UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

DARYL TEBLUM, individually and on behalf of all others similarly situated,

Plaintiff,

v. Case No.: 2:19-cv-403-MRM

PHYSICIAN COMPASSIONATE CARE LLC,

Defendant.
_____/

ORDER

Pending before the Court is Plaintiff's Unopposed Renewed Motion for Final Approval of Class Settlement (Doc. 84) and Plaintiff's Unopposed Second Amended and Renewed Motion for Attorneys' Fees and Service Award for Class Representative and Motion to Find Notice and Administrative Costs Reasonable and Authorized (Doc. 80).[1] For the reasons below, both Plaintiff's Unopposed Renewed Motion for Final Approval of Class Settlement (Doc. 84) and Plaintiff's Unopposed Second Amended and Renewed Motion for Attorneys' Fees and Service Award for Class Representative and Motion to Find Notice and Administrative Costs

[1] The parties consented to proceed before a United States Magistrate Judge for all purposes. (*See* Docs. 64, 65).

Reasonable and Authorized (Doc. 80) are **GRANTED in part and DENIED in part** as set forth below.

I. Background

On June 14, 2019, Plaintiff Daryl Teblum brought a class action under Federal Rule of Civil Procedure 23 on behalf of himself and all others similarly situated for alleged violations of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 *et seq*. (*See* Doc. 1). Defendant Physician Compassionate Care LLC, doing business as DocMJ, filed an Answer on July 30, 2019, denying all liability, (Doc. 18), and Defendant's Motion for Judgment on the Pleadings on September 17, 2019, (Doc. 24). With leave of the Court, (Doc. 37), Plaintiff filed a First Amended Complaint on March 26, 2020, (Doc. 38).

Plaintiff's First Amended Complaint alleges that Defendant caused an automated text message to be sent to Plaintiff's and other individuals' cellular telephones to promote Defendant's business, goods, and services. (*Id.* at 4-5). Plaintiff alleges that Defendant used an automated telephone dialing system ("ATDS") without express written consent and while Plaintiff was listed on the National Do Not Call Registry. (*Id.* at 6-8). Ultimately, Plaintiff alleges that Defendant's behavior violated the TCPA. (*Id.* at 12). Defendant moved to dismiss the First Amended Complaint on April 9, 2020. (*See* Doc. 40).

On July 26, 2019, the Court stayed discovery, (Doc. 17), and the limited stay remained in effect through April 21, 2020, (*see* Docs. 31, 34). The parties began

negotiating a class settlement on April 27, 2020, and reached a settlement on May 19, 2020. (Doc. 67 at 2).

On June 5, 2020, Plaintiff and proposed class counsel filed an unopposed motion for preliminary approval of their proposed Settlement Agreement, which, if approved, would resolve all claims against Defendant. (*See* Doc. 49). On January 20, 2021, the Undersigned recommended to the then-presiding United States District Judge that the motion be granted in part and denied in part. (*See* Doc. 53). Specifically, the Undersigned recommended that the motion be granted but that the parties be required to submit a revised short form notice that cured the deficiency identified in the Report and Recommendation within fourteen days of the presiding District Judge's Order on the Report and Recommendation. (*See id.* at 17-18). On February 4, 2021, the presiding United States District Judge adopted the Undersigned's Report and Recommendation. (Doc. 54).

On February 8, 2021, the parties filed their revised short form notice, curing the deficiency identified in the Report and Recommendation. (*See* Doc. 55). The Court approved the short form notice on February 11, 2021, and authorized the Notice Administrator to distribute the Notice of Settlement and Claim Form to the putative collective-action members. (*See* Doc. 56).

Plaintiff later filed an Unopposed Motion for Final Approval of Class Settlement and Application for Service Award and Attorneys' Fees on May 14, 2021. (Doc. 67). The Court conducted an in-person fairness hearing on June 14, 2021. (*See* Doc. 70). As of the date of the June 14, 2021 fairness hearing, no class member

had submitted a written objection, and none appeared at the hearing to raise objections to the settlement. (*See id*. at 3-4, 25).

Following the fairness hearing, the Court denied without prejudice the Unopposed Motion for Final Approval of Class Settlement and Application for Service Award and Attorneys' Fees (Doc. 67) because adequate notice had not been given to the class members. (*See* Doc. 74). As a result, the Court found that, if the parties wished to proceed under the terms of the settlement, additional notice was required. (*See id.*). The Court, therefore, directed the parties to file either: (1) a motion for the Court to approve subsequent notice; (2) a notice of their intent to revisit the terms of the agreement; or (3) a notice of their intent to litigate the merits of this case. (*Id.* at 15-18). If the parties chose to seek approval of a subsequent notice and objection procedure, the Court provided instructions for the procedure. (*See id.* at 16).

On March 2, 2022, Plaintiff filed Plaintiff's Renewed Consent Motion for Approval of Renewed Proposed Notice and Objection Procedure, requesting that the Court approve the renewed procedure. (Doc. 79). The Court granted the motion on March 7, 2022. (Doc. 82).

Plaintiff also filed Plaintiff's Unopposed Second Amended and Renewed Motion for Attorneys' Fees and Service Award for Class Representative and Motion to Find Notice and Administrative Costs Reasonable and Authorized (Doc. 80) on March 2, 2022, and Plaintiff's Unopposed Renewed Motion for Final Approval of Class Settlement (Doc. 84) on June 9, 2022.

The Court conducted an in-person fairness hearing on August 12, 2022.[2] (*See* Doc. 90).[3] As of the date of the August 12, 2022 fairness hearing, no class member had submitted a written objection, and none appeared at the hearing to raise objections to the settlement. (*See id*. at 1).

Following the fairness hearing and for the reasons explained below, the Court grants in part and denies in part Plaintiff's Unopposed Renewed Motion for Final Approval of Class Settlement (Doc. 84) and grants in part and denies in part Plaintiff's Unopposed Second Amended and Renewed Motion for Attorneys' Fees and Service Award for Class Representative and Motion to Find Notice and Administrative Costs Reasonable and Authorized (Doc. 80).[4]

Because attorney fees and the costs of notice and administration may be awarded only if the Court approves the settlement, the Court considers Plaintiff's Unopposed Renewed Motion for Final Approval of Class Settlement (Doc. 84) first.[5]

---

[2] At the start of the August 12, 2022 fairness hearing, counsel for both parties affirmatively adopted and incorporated all arguments made at the June 14, 2021 fairness hearing.

[3] The Court finds that the interests of justice are best served by entering this Order before the final transcript for the August 12, 2022 fairness hearing is filed.

[4] The Court is satisfied that it has jurisdiction over the parties and the settlement class members and to approve the Settlement Agreement.

[5] Given the interrelatedness of the motions, the Court construes each as adopting the arguments set forth in the other.

II. Plaintiff's Unopposed Renewed Motion for Final Approval of Class Settlement (Doc. 84)

A. Certification of Rule 23 Settlement Class

While Federal Rule of Civil Procedure 23(e) allows class actions to be settled, it only permits settlements for certified classes. *See Holman v. Student Loan Xpress, Inc.*, No. 8:08-cv-305-T-23MAP, 2009 WL 4015573, at *4 (M.D. Fla. Nov. 19, 2009). District courts are given discretion to certify a class under Rule 23. *Cooper v. S. Co.*, 390 F.3d 695, 711 (11th Cir. 2004); *see also Pierre-Val v. Buccaneers Ltd. P'ship*, No. 8:14-cv-01182-CEH, 2015 WL 3776918, at *1 (M.D. Fla. June 17, 2015). Using this discretion, this Court has permitted provisional certification of "settlement classes" because doing so helps avoid "the costs of litigating class status while facilitating a global settlement, ensuring notification of all class members of the terms of the proposed Settlement Agreement, and setting the date and time of the final approval hearing." *Pierre-Val*, 2015 WL 3776918, at *2 (citing *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 790 (3d Cir. 1995)); *see also Saccoccio v. JP Morgan Chase Bank, N.A.*, 297 F.R.D. 683, 690 (S.D. Fla. 2014) (citation omitted).

Here, class counsel requests certification of the following settlement class:

> All persons within the United States who (1) were sent a text message; (2) by or on behalf of Defendant; (3) on their mobile telephone; (4) from June 14, 2015 through the date of final approval; (5) using the text messaging platform provided by Twilio to send text messages like the one Plaintiff received.

(Doc. 84-1 at 10; *see also* Doc. 84 at 4).[6] Excluded from the settlement class are: (i) the district judge and magistrate judge presiding over this case, the judges of the United States Court of Appeals for the Eleventh Circuit, their spouses, and persons within the third degree of relationship to either of them; (2) individuals who are or were during the Class Period agents, directors, employees, officers, or servants of Defendant or of any affiliate or parent of Defendant; (3) Plaintiff's counsel and their employees, and (4) all persons who filed a timely and proper request to be excluded from the settlement class in accordance with Section III(D) of the Settlement Agreement. (*See id.*).

In evaluating the proposed settlement class, Rule 23 requires that all putative classes "must meet each of the requirements specified in Federal Rule of Civil Procedure 23(a), as well as at least one of the requirements set forth in Rule 23(b)." *Calderone v. Scott*, 838 F.3d 1101, 1104 (11th Cir. 2016) (quoting *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1265 (11th Cir. 2009)). "Rule 23(a) requires every putative class to satisfy the prerequisites of numerosity, commonality, typicality, and adequacy of representation." *Id.* Rule 23(b) specifies the types of class actions that may be maintained if Rule 23(a) is satisfied. While the requirements of Rule 23(a)

[6] Although the class period as defined continues through the date of final approval, the parties confirmed on the record at both the June 21, 2021 fairness hearing and the August 12, 2022 fairness hearing that Defendant ceased sending text messages "well before the notice was sent" to class members. (*See, e.g.*, Doc. 70 at 29-30). Based on this, the parties represented that, as a practical matter, neither party was aware of anyone who received a text message but to whom notice was not attempted to be given. (*See, e.g.*, *id.* at 30).

and 23(b) still apply to settlement classes, the Court may provisionally find, for settlement purposes only, that those requirements are met. *See Pierre-Val*, 2015 WL 3776918, at *2. When the class is to be certified for settlement purposes only, the Court "need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial." *See Saccoccio*, 297 F.R.D. at 691 (internal citation omitted) (quoting *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 620 (1997)). The Court addresses these requirements in turn below.

First, the Court finds that, for settlement purposes only, the class satisfies the numerosity requirement of Federal Rule of Civil Procedure 23(a)(1). The Eleventh Circuit has stated, in dicta, that "while there is no fixed numerosity rule, 'generally less than twenty-one is inadequate, more than forty adequate, with numbers between varying according to other factors.'" *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986) (citation omitted). Here, the parties assert that "the Settlement Class consists of approximately 40,919 individuals,"[7] making joinder impracticable and well above the Eleventh Circuit's threshold. (Doc. 84 at 23); *see also Cox*, 784 F.2d at 1553; *Kilgo v. Bowman Trans.*, 789 F.2d 859, 878 (11th Cir. 1986) (numerosity satisfied when the plaintiffs identified at least 31 class members).

[7] The Weekly Case Status Report given to the Court at the August 12, 2022 fairness hearing states that there are 40,870 class members. (*See* Doc. 90-1). Even if the Court were to consider this to be the size of the class, the finding would remain the same.

Second, the Court finds that, for settlement purposes only, the class satisfies commonality under Federal Rule of Civil Procedure 23(a)(2). Here, Plaintiff and the class members share common issues of fact and law, including whether Defendant sent a text message in violation of the TCPA, injuring the proposed class members in the same way. *See Med. & Chiropractic Clinic, Inc. v. KMH Cardiology Centres, Inc.*, No. 8:16-cv-644-T-23JSS, 2017 WL 2773932, at *4 (M.D. Fla. June 1, 2017), *report and recommendation adopted*, 2017 WL 2731296 (M.D. Fla. June 26, 2017) (finding common questions centered on whether the defendant's action violated the TCPA sufficient to satisfy the commonality requirement).

Third, the Court finds that, for settlement purposes only, typicality is met under Federal Rule of Civil Procedure 23(a)(3). Plaintiff's claim is typical of the settlement class because it concerns the same or similar alleged text message from Defendant, arises from the same legal theories, and alleges the same types of harm and entitlement to relief. *See id.*

Finally, the Court finds that, for settlement purposes only, adequacy of representation is satisfied under Federal Rule of Civil Procedure 23(a)(4). Adequacy of representation is satisfied when "plaintiffs' counsel are qualified, experienced, and generally able to conduct the proposed litigation," and when "plaintiffs [do not] have interests antagonistic to those of the rest of the class." *Griffin v. Carlin*, 755 F.2d 1516, 1533 (11th Cir. 1985) (citation omitted). Here, there are no apparent conflicts of interest between Plaintiff and the settlement class. Additionally, Plaintiff's previous filings show that he has retained competent counsel to represent him and

the settlement class. (*See* Doc. 49-2 at 6-11). Specifically, Plaintiff's counsel regularly engage in consumer protection litigation and other complex litigation similar to this action. (*See id.*).

Along with the requirements of Rule 23(a), Plaintiff must also satisfy at least one of the requirements set forth in Federal Rule of Civil Procedure 23(b). *Calderone*, 838 F.3d at 1104. Here, Plaintiff argues that Rule 23(b)(3) is satisfied for settlement purposes. (Doc. 84 at 24-25). The Court agrees and finds that, for settlement purposes only, the common legal and alleged factual issues here predominate over individualized issues, and resolution of the common issues for the settlement class members in a single, coordinated proceeding is superior to individual lawsuits addressing the same legal and factual issues. *See Med. & Chiropractic Clinic, Inc.*, 2017 WL 2773932, at *4 (finding that common questions predominated over individualized questions in a TCPA action).

Based on the foregoing and being otherwise fully informed, the Court finds that, for settlement purposes only, the proposed class satisfies the requirements of Federal Rule of Civil Procedure 23. The Court, therefore, certifies the settlement class.

B. Appointment of Class Counsel and Class Representative

Having certified the settlement class, the Court next addresses the appointment of class counsel and a class representative.

Upon consideration of the factors set forth in Federal Rule of Civil Procedure 23(g)(1) and the filings, and based on the discussion above about adequacy of

representation, the Court appoints Plaintiff Daryl Teblum as the representative of the settlement class. The Court further appoints Manuel S. Hiraldo of Hiraldo P.A., Ignacio J. Hiraldo of IJH Law, and Michael Eisenband of Eisenband Law, P.A. as class counsel.

C. Notice to Class Members

Federal Rule of Civil Procedure 23 governs class notice requirements. Before approving a class action settlement, a district court must ensure that "notice [was given] in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1)(B). Specifically, class members must receive the "information reasonably necessary to make a decision [as to whether] to remain a class member and be bound by the final judgment or opt out of the action." *Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1239 (11th Cir. 2011) (quoting *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1104-05 (5th Cir. 1977)). In an action certified under Rule 23(b)(3), "class members should receive 'the best notice that is practicable under the circumstances.'" *Saccoccio*, 297 F.R.D. at 691 (quoting Fed. R. Civ. P. 23(c)(2)(B)).

Plaintiff represents that the Notice Program, which was completed in full two times, consisted of three components: (1) email notice; (2) mail notice; and (3) website notice. (Doc. 84 at 5-6; *see also* Doc. 84-1 at 15-16). Plaintiff represents that notice was "timely and properly accomplished." (Doc. 84 at 7-8 (citing Doc. 84-4 at ¶¶ 9-10; Doc. 84-5 at ¶¶ 1-3)).

More particularly, for the first round of notice the Settlement Administrator received data from Defendant comprising of names and/or last known mailing and/or email addresses for 40,919 unique phone numbers. (*Id.* at 8 (citing Doc. 84-4 at ¶ 5)). Using this data, the Settlement Administrator issued 40,296 email notices and 573 mail notices to potential class members. (*Id.* (citing Doc. 84-4 at ¶ 6)). Of the emails sent, 33,194 were successfully delivered. (*Id.* (citing Doc. 84-4 at ¶ 7)). The Settlement Administrator worked to find mailing addresses for those individuals whose emails were not successfully delivered. (*Id.* (citing Doc. 84-4 at ¶ 7)).

On February 19, 2021, the Settlement Administrator mailed 753 notices to potential class members, and 114 were returned as undeliverable. (*Id.* (citing Doc. 84-4 at ¶ 8)). The Settlement Administrator found updated addresses for 12 of the 114 potential class members whose mail notice was returned as undeliverable. (*Id.* (citing Doc. 84-4 at ¶ 8)).

Following the first round of notice, the parties voluntarily directed the Settlement Administrator to perform a second round of supplemental email and mail notices, which notices were sent to 40,795 potential class members. (*Id.* at 8-9 (citing Doc. 84-4 at ¶¶ 11-12)).

Following the Court's denial of the initial motion for final approval, the Settlement Administrator re-sent the email notice to 35,815 class members whose address was known and re-sent the mail notice to 1,762 class members whose emails were undeliverable but who had a valid mailing address on file. (*Id.* (citing Doc. 84-5 at ¶ 1)). Similarly, the Settlement Administrator re-sent the mail notice to 1,092 class

members who did not have an email address, and 309 notices were returned as undeliverable. (*Id.* (citing Doc. 84-5 at ¶ 2)). The Settlement Administrator re-sent the notice to class members whose updated address was located. (*Id.* (citing Doc. 84-5 at ¶ 2)).

The Settlement Administrator also established the settlement class website, where class members could find more information and download the Long-Form Notice, Claim Form, and other case-related documents. (*Id.* at 9-11 (citations omitted)); *see also* Teblum v. Physician Compassionate Care LLC d/b/a DocMJ Settlement Administrator, http://www.physiciancompassionatecaretcpasettlement.com (last visited 8/24/2022).[8] The Settlement Administrator also set up a toll-free telephone number for class members. (*Id.* at 11 (citation omitted)).

No class member objected to the Settlement Agreement or sought exclusion from the class. (Doc. 84 at 12 (citing Doc. 84-5 at ¶¶ 6-7); Doc. 87 at ¶¶ 5-7; Doc. 87-1 at ¶¶ 1-2).

Upon review, the Court finds that the notice to the class was reasonable and the best notice practicable under the circumstances, consistent with Rule 23(e)(1) and Rule 23(c)(2)(B). Moreover, the content and manner of the notice was approved by

[8] The Court has independently confirmed that all relevant filings and documents were timely published on the settlement website following the Court's denial of the initial motion for final approval.

the Court at the preliminary approval stage. The Court finds no reason to depart from that finding now.

Accordingly, the Court finds that the notice provided to the settlement class (1) constituted the best notice practicable under the circumstances; (2) constituted notice that was reasonably calculated, under the circumstances, to apprise the settlement class of the pendency of the action, their right to object to or exclude themselves from the proposed Settlement Agreement, and to appear at the Final Approval Hearing; (3) was reasonable and constituted due, adequate, and sufficient notice to all persons entitled to receive notice; and (4) met all applicable requirements of the Federal Rules of Civil Procedure, the Due Process Clause of the United States Constitution, and the rules of the Court. The Court also finds that notice has been provided to the appropriate state and federal officials in accordance with the requirements of the Class Action Fairness Act, 28 U.S.C. § 1715. (*See* Doc. 50; *see also* Doc. 84-4 at ¶¶ 2-4).

D. Approval of Class Settlement

Courts have consistently held that settlements are "highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts and preventing lawsuits." *Miller v. Rep. Nat'l Life Ins. Co.*, 559 F.2d 426, 428 (5th Cir. 1977). In reviewing a proposed settlement of a class action, the Court must determine that the proposed settlement is "fair, adequate and reasonable." *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984); Rule 23(e)(2).

In *Bennett v. Behring Corporation*, 737 F.2d 982, 986 (11th Cir. 1984), the Eleventh Circuit outlined several factors that a Court must consider in determining whether a proposed class-action settlement is fair, adequate, and reasonable:

> (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved.

737 F.2d at 986. In evaluating these factors, the Court may "rely upon the judgment of experienced counsel for the parties," and "absent fraud, collusion, or the like," is "hesitant to substitute its own judgment for that of counsel." *See Canupp v. Liberty Behav. Health Corp.*, 417 F. App'x 843, 845 (11th Cir. 2011) (citing *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)).

Further, as of December 1, 2018, Federal Rule of Civil Procedure 23 was amended to add a mandatory, but non-exhaustive set of comparable final approval criteria. In determining a final approval of a class action settlement, the Court must find:

> (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)(2). For the reasons discussed below, the Court finds the proposed settlement satisfies these criteria and is fair, adequate, and reasonable.

1. No Fraud or Collusion

There is no evidence that the settlement results from collusion. The parties represent that "Plaintiff and the Settlement Class were represented by counsel throughout the negotiations," that settlement negotiations lasted about three and a half weeks, and that "the Parties negotiated and reached agreement regarding fees and costs only after agreeing on all other material terms of the Settlement." (Doc. 84 at 14; *see also* Doc. 67-1 at ¶¶ 3-5). Additionally, before the settlement negotiations, both parties had actively engaged in motion practice. (*See, e.g.*, Docs. 24, 25, 40). Given the representations of counsel about the negotiations coupled with the active litigation of this action, the Court finds that the Settlement Agreement resulted from arm's-length negotiations and there was no fraud or collusion in arriving at the settlement. *See Saccoccio*, 297 F.R.D. at 692 ("Where the parties have negotiated at arm's length, the Court should find that the settlement is not the product of collusion.").

2. Likelihood of Success at Trial

"Plaintiff's likelihood of success at trial is not only the first *Bennett* factor, it is also 'by far the most important factor' in evaluating a class action settlement." *Hanley v. Tampa Bay Sports & Ent. LLC*, No. 8:19-cv-00550-CEH-CPT, 2020 WL 2517766, at *4 (M.D. Fla. Apr. 23, 2020) (quoting *Figueroa v. Sharper Image Corp.*, 517

F. Supp. 2d 1292, 1323 (S.D. Fla. 2007)). Here, Plaintiff's likelihood of success at trial is far from certain. As class counsel acknowledges, "Defendant advanced significant defenses which Plaintiff would have had to overcome in the absence of the Settlement." (Doc. 84 at 18 (citing Doc. 67-1 at ¶ 8)). Specifically, at the time that the parties engaged in settlement negotiations, there was a risk that the TCPA would be struck down as unconstitutional. (*See id.* (citing Doc. 67-1 at ¶ 8); *see also id.* at 15-17 (citing *Barr v. Am. Ass'n of Pol. Consultants*, 140 S. Ct. 2335 (2020))). Additionally, Plaintiff and the class would need to prove that the equipment used to send the text messages was an ATDS, an issue that was far from clear under the prevailing law. (*See id.* at 15-17 (citations omitted)). Had Plaintiff been able to overcome these concerns, Plaintiff would nonetheless need to "survive summary judgment briefing, succeed at trial, and surely continue to advance his positions through appellate litigation." *See Hanley*, 2020 WL 2517766, at *4. Given the uncertainties in the ability to prevail when the settlement was reached, the Court finds that Plaintiff and the class are better served by a definitive recovery under the Settlement Agreement.

3. The Point at Which the Settlement Is Fair, Adequate, and Reasonable

"The second and third considerations of the *Bennett* test are easily combined. A court first determines the range of recovery by resolving various damages issues. The court then determines where in this range of possible recovery do fair, adequate, and reasonable settlements lie." *Hanley*, 2020 WL 2517766, at *4 (quoting *Behrens v.*

Wometco Enters., Inc., 118 F.R.D. 534, 541 (S.D. Fla. 1988)). Importantly, "the fact that a proposed settlement amounts to only a fraction of the potential recovery does not mean the settlement is unfair or inadequate." *Ferron v. Kraft Heinz Foods Co.*, No. 20-CV-62136-RAR, 2021 WL 2940240, at *10 (S.D. Fla. July 13, 2021) (quoting *Behrens*, 118 F.R.D. at 542). Instead, "[a] settlement can be satisfying even if it amounts to a hundredth or even a thousandth of a single percent of the potential recovery." *Hanley*, 2020 WL 2517766, at *4 (quoting *Behrens*, 118 F.R.D. at 542).

The TCPA, under which Plaintiff sued, allows recovery of actual damages or $500.00, whichever is greater, along with an additional penalty if the defendant is found to have violated the TCPA willfully or knowingly. 47 U.S.C. § 227(b)(3)(B). Given that the class composed of 40,919 individuals, (*see* Doc. 84 at 23), the total recovery would be at least $20,459,500.00, if each person could prove at least one TCPA violation (40,919 x $500.00 = $20,459,500.00).[9] By contrast, the parties settled this action for $736,542.00, (Doc. 84-1 at 11), with an individual recovery of $18.00 "less any Notice and Administration Costs, Attorneys' Fees and Expenses, and Service Award," (*id.* at 12).

While a maximum of an $18.00 recovery is only 3.6% of the potential minimum statutory award of $500.00 for a single violation of the TCPA, the Court still finds that the recovery here is fair, reasonable, and adequate. *See Ferron*, 2021

[9] If there are only 40,870 class members, as suggested by the Weekly Case Status Report, (*see* Doc. 90-1), the total recovery would be $20,435,000.00.

WL 2940240, at *10 (citing *Behrens*, 118 F.R.D. at 542). In reaching this conclusion, the Court relies heavily on the prompt payment to the class members under the Settlement Agreement. (*See* Doc. 84-1 at 12-13). Had the parties not settled, the action would likely have continued for years, including during the pendency of appeals, and the possibility remains that the class members would not recover at all. (*See* Doc. 80 at 13). Additionally, although the possibility remains that some individuals may have received multiple text messages – warranting a higher recovery – class members were given the option to opt out of the class and proceed against Defendant in their own right. (*See* Doc. 70 at 32-35).[10] Given the potential issues with the class members' ability to succeed on the merits, coupled with an individual class member's right to opt-out, the Court finds the settlement amount to be fair, adequate, and reasonable.

Furthermore, as to the release language, (*see* Doc. 84-1 at 9), the Court noted at the June 14, 2021 fairness hearing that the release in the Settlement Agreement seemed to encompass more than just the named Defendant, (*see* Doc. 70 at 35). When questioned on this issue, counsel for Defendant clarified that there is a related corporate formality between all the entities "such that [each company is] paying the funds and receiving the release." (*Id.* at 35-36). It is "well established law that class action[settlements] may include claims not presented and even those which could

[10] The parties were unaware of any class member who received more than one text message but could not confirm whether analysis on the issue was conducted. (*See* Doc. 70 at 32-33).

not have been presented as long as the released conduct arises out of the identical factual predicate as the settled conduct." *Lipuma v. Am. Express Co.*, 406 F. Supp. 2d 1298, 1317 (S.D. Fla. 2005) (internal quotations omitted) (quoting *Wal–Mart Stores, Inc. v. Visa U.S.A., Inc.* 396 F.3d 96, 106 (2d Cir. 2005)). As a result, "class action settlements have in the past released claims against non-parties where, as here, the claims against the non-party being released were based on the same underlying factual predicate as the claims asserted against the parties to the action being settled." *Id.* (quoting *Wal–Mart Stores, Inc.*, 396 F.3d at 109). Based on counsel's representations about the relationship between the corporate entities, the Court finds the release language fair, adequate, and reasonable.

Finally, upon review of the terms of the Settlement Agreement, the Court finds that the Settlement Agreement treats all class members equitably. Likewise, the Court finds that the method of processing and distributing claims is effective and adequate. (*See* Doc. 84-1 at 12-13).

4. Complexity, Expenses, and Duration of Litigation

As discussed above, there were many factual and legal issues that would need to be overcome for Plaintiff and the class members to prevail in this action. *See* Part II.D.2, *supra*. This would likely have resulted in considerable motion practice and likely a difficult trial, increasing the expense of the litigation. Then, any rulings on these issues would likely have been appealed, increasing both the cost and duration of litigation. In light of the novel and complex issues presented and present at the time of settlement negotiations and the potential for expensive and time-consuming

litigation absent a settlement, the Court finds that this factor weighs in favor of approving the Settlement Agreement. *See Hanley*, 2020 WL 2517766, at *4.

5. Substance and Amount of Opposition

"The reaction of the class [to the proposed settlement] is an important factor." *Id.* (alteration in original) (quoting *Saccoccio*, 297 F.R.D. at 694). Here, there were no objections filed to the Settlement Agreement and no class member timely opted out of the settlement. (Doc. 84 at 12 (citing Doc. 84-5 at ¶¶ 6-7); Doc. 87 at ¶¶ 5-7; Doc. 87-1 at ¶¶ 1-2). As of August 11, 2022, however, only 1,702 class members had filed claims. (*See* Doc. 90-1). Despite the low percentage of participation, the Court finds that the lack of any opposition weighs strongly in favor of the Court's approval of the Settlement Agreement.

6. Stage at Which Settlement Is Reached

"The stage of the proceedings at which settlement is achieved is 'evaluated to ensure that Plaintiffs had access to sufficient information to adequately evaluate the merits of the case and weigh the benefits of settlement against further litigation.'" *Saccoccio*, 297 F.R.D. at 694 (citations omitted). In addition, "[e]arly settlements are favored" such that "vast formal discovery need not be taken." *Id.* (citation omitted).

Here, the action settled relatively early in litigation, before Plaintiff moved for class certification and even before discovery formally began. Even so, the parties represent that they engaged in informal discovery. (*See* Doc. 70 at 23-24). Additionally, both parties had experienced counsel with sufficient information to

evaluate the merits of the action. (*See id.* at 20-22). Accordingly, given the extent to which the parties were informed about the merits of their claims and defenses as well as class counsel's experience in similar litigations, the Court finds this factor weighs in favor of approving the Settlement Agreement.

In sum, having carefully reviewed the motion and Settlement Agreement and otherwise being fully informed, the Court finds that the settlement is fair, adequate, and reasonable and approves the Settlement Agreement.

III. Plaintiff's Unopposed Second Amended and Renewed Motion for Attorneys' Fees and Service Award for Class Representative and Motion to Find Notice and Administrative Costs Reasonable and Authorized (Doc. 80)

A. Request for Attorney's Fees

Class counsel maintains that they have conferred a benefit upon the class and, therefore, should be compensated for their services from the common fund based on a reasonable percentage of the fund. (Doc. 80 at 6-15 (citations omitted)).

The Eleventh Circuit has held that the proper method for calculating attorney's fees from a common fund is the percentage of fund method. *Poertner v. Gillette Co.*, 618 F. App'x 624, 628 (11th Cir. 2015) (citing *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 774-75 (11th Cir. 1991)). In determining the appropriate percentage of a common fund to be awarded as a fee, the Eleventh Circuit has stated, "[t]here is no hard and fast rule mandating a certain percentage of a common fund which may reasonably be awarded as a fee because the amount of any fee must be determined upon the facts of each case." *Camden I*, 946 F.2d at 774. Still, the

majority of common fund fee awards fall in the range of 20% to 30% in accordance with the individual circumstances of each case. *Id*. at 774-75.

The circumstances that allow for adjustment are as follows:

> (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and the length of the professional relationship with the client; and (12) awards in similar cases.

Id. at 772 n.3 (citing *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714, 717-19 (5th Cir. 1974)). The district court is also to consider any substantial objections, the economics involved in prosecuting the action, and any other factors that would be relevant to the Court's determination. *Id.* at 775.

Here, under the Settlement Agreement, class counsel requests an award of attorney's fees in the amount of $184,135.50, representing 25% of the settlement fund. (*See* Doc. 80 at 6). Counsel contends that "[t]he requested fee is within the range of reason under the factors listed in *Camden I Condo. Ass'n. v. Dunkle*, 946 F.2d 768 (11th Cir. 1991)." (*Id.*). The Court considers the relevant factors in turn below to determine whether counsel's fee request is reasonable.

1. Nature of Contingency Fees and the Burden and Economics of Prosecuting a Class Action

The inherent risk of a contingency fee arrangement is an important factor in determining the reasonableness of a fee award. *See Ressler v. Jacobson*, 149 F.R.D. 651, 653 (M.D. Fla. 1992). Given the inherent risks as well as the substantial time, effort, and money needed to sustain the representation of a class client, the "bonus" from a contingency fee arrangement is necessary. *See In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1365 (S.D. Fla. 2011) ("A contingency fee arrangement often justifies an increase in the award of attorney's fees. This rule helps assure that the contingency fee arrangement endures. If this 'bonus' methodology did not exist, very few lawyers could take on the representation of a class client.") (quoting *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 548 (S.D. Fla. 1988)).

Here, class counsel assumed major risks in undertaking this representation. First, class counsel would have the difficult burden of proving that the equipment used to send the text messages constituted an ATDS. (*See* Doc. 84 at 16-17). Second, there was ample potential for challenges in litigating this matter. For example, Defendant denied liability and, before settlement, Plaintiff faced a motion for judgment on the pleadings and a motion to dismiss. (*See* Docs. 18, 24, 40). Had class counsel failed to overcome these issues, class counsel would have been uncompensated for the time and expenses advanced in this litigation. (*See* Doc. 80 at 13-14 (citing Doc. 67-1 at ¶ 27)). Thus, the Court finds that the risks borne by class counsel support the appropriateness of the fee requested.

2. Requested Fee Reflects the Market Rate in Other Complex, Contingent Litigation

The percentage method of awarding fees is intended to mirror the practice in the marketplace where attorneys negotiate percentage fees with their clients. *Pinto v. Princess Cruise Line*s, 513 F. Supp. 2d 1334, 1340 (S.D. Fla. 2007). Thus, "attorneys regularly contract for contingent fees between 30% and 40% directly with their clients." *Pinto*, 513 F. Supp. 2d at 1341. Here, the Court finds a fee of 25% is reasonable given the customary percentage fee award for attorney's fees derived from a settlement fund. *See Hanley*, 2020 WL 2517766, at *6 (in a TCPA settlement which included a reversionary fund, finding reasonable a fee award of slightly more than one-third of the common fund); *see also Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1300 (11th Cir. 1999) (affirming a district court award of fees in the amount of 33.5% of the settlement fund); *Morgan v. Pub. Storage*, 301 F. Supp. 3d 1237, 1267 (S.D. Fla. 2016) ("[A] fee award of 33% . . . is consistent with attorneys' fees awards in federal class actions in this Circuit.").

3. The Novelty and Difficulty of the Issues

Courts have long recognized that the novelty and difficulty of the issues in a case are to be considered in determining a fee award. *See Johnson*, 488 F.2d at 717-18. As class counsel notes, "[l]itigation of this [a]ction required counsel trained in class action law and procedure as well as the specialized issues presented here, such as analyzing class certification issues and litigating the novel issue of whether the software used to make the calls was an ATDS, as defined by the TCPA." (Doc. 80

at 11 (citing Doc. 67-1 at ¶ 20)). These issues point to and underscore the overall complexity and novelty of the action. Class counsel needed to be prepared to litigate and overcome these novel and complex issues to be compensated for their work. Thus, the Court finds these factors also support the reasonableness of the requested fee.

4. The Skill, Experience, and Reputation of Class Counsel

When evaluating a requested fee, courts also consider the experience, reputation, and ability of both class counsel and opposing counsel. *Gibbs v. Centerplate, Inc.*, No. 8:17-cv-02187-EAK-JSS, 2018 WL 6983498, at *8 (M.D. Fla. Dec. 28, 2019), *report and recommendation adopted*, 2019 WL 1093441 (M.D. Fla. Jan. 7, 2019). The filings attached to the motion for preliminary approval show that Plaintiff's counsel has substantial experience in consumer protection collective actions. (*See* Doc. 49-2 at 6-11). Further, as Plaintiff notes, Defendant was also represented by competent counsel. (*See* Doc. 80 at 11-12 (citing Doc. 67-1 at ¶ 21)). Thus, the Court finds the skill, experience, and reputation of the representation supports the requested fee.

5. The Amount Involved and Results Obtained

According to the Eleventh Circuit in *Camden I*, the "common fund is itself the measure of success;" therefore, the "monetary results achieved predominate over all other criteria." *Camden I*, 946 F.2d at 770, 773; *see Gibbs*, 2018 WL 6983498, at *8 ("Stated another way, the amount involved, and results obtained is the most

important factor in determining an award of attorneys' fees." (internal quotations omitted)). Here, class counsel achieved a settlement in the amount of $736,542.00. (Doc. 84-1 at 11). The settlement entitles class members to up to $18.00, rather than risking zero recovery if litigated. (*See id.* at 12; Doc. 80 at 12). Additionally, class counsel was able to negotiate with Defendant to create a "wholly cash common fund" for the class. *See Wolff v. Cash 4 Titles*, No. 03-22778-CIV, 2012 WL 5290155, at *3 (S.D. Fla. Sept. 26, 2012) (explaining that unlike cases in which attorneys petitioned for a fee award after obtaining non-monetary relief such as "coupons," class counsel created "a substantial, tangible, and real benefit for the class," by creating a wholly cash common fund). Given the uncertainty in recovery had the case proceeded through trial, *see* Part II.D.2, *supra*, the Court find that the results achieved support the requested attorney's fees.

6. Time and Labor of Class Counsel

Despite the relatively early settlement, counsel represents that "[p]rosecuting and settling these claims demanded considerable time and labor." (Doc. 80 at 10 (citing Doc. 67-1 at ¶ 15)). In support, counsel points to the time spent investigating the claims, responding to Defendant's motions, negotiating and drafting the Settlement Agreement, and participating in the preliminary approval process. (*See id.* at 10-11 (citing Doc. 67-1 at ¶¶ 16-18)). Furthermore, counsel undertook expenses to prepare for and attend the fairness hearing as well as draft the motion for final approval. This list is non-exhaustive and litigating this action surely precluded counsel from engaging in other matters and cases they could have otherwise pursued.

Moreover, despite the time spent on this action, class counsel received no compensation in this case during the pendency of litigation. Considering the efforts made to both prosecute and settle this action, the Court finds the fee requested is appropriate and fair.

Finally, the Court finds that public policy supports the awarding of attorney's fees, especially in class action cases. *See Ressler*, 149 F.R.D. at 657 ("[P]ublic policy favors the granting of counsel fees sufficient to reward counsel for bringing these [class] actions and to encourage them to bring additional such actions.").

In light of the above factors, the Court awards class counsel's requested attorney's fees in the amount of $184,135.50, representing about 25% of the settlement fund as compensation for their services on behalf of the class.

B. Request for Service Award

As to the request for the $5,000.00 service award, the Court finds that the request is due to be denied. The Eleventh Circuit has held that incentive or service awards – given to class representatives in order to compensate them for their services and the risks they incurred on behalf of the class – are prohibited. *See Johnson v. NPAS Sols., LLC*, 975 F.3d 1244, 1257, 1260 (11th Cir. 2020).[11] Accordingly, the

[11] When the motion was filed, the mandate in *Johnson* had been withheld and a petition for a hearing *en banc* was pending. On August 3, 2022, however, the Eleventh Circuit denied the petition. *Johnson v. NPAS Sols., LLC*, No. 18-12344, 2022 WL 3083717 (11th Cir. Aug. 3, 2022).

Court finds, and Plaintiff does not dispute, that the request for a service award must be denied.

C. Notice and Administration Fees

Under the Settlement Agreement, the reasonable notice and administrative costs – not to exceed $55,000.00 – are recoverable if authorized by the Court. (Doc. 84-1 at 8, 14-15). Accordingly, Plaintiff requests that the Settlement Administrator's notice and administrative costs be found reasonable and be authorized. (Doc. 80 at 15-16 (citations omitted)).

In support, Plaintiff represents that the Settlement Administrator expended $34,164.99, not including any fees associated with re-noticing the settlement following the Court's prior Order denying the first motion for final approval. (*See id.* at 16 (citing Doc. 80-1 at ¶ 10)). Additionally, Plaintiff notes that, in the event final approval is granted, the Settlement Administrator expects to expend another $11,993.76. (*Id.* (citing Doc. 80-1 at ¶ 16)). Accordingly, Plaintiff explains that, "if Final Approval is provided by this Court, [the Settlement Administrator] requests $46,158.75 in costs and fees." (*Id.* (citing Doc. 80-1 at ¶ 17)). Plaintiff contends that "[u]nder the circumstances, . . . the amount invoiced by [the Settlement Administrator] in connection with administration work in this matter is reasonable and necessary," and Plaintiff, therefore, "requests that the Court approve payment to [the Settlement Administrator] of this sum." (*Id.*).

Settlement administrators are typically entitled to "reimbursement for fees, costs, and expenses incurred in connection with the administration of the settlement

fund," subject to the approval of the Court. *See Wolff v. Cash 4 Titles*, 351 F.3d 1348, 1357 (11th Cir. 2003) (internal quotation marks omitted). In considering a request for an award of expenses, a court must determine whether class counsel has shown that the requested expenses are reasonable and necessary to the prosecution of the case. *See Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1298 (11th Cir. 1999).

Upon review, the Court finds the $34,164.99 already expended by the Settlement Administrator is reasonable and necessary to the prosecution of the case. (*See* Doc. 80-1 at ¶ 15 (providing a non-exhaustive list of how the Settlement Administrator incurred $34,164.99 in expenses)). Additionally, the Court finds that additional fees – in an indeterminate amount – will be necessarily incurred to distribute the Settlement Fund. Given the Settlement Administrator's authorized representative's estimation that the Settlement Administrator will likely incur $11,993.76 in distribution costs, the Court will allow the Settlement Administrator to receive up to that amount without further Court order. (*See* Doc. 80-1 at ¶ 16). In reaching this conclusion, the Court relies on the fact that the total costs and fees, $46,158.75, does not exceed the total amount permitted under the Settlement Agreement. (*See* Doc. 84-1 at 8).

Accordingly, the Court awards the Settlement Administrator its final costs and expenses up to $46,158.75 ($34,164.99 + $11,993.76 = $46,158.75). The Court clarifies that the Settlement Administrator may not recover fees and costs in excess of what was necessarily incurred. If, after distributing the Settlement Fund, the Settlement Administrator requires additional fees and costs, the parties may jointly

move for this relief. Any subsequent motion must address whether notice to the class members is required and, if so, whether proper notice was provided.

IV. Retention of Jurisdiction

Although the Settlement Agreement suggests that the parties request that the Court retain jurisdiction for a broader purpose, (*see* Doc. 84-1 at 26), at the June 14, 2021 fairness hearing the parties stated that they intended for the retention of jurisdiction to be limited to the service award issue, (*see* Doc. 70 at 42-43). Because the service award issue is now resolved, the parties agreed at the August 12, 2022 fairness hearing that the Court need not retain jurisdiction for any purposes. Thus, the Court declines to retain jurisdiction over this action.

CONCLUSION

For these reasons, the Court **ORDERS** that:

1. Plaintiff's Unopposed Renewed Motion for Final Approval of Class Settlement is **GRANTED in part and DENIED in part** as set forth below:

    a. The Settlement Agreement is **APPROVED**, under Federal Rule of Civil Procedure 23(e), as a fair, reasonable, and adequate settlement in the best interests of the settlement class, in light of, *inter alia*, (a) the uncertainty about the likelihood of the settlement class's ultimate success on the merits; (b) the range of the settlement class's possible recovery; (c) the complexity,

expense, and duration of the litigation; (d) the substance and amount of opposition to the Settlement Agreement; (e) the state of proceedings at which the Settlement Agreement was achieved; (f) all written submissions, declarations, and arguments of counsel; and (g) only after notice and a hearing.

b. The settlement class, defined below, is **CERTIFIED** solely for purposes of the Settlement under Federal Rule of Civil Procedure 23(b)(3). The settlement class is defined as:

> All persons within the United States who (1) were sent a text message; (2) by or on behalf of Defendant; (3) on their mobile telephone; (4) from June 14, 2015 through the date of final approval; (5) using the text messaging platform provided by Twilio to send text messages like the one Plaintiff received.

c. Excluded from the settlement class are: (i) the district judge and magistrate judge presiding over this case, the judges of the United States Court of Appeals for the Eleventh Circuit, their spouses, and persons within the third degree of relationship to either of them; (2) individuals who are or were during the class period agents, directors, employees, officers, or servants of Defendant or of any affiliate or parent of Defendant; (3) Plaintiff's counsel and their employees, and (4) all persons who file a timely and proper request to be excluded from the settlement class in accordance with Section III(D) of the Settlement Agreement.

d. Plaintiff Daryl Teblum is **APPOINTED** as the class representative of the settlement class.

e. Manuel S. Hiraldo of Hiraldo P.A., Ignacio J. Hiraldo, of IJH Law, and Michael Eisenband of Eisenband Law P.A., who are suitable and competent counsel, are **APPOINTED** as class counsel under Federal Rule of Civil Procedure 23(g).

f. The motion is **DENIED** to the extent that it seeks any greater or different relief.

2. Plaintiff's Unopposed Second Amended and Renewed Motion for Attorneys' Fees and Service Award for Class Representative and Motion to Find Notice and Administrative Costs Reasonable and Authorized (Doc. 80) is **GRANTED in part and DENIED in part** as set forth below:

a. Class counsel is **AWARDED** attorney's fees in the total amount of $184,135.50. This amount must be paid within the time period and in the manner set forth in the Settlement Agreement.

b. Plaintiff's request for a $5,000 Service Award is **DENIED**.

c. The Settlement Administrator is **AWARDED** its final costs and expenses up to $46,158.75.

d. The motion is **DENIED** to the extent that it seeks any greater or different relief.

3. The Court **DECLINES** to retain jurisdiction over this action.

4. This action, including all individual and class claims, is **DISMISSED WITH PREJUDICE**, without fees or costs to any party except as otherwise provided herein.

5. The Clerk of Court is **DIRECTED** to enter judgment accordingly, to terminate any pending motions and deadlines, and to close the case.

DONE and **ORDERED** in Tampa, Florida on August 24, 2022.

Mac R. McCoy
United States Magistrate Judge

Copies furnished to:

Counsel of Record
Unrepresented Parties