

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

BRYAN HANLEY, *an individual on behalf of himself and all others similarly situated,*

Plaintiff,

v.

TAMPA BAY SPORTS AND ENTERTAINMENT LLC, *a Delaware limited liability company,*

Defendant.

CASE NO. 8:19-CV-00550-CEH-CPT

PLAINTIFF’S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AGREEMENT

Plaintiff Bryan Hanley, individually and as the putative representative of the proposed Settlement Class, moves for preliminary approval of the Parties’ Class Action Settlement Agreement (the “Settlement Agreement” or “Settlement”) and to certify the proposed Settlement Class for settlement purposes only. A copy of the Settlement Agreement is attached as **Exhibit A**.¹ The relief sought by this motion is unopposed.

I. INTRODUCTION

In this Action, Plaintiff alleges that Defendant Tampa Bay Sports and Entertainment LLC (“Defendant” or “TBSE”) sent text messages to the Plaintiff’s and Settlement Class Members’ wireless telephones without first obtaining their express written consent in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (the “TCPA”).

¹ Unless otherwise noted, all capitalized terms have the same meaning as ascribed to it in the Settlement Agreement.

This litigation has been both comprehensive and highly contentious. Since this case was filed, the Parties vigorously advanced their respective positions. Settlement negotiations were likewise hard fought, and notwithstanding the assistance of a highly-respected and experienced mediator, the Parties' mediation conference resulted in an impasse. After the failed mediation, the Plaintiff continued to fiercely litigate this case and to advocate his positions, including by moving for leave to amend the operative Complaint to pursue personal liability against TBSE's affiliates and its marketing executives and to add causes of action for violations of the Electronic Communications Privacy Act, 18 U.S.C. § 2510 ("ECPA") as well as for the common law tort of intrusion upon seclusion. *See* ECF No. 72. The Plaintiff also moved to compel additional discovery from Defendant. ECF No. 73. Notwithstanding the Plaintiff's readiness to continue to litigate on behalf of himself and the proposed class, following the Parties' mediation, counsel for Plaintiff and Defendant continued to engage in settlement discussions, held multiple telephone conferences over the ensuing weeks, and exchanged emails and multiple red-line drafts regarding the provisions of a binding settlement term sheet, which ultimately resulted in heavily negotiated and arm's length Settlement.

The cornerstone of the Settlement is the immediate, substantial, and concrete monetary relief it provides to the Settlement Class Members. As set forth in the Settlement Agreement, the Settlement creates a \$2,250,000 Settlement Fund, which will be paid, pursuant to a hybrid pro rata and claims made basis to all Settlement Class Members who submit a valid Claim Form. The costs of notice, settlement administration, amounts awarded by the Court for attorneys' fees and expenses, and Plaintiff's incentive award will be deducted from the Settlement Fund prior to payments to the Settlement Class Members. In addition, the Settlement includes current and prospective injunctive relief in favor of the Settlement Class through Defendant's cessation of its

texting program in its current form along with a covenant that any reintroduction thereof will fully comply with the TCPA. The Settlement also provides that the best practicable notice be provided to Class Members and calls for the designation of a reputable and competent professional Settlement Administrator to disseminate notice of and administer the Settlement.

In light of the extensive monetary and injunctive relief to be provided by the Settlement Agreement and the discussion below, the Settlement is well within the bounds of reasonableness. The Plaintiff therefore respectfully moves the Court to approve the Settlement Agreement and to preliminarily certify the Settlement Class for settlement purposes.

II. HISTORY OF THE LITIGATION

The record demonstrates that the Parties pursued their opposing positions comprehensively and zealously. The Plaintiff instituted this Action by filing a Class Action Complaint in the United States District Court for the Middle District of Florida on March 5, 2019. ECF No. 1 (“Compl.”). The material allegations of the Complaint centered on TBSE’s allegedly unlawful transmission of advertising text messages via an automatic telephone dialing system without first obtaining the recipients’ prior express written consent. *Id.* ¶¶ 1-2. Specifically, the Complaint asserted that Defendant implemented bait and switch practices whereby it used promotional literature advertising the prospect of free giveaways to obtain consumers’ telephone numbers and lure them into a repeat and recurring text telemarketing campaign. *Id.* ¶¶ 19-49.

In response to the Complaint, on April 29, 2019, Defendant simultaneously filed three motions: (1) TBSE’s Motion to Stay Proceedings, (2) TBSE’s Motion to Dismiss, and (3) TBSE’s Motion to Strike Class Allegations. ECF Nos. 14, 15, 17. Plaintiff opposed what he considered Defendant’s effort to obtain an indefinite stay. ECF No. 23. Before Plaintiff could respond to Defendant’s Motions to Dismiss and to Strike the Class Allegations, Defendant also filed a Motion

for Stay of Discovery and, alternatively, for Phased Discovery. ECF Nos. 23, 25. Ultimately, Plaintiff responded to all of Defendant's aforementioned motions. ECF Nos. 27-28, 39. And shortly thereafter, on June 3, 2019, Plaintiff moved to certify this action as a class action under Federal Rule of Civil Procedure 23 and to appoint his counsel, the law firm CAREY RODRIGUEZ MILIAN GONYA LLP, as class counsel. ECF No. 29.

On June 25, 2019, this Court ordered the Parties to appear before the Court on July 10, 2019 for a Preliminary Pretrial Conference and for a hearing on Defendant's Motions to Stay Proceedings and to Stay Discovery and for Phased Discovery. ECF Nos. 40-41.

Before the Parties appeared for the hearing, the United States acknowledged the basis for Defendant's Motion to Dismiss: that the federal statute that the Plaintiff was suing under, the TCPA, was alleged to be unconstitutional. ECF No. 42. According to TBSE, the TCPA is unconstitutional because it discriminates on the basis of speech contents by exempting various agents of the U.S. government from its provisions and because there is no compelling government interest in policing the types of communications typically sent through text messages. In addition, TBSE asserted it could not readily determine what dialing equipment would fall within the TCPA's prohibition against use of an automatic telephone dialing system, thus making the law void for vagueness. In light of TBSE's arguments, the United States asked for additional time to intervene to support the statute's constitutionality. When the United States did intervene, it argued in support of the TCPA's constitutionality, noting that Congress made extensive findings about the law's purpose of protecting consumer privacy, an interest it asserted the United States Supreme Court considered compelling. Also, before the Parties were due to appear before the Court, Defendant responded to Plaintiff's motion for class certification with a 30-page opposition brief containing 10,000 pages of materials, 17 exhibits, including an expert report, affidavits from its marketing

executives, and affidavits from Tampa Bay Lightning fans expressing their desire to receive the texts at issue and asserting dissatisfaction with the pending litigation. ECF No. 48. The Plaintiff immediately sought leave to submit a reply in further support of his motion for class certification. ECF No. 49.

On July 10, 2019, the Parties appeared before the Court for a Preliminary Trial Conference. The Court ordered the Parties to confer further and to submit an amended Case Management Report. *See* ECF No. 50. Arguments were also held on Defendant's Motion to Stay Proceedings and to Stay and Phased Discovery. Both of these motions were denied and the Plaintiff's motion for leave to submit a reply in support of his motion for class certification was granted. *See* ECF Nos. 50, 51.

Following the July 10, 2019 hearing, Plaintiff submitted his reply in further support of his motion to certify a class. ECF No. 55. Through the reply, Plaintiff addressed Defendant's positions and proposed an amended class definition that addressed some of Defendant's objections to class certification. Thereafter, Defendant sought leave to file a sur-reply to Plaintiff's motion for class certification, which the Court granted. ECF Nos. 57, 60. In the sur-reply, Defendant argued that Plaintiff prejudicially moved the goal-post by changing his proposed class definition in his reply brief. ECF No. 62. Plaintiff then sought and obtained leave for the submission of a sur-sur-reply on class certification issues and presented additional reasons why he believed class certification was appropriate. ECF Nos. 67-68, 70.

During this time, the Parties were not only busy briefing the constitutionality of the TCPA and whether this action was properly litigated as a class action, but were also engaged in direct communications, and as part of their obligations under Fed. R. Civ. P. 26, discussing the prospect of resolution. Those discussions eventually led to an agreement between the Parties to engage in

formal mediation, which the Parties agreed would take place before Jay Cohen, who is a neutral party with substantial experience mediating consumer class actions, including class actions alleging violation of the TCPA. The Parties ultimately notified the Court that they agreed to attend mediation at the offices of Defendant's counsel on September 23, 2019. ECF No. 58. While the mediation efforts were ultimately unsuccessful, they did set the stage for continued and more in-depth discussions for settlement. ECF No. 74.

After mediation, the Plaintiff sought leave to submit an Amended Class Action Complaint that added several of Defendant's corporate affiliates and employees who were alleged to have been directly involved in the supposedly offending behavior. ECF Nos. 72, 72-1. In addition, Plaintiff's proposed Amended Class Action Complaint sought to allege claims for intrusion upon seclusion and to obtain civil remedies for violations of criminal wiretap laws. Shortly thereafter, the Plaintiff also moved to compel Defendant to produce additional documents in response to his First Set of Requests for Production. ECF No. 73.

During this time, counsel for the Parties continued settlement negotiations that began at the September 23, 2019 mediation in Tampa. Following counsels' multiple telephone conferences, email exchanges and redline drafts, on October 14, 2019, the Parties signed the Binding Settlement Term Sheet that set forth the roadmap to concluding this litigation for all Parties and in a fashion that provides meaningful relief to all absent class members. On October 17, 2019, the Parties informed the Court of the Binding Settlement Term Sheet and that it expected to submit a comprehensive Settlement Agreement and to move for preliminary approval thereof within forty (40) days.

TBSE has and continues to deny that it committed any wrongdoing or that it threatened or attempted to commit, any wrongful act or violation of law or duty as alleged in the Action and has

vowed to both defend this Action and to oppose certification of a litigation class. Nonetheless, taking into account the uncertainty and risks inherent in any litigation, TBSE has concluded it is desirable and beneficial that the Action be fully and finally settled and terminated in the manner and upon the terms and conditions set forth in the Settlement Agreement. Plaintiff believes that the claims asserted in the Action against TBSE have merit and that he would have prevailed at summary judgment and/or trial. Nonetheless, Plaintiff and Class Counsel recognize that TBSE raised factual and legal defenses that present a risk that Plaintiff may not prevail. Plaintiff and Class Counsel also recognize the expense and delay associated with continued prosecution of the Action against TBSE through class certification, summary judgment, trial, and any subsequent appeals. Plaintiff and Class Counsel have also taken into account the uncertain outcome and risks of litigation, especially in complex class actions such as this, as well as the difficulties inherent in such litigation. Therefore, Plaintiff believes it is desirable that the Released Claims be fully and finally compromised, settled, and resolved with prejudice. Based on its evaluation, Class Counsel has concluded that the terms and conditions of this Settlement Agreement are fair, reasonable, and adequate to the Settlement Class, and that it is in the best interests of the Settlement Class to settle the claims raised in the Action pursuant to the terms and provisions of this Settlement Agreement.

III. SETTLEMENT TERMS

The Parties propose to certify the following Settlement Class:

All Persons who are users of or subscribers to cell phone numbers that, after a keyword was texted to shortcode telephone number 61873, were sent at least one SMS text message in connection with the Bolts Text Club through the Phizzle text message dialing platform.

Excluded from the Settlement Class are (1) any Judge or Magistrate presiding over this Action and members of their families; (2) the Defendant, Defendant's subsidiaries, parent companies, successors, predecessors, and any entity in which the Defendant or its parent company, if any, has

a controlling interest and their current or former officers, directors, agents, attorneys, and employees; (3) persons who properly execute and file a valid and timely request for exclusion from the class; and (4) the legal representatives, successors or assigns of any such excluded persons.

a. Monetary Settlement Relief

The cornerstone of the Settlement is the substantial, concrete monetary relief it provides to Settlement Class Members. The Settlement Agreement allows the Settlement Class Members to look to a Settlement Fund of up to \$2,250,000 for settlement and satisfaction of their claims.

The first \$1,400,000 of the Settlement Fund is entirely non-reversionary. This means that no part of it can revert to Defendant under any circumstance whatsoever. In addition, to the extent that the total amount of Approved Claims multiplied by Forty-Five Dollars (\$45.00) exceeds \$1,400,000, the Settlement Fund will be increased upwards so that it equals the total amount of Approved Claims multiplied by Forty-Five Dollars (\$45.00) up to the total amount of the Settlement Fund, i.e., \$2,250,000.00. The total Settlement Fund, as calculated above, will be used to pay all administration expenses and fees and will then be apportioned among the Settlement Class Members on a pro rata basis.

To receive a Cash Award under the terms and conditions of the Settlement, Settlement Class Members must, among other things, truthfully, accurately, and completely fill out and sign the Claim Form, attesting to their receipt of a text message, and either submit the Claim Form on the Settlement Website or mail the Claim Form, with first class postage prepaid, to the Settlement Administrator, postmarked on or before the Claims Submission Deadline.

The amount of a Settlement Class Member's Cash Award depends on the number of Persons who submit valid Claim Forms and the amounts deducted from the Settlement Fund for

notice and class action administration, attorneys' fees and expenses, and a potential incentive award to the named Plaintiff.

The claims process and Claim Form will be as least burdensome and time consuming as possible and will present objective criteria that Settlement Class Members may fairly satisfy to receive relief.

b. Injunctive Settlement Relief

In addition to the substantial monetary relief that the Settlement provides, additional core relief includes changes to TBSE's business practice of sending marketing text messages to consumers. Indeed, as a current benefit, TBSE has already halted its text message marketing program. TBSE further agrees that before engaging in any new text message marketing program, that it will implement a training program and institute compliance protocols to ensure compliance with the TCPA. These training programs and compliance protocols will train relevant personnel on both legal compliance and how to maintain best practices, including the use of what is commonly referred to as a "double opt-in" procedure to ensure "prior express written consent" is properly obtained.

c. Class Notice and Claims Administration

Furthermore, the Settlement Agreement requires Court appointment of a reputable Class Action Administrator, the dissemination of best practicable notice, a transparent settlement administration process, a Settlement website, a toll-free information line with taped frequently asked questions and a voicemail box, a centralized post-office box to correspond with Settlement Class Members, and a detailed process for administering Claims Payments for Settlement Class Members. The Parties solicited and received numerous estimates from nationally recognized claims administrators with substantial experience in class action settlements. Following review of

various proposals, the Parties identified a claims administrator they believe is best suited to serve as the administrator in this particular matter. To this end, the Parties seek this Court's approval to retain Angeion Group, LLC. A copy of the Declaration of Steven Weisbrot, attesting to his and Angeion's qualifications is submitted herewith as **Exhibit B**.

The Notice program is designed to provide the Settlement Class with important information regarding the Settlement and their rights thereunder, including a description of the material terms of the Settlement; a date by which Settlement Class members may exclude themselves from or "opt-out" of the Settlement Class; a date by which Settlement Class members may object to the Settlement; Class Counsel's fee application and/or the request for an incentive award; the date of the Final Approval Hearing; information regarding the Settlement Website where Settlement Class members may access the Settlement Agreement; and other important documents.

The costs associated with dissemination of the Class Notice and administration of the Settlement will be paid from the Settlement Fund, subject to the Court's approval.

Finally, TBSE is required to comply with the notice provisions of the Class Action Fairness Act of 2005, 28 U.S.C. §1715, *et seq.*

By this Motion, the Parties seek this Court's approval of the following proposed Notices which are attached hereto: (i) Individual Notice via U.S. Mail (**Exhibit C**); (ii) Email Notice (**Exhibit D**), and; (iii) Settlement Website Notice (**Exhibit E**).

d. Objectors and Opt-Outs

To the extent that any Settlement Class Members object to the Settlement, the Parties ask the Court to adopt the deadlines and procedures for objectors set forth in the proposed Class Notice to ensure that that all interested persons are afforded a reasonable opportunity to be heard and that the Final Approval Hearing may be conducted in an orderly, efficient, and just manner. First, the

proposed Settlement provides a procedure for any Settlement Class Member who wishes to opt-out of the Settlement. Second, any Settlement Class Member or governmental entity with standing that wishes to object to the proposed Settlement may do so by filing a timely written statement, containing all information required by the proposed Class Notice, with the Court on or before Objection/Exclusion Deadline. Third, any attorney or Settlement Class Member who intends to appear or speak at the Final Approval Hearing must enter a written notice of appearance with the Court on or before the Objection/Exclusion Deadline. To be timely, requests for exclusion must be received no later than the Objection/Exclusion Deadline, and simply and clearly state the Settlement Class Member's intention to exclude themselves from the Settlement.

An objection must be timely submitted and contain: (1) the objecting Settlement Class Member's name and address; (2) an explanation of the basis upon which the objecting Settlement Class Member claims to be a Settlement Class Member, including the cellular telephone number to which the Settlement Class members subscribed and to which one or more text messages were received from TBSE; (3) all grounds for the objection, including all citations to legal authority and evidence supporting the objection; (4) the name and contact information of any and all attorneys representing, advising, or in any way assisting the objecting Settlement Class Member in connection with the preparation or submission of the objection or who may profit from the pursuit of the objection; (5) the number of times in which the objecting Settlement Class Member has objected to a class action settlement within the preceding five (5) years; (6) a copy of any orders related to or ruling on the objecting Settlement Class Member's counsel's or the counsel's law firm's prior objections made by individuals or organizations represented by them that were issued by the trial and appellate courts in each listed case in which the objecting Settlement Class Member's counsel and/or counsel's law firm have objected to a class action settlement within the

preceding five (5) years; (7) any and all agreements that relate to the objection or the process of objecting—whether written or oral—between objector or objecting Settlement Class Member’s counsel and any other person or entity; and (8) a statement indicating whether the objecting Settlement Class Member intends to appear at the Final Approval Hearing (either personally or through counsel who files an appearance with the Court in accordance with the Local Rules).

The Settlement Agreement also provides for the Court’s Preliminary Approval Order to contain a temporary injunction enjoining other proceedings relating to the Released Claims in order to preserve the status quo pending the Court’s final decision on the reasonableness and fairness of the Settlement.

e. Release of Claims

In exchange for the Settlement consideration, Plaintiff and all Settlement Class members agree to the release defined in the Settlement Agreement.

IV. THE PROPOSED SETTLEMENT IS WITHIN THE RANGE OF REASONABLENESS, MEETS ALL RULE 23(e) REQUIREMENTS AND WARRANTS PRELIMINARY APPROVAL

Before a class action may be dismissed or compromised, notice must be given in the manner directed by the Court and judicial approval must be obtained. Fed. R. Civ. P. 23(e). In analyzing any settlement, “there is an overriding public interest in favor of settlement [because it] is common knowledge that class action suits have a well deserved reputation as being most complex.” *Strube v. American Equity Inv v. Life Ins. Co.*, 226 F.R.D. 688, 698 (M.D. Fla. 2005) (quoting *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)² (citation omitted); see also *Pierre-Val v. Buccaneers Ltd. P’ship*, No. 8:14-cv-01182-CEH-AEH, 2015 WL 12843848, at *7 (M.D. Fla. Dec. 7, 2015) (“[S]erious questions of law and fact exist such that the value of an immediate

² In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions prior to October 1, 1981.

recovery outweighs the mere possibility of further relief after protracted and expensive litigation.”). Moreover, “in evaluating a settlement’s fairness, “the Court must not forget that compromise is the essence of a settlement.” *Strube*, 226 F.R.D. at 699 (internal citations omitted). The trial court “should not make a proponent of a proposed settlement justify each term ... against a hypothetical or speculative measure of what concessions might have been gained.” *Id.*

Judicial review of a proposed class action settlement “is a two-step process that includes (1) preliminary approval and (2) a subsequent fairness hearing.” *O’ Connor v. Worthington PJ, Inc.*, No. 2:16-cv-608-ftM-99MRM, 2017 WL 6762436, at *3 (M.D. Fla. Dec. 13, 2017). In the first step, the Court determines whether the proposed settlement should be preliminarily approved. *See* David F. Herr, ANNOTATED MANUAL FOR COMPLEX LITIGATION § 21.632 (4th ed. 2004). In the second step, after hearing from any objectors and being presented with declarations and materials to support the fairness of the settlement, the court makes a final decision whether the settlement should be finally approved. *See id.* §§ 21.633-35.

“Preliminary approval of a settlement agreement requires only an ‘initial evaluation’ of the fairness of the proposed settlement on the basis of the written submissions.” *O’ Connor*, 2017 WL 6762436, at *3 (citing *Pierre-Val*, 2015 WL 3776918, at *1 (M.D. Fla. June 17, 2015)). At the preliminary approval stage, the court makes the preliminary determination whether the proposed settlement is within the range of fairness, reasonableness, and adequacy so as to justify notice to the class of the settlement, and the setting of a final fairness hearing to decide whether the proposal is indeed fair, reasonable, and adequate in the ultimate sense. MANUAL FOR COMPLEX LITIGATION § 21.632 (4th ed. 2004); *see also* 4 Herbert N. Newberg & Alba Conte, NEWBERG ON CLASS ACTIONS, §11.25 (4th ed. 2002); *Youngman v. A&B Insurance and Financial*, No. 6:16-cv-1478-Orl-41GJK, 2018 WL 2348704, at *3 (M.D. Fla. Mar. 22, 2018); *Bennett v. Behring Corp.*, 737 F.2d 982, 986

(11th Cir. 1984) (a proposed settlement must be “fair, adequate and reasonable and [not] the product of collusion between the parties.”).

The proposed Settlement Agreement is within the range of reasonableness and notice to Settlement Class Members is warranted.

a. The proposed Notice and class administration protocols warrant providing Notice to the Class.

As set forth above, the proposed notice and class administration protocols are designed to provide the best notice practicable. Through a combination of direct mail, email, newspaper publication, and website interaction, the proposed notice protocol provides clear and concise information about the settlement terms, class members’ rights, and is designed to reach as many members of the settlement class as possible.

b. The Settlement provides substantial relief.

“[The] fact that a proposed settlement amounts to only a fraction of the potential recovery does not mean the settlement is unfair or inadequate.” *Strube*, 266 F.R.D. at 698. This Settlement meets a critical test in gauging its fairness and reasonableness because it provides significant, concrete relief to affected class members and directly remedies the injury alleged in the Action. The gravamen of Plaintiff’s Complaint was that he and the Settlement Class Members received text messages from Defendant without their consent and thus that they are entitled to compensation under the TCPA. Accordingly, the Settlement creates a \$2,250,000 Settlement Fund to compensate Settlement Class Members who are allegedly entitled to compensation under the TCPA. Settlement Class Members can receive payment by submitting a simple Claim Form either by hard copy or online. The Settlement thus directly addresses the claimed harm.

In fact, the Settlement does more than provide the Settlement Class Members with immediate monetary relief. TBSE, the Defendant that Plaintiff alleges was responsible for sending

the alleged text messages, has represented that its text message marketing program has already been discontinued. Additionally, this Settlement is premised on Defendant's agreement that any future text messaging campaigns it initiates will fully comply with the TCPA, follow best practices, and be instituted only after appropriate training protocols have been instituted.

c. The Settlement provides immediate relief to more than 180,000 Class Members.

This Settlement eliminates the delay and expenses of litigation. This strongly weighs in favor of approval. *See, e.g., Access Now, Inc. v. AMH CGH, Inc.*, No. 98-3004-CIV-GOLD, 2001 WL 1005593, at *4 (S.D. Fla. May 11, 2001) (“By settling their claims, the class will avoid the risk of loss at trial and will receive equitable relief commensurate with that requested in their Complaint, without the expense, delay and uncertainty of further litigation.”). For class actions in particular, courts view settlement favorably because it “avoids the costs, delays and multitudes of other problems associated with them.” *Id.* “The Court should consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise of the mere possibility of relief in the future, after protracted and extensive litigation. In this respect, [as this Court has observed] ‘[i]t has been held proper to take the bird in the hand instead of a prospective flock in the bush.’” *Borcea v. Carnival Corp.*, 238 F.R.D. 664, 674 (S.D. Fla. 2006) (citation omitted).

Absent a settlement, the final resolution of this litigation through the trial process will likely require several years of protracted adversarial litigation and appeals, which will delay relief to more than 180,000 Settlement Class Members. Settlement Class Members may receive immediate economic relief under the Settlement by submitting a simple Claim Form. It is clearly advantageous for Settlement Class Members to be able to obtain this significant financial relief without further delay. By reaching this Settlement, the Parties avoid further protracted litigation

and will establish a means for prompt, streamlined resolution of Settlement Class Members' claims against Defendant. Given the alternative of long and complex litigation before this Court, the risks involved in such litigation, the potential evidentiary issues, and the possibility of further appellate review, the availability of prompt relief under the Settlement is highly beneficial to Settlement Class Members. *See Coles v. Stateserv Med. of Fla., LLC*, No. 8:17-cv-829-T-17AEP, 2018 WL 3860263, at *2 (M.D. Fla. June 19, 2018) *report and recommendation adopted*, 2018 WL 4381186 (M.D. Fla. July 19, 2018) (“[T]he litigation of the case through trial, and possibly the appellate process, would prove complex, expensive, and time-consuming for the parties, as the positions of the parties greatly differ and each would zealously advocate for its position, and would most likely result in protracted litigation with an uncertain outcome”).

d. The Settlement is a Product of Well-Informed, Arm's Length Negotiations

A class action settlement should be approved so long as a district court finds that “the settlement is fair, adequate and reasonable and is not the product of collusion between the parties.” *Strube*, 266 F.R.D.688 at 697, (quoting *Cotton*, 559 F.2d at 1330); *see also Lipuma v. American Express Co.*, 406 F. Supp. 2d 1298, 318-19 (S.D. Fla. 2005) (approving class settlement where the “benefits conferred upon the Class are substantial, and are the result of informed, arm's-length negotiations by experienced Class Counsel”); *see also Coles*, 2018 WL 3860263, at *2 (“[I]f a proposed settlement falls within the range of possible approval, or if probable cause exists to notify the class of the proposed settlement, such settlement should be preliminarily approved.”).

The Settlement here is the result of extensive, arm's-length negotiations between experienced attorneys who are most knowledgeable with this class action litigation and with the legal and factual issues of this Action. Furthermore, Class Counsel are experienced in complex litigation, certification, trial, and settlement of nationwide class action cases and zealously

represented the Plaintiff throughout this litigation. *See* Declarations of David P. Milian (“Milian Decl.”) ¶¶ 4-7 and Ruben Conitzer (“Conitzer Decl.”) ¶ 6 submitted concurrently herewith as **Exhibits F and G**, respectively.

In negotiating this Settlement, Class Counsel had the benefit of years of experience in litigating and settling complex class actions and have an intimate familiarity with the facts of the Action. Class Counsel received class discovery as part of the mediation process, and this enabled them to gain a better understanding of the marketing program at issue. Class Counsel also conducted a thorough analysis of Plaintiff’s claims and conducted an extensive investigation into Defendant’s alleged conduct. Milian Decl. ¶ 9; Conitzer Decl. ¶ 7 .

e. Complexity, Expense, and Duration of Litigation

The traditional means for handling claims like those at issue here tax the court system, require massive expenditures of public and private resources, and, given the relatively small value of the claims of the individual class members, would be impracticable. *See Strube*, 226 F.R.D. at 698; *Coles*, 2018 WL 3860263, at *2. Thus, the Settlement is the best vehicle for Settlement Class Members to receive the relief to which they claim entitlement in a prompt and efficient manner.

V. THE CLASS SHOULD BE CONDITIONALLY CERTIFIED

“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. v. Windsor*, 521 U.S. 591, 620 (1997); *see also Williams v. New Penn Fin., LLC*, No. 3:17-CV-570-J-25JRK, 2018 WL 8584026, at *2 (M.D. Fla. Oct. 26, 2018), *report and recommendation adopted*, 2018 WL 8584027 (M.D. Fla. Dec. 21, 2018) (“In deciding whether to provisionally certify a settlement class, a court must consider the same factors that it would consider in connection with a proposed litigation class—

i.e., all Rule 23(a) factors and at least one subsection of Rule 23(b) must be satisfied—except that the Court need not consider the manageability of a potential trial, since the settlement, if approved, would obviate the need for a trial.”).

Certification of the proposed Settlement Class will allow notice of the Settlement to issue to inform Settlement Class members of the existence and terms of the Settlement, their right to object and be heard on its fairness, to opt-out, and the date, time and place of the Final Approval Hearing. *See Manual for Compl. Lit.*, at §§ 21.632, 21.633. For the reasons set forth below, certification is appropriate under Fed. R. Civ. P. 23(a) and (b)(3).

a. The Plaintiff Has Standing.

While not an explicit requirement under Rule 23, “prior to the certification of a class ... the district court must determine that at least one named class representative has ... standing to raise each class subclaim.” *Prado-Steiman ex rel. Prado v. Bush*, 221 F. 3d 1266, 1279-80 (11th Cir. 2000).

In this case, named Plaintiff Bryan Hanley clearly possesses the requisite standing to assert claims for TCPA violations. As alleged by the Complaint and supported by sworn declaration, the Plaintiff saw one of Defendant’s advertisements promising the chance to “Win Free Lightning Tickets” by texting a keyword to a five-digit short code telephone number. *See* ECF No. 29-1 (“Hanley Decl.”) ¶ 10. After following Defendant’s instructions, Plaintiff began to regularly receive Defendant’s marketing text messages on his cell phone. *Id.* ¶ 14. Plaintiff would have texted “STOP” to end these messages from being sent to his phone, but was prevented from doing so because the free game for which he tried to win tickets had not yet occurred and he was afraid he would become ineligible to win if he opted out from the texting campaign. *Id.* ¶ 25. In total, Plaintiff received fifteen messages from Defendant in about a three-week period. *Id.* ¶¶ 10-31.

These recurring messages were sent to him after his cell phone number was obtained on a false premise and interrupted the Plaintiff's day, made him not want to check his phone, actually interfered with people who did have a valid reason to try to contact him, were annoying, intrusive, and invaded his privacy. *Id.* ¶¶ 35-36.

As a result, the Plaintiff "suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *JWD Auto., Inc. v. DJM Advisory Grp. LLC*, 218 F. Supp. 3d 1335, 1338 (M.D. Fla. 2016) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016)). Specifically, "[b]y alleging Defendant autodialed [his] cell phone on [fifteen] separate occasions [and sent him advertisement and telemarketing materials] without [his] permission, Plaintiff accuses Defendant of engaging in precisely the type of abusive behavior the TCPA aims to prevent: infringement of 'the substantive right to be free from certain types of phone calls and texts absent consumer consent.'" *Williamceau v. Dyck-O'Neal, Inc.*, No. 2:16-cv-855-Ftm-29CM, 2017 WL 2544872, at *2 (M.D. Fla. Jun. 13, 2017); *see also* Hanley Decl. ¶ 36.

Because "a violation of the TCPA itself [constitutes] a concrete de facto injury ... a plaintiff alleging a violation under the TCPA need not allege an *additional* harm beyond unsolicited calls to the plaintiff." *Williamceau*, 2017 WL 2544872, at *2 (internal citations omitted) (emphasis in original); *see also* *Tillman v. Ally Fin. Inc.*, No. 2:16-cv-313-Ftm-99CM, 2016 WL 6996113, at *4 & n.6 (M.D. Fla. Nov. 30, 2016) (TCPA plaintiff has standing on allegation he received autodialed calls without regards to whether other harms are alleged). But even though Plaintiff has standing because he was subjected to conduct outlawed by the TCPA and suffered the harms it meant to avoid, he has *alleged additional harm* beyond that intended to be redressed by the TCPA. *See Spokeo*, 136 S. Ct. at 1549 (A plaintiff "need not allege any *additional* harm beyond the one

Congress had identified.”) (emphasis in original). The Plaintiff’s factual allegations, as supported by sworn evidence, confirm that he was harmed by being subjected to an unfair and deceptive marketing ploy whereby Defendant’s promise of a chance to win free hockey tickets substantively constituted the mere bait to lure the Plaintiff into its automated marketing sales campaign which bombarded him with such frequency it made him not want to check his phone and interfered with legitimate phone purposes. *See also, e.g.*, Fla. Stat. § 817.41(1) (forbidding misleading advertising); 16 C.F.R. § 238.0-238.4 (describing illegal bait and switch tactics).

b. The Requirements of Fed. R. Civ. P. 23(a)(1)-(4) Are Satisfied.

Certification under Fed. R. Civ. P. 23(a) of the Federal Rules of Civil Procedure requires that (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

1. Numerosity

The numerosity requirement of Fed. R. Civ. P. 23(a) is satisfied because the Settlement Class consists of approximately 180,000 individuals residing throughout the United States and joinder of all such persons is impracticable. *See* Fed. R. Civ. P. 23(a)(1).

2. Commonality

“Commonality requires the plaintiff to demonstrate that the class members ‘have suffered the same injury,’” and 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*, 564 U.S. 338, 131 S. Ct. 2541, 2551 (2011) (citation omitted). Here, the commonality

requirement is readily satisfied. There are multiple questions of law and fact – centering on TBSE’s text marketing program – that are common to the Settlement Class, that are alleged to have injured all Settlement Class members in the same way, and that would generate common answers.

3. *Typicality*

For similar reasons, Plaintiff’s claims are reasonably coextensive with those of the absent class members such that the Fed. R. Civ. P. 23(a)(3) typicality requirement is satisfied. *See Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984) (typicality satisfied where claims “arise from the same event or pattern or practice and are based on the same legal theory”); *Murray v. Auslander*, 244 F.3d 807, 811 (11th Cir. 2001) (named plaintiffs are typical of the class where they “possess the same interest and suffer the same injury as the class members”). Plaintiff is typical of the absent Settlement Class members because he received the same or similar text messages and suffered the same injuries, and because they will all benefit from the relief provided by the Settlement.

4. *Adequacy of Representation*

Plaintiff and Class Counsel also satisfy the adequacy of representation requirement. Adequacy under Fed. R. Civ. P. 23(a)(4) relates to (1) whether the proposed class representative has interests antagonistic to the class; and (2) whether the proposed class counsel has the competence to undertake this litigation. Plaintiff’s interests are coextensive with, not antagonistic to, the interests of the Settlement Class, because Plaintiff and the absent Settlement Class members have the same interest in the relief afforded by the Settlement, and the absent Settlement Class members have no diverging interests. Further, Plaintiff and the Settlement Class are represented by qualified and competent Class Counsel who have extensive experience and expertise prosecuting complex class actions. *See Gonzalez v. TCR Sports Broadcasting Holding, LLP*, No.

1:18-CV-20048-DPG, 2019 WL 2249941, at *8 (S.D. Fla. May 24, 2019) (“The Court APPOINTS Plaintiff’s attorneys David P. Milian and Ruben Conitzer of the law firm Carey Rodriguez Milian Gonya LLP as Class Counsel pursuant to Federal Rule 23(g), who it deems are suitable and competent counsel.”) (certifying settlement class); *see also Eldridge v. Pet Supermarket, Inc.*, No. 18-22531-Civ-WILLIAMS-TORRES, 2019 WL 4694142, *6, *10 (S.D. Fla. Aug. 21, 2019) (“[W]e are convinced that the proposed class counsel – from the law firm of Carey Rodriguez Milian Gonya LLP – will adequately represent the class because they have a well-documented history of complex litigation and experience in consumer class action lawsuits pursuant to the TCPA.”) (Magistrate Judge recommending certification of contested litigation class and appointing David P. Milian and Ruben Conitzer as class counsel).

Class Counsel devoted substantial time and resources to vigorous litigation of the Action. *See* Milian Decl. ¶¶ 9-11; Conitzer Decl. ¶¶ 7-9.

c. The Requirements of Fed. R. Civ. P. 23(b)(3) Are Satisfied.

Under Fed. R. Civ. P.23(b)(3), certification is appropriate if the questions of law or fact common to the members of the class predominate over individual issues of law or fact and if a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

1. Common Questions Predominate

Plaintiff readily satisfies the Rule 23(b)(3) predominance requirement because liability questions common to all Settlement Class members substantially outweigh any possible issues that are individual to each Settlement Class member.

2. Class Treatment of Plaintiff’s Claims is Superior

Finally, resolution of hundreds 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). For these reasons, the Court should certify the Settlement Class.

VI. THE PROPOSED NOTICE WILL AFFORD SETTLEMENT CLASS MEMBERS WITH AMPLE DUE PROCESS

“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 Compl. Lit.* § 21.312 (internal quotation marks omitted). 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). 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) (internal quotation marks omitted); *see also* *Manual for Compl. Lit.*, § 21.312 (listing relevant information).

The Notice satisfies all of these criteria. As recited in the Settlement and above, the proposed Notice program will inform Settlement Class members of the substantive terms of the Settlement. It will advise Settlement Class members of their options for remaining part of the Settlement Class, for objecting to the Settlement, Class Counsel’s Attorneys’ fee application and/or request for incentive award, or for opting-out of the Settlement, and how to obtain additional information about the Settlement. The Notice is designed to reach the highest percentage of Settlement Class members as practicable and far exceeds the requirements of Constitutional Due Process.

VII. PROPOSED SCHEDULE

In connection with the preliminary approval of the Settlement, the Court should set a date and time for the Final Approval Hearing, as well as other deadlines relevant to the Claim submission progress. Class Counsel propose the following schedule:

Event	Timeline
Deadline for Completion of Email Notice	35 days after entry of the Preliminary Approval Order
Deadline for Completion of U.S. Mail Notice	35 days after entry of the Preliminary Approval Order
Deadline for Notice via Settlement Website	10 days after entry of the Preliminary Approval Order
Deadline for filing Motion for Final Approval of the Settlement	14 days before Final Approval Hearing
Deadline For Counsel's Fee Application and expenses and for incentive award	45 Days Prior to the Final Approval Hearing
Deadline for opting-out of the Settlement and for submission of Objections	30 days before Final Approval Hearing
Deadline for Responses to Objections	10 days before the Final Approval Hearing
Final Approval Hearing	90 days after Preliminary Approval
Last day Class Claimants may submit a Claim Form	60 days after the Final Approval Hearing

VIII. CONCLUSION

Based on the foregoing, Plaintiff and Class Counsel respectfully request that the Court: (1) preliminarily approve the Settlement; (2) certify the proposed Settlement Class for settlement purposes; (3) approve the Notice program set forth in the Settlement Agreement and approve the form and content of the Notices and Claim Form as attached to the Settlement Agreement; (4) approve and order the opt-out and objection procedures set forth in the Settlement Agreement; (5) adopt the proposed schedule above; (6) appoint Bryan Hanley as Class Representative; (7) appoint David P. Milian and Ruben Conitzer of Carey Rodriguez Milian Gonya, LLP as Class Counsel; and (8) schedule a Final Approval Hearing. A Proposed Preliminary Approval Order is submitted herewith as Exhibit H.

November 26, 2019

Respectfully submitted,

By: /s/ Ruben Conitzer

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