vivint, Inc.*, No. 12-cv-61826-WJZ, 2015 U.S. Dist. LEXIS 179532 (S.D. Fla. Feb. 23, 2015) (ECF No. 201) (awarding $20,000 incentive award in TCPA class settlement); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, l30 F.R.D. 366, 374 (S.D. Ohio 1990) (awarding two incentive awards of $55,000 and three incentive awards of $35,000); *Bogosian v. Gulfoil Corp.*, 621 F. Supp. 27, 32 (E.D. Pa. 1985) (incentive awards of $20,000 to each of two plaintiffs).

As such, the Court should make a preliminary finding that the attached Agreement is fair, reasonable and adequate when the benefits to Settlement Class Members described above are weighed against the cost and uncertainty of future, protracted litigation regarding Plaintiff's claims. As noted above, Defendants have indicated that they will vigorously oppose the claims asserted in this Action if the attached Agreement is not approved, and Plaintiff and Plaintiff's counsel have carefully considered the risks inherent to litigation and the defenses available to Defendants in agreeing to the benefits described herein.

V. THE COURT SHOULD CERTIFY THE SETTLEMENT CLASS

A class may be certified "solely for purposes of settlement [if] a settlement is reached before a litigated determination of the class certification issue." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 618-20 (1997). In conditionally certifying a class for the purposes of settlement, the district court need not inquire whether the case, if tried, would present intractable management problems, but must still make a finding that the plaintiff has established the criteria set out in Rule 23(a), Federal Rules of Civil Procedure, and at least one of the subsections of Rule 23(b). As set forth below, the proposed Settlement Class in this matter satisfies each of the prerequisites for certification, and the Settlement Class should be conditionally certified for settlement purposes.

A. The Proposed Settlement Class Satisfies the Requirements of 23(a)

Federal Rule of Civil Procedure 23(a) provides that a class may be certified when (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately

protect the interests of the class. Fed. R. Civ. P. 23(a). The Settlement Class satisfies each of these requirements.

a. Numerosity

Federal Rule of Civil Procedure 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." "The general rule is that a plaintiff need not provide the exact number of potential class members in order to satisfy this requirement." *Bynum v. District of Columbia*, 214 F.R.D. 27, 32-33, 2003 U.S. Dist. LEXIS 4797, *12-13 (D.D.C. 2003) (citing *Kifafi v. Hilton Hotels Retirement Plan*, 189 F.R.D. 174, 176 (D.D.C. 1999) ("So long as there is a reasonable basis for the estimate provided, the numerosity requirement can be satisfied without precise numbers.") (other citations omitted)). "Generally speaking, courts have found that a proposed class consisting of at least forty members will satisfy the impracticability requirement." *Bynum*, 214 F.R.D. at 32 (citations omitted).

Here, the Settlement Class as proposed satisfies the numerosity requirement. Based upon Plaintiff counsel's extensive investigation and the information obtained during discovery, the Parties have agreed, solely for the purposes of settlement, that at least approximately 112,000 individuals may have received a Covered Call as defined above. As such, and in line with the law cited above, joinder of all such persons who received a Covered Call would be impracticable, and the Settlement Class is sufficiently numerous as to satisfy Rule 23(a)(1). *See Bynum*, 214 F.R.D. at 32-33.

b. Commonality

The second requirement is that "there are common questions of law or fact common to the class." Rule 23(a)(2). Traditionally, "the commonality inquiry focuses on what characteristics are shared among the whole class." *Alvarez v. Keystone Plus Constr. Corp.*, 303

F.R.D. 152, 161, 2014 U.S. Dist. LEXIS 50303, *19 (D.D.C. 2014) (internal quotation marks and citation omitted). It is Plaintiff's position that "[t]he commonality test is met when there is at least one issue, the resolution of which will affect all or a significant number of the putative class members, such that factual variations among the class members will not defeat the commonality requirement, so long as a single aspect or feature of the claim is common to all proposed class members." *Id.* at *17 (internal quotation marks and citations omitted). Ultimately, the "burden to meet the commonality requirement of Rule 23(a) is relatively light." *Napoles-Arcila v. Pero Family Farms, LLC*, 2009 WL 1585970, *6 (S.D. Fla. Jun. 4, 2009) (*citing Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1268 (11th Cir. 2009)).

Here, the common legal and factual questions refer to standardized conduct by Defendant towards Plaintiff and members of the proposed Settlement Class. *See In re Terazosin Hydrochloride Antitrust Litig.*, 220 F.R.D. 672, 687 (S.D. Fla. 2004) (holding that commonality is satisfied when "defendants have engaged in a standardized course of conduct that affects all class members."). Through discovery, the Parties have limited membership in the Settlement Class to only those persons and/or entities who received one or more Covered Calls as defined above. Thus, the sole remaining issues of law – whether the alleged calls violated the TCPA and its implementing regulations and whether the Defendants are liable for any such violations – are common to all members of the Settlement Class, and these facts easily satisfy the requirements of Rule 23(a)(2).

c. *Typicality*

The third requirement is that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Rule 23(a)(3). "Typicality requires that the claims of the representative be typical of those of the class and often overlaps with the

commonality inquiry, as each seeks to determine the practicality of proceeding with a class action and the extent to which the plaintiffs will protect the interests of absent class members." *Alvarez* at *18-19 (internal quotations and citations omitted). "[T]he typicality requirement is satisfied if each class member's claim arises from the same course of events that led to the claims of the representative parties and each class member makes similar legal arguments to prove the defendant's liability." *Id.*

Here, as discussed above in the context of commonality, the claims, legal theories, interest, and alleged suffered injury of the representative Plaintiff and the proposed Settlement Class are identical. The Plaintiff and Settlement Class Members all received Covered Calls as defined above, in alleged violation of the TCPA. The claims of the representative Plaintiff are therefore typical of the Settlement Class that he purports to represent, and, thus, the typicality requirement is fully satisfied.

d. *Adequacy of Representation*

The final requirement of Rule 23(a) is that "the representative parties will fairly and adequately protect the interests of the class." Rule 23(a)(4). "The adequacy requirement is satisfied upon a showing that (1) there is no conflict of interest between the proposed class representative and other members of the class, and (2) the proposed class representative will vigorously prosecute the interests of the class through qualified counsel." *Alvarez* at *20.

With regard to the Class Representative, the Plaintiff has standing to bring an action for violation of the class members' rights protected by the TCPA and has no interest antagonistic or in conflict with the interests of the proposed Settlement Class members it seeks to represent. Plaintiff and all of the Settlement Class Members share a common goal in recovering statutory damages for the TCPA violations alleged in this matter. *Id*. Moreover, Plaintiff fully

understands its fiduciary role when serving as a representative of others in a class action, has contributed significant time and resources to this matter, and has, and will continue to, follow through with his obligations as Class Representative *Id*.

Similarly, proposed Class Counsel are all qualified, well-respected members of the legal community who have significant experience litigating class action matters of similar, size, scope, and complexity to the instant action. *See* Exhibit 2, Heller Decl. at ¶¶ 9-11. Plaintiff's counsel have previously litigated complex, statutory issues in federal court, have performed extensive research and are familiar with the legal and factual issues raised in this litigation, and have the personnel and resources to conduct litigation of this nature. *See id*. Throughout this litigation, counsel has diligently investigated, prosecuted, and devoted substantial time and resources to Plaintiff's and the Settlement Class's claims, and will continue to do so throughout the pendency of this action. *See id*. Adequacy of representation is therefore satisfied.

B. The Proposed Settlement Class Satisfies the Requirements of 23(b)(3)

Federal Rule of Civil Procedure 23(b)(3) permits class certification if the court finds that the questions of law and/or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. *See* Rule 23(b)(3). To be certified under Rule 23(b)(3), an action must satisfy both the predominance and superiority requirements. *See Smith v. Wm. Wrigley Jr. Co.*, 2010 U.S. Dist. LEXIS 67832, *14 (S.D. Fla. June 15, 2010).

a. Predominance

The Rule 23(b)(3) predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 594. In order to satisfy this requirement, the named plaintiff must establish that the issues subject to generalized

proof in the class action, and thus applicable to the class as a whole, predominate over those issues that are subject only to individualized proof. *See Jackson v. Motel 6 Multipurpose, Inc.,* 130 F.3d 999, 1005 (11th Cir. 1997). Common issues of law and fact predominate "if they have a direct impact on every class member's effort to establish liability and on every class member's entitlement to injunctive and monetary relief." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1255 (11th Cir. 2004) (*quoting Ingram v. Coca–Cola Co.*, 200 F.R.D. 685, 699 (N.D. Ga. 2001), *abrogated in part on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008)). Thus, the court's analysis turns on whether "there is sufficient common evidence of a resulting injury and the amount of that injury." *In re Nifedipine Antitrust Litig*., 246 F.R.D. 365, 369 (D.D.C. 2007).

Predominance is satisfied here because the claims of both the Class Representative and the members of the Settlement Class all arise from Defendant's uniform conduct applicable to the Settlement Class as a whole. The Parties have limited membership in the Settlement Class to only those persons and/or entities who received one or more Covered Calls as defined above. As such, predominance has been satisfied. *See Wm. Wrigley Jr. Co.*, 2010 U.S. Dist. LEXIS 67832 at *14-15 ("Applying this [predominance] standard to the action, the Court finds that all of the claims of the named Plaintiff and the Proposed Class are based on the same legal theories and the same uniform advertising. Therefore, common issues substantially predominate over any individual issues.") (emphasis added).

Additionally, because the Court need not consider manageability issues as part of the predominance inquiry for purposes of a settlement class, predominance is easily satisfied here. *See Radosti*, 717 F. Supp. 2d at 54 ("Because the class is being certified for purposes of

settlement only, the Court need not consider whether the case, if tried, would present intractable management problems.").

b. Superiority

The focus of Rule 23(b)(3)'s superiority analysis is on "the relative advantages of a class action suit over whatever other forms of litigation might be realistically available to the plaintiffs." *Manno,* 289 F.R.D. at 690 (*quoting Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1183-84 (11th Cir. 2010)). The "purpose of the superiority requirement is consistent with the overall goals of Rule 23, which is to assure that the class action is the most efficient, effective and economic means of settling the controversy." *Walco Investments, Inc. v. Thenen*, 168 F.R.D. 315, 337 (S.D. Fla. 1996) (citations omitted). "In many respects, the predominance analysis has a tremendous impact on the superiority analysis for the simple reason that, the more common issues predominate over individual issues, the more desirable a class action lawsuit will be as a vehicle for adjudicating the plaintiffs' claims." *Wm. Wrigley Jr. Co.*, 2010 U.S. Dist. LEXIS 67832 at *15 (citing *Klay v. Humana, Inc.*, 382 F.3d 1241, 1269 (11th Cir. 2004)).

A class action will be superior to all other methods for fairly and efficiently adjudicating this controversy because "the proposed class members' claims are predicated on a common set of facts and concern the same product and advertising." *Wm. Wrigley Jr. Co.*, 2010 U.S. Dist. LEXIS 67832 at *15 (emphasis added). Moreover, the interest of the Settlement Class Members in individually controlling the prosecution of separate actions is low, due to the statutory nature of the potential damages and the amount of each individual class member's damages. *See id*. ("Moreover, if the Proposed Class is not certified, it is likely that potential class members would

lack incentive to pursue their claims individually due to the small awards involved."). Thus, a class action affords an efficient resolution to this controversy.

C. Class Notice Meets the Requirements of Rule 23(c)(2)(B) and Should be Approved

"If the court preliminarily approves the settlement, it must direct the preparation of notice of the certification of the settlement class, the proposed settlement and the date of the final fairness hearing." *Manual for Complex Litigation, Fourth*, § 21.632-21.635 (West 2004); *see also* Fed. R. Civ. P. 23(e)(1) ("The court must direct notice in a reasonable manner to all class members who would be bound by the [proposed settlement, voluntary dismissal, or compromise]."); Fed. R. Civ. P. 23(c)(2)(B) (setting forth the requirements for notice). The standard for the adequacy of a settlement notice in a class action is measured by reasonableness. *See Faught*, 668 F.3d at 1239. "There are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 114 (2d Cir. 2005) (*quoting Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir. 1982)).

The attached proposed Class Notice submitted by the Parties clearly meets this reasonableness standard in all respects. The attached Class Notice (1) describes the nature and status of the litigation; (2) sets forth a clear definition of the proposed Settlement Class; (3) sets forth the basic terms of the proposed Agreement; (4) advises members of the proposed Settlement Class that a class member may enter an appearance through an attorney if the member so desires and of the appropriate methods to either submit a claim form, opt-out, or object to the proposed Agreement; (5) advises members of the proposed Settlement Class of the time and

manner for requesting exclusion and that the court will exclude from the class any member who requests exclusion; (6) informs members of the proposed Settlement Class of the identities of the Class Representative, Class Counsel, and the awards that each has applied for in this case; (7) provides members of the proposed Settlement Class with contact information for both Class Counsel and the Settlement Administrator; and (8) states the binding effect of a class judgment on members under Rule 23(c)(3).

Moreover, the Notice Plan described above, to be effectuated by KCC, is designed to reach as many potential Settlement Class members as possible, and is the best notice practicable under the circumstances. The direct mailing, Internet publication, press release, and website notice plan described above is consistent with other effective court-approved notice plans, and should easily satisfy the requirements of Rule 23 and Due Process. KCC is an extremely reputable class action administrator experienced in disseminating notice in similar class actions, and the proposed Notice Plan mirrors similar plans developed and implemented by KCC and approved by numerous federal courts in analogous TCPA cases in the settlement context.

In granting preliminary settlement approval, the Court should also therefore approve the Parties' proposed form and method of providing notice to members of the proposed Settlement Class, as set forth in the attached Class Notice (Exhibit 1-B and Exhibit 1-C).

VI. THE COURT SHOULD APPOINT SHAWN HELLER, RICHARD BENNETT AND PETER BENNETT AS SETTLEMENT CLASS COUNSEL

Rule 23(c)(1)(B) provides that "an order that certifies a class action . . . must appoint class counsel under Rule 23(g)." Rule 23(g)(1)(A) states that "[i]n appointing class counsel, the court (i) must consider: [1] the work counsel has done in identifying or investigating potential claims in the action; [2] counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; [3] counsel's knowledge of the applicable law; and

[4] the resources that counsel will commit to representing the class." All factors weigh in favor of appointing Shawn Heller, Richard Bennett and Peter Bennett as Settlement Class Counsel.

As described under the Rule 23(a)(4) adequacy analysis, counsel and their firms have -- and continue to be – willing and able to vigorously prosecute this action and to devote all necessary resources to obtain the best possible result for Settlement Class Members.

VII. CONCLUSION

WHEREFORE, for all of the foregoing reasons, the Parties jointly request that the Court grant the attached proposed Order, which provides:

(1) preliminary approval of the proposed settlement as set forth in the attached Agreement (Exhibit 1);

(2) the conditional certification of the proposed Settlement Class, for the purposes of settlement, pursuant to Rule 23(a) and (b)(3), Federal Rules of Civil Procedure;

(3) that members of the Settlement Class be given notice of the pendency of this action and the proposed settlement in the form and manner proposed by the Parties in the attached Agreement (Exhibit 1) and Class Notice (Exhibit 1-B);

(4) the appointment plaintiff Darrell Rogers as Class Representative;

(5) the appointment of undersigned Plaintiff's counsel as Class Counsel pursuant to Rule 23(g), Federal Rules of Civil Procedure;

(6) the scheduling of a Final Fairness Hearing, at which time the Court will consider final approval of the settlement and final entry of the attached Agreement; and

(7) such other and further relief as the Court deems just and reasonable.

Respectfully submitted:

Shawn A. Heller, Esq.
D.C. Bar No. 985899
shawn@sjlawcollective.com
Social Justice Law Collective, PL
974 Howard Avenue
Dunedin, Florida 34698
Tel: (202) 709-5744

Peter Bennett
D.C. Bar No. 1016919
peterbennettlaw@gmail.com
Richard Bennett, Esq.
Florida Bar No. 150627
Richardbennett27@gmail.com
Bennett & Bennett
1200 Anastasia Ave., Ofc 360
Coral Gables, Florida 33134
Tel: (305) 444-5925

Attorneys for Plaintiff

By: /s/ *Shawn A. Heller*
Shawn A. Heller

Steven A. Augustino
D.C. Bar No. 439987
KELLEY DRYE & WARREN LLP
3050 K Street, NW, Suite 400
Washington, D.C. 20007
Telephone: (202) 342-8400
Fax: (202) 342-8451
Email: saugustino@kelleydrye.com
Email: bstern@kelleydrye.com

Lisa A. Messner
D.C. Bar No. OH0039
Mac Murray & Shuster, LLP
6530 West Campus Oval, Ste. 210
New Albany, Ohio 43054
Telephone: (614) 939-9955
Fax: (614) 939-9954
Email: lmessner@mslawgroup.com

Attorneys for Defendants

By: *s/ Steven A. Augustino*
Steven A. Augustino

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, on this 5th day of November, 2019, which will send a notice of electronic filing to all attorneys of record.

By: /s/ *Shawn A. Heller*
Shawn A. Heller, Esq.