IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MICHAEL KAISER-NYMAN, individually and on behalf of a class of all persons and entities similarly situated, Plaintiff, vs. FIRST CHOICE PAYMENT SOLUTIONS G.P., d/b/a SEKURE MERCHANT SOLUTIONS Defendant.	Case No. 1:17-cv-05472 Honorable Thomas M. Durkin

PLAINTIFF'S UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT
AND FOR CONDITIONAL CERTIFICATION OF SETTLEMENT CLASS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

I. INTRODUCTION

Plaintiff, Michael Kaiser-Nyman ("Plaintiff"), along with the Defendant, First Choice Payment Solutions G.P., d/b/a Sekure Merchant Solutions ("First Choice" or "Defendant") (collectively, Plaintiff and Defendant shall be referred to as "the Parties"), have reached a class action settlement of this matter.[1] The Settlement includes the establishment of a $6,250,000 Settlement Fund to be distributed to Settlement Class Members who file a valid claim after payment of notice and administration costs (if approved), class counsel fees (if any), and an incentive award to the Plaintiff (if any), which notice and administration costs, class counsel fees, and incentive award shall be exclusively paid from the Settlement Fund.[2] There is no reverter in the Settlement Fund. Notice will be effectuated through postcards mailed directly to Settlement Class Members identified in records obtained in discovery and a website through which Claim Forms may be directly submitted.

In evaluating the fairness of a proposed class action settlement, the key consideration is the strength of the Plaintiff's case on the merits balanced against the amount offered in the Settlement. *See Synfuel Tech., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006). Although Plaintiff believes that he would ultimately prevail on the merits at trial, success is far from assured. At every turn of the litigation and in negotiations, Defendant has denied liability and vigorously defended their position. If approved, the Settlement will bring a sure end

---

[1] First Choice does not oppose this motion insofar as it supports the settlement. First Choice does not concede or admit, and in fact disputes, many of Plaintiff's assertions. First Choice's non-opposition to this motion insofar as it supports the settlement shall not constitute a waiver or admission of a finding or evidence that any allegations of claims asserted in this action, individually or on behalf of the class, are appropriate for class treatment. First Choice further disputes, and does not admit, any allegations, claims, or liability asserted in this action.

[2] All capitalized terms not defined herein have the meanings set forth in the Parties' Class Action Settlement Agreement ("Settlement" or "Agreement"), attached as Exhibit 1.

to what would be contentious and costly litigation centered on questions of whether Defendant is liable for the allegedly unlawful calls placed by First Choice and challenged in this action, and whether the alleged calls in this action were placed using a an automatic telephone dialing system ("ATDS") or an artificial or prerecorded voice to telephone numbers assigned to a cellular telephone service or any service for which the called party is charged for the call in allegedly violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227, and regulations issued by the Federal Trade Commission.

The relief provided meets the applicable standards of fairness when taking into consideration the nature of Plaintiff's claims and the risks inherent in class litigation. Accordingly, Plaintiff respectfully request that the Court: (1) grant preliminary approval of the Settlement; (2) provisionally certify the proposed Settlement Class; (3) appoint Plaintiff's attorneys as Class Counsel; (4) appoint Plaintiff as representative of the Settlement Class; (5) approve the proposed Notice Plan, Notice, and Claim Form; and (6) schedule the Final Approval Hearing and related dates as proposed.

II. NATURE AND BACKGROUND OF THE CASE

This case rests on alleged violations of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, which prohibits, *inter alia*, initiating any telephone solicitation to a cell phone using an ATDS or an artificial or prerecorded voice. *See* 47 U.S.C. § 227(b). Plaintiff is an individual residing in the greater Chicago area whose cellular telephone number has been called with unsolicited messages for years. Guided by the Court's participation in the Mandatory Initial Discovery Pilot ("MIDP"), the parties have exchanged tens of thousands of pages of first party and third-party discovery and engaged in a thorough investigation of the claims and defenses.

First Choice provides payment processing services to businesses in the United States. *See* Exhibit 2, Affidavit of Anthony Paronich at ¶ 7. To promote its services, First Choice uses telemarketing. *Id.* at ¶ 8. First Choice purchases data from third parties, including Dun & Bradstreet, to be used in its telemarketing. *Id.* at ¶ 9. Dun & Bradstreet sells aggregated business data to the public, including telephone numbers. *See* https://www.dnb.com/products/marketing-sales/dnb-hoovers.html (Last Visited August 23, 2018).

During his deposition, Eyal Artzy, one of the managers of First Choice, testified that he was primarily responsible to oversee the "lead acquisition process" at First Choice, which includes telemarketing. Paronich Affidavit at ¶ 10. Mr. Artzy testified that First Choice has 200-250 telemarketing employees at any time, and that they use the Five9 dialing system in multiple modes, including, but not limited to, predictive and preview, to make calls to potential business that might want to sign up for their credit card processing services. *Id.* at ¶ 11. To eliminate calls to cellular telephones, First Choice purchased lists of cellular telephone numbers from Interactive Marketing Solutions, a member of the Data & Marketing Association, to be scrubbed against the data purchases from third parties, including, but not limited to, Dun & Bradstreet. *Id.* at ¶ 12. Despite this process, an analysis of First Choice's calling data revealed calls to cellular telephones. *Id.* at ¶ 13.

On June 5, 2018, the parties mediated before Hon. Morton Denlow (Ret.). *Id.* at ¶ 14. While that mediation was unsuccessful, it led to subsequent settlement discussions amongst counsel that culminated in the Settlement Agreement for which Plaintiff seeks preliminary approval. *Id.* at ¶ 15. At all times, the Parties' settlement negotiations were adversarial, non-collusive, and at arm's-length.

III. THE PROPOSED SETTLEMENT

A. THE SETTLEMENT CLASS

The proposed Settlement would establish a "Settlement Class" for settlement purposes only, defined as:

> All persons within the United States to whom Defendant made a telephone call through the Five9, Inc. dialing software and/or system (*i.e.*, an automated telephone dialing system or an artificial or prerecorded voice) to any telephone number assigned to a cellular telephone service or any service for which the called party is charged for the call for the purpose of promoting Defendant's goods or services from July 26, 2013 through February 1, 2018. These individuals are identified on the Class List.
>
> Excluded from the Settlement Class are the following: (1) any trial judge that may preside over this Action; (ii) Defendant; (iii) any of the Released Parties; (iv) Class Counsel and their employees; (v) the immediate family of any of the foregoing Persons; (vi) any member of the Settlement Class who has timely submitted a Request for Exclusion by the Objection/Exclusion Deadline; and (vii) any Person who has previously given a valid release of the claims asserted in the Action.

(Agreement ¶ 1.41.)

B. SETTLEMENT RELIEF

1. Class Member Relief: Settlement Fund

The proposed Settlement establishes a non-reversionary $6,250,000 Settlement Fund, which will exclusively be used to pay: (1) cash settlement awards to Settlement Class Members; (2) Settlement Administration Expenses (estimated to not exceed $750,000); (3) court-approved attorney's fees of up to one-third of the total amount of the Settlement Fund, in addition to out of pocket expenses; and (4) a court-approved incentive award to the Class Representative of up to $15,000. (Agreement ¶¶ 15.1-15.2.)

Each Settlement Class Member who submits a valid claim shall be entitled to receive an equal *pro rata* amount of the Settlement Fund after all Settlement Administrative Expenses, Incentive Awards, and Fee awards are paid out of the Settlement Fund. (Agreement. ¶ 4.3.) If all the attorneys' fees, expenses, incentive award and Settlement Administration Expenses are

approved as requested, Plaintiff's counsel estimate that the average Settlement Class Member payment would be approximately $30. (Paronich Decl. ¶ 16.) The Settlement provides for a potential second distribution for any funds remaining due to uncashed settlement distribution checks to those Settlement Class Members that cashed their first distribution checks, to the extent administratively feasible.[3] (Agreement. ¶ 4.3(d).)

2. Class Member Relief: Remedial Measures

As part of the proposed Settlement, the Defendant has also agreed to ensure that it maintains a system to comply with the TCPA's requirements, which is described below:

> (i) Defendant purchases sales leads from non-party Dun & Bradstreet, Inc. and its affiliates, including, Hoover's, that are uploaded to Defendant's mySQL Database; (ii) Defendant purchases and receives bi-monthly lists from non-party Interactive Marketing Solutions, Corp. ("IMS") that reflect wireless numbers and landline ported to wireless numbers; (iii) Defendant scrubs its mySQL Database against each such list received from IMS in an effort to remove wireless numbers and landline ported to wireless numbers from Defendant's mySQL Database; and (iv) Defendant only makes calls to those telephone numbers in its MySQL Database that have been scrubbed against the lists received from IMS.

(Agreement ¶ 4.2) This process will provide Settlement Class Members (and the public) with further relief.

3. Class Representative Incentive Award

If approved by the Court, the Plaintiff will receive an incentive award of $15,000 from the Settlement Fund, in lieu of any payments on claims to which he might otherwise be entitled as a Settlement Class Member under the Settlement. (Agreement ¶ 8.2.) This award will

[3] If distribution of any amounts remaining from uncashed checks is administratively infeasible—*i.e.*, Settlement Class Members would receive less than an additional $5.00, after administrative costs—then that amount will instead be distributed to a Court-approved *cy pres* recipient. (Agreement ¶ 4.3(d)) The Parties propose the National Consumer Law Center as the designated *cy pres* recipient. (Agreement ¶ 1.15)

compensate Plaintiff for his time and effort and for the risk they undertook in prosecuting this case.

4. Attorneys' Fees and Costs

Well before the expiration of time for Settlement Class Members to file objections, Class Counsel will apply to the Court for an award of attorneys' fees in the amount of up to one-third of the total amount of the Settlement Fund, in addition to out of pocket expenses. (Agreement ¶ 1.20.) As Class Counsel will address in their fee application, an award of attorneys' fees and costs will compensate Class Counsel for the work already performed in relation to the settled claims, as well as the remaining work to be performed in documenting the Settlement, securing Court approval of the Settlement, making sure the Settlement is fairly implemented, and obtaining dismissal of the action.

5. Remaining Funds

Any amount remaining in the Settlement Fund after paying all approved Claim Forms, Settlement Administration Expenses, and any Fee Award and Incentive Award will be distributed to a Court-approved *cy pres* recipient. (Agreement ¶ 4.3(d)). The Parties propose National Consumer Law Center. (Agreement ¶ 1.14). This will only include the amount remaining from uncashed checks, to the extent further distribution to the Settlement Class is not administratively feasible. (Agreement ¶ 4.3(d))

C. NOTICE AND SETTLEMENT ADMINISTRATION

All Settlement Administration Expenses will be exclusively paid from the Settlement Fund. (Agr. ¶ 1.39.) The Parties have agreed upon, and propose that the Court approve, the nationally-recognized class action administration firm Kurtzman Carson Consultants LLC ("KCC") to be the Settlement Administrator (Agr. ¶ 1.40), to implement the Class Notice, and to administer the Settlement, subject to review by counsel and the Court. The Settlement

Administrator's duties will include: (1) sending the Class Notice to the Settlement Class pursuant to the Settlement; (2) responding to inquiries regarding the settlement process from persons in the Settlement Class; (3) processing and evaluating Claim Forms, Requests for Exclusion, and objections; and (4) issuing Benefits Checks and Cash Benefits.

The Settlement Administrator will send Postcard Notice via the U.S. Postal Service—substantially in the form attached as Exhibit 3 to the Settlement Agreement—to the names and addresses of Settlement Class Members identified through the calling data obtained in discovery, the "Class List". (Agreement ¶ 7.2(a).) The Settlement Administrator will also attempt to identify name and address information for any Settlement Class Member phone number that was not available in discovery, which is done through the use of third party data vendors. *Id.* The Settlement Administrator will administer a Settlement Website, through which Settlement Class Members will be able to submit Claim Forms and obtain further details and information about the Settlement. (Agreement ¶ 7.2(b).)

D. OPT-OUT AND OBJECTION PROCEDURES

Persons in the Settlement Class will have the opportunity to exclude themselves from the Settlement or object to its approval. (Agreement ¶¶ 14.1-3.) The procedures and deadlines for filing Requests for Exclusion and objections will be conspicuously listed in the Class Notice and on the Settlement Website. (*See* Agreement at Ex. 2-3.) The Class Notice informs Settlement Class Members that they will have an opportunity to appear and have their objections heard by this Court at a Final Approval Hearing. (*Id.*) The Notice also informs Settlement Class Members that they will be bound by the release contained in the Settlement unless they timely exercise their opt-out right. (*Id.*)

E. RELEASE

The release is appropriately tailored to this case involving alleged violations similar to

those alleged, and is limited to those Settlement Class Members identified in the Class List, which is compiled of calling data exchanged in discovery. In exchange for settlement benefits, the Settlement Class Members who do not timely opt out of the Settlement will release Defendant from any and all claims against the Released Parties, arising out of First Choice's telemarketing activities on the Five9, Inc. dialing software and/or system. (Agreement. § 6.)

IV. ARGUMENT

A. THE SETTLEMENT APPROVAL PROCESS

Federal courts strongly favor and encourage settlements, particularly in class actions and other complex matters, where the inherent costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *Armstrong v. Bd. of Sch. Dirs. of the City of Milwaukee*, 616 F.2d 305, 312–13 (7th Cir. 1980) (noting that "[i]n the class action context in particular there is an overriding public interest in favor of settlement") (citations, quotations, and internal marks omitted), *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998); *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996) ("Federal courts naturally favor the settlement of class action litigation."). The traditional means for handling claims like those at issue here — individual litigation — would unduly tax the court system, require a massive expenditure of public and private resources and, given the relatively small value of the claims of the individual Settlement Class Members, would be impracticable. Thus, the proposed Settlement is the best vehicle for Settlement Class Members to receive relief in a prompt and efficient manner.

A court may approve a class action settlement if it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). A proposed class settlement is presumptively fair where it "is the product of arm's length negotiations, sufficient discovery has been taken to allow the parties and the court to act intelligently, and counsel involved are competent and experienced." Newberg §

11.41; *Am. Int'l Grp., Inc. v. ACE INA Holdings*, Nos. 07-2898, 09-2026, 2012 WL 651727, at *2 (N.D. Ill. Feb. 28, 2012) ("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.") (quotation and internal citation omitted).

Approval of a class action settlement is a two-step process. *Armstrong*, 816 F.2d at 314. At the preliminary approval stage, the question for this Court is whether the settlement falls "within a range of possible approval" and therefore warrants dissemination of notice apprising class members of the proposed settlement. *Id.* If the Court preliminarily approves the class action settlement, it then proceeds to the second step in the review process – the fairness hearing. *Id.*; *Manual for Complex Litig.* § 21.633 (4th ed. 2004).

In assessing the fairness, reasonableness and adequacy of a settlement, courts view the facts in the light most favorable to the settlement. *Isby*, 75 F.3d at 1199. The Court "should not substitute [its] own judgment as to the optimal settlement terms for the judgment of the litigants and their counsel." *Armstrong*, 616 F.2d at 315. To evaluate fairness at the preliminary approval stage, courts consider the following factors: (1) the strength of the case for plaintiff on the merits, balanced against the amount offered in settlement; (2) the complexity, length and expense of the litigation; (3) the presence of collusion in reaching a settlement; and (4) the stage of the proceedings and the amount of discovery completed. *Synfuel Techs., Inc.*, 463 F.3d at 653; *see also Armstrong*, 616 F.2d at 314; *Isby*, 75 F.3d at 1199.

As set forth in the following, the settlement here warrants preliminary approval so that persons in the Settlement Class can be notified of the settlement and provided an opportunity to voice approval or opposition.

B. THE SETTLEMENT MERITS PRELIMINARY APPROVAL

1. The Proposed Settlement Provides Substantial Relief to the Settlement Class Particularly in Light of the Uncertainty of Prevailing on the Merits

a. Benefits to the Class

"The most important factor relevant to the fairness of a class action settlement is the first one on the list: the strength of the Plaintiff' case on the merits balanced against the amount offered in the settlement." *Synfuel Techs., Inc.*, 463 F.3d at 653. Nevertheless, "[b]ecause the essence of settlement is compromise, courts should not reject a settlement solely because it does not provide a complete victory to Plaintiff." *In re AT&T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 347 (N.D. Ill. 2010) (citations omitted).

The Settlement Agreement requires Defendant to pay $6,250,000 into a fund out of which Settlement Class Members will receive a cash payment. Although the precise amount of each Settlement Class Member's award cannot be determined until all claims have been submitted, Plaintiff estimates that the average payment will be $30. Without the settlement, the certified class ran the very real risk of recovering nothing, and even in the event of judgment, recovery against Defendant was far from certain.

b. The Strength of Plaintiff's Case

Plaintiff continues to believe that his claims against Defendant have merit, and that he could make a compelling case if his claims were tried. Nevertheless, Plaintiff's claims would face a number of difficult challenges if the litigation were to continue. Apart from the numerous affirmative defenses asserted in their Answer, Defendant consistently argued that the dialing system that it used did not qualify as an ATDS, particularly since the recent decision of the United States Court of Appeals for the District of Columbia in *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. Mar. 16, 2018) (overturning a 2015 Order from the FCC on the definition of an

Automatic Telephone Dialing System). If the dialing system at issue is not determined to be an ATDS, the Plaintiff does not have a claim.

In addition, at least some courts view awards of aggregate, statutory damages with skepticism and reduce such awards — even after a plaintiff has prevailed on the merits — on due process grounds. *See, e.g., Aliano v. Joe Caputo & Sons – Algonquin, Inc.*, No. 09-910, 2011 WL 1706061, at *4 (N.D. Ill. May 5, 2011) ("[T]he Court cannot fathom how the minimum statutory damages award for willful FACTA violations in this case — between $100 and $1,000 per violation — would not violate Defendant's due process rights …. Such an award, although authorized by statute, would be shocking, grossly excessive, and punitive in nature."); *but see Phillips Randolph Enters., LLC v. Rice Fields*, No. 06-4968, 2007 WL 129052, at *3 (N.D. Ill. Jan. 11, 2007) ("Contrary to [defendant's] implicit position, the Due Process clause of the 5th Amendment does not impose upon Congress an obligation to make illegal behavior affordable, particularly for multiple violations.").

2. Continued Litigation Is Likely to Be Complex, Lengthy, and Expensive

Litigation would be lengthy and expensive if this action were to proceed. Although the Parties have nearly concluded discovery, extensive motion work, including finishing the briefing of class certification and motions for summary judgment, remain. Realistically, it could be more than a year before the case would proceed to trial. The appeals process may further delay any judgment in favor of Settlement Class Members. The Settlement avoids these risks and provides immediate and certain relief. *See, e.g., Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 586 (N.D. Ill. 2011) (citation omitted) ("Settlement allows the class to avoid the inherent risk, complexity, time, and cost associated with continued litigation.").

3. The Settlement Resulted from Extensive, Arm's-Length Negotiations and Is Not the Result of Collusion

The requirement that a settlement be fair is designed to prevent collusion among the parties. *Mars Steel Corp. v. Cont'l Ill. Nat'l Bank & Trust Co. of Chicago*, 834 F. 2d 677, 684 (7th Cir. 1987) (approving settlement upon a finding of no "hanky-panky" in negotiations). There is an initial presumption that a proposed settlement is fair and reasonable when it was the result of arm's-length negotiations. Newberg, *supra*, § 11:42; *see also Am. Int'l Grp.*, 2012 WL 651727, at *10.

Here, the proposed settlement was negotiated after a full-day mediation session with Hon. Morton Denlow (Ret.) followed by weeks of continued negotiations between the Parties. Plaintiff's counsel are particularly experienced in the litigation of nationwide class action cases, particularly under the TCPA, as are Defendant's counsel. (*See* Paronich Decl. ¶ 4; Declaration of Edward A. Broderick, attached as Exhibit 3, at ¶ 9; Declaration of Alexander H. Burke, attached as Exhibit 4, at ¶ 7; Declaration of Matthew P. McCue, attached as Exhibit 5, at ¶ 8). In negotiating this Settlement, Plaintiff's Counsel had the benefit of years of experience with class actions in general and a familiarity with the facts of this case in particular. *Id*. The fact that Plaintiff achieved an excellent result for the Settlement Class despite facing significant procedural and substantive hurdles raised by skilled defense counsel is a testament to the non-collusive nature of the Settlement.

4. The Stage of the Proceedings and the Amount of Discovery Completed Supports Preliminary Approval

As outlined above, the Parties have engaged in substantial, substantive discovery, permitting a thorough analysis of the factual and legal issues involved in this matter Settlement negotiations have been prolonged and hard-fought. Before the mediations with Judge Denlow, the Parties provided extensive written analyses of the factual and legal issues involved with the

case. Counsel's thorough legal and factual analyses—including those based on substantial discovery and the use of a consulting expert—informed the Settlement.

C. PLAINTIFF'S REQUESTED FEES ARE REASONABLE

Plaintiff's Counsel seek an award not to exceed one-third of the total settlement fund to compensate counsel for reasonable fees associated with this action (Agreement ¶ 15.1.) Additionally, counsel for the Plaintiff will be applying for reimbursement of the actual costs expended in litigating this matter. (*Id.*) The requested fee is reasonable under the circumstances of this case. In the Seventh Circuit, "courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) (citing cases).

Plaintiff's Counsel have achieved an excellent result for the Settlement Class. The Settlement creates a non-reversionary Settlement Fund of $6,250,000, affording Settlement Class Members direct monetary relief. Although Plaintiff's Counsel were confident in the ability to succeed at class certification and at trial, success was by no means guaranteed, especially considering Defendant's substantial opposition and the complexity of the issues involved. Because putative Class Counsel agreed to prosecute this case on contingency with no guarantee of ever being paid, counsel faced substantial risk. Finally, the fee is in line with those deemed reasonable in the Seventh Circuit. *See Pearson v. NBTY, Inc.*, 772 F.3d 778, 782 (7th Cir. 2014) ("[A]ttorneys' fees awarded to class counsel should not exceed a third or at most a half of the total amount of money going to class members and their counsel.").

Prior to final approval and well before the objection deadline, Plaintiff's Counsel will file a separate motion for an award of attorneys' fees and costs, addressing in greater detail the facts and law supporting their fee request in light of all of the relevant facts.

D. THE REQUESTED INCENTIVE AWARD IS REASONABLE

Incentive awards for class representatives like the one requested here are appropriate. Such awards, which serve as premiums in addition to any claims-based recovery from the settlement, promote the public policy of encouraging individuals to undertake the responsibility of representative lawsuits. *See Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (approving incentive award of $25,000); *see also* Manual for Complex Litig. § 21.62, n. 971 (incentive awards may be "merited for time spent meeting with class members, monitoring cases, or responding to discovery"). Such awards are generally proportional to the representative's losses or claims, and can range from several hundred dollars to many thousands of dollars.

Here, Plaintiff's requested incentive award of not more than $15,000 is appropriate. Unlike unnamed persons in the Settlement Class, who will enjoy the benefits of the Class Representative's efforts without taking any personal action, Plaintiff exposed himself to investigation, committed himself to all the rigors of litigation in the event the case did not settle, and subjected himself to all the obligations of a named party, and in a TCPA case relating to electronic records through the MIDP, that included having all of his electronic devices imaged and copied.

E. THE PROPOSED CLASS NOTICE SATISFIES DUE PROCESS

Rule 23(e)(1) requires the Court to "direct notice in a reasonable manner to all class members who would be bound by" a proposed settlement. Fed. R. Civ. P. 23(e)(1); *see also* Manual for Complex Litig., *supra*, at § 21.312. The best practicable 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). According to the Manual for Complex Litigation, § 21.312, a settlement notice should do the following:

- Define the class;
- Describe clearly the options open to the class members and the deadlines for taking action;
- Describe the essential terms of the proposed settlement;
- Disclose any special benefits provided to the class representatives;
- Indicate the time and place of the hearing to consider approval of the settlement, and the method for objecting to or opting out of the settlement;
- Explain the procedures for allocating and distributing settlement funds, and, if the settlement provides different kinds of relief for different categories of class members, clearly set out those variations;
- Provide information that will enable class members to calculate or at least estimate their individual recoveries; and
- Prominently display the address and phone number of class counsel and the procedures for making inquiries.

The proposed Class Notice, attached as Exhibits 2-3 to the Settlement Agreement, satisfies all of the above criteria. The Class Notice is clear, straightforward, and provides persons in the Settlement Class with enough information to evaluate whether to participate in the Settlement. The Class Notice therefore satisfies the requirements of Rule 23. *See F.C.V., Inc. v. Sterling Nat'l Bank*, 652 F. Supp. 2d 928, 944 (N.D. Ill. 2009) (Rule 23(b)(3) class) (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808 (1985)) (explaining that a settlement notice must provide settlement class members with an opportunity to present their objections to the settlement).

The Settlement Agreement provides for direct notice via U.S. Mail to all addresses for all persons in the Settlement Class reflected in the Class List obtained through discovery, and the Settlement Administrator will attempt to identify the name and address for any phone number in the Class List that does not have a name and address. To supplement this Postcard Notice, the Settlement Agreement provides for the creation of a Settlement Website where persons in the

Settlement Class may obtain additional relevant information about the Settlement and submit Claim Forms. (Agreement. ¶ 7.2(a)-(b).). Furthermore, persons in the Settlement Class will have the opportunity to request a paper claim form that is mailed to them at no expense to the Settlement Class Member if they do not want to submit their Claim Form online. *See* Exhibit 3 to the Settlement Agreement.

This Class Notice plan satisfies due process. While Rule 23 does not require that each potential class member receive actual notice of the class action, this Court must make certain that persons in the Settlement Class receive "the best practicable notice that is: 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *F.C.V., Inc.*, 652 F. Supp. 2d at 944 (Rule 23(b)(3) class) (quoting *Shutts*, 472 U.S. at 808). The Class Notice constitutes the best notice practicable under the circumstances, provides due and sufficient notice to the Settlement Class, and fully satisfies the requirements of due process and Federal Rule of Civil Procedure 23.

F. THE COURT SHOULD GRANT CLASS CERTIFICATION FOR SETTLEMENT PURPOSES

Class certification is proper if Plaintiff satisfy the requirements of Rule 23(a) and one of the prongs of Rule 23(b). *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012). Rule 23(a) requires Plaintiff to establish "'numerosity, commonality, typicality, and adequacy of representation.'" *Kleen Products LLC v. Int'l Paper*, 306 F.R.D. 585, 589 (N.D. Ill. 2015) (quoting *Messner*, 669 F.3d at 811). In this case, Plaintiff seeks certification under Rule 23(b)(3), which "requires the court to find[ ] that the questions of law 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," *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 759 (7th Cir. 2014) (quoting the Rule) (internal quotation marks omitted).

The purpose of Rule 23 is to provide for the efficient administration of justice, as the class action mechanism allows large numbers of claims involving the same core issues to proceed in the aggregate, providing a path to relief where otherwise there would be none. "Class actions serve an important function in our system of civil justice." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981); Wright, *et al.*, 7A *Fed. Practice & Proc.* § 1751 (3d ed. 2010). In class actions such as this one, the alternative to certification is reaping the benefits of illegal calls with impunity. *See Mullins v. Direct Digital, LLC*, 795 F.3d 654, 658 (7th Cir. 2015).

1. The Rule 23(a) Factors Are Met

a. The Class Is Sufficiently Numerous and Joinder Is Impracticable

A plaintiff does not need to "specify the exact number of persons in the class, … but cannot rely on conclusory allegations that joinder is impractical or on speculation as to the size of the class in order to prove numerosity." *Marcial v. Coronet Ins. Co.*, 880 F.2d 954, 957 (7th Cir. 1989) (internal citations omitted). The Seventh Circuit has implied that even a class of forty may be sufficient to warrant class certification. *See Pruitt v. City of Chicago*, 472 F.3d 925, 926 (7th Cir. 2006) (noting that "[s]ometimes 'even' 40 Plaintiff would be unmanageable"). Numerosity is determined prior to any consideration of whether a particular class member has a valid claim. *See Parko v. Shell Oil Co.*, 739 F.3d 1083, 1084 (7th Cir. 2014) ("How many (if any) of the class members have a valid claim is the issue to be determined *after* the class is certified.") (emphasis in original).

In this case, there are 1,213,757 Settlement Class Members. This more than establishes that "joinder of all members is impractical." Fed. R. Civ. P. 23(a)(1). Numerosity is satisfied.

b. The Settlement Class Shares Many Common Issues of Law and Fact

"One of the requirements for a class action in federal court is the existence of 'questions of law or fact common to the class.'" *Suchanek*, 764 F.3d at 755 (quoting Fed. R. Civ. P. 23(a)(2)). "Where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question." *Id.* at 756 (citing *Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010)). "The Supreme Court has explained that 'for purposes of Rule 23(a)(2) even a single common question will do.'" *Id.* at 755 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556 (2011)). Here, every class member's claims arise from the same common nucleus of operative facts: First Choice allegedly called the cellular telephones of the class members using an ATDS or an artificial or prerecorded voice to market products or services. Similarly, every class member has an interest in the same overarching question of law, *i.e.*, whether Defendant violated the TCPA by making these calls. On these issues alone, a class is appropriate. Additionally common questions of law and fact include:

- Does First Choice's dialing system qualify as an ATDS?
- Did First Choice have consent of call recipients to make the calls challenged in this case?
- If First Choice violated the TCPA, were those violations knowing or willful such that treble damages are appropriate under 47 U.S.C. § 227(b)(3)?

These questions are dispositive, apply equally to all class members and, importantly, can be *answered* using common proof and uniform legal analysis. Further, the uniformity of the applicable law — the federal TCPA — distinguishes this case from putative nationwide class actions requiring application of multiple states' laws. The commonality requirement is therefore met. As the Seventh Circuit recently stated, "[c]lass certification is normal in litigation under § 227, because the main questions … are common to all recipients." *Ira Holtzman, C.P.A., & Assocs. v. Turza*, 728 F.3d 682, 684 (7th Cir. 2013.

c. Plaintiff's Claims Are Typical of the Settlement Class

As with commonality, the threshold requirement for typicality is "not high." *See Brown v. Nucor Corp.*, 576 F.3d 149, 153 (4th Cir. 2009). Typicality means that the plaintiff's claims "arise[] from the same event or practice or course of conduct that gives rise to the claims of the other class members and ... [the] claims are based on the same legal theory." *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992) (citation omitted). This component is usually satisfied where "Defendant has engaged in standardized conduct towards members of the proposed class." *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998). However, typicality does not require that the representative's claims be identical to every other member of the class. *See Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006) (noting that "factual variations may not defeat typicality").

Here, the Plaintiff satisfies the typicality requirement because their interests are sufficiently aligned with those of the class. Like all class members, the Plaintiff received automated telemarketing calls on his cellular telephone. He seeks the same relief as the class, and is not subject to unique defenses.

d. Plaintiff and His Counsel Are Adequate Representatives

"Rule 23(a)(4) requires that the named Plaintiff and class counsel 'will fairly and adequately protect the interests of the class.'" *Birchmeier v. Caribbean Cruise Line, Inc.*, 302 F.R.D. 240, 252 (N.D. Ill. 2014), petition denied by *In re Caribbean Cruise Line, Inc.*, 2014 U.S. App. LEXIS 25084 (7th Cir. 2014) (quoting the Rule). In adequacy analysis, the Court considers "the adequacy of the named Plaintiff as representatives of the proposed class's myriad members, with their differing and separate interests." *Gomez v. St. Vincent Health, Inc.*, 649 F.3d 583, 592 (7th Cir. 2011). While the Supreme Court has noted that adequacy and typicality analysis "tend [ ] to merge," *Windsor*, 521 U.S. at 626 n. 20, courts have rejected proposed class representatives

due to "conflicts of interest" or "serious credibility problems," *Birchmeier*, 302 F.R.D. at 252 (internal quotation marks and citations omitted).

Here, the Plaintiff has no conflicting interests with class members. In fact, by investigating, documenting, filing, and prosecuting this action, the Plaintiff has demonstrated a desire and ability to protect class members' interests. There is nothing to suggest that the Plaintiff has any interest antagonistic to the vigorous pursuit of the class claims against the defendant. Rather, his interests are perfectly aligned with those of class members. In addition, putative Class Counsel are practitioners with substantial experience in consumer and class action litigation, including cases under the TCPA like this one. The requirements of Rule 23(a), therefore, are satisfied.

2. The Rule 23(b)(3) Factors Are Satisfied

Rule 23(b)(3)'s predominance requirement tests whether proposed classes are "sufficiently cohesive to warrant adjudication by representation." *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013) (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). Predominance is satisfied so long as individual issues do not "overwhelm" common issues. *Id.* (quoting *Amgen Inc. v. Conn. Retirement Plans & Trust Funds*, 133 S. Ct. 1184, 1196 (2013)). Common issues predominate here because the central liability question—*i.e.*, whether the calls were made in violation of the TCPA—can be established through generalized evidence. Predominance is "readily met" in certain consumer cases. *Windsor*, 521 U.S. at 625. The touchstone for predominance analysis in the Seventh Circuit is efficiency. *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 362 (7th Cir. 2012) ("*Butler I*"), *vac'd on other grounds* 133 S. Ct. 2768 (2013), *judgment reinstated*, 727 F.3d 796 (7th Cir. 2013) ("*Butler II*"), *cert. denied* 134 S. Ct. 1277 (2014). "[T]he requirement of predominance is not satisfied if

'individual questions ... overwhelm questions common to the class.'" *Butler II,* 727 F.3d at 801 (quoting *Amgen Inc. v. Conn. Ret. Plans & Trust Funds,* 133 S. Ct. 1184, 1196 (2013)).

Because the claims are being certified for purposes of settlement, there are no issues with manageability. *Windsor,* 521 U.S. at 620 ("Confronted with a request for settlement-only 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."). Additionally, resolution of tens of thousands of claims in one action is far superior to individual lawsuits and promotes consistency and efficiency of adjudication. *See Butler*, 727 F.3d at 801 (noting that "the more claimants there are, the more likely a class action is to yield substantial economies in litigation") (quoting *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004)). Thus, certification for purposes of settlement is appropriate.

G. SCHEDULING A FINAL APPROVAL HEARING IS APPROPRIATE

The last step in the settlement approval process is a final approval hearing at which the Court may hear all evidence and argument necessary to make its settlement evaluation. Proponents of the Settlement may explain the terms and conditions of the Settlement and offer argument in support of final approval. The Court will determine after the Final Approval Hearing whether the Settlement should be approved, and whether to enter a final order and judgment under Rule 23(e). Plaintiff requests that the Court set a date for a hearing on final approval at the Court's convenience, but no earlier than 100 days after the preliminary approval order is entered, and schedule further settlement proceedings pursuant to the schedule set forth below:

ACTION	DATE
Preliminary Approval Order Entered	At the Court's Discretion
Notice Deadline	Within 21 days following entry of Preliminary Approval Order

ACTION	DATE
Class Counsel's Fee Motion Submitted	Within 30 days following entry of Preliminary Approval Order
Exclusion/Objection/ Claim Deadline	60 days after Notice Deadline
Final Approval Brief and Response to Objections Due	At least 14 days prior to the Final Approval Hearing
Final Approval Hearing Date	No earlier than 100 days following entry of Preliminary Approval Order

V. CONCLUSION

The proposed class action Settlement is fair, reasonable, adequate, and well within the permissible range of possible judicial approval. It should, therefore, be approved in all respects.

Respectfully submitted,

PLAINTIFF,
individually and on behalf of a class of all persons and entities similarly situated

Dated: August 24, 2018

By: */s/ Anthony I. Paronich*

Edward A. Broderick
Email: ted@broderick-law.com
Anthony I. Paronich
Email: anthony@broderick-law.com
BRODERICK & PARONICH, P.C.
99 High Street, Suite 304
Boston, Massachusetts 02110
Telephone: (617) 738-7080

Alexander H. Burke
Email: aburke@burkelawllc.com
BURKE LAW OFFICES, LLC
155 North Michigan Avenue, Suite 9020
Chicago, Illinois 60601
Telephone: (312) 729-5288
Facsimile: (312) 729-5289

Matthew P. McCue (appearance forthcoming)
Email: mmccue@massattorneys.net
THE LAW OFFICE OF MATTHEW P. MCCUE
1 South Avenue, Suite 3
Natick, Massachusetts 01760
Telephone: (508) 655-1415
Facsimile: (508) 319-3077

Attorneys for Plaintiff and the Proposed Class

CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2018, I electronically filed the foregoing with the Clerk of the Court, using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ *Anthony I. Paronich*
Anthony I. Paronich