IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DIANNE RICE-REDDING, RICKY COLEMAN, KEN JOHANSEN, RITA JOHANSEN, and ALVINA HAILE-RECIO, individually and on behalf of all others similarly situated, Plaintiffs, v. NATIONWIDE MUTUAL INSURANCE COMPANY, Defendant,	Case No. 1:16-cv-03634-WMR

PLAINTIFFS' MEMORANDUM IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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INTRODUCTION

The Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, prohibits using an automatic telephone dialing system ("ATDS" or "autodialer") or pre-recorded messages to make nonconsensual calls to cellular telephones. The TCPA also restricts contacting residential telephone numbers on a company's specific Internal Do Not Call Registry ("IDNC") multiple times during a twelve-month period. This case alleges that Nationwide Mutual Insurance Company ("Nationwide") and its alleged vendors and agents violated the TCPA's ATDS, pre-record, and IDNC provisions. Nationwide denies the material allegations in the operative complaint.

Recognizing the risks of protracted litigation, the parties mediated the case with respected mediator Hon. Morton Denlow (Ret.) of JAMS in Chicago. While the mediation was not initially successful, the parties did reach an agreement over the following weeks and agreed to request approval of an all-cash, non-reversionary settlement totaling $5 million for three settlement classes. This is an excellent result, considering the risks, uncertainties, burden, and expense associated with continued litigation. Pursuant to the parties' agreement, Plaintiffs now respectfully request that this Court: (1) conditionally approve the parties' settlement as fair, adequate, reasonable, and within the reasonable range of

possible final approval, (2) appoint Plaintiffs as the class representatives, (3) appoint Plaintiffs' counsel as class counsel, (4) approve the proposed notice program as the best practicable under the circumstances that satisfies due process and Rule 23, (5) set a date for a final approval hearing, and (6) set deadlines for members of the settlement class to submit claims for compensation, and to object to or exclude themselves from the settlement.

SUMMARY OF THE SETTLEMENT[1]

The settlement calls for Nationwide to create a non-reversionary cash settlement fund of $5,000,000, *see* Exhibit 1, Settlement Agreement and Release ("Agr."), ¶ 2.35, to compensate the following class members:

> MediaAlpha Settlement Class[2]
>
> All persons within the United States who received a telephone call advertising Nationwide's homeowners or automotive insurance products, whose telephone call or Lead Information was transferred by MediaAlpha to Nationwide during the Class Period.

[1] Any undefined capitalized terms shall have the meaning attributed to them in the parties' Settlement Agreement, which is being submitted contemporaneously herewith.

[2] This class includes only Class Representatives Ken Johansen and Rita Johansen and the approximately 427,123 MediaAlpha Settlement Class Members identified in MediaAlpha's business records.

Nationwide IDNC Settlement Class[3]

> All persons within the United States who (a) received more than one telephone solicitation within any 12-month period falling within the Class Period (b) on their phone number that had been registered on the Nationwide Internal Do Not Call Registry for more than 31 days, (c) the purpose of which was to advertise Nationwide's automotive or homeowners' insurance products.

Variable Settlement Class[4]

> All persons within the United States who received a telephone call from Variable Marketing, whose telephone call or Lead Information was transferred to a Nationwide Agent during the Class Period.

The "Class Period" is defined as September 27, 2012 through October 15, 2018. *Id.* at ¶ 2.8. Settlement Class Members will be given notice by the settlement administrator[5] via a designated settlement website and by mail. *Id.* at ¶¶ 8.2, 8.3.

The Settlement Fund will be allocated as follows: first, payments of settlement costs approved by the Court, which include the costs of notice and claims administration, attorneys' fees and expenses that this Court may approve,

[3] This class includes only the Class Representatives Ken Johansen, Rita Johansen, and Alvina Haile-Recio and 239 Nationwide IDNC Settlement Class Members Nationwide identified in its business records.

[4] This class includes only the Class Representatives Dianne Rice-Redding and Ricky Coleman and the approximately 16,969 individuals identified through the Variable lead database.

[5] Following a competitive bidding process, the parties recommend the appointment of JND Legal Administration Co. ("JND") as the claims administrator. *Id.* at ¶ 2.6.

and any incentive awards to Class Representatives that this Court may approve. *Id.* at ¶ 4.1. Next, 29.5% of the remainder of the Settlement Fund will be allocated to the Variable Settlement Class (the "Variable Portion"), 70% to the MediaAlpha Settlement Class (the "MediaAlpha Portion"), and 0.5% to the Nationwide IDNC Settlement Class (the "Nationwide IDNC Portion"). *Id.* A *pro rata* Cash Award of the Variable Portion will be sent to all Variable Settlement Class Members for whom Notice is not ultimately returned as undeliverable – no claim will be required for Variable Settlement Class Members to receive payment; checks will be sent to them automatically. at ¶ 4.2. A *pro rata* Cash Award of the MediaAlpha Portion and Nationwide IDNC Portion will be sent to all MediaAlpha and Nationwide IDNC Settlement Class Members who file valid claims certifying that they received calls. *Id.* at ¶¶ 4.3, 4.4.

Class Members who do not exclude themselves will release claims specifically tailored to the practices that give rise to this matter. In particular, the release is limited to the class members identified during the applicable class period and is limited to the facts that arise out of or relate to the facts or claims in this Action. *Id.* at ¶ 13.1.

ARGUMENT

I. THE SETTLEMENT WILL LIKELY BE APPROVED AS FAIR, REASONABLE, AND ADEQUATE UNDER RULE 23(e)(2)

"Under Rule 23(e) of the Federal Rules of Civil Procedure, a class-action settlement may be approved if the settlement is 'fair, reasonable, and adequate.'" *Melanie K. v. Horton*, No. 14-710, 2015 WL 1799808, at *2 (N.D. Ga. Apr. 15, 2015) (quoting Fed. R. Civ. P. 23(e)(2)). "Approval is generally a two-step process in which a . . . determination on the fairness, reasonableness, and adequacy of the proposed settlement terms is reached." *Id.* (citation omitted).

Rule 23 – and particularly the portions thereof dealing with settlement – was amended in December 2018. The first step in the amended process is a preliminary fairness determination. Specifically, counsel submit the proposed terms of settlement to the district court, along with "information sufficient to enable [the court] to determine whether to give notice of the proposal to the class." Fed. R. Civ. P. 23(e)(1)(A) (2018). This is so the Court may make "a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms[.]" Manual for Complex Litigation § 21.632 (4th ed. 2004); *see also* 4 Alba Conte & Herbert B. Newberg, Newberg on Class Actions, § 11.25 (4th ed. 2002).

The new Rule calls for front-loaded scrutiny of a proposed settlement so that any issues are identified *before* notice goes out to the class. The new Fed. R. Civ.

P. 23(e) states that grounds exist for class notice where the parties show that "the court will likely be able to (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B). To that end, where, as here, the proposed settlement would bind class members, it may only be approved after a final hearing and a finding that it is fair, reasonable, and adequate, based on the following factors:

> (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). If the court preliminarily finds that the settlement is fair, adequate, and reasonable, it then "direct[s] the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing." *Id.*; Fed.R.Civ.P. 23(e)(1)(B) (2018).

The second step in the process is a final fairness hearing. Fed.R.Civ.P. (e)(2) (2018); *also* Manual for Complex Litigation, § 21.633-34; *Hall v. Frederick J.*

Hanna & Assocs., P.C., No. 15-3948, 2016 WL 2866081 (N.D. Ga. May 10, 2016). As explained below, consideration of these factors supports preliminary approving the Settlement and issuing notice.

A. The Class Representatives and Class Counsel have adequately represented the Classes.

By their very nature, because of the many uncertainties of outcome, difficulties of proof, and lengthy duration, class actions readily lend themselves to compromise. Indeed, "[t]here is an overriding public interest in favor of settlement, particularly in class actions that have the well-deserved reputation as being most complex." *Ass'n For Disabled Ams., Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 466 (S.D. Fla. 2002); *accord 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."). This matter is no exception.

Against this backdrop, courts consider "the degree of case development that class counsel have accomplished prior to settlement" to ensure that counsel had an adequate appreciation of the merits of the case before negotiating." *In re Checking Overdraft Litig.*, 830 F. Supp. 2d at 1349 (internal quotation marks omitted). At the same time, "[t]he law is clear that early settlements are to be encouraged, and accordingly, only some reasonable amount of discovery should be required to make these determinations." *Ressler*, 822 F. Supp. at 1555.

Here, the parties entered into the settlement only after both sides were fully apprised of the facts, risks, and obstacles involved with continued litigation that lasted more than two years, and had engaged in related efforts that assisted Plaintiffs' counsel to evaluate this case even before that. In fact, on October 4, 2013, a class action complaint was filed alleging that Variable made automated and prerecorded telemarketing calls to class members' cellular telephones on behalf of Nationwide and other insurers, in violation of the Telephone Consumer Protection Act, 47 C.F.R. § 227, *et seq*. ("TCPA"). *Matejovich et al. v. American Automobile Association, Inc. et al.*, No. 1:13-cv-7149 (N.D. Ill.). Nationwide was originally a defendant in the *Matejovich* action. The court consolidated the *Matejovich* action with other cases challenging Variable calls alleged to have been made on behalf of State Farm, Nationwide Insurance, and Farmers Insurance, and appointed lead counsel. *Smith v. State Farm Mut. Auto. Ins. Co.*, 301 F.R.D. 284 (N.D. Ill. 2014). The three insurance company defendants subsequently filed motions to dismiss. (*See Smith v. State Farm Mut. Auto. Ins. Co.*, No. 1:13-cv-2018 (N.D. Ill.), Dkt. 114 (State Farm); 122 (Nationwide Insurance); 125 (Farmers Insurance)).

The *Smith* court granted Nationwide's and Farmers' motions to dismiss, but denied State Farm's motion. (*See Smith v. State Farm Mut. Auto. Ins. Co.*, 30 F. Supp. 3d 765 (N.D. Ill. 2014), Dkt. 146 (hereinafter the "State Farm Order")).

While the *Smith* court held as a matter of law that the FCC Ruling establishing vicarious liability for telemarketing calls was binding, the court concluded that the complaint did not assert sufficient facts to make out a plausible claim that Nationwide was vicariously liable for the Variable calls. *Id.* at 8-12, 15-20. The *Smith* court therefore dismissed Nationwide as a defendant in that matter.

Smith counsel vigorously pursued discovery from Variable and engaged in discovery-related motion practice.[6] As a result of those efforts, Variable provided written discovery responses and produced documents regarding its relationship *with Nationwide*. Variable's Rule 30(b)(6) representative sat for deposition twice. (*See* Dkt. 234). In his deposition, Variable's president testified about the relationship with Nationwide. *See* Exhibit 2, Affidavit of Matthew R. Wilson at ¶ 9**.** After Variable stated in its discovery responses that a comprehensive database of its customer and call records was held by its database developer in Morocco, Plaintiffs obtained a copy of Variable's data from the Moroccan developer and a sworn affidavit verifying its authenticity. *Id.* at ¶ 10**.**

[6] On October 27, 2014, Plaintiffs moved to compel Variable to respond to Plaintiffs' discovery requests. (Dkt. 168). The Court found the motion "well-taken" and granted it in its entirety. (Dkt. 173). After Variable did not respond, Plaintiffs filed a motion to show cause. (Dkt. 181). The Court granted the motion and ordered Variable's principal to appear in person. (Dkt. 188). After Variable did not appear, Plaintiffs filed a Supplemental Memorandum for Sanctions (Dkt. 196). On January 31, 2015, Variable's counsel made an appearance. (Dkt. 199).

The Variable discovery helped pave the way for the filing of this case. In this case, Plaintiffs pursued substantial discovery from Nationwide relating to its relationship with Variable and MediaAlpha, resulting in the production of more than 10,000 pages of documents. *Id.* at ¶ 11**.** The Plaintiffs also issued multiple sets of discovery and almost ten third party subpoenas, which also resulted in the production of thousands of additional pages of documents. *Id.* at ¶ 12**.**

Finally, before mediating, the parties briefed for settlement purposes the strengths and weaknesses of their respective positions. As such, the parties easily "conducted enough discovery to be able to determine the probability of their success on the merits, the possible range of recovery, and the likely expense and duration of the litigation" before negotiating the settlement. *Mashburn v. Nat'l Healthcare, Inc.*, 684 F. Supp. 660, 669 (M.D. Ala. 1988).

In addition, a plaintiff and counsel are adequate if "counsel are qualified, experienced, and generally able to conduct the proposed litigation," and the "plaintiff[] [does not] have interests antagonistic to those of the rest of the class." *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 726 (11th Cir. 1987).

Here, Plaintiffs' claims are aligned with the claims of the other class members. They thus have every incentive to vigorously pursue the claims of the class, as they have done to date by remaining actively involved in this matter since

its inception, participating in discovery, and involving themselves in the settlement process. In addition, the Plaintiffs retained the services of law firms with extensive experience in litigating consumer class actions, and TCPA actions in particular.

"In a case where experienced counsel represent the class, the Court absent fraud, collusion, or the like, should hesitate to substitute its own judgment for that of counsel." *Ingram*, 200 F.R.D. at 691 (citing *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)); *see also In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. at 312-13 ("In determining whether to approve a proposed settlement, the Court is entitled to rely upon the judgment of the parties' experienced counsel.").

Here, Plaintiffs' counsel believe that the parties' settlement is fair, reasonable, and adequate, and in the best interests of the members of the class. Plaintiffs' counsel also believes that the benefits of the parties' settlement far outweigh the delay and considerable risk of proceeding to trial.

B. The settlement was negotiated at arm's-length by vigorous advocates, and there has been no fraud or collusion.

"A settlement reached after a supervised mediation receives a presumption of reasonableness and the absence of collusion." 2 McLaughlin on Class Actions, § 6:7 (8th ed. 2011); *see also In re Checking Account Overdraft Litig.*, 275 F.R.D. 654, 662 (S.D. Fla. 2011) ("The Court finds that the Settlement was reached in the

absence of collusion, is the product of informed, good-faith, arm's-length negotiations between the parties and their capable and experienced counsel, and was reached with the assistance of a well-qualified and experienced mediator[.]").[7]

Here, the Settlement Agreement resulted from good faith, arms'-length settlement negotiations over many months, including an in-person mediation session before the Honorable Morton Denlow (ret.) of JAMS. *See* Agr. at ¶ 1.6. Plaintiffs and Nationwide submitted detailed mediation submissions to Judge Denlow and to one another setting forth their respective views as to the strengths of their cases. *Id.* Accordingly, it is clear that the parties negotiated their settlement at arm's-length, and absent any fraud or collusion. *See Wilson v. Everbank*, No. 14-22264, 2016 WL 457011, at *6 (S.D. Fla. Feb. 3, 2016) (finding no evidence of fraud or collusion where the settlement was negotiated at arms' length, and where the mediation was overseen by a nationally renowned mediator).

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[7] *See also D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) ("[A] mediator[ ] helps to ensure that the proceedings were free of collusion and undue pressure."); *Johnson v. Brennan*, No. 10-4712, 2011 WL 1872405, at *1 (S.D.N.Y. May 17, 2011) (The participation of an experienced mediator "reinforces that the Settlement Agreement is non-collusive."); *Sandoval v. Tharaldson Emp. Mgmt., Inc.*, No. 08-482, 2010 WL 2486346, at *6 (C.D. Cal. June 15, 2010) ("The assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive."); *Milliron v. T-Mobile USA, Inc.*, No. 08-4149, 2009 WL 3345762, at *5 (D.N.J. Sept. 14, 2009) ("[T]he participation of an independent mediator in settlement negotiation virtually insures that the negotiations were conducted at arm's length and without collusion between the parties.").

C. The Settlement provides substantial relief for the Classes.

Plaintiffs' and their counsel's zealous advocacy, the arm's-length nature of the Settlement, the relief afforded under the Agreement, and the equitable treatment to the Class all support a finding that the Settlement is fair, reasonable, and adequate. As such, and as further detailed below, the proposal should be preliminarily approved with an order directing that notice be provided to the Class.

1. Diverse and substantial legal and factual risks weigh in favor of settlement.

The Court must also consider "the likelihood and extent of any recovery from the defendants absent . . . settlement." *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 314 (N.D. Ga. 1993); *see also Ressler v. Jacobson*, 822 F. Supp. 1551, 1555 (M.D. Fla. 1992) ("A Court is to consider the likelihood of the plaintiff's success on the merits of his claims against the amount and form of relief offered in the settlement before judging the fairness of the compromise.").

With this in mind, while Plaintiffs strongly believe in their claims, Plaintiffs understand that Nationwide asserts a number of potentially case-dispositive defenses. For example, Nationwide contends that it is not vicariously liable for the acts of the vendors who made the calls at issue. Some other Courts in TCPA cases have agreed based on the specific facts in those cases. *See e.g. Jones v. Royal Admin. Servs. Inc.*, 887 F.3d 443 (9th Cir. 2018); *Kristensen v. Credit Payment*

Servs. Inc., 879 F.3d 1010 (9th Cir. 2018).

Nationwide also argues that the Plaintiffs would not be able to certify the class defined in the class action complaint. In particular, Nationwide asserts that the classes Plaintiffs assert in their complaint are unascertainable, and that individual issues predominate over common questions of law and fact. Nationwide relies on decisions issued by various district courts to justify its reasoning. Further, Nationwide asserts that it is not known what proportion of the calls at issue were actually received, were without consent, or were not self-initiated.

Plaintiffs dispute every one of these defenses. But it is obvious that their likelihood of success at trial is far from certain. Accordingly, Plaintiffs' decision to settle their claims, and the claims of the members of the class, is reasonable. *See Bennett*, 96 F.R.D. at 349-50 (noting that the plaintiffs faced a "myriad of factual and legal problems" that led to "great uncertainty as to the fact and amount of damage," which made it "unwise [for the plaintiffs] to risk the substantial benefits which the settlement confers . . . to the vagaries of a trial").

2. The monetary terms of this proposed settlement fall favorably within the range of prior TCPA class action settlements.

"In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with

uncertain results." Newberg on Class Actions, § 11:50. This is, in part, because "the law should favor the settlement of controversies, and should not discourage settlement by subjecting a person who has compromised a claim to the hazard of having the settlement proved in a subsequent trial . . . ." *Grady v. de Ville Motor Hotel, Inc.*, 415 F.2d 449, 451 (10th Cir. 1969). It is also, in part, because "[s]ettlement is the offspring of compromise; the question we address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998); *see also In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. at 319 ("In assessing the settlement, the Court must determine whether it falls within the range of reasonableness, not whether it is the most favorable possible result in the litigation.") (internal citation omitted).

Here, the parties agree to resolve this matter for a settlement fund of $5,000,000, which on the whole amounts to $11.25 per class member. This figure compares well with other TCPA class action settlements that courts, including the Northern District of Georgia, have approved. *See, e.g., Prather v. Wells Fargo Bank, N.A., et al,* No. 1:15-cv-4231, Dkt. No. 35-2 (N.D.Ga. Feb. 22, 2017) ($4.65 per class member); *Cross v. Wells Fargo Bank, N.A.,* No. 1:15-cv-1270, Dkt. No. 34-1 (N.D.Ga. Aug. 11, 2016) ($4.75 per class member); *Markos v. Wells Fargo*

Bank, N.A., No. 1:15-cv-1156, Dkt. No. 34-1 (N.D.Ga. June 29, 2016) ($4.98 per class member); *Wilkins v. HSBC Bank Nevada, N.A.,* No. 14-190, 2015 WL 890566 (N.D. Ill. Feb. 27, 2015) ($4.41 per class member); *In re Capital One TCPA Litig.,* 80 F. Supp. 3d 781 (N.D. Ill. 2015) ($4.31 per class member); *Kolinek v. Walgreen Co.,* 311 F.R.D. 483, 493 (N.D. Ill. 2015) ($1.20 per class member); *Malta v. Fed. Home Loan Mortg. Corp.,* No. 10-1290, 2013 WL 444619 (S.D. Cal. Feb. 5, 2013) (approximately $4 per class member).

The parties' settlement, therefore, falls within "a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties of law and fact in a particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. at 323; *see also id.* at 326 (A court "should consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere probability of relief in the future, after protracted and expensive litigation."). Indeed, "it has been held proper to take the bird in the hand instead of a prospective flock in the bush." *Id.* (internal citation omitted).

3. The method of providing relief is effective and treats all members of the Classes fairly.

"[T]he effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims," is also a relevant

factor in determining the adequacy of relief. Fed. R. Civ. P. 23(e)(2)(C)(ii). The Committee Note to the 2018 amendments to Rule 23(e)(2) says that this factor is intended to encourage courts to evaluate a proposed claims process "to ensure that it facilitates filing legitimate claims. A claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding."

This settlement proposes the gold-standard in class member relief: cash payments. In fact, with respect to the Variable Class, where the Plaintiffs have developed evidence that there was no consent to make any of the calls at issue, class members *do not even have to file a claim*, and each class member will receive a check automatically. With respect to the remaining class members, as mentioned above, the remaining telemarketing calls at issue are not *per se* illegal, and the parties have proposed a claims process that permits persons in the remaining two classes to identify themselves as valid claimants.

The allocation of the Settlement Fund among the Classes—29.5% for the Variable Class, 70% for the MediaAlpha Class, and 0.5% for the IDNC Class—reflects not only the relative size of the classes, but also, crucially, the relative strength of their claims. The Nationwide IDNC Class, while receiving the smallest share of the settlement, consists only of 239 potential class members. And

although the Variable Class has approximately 16,969 members and the Media Alpha Class has approximately 427,123 members, a far larger per-person share of the Settlement Fund is allocated to the Variable Class. That is because members of the Variable Class are not subject to a "prior express consent" defense, while many members of the other classes likely would be subject to it; indeed, Nationwide has maintained that it has a valid consent defense even to with respect to the Class Representatives themselves. In addition, Variable Class Members are expected to recover an amount that will be very similar to the amounts recovered by the class members in the State Farm case that similarly involved calls placed by Variable.

The claims process for the Media Alpha class and the Nationwide IDNC class was designed to be accessible and straightforward, but at the same time deter unjustified claims without placing undue burdens on Class Members. In order for those Class Members to make a claim, they need only to fill out a simple, 1-page claim form (*see* Exhibit 4 (Variable Class), Exhibit 5 (Media Alpha Class), Exhibit 6 (IDNC Class)), identifying their contact information and the phone number called, and providing a simple certification with a signature. Claims may be submitted either online, by mail, or by phone. *See* Exhibit 3, at 2-3. The third party administrator will review claim forms for completeness, timeliness, and correctness. Claimants do not need to attach *any* documentary evidence for claims

to be approved. Furthermore, the Settlement Fund is non-reversionary, so there is no incentive for Nationwide to challenge claims. This claims process is thus simple, straightforward, and accessible, while appropriately discouraging fraudulent claims by requiring a simple signed certification and verification process.

4. The proposed award of attorneys' fees is fair and reasonable.

"[T]he terms of any proposed award of attorney's fees, including timing of payment," are also factors in considering whether the relief provided to the Class in a proposed Settlement is adequate. Fed. R. Civ. P. 23(c)(2)(C)(iii). Plaintiffs' counsel will seek an award of fees no greater than $1,666,666.67. Exhibit 3, at 11.

This amount falls squarely in line with other approved TCPA class settlements. *E.g., Todd S. Elwert, Inc., DC v. All. Healthcare Servs., Inc.*, No. 15-2673, 2018 WL 4539287, at *4 (N.D. Ohio Sept. 21, 2018) (awarding fees of one-third of fund in TCPA case); *Wreyford v. Citizens for Transp. Mobility, Inc.*, No. 12-2524, 2014 WL 11860700, at *1 (N.D. Ga. Oct. 16, 2014) (same); *Schwyhart v. AmSher Collection Servs., Inc.*, No. 15-1175, 2017 WL 1034201, at *3 (N.D. Ala. Mar. 16, 2017) ("attorneys' fees … of one-third of the Settlement Fund ... is fair and reasonable"). Plaintiffs' counsel achieved an excellent result for the Class after undertaking substantial risk in prosecuting this action on a pure contingency basis,

and they should be fairly compensated.

Prior to final approval, Plaintiffs' counsel will file a separate motion for award of attorneys' fees and costs, addressing in detail the facts and law supporting their fee request, and the anticipated fee request will likewise be stated in the Class Notice. Further, not only is this an entirely non-reversionary settlement, but the Settlement ensures that all claims will be validated prior to the Court's fee determination. Thus, because attorneys' fees will only be paid after the Court is fully advised of the amount of benefits distributable to valid claimants, the timing concerns raised in the Federal Rules' Committee Notes are not applicable here. *See* Fed. R. Civ. P. 23 Notes ("Settlement regimes that provide for future payments, for example, may not result in significant actual payments to class members…. In some cases, it may be appropriate to defer some portion of the fee award until actual payouts to class members are known.").

II. THE SETTLEMENT CLASS SATISFIES RULE 23.

A. The members of the class are so numerous that joinder of all of them is impracticable.

Rule 23(a) requires that a class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "[A] plaintiff need not allege the exact number and identity of the class members, but must only establish that joinder is impracticable through some evidence or reasonable estimate of the number of

purported class members." *In re Netbank, Inc. Sec. Litig.*, 259 F.R.D. 656, 664 (N.D. Ga. 2009) (citation omitted). And "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).

Here, there are approximately 444,331 class members. *See* Agr. at ¶¶ 2.19, 2.22, 2.40. Joinder, therefore, is impracticable, and the class thus easily satisfies Rule 23's numerosity requirement.

B. Questions of law and fact are common to the members of the class.

Rule 23(a) also requires that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "A 'common' issue is one that may be proved through the presentation of generalized proof applicable to the class as a whole. *In re Netbank, Inc. Sec. Litig.*, 259 F.R.D. at 664 (citing *Murray v. Auslander*, 244 F.3d 807, 811 (11th Cir. 2001)). "Rule 23 does not[,] [however,] require that all the questions of law and fact raised by the dispute be common." *Cox*, 784 F.2d at 1557; *see also Carriuolo v Gen. Motors Co.*, 823 F.3d 977, 984 (11th Cir. 2016) ("For purposes of Rule 23(a)(2) even a single common question will do.") (internal quotation marks and alteration omitted).

Here, the claims of the members of the class stem from the same factual

circumstances—calls that Nationwide or its vendors placed to telephone numbers to solicit new customers in alleged violation of the TCPA. Common questions, therefore, include whether Nationwide is vicariously liable for the conduct of the vendors and whether the calls themselves violate the TCPA. Consequently, the class satisfies Rule 23's commonality requirement. *See Gehrich*, 316 F.R.D. at 224 ("The proposed class also satisfies commonality . . . . Each class member suffered roughly the same alleged injury: receipt of at least one phone call or text message from Chase to her cell phone."). There are also several common questions of law, including: (1) whether Nationwide violated the TCPA; (2) whether Nationwide willfully or knowingly violated the TCPA; and (3) whether Nationwide had 'prior express consent' for the calls."; *Bellows v. NCO Fin. Sys., Inc.*, No. 07-01413, 2008 WL 4155361, at *6 (S.D. Cal. Sept. 5, 2008) ("[T]he commonality requirement is met here. The putative class claims stem from the same alleged conduct, *i.e.*, NCO allegedly calling consumers on their cellular telephones, or other wireless devices, without 'prior express consent,' using an 'automatic telephone dialing system' or an 'artificial or prerecorded voice.'").

C. Plaintiffs' claims are typical of the claims of the members of the class they represent.

Under Rule 23(a)(3), the claims or defenses of the representative party must be typical of the class. Fed. R. Civ. P. 23(a)(3). The "typicality" requirement seeks

to ensure that a representative plaintiff "possess[es] the same interest and [has] suffer[ed] the same injury shared by all members of the class [s]he represents." *In re Netbank, Inc. Sec. Litig.*, 259 F.R.D. at 665.

With respect to the MediaAlpha Settlement Class, Mr. Johansen and Ms. Johansen each allege that they received a call that MediaAlpha transferred to Nationwide in an attempt to sell Nationwide insurance. Furthermore, Mr. Johansen, Ms. Johansen, and Ms. Haile-Recio each allege that they received more than one telephone solicitation in a 12-month period, despite the fact that their phone number had been registered on Nationwide's Internal Do Not Call Registry for more than 31 days prior. Finally, Ms. Rice-Redding and Mr. Coleman allege they received telephone calls from Variable and were transferred to a Nationwide Agent. As a result, the Plaintiffs' claims are typical of the claims of the members of the classes. *See Gehrich*, 316 F.R.D. at 224 ("The proposed class also satisfies . . . typicality. Each class member suffered roughly the same alleged injury: receipt of at least one phone call or text message from Chase to her cell phone."); *accord Manno v. Healthcare Revenue Recovery Grp., LLC*, 289 F.R.D. 674, 687 (S.D. Fla. 2013) ("The Court also finds that Manno's claims are typical of the TCPA class.").

D. The questions of law and fact common to the members of the class predominate over any questions potentially affecting only individual members.

Rule 23(b)(3)'s predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 634 (1997). "Under Rule 23(b)(3) it is not necessary that all questions of law or fact be common, but only that some questions are common and that they predominate over the individual questions." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1254 (11th Cir. 2004). Indeed, "[p]redominance means that the issues in a class action must be capable of generalized proof such that the issues of the class predominate over those issues that are subject only to individualized proof." *Gaalswijk-Knetzke v. Receivables Mgmt. Servs. Corp.*, No. 08-493, 2008 WL 3850657, at *4 (M.D. Fla. Aug. 14, 2008). "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Hanlon*, 150 F.3d at 1022; *see also Carriuolo*, 823 F.3d at 985.

Here, the central legal issue is whether Nationwide could be held vicariously liable for the calls that were alleged to have violated the TCPA. This is sufficient to satisfy the predominance requirement. *See Gehrich*, 316 F.R.D. at 226 ("The

common questions listed above are the main questions in this case, they can be resolved on a class-wide basis without any individual variation, and they predominate over any individual issues. The proposed class satisfies Rule 23(b)(3).").

E. A class action is superior to other available methods for the fair and efficient adjudication of the claims of Plaintiff and the class.

Rule 23(b)(3) also requires that a district court determine that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." In determining whether the "superiority" requirement is satisfied, a court may consider: (1) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action. Fed. R. Civ. P. 23(b)(3).

Because Plaintiffs seek to certify classes in the context of a settlement, this Court need not consider any possible management-related problems as it otherwise would. *See Amchem Prods.*, 521 U.S. at 620 ("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, see Fed. Rule Civ.

Proc. 23(b)(3)(D), for the proposal is that there be no trial.").

In any event, no one member of the class has an interest in controlling the prosecution of this action because Plaintiffs' claims and the claims of the members of the class are the same. Alternatives to a class action are either no recourse for millions of individuals, or a multiplicity of suits resulting in an inefficient and possibly disparate administration of justice.

III. THE PARTIES' NOTICE PLAIN SATISFIES THE REQUIREMENTS OF RULE 23 AND DUE PROCESS REQUIREMENTS.

Under Rule 23(e), a court must "direct notice in a reasonable manner to all class members who would be bound" by the proposed settlement. Fed. R. Civ. P. 23(e)(1). Notice of a proposed settlement to class members must be the "best notice practicable." Fed. R. Civ. P. 23(c)(2)(B). "[B]est notice practicable" means "individual notice to all members who can be identified through reasonable effort." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974).

As such, "[t]he adequacy of class notice is measured by reasonableness," and "[t]he notice must provide the class members with information reasonably necessary to make a decision whether to remain a class member and be bound by the final judgment or opt out of the action." *Roundtree v. Bush Ross, P.A.*, No. 14-357, 2015 WL 5559461, at *1 (M.D. Fla. Sept. 18, 2015) (quoting *Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1239 (11th Cir. 2011)).

Here, the parties agreed to a robust notice program involving direct mail notice to class members, a dedicated settlement website and a toll-free telephone number to be administered by a well-regarded third-party claims administrator—JND Legal Administration Co.—which has significant experience in the administration of TCPA class actions. *See* Exhibit 3 (Longform Notice), Exhibit 4 (Variable Class Postcard Notice), Exhibit 5 (MediaAlpha Class Postcard Notice), Exhibit 6 (IDNC Class Postcard Notice). As such, the parties' notice plan complies with Rule 23 and due process because, *inter alia*, it informs class members of: (1) the nature of the action; (2) the essential terms of the settlement, including the definition of the class and claims asserted; (3) the binding effect of a judgment if the class member does not request exclusion; (4) the process to object to, or to be excluded from, the class, including the time and method for objecting or requesting exclusion and that class members may make an appearance through counsel; (5) information regarding class counsel's request for an award of attorneys' fees and expenses; (6) the procedure for submitting claims to receive settlement benefits for class members from whom claims are necessary; and (7) how to make inquiries and obtain additional information. Fed. R. Civ. P. 23(c)(2)(B); *Roundtree*, 2015 WL 5559461, at *1 ("The class notice provides reasonably adequate information about the nature of the action and the class

settlement, and provides sufficient details for class members to determine whether to remain in the class or opt out. Accordingly, the form and content of the class notice are approved.").

In sum, the parties' notice plan ensures that class members' due process rights are amply protected, and it should be approved. Fed. R. Civ. P. 23(c)(2)(A).

CONCLUSION

Plaintiffs respectfully request that this Court (1) conditionally approve the parties' settlement as fair, adequate, reasonable, and within the reasonable range of possible final approval, (2) appoint Plaintiffs as the class representatives, (3) appoint Plaintiffs' counsel as class counsel, (4) approve the parties' proposed notice program, and confirm that it is the best practicable under the circumstances and that it satisfies due process and Rule 23, (5) set a date for a final approval hearing, (6) set deadlines for members of the settlement class to submit claims for compensation, and to object to or exclude themselves from the settlement, and (7) grant such further and other relief the Court deems reasonable and just.

Respectfully submitted,

Dated: March 8, 2019

By: */s/ Michael J. Boyle, Jr.*
MEYER WILSON CO., LPA
Matthew R. Wilson (*pro hac vice*)

Email: mwilson@meyerwilson.com
Michael J. Boyle, Jr. (*pro hac vice*)
Email: mboyle@meyerwilson.com
1320 Dublin Road, Ste. 100
Columbus, Ohio 43215
Telephone: (614) 224-6000
Facsimile: (614) 224-6066

Anthony I. Paronich
BRODERICK & PARONICH, P.C.
Anthony I. Paronich (*pro hac vice*)
Email: anthony@broderick-law.com
Edward A. Broderick (*pro hac vice*)
Email: ted@broderick-law.com
125 Summer St., Suite 1030
Boston, MA 02360
Telephone: (508) 221-1510

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
Jonathan D. Selbin (*pro hac vice*)
Email: jselbin@lchb.com
250 Hudson Street, 8th Floor
New York, NY 10013
Telephone: (212) 355-9500
Facsimile: (212) 355-9592

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
Daniel M. Hutchinson (*pro hac vice*)
Email: dhutchinson@lchb.com
275 Battery Street, 29th Floor
San Francisco, California 94111-3339
Telephone: (415) 956-1000
Facsimile: (415) 956-1008

LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
John T. Spragens (*pro hac vice*)
Email: jspragens@lchb.com
150 4th Ave. N, Suite 1650
Nashville, TN 37219
Telephone: (615) 313-9000
Facsimile: (615) 313-9965

BURKE LAW OFFICES, LLC
Alexander H. Burke (*pro hac vice*)
Email: aburke@burkelawllc.com
Daniel J. Marovitch (*pro hac vice*)
Email: dmarovitch@burkelawllc.com
155 N. Michigan Avenue, Suite 9020
Chicago, IL 60601
Telephone: (312) 729-5288
Facsimile: (312) 729-5289

LAW OFFICE OF MATTHEW P. MCCUE
Matthew P. McCue (*pro hac vice*)
Email: mmccue@massattorneys.net
1 South Ave, Suite 3
Natick, MA 01760
Telephone: (508) 655-1415

THE KOVAL FIRM, LLC
Steven H. Koval (Ga. Bar No. 428905)
Email: shkoval@aol.com
3575 Piedmont Road
Building 15, Suite 120
Atlanta, GA 30305
Telephone: (404) 513-6651
Facsimile: (404) 549-4654

Attorneys for Plaintiffs and the Proposed Classes

CERTIFICATE OF COMPLIANCE WITH L.R. 5.1.C & 7.1.D

Pursuant to L.R. 7.1.D, I certify that this document has been prepared with 14-point, Times New Roman font, approved by the Court in L.R. 5.1.C.

/s/ Michael J. Boyle, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on this day, March 8, 2019, I caused the foregoing PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR UNOPPOSED

MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT to be electronically filed with the Clerk of the Court using the CM/ECF system, which will automatically send notification of such filing to all attorneys of record.

/s/ Michael J. Boyle, Jr.