UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

SCOTT PETERSON, on behalf of himself and all others similarly situated,

Plaintiff,

v.

APRIA HEALTHCARE GROUP, INC.,

Defendant.
_____/

CIVIL ACTION NO. 6:19-cv-00856

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

Plaintiff, Scott Peterson, respectfully submits this Unopposed Motion for Preliminary Approval of Class Action Settlement and Certification of Settlement Class.[1]

I. INTRODUCTION

This case involves alleged violations of the Telephone Consumer Protection Act, 47 U.S.C. §227(b), ("TCPA"), which prohibits the use of automatic telephone dialing systems ("ATDS") to call or text cellular telephones unless the caller has the "prior express consent" of the called party to make such calls. *See* 47 U.S.C. § 227(b)(1)(A)(iii). Plaintiff alleges that Defendant, Apria Healthcare Group, Inc., (together with Plaintff, the "Parties"), violated the TCPA by initiating debt calls and text messages via ATDS to a cellular telephone number that was not assigned to the intended recipient of the phone calls and text messages, and the recipient did not consent to receive

[1] All capitalized terms included in this motion and incorporated memorandum of law are defined within the Settlement Agreement and Release, attached hereto as Exhibit 1, and its definitions are incorporated by reference as if fully set forth herein.

such text messages.

Defendant denies any liability and has asserted substantial defenses, including what it contends are well-founded affirmative defenses, (Doc. 16). Specifically, Apria contends it receives prior express consent from its customers to place automated calls to any phone number associated with their account, including for collection purposes. Apria further contends it lacks sufficient information to identify which of the thousands of collection calls it has placed may have reached someone other than the intended recipient. Apria further contends time-consuming, individualized inquiries would be necessary on a per-call basis to resolve that question. Apria also asserts that whether calls were received on cell phones at the time the calls were placed requires individual fact finding. Finally, Apria claims that its calling records do not differentiate cell phone numbers from landline numbers, raising issues here, as the class includes only those recevieing calls or texts to their cellular telephone numbers.

II. BACKGROUND

A. Nature of the Claims and Procedural History

On May 6, 2019, Plaintiff filed a class action Complaint against Defendant in the United States District Court for the Middle District of Florida. (Doc. 1). The Complaint alleged violations of the TCPA and sought class certification, statutory damages, injunctive relief, and an award of attorneys' fees, costs and expenses on behalf of Plaintiff and the proposed class. (Doc. 1). On June 19, 2019, Defendant filed an Answer and Affirmative Defenses. (Doc. 16).

Plaintiff served written discovery requests, including interrogatories and requests for production of documents, to which Defendant served written responses.

Subsequently, the Parties began exploring the potential for resolution of Plaintiff's claims on a class-wide basis. These discussions were prompted by the Parties' desire to avoid the expense,

uncertainties, and burden of protracted litigation, and to put to rest any and all claims or causes of action that have been, or could have been, asserted against Defendant arising out of the alleged TCPA violations.

The Parties agreed to Jill R. Sperber, Esq. as a mediator. Ms. Sperber is well known as a highly skilled and experienced mediator who has mediated many complex and class action cases. On February 4, 2020, the Parties conducted an in-person mediation session to explore settlement. During the mediation, the Parties set forth and discussed their respective positions on the merits of the class claims and the potential for a settlement that would involve class-wide relief. The Parties exchanged offers and counteroffers, and negotiated the points of each vigorously. At all times, the settling Parties' negotiations were adversarial, non-collusive, and conducted at arm's length. The mediation resulted in the material terms set forth in the Settlement before this Court for consideration. *See* Declaration of JohnYanchunis, attached hereto as Exhibit 2, ¶ 11 (hereinafter "Yanchunis Decl.").

B. Summary of the Settlement Terms

Following mediation, the Parties, through their respective counsel, turned to the task of memorializing the terms of the resolution in the Settlement, and the form and content of the Notice. Plaintiff and Defendant finalized the terms and details of the Settlement, which is attached hereto as **Exhibit 1**.[2] Following is a summary of the Settlement's material terms.

The Settlement Class. The Settlement Class is an opt-out class under Rule 23(b)(3) of the Federal Rules of Civil Procedure. It is defined to include all persons in the United States who, between May 6, 2015 and the present, (1) received a non-emergency call or text message to their cellular telephone numbers; (2) through the use of an automatic telephone dialing system or an

[2] The Settlement Agreement is cited to herein after as "S.A."

artificial or pre-recorded voice; (3) from Defendant; and (4) who were not Apria customers at the time of the calls and text messages. Excluded from the Settlement Class are: (a) Defendant and its present and former officers, directors, employees, shareholders, insurers, and their successors, heirs, assigns, and legal representatives; and (b) the Court and members of the Court's staff. S.A. ¶ 1.13.

1. Monetary, Prospective and Other Relief for the Benefit of the Settlement Class. The Settlement requires the establishment of a Settlement Fund in the amount of $175,000.00 to be funded by the Defendant, pursuant to the terms of the Settlement. S.A. ¶ 1.15. Each Settlement Class Member who submits a timely and valid claim form will receive a check in the amount of $50.00 regardless of the number of text messages the class member may have received, subject only to a *pro rata* reduction in the event that the claims and other payments approved by the Court otherwise would exceed the total Settlement Fund. *See* S.A. ¶¶ 1.01, 4.06.

2. Class Release. In exchange for the benefits conferred by the Settlement, all Settlement Class Members who do not opt out will be deemed to have released all claims, whether known or unknown, that arise out of or relate in any way to the TCPA, or any calls or text messages received from Released Parties at any time from May 6, 2015 to the present, including, but not limited to, claims that have been, or could have been, brought in the Action, as well as any claims arising out of the same nucleus of operative facts as any of the claims asserted in the Action. S.A. ¶ 1.10.

3. The Notice Plan. The notice plan is designed to provide the best notice practicable. The administrative fees, costs, and expenses of the Settlement Administrator incurred in

connection with the notice plan will be paid separate and apart from the Settlement Fund. *See* S.A. ¶ 2.02.[3]

The notice plan is comprised of publication notice and Internet notice. The Settlement Administrator will arrange for publication of a notice substantially in the form attached to the Settlement as its Exhibit B, which shall appear on two occasions in *The Wall Street Journal*. The publication Class Notice will direct individuals to the settlement website. S.A. ¶ 3.03.01. The Settlement Administrator will establish the settlement website where it will post a downloadable copy of a Class Notice and claim form, substantially in the form of the Settlement's Exhibit C. The Internet address of the website shall be included prominently in the publication notice. S.A. ¶ 3.03.02. Settlement Class Members will be able to file claims on the settlement website or via mail. S.A. ¶ 4.03.

Defendant will also provide the notification required by the Class Action Fairness Act, 28 U.S.C. § 1715, to the Attorneys General of each U.S. State in which Settlement Class Members reside, the Attorney General of the United States, and any other required government officials. *See* S.A. ¶ 2.02.

4. Class Representative Service Award. Class Counsel will seek and Defendant will not oppose a service award of $2,500.00 for Plaintiff (or in another lesser amount if set by the Court). S.A. ¶ 2.03.

5. Attorneys' Fees, Costs and Expenses. Subject to Court approval, Class Counsel will request no more than 33% of the Settlement Fund for their attorneys' fees, in addition to reimbursement of the litigation costs and expenses incurred in this Litigation, which shall be paid from the Settlement Fund subject to approval from the Court. Defendant may object to the amount

[3] The Parties seek appointment of JND Legal Administration as the Settlement Administrator.

of, but not the entitlement to, attorneys' fees, costs and expenses. S.A. ¶ 2.03. Class Counsel has agreed to a cap of $10,000 on documented expenses, in light of the early settlement. The Parties negotiated these attorneys' fees, costs and expenses only after reaching agreement on all of the material terms of the Settlement. Yanchunis Decl. ¶ 11. In the event the Court grants preliminary approval of the Settlement, Class Counsel will file a motion seeking fees, costs and expenses, and a Service Award no later than sixty (60) days after entry of the Preliminary Approval Order.

In addition to seeking preliminary approval of the Settlement, Plaintiff also seeks conditional certification of a nationwide class for purposes of providing the Settlement Class with notice of the Settlement and an opportunity to opt-out, object, or otherwise be heard. The Settlement satisfies all criteria for preliminary settlement approval under Eleventh Circuit law and is fair, reasonable and adequate.

III. ARGUMENT

A. Certification of the Settlement Class Is Appropriate

Prior to granting preliminary approval of a proposed settlement, the Court should first determine that the proposed Settlement Class is appropriate for certification. *See* MANUAL FOR COMPLEX LITIG., § 21.632 (4th ed. 2004)); *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Class certification is proper if the proposed class, proposed class representative, and proposed class counsel satisfy the numerosity, commonality, typicality, and adequacy of representation requirements of Rule 23(a). Fed. R. Civ. P 23(a)(1)–(4); *see also Fabricant v. Sears Roebuck*, 202 F.R.D. 310, 313 (S.D. Fla. 2001). Additionally, where (as in this case) certification is sought under Rule 23(b)(3), the plaintiff must demonstrate that common questions of law or fact predominate over individual issues and that a class action is superior to other methods of adjudicating the claims. Fed. R. Civ. P. 23(b)(3); *Amchem*, 521 U.S. at 615–16. District courts are

given broad discretion to determine whether certification of a class action lawsuit is appropriate. *Walco Investments, Inc. v. Thenen*, 168 F.R.D. 315, 323 (S.D. Fla. 1996).

A court in a sister district has stated that "[a] class may be certified 'solely for purposes of settlement where a settlement is reached before a litigated determination of the class certification issue.'" *Burrows v. Purchasing Power, LLC*, No. 1:12-CV-22800, 2013 U.S. Dist. LEXIS 189397, at *3 (S.D. Fla. Oct. 4, 2013) (Hon. Ungaro, U.) (quoting *Lipuma v. American Express Co.*, 406 F. Supp. 2d 1298, 1314 (S.D. Fla. 2005)). "Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Amchem Products, Inc.*, 521 U.S. at 620. This case meets all of the Rule 23(a) and 23(b)(3) prerequisites, and for the reasons set forth below, certification is appropriate.

1. The Proposed Settlement Class Meets All of the Requirements for Certification of a Settlement Class Pursuant to Rule 23(a).

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

The first prerequisite to class certification is numerosity, which requires "the class [be] so numerous that joinder of all members is impractical." Fed. R. Civ. P. 23(a)(1). "While 'mere allegations of numerosity are insufficient,' Fed. R. Civ. P. 23(a)(1) imposes a 'generally low hurdle,' and 'a plaintiff need not show the precise number of members in the class.'" *Manno v. Healthcare Revenue Recovery Grp., LLC*, 289 F.R.D. 674, 684 (S.D. Fla. 2013) (citation omitted). While the exact size of the putative class need not be specified, "'generally less than twenty-one is inadequate, more than forty adequate; with numbers between varying according to other factors.'" *Cox v. Am. Cast. Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986) (quoting 3B Moore's Federal Practice para. 23.05[1] n.7 (1978)).

In the present case, Apria has placed calls to thousands of unique cellular phone numbers. Although Apria asserts that its records do not permit efficient determination of whether calls Apria placed may have reached someone other than the Apria customer who provided the phone number, that number is sure to be far nmore than forty. Thus, the numerosity requirement is satisfied.

b. The Settlement Class Satisfies the Commonality Requirement of Rule 23(a)(2).

The second prerequisite to class certification is commonality, which "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*, 131 S. Ct. 2541, 2545 (2011) (citation omitted). The commonality requirement presents a low hurdle, as commonality does not require that all questions of law and fact raised be common. *Muzuco v. Re$ubmitIt, LLC*, 297 F.R.D. 504, 514 (S.D. Fla. 2013). "[F]or purposes of Rule 23(a)(2) '[e]ven a single [common] question' will do." *Dukes*, 131 S. Ct. at 2556. Rule 23(a)(2) requires "only that there be at least one issue whose resolution will affect all or a significant number of the putative class members." *Sharf v. Financial Asset Resolution, LLC*, 295 F.R.D. 664, 669 (S.D. Fla. 2014) (internal citations omitted); *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1355 (11th Cir. 2009); *James D. Hinson Elec. Contr. Co. v. BellSouth Telecomms., Inc.*, 275 F.R.D. 638, 642 (M.D. Fla. 2011) (citing *Williams*, 568 F.3d at 1355).

Here, the commonality requirement of Rule 23(a)(2) is readily satisfied. There are many questions of law and fact common to the Settlement Class that focus on Defendant's common practice of causing calls and text messages to be sent to Settlement Class Members on their cellular

telephones. *See Manno*, 289 F.R.D. at 685. Plaintiff initially alleged numerous questions of fact and law common to the Settlement Class, including, among others:

a. whether Defendant uses an ATDS, or artificial or pre-recorded voice to place calls and/or send text messages to cellular telephones;

b. whether between May 6, 2015 and the present, Defendant used an ATDS or artificial or pre-recorded voice to place calls and/or send text messages to the cellular telephones of Plaintiff and putative Class Members;

c. whether between May 6, 2015 and the present, Defendant used an artificial or pre-recorded voice in connection with its placement of autodialed calls to the cellular telephones of Plaintiff and putative Class Members;

d. whether Defendant is subject to the TCPA;

e. whether Defendant can show that it obtained prior express consent from Plaintiff and putative Class Members to place calls or send text messages to their cellular telephones using an ATDS or artificial or pre-recorded voice;

f. whether Defendant's conduct violates the TCPA;

g. whether Defendant's conduct was negligent;

h. whether Defendant's conduct was knowing and/or willful;

i. whether Defendant is liable for damages, and the amount of such damages;

j. whether Plaintiff and putative Class Members are entitled to declaratory relief;

k. whether Defendant should be enjoined from engaging in conduct in violation of the TCPA in the future; and

l. whether Plaintiff and Class Members are entitled to any other remedy.

c. The Settlement Class Satisfies the Typicality Requirement of Rule 23(a)(3).

The next prerequisite to certification, typicality, "measures whether a significant nexus exists between the claims of the named representative and those of the class at large." *Hines v. Widnall*, 334 F.3d 1253, 1256 (11th Cir. 2003); Fed. R. Civ. P. 23(a)(3). A class representative's claims are typical of the claims of the class if they "arise from the same event or pattern or practice and are based on the same legal theory." *Kornberg v. Carnival Cruise Lines, Inc*., 741 F.2d 1332, 1337 (11th Cir. 1984); *see also Cooper v. Southern Co*., 390 F.3d 695, 714 (11th Cir. 2004) ("Neither the typicality nor the commonality requirement mandates that all putative class members share identical claims, and . . . factual differences among the claims of the putative members do not defeat certification."). Simply put, when the same course of conduct is directed at both the named plaintiff and the members of the proposed class, the typicality requirement is met. *Kennedy v. Tallant*, 710 F.2d 711, 717 (11th Cir. 1983).

Here, the typicality requirement is satisfied for the same reasons that Plaintiff's claims meet the commonality requirement. Specifically, Plaintiff and Settlement Class Members were each subjected to the same conduct – they all received phone calls and text messages from Defendant from May 6, 2015 to present to telephone numbers that they did not consent to receive such calls or text messages. Plaintiff's claim is typical because he did not consent to receive calls or text messages from Defendant.

d. The Settlement Class Satisfies the Adequacy Requirement of Rule 23(a)(4).

Rule 23(a)(4) requires that the class representative "not possess interests which are antagonistic to the interests of the class." 1 Newberg on Class Actions § 3:21. Additionally, the class representative's counsel "must be qualified, experienced, and generally able to conduct the

litigation." *Id.*; *Amchem*, 521 U.S. at 625-26. At the preliminary stage of the approval process, there is nothing to suggest that this requirement has not been satisfied. Plaintiff is a Member of the Settlement Class and he does not possess any interests antagonistic to the Settlement Class. *See* Yanchunis Decl. ¶ 16. In addition, proposed Class Counsel are experienced in class action litigation, including TCPA actions, and have submitted a declaration establishing their skills and experience in handling class litigation around the country and in this District. *See* Yanchunis Decl. ¶¶ 3–7, 17, Exh. A thereto. Accordingly, the requirements of Rule 23(a) are met.

2. The Proposed Settlement Class Meets the Predominance and Superiority Requirements of Rule 23(b)(3).

In addition to meeting the prerequisites of Rule 23(a), the proposed Settlement Class must also meet one of the three requirements of Rule 23(b). *In re Checking*, 286 F.R.D. at 650. Here, Plaintiff seeks certification under Rule 23(b)(3), which requires that (i) questions of law and fact common to members of the class predominate over any questions affecting only individuals, and that (ii) the class action mechanism is superior to other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3). "'It is not necessary that all questions of fact or law be common, but only that some questions are common and that they predominate over individual questions.'" *BellSouth Telecomms., Inc*., 275 F.R.D. at 644 (quoting *Klay v. Humana, Inc.*, 382 F.3d 1241, 1254 (11th Cir. 2004)). The "inquiry into whether common questions predominate over individual questions is generally focused on whether there are common liability issues which may be resolved efficiently on a class-wide basis." *Agan*, 222 F.R.D. at 700. The Settlement Class readily meets these requirements.

a. Common Questions of Law and Fact Predominate.

Rule 23(b)(3)'s predominance requirement focuses primarily on whether a defendant's liability is common enough to be resolved on a class basis, *see Dukes*, 131 S. Ct. at 2551-57, and

whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. Common issues of fact and law predominate in a case "if they have a direct impact on every class member's effort to establish liability and on every class member's entitlement to injunctive and monetary relief." *BellSouth Telecomms., Inc*., 275 F.R.D. at 644 (citing Klay, 382 F.3d at 1255); *see also Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1179 (11th Cir. 2010) (noting that "[t]he relevant inquiry [is] whether questions of liability to the class . . . predominate over . . . individual issues relating to damages. . . ."). Predominance does not require that all questions of law or fact be common, but rather, that a significant aspect of the case "can be resolved for all settlement class members of the class in a single adjudication." *Tornes v. Bank of America, NA* (In re Checking Account Overdraft Litig.), 275 F.R.D. 654, 660 (S.D. Fla. 2011). "When 'one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.'" *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (quoting 7AA C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §1778, pp. 123-124 (3d ed. 2005)).

Common issues readily predominate here because the central liability question in this case — whether Defendant sent or caused calls and text messages to be sent to the Settlement Class Members' telephone numbers via use of an ATDS — can be established through generalized evidence. *See Klay v. Humana, Inc.*, 382 F.3d 1241, 1264 (11th Cir. 2004) ("When there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position, the predominance test will be met.").

Because the claims are being certified for purposes of settlement, there are no issues with manageability, and resolution of thousands of claims in one action is far superior to individual lawsuits and promotes consistency and efficiency of adjudication. *Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997) ("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.").

b. A Class Action Is the Superior Method for Adjudicating This Controversy.

Finally, a class action is superior to other methods available to fairly, adequately, and efficiently resolve the claims of the proposed Settlement Class. As courts have historically noted, "[t]he class action fills an essential role when the plaintiffs would not have the incentive or resources to prosecute relatively small claims in individual suits, leaving the defendant free from legal accountability." *In re Checking*, 286 F.R.D. at 659. At its most basic, "[t]he inquiry into whether the class action is the superior method for a particular case focuses on 'increased efficiency.'" *Agan*, 222 F.R.D. at 700 (quoting *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1359 (11th Cir. 2002)).

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

certification of a settlement-only class because trial management concerns were not implicated by a settlement-only class, as opposed to a litigated class). A class action settlement is superior to other means of resolution because a settlement affording Settlement Class Members an opportunity to receive compensation benefits *all* Parties.

Here, resolution of thousands of claims in one action is far superior to individual lawsuits, because it promotes consistency and efficiency of adjudication. *See* Fed. R. Civ. P. 23(b)(3). Indeed, absent class treatment in the instant case, each Settlement Class Member will be required to present the same or essentially the same legal and factual arguments, in separate and duplicative proceedings, the result of which would be a multiplicity of trials conducted at enormous expense to both the judiciary and the litigants.

Moreover, there is no indication that Members of the Settlement Class have an interest in individual litigation or an incentive to pursue their claims individually, given the small amount of damages likely to be recovered, relative to the resources required to prosecute such an action. *See In re Terazosin Hydrochloride Antitrust Litig.*, 220 F.R.D. 672, 700 (S.D. Fla. 2004) (class actions are "particularly appropriate where . . . it is necessary to permit the plaintiffs to pool claims which would be uneconomical to litigate individually"). Additionally, the proposed Settlement will give the Parties the benefit of finality, and because this case has now been settled, pending Court approval, the Court need not be concerned with issues of manageability relating to trial. *See Amchem*, 521 U.S. at 620 ("[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case . . . would present intractable management problems. . . .").

The Court should certify the Settlement Class, as the superiority requirement is satisfied, along with all other Rule 23 requirements.

B. Plaintiff's Counsel Should Be Appointed as Class Counsel.

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

As discussed above, and as fully explained in Class Counsel's Declaration, attached hereto as Exhibit 2 and its Exhibit A, proposed Class Counsel have extensive experience prosecuting class actions and other complex litigation. Further, proposed Class Counsel have diligently investigated and prosecuted the claims in this matter, have dedicated substantial resources to the investigation of those claims, and have successfully negotiated the settlement of this matter to the benefit of Plaintiff and the proposed Settlement Class. *Id.* Accordingly, the Court should appoint John Allen Yanchunis Sr. and Patrick A. Barthle of Morgan & Morgan Complex Litigation Group as Class Counsel.

C. The Settlement Is Fundamentally Fair, Reasonable, Adequate and Warrants Preliminary Approval.

After determining that a proposed settlement class is appropriate for certification, courts consider whether the proposed settlement itself warrants preliminary approval. Under Rule 23(e), "the Court will approve a class action settlement if it is 'fair, reasonable, and adequate.'" *Burrows v. Purchasing Power, LLC*, No. No. 1:12-CV-22800, 2013 U.S. Dist. LEXIS 189397, at *13 (S.D. Fla. Oct. 4, 2013) (Hon. Ungaro, U.) (quoting Fed. R. Civ. P. 23(e)(2)). *Underwood v. Manfre*, 2014 WL 67644, at *21-22 (M.D. Fla. Jan. 8, 2014). ("If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies...the court

should direct that notice under Rule 23(e) be given to the class members of a formal fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement.") (quoting William B. Rubenstein, Newberg on Class Actions § 11:25 (4th ed.) (citing The Manual for Complex Litigation § 30.41 (3d ed.)).

Further, it must be noted that there is a strong judicial and public policy favoring the voluntary conciliation and settlement of complex class action litigation. *In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992) ("Public policy strongly favors the pretrial settlement of class action lawsuits"); *Warren v. City of Tampa*, 693 F. Supp. 1051, 154 (M.D. Fla. 1998), *aff'd,* 893 F. 2d 347 (11th Cir. 1998); *Access Now, Inc. v. Claires Stores, Inc*., No. 00-cv-14017, 2002 WL 1162422, at *4 (S.D. Fla. May 7, 2002). This is because class action settlements ensure class members a benefit, as opposed to the "mere possibility of recovery at some indefinite time in the future." *In re Domestic Air Transport.*, 148 F.R.D. 297, 306 (N.D. Ga. 1993); *see also, e.g., Ass'n for Disabled Americans, Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 466 (S.D. Fla. 2002) (finding that the policy favoring settlement is especially relevant 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). Thus, while district courts have discretion in deciding whether to approve a proposed settlement, deference should be given to the consensual decision of the Parties. *Warren*, 693 F. Supp. at 1054 ("affording great weight to the recommendations of counsel for both parties, given their considerable experience in this type of litigation").

1. The Settlement Satisfies Amended Rule 23(e) for Preliminary Approval

Amended Rule 23(e)(1) provides that notice should be given to the class, and hence, preliminary approval should be granted, where the Court "will likely be able to" (i) finally approve

the settlement under Amended Rule 23(e)(2), and (ii) certify the class for settlement purposes. Fed. R. Civ. P. 23(e)(1)(B)(i)–(ii); *see also id.* 2018 Amendment Advisory Committee Notes. As explained above, the Class here meets the criteria for certification of a settlement class, including all aspects of numerosity, commonality, typicality, adequacy, and predominance. Rule 23(e)(1)(B)(ii) is therefore met.

As to Rule 23(e)(1)(B)(i), final approval is proper under the amended rule upon a finding that the settlement is "fair, reasonable, and adequate" after considering whether:

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

Fed. R. Civ. P. 23(e). The Court will "likely be able to" finally approve this Settlement and thus preliminary approval should be granted.

a. Adequacy of Representation and Arm's Length Negotiation

As an initial matter, and as explained above, Plaintiff and Class Counsel have adequately represented the Class. *See supra* section III.A.1.d. Moreover, the Settlement was negotiated at arm's length using experienced mediator Jill R. Sperber. Yanchunis Decl. ¶ 11; *see also Perez v. Asurion Corp*., 501 F. Supp. 2d 1360, 1384 (S.D. Fla. 2007) (concluding that class settlement was not collusive in part because it was overseen by "an experienced and well-respected mediator");

Lipuma, 406 F. Supp. 2d at 318-19 (approving class settlement where the "benefits conferred upon the Class are substantial, and are the result of informed, arms-length negotiations by experienced Class Counsel"). Subsections (A) and (B) of Rule 23(e)(2) are therefore met.

b. Adequacy of Relief

The relief offered by the Settlement is adequate considering the risks of continued litigation. Although Plaintiff is confident in the merits of his claims, the risks involved in prosecuting a class action through trial cannot be disregarded. Plaintiff's claims would still need to succeed on a motion for class certification, and likely survive an appeal thereof.

As discussed above, pursuant to the Settlement, the Defendant will make a Settlement Fund of $175,000.00 available. Each Settlement Class Member who submits a timely and valid claim form will receive a check in the amount of $50.00 regardless of the number of text messages the class member may have received, subject only to a *pro rata* reduction in the event that the claims and other payments approved by the Court otherwise would exceed the total Settlement Fund. Given the relief offered under the Settlement, Class Counsel believe the results achieved are well within the range of possible approval.

Nevertheless, and despite the strength of the Settlement, Plaintiff is pragmatic in his awareness of the various defenses available to Defendant, as well as the risks inherent to continued litigation. Defendant consistently denied the allegations raised in the Complaint, and made clear at the outset that it would vigorously defend this case through trial as needed, including contesting class certification issues of ascertainability and individualized issues, as discussed above. Moreover, Defendant has repeatedly challenged the existence of an ATDS and the jurisprudence on this issue is constatnly evolving, and, of late, not in Plaintiff's favor. *See Glasser v. Hilton*

Grand Vacations Co., LLC, 948 F.3d 1301, 1304 (11th Cir. 2020) (finding that an ATDS must both store and produce using a random or sequential number generator).

The Settlement relief will be distributed via a straight-forward claims process utilizing an easy to understand and use claim form. S.A. § 4. Checks for approved claims will then be mailed and postmarked as soon as practicable, but no later than sixty (90) days after Final Approval. S.A. ¶¶ 1.05, 2.01.

Attorneys' fees, costs, and expenses were negotiated separate, apart, and after reaching agreement on the Class relief. Yanchunis Decl. ¶ 11. Plaintiff will seek attorneys' fees of up to thirty-three percent (33%) of the Settlement Fund, plus any reasonable out-of-pocket costs and litigation expenses incurred by Class Counsel. Attorneys' fees, costs, and expenses, in whatever amount set by the Court, are to be paid no later than thirty (30) days after the date of Final Approval. S.A. ¶ 4.02.

The parties have agreed to maximum number of exclusions, above which Apria may elect to terminate this agreement. S.A. ¶ 3.05. The parties agreed not to file that number publicly. *Id.*

Accordingly, the relief provided by the Settlement is fair, reasonable, and adequate especially when considering the inherent costs, risks, and delay were this matter to proceed. Subsection (C) of Rule 23(e)(2) is therefore met.

c. The Settlement Treats Each Respective Class Member Equitably

The last requirement of the new Rule 23(e) is that the Settlement "treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(2)(D). Here, the Settlement treats all Class Members equitably relative to one another because all Class Members who received an unconsented-to text or call are eligible for compensation in the amount of $50 following submission of a claim form. Depending on the claims, that amount can decrease *pro rata*.

2. The Settlement Also Satisfies Historic Factors for Preliminary Approval

The historical procedure for review of a proposed class action settlement is a well-established two-step process. ALBA & CONTE, 4 NEWBERG ON CLASS ACTIONS, §11.25, at 38–39 (4th ed. 2002). The first step is a preliminary, pre-notification hearing to determine whether the proposed settlement is "within the range of possible approval." *Id.* (quoting MANUAL FOR COMPLEX LITIG., §30.41 (3rd ed. 1995)); *Fresco v. Auto Data Direct, Inc.*, No. 03-cv-61063, 2007 WL 2330895, at *4 (S.D. Fla. May 14, 2007). "Preliminary approval is appropriate where the proposed settlement is the result of the parties' good faith negotiations, there are no obvious deficiencies and the settlement falls within the range of reason." *Smith v. Wm. Wrigley Jr. Co.*, No. 09-cv-60646, 2010 WL 2401149, at *2 (S.D. Fla. Jun. 15, 2010). Moreover, settlement negotiations that involve arm's length, informed bargaining with the aid of experienced counsel support a preliminary finding of fairness. *See* MANUAL FOR COMPLEX LITIG. at §30.42. ("A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.") (internal quotation marks omitted).

Here, there should be no question that the proposed Settlement is "within the range of possible approval." As explained above, the process used to reach the Settlement was exceedingly fair and overseen by an experienced neutral. The Settlement is the result of intensive, arm's length negotiations between experienced attorneys who are familiar with class action litigation and with the legal and factual issues in these cases.

As discussed above, the relief provided by the Settlement is significant, especially considering the risks and delay further litigation would entail, including the potentiality or increasingly hostile jurisdprudence on the ATDS issue.

Thus, the Settlement is due to be preliminarily approved under the historic factors too.

D. The Form and Method of Class Notice Are Adequate and Satisfy the Requirements of Rule 23.

"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. LITIG. § 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. LITIG., § 21.312 (listing relevant information).

The notice plan here satisfies all of these criteria and is designed to provide the best notice practicable. Foremost, the language of the notice is reasonably calculated under the circumstances to apprise the Settlement Class of the pendency of the case, class certification (for settlement purposes), the terms of the Settlement, Class Counsel's motion for attorneys' fees, costs and expenses, and the Class Representative's service award, Settlement Class Members' rights to opt-out of or object to the Settlement, as well as the other information required by Rule 23(c)(2)(B).

Additionally, the notice plan includes publication and internet notice. Given the individualized issues and ascertainability problems argued by Apria and identified above, Apria asserts that individual Class Members cannot be identified through reasonable efforts and that

attempting to do so would require expensive and time consuming, individualized inquiries. Thus, the proposed publication is the best notice practicable under the circumstances. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 317, 70 S. Ct. 652 (1950) ("This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning."); *Juris v. Inamed Corp.*, 685 F.3d 1294, 1321 (11th Cir. 2012) ("Where certain class members' names and addresses cannot be determined with reasonable efforts, notice by publication is generally considered adequate."); *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 786 (7th Cir. 2004) ("When individual notice is infeasible, notice by publication in a newspaper of national circulation ... is an acceptable substitute.") (citing *Mullane*); *Shurland v. Bacci Cafe & Pizzeria on Ogden, Inc.*, 271 F.R.D. 139, 145 (N.D. Ill. 2010) (finding notice by publication sufficient to put members of an unascertainable class on notice).

The proposed Order Preliminarily Approving Class Action Settlement, attached to the Settlement as its Exhibit A, has been drafted and approved by counsel for Plaintiff and counsel for Defendant. The proposed form of notice, attached to the Settlement as its Exhibits B and C, satisfies all of the criteria above. The notice plan provides for publication of notice in The Wall Street Journal on two occasions, which will direct Settlement Class Members to the settlement website, where they can file their claims. Thus, notice will be provided to Settlement Class Members online through the dedicated Settlement website that the Settlement Administrator will maintain. Finally, Defendant will provide the notification required by the Class Action Fairness Act, 28 U.S.C. § 1715, to the Attorneys General of each U.S. State in which Settlement Class Members reside, the Attorney General of the United States, and any other required government officials.

Therefore, the notice and notice plan satisfy all applicable requirements of the law, including, but not limited to, Rule 23 of the Federal Rules of Civil Procedure and applicable Due Process. The Court should therefore approve the notice plan and the form and content of the notice attached to the Settlement as Exhibits B and C.

E. The Court Should Schedule a Final Approval Hearing.

The last step in the preliminary approval process is to schedule a Final Approval Hearing, at which the Court will hear evidence and argument necessary to make its final evaluation of the Settlement. The Court will determine at or after the Final Approval Hearing whether the Settlement should be approved; whether to enter the Final Judgment and Order of Dismissal with Prejudice under Rule 23(e); and whether to approve Class Counsel's motion for attorneys' fees, costs and expenses, and request for a service award for the Class Representative. Plaintiff and Class Counsel request that the Court schedule the Final Approval Hearing at a date convenient for the Court, and in compliance with the provisions of the Class Action Fairness Act of 2005, 28 U.S.C. § 1715. Plaintiff and Class Counsel will file the motion for final approval and motion for attorneys' fees, costs and expenses, and request for a service award no more than 60 days after Preliminary Approval.

IV. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that the Court enter an order: (1) certifying, for settlement purposes, the proposed Settlement Class, pursuant to Rules 23(a), (b)(3) and (e) of the Federal Rules of Civil Procedure; (2) granting Preliminary Approval of the Settlement; (3) approving the notice plan set forth in the Settlement and the form and content of the notice attached as Exhibits B and C hereto, and appointing JND as the Settlement Administrator; (4) approving and ordering the opt-out and objection procedures set forth in the

Settlement; (5) appointing Plaintiff Scott Peterson as Class Representative; (6) appointing John A. Yanchunis, Sr. and Patrick A. Barthle of Morgan & Morgan Complex Litigation Group as Class Counsel; (7) scheduling a Final Approval Hearing at a date convenient for the Court, and in compliance with the provisions of the Class Action Fairness Act of 2005, 28 U.S.C. § 1715. A [Proposed] Order Preliminarily Approving Class Settlement is attached as Exhibit A to the Settlement Agreement.

Dated: May 26, 2020 Respectfully submitted,

MORGAN & MORGAN
COMPLEX LITIGATION GROUP

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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 26, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to all attorneys of record in this matter.

/s/ John A. Yanchunis
John A. Yanchunis