IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

OPHELIA PARKER, and JOSEPH NASO, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

Case No. 6:16-cv-01193-CEM-DAB

UNIVERSAL PICTURES, a division of UNIVERSAL CITY STUDIOS, LLC; LEGEND PICTURES, LLC; LEGENDARY PICTURES FUNDING, LLC; LEGENDARY ANALYTICS, LLC; and HANDSTACK, P.B.C.,

Defendants.
_____/

PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND CERTIFICATION OF SETTLEMENT CLASSES

TABLE OF CONTENTS

TABLE OF EXHIBITS

Ex. No.	Description of Exhibit
A	Joint Stipulation of Settlement and Release
B	Proposed Notice Forms
C	Proposed Preliminary Approval Order
D	Third Amended Complaint
E	Anya Vekhvoskaya's Supplemental Report
F	Declaration of Edmund Normand
G	Plaintiffs' Discovery Requests
H	Deposition Notices
I	Declaration of Rodney Max
J	Normand PLLC Resume
K	Gray LLC resume
L	JND Resume
M	Telephone and Identification Numbers for Proposed Class (redacted)
N	Proposed Preliminary Schedule

Plaintiffs OPHELIA PARKER and JOSEPH NASO respectfully submit this Memorandum of Law in Support of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement and Certification of Settlement Classes.

I. INTRODUCTION

As requested by the Court (Doc. 158), Plaintiffs submit the following in support of Plaintiffs' Unopposed Motion for Preliminary Approval of the Class Action Settlement and Certification of Settlement Classes. Doc. 162.

This case involves alleged violations of the Telephone Consumer Protection Act, 47 U.S.C. §227(b) and (c) ("TCPA"). Plaintiffs, individually and on behalf of all others similarly situated, allege that Defendants violated TCPA §227(b) by sending text messages promoting the *Warcraft* movie via an Automatic Telephone Dialing System ("ATDS") to wireless telephone numbers without consent. Further, Plaintiffs allege that Defendants violated TCPA §227(c) by (1) sending *Warcraft* promotional text messages to subscribers on the National Do-Not-Call Registry; (2) sending *Warcraft* promotional text messages to subscribers who requested Defendants stop sending text messages; and (3) sending *Warcraft* promotional text messages outside the permitted time (8 A.M. to 9 P.M.). Doc. 97. Defendants assert multiple defenses against liability and class certification.

After the completion of fact and expert discovery, class certification briefing, on the eve of summary judgment briefing, and after three full-day mediation sessions, Plaintiffs Ophelia Parker and James Naso ("Plaintiffs"), Defendant Universal Pictures, a division of Universal City Studios, LLC ("Universal"), Defendants Legend Pictures, LLC; Legendary Pictures Funding, LLC; Legendary Analytics LLC (jointly "Legendary"), and Defendant Handstack, P.B.C., ("Handstack") (collectively "the Parties") have reached a settlement ("Settlement") in this TCPA putative class action.

This Settlement provides outstanding and meaningful relief to the Class. Notably, the Settlement provides the Class, which consists of approximately 466,779 cell-phone users, substantial

monetary relief of up to $19,225,515.00. *See* Joint Stipulation of Settlement and Release attached hereto as Exhibit A. *See also* proposed Notice forms and proposed Preliminary Approval Order attached hereto as Exhibit B and Exhibit C, respectively. Each Class Member is eligible for cash payments between $35.00 and $50.00 for each Class in which they are a member (further described below), depending on the type of violation relevant to each respective Class. Ex. A ¶ 40 (Joint Stipulation of Settlement). Equally important, the Settlement provides significant injunctive relief that effectively stops the complained-of behavior. Ex. A ¶¶ 41-42. This monetary and injunctive relief substantially benefits the Classes and is a favorable outcome for Class Members when compared to other approved TCPA settlements within this District and nationally.

This Settlement provides prompt and effective relief to the Class after years of hard-fought litigation and in the face of new uncertainties in developing TCPA jurisprudence. As such, and as set forth more fully below, Plaintiffs move the Court to grant Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement and Certification of Settlement Class. Doc. 162.

II. BACKGROUND AND NATURE OF THE LITIGATION

A. Background Facts And The Telephone Consumer Protection Act

This case asserts that the Defendants' telemarketing solicitation practices violate various sections of the TCPA. Ex. D (Third Amended Complaint); *see also* Doc. 97. Legendary and Universal jointly produced and marketed *Warcraft*, a major motion picture released in June 2016. Doc. 112 at 2-3. In May to mid June, 2016, Legendary and Universal contracted with Handstack to effectuate a text-marketing campaign to promote *Warcraft*. Doc. 112 at 3. Over a short period of time in late-May to mid-June 2016, text messages were sent to approximately 466,779 telephone numbers promoting *Warcraft*. Ex. E (Anya Vekhvoskaya's Supplemental Report). Plaintiffs allege that Defendants did not verify if the telephone numbers receiving the text messages were on the National Do-Not-Call Registry. Doc. 97 at ¶ 92. Further, many recipients replied requesting that Defendants cease sending

them text messages, but such requests were ignored. Doc. 97 at ¶ 202. Finally, many recipients received text messages before 8:00 A.M. or after 9:00 P.M. local time. Doc. 97 at ¶ 191. Plaintiffs contend that Defendants transmitted these telemarketing texts via an ATDS, and were prohibited by 47 U.S.C. §227(b) and 47 U.S.C. §227(c) (as to §227(c), even if the texts were not transmitted via an ATDS), along with associated regulations located in 47 C.F.R. §64.1200.

Plaintiffs are Florida residents who, like consumers nationwide, continue to be plagued by spam telemarketing.[1] Both Plaintiffs registered their telephone numbers on the National Do-Not-Call Registry more than thirty-days before the text message campaign described above. Doc. 112. Yet, both Plaintiffs received multiple telemarketing texts promoting a movie called *Warcraft*. Mr. Naso received text messages before 8 A.M. or after 9 P.M.. Doc. 97 at ¶ 144. Ms. Parker received one or more text messages after requesting that Defendants stop sending text messages to her telephone number. Doc. 97 at ¶ 134.

B. Litigation And Motion Practice

The case was vigorously litigated for over two years, including numerous pleading amendments as discovery revealed additional defendants and causes of action. Plaintiffs were added to provide the putative Class with all available causes of action under the TCPA. The Parties fully briefed the issue of class certification, and the case settled on the eve of the summary judgment deadline. *See* Ex. F (Declaration of Edmund Normand, which includes detailed litigation summary).

C. Discovery

The Parties engaged in large-scale discovery to uncover salient facts sufficient to understand the merits of the various causes of action and the viability of class certification. Each side propounded, answered, and produced extensive discovery. Plaintiffs sent Defendants eleven

[1] As recently summarized in the Washington Post, the current onslaught of marketing spam harassment is unprecedented, and the Do-Not-Call list is uniformly ignored by telemarketers. Zuylen-Wood, Simon van, "How Robo-Callers Outwitted the Government and Completely Wrecked the Do Not Call List." The Washington Post, 11 Jan. 2018.

separate sets of Requests for Production, four separate sets of Interrogatories, and six separate Requests for Admission. Defendants produced over 900,000 documents. Ex. F. Defendants also served multiple sets of formal discovery. Ex. G (Plaintiffs' Discovery Requests).

The Parties conducted over twelve depositions, most lasting an entire day each, in Massachusetts, California, Florida, and Virginia, requiring great travel and time to complete. Ex. H (Deposition Notices); Ex. F.

D. Settlement Proceedings

The Settlement was the product of lengthy negotiations supervised by two experienced mediators. The negotiations included three full day, in-person mediations in multiple cities, as well as numerous phone conferences and emails that occurred outside of and supplemental to mediation. Jay Cohen and Rodney Max were appointed as mediators. Ex. F. Mr. Cohen and Mr. Max are well-known nationally and internationally as highly-skilled mediators with experience in complex cases and class actions. *See* Ex. F at ¶ 38.

The first in-person mediation was held on April 26, 2018, before Mr. Cohen. Ex. F. Settlement discussions occurred prior to and after the first mediation. However, the mediation led to an impasse. Doc 141. After six additional months of litigation, efforts at mediation were recommenced. Ex. F. Subsequent mediations with Mr. Max took place on October 16, 2018, in Orlando, Florida, and on the first available subsequent date and place, Sunday, October 28, 2018, in Chicago, Illinois. Ex. F. The Parties conducted pre-mediation telephone calls with Mr. Max. Although informal settlement negotiations began in 2016, it was not until the second and third mediations held before Mr. Max that the Parties made meaningful progress towards resolution. *See* Ex. F and Ex. I (Declaration of Rodney Max). Settlement between all Parties was finalized on November 16, 2018. Ex. F. The length of the negotiations was not due to a lack of effort or commitment by the Parties, but rather was impacted by uncertainty over the likelihood of success of

the various claims, due in part to extraordinary changes in the law during the pendency of the action. The negotiations also evolved as new Plaintiffs with new claims were added to the action.

The changes to the law included the landmark case of *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018), where the D.C. Circuit invalidated aspects of the FCC 2015 Declaratory Ruling, including, *inter alia*, the extent to which the 2015 Ruling interpreted the definition of an ATDS to include systems with the "capacity" to encompass its "potential functionalities" with modifications such as software changes. *Id.* at 691. The D.C. Circuit also overruled FCC Orders to the extent that they seemingly held both that (i) a device qualifies as an ATDS only if it has the capacity to generate random or sequential numbers to be called and (ii) that it qualifies as an ATDS even without such capacity, so long as it is capable of automatically dialing numbers from a pre-programmed database of numbers. *Id.* at 703. Whether or not Defendants utilized an ATDS in transmitting the subject text messages, was a dispositive factor for the ATDS claims, the largest class claim in Plaintiffs' complaint. Thus, the decision in *ACA Int'l v. FCC* introduced a fundamental uncertainty over a year-and-a-half into the litigation and made the mediation process more complicated. The TCPA § 227(c) Classes that do not require an ATDS also had roadblocks. Defendants Universal and Legendary claimed that Handstack alone was the initiator of the text messages and thus, without agency, only Handstack, a largely judgment-proof company, would be liable. Ex. F.

In anticipation of mediation, the Parties submitted written mediation briefs, which highlighted the key substantive and class certification issues in this case and served to outline the relative strengths and weaknesses of the various TCPA claims. Following the first mediation, the second and third meditations were conducted after Plaintiffs' Motion for Class Certification was fully briefed by all Parties. Doc. 112. At the third meditation, on Sunday, October 28, 2018, Mr. Max conducted a full day of mediation in which he met with the Parties together and separately well over a dozen times. *See* Ex. F and Ex. I. Mr. Max was instrumental in assessing the respective risks of

settlement and ensuring that the procedural protections of Rule 23 were satisfied. *See* Ex. F ¶ 39 and Ex. I.

As a result, Mr. Max successfully assisted the Parties in structuring the terms of the Settlement to enable Plaintiffs and Defendants Universal and Legendary to reach general outlines of an agreement. Still, it took two more weeks before the Parties finalized the terms of the Settlement. *See* Ex. F ¶ 40.

E. Defendants' Position

At all times, Defendants denied and continue to deny allegations of any of the wrongful acts or violations of law and contend that they acted properly at all times. Defendants also contend that neither the Plaintiffs nor the proposed Class are entitled to damages. Additionally, as demonstrated by briefing filed in this Action, Defendants vigorously opposed class certification.

Other issues, including Handstack's insolvency status, made collecting damages dependent on factual issues concerning whether Handstack was Universal and Legendary's actual or apparent agent or whether Universal and/or Legendary was otherwise liable for Handstack's transmission of the text messages at issue. Ex. F (Declaration of Edmund Normand). Legendary and Universal strongly contested that they were liable under agency principles for Handstack's actions in sending the *Warcraft* text messages. *See* Doc. 103, Universal 8th affirmative defense and Doc. 102, Legendary 8th affirmative defense. Without agency or direct liability, Universal and Legendary, the only financially viable Defendants, could not be liable for the text message campaign.

III. SUMMARY OF THE PROPOSED SETTLEMENT

A. Settlement Class Definitions

The Settlement Classes[2] are defined as follows:

[2] Unless otherwise specified, capitalized terms have the same meanings as those set forth in the Definitions section of the Settlement Agreement. See Ex. A ¶¶ 9-35.

1. The "ATDS Class" consists of all persons or entities within the United States who received one or more text messages as part of the *Warcraft* Text Messaging Campaign.
2. The "Internal-Do-Not-Call Class" consists of all persons within the United States who received more than one text message to a residential line as part of the Warcraft Text Messaging Campaign, one of which was received after the Class Member submitted a request to not receive additional texts.
3. The "National Do-Not-Call Class" consists of all persons within the United States who received more than one text message to a residential line as part of the Warcraft Text Messaging Campaign (a) in a 12-month period; and (b) more than 30 days after the placement of their number on the National Do-Not-Call Registry.
4. The "Out of Time Class" will consist of all persons within the United States who received more than one text message to a residential line as part of the Warcraft Text Messaging Campaign, at least one of which was before 8 A.M. or after 9 P.M. local time at the texted person's location.

Excluded from the Settlement Classes are (1) the trial judge presiding over this case; (2) Defendants, as well as any parent, subsidiary, affiliate or control person of Defendants, and the officers, directors, agents, servants or employees of Defendants; (3) any of the Released Parties; (4) the immediate family of any such person(s); (5) any Settlement Class Member who has timely opted out of the Settlement; and (6) Class Counsel, their employees, and their immediate family.

B. Individual Class Member Benefits

1. Monetary Payments

The Settlement requires Legendary to provide $19,225,515.00 available for settlement of valid claims, settlement administration costs, attorneys' fees, a service award to each Plaintiff, and costs and expenses of the litigation.

Each Settlement Class Member of the "ATDS Class" who submits a timely and valid claim form will receive a check in the amount of $35.00. Ex. A ¶ 40. Each Settlement Class Member of the "Internal Do-Not-Call Class" who submits a timely and valid claim form will receive a check in the amount of $50.00. Ex. A ¶ 40. Each Settlement Class Member of the "National Do-Not-Call Class" who submits a timely and valid claim form will receive a check in the amount of $50.00. Ex. A ¶ 40. Each Settlement Class Member of the "Out of Time Class" who submits a timely and valid claim form will receive a check in the amount of $50.00. Ex. A ¶ 40.

Class Members will be permitted to submit claims up through the Claims Deadline. The Claims Deadline follows the Final Approval Hearing to fully maximize the time available to Class Members to receive the monetary benefit. Ex. A. The amount available to each individual Class Member, if the Settlement is approved, is a minimum of $35 and maximum of $185, depending on the claimant's membership status in each Class. Ex. A. Though unlikely, the amount of the claims may be reduced pro-rata if the total amount required to pay each claim exceeds the net amount remaining available for such payments from the $19,225,515.00, after payment of: (1) the Settlement Administration Expenses (of which, only $750,000.00 may be deducted from the total monetary settlement, with Legendary remaining liable for any administration costs that so exceed this amount); (2) the Incentive Awards to the Class Representatives; and (3) the Fee Award. In such unlikely situation, each Settlement Class Member with an Approved Claim shall receive a pro-rata reduced amount for such Class Member's Approved Claim, as determined by the remaining net balance.

Given that an amount of $19,225,515.00 is available, it is almost certain that even with an exceptionally high claims rate, sufficient funds will be available to pay every claimant $35 and up to $185. Ex. A; Ex. F (Declaration of Edmund Normand).

2. Injunctive Relief

In addition to securing monetary relief, the Settlement Agreement also requires Defendants to take affirmative steps to protect consumers' privacy and ensure compliance with the TCPA going forward. Importantly, these steps result in the cessation of the offending behavior for all Class Members and serves to help prevent future consumers from experiencing such harms. Ex. F. Specifically, as consideration for the Release contained in the Settlement, Defendant Handstack has agreed to the following changes in their business practices as injunctive relief:

> a. Handstack, for itself or for any client, will not use the Cell Phone Number List used in Warcraft texting campaign("Cell Phone Number List") or any part of it to send or direct any text message and will not provide the Cell phone Number List to any other person or entity;
> b. Should Handstack, on behalf of itself or for any client, carry out any telemarketing using its web-based platform for sending to groups and receiving return text messages (the "Handstack Platform") as used for the Warcraft Text Message Campaign, to a cellular telephone service, Handstack shall be subject to the following terms:
>
> > 1. Handstack shall maintain and create a database of individuals who have provided prior consent as required by the TCPA or the rules and regulations promulgated thereunder, to receive such calls/texts, including the date and manner in which such consent was obtained;
> > 2. Handstack shall implement reasonable procedures to ensure that no phone number on the National Do Not Call Registry is called/texted absent prior express consent from the person assigned the number; and
> > 3. Handstack shall develop and implement a written TCPA compliance policy, which includes maintaining an internal opt-out list for any future telemarketing campaigns.
>
> Unless such call/text is made to collect a debt owed to or guaranteed by the United States, made for emergency purposes, made with prior express consent of the called party, or otherwise made in compliance with the TCPA, the rules and regulations promulgated thereunder,

> and/or applicable case law, or made as an individual acting in the course of a business in which Handstack has no control over or authority to determine TCPA compliance or Handstack does not initiate the sending of text messages.

Ex. A ¶¶ 41, 45.

Furthermore, as consideration for the Release contained in the Settlement, Legendary and Universal have agreed to implement the following changes in connection with their actions and thus have agreed to the following injunctive relief:

> a. The Legendary and Universal Defendants will neither send nor direct any other person or entity to send any text messages to promote or advertise the *Warcraft* film;
> b. Legendary will not employ the services of Handstack to send text messages to market, promote, publicize, or advertise any of Defendants' products or services.

Ex. A ¶ 42.

C. Payment Of Notice And Administrative Fees

Defendant Legendary will be responsible for paying for the cost of sending Notice to the Settlement Class, as well as all costs incurred by the Settlement Administrator in the administration of the Settlement. Ex. A ¶ 47.

D. Class Representatives Service Award

Subject to the Court's approval, each Class Representative shall receive an award of $5,000.00 to compensate them for their time, effort, and risk in prosecuting this litigation on behalf of the Class. Ex. A ¶ 68. The service award will be in addition to the relief the Plaintiffs will otherwise be entitled to under the terms of the Settlement.

E. Payment Of Reasonable Attorneys' Fees And Expenses

In addition to all other relief, and subject to Court approval, Class Counsel will request attorneys' fees of up to 23.41% of the Total Settlement Amount, and for reimbursement of costs and expenses of up to $200,000. Ex. A. The Parties did not in any way discuss or negotiate

attorneys' fees or costs until reaching agreement on all other material terms of the Settlement. *See* Ex. F (Declaration of Edmund Normand) and Ex. I (Declaration of Rod Max). The amounts of the attorneys' fees and litigation costs and expenses were agreed to only after a proposal initiated by Mr. Max. Ex. F; Ex. I. In the event the Court grants preliminary approval of the Settlement, Class Counsel will file a motion seeking fees and costs and propose to do so no later than thirty (30) business days prior to the Final Settlement Approval Hearing.

F. Release

In exchange for the benefits conferred by the Settlement, all Settlement Class Members who do not opt out will be deemed to have released all claims, whether known or unknown (including, but not limited to, unknown claims) that were asserted or could have been asserted in this case by Plaintiff or Settlement Class Members, directly against the Released Parties, including all claims arising out of, or relating to, in whole or in part, the claims or facts and circumstances asserted in this case, including, without limitation, any claims by Plaintiff or Settlement Class Members arising out of, or relating to, Defendants' alleged violations of the TCPA during the class period, including the transmission of text messages regarding *Warcraft* between May 1, 2016 and June 31, 2016. *See* Ex. A ¶ 70.

IV. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED

Prior to granting preliminary approval of a proposed settlement, the Court must first determine that the proposed Class is a proper class for settlement purposes. The Federal Judicial Center's Manual for Complex Litigation instructs courts undertaking preliminary settlement review in uncertified cases to "make a preliminary determination that the proposed class satisfies the criteria set out in Rule 23(a) and at least one of the subsections of Rule 23(b)." Manual for Complex Litigation, Fourth, § 21.632; *see also Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Rule 23(a) requires that the proposed class be so numerous that joinder of all individual class members is

impracticable (numerosity); that there are common questions of law and fact affecting all class members (commonality); that the proposed representative's claims be typical of the class (typicality); and that both the named-representative(s) and his or her counsel adequately represent the interests of the class (adequacy). Fed. R. Civ. P. 23(a); *Babineau v. Fed. Exp. Corp.,* 576 F.3d 1183, 1189-90 (11th Cir. 2009); *Rosario-Guerro v. Orange Blossom Harvesting,* 265 F.R.D. 619, 624 (M.D. Fla. 2010); *see also Grant v. Ocwen Loan Servicing*, 2018 U.S. Dist. LEXIS 135202, *5 (M.D. Fla. 2018). Additionally, where certification is sought under Rule 23(b)(3), the plaintiff must demonstrate and the court must find that common questions of law or fact predominate over individual issues and that a class action is superior to other methods of adjudicating the claims. Fed. R. Civ. P. 23(b)(3); *Amchem*, 521 U.S. at 615–16; *Carter v. Forjas*, 701 Fed. Appx. 759, 765 (11th Cir. 2017).

District courts are given broad discretion to determine whether certification of a class action lawsuit is appropriate. *Fata v. Pizza Hut of Am., Inc.,* 2016 U.S. Dist. LEXIS 153545, *15 (M.D. Fla. 2016); *see also Holmes v. Continental Can Co.,* 706 F.2d 1144, 1147 (11th Cir. 1983). "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Amchem Products, Inc.*, 521 U.S. at 620. This case meets all of the Rule 23(a) and 23(b) prerequisites, and, for the reasons set forth below, certification is appropriate. A Proposed Order Preliminarily Approving Class Settlement and Providing for Class Notice is attached hereto as Exhibit C (Proposed Preliminary Approval Order).

A. The Proposed Settlement Class Meets All Of The Requirements For Certification Of A Settlement Class Pursuant To Rule 23(A) Of The Federal Rules Of Civil Procedure

1. The Settlement Class Satisfies the Numerosity Requirement of Rule 23(a)(1)

The first prerequisite to class certification, numerosity, is met when "the class is so numerous that joinder of all members is impractical." Fed. R. Civ. P. 23(a)(1). Although mere numbers are not dispositive, the Eleventh Circuit has indicated that "less than twenty-one [class

plaintiffs] is inadequate" and "more than forty" class plaintiffs is generally enough to satisfy the rule." *Vega v. T-Mobile, U.S.A., Inc.*, 564 F.3d 1256, 1267 (11th Cir. 2009) (citations omitted). Furthermore, a "plaintiff need not show the precise number of members in the class." *Vega*, 564 F.3d 1256, 1267 (11th Cir. 2009) (*quoting Evans v. U.S. Pipe & Foundry Co.*, 696 F.2d 925, 930 (11th Cir. 1983)). The Parties do not dispute that numerosity exists. Defendant Handstack's records identify approximately 466,779 unique cellular telephone numbers that were sent the aforementioned text messages. *See* Ex. E, ¶ 19 (Anya Vekhvoskaya's Supplemental Report). With a proposed Class of over 400,000 Class Members, the numerosity requirement is satisfied.

2. The Commonality Requirement is Satisfied

The second prerequisite to class certification, commonality, "requires the plaintiff to demonstrate that the class members 'have suffered the same injury;'" the plaintiff's common contention "must be 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." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2545 (2011) (citation omitted). "The threshold for commonality is not high." *Klewinowski v. MFP, Inc.,* 2013 U.S. Dist. LEXIS 130591, at *4 (M.D. Fla. 2013) *quoting Cheney v. Cyberguard,* 213 F.R.D. 484, 490 (S.D. Fla. 2003). "For purposes of Rule 23(a)(2), even a single common question will do." *Klewinowski* at *4-5 (*quoting Dukes*, 131 S. Ct. at 2556). Rule 23(a)(2) requires only that there be one common issue to be resolved that will affect the putative class members. "However, this prerequisite does not mandate that all questions of law or fact be common; rather, a single common question of law or fact is sufficient to satisfy the commonality requirement, as long as it affects all class members alike. . . . Commonality may be established where there are allegations of common conduct or standardized conduct by the defendant directed towards members of the proposed class." *Klewinowski* at *4-5 (*quoting Strube v. American Equity Investors Life Insurance Company*, 226 F.R.D. 688, 695 (M.D. Fla. 2005)

(internal citations omitted)); *see also Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1355 (11th Cir. 2009).

Here, the commonality requirement of Rule 23(a)(2) is easily satisfied. There are numerous questions of law and fact common to the Settlement Class concerning Defendants' uniform campaign to send promotional text messages to the Settlement Class Members' cellular telephones. Numerous questions of fact and law common to the Settlement Class exist, including, but not limited to: (1) whether the device Defendants used to send promotional text messages to the cellular telephone numbers assigned to the Plaintiffs and Settlement Class Members qualifies as an ATDS; (2) whether Handstack was Legendary and/or Universal's actual or apparent agent; (3) whether Universal and/or Legendary are liable for the transmission of the text messages; (4) whether Defendants entered into a joint venture concerning the marketing campaign; (5) whether Defendants violated TCPA § 227(c) by (a) sending *Warcraft* text messages to recipients on the National Do-Not-Call Registry; (b) sending *Warcraft* text messages to recipients after they had asked Defendants to cease sending *Warcraft* text messages; and (c) sending *Warcraft* text messages to recipients after 9:00 P.M. or prior to 8:00 A.M. local time. For each Class, the answer to these outcome-determinative questions is exactly the same for every Settlement Class Member. Thus, the Rule 23(a)(2) commonality requirement is satisfied.

3. The Typicality Requirement is Satisfied

Next, Rule 23 requires that class representatives have claims that are typical of those of the putative class members. Fed. R. Civ. P. 23(a)(3). The typicality prerequisite "measures whether a significant nexus exists between the claims of the named representative and those of the class at large." *Hines v. Widnall*, 334 F.3d 1253, 1256 (11th Cir. 2003). A class representative's claims are typical of the claims of the class if they "arise from the same event or pattern or practice and are based on the same legal theory." *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir.

1984); *see also Cooper v. Southern Co.*, 390 F.3d 695, 714 (11th Cir. 2004) ("Neither the typicality nor the commonality requirement mandates that all putative class members share identical claims, and … factual differences among the claims of the putative members do not defeat certification.").

The burden imposed by the typicality requirement is not great. Newberg on Class Actions (4th ed. 2002). In the TCPA context, typicality is established where the plaintiff "brings the same TCPA claim that will be advanced by the class." *Mohamed v. Off Lease Only, Inc.,* 320 F.R.D. 301, 314-315, (S.D. Fla. 2017) (*citing Cabrera v. Gov't Emples. Ins. Co.,* 2014 WL 11894430, *4 (S.D. Fla. Sept. 26, 2014)).

Here, the typicality requirement is satisfied for the same reasons that Plaintiffs' claims meet the commonality requirement. Specifically, Plaintiffs and Settlement Class Members were all subjected to the same conduct – they each received text messages promoting *Warcraft* in May and June of 2016 and they did not consent to receive such text messages. Both Mr. Naso and Ms. Parker have claims typical of the ATDS Class. Because Ms. Parker received a text message after requesting Defendants' stop sending such text messages, she has a claim typical of the Internal Procedures Class members. Because Mr. Naso and Ms. Parker were both registered with the Do-Not-Call Registry more than 30 days before receiving the text messages, both are typical of the Do-Not-Call Class members. Because Mr. Naso received a text message outside the time permitted by TCPA regulations, his claim is typical of the Out-of-Time Class members. Plaintiffs are Class Members and resolution of their claims herein will necessarily conclude the claims of all members of the Class. Simply, if it was unlawful under the TCPA to send text message advertisements to the named Plaintiffs in the manner they were texted, then all such text messages were unlawful with respect to the members of the Class. Typicality is therefore satisfied here.

4. The Adequacy Requirement is Satisfied

Rule 23(a) requires that the representative parties have and will continue to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requirement mandates that: (i) the class representative possesses no interests antagonistic to the class, and (ii) class counsel is competent. *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 726-28 (11th Cir. 1987).

a. Class Representatives

The adequacy of the class representatives is analyzed with a two-prong approach: whether 1) substantial conflicts of interest exist between the class representative(s) and the class and 2) the class representative(s) will adequately prosecute the action. *Palm Beach Golf Center-Boca, Inc. v. Sarris*, 311 F.R.D. 688, 696 (S.D. Fla. 2015) (citations omitted). Both Plaintiffs participated in discovery, engaged in mediation discussions, and provided deposition testimony, where they demonstrated knowledge of the claim and ability and willingness to adequately prosecute the action. Ex. F (Declaration of Edmund Normand). Neither Plaintiff has conflicts of interest with other Class Members that would preclude them from serving a fiduciary role to the Class. Ex. F.

b. Class Counsel

Plaintiffs' counsel are well-respected members of the legal community and regularly engaged in complex litigation, including class actions. Additionally, counsel have the resources necessary to conduct litigation of this nature. Both Mr. Normand and Mr. Gray have previously been appointed as class counsel. *See* Ex. J (Normand PLLC resume); Ex. K (Gray LLC resume); *see also De Leon v. Bank of Am., N.A.,* 2014 U.S. Dist. LEXIS 74056, *14 (finding instructive proposed class counsel's previous appointment as lead counsel). Proposed Class Counsel diligently investigated and invested substantial resources in the prosecution of this action and will continue to do so. Ex. F. Thus, both named Plaintiffs and their counsel will adequately represent the Class.

B. The Proposed Settlement Class Additionally Meets The Requirements Of Rule 23(B)(3)

In addition to meeting the prerequisites of Rule 23(a), the proposed Settlement Class must also meet the requirements of one of the three sections of Rule 23(b). *In re Checking Account Overdraft Litig.*, 286 F.R.D. 645, 650 (S.D. Fla. 2012). Here, Plaintiffs seek certification under Rule 23(b)(3), which requires that (i) questions of law and fact common to members of the class predominate over any questions affecting only individuals, and that (ii) the class action mechanism is superior to other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3). The Settlement Class meets both of these requirements.

1. The Predominance Requirement is Satisfied

When considering the element of predominance, "[i]t is not necessary that all questions of fact or law be common, but only that some questions are common and that they predominate over individual questions." *In re Theragenics Corp. Sec. Litig.*, 205 F.R.D. 687, 697 (N.D. Ga. 2002). "In determining whether class or individual issues predominate in a putative class action suit, we must take into account 'the claims, defenses, relevant facts, and applicable substantive law' to assess the degree to which resolution of the classwide issues will further each individual class member's claim against the defendant." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1254 (11th Cir. 2004) (*citing Castano v. American Tobacco Co.,* 84 F.3d 734, 744 (1996)). The "inquiry into whether common questions predominate over individual questions is generally focused on whether there are common liability issues which may be resolved efficiently on a class-wide basis." *Agan v. Katzman & Korr, P.A.*, 222 F.R.D. 692, 700 (S.D. Fla. 2004); *see Dukes,* 131 S. Ct. at 2551-57. Common questions that predominate over individual issues are those that are "subject to generalized proof, and thus applicable to the class as a whole…" *Kerr v. City of West Palm Beach,* 875 F.2d 1546, 1558 (11th Cir. 1989) (internal citations omitted).

Plaintiffs have already established the common questions relevant to the Classes, *supra* p. 13-14. The question, then, is whether such common questions also predominate over any individual questions. *Dukes,* 131 S. Ct. at 2551-57. In the context of the proposed Settlement, common issues of fact and law clearly predominate. Defendants' practice of sending the same *Warcraft* promotional text messages in violation of the TCPA using the same Handstack text message system to text phone numbers obtained from the same list and procured in the same way, is common to each Class Member's claims and damages and predominates over any individual issues that might exist.

2. The Superiority Requirement is Satisfied

Rule 23(b)(3) further requires that the class action mechanism be superior to the other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3). "The inquiry into whether the class action is the superior method for a particular case focuses on 'increased efficiency.'" *Agan*, 222 F.R.D. at 700 (quoting *Sikes v. Teleline, Inc.,* 281 F.3d 1350, 1359 (11th Cir. 2002)). Class actions are particularly appropriate when they function as "[a] convenient economical means of disposing of similar lawsuits, and the facilitation of the spreading of litigation costs among numerous litigants with similar claims." *Castorela v. Mellon,* 754 F.Supp. 191, 193 (M.D. Fla. 1990). The focus of the 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." *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1183-84 (11th Cir. 2010) (citation omitted). The superiority analysis is heavily influenced by the predominance analysis, because "the more common issues predominate over individual issues," the more likely a class action is the superior method for adjudicating the claims. *Reyes v. BCA Fin. Servs.,* 2018 U.S. Dist. LEXIS 106449 at *49 (S.D. Fla. 2018) (*quoting Sacred Heart* at 1184).

Courts have routinely rejected arguments against finding superiority in TCPA cases. Further, this Court in particular has found superiority to be satisfied in TCPA litigation in recent previous

occasions: first, because "it would result in judicial inefficiency for over 300,000 of the same claims against Defendant to be prosecuted separately." *Youngman v. A&B Ins. & Fin., Inc.,* 2018 U.S. Dist. LEXIS 65271 (M.D. Fla. Mar. 22, 2018) at *18 *aff'd by Youngman* 2018 U.S. Dist. LEXIS 64339 (M.D. Fla. Apr. 17, 2018). Second, because, in part, of the size of the Class (over 400,000 putative Class Members) and because each individual case would require burdensome discovery of multiple corporations. *Preman v. Pollo Operations, Inc.,* 2018 U.S. Dist. LEXIS *79065* at *24 (M.D. Fla. Apr. 12, 2018) *aff'd by Preman* 2018 U.S. Dist. LEXIS 78069 at *1 (M.D. Fla. May 9, 2018).

Here, the size of the Classes - ranging from thousands ("Out-of-Time" Class) to almost half-a-million putative Class Members ("ATDS" Class) - dwarfs those in *Youngman* and *Preman*. Additionally, there are non-parties in addition to the four Defendants from which burdensome discovery would need to be procured in each individual claim. The class action mechanism is clearly the superior method for adjudicating the claims in this case. *See Physicians Healthsource, Inc. v. Doctor Diabetic Supply, LLC,* 2014 U.S. Dist. LEXIS 177222 at *9 (S.D. Fla. Dec. 23, 2014) ("TCPA classes are routinely certified as class actions" because the factors inherent to TCPA litigation "all point to the superiority of a class action.").

Factors the Court may consider are: (A) the interests of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class. As noted earlier, any perceived difficulties managing the Settlement Class need not be considered in this settlement context. *Amchem*, 521 U.S. at 620; *Sullivan v. DB Invs., Inc.*, 667 F.3D 273,302-303 (3d Cir. 2011) (holding that potential variances in different states' laws would not defeat certification of a settlement-only class because trial management concerns do not exist in a settlement-only class).

Here, resolution of thousands of claims in one action is far superior to individual lawsuits, because it promotes consistency and efficiency of adjudication. *See* Fed. R. Civ. P. 23(b)(3). Indeed, absent class treatment in the instant case, each Settlement Class Member will be required to present the same or essentially the same legal and factual arguments, in separate and duplicative proceedings, the result of which would be a multiplicity of trials conducted at enormous expense to both the judiciary and the litigants. Moreover, there is no indication that Members of the Settlement Class have an interest in individual litigation or an incentive to pursue their claims individually, given the small amount of damages likely to be recovered, relative to the resources required to prosecute such an action, including conducting sophisticated electronic discovery from over six corporations and conducting depositions ranging from Boston to Los Angeles. *See* Ex. F (Declaration of Edmund Normand). *See In re Terazosin Hydrochloride Antitrust Litig.,* 220 F.R.D. 672, 700 (S.D. Fla. 2004) (class actions are "particularly appropriate where . . . it is necessary to permit the plaintiffs to pool claims which would be uneconomical to litigate individually").

C. The Settlement Class Is Sufficiently Ascertainable Through Objective Criteria

The Settlement Class is sufficiently defined using objective criteria to include all persons who received *Warcraft* text messages. Plaintiffs demonstrated that these Classes are ascertainable (*see* Doc. 112), and did so using the same method and expert that this Court found appropriate in *Youngman v. A&B Ins. & Fin., Inc.*, 2018 U.S. Dist. LEXIS 65271 at *4 (M.D. Fla. Mar. 22, 2018), *report and recommendation adopted*, 2018 U.S. Dist. LEXIS 64339 (M.D. Fla. Apr. 17, 2018). *See also Karhu v. Vital Pharms., Inc.*, 621 Fed. Appx. 945, 947 (11th Cir. 2015). The Plaintiffs and their experts agree that the Settlement Class is sufficiently ascertainable based on objective criteria. *See* Ex. E (Anya Vekhvoskaya's Supplemental Report).

D. The Proposed Class Representatives Have Standing To Assert The Class Claims

To establish Article III standing, a plaintiff must show that: (1) it suffered an injury in fact; (2) the injury at issue is fairly traceable to the defendant's alleged conduct; and (3) the injury is likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016). To have standing to represent a class, "a party must not only satisfy the individual standing prerequisites, but must also 'be part of the class and possess the same interest and suffer the same injury as the class members.'" *Mills v. Foremost Ins. Co.,* 511 F.3d 1300, 1307 (11th Cir. 2008) (*quoting Prado-Steiman v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000)).

The proposed Class Representatives have standing to assert all claims by all proposed Classes. Both Plaintiff Parker and Plaintiff Naso received two or more *Warcraft* text messages that they allege were sent via an ATDS (ATDS Class), while they were on the National Do Not Call Registry (National Do-Not-Call Class). Plaintiff Parker alleges she opted out of the *Warcraft* Text Message Campaign and still received additional *Warcraf*t text messages (Internal Do-Not-Call Class). Plaintiff Naso received a text message outside of the permitted telemarketing time frames of 8 A.M. to 9 P.M. provided in 47 C.F.R. § 64.1200 (Out Of Time Class).

V. THE COURT SHOULD APPOINT PLAINTIFFS' COUNSEL AS CLASS COUNSEL

Under Rule 23, "a court that certifies a class must appoint class counsel . . .[who] must fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B). In making this determination, the court must consider the proposed class counsel's (1) work in identifying or investigating potential claims; (2) experience in handling class actions or other complex litigation and the types of claims asserted in the case; (3) knowledge of the applicable law; and (4) resources committed to representing the class. Fed. R. Civ. P. 23(g)(1)(A)(i)-(iv).

As discussed above, and as explained in Class Counsel's Declaration and Firm Resumes (*see* Exhibits F, I and J), proposed Class Counsel identified the claims and possess extensive experience

prosecuting similar class actions. Further, proposed Class Counsel have diligently investigated and prosecuted the claims, have dedicated substantial resources to the investigation of those claims, and have negotiated the settlement of this matter to the benefit of the Plaintiffs and the proposed Settlement Class. *Id.* Accordingly, the Court should appoint Edmund Normand and Alex Couch of Normand PLLC and William Gray of Gray Law LLC as Class Counsel.

VI. THE PROPOSED NOTICE AND FORM OF NOTICE SHOULD BE APPROVED

The Settlement Administrator, JND Legal Administration, is an experienced and well-regarded notice and class administrator, with experience in the administration of class settlements under the TCPA. *See* Ex. L (JND Resume).

The Notice Plan is designed to provide the best notice practicable. Call logs identify approximately 466,779 unique cellular telephone numbers, which will be used to identify the putative Settlement Class Members and provide direct notice. Ex. M (Telephone and Identification Numbers for Proposed Class (redacted)). "Rule 23(e)(1)(B) requires the court to direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise regardless of whether the class was certified under Rule 23(b)(1), (b)(2), or (b)(3)." Manual for Complex Litigation, Fourth, § 21.312. Reasonable notice is that which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950). To satisfy this standard, "[n]ot only must the substantive claims be adequately described but the notice must also contain information reasonably necessary to make a decision to remain a class member and be bound by the final judgment or opt out of the action." *Twigg v. Sears, Roebuck & Co.,* 153 F.3d 1222, 1227 (11th Cir. 1998).

Foremost, the proposed notice is reasonably calculated under the circumstances to apprise the Settlement Class of the pendency of the case, class certification (for settlement purposes), the

terms of the Settlement, Class Counsel's motion for attorneys' fees, costs and expenses, the Class Representatives' service award, Settlement Class Members' rights to opt-out of or object to the Settlement, and other information required by Fed. R. Civ. P. 23(c)(2)(B). *See* Manual for Complex Litigation, Fourth, § 21.312 .

The Notice Plan involves direct notice to each Class Member. Ex. A ¶¶ 48-55 (Joint Stipulation of Settlement). The Notice Plan is comprised of email notice, direct mail notice and internet notice. *Id.* at ¶ 53. Specifically, the Notice Plan entails sending notice to approximately 466,779 individuals by email. *Id.* at ¶ 53(b). To the extent that any email cannot be delivered or result in a bounceback, the Settlement Administrator will, to the extent reasonably possible, mail a postcard containing notice to the Settlement Class Member. *Id.* at ¶ 53(c). The Notice also includes a Settlement Website maintained by the Settlement Administrator and will contain the Long-Form Notice, the Complaint, the Motion for Fee Award and the Motion for Final Approval. *Id.* at ¶ 53(d).

The form of the Order Preliminarily Approving Settlement and Providing for Class Notice, attached hereto as Exhibit C (Proposed Preliminary Approval Order), has been drafted and approved by counsel for Plaintiff and Defendants and satisfies all of the criteria above. Notice will be sent by email and direct mail notice as needed. Also, Notice will be provided to Settlement Class Members online through a dedicated Settlement website that the Settlement Administrator will maintain. Ex. A ¶ 53(d). Finally, the Settlement Administrator will provide the notification required by the Class Action Fairness Act, 28 U.S.C. § 1715, to the Attorney General of each state in which Settlement Class Members reside, the Attorney General of the United States, and any other required government officials. Ex. A ¶ 46(q).

Therefore, the notice and Notice Plan satisfy all applicable requirements. The Court, respectfully, should therefore approve the Notice Plan and the form and content of the Notice attached hereto as Exhibit B (Proposed Notice Forms).

VII. THE PROPOSED SETTLEMENT WARRANTS PRELIMINARY APPROVAL

"Preliminary approval is appropriate where the proposed settlement is the result of the parties "good faith negotiations, there are no obvious deficiencies and the settlement falls within the range of reason." *In re Checking Account Overdraft Litigation*, 275 F.R.D. 654, 661 (S.D. Fla. 2011) (citations omitted). When deciding whether to grant preliminary approval, the court decides whether the proposed settlement "is within the range of possible approval or, in other words, [if] there is probable cause to notify the class of the proposed settlement." *Fresco v. Auto Data Direct, Inc.* No. 03-61063-CIV, 2007 WL 2330895, at *4 (S.D. Fla. May 14, 2007) (citations and quotations omitted). A proposed class settlement should be "fair, adequate and reasonable and . . . not the product of collusion between the parties." *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977). Preliminary approval is not a fairness hearing; its purpose, instead, is to determine whether there is reason to notify the class of the proposed settlement and to schedule a fairness hearing. Newberg, §11.25, at 38-39; Fresco, 2007 WL 2330895 at *4 (stating that "[a] proposed settlement should be preliminarily approved if it is within the range of possible approval or, in other words, if there is probable cause to notify the class of the proposed settlement." (internal quotations omitted).)

The Eleventh Circuit has provided courts guidance by indicating that courts should consider the following factors in its fairness determination: (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved. *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984). A settlement should be approved if it is fair, adequate, and reasonable. *Id.*

There is strong judicial and public policy favoring settlement of class actions. *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"); *Warren v. City of Tampa,* 693 F. Supp. 1051, 154 (M.D. Fla. 1998), aff'd, 893 F. 2d 347 (11th Cir. 1998); *Access Now, Inc. v. Claires Stores, Inc.,* No. 00-cv-14017, 2002 WL 1162422, at *4 (S.D. Fla. May 7, 2002). This is because class action settlements ensure class members a benefit, as opposed to the "mere possibility of recovery at some indefinite time in the future." *In re Domestic Air Transport.,* 148 F.R.D. 297, 306 (N.D. Ga. 1993). Thus, while district courts have discretion in deciding whether to approve a proposed settlement, deference should be given to the consensual decision of the Parties. *Warren,* 693 F. Supp. at 1054 ("affording great weight to the recommendations of counsel for both parties, given their considerable experience in this type of litigation"). As explained below, each of the factors established by the Eleventh Circuit favors approval of the Settlement.

A. The Likelihood of Success at Trial

This factor favors granting preliminary approval. The Plaintiffs believe their claims are valid and the Classes would be certified, but they are also are cognizant of risks with trial and risks on appeal following trial. The risks here were manifest given Defendant's numerous defenses, including prior consent to text Class Members, that there was no ATDS due to extensive human intervention and no random or sequential number generator used to send the texts, the lack of vicarious liability among the parties and other defenses. As such, there are substantial risks of proceeding with litigation through trial or summary judgment.

Further, the parties disagree about whether Defendants Universal and Legendary could be vicariously liable under the TCPA for violations of 47 U.S.C § 227(b) and (c) because they contend that Defendant Handstack was an independent contractor solely responsible for initiating the sending of the texts. Defendants maintain that they had viable consent defenses to the claims of many potential Class Members. Docs. 102, 103, and 106. Unfavorable decisions regarding what constitutes ATDS, including what is sufficient human intervention so as to not qualify as an ATDS,

also make the 47 U.S.C § 227(b) claims uncertain; this risk was exacerbated, as discussed above, by the ruling in *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. 2018). Considering these issues, success at trial is uncertain for the ATDS claims. While there is a better chance of success on the 47 U.S.C § 227(c) claims as to at least Handstack, the chance of collection of a judgment from Handstack alone is non-existent since Handstack lacks solvency.

Even before reaching trial, there is risk that Plaintiff's motion for class certification would be denied. In addition to arguing that no class could be certified for a number of reasons, Defendants also contend that a national class is not maintainable under *Bristol-Myers Squibb Co. v. Superior Court,* 137 S. Ct. 1773 (2017), which could limit the Class to only Florida residents. *See* Doc. 117 at 28-29, and Doc.132 at 3-4.

B. The Range of Possible Recovery

The range of possible recovery is $0 or $500 for the ATDS violation claims under 47 U.S.C. §227(b). The range is $0 up to $500 per violation for Subscriber Privacy Rights claims under 47 U.S.C. §227(c) ("up to $500 in damages for each such violation"). Thus, even if the Class were to first prevail at the certification stage, and then secure a victory at trial, it is still possible for a jury to award nominal damages for those claims.

C. The Point on or Below the Range of Possible Recovery at which a Settlement is Fair, Adequate and Reasonable

Here, there is great risk that Plaintiffs would not have prevailed at trial, at class certification or summary judgment. There is a risk that no class, or a Florida-only class, would be certified. There is a risk that any jury award would be solely against Handstack, meaning it would be worthless. Under the proposed settlement each Class Member is eligible for a cash payment of $35 or $50 for each of four possible TCPA violations, making the possible range of recovery $35 to $185 for each Class Member, depending on the TCPA violations for each text message(s) received. Ex. A ¶40

(Joint Stipulated Settlement). Furthermore, and as will be demonstrated more completely in proposed Class Counsel's Motion for Final Approval, $35 to $185 for each Class Member meets or exceeds other awards in TCPA class actions. The following are other representative TCPA settlements in other cases: *Couser v. Comenity Bank,* 125 F. Supp. 3d 1034 (S.D. Cal. 2015) (settlement amount favored final approval, with approximately $13.75 given per class member); *Manouchehri v. Styles for Less, Inc.*, No. 14cv2521 NLS, 2016 U.S. Dist. LEXIS 80038, at *4 (S.D. Cal. June 20, 2016) (preliminarily approving settlement where class members could choose to receive either a $10 cash award or a $15 voucher); *Spillman v. RPM Pizza,* LLC, 2013 U.S. Dist. LEXIS 72947 at *2, *9 (M.D. La. May 23, 2013) (final approval for up to $15 for each claimant); *Garret v. Sharps Compliance, Inc.*, No. 1:10-cv-04030, Dkt. No. 65 (N.D. Ill. Feb. 23, 2012) (claimants received between $27.42 and $28.51); *Hashw v. Dep't Stores Nat'l Bank*, 2016 U.S. Dist. LEXIS 61004 (D. Minn. 2016) (final approval of settlement where "each claimant will receive approximately $33.20"); *In re Capital One TCPA Litigation*, 12-cv-10064 (MDL No. 2416) (N.D. Ill. Feb. 12, 2015) (granting final approval where each claimant would be awarded $39.66); *Adams v. AllianceOne Receivables Mgmt., Inc.,* No. 3:08-cv-00248-JAH-WVG, Dkt. No. 137 (S.D. Cal. Sept. 28, 2012) (claimants received $40 each); *Wright v. Nationstar Mortg. LLC*, 2016 U.S. Dist. LEXIS 115729, *28 (N.D. Ill. 2016) (finally approving "$45.00 recovery per claimant"); S*teinfeld v. Discover Fin. Servs.*, 2014 U.S. Dist. LEXIS 44855 at *4 and *11-12 (N.D. Cal. Mar. 31, 2014) ($46.98 to each claimant); *see also Kolinek v. Walgreen Co.*, Case No.1:13-cv-04806 (N.D. Ill.) (final approval given in a TCPA class action settlement involving a $11 million fund for 9.2 million class members that resulted in payments of $30 per class member). As such, the amount recovered, between $35-$185, per Class Member clearly falls within the range of what has been considered fair, adequate, and reasonable on final approval. This is without any consideration of the substantial value of the injunctive relief obtained. When the risks of recovering nothing at all are factored in, the settlement amount is clearly fair, adequate, and reasonable.

D. The Complexity, Expense and Duration of Litigation.

This case was filed in June 30, 2016, and the parties reached a settlement in November of 2018. In the intervening two and a half years, the parties expended thousands of hours and (hundreds of thousands of dollars in expenses) litigating this case, which included complex factual and legal issues. Clearly, the ever evolving law on TCPA and the increasingly complex technical aspects of the mass calling schemes and ATDS require intensive expert and legal analysis making the case complex to understand, litigate and prove. The litigation encompassed nine parties, depositions conducted in four states and six cities, opinions provided by five experts relating to highly technical information, and detailed analysis of voluminous data related to hundreds of thousands of consumers. Accordingly, the fourth factor shows the Settlement is fair, reasonable, and adequate.

E. The Substance and Amount of Opposition to the Settlement

This factor is better evaluated during final approval briefing after Notice is issued and Settlement Class Members have had the opportunity to file claims, opt out, and lodge objections. Plaintiffs believe that, given the strength of the Settlement and the benefits achieved, Settlement Class Members will be view the Settlement as positive. There certainly has not been any suggestion or indication that there are any issues with the terms of the Settlement. Class Counsel's briefing in support of final approval will show that the lack of opposition weighs in favor of approving the Settlement.

F. The Stage of Proceedings at which the Settlement was Achieved

This factor favors finding the Settlement fair, reasonable, and adequate. When the parameters of the Settlement were reached, the Parties were on the eve of filing their respective motions for Summary Judgment, almost two and a half years after the case was filed. Additionally, Plaintiffs' Motion for Class Certification was fully briefed and the Court indicated a ruling was imminent. Moreover, the Settlement occurred after the discovery cutoff date and after extensive

discovery provided sufficient information for the Parties to confidently evaluate the strengths and weaknesses of their respective cases. Ex. F. The Parties arrived at the second and third mediations after they fully contemplated the prospects of success in class certification, summary judgment, and trial. Ex. F. Thus, this Settlement was reached after the Parties had the information necessary to properly evaluate the strengths and weaknesses of their positions through the mediation process.

G. The Settlement Was Achieved With The Help Of A Respected Mediator Who Ensured The Negotiations Were Free Of Any Collusion.

Moreover, settlement negotiations that involve arm's length, negotiations by experienced counsel support a preliminary finding of fairness. *See* Manual for Complex Litigation, Third, § 30.42. ("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.") (internal quotation marks omitted). In this case, not only was there arm's-length bargaining, it was after extensive discovery. As discussed above, the Parties engaged in formal mediations before experienced and respected mediators. "Where the parties have negotiated at arm's length, the Court should find that the settlement is not the product of collusion." *Braynen v. Nationstar Mortg., LLC*, 2015 U.S. Dist. LEXIS 151744, 2015 WL 6872519, at *10 (S.D. Fla. Nov. 9, 2015) (internal quotation omitted).

Indeed, courts in the 11th Circuit and elsewhere have specifically cited to the role of Mediator Max as reliable evidence weighing in favor of settlements. "This settlement was negotiated at arms' length. The mediation was overseen by Rodney Max, a nationally renowned mediator, who submitted a sworn declaration to the Court providing details of the parties' mediation efforts…. The very fact of Mr. Max's involvement—let alone his sworn declaration—weighs in favor of approval. Ex. I. There is no suggestion of fraud or collusion here, explicit or subtle." *Wilson v. EverBank,* 2016 U.S. Dist. LEXIS 15751, at *22-23 (S.D. Fla. Feb. 3, 2016) (citations omitted). Other Courts have also recognized the presumption of fairness from settlements supervised by Mr. Max. *Fresco v. Auto*

Data Direct, Inc., 2007 U.S. Dist. LEXIS 37863, at *15 (S.D. Fla. May 11, 2007) ("[T]he Court finds there is no evidence of collusion in this proposed settlement, which favors preliminary approval. Plaintiffs have submitted in support of their motion the affidavit of Rodney A. Max, an eminently qualified mediator"); *Lee v. Ocwen Loan Servicing, LLC*, 2015 U.S. Dist. LEXIS 121998, 2015 WL 5449813, *11 (S.D. Fla. Sept. 14, 2015) ("His involvement serves to reject any notion that a resulting settlement was the product of collusion."); *Curry v. AvMed, Inc.*, 2014 U.S. Dist. LEXIS 48485, 2014 WL 7801286, *2 (S.D. Fla. Feb. 28, 2014) (favorably observing that class settlement negotiations were "presided over by the highly experienced third-party neutral Rodney A. Max"); *Saccoccio v. JP Morgan Chase Bank, N.A.,* 297 F.R.D. 683, 692 (also finding no collusion when case was mediated by Rodney Max); *Brna v. Isle of Capri Casinos Inc.*, 2018 U.S. Dist. LEXIS 26662, at *4-5 (S.D. Fla. Feb. 20, 2018) ("This case was mediated by Rodney Max, who is not only well known for mediating class actions but who has been recognized in this district as probably one of the top mediators in the country."); *Sanchez-Knutson v. Ford Motor Co.*, 2017 U.S. Dist. LEXIS 96560, at *5 (S.D. Fla. June 20, 2017) ("The Settlement was reached only after two years of litigation, and the negotiations conducted over several months were adversarial and overseen by one of the top mediators in the United States, Rodney Max.").

VIII. THE COURT SHOULD SCHEDULE A FINAL APPROVAL HEARING.

The last step in the preliminary approval process is to schedule a Final Approval Hearing, at which the Court will hear evidence and argument necessary to make its final evaluation of the Settlement. The Court will determine at or after the Final Approval Hearing whether the Settlement should be approved, whether to enter the Final Judgment and Order of Dismissal with Prejudice under Rule 23(e), and whether to approve Class Counsel's motion for attorneys' fees, costs and expenses, and the request for a service award for the Class Representatives.

Plaintiffs and Class Counsel request that the Court schedule the Final Approval Hearing at a date convenient for the Court and in compliance with the provisions of the Class Action Fairness Act of 2005, 28 U.S.C. § 1715. Plaintiff and Class Counsel will file the motion for final approval and motion for attorneys' fees, costs and expenses, and request for a service award at least thirty days (30) business days before the Final Approval Hearing.

IX. PROPOSED PRELIMINARY SCHEDULE

The Plaintiffs propose the schedule attached as Exhibit N leading to the Final Approval Hearing.

X. CONCLUSION

Based on the foregoing, Plaintiffs respectfully requests that the Court enter an order to:

(1) preliminarily approve the Joint Stipulation of Settlement and Release ("Stipulation of Settlement") as within the range of fair, adequate and reasonable;

(2) provisionally certify the Settlement Classes pursuant to Federal Rule of Civil Procedure 23(b)(2), (b)(3) and (e);

(3) appoint Edmund Normand and Alex Couch of Normand PLLC and William Gray of Gray LLC as Class Counsel;

(4) appoint Joseph Naso and Ophelia Parker as Class Representatives;

(5) appoint JND Legal Administration as the Settlement Administrator;

(6) approve the Notice Program set forth herein and the form and content of the Notices;

(7) approve the Claims process;

(8) approve the procedures for Settlement Class Members to exclude themselves from the Settlement Classes or to object to the Settlement;

(9) stay the Action pending Final Approval of the Settlement; and

(10) set a schedule of events, attached as Exhibit N hereto, including a Final Approval hearing for a time and date mutually convenient for the Court, Class Counsel and counsel for Defendants, at which the Court will (i) conduct an inquiry into the fairness of the Settlement, (ii) determine whether it was made in good faith, and (iii) determine whether to approve the Settlement and Class Counsel's application for attorneys' fees, costs and expenses and a Service Award to each Plaintiff ("Final Approval Hearing").

Dated: November 29, 2018

Respectfully Submitted,

/s/ Ed Normand
Edmund A. Normand
FBN: 865590
/s/ Alex Couch
Alex Ray Couch
FBN: 118152
NORMAND PLLC
3165 McCrory Place, Ste. 175
Orlando, FL 32803
Tel: 407.603.6031
ed@ednormand.com
alex@ednormand.com
service@ednormand.com

/s/ William C. Gray (*pro hac vice*)
William C. Gray, Esq.
GRAY LLC
17 N. State Street
Suite 1600
Chicago, IL 60602
Tel: 312.967.3653
BGray@GrayLLCLaw.com

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed with the Clerk of Court by using CM/ECF systems this 29th day of November, 2018. I also certify that the foregoing document is being served this day on all counsel of record identified on the Service List either via transmission of Notices of Electronic Filing generated by CM/ECF or in the some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Alex Couch
Alex Couch

SERVICE LIST

Gregory W. Herbert, Esq.
Rob Herrington, Esq.
GREENBERG TRAURIG, P.A.
450 South Orange Ave.
Suite 650
Orlando, FL 32801
herbertg@gtlaw.com
herringtonr@gtlaw.com
castrop@gtlaw.com
redmanb@gtlaw.com

Steven A. Marenberg
Stephen M. Payne Michael Harbor
IRELL & MANELLA, LLP
1800 Avenue of the Stars
Suite 900
Los Angeles, CA 90067
smarenberg@irell.com
spayne@irell.com
mharbour@irell.com
smarenberg@irell.com
kjones@irell.com

E. Colin Thompson
Michael Joseph Labbee
SMOLKER, BARTLETT, LOEB, HINDS & THOMPSON, P.A.
100 N. Tampa Street, Ste. 2050
Tampa, Florida 33602
colint@smolkerbartlett.com
alyssac@smolkerbartlett.com
michaell@smolkerbartlett.com
rochelleb@smolkerbartlett.com