

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

DENISE BAKER, for herself and on behalf of
all similarly situated individuals,

Plaintiff,

v.

NAVIENT SOLUTIONS, LLC,

Defendant.

No. 1:17-cv-1160 (LMB/JFA)

**PLAINTIFF DENISE BAKER'S MEMORANDUM IN SUPPORT OF
MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

I. INTRODUCTION

Plaintiff Denise Baker (“Plaintiff”) moves for preliminary approval of a nationwide settlement and conditional class certification in this class action lawsuit against defendant Navient Solutions, LLC (“NSL”) for alleged violations of the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227. In this action, Plaintiff alleges, on behalf of herself and a putative class of individuals, that NSL made calls to her cellular telephone using an automatic telephone dialing system (“ATDS”) without the “prior express consent” required by the TCPA. NSL denies the material allegations of Plaintiff’s Class Complaint (the “Complaint”) and vigorously disputes that it violated the TCPA when contacting Plaintiff and the proposed class members. Therefore, in the litigation, NSL denies that Plaintiff and the putative class members are entitled to any relief whatsoever.

Nevertheless, after extensive discovery, the full briefing of NSL’s motion for summary judgment and a mediation before a former United States Magistrate Judge, the parties have agreed to resolve this matter for an all-cash, non-reversionary settlement fund in the amount of \$2.5 million. Under the parties’ proposed agreement, class members who submit a timely and valid claim will receive a *pro rata* distribution from the fund, as discussed in detail below. The settlement is a good result for the class given the substantial risk of continuing the litigation.

For instance, NSL has a motion pending to deposit \$15,000 (an amount sufficient to satisfy Plaintiff’s individual claim in this action) with the Clerk of the Court with a request that, if granted, the Court enter judgment in Plaintiff’s favor on her individual claim -- the first step in NSL’s effort to bring itself within the hypothetical contemplated by the United States Supreme Court in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 668 (2016), for addressing class action litigation. If the Court permits the deposit and enters an individual judgment for Plaintiff, NSL argues that dismissal of the class claims would be warranted.

Furthermore, following the recent ruling in *ACA International v. Federal Communications Commission*, 885 F.3d 687 (D.C. Cir. 2018) (vacating in part *In re Rules and*

Regulations Implementing the Telephone Consumer Protection Act of 1991, 30 FCC Rcd. 7961 (2015) (the “2015 Order”), and follow-on decisions -- as reflected in NSL’s briefing on its pending motion for summary judgment -- NSL has enhanced arguments that Plaintiff will not be able to establish that its telephone system falls within the statutory definition of an ATDS. NSL avers that *ACA International* clearly abrogated the FCC’s 2015 Order, which stated a very broad definition of an ATDS, and, thus, that *ACA International* increases NSL’s ability to defend Plaintiff’s claims.

In addition, NSL questions whether Plaintiff will be able to certify a litigation class going forward. Here, Plaintiff was listed as a credit reference on an NSL borrower’s private student loan applications. NSL contends that she therefore cannot represent a class including individuals who received calls in connection with federal student loans because those claims are subject to unique defenses, including under the Bipartisan Budget Act of 2015’s (“Budget Act”) exception for calls made “to collect a debt owed to or guaranteed by the United States” and the exemption in *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Broadnet Teleservices LLC Petition for Declaratory Ruling, et al.*, CG Docket No. 02-278 (the “*Broadnet Ruling*”), Declaratory Ruling at 6 ¶ 11, FCC 16-72 (July 5, 2016), for calls made by agents of the United States government. This settlement, thus, enables Plaintiff and the settlement class members to receive immediate and certain relief now, rather than face the uncertainty attendant to continued litigation.

Accordingly, Plaintiff respectfully requests that the Court: (1) grant preliminary approval of the parties’ proposed settlement as fair, reasonable and adequate, and within the range of possible approval; (2) conditionally certify the settlement class; (3) appoint Plaintiff’s counsel as counsel for the settlement class; (4) approve the notice program set forth in the parties’ agreement as the best practicable under the circumstances that satisfies due process and Federal Rule of Civil Procedure 23; and (5) set a date for a final fairness hearing and contingent deadlines.

II. BACKGROUND

A. Procedural History

Plaintiff filed her Complaint on October 16, 2017, alleging a single count against NSL, on behalf of herself and a putative class and subclass of individuals, for violation of the TCPA. (ECF #1.) The following day, Plaintiff filed a placeholder motion for class certification and a motion to stay the class certification motion. (ECF ## 3–8.) The Court granted the stay of Plaintiff’s placeholder certification motion on October 18, 2017. (ECF #9.)

On November 13, 2017, NSL answered the Complaint (ECF #13), and the parties promptly engaged in discovery. (Decl. of William L. Downing in Supp. of Mot. for Prelim. Approval (“Downing Decl.”) ¶¶ 13, 14.) Plaintiff propounded -- and NSL responded to -- 69 requests for production of documents, 25 interrogatories and 163 requests for admissions. (*Id.* ¶ 14) Plaintiff also deposed three NSL call center agents, two NSL corporate representatives pursuant to Federal Rule of Civil Procedure 30(b)(6), the corporate representative of third-party software developer Genesys Telecommunications Laboratories, Inc. pursuant to Rule 30(b)(6) and NSL’s expert witness, Ray Horak. (*Id.* ¶ 13.) Meanwhile, NSL propounded document requests on Plaintiff and took her deposition. (*Id.*)

On May 4, 2018, NSL filed a motion for summary judgment and a concurrent motion to deposit the amount of \$15,000 (as noted above, to perfect the hypothetical contemplated by the Supreme Court in *Campbell-Ewald* for addressing class action litigation). (ECF ## 39–45.) NSL’s motion for summary judgment requests that the Court enter judgment as a matter of law in its favor on multiple grounds, including, importantly, on Plaintiff’s ability to establish the use of an ATDS in calling her and other credit references on delinquent student loans. (ECF ## 42, 57.) The summary judgment and deposit motions were fully briefed as of June 1, 2018, and remain pending. (*See* ECF ## 47, 51, 55–58.)

B. The Parties' Mediation

This settlement is the result of good-faith, arms-length negotiations and mediation before the Honorable Diane M. Welsh (Ret.), which took place on June 4, 2018 in Washington, DC. (Downing Decl. ¶ 16.) Plaintiff attended the mediation in person. The parties' settlement discussions took place at the direction and under the supervision of Judge Welsh, who is a former United States Magistrate Judge and private mediator, and who has successfully mediated notable class actions, including a global settlement of multidistrict products liability litigation against Stryker Orthopedics in *In re Stryker Rejuvenate, ABG II Hip Implant Products Liability Litigation*, MDL No. 13-2441 (D. Minn.), and associated cases. (*Id.*) Prior to the June 4 mediation, the parties exchanged detailed mediation briefs and, at the mediation, set forth their positions in the course of spirited negotiations. (*Id.* ¶) The parties agreed to settle this action with Judge Welsh's assistance at the mediation and, over the ensuing weeks, worked to memorialize the terms of the settlement, begin assembling a list of settlement class members for purposes of providing notice of the settlement, and engage a settlement administrator. (*Id.* ¶ 17) A final Settlement Agreement and Release ("Agreement") was executed by the parties on June 19, 2018. (*Id.* ¶ 17, Ex. 1).

III. THE PROPOSED SETTLEMENT

Pursuant to the Settlement Agreement, NSL has agreed to establish a non-reversionary cash settlement fund of \$2,500,000 (the "Settlement Fund") to compensate an estimated 300,000 class members (the "Settlement Class"), defined as follows:

Each person throughout the United States who was: (1) listed as a credit reference on a student loan application; and (2) called by NSL on a cellular telephone number using dialing technology manufactured and/or licensed by Interactive Intelligence. Excluded from the class definition are: (1) persons who were listed as credit references on student loan applications and who also have student loans serviced by NSL; (2) persons or entities included within the class defined in the Final Approval Order (Dkt. #177) in *Johnson v. Navient Solutions, Inc.*, Case No.: 1:15-cv-

0716 (S.D. Ind.); and (3) any employees, officers, directors of NSL, any attorneys appearing in this case and any judge assigned to hear this action.

(Agreement § II, ¶¶ 13, 28.)

To obtain compensation from the Settlement Fund, Settlement Class members will need to submit a claim to the settlement administrator, which will be Rust Consulting (the “Settlement Administrator”), subject to the Court’s approval, and was selected by the parties following a competitive bidding process.¹ (Agreement § III.—F.—2; Downing Decl. ¶ 18.) Settlement Class members will have the ability to submit claims through a designated website or by mail. (Agreement § III.—F.—2.) Settlement Class members who submit a timely claim will be entitled to a *pro rata* share of the Settlement Fund, following deductions for the costs of notice and claims administration, reasonable attorneys’ fees and costs, a service award to Plaintiff and other expenses, as the Court may approve. (*Id.* § III.—F.—1.)² Based on the size of the Settlement Fund, the number of Settlement Class members, and counsel’s experience with claims rates in similar settlements, the expected cash award per Settlement Class member is estimated to be approximately \$50.00, although the actual amount is dependent on a number of factors and may be higher or lower than that range. (Downing Decl. ¶ 20.)

In exchange, Settlement Class members who choose not to opt out of the settlement will release claims tailored to the facts giving rise to this matter. (*Id.* § II., ¶ 21; *id.* § III.—G.) Specifically, Settlement Class members who do not opt out will release all claims

(a) that arise out of or are related in any way to the use by NSL of an “automatic telephone dialing system” to make calls to a cellular telephone (to the fullest extent that this term is used, defined or

¹ Counsel solicited bids from three potential settlement administrators. (Downing Decl. ¶ 18.)

² No later than 30 days before the deadline for persons in the Settlement Class to opt out and object to the settlement, Plaintiff’s counsel will file a motion for an award of reasonable attorneys’ fees, not to exceed \$833,333, and reimbursement of litigation costs and expenses, not to exceed \$35,000. (*See* Agreement § III.—H) In addition, NSL will not object to an incentive award to Plaintiff of up to \$15,000, subject to Court approval. (Agreement § III.—I.)

interpreted by the TCPA, relevant regulatory or administrative promulgations and case law) in connection with efforts to contact or attempt to contact Settlement Class Members, including, but not limited to, claims under or for violations of the TCPA, and any other statutory or common law claim arising from the use of automatic telephone dialing systems, including any claim under or for violation of federal or state unfair and deceptive practices statutes, violations of any federal or state debt collection practices acts (including but not limited to, the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.*), invasion of privacy, conversion, breach of contract, unjust enrichment, specific performance and/or promissory estoppel; or (b) that arise out of or relate in any way to the administration of the Settlement.³

(*Id.* § II., ¶ 21.) This release is appropriately limited to claims arising out of the factual predicate of this action. *See Berry v. Schulman*, 807 F.3d 600, 616 (4th Cir. 2015) (“In class action settlements, parties may release not only the very claims raised in their cases, but also claims arising out of the ‘identical factual predicate.’”)

IV. ARGUMENT

A. The Court Should Grant Preliminary Approval Of The Settlement.

Federal Rule of Civil Procedure 23(e) governs settlements of class action lawsuits and “requires court-approval of any proposed settlement of a class action lawsuit.” *Funkhouser v. City of Portsmouth*, No. 2:13-cv-520, 2015 WL 12826461, at *1 (E.D. Va. Mar. 18, 2015); *see also In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991) (explaining that Rule 23(e) requires “approval of the court” for dismissal of a class action lawsuit). Rule 23(e) also “requires that class members receive notice of the settlement before the court approves it.” *Id.* “The voluntary resolution of litigation through settlement,” however, is nevertheless “strongly favored by the courts” and “particularly appropriate” in class actions. *South Carolina Nat’l Bank v. Stone*, 749 F. Supp. 1419, 1423 (D.S.C. 1990); *see also Lomascolo v. Parsons Brinckerhoff, Inc.*, No. 08-cv-1310, 2009 WL 3094955, at *10 (E.D. Va. Sept. 28, 2009) (noting that the

³ Capitalized terms in quotations from the Settlement Agreement are defined therein.

resolution of litigation, particularly class action and other complex litigation, through settlement is favored).

“Courts generally follow a two-step procedure for approving class action settlements.” *Funkhouser*, 2015 WL 12826461, at *1 (citing *Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 855 F. Supp. 825, 827 (E.D.N.C. 1994)). “First, the Court conducts a preliminary review of the proposed settlement to determine if it ‘is within the range of possible approval, or in other words, whether there is probable cause to notify the class of the proposed settlement.’” *Id.* (quoting *Horton*, 855 F. Supp. at 827); Manual for Complex Litigation (4th) (“MCL”) § 21.632. Second, “[o]nce the Court grants preliminary approval and notice is sent to the class, the Court conducts a final fairness hearing to determine if the proposed settlement is ‘fair, reasonable, and adequate.’” *Funkhouser*, 2015 WL 12826461, at *1 (quoting *Horton*, 855 F. Supp. at 827); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622 (1997); MCL §§ 21.633–21.635.

At the preliminary approval stage, the Court’s goal is “to determine whether notice of the proposed settlement should be sent to the class, not to make a final determination of the settlement’s fairness.” William B. Rubenstein, 4 Newberg on Class Actions § 13:13 (5th ed.); MCL § 21.632. The Court therefore is not required to undertake an in-depth consideration of the factors for final approval. *See id.* Rather, the question is whether the settlement appears to be within the range of possible approval and is “[t]he result of good-faith bargaining at arm’s length, without collusion.” *In re Jiffy Lube Sec. Litig.*, 927 F.2d at 159; *see also Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975); *Horton*, 855 F. Supp. at 827 (E.D.N.C. 1994). Specifically, if the Court is satisfied that “the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval,” it should grant preliminary approval. *Smith v. Res-Care, Inc.*, No. 3:13–5211, 2015 WL 461529, at *3 (S.D.W. Va. Feb. 3, 2015) (quoting *Samuel v. Equicredit Corp.*, No. CIV.A. 00–6196, 2002 WL 970396, at *1 (E.D. Pa. 2002) (citing Manual of Complex

Litigation (2d) § 30.44 (1985)); *but see South Carolina Nat'l Bank*, 139 F.R.D. at 339 (noting that settlements, by definition, are compromises).

Moreover, the Court is not required to “decide the merits of the case or resolve unsettled legal questions” in determining whether to grant preliminary approval. *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n. 14 (1981). And it should not “turn the settlement hearing into a trial or a rehearsal of the trial nor need it reach any dispositive conclusions on the admittedly unsettled legal issues in the case.” *Flinn*, 528 F.2d at 1172–73. Indeed, the Court need only examine whether there is a probability that the settlement could be finally approved, and if so, order notification to the class. *Horton*, 855 F. Supp. at 827. In so doing, it may give considerable weight to the opinion of experienced class counsel. *See, e.g., Reed v. GMC*, 703 F.2d 170, 175 (5th Cir. 1983) (“In reviewing proposed class settlements, a trial judge is dependent upon a match of adversary talent because he cannot obtain the ultimate answers without trying the case.”). It may also take into account that the settlement was reached with the assistance of a respected and experienced mediator. *See In re Toys “R” Us Antitrust Litig.*, 191 F.R.D. 347, 352 (E.D.N.Y. 2000) (“Most significantly, the settlements were reached only after arduous settlement discussions conducted in a good faith, non-collusive manner, over a lengthy period of time, and with the assistance of a highly experienced neutral mediator[.]”).

Here, the settlement is the result of serious, informed, non-collusive negotiations with the assistance of an experienced mediator. (Downing Decl. ¶ 16.) It was reached after extensive and complete discovery, and after full briefing on NSL’s deposit motion and summary judgment motion. (*Id.* ¶ 15.) The settlement provides substantial benefits to the Settlement Class and, if approved, will result in the potential for approximately 300,000 Settlement Class members -- who would never have pursued TCPA claims on their own -- to receive a recovery. (*Id.* ¶¶ 19, 20.) Given the complexity of this case and the significant risks that the Settlement Class would face if the claims were to proceed, Plaintiff and Plaintiff’s counsel believe that the settlement is fair and reasonable represents a good result for the Settlement Class members. (*Id.*

¶¶ 21-23.) Accordingly, the settlement is well within the range of possible approval, and notice should therefore be sent to the Settlement Class.

1. The Settlement Falls Within The Range Of Possible Approval.

a. *Plaintiff And The Settlement Class Face Real Risks From NSL's Defenses To Liability And Certification.*

Plaintiff and Plaintiff's counsel recognize that continued litigation of this matter would present several challenges, both on the merits of the claims and with respect to certification of a litigation class. (Downing Decl. ¶ 21.) Indeed, NSL has filed extensive briefing in connection with its tender motion and summary judgment motion (and would have, as well, in connection with any opposition to a certification motion). (ECF ## 39-45, 51, 57-58.) While Plaintiff disagrees with NSL's arguments, they nevertheless present a serious risk that the Court might rule in favor of NSL on the merits or decline to certify a litigation class. (Downing Decl. ¶ 21.)

For instance, in order to bring itself within the hypothetical contemplated by the Supreme Court in *Campbell-Ewald*, for addressing proposed class action litigation, NSL seeks leave to deposit \$15,000 (which it contends is more than sufficient to satisfy Plaintiff's individual claim) with the Clerk of the Court pursuant to Federal Rule of Civil Procedure 67 contemporaneously with filing its summary judgment motion, and requests that the Court enter judgment against NSL and for Plaintiff on her individual claim in this amount. (See ECF ## 39, 42.) If permitted to deposit the \$15,000 with the Clerk, NSL would consent to a judgment in Plaintiff's favor, along with an injunction barring NSL from calling her. (*Id.* at 6-11.) Once Plaintiff's claim is satisfied, NSL argues that, pursuant to the reasoning of the majority of Justices in *Campbell-Ewald* and follow-on decisions, the Court should dismiss the class claims without prejudice. (*Id.*)

In addition, NSL argues that following the D.C. Circuit's ruling in *ACA International*, Plaintiff cannot meet her burden of proof with respect to NSL's use of an ATDS to make the calls in question. (See, e.g., ECF #57 at 2-13.) The TCPA prohibits the making of "any call

(other than a call made for emergency purposes or made with the prior express consent of the called party) using [an ATDS] or an artificial or prerecorded voice” to any cellular telephone. 47 U.S.C. § 227(b)(1)(A)(iii). An ATDS is defined as “equipment which has the capacity -- (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.” *Id.* § 227(a)(1).

NSL contends that, in *ACA International*, the D.C. Circuit abrogated, among other things, the conclusion in the 2015 Order and other prior FCC orders that a “predictive dialer” is an ATDS, without regard to whether it can “store or produce telephone numbers to be called, using a random or sequential number generator.” (ECF #57 at 2–8.) NSL further avers that the calls here are not actionable because they were made “manually” and the equipment used to make them lacks the capacity to store or produce telephone numbers using a random or sequential number generator and, thus, falls outside of the definition of an ATDS. (*Id.* at 2–13.) Accordingly, even though NSL denies that the system in question was a “predictive dialer,” it argues that even if it was, that would not be sufficient to prove the use of an ATDS. (*Id.* at 2–8.) NSL points to several decisions so holding in the wake of *ACA International*. *See, e.g., Herrick v. GoDaddy.com LLC*, ---F.3d---, No. CV–16–00254–PHX–DJH, 2018 WL 2229131, at *7 (D. Ariz. May 14, 2018) (“As a result of the D.C. Circuit’s holding on this issue, this [c]ourt will not defer to any of the FCC’s ‘pertinent pronouncements’ regarding the first required function of an ATDS, *i.e.*, a device that has the capacity to store or produce telephone numbers ‘using a random or sequential number generator.’” (quoting *ACA Int’l*, 885 F.3d at 701)); *Marshall v. CBE Grp., Inc.*, No. 2:16–cv–02406–GMN–NJK, 2018 WL 1567852, at *7 (D. Nev. Mar. 30, 2018) (“[T]he D.C. Circuit explicitly rejected this ‘expansive’ interpretation of the TCPA, particularly as that definition pertained to systems that may not, in fact, have the capacity to dial randomly or sequentially.”). *But see Reyes v. BCA Fin. Servs., Inc.*, No. 16-24077-CIV Goodman, 2018 WL 2220417 (S.D. Fla. May 14, 2018) (“So the *ACA International* case has given the Court

considerable pause. But the Court finds that the prior FCC Orders are still binding. Therefore, the *ACA International* case does not change the Court's conclusion on the ATDS issue.)

Further, NSL maintains that the system in question bears none of the hallmarks of an ATDS because, NSL asserts, it cannot dial telephone numbers without direct human intervention and cannot dial thousands of numbers in a short period of time. (*Id.* at 8–13.) It also contends that, because Plaintiff did not designate an expert witness or physically inspect the system at issue, she cannot carry her burden of proving the use of an ATDS because the system's functionality “depends on, among other things, its specific components and how they are configured.” (ECF #42 at 15.)

NSL has also called into question whether Plaintiff can represent a class including individuals who received calls in connection with federal, as opposed to private, student loans. (*See, e.g.*, ECF 57 at 14–16.) According to NSL, the Budget Act's amendment to the TCPA, immunizing calls made “to collect debt owed to or guaranteed by the United States” from liability, would defeat any claims for calls made to references in connection with federal loans. (ECF #42 at 18–19; ECF #57 at 14–15.) While the FCC signaled its intent to exclude calls made to references from this exception in *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 31 FCC Rcd. 9074 (2016) (the “2016 Order”), NSL notes that the 2016 Order is not final and the Court is free to interpret the Budget Act's amendment as it sees fit, and NSL asserts that interpreting the amendment to exclude calls to references does not square with Congress's purpose in passing the amendment. (ECF #42 at 18–19; ECF #57 at 14–15.) Moreover, NSL claims that it cannot be liable for calls made to credit references in the course of servicing federal loans because “agents” of the federal government are granted TCPA immunity for calls placed pursuant to “validly conferred” federal authority and in compliance with the federal government's instructions, as stated in the *Broadnet Ruling*. (ECF #57 at 15–16.) NSL maintains that federal regulations require servicers of federal student loans to engage in diligent efforts to collect delinquent debts by, among other things, contacting each reference

identified in the borrower's loan file. (ECF #42 at 16–18; ECF #56 at 15–16.) *See also* 34 C.F.R. § 682.411.

Finally, NSL argues that, because *ACA International* shifted the standards governing what systems constitute an ATDS, and the standards were unclear, arbitrary and capricious before the ruling (as the D.C. Circuit confirmed), Plaintiff cannot establish under any circumstances that NSL's calls were made with knowledge that it was using an ATDS in violation of the TCPA, as she would need to do to establish knowing or willful violations. (ECF #57 at 17.) *See also Lary v. Trinity Physician Fin. & Ins. Servs.*, 780 F.3d 1101, 1107 (11th Cir. 2015) (holding that a TCPA violation is only knowing and willful if the defendant intended to perform or knew that it was performing each of the elements of the claim); *In re Stancil*, 487 B.R. 331, 343 (Bankr. D.D.C. 2013) (“[W]hen the law regarding whether an act violates [a statute] is sufficiently unsettled to permit a reasonable belief that the [statute] did not bar the act at issue, ‘willfulness’ is not present.”)

Therefore, NSL has raised several noteworthy merits and certification related arguments that Plaintiff cannot ignore, and which present significant litigation risk that Plaintiff and the Settlement Class could recover nothing were this action to proceed.

b. *Continued Litigation Is Likely To Be Complex, Lengthy And Expensive.*

This case involves several complex and unsettled legal questions in the wake of the D.C. Circuit's ruling in *ACA International*, including whether equipment such as that at issue here falls within the TCPA's definition of an ATDS. (Downing Decl. ¶¶ 15, 21.) Extensive litigation effort also would be required if the case were to proceed. In the near term, the Court would need to issue a ruling on NSL's pending summary judgment and deposit motions and, if the case then were to continue, the parties would need to engage in further motion practice, including a motion for class certification. And if the case were to continue on a class basis at that point, trial preparation and trial would be time consuming and costly. Moreover, taking into account the

significant likelihood that either party would pursue an appeal of an adverse ruling at any of these stages, it is possible that a long period of time could pass before this case was fully resolved. (*Id.* ¶ 22) Thus, instead of facing the uncertainty of a potential award years from now, this settlement enables Plaintiff and the Settlement Class to receive immediate and certain relief. (*Id.*) These considerations weigh in favor of preliminary approval of this settlement. *See Stone*, 749 F. Supp. at 1423; *Lomascolo*, 2009 WL 3094955, at *10.

c. *The Value Of The Settlement Is Significant And Is A Good Result For The Class.*

Against the various risks and costs that accompany continued litigation, the value of the settlement compares very favorably, on a per-class member basis -- approximately \$8.33 per class member -- to similar TCPA class action settlements that courts recently have approved. *See Hooker v. Sirius XM Radio, Inc.*, No. 4:13-CV-003, 2017 WL 4484258 (E.D. Va. May 11, 2017) (approximately \$3 per settlement class member); *Martinez v. Medcredit, Inc.*, No. 4:16CV01138 ERW, 2018 WL 2223681, at *1 (E.D. Mo. May 15, 2018) (approximately \$7.97 per settlement class member); *James v. JPMorgan Chase Bank, N.A.*, No. 8:15-CV-2424-T-23JSS, 2017 WL 2472499, at *1 (M.D. Fla. June 5, 2017) (approximately \$5.50 per settlement class member); *Gutierrez-Rodriguez v. R.M. Galicia, Inc.*, No. 16-CV-00182-H-BLM, 2018 WL 1470198, at *1 (S.D. Cal. Mar. 26, 2018) (approximately \$24.22 per settlement class member); *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 227 (N.D. Ill. 2016) (approximately \$1 per settlement class member); *Prater v. Medcredit, Inc.*, No. 14-00159, 2015 WL 8331602 (E.D. Mo. Dec. 7, 2015) (approximately \$10 per settlement class member); *Malta v. Fed. Home Loan Mortg. Corp.*, No. 10-cv-1290, 2013 WL 444619 (S.D. Cal. Feb. 5, 2013) (approximately \$4 per settlement class member).⁴ Hence, it provides Settlement Class members with substantial

⁴ *See also Picchi v. World Fin. Network Bank*, No. 11-CV-61797 (S.D. Fla.) (approximately \$3 per settlement class member); *Duke v. Bank of Am., N.A.*, No. 5:12-cv-04009-EJD (N.D. Cal.) (approximately \$4 per settlement class member); *Connor v. JPMorgan Chase Bank*, No. 10 CV 1284 DMS BGS (S.D. Cal.) (approximately \$5 per settlement class member); *Wilkins v. HSBC Bank Nev., N.A.*, No. 14-cv-190 (N.D. Ill.) (approximately \$5 per settlement

monetary relief, despite the purely statutory damages at issue -- damages which some courts have deemed too small to incentivize individual actions. *See, e.g., Palm Beach Golf Center-Boca, Inc. v. Sarris*, 311 F.R.D. 688, 699 (S.D. Fla. 2015) (noting that the small potential recovery in individual TCPA actions reduced the likelihood that class members will bring suit); *St. Louis Heart Ctr., Inc. v. Vein Ctrs. for Excellence, Inc.*, No. 12-174, 2013 WL 6498245, at *11 (E.D. Mo. Dec. 11, 2013) (explaining that, because the statutory damages available to each individual class member are small, it is unlikely that the class members have interest in individually controlling the prosecution of separate actions); *Siding & Insulation Co. v. Beachwood Hair Clinic, Inc.*, 279 F.R.D. 442, 446 (N.D. Ohio 2012) (stating that, since each class member is unlikely to recover more than a small amount, they are unlikely to bring individual suits under the TCPA).

Settlement Class members will therefore receive substantial monetary relief, which they likely would not have otherwise pursued on their own.⁵ Hence, the value of the settlement, balanced against the risks and costs of continued litigation, favors preliminary approval. *See In re Ionosphere Clubs, Inc.*, 156 B.R. 414, 427–28 (S.D. N.Y. 1993) (explaining that “there is no reason . . . why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery”); *Jenkins v. Trustmark Nat. Bank*, No. 3:12–CV–00380–DPJ–FKB, 2014 WL 1229661, *10 (S.D. Miss. 2014) (same); 4 Newberg on Class Actions § 13:15 (same).

2. The Settlement Is The Product Of Serious, Informed, Non-Collusive Negotiations.

Over the course of this action, the parties engaged in extensive discovery, thus enabling them to make an informed evaluation of the action. (Downing Decl. ¶¶ 13-15.) *See also In re*

class member); *In re Capital One Tel. Consumer Prot. Act Litig.*, No. 12-cv-10064, MDL No. 2416 (N.D. Ill.) (approximately \$5 per settlement class member).

⁵ Class counsel estimates, based on their experience with TCPA class action settlements and associated claims rates, that class members who submit a qualified claim here will receive approximately \$50.00. (Downing Decl. ¶ 20)

Red Hat, Inc. Securities Litigation, No. 5:04–CV–473–BR (3), 2010 WL 2710517, *2 (E.D. N.C. 2010), *report and recommendation adopted*, 2010 WL 2710446 (E.D. N.C. 2010) (explaining that “the posture of the case, which has been rigorously prosecuted and defended, weighs in favor of preliminary approval”); *Beaulieu v. EQ Indus. Services, Inc.*, No. 5:06–CV–00400–BR, 2009 WL 2208131, *24–25 (E.D. N.C. 2009) (concluding that settlement was procedurally adequate for purposes of preliminary approval because the parties had participated in “substantial” discovery that “facilitat[ed] an informed decision” and had engaged in arm’s length adversarial negotiations). Here, as noted above, Plaintiff propounded -- and NSL responded to -- broad written discovery, including 69 requests for production of documents, 25 interrogatories, and 163 requests for admissions. (*Id.* ¶ 14.) Plaintiff also deposed three NSL call center agents, two NSL corporate representatives, the corporate representative of third-party software developer Genesys Telecommunications Laboratories, Inc., and NSL’s expert witness, Ray Horak. (*Id.* ¶ 13.) NSL likewise propounded document requests on Plaintiff and took her deposition. (*Id.* ¶ 14.) Indeed, the settlement was not reached until well after the close of discovery. (*Id.* ¶¶ 15, 16.) The parties have also fleshed out their respective legal and factual arguments in connection with NSL’s fully briefed summary judgment motion (*see* ECF ## 39–45), and in mediation briefs that the parties exchanged and submitted to Judge Welsh. (Downing Decl. ¶ 16.)

Moreover, the settlement was reached after good-faith, arms-length negotiations in formal mediation before Judge Welsh, an experienced mediator. (*Id.* ¶ 16.) This supports the conclusion that the proposed settlement is non-collusive, because a settlement “reached with the help of third-party neutrals enjoys a ‘presumption that the settlement achieved meets the requirements of due process.’” *In re Penthouse Exec. Club Comp. Litig.*, No. 10 CIV. 1145 KMW, 2013 WL 1828598, at *2 (S.D.N.Y. Apr. 30, 2013) (quoting *Johnson v. Brennan*, 10 Civ. 4712 CM, 2011 WL 4357376, at *8 (S.D.N.Y. Sept. 16, 2011)); *see also Ruch v. AM Retail Grp., Inc.*, No. 14-CV-05352-MEJ, 2016 WL 1161453, at *11 (N.D. Cal. Mar. 24, 2016) (holding that

the “process by which the parties reached their settlement,” which included “formal mediation . . . weigh[ed] in favor of preliminary approval”); 4 Newberg on Class Actions § 13:14. This settlement thus is “the result of good-faith bargaining at arm’s length, without collusion.” *Jiffy Lube*, 927 F.2d at 159.

3. The Settlement Has No Obvious Deficiencies And Does Not Improperly Grant Preferential Treatment To Plaintiff.

In connection with the settlement, Plaintiff will request a service award intended to recognize the time and effort she put into participating in this litigation by, among other things, collecting documents in response to requests for production, preparing and sitting for deposition and participating in the mediation. (Downing Decl. ¶ 11; Baker Dec. *in passim*.) NSL has agreed not to object to a service award to Plaintiff of up to \$15,000, subject to the Court’s approval. (Agreement § III.—I.) This service award is appropriate and justified as part of the overall settlement. *See, e.g., Deloach v. Philip Morris Cos., Inc.*, No. 1:00CV01235, 2005 WL 1528783, at *3 (M.D.N.C. June 29, 2005) (permitting service payments).

Additionally, no later than thirty days before the deadline for Settlement Class members to opt-out and object to the settlement, Plaintiff’s counsel will file a motion for an award of reasonable attorneys’ fees, not to exceed \$833,333, and reimbursement of litigation costs and expenses, not to exceed \$35,000. (*See* Agreement § III.—H.) Counsel’s fee request will be consistent with those routinely awarded in class action settlements. *See* 5 Newberg on Class Actions § 15:73 (“[R]egardless of whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery.”); *In re Rite Aid Corp. Sec. Litig.*, 146 F.Supp.2d 706, 735 (E.D. Pa. 2001) (examining 289 class action settlements ranging from under \$1 million to \$50 million and finding that the average attorneys’ fees award percentage is 31.71% and median is one-third).

B. Conditional Certification Of The Settlement Class Is Appropriate.

In connection with her request for preliminary approval of the settlement, Plaintiff further requests that the Court conditionally certify the proposed Settlement Class. Conditional or preliminary class certification is appropriate at this stage when the Settlement Class has not been previously certified and the Court makes a “preliminary determination that the proposed class satisfies the criteria set out in Rule 23(a) and at least one of the subsections of Rule 23(b).” MCL § 21.632; 4 Newberg on Class Actions § 13:18. Here, Plaintiff asks the Court to preliminarily certify the Settlement Class, which consists of “[e]ach person throughout the United States who was: (1) listed as a credit reference on a student loan application; and (2) called by NSL on a cellular telephone number using dialing technology manufactured and/or licensed by Interactive Intelligence.”⁶ (Agreement § II, ¶ 28.)

1. The Settlement Class Satisfies The Requirements Of Rule 23(a).

Rule 23 “contains an implicit threshold requirement that the members of a proposed class be ‘readily identifiable’” or “ascertainable.” *Soutter v. Equifax Info. Servs., LLC*, 307 F.R.D. 183, 196 (E.D. Va. 2015). And Rule 23(a) explicitly sets forth four prerequisites for class certification eligibility: “(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a). Here, the proposed Settlement Class satisfies all of these criteria.

Ascertainability. NSL is in the process of compiling the names, telephone numbers and addresses, where available, of the persons in the Settlement Class so as to provide notice. NSL

⁶ “Excluded from the class definition are: (1) persons who were listed as credit references on student loan applications and who also have student loans serviced by NSL; (2) persons or entities included within the class defined in the Final Approval Order (Dkt. #177) in *Johnson v. Navient Solutions, Inc.*, Case No.: 1:15-cv-0716 (S.D. Ind.); and (3) any employees, officers, directors of NSL, any attorneys appearing in this case and any judge assigned to hear this action.” (Agreement § II, ¶ 28.)

anticipates that this information will be available for the majority of the members of the Settlement Class.⁷ The members of the Settlement Class are therefore “readily identifiable.” *Soutter*, 307 F.R.D. 183, 196 (E.D. Va. 2015) (explaining that “plaintiff need not be able to identify every class member at the time of certification” (quotation marks omitted)).

Numerosity. The Settlement Class here consists of approximately 300,000 members and, thus, “is so numerous that joinder of all members is impracticable.” *See* Fed. R. Civ. P. 23(a)(1); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 425 (4th Cir. 2003) (concluding that class of 1,400 members “easily satisfied Rule 23(a)(1)’s numerosity requirement”). (*See also* Downing Decl. ¶ 19.)

Commonality. The Settlement Class satisfies Rule 23(a)(2)’s commonality requirement because “‘common questions [are] dispositive and overshadow other issues.’” *DiFelice v. US Airways, Inc.*, 235 F.R.D. 70, 78 (E.D. Va. 2006) (quoting *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 146 (4th Cir. 2001) (“Minor differences in the underlying facts of individual class members’ cases do not defeat a showing of commonality where there are common questions of law.”)); *Hewlett v. Premier Salons Int’l, Inc.*, 185 F.R.D. 211, 216 (D. Md. 1997)). The common questions of law and fact here include whether NSL used an ATDS to place the telephone calls at issue to the persons in the Settlement Class. (*See* ECF #4 at 5.) These common questions satisfy Rule 23(a)(2).

Typicality. “[T]he typicality prerequisite focuses on the general similarity of the named representative’s legal and remedial theories to those of the proposed class.” *Soutter*, 307 F.R.D. at 208. Here, Plaintiff’s claims and defenses are “‘typical of the claims or defenses of the class,’” because she alleges that NSL called her as a reference for a third-party’s student loan using an ATDS without her prior express consent, and the Settlement Class likewise consists of

⁷ To address those instances where address information is unavailable, the Settlement Administrator will also publish notice of the settlement in two separate national editions of USA Today and one national edition of the U.S. Wall Street Journal. (Agreement § III.—E.—2.)

persons who were also listed as references on third-parties' student loans and who, Plaintiff alleges, were also called using an ATDS. *See id.* (quoting *Deiter v. Microsoft Corp.*, 436 F.3d 461, 467 (4th Cir. 2006) (quoting Fed. R. Civ. P. 23(a)(3))). Also, the Settlement Class, by definition, is limited to references who were called using the same equipment used to call Plaintiff. Thus, Plaintiff's claims and those of the Settlement Class are based on the same legal theories and the same fact pattern. *See Soutter*, 307 F.R.D. at 208 (explaining that "the concepts of commonality and typicality . . . 'merge' when the class representative's claims are 'typical' in the same way the class claims are 'common'"). Therefore, the typicality requirement is satisfied here, too.

Adequacy. Rule 23(a)(4) permits class certification where "the representative parties fairly and adequately protect the interests of the class." A class representative satisfies this requirement if he or she is "part of the class and possess the same interest and suffer[ed] the same injury as the class members." *Gunnells*, 348 F.3d at 425 (quotation marks omitted). Here, Plaintiff's interests are aligned with those of the Settlement Class because they possess the same interest in being vindicated for alleged injuries they suffered from the invasion of their privacy interests that allegedly resulted from NSL's calls. Additionally, however, adequacy requires that class counsel be "qualified, experienced, and able to conduct [the] litigation." *Soutter*, 307 F.R.D. at 212. Plaintiff's counsel here has experience prosecuting complex consumer class actions and, therefore, Rule 23(a)(4)'s adequacy requirements are satisfied. (*See* Downing Decl. ¶¶ 6-10; Turner Decl. ¶¶ 5-8.)

2. The Settlement Class Satisfies The Requirements Of Rule 23(b)(3).

The Settlement Class here should be conditionally certified because it also meets at least one of the three alternative requirements of Rule 23(b). Specifically, the Settlement Class may properly be certified under Rule 23(b)(3) because (1) "the questions of law or fact common to class members predominate over any questions affecting only individual members," and (2) "a class action is superior to other available methods for fairly and efficiently adjudicating the

controversy.” *Cape Coral Municipal Firefighters’ Retirement Plan v. Emergent Biosolutions, Inc.*, HQ, No. 16-CV-2625, 2018 WL 2840420, at *5 (D. Md. June 8, 2018) (quoting Fed. R. Civ. P. 23(b)(3)).

a. *Common Questions Of Law And Fact Predominate.*

The predominance inquiry “tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Emergent*, 2018 WL 2840420, at *5 (quoting *Amchem*, 521 U.S. at 623). Where “the liability issue is common to the class, common questions are held to predominate over individual ones.” *Id.* (quoting *Hewlett v. Premier Salons Int’l, Inc.*, 185 F.R.D. 211, 220 (D. Md. 1997)); *see also In re NII Holdings, Inc. Sec. Litig.*, 311 F.R.D. 401, 408 (E.D. Va. 2015).

“Considering whether ‘questions of law or fact common to class members predominate’ begins, of course, with the elements of the underlying cause of action.” *Id.* at *6. (quoting *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011)) (quotation marks omitted). Here, the elements of Plaintiff’s -- and thus the Settlement Class’s -- TCPA claims are: (1) that NSL made a call to a cellular phone using an ATDS, (2) to a person who did not provide “prior express consent.” *See Worsham v. Travel Options, Inc.*, No. JKB-14-2749, 2016 WL 4592373, at *6 (D. Md. Sept. 2, 2016), *aff’d*, 678 F. App’x 165 (4th Cir. 2017); 47 U.S.C. § 227(b)(1)(A)(iii). There is no dispute that NSL made calls to Plaintiff and the Settlement Class without their prior express consent, as they are non-borrower references. Thus, the question becomes whether the system used to make such calls constituted an ATDS. Because the definition of the Settlement Class is limited to non-borrower references who received a call from NSL using the same system used to call Plaintiff (*see* Agreement § II, ¶ 28), the factual and legal issues surrounding Plaintiff’s and the Settlement Class members’ claims are common. *See Amchem*, 521 U.S. at 625 (explaining that the “[p]redominance is a test readily met in certain cases alleging consumer or securities fraud”).

b. *A Class Action Is Superior To Other Methods Of Adjudicating This Dispute.*

The superiority inquiry considers whether a class action is “superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). In the settlement context, courts consider the following factors in determining whether this requirement is met: “(A) the class members’ interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; [and] (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum.” *See id.*; *Amchem*, 521 U.S. at 620 (explaining that, in the settlement context, courts need not consider “the likely difficulties in managing a class action” because it is not implicated).

Here, conditional certification of the Settlement Class under Rule 23(b)(3) is appropriate. Class members in TCPA cases where relatively small statutory damages are available “likely have little interest in controlling the litigation in this case.” *Krakauer v. Dish Network L.L.C.*, 311 F.R.D. 384, 400 (M.D.N.C. 2015); *see also* Fed. R. Civ. P. 23(b)(3)(A); *Gunnells*, 348 F.3d at 425; *Amchem*, 521 U.S. at 616–17. Nor is the “type of injury allegedly suffered by the class members . . . for example, a personal injury or death where a plaintiff would ordinarily have ‘a substantial stake in making individual decisions on whether and when to settle.’” *Krakauer*, 311 F.R.D. at 400 (quoting *Amchem*, 521 U.S. at 616). Further, to the extent individual claimants believe they can recover more in an individual suit, they may opt-out of this settlement and pursue their own actions separately. *See* Fed. R. Civ. P. 23(c)(2)(B)(v). (*See also* Agreement § III.—K.) But given the number of class members, “class-wide adjudication of the claims would be more efficient.” *Krakauer*, 311 F.R.D. at 400; *see also* *Gunnells*, 348 F.3d at 432–33. Indeed, “[a]djudicating these claims in one forum would provide flexibility, control, and consistency that would not exist with individual litigation.” *Krakauer*, 311 F.R.D. at 400 (citing

Fed. R. Civ. P. 23(b)(3)(C); *Gunnells*, 348 F.3d at 425). The Court should therefore conditionally certify the Settlement Class.

3. Plaintiff's Counsel Should Be Appointed To Represent The Settlement Class.

Attorneys appointed by the Court to serve as class counsel must “fairly and adequately represent the interests of the class.” Fed. R. Civ. P. 23(g)(1)(B). In determining whether counsel can do so, courts consider: (1) “the work counsel has done in identifying or investigating potential claims in the action,” (2) “counsel’s experience in handling class actions, other complex litigation, and claims of the type asserted in the action,” (3) “counsel’s knowledge of the applicable law,” and (4) “the resources counsel will commit to representing the class.” Fed. R. Civ. P. 23(g)(1)(C)(i). Here, Plaintiff’s counsel satisfies each of these criteria, as they have experience in class-action and complex litigation. (*See* Downing Decl. ¶¶ 6-10; Turner Decl. ¶¶ 5-8.) Plaintiff’s counsel should therefore be appointed to represent the Settlement Class here.

C. The Notice Plan Satisfies The Requirements Of Rule 23 And Due Process.

Pursuant to Rule 23(e), before approving a class action settlement, 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.” *See* Fed. R. Civ. P. 23(c)(2)(B). This means “individual notice to all members who can be identified through reasonable effort.” *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). Notice should be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). This is accomplished when the notice defines the class, describes the essential terms of the settlement and explains the procedures and deadlines for making a claim, opting out or objecting. *See* MCL 4th § 21.312.

Here, the proposed settlement includes a robust notice program to be administered by a well-regarded third-party claims administrator with significant experience in the administration of TCPA class actions. (Downing Decl. ¶ 18; Agreement § III.—E.) Under the program, within 60 days of the entry of a preliminary approval order, NSL will provide the Settlement Administrator with the names, addresses and telephone numbers for the Settlement Class members (as reflected in reasonably available computerized records of NSL). (Agreement § III.—E.) The Settlement Administrator will then provide the Settlement Class with notice by mail, publication, and a website within 90 days of entry of the preliminary approval order. (*Id.*) *See also In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 109–10 (D.N.J. 2012) (approving settlement using mailed notices that also directed class members to a website and phone number for more details).

Mail notice will be provided to all persons in the Settlement Class who can reasonably be identified and for whom address information can be secured, including through a reverse lookup process, as necessary. (*Id.*) A National Change of Address update will be done before mailing, and skip tracing will be performed for all returned direct mail. (*Id.*) The mail notice will include a tear-off claim form and will direct recipients to a settlement website to be established for additional information or to submit a claim online. (*Id.*) In addition, the Settlement Administrator will publish notice of the settlement in two separate national editions of USA Today and one national edition of the U.S. Wall Street Journal. (*Id.*) The Settlement Administrator will also establish and maintain the settlement website, on which the website notice, the Settlement Agreement, the preliminary approval order and any other materials the parties agree to include, or the Court directs the parties to include, will be posted. (*Id.*) The Settlement Administrator will additionally establish and maintain a toll-free telephone number, which will be identified on the mail notice, that Settlement Class members can call to receive more information regarding the settlement. (*Id.*)

This notice plan, therefore, complies with Federal Rule of Civil Procedure 23 and due process because, among other things, it informs Settlement Class members of: (1) the nature of the action; (2) the essential terms of the settlement, including the definition of the Settlement Class and the 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 Settlement 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; and (7) how to make inquiries and obtain additional information. *See* Fed. R. Civ. P. 23(c)(2)(B). (*See also* Agreement, *generally*.) The Court should therefore approve the notice program.

V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court enter the proposed preliminary approval order and: (1) grant preliminary approval of the parties' proposed settlement as "fair, reasonable, and adequate" under Rule 23(e)(2); (2) conditionally certify the Settlement Class pursuant to Rule 23(a), (b)(3); (3) appoint Plaintiff's counsel as counsel for the Settlement Class pursuant to Rule 23(g); (4) approve the notice plan as set forth in the Settlement Agreement pursuant to Rule 23(b)(3); and (5) set a date for a final fairness hearing and contingent deadlines.

Dated: June 19, 2018

By: /s/ William L. Downing

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CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2018, I will electronically file the foregoing with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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