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

TOMEKA BARROW and ANTHONY DIAZ, Individually and On Behalf of All Others Similarly Situated, Plaintiffs, v. JPMORGAN CHASE BANK, N.A., Defendant.	*	Civil Action File No. 1:16-cv-03577-AT

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND CERTIFICATION OF SETTLEMENT CLASS

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Plaintiffs Tomeka Barrow ("Barrow") and Anthony Diaz ("Diaz") (together, "Plaintiffs"), respectfully submit this memorandum in support of their unopposed motion for preliminary approval of class action settlement and certification of settlement class in this action. The terms of the Settlement are set forth in the Settlement Agreement and Release (hereinafter the "Agreement" or "Agr.") filed as Exhibit A to the Declaration of Abbas Kazerounian ("Kazerounian Decl.").

The proposed Settlement provides that JPMorgan Chase Bank, N.A. ("JPMC" or "Defendant") will pay the sum of $2,250,000 (the "Settlement Fund") (Agr. § III.C.1) in settlement of all claims of Plaintiffs and the approximately 242,359 Settlement Class Members (*see* Declaration of Jason A. Ibey ("Ibey Decl."), ¶ 9). In return for payment of the Settlement Fund, Plaintiffs and the Settlement Class will dismiss the action with prejudice and release and discharge Defendant and other related Released Parties from all claims relating to the Action with prejudice. Agr. §§ III.C.1; III.H.

Plaintiffs respectfully request that this Court: (1) conditionally certify the settlement class as fair, adequate, reasonable, and within the reasonable range of possible final approval; (2) appoint Plaintiffs as Class Representatives; (3) appoint Plaintiffs' counsel as Class Counsel; (4) preliminarily approve the notice program proposed by the parties; (5) approve the claim form and claims process described herein; (6) establish a procedure for settlement class members to submit claims, to

object to the Settlement or to exclude themselves from the settlement class and set deadlines for doing so; (7) pending final determination of whether the Settlement should be approved, stay all proceedings in this action except for those related to effectuation of the settlement; (8) enjoin the settlement class and their representatives from commencing or prosecuting against any of the released parties any action or proceeding asserting any of the released claims; and (9) schedule a final approval hearing.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In the Second Amended Complaint (Dkt. No. 19, "SAC"), Plaintiffs allege that in its efforts to collect on mortgage and home equity line of credit accounts since 2012, JPMC violated the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq*., ("TCPA") by calling cellular telephones via an "automatic telephone dialing system" and/or using an "artificial or prerecorded voice" without "prior express consent" (*id*. at § 227(b)(1)(A)), after the persons called had asked JPMC orally to stop calling. *See Osorio v. State Farm Bank, F.S.B*., 746 F.3d 1242, 1256 (11th Cir. 2014) (oral revocation of consent is permitted).

Plaintiffs contend that they and the proposed settlement class are entitled to statutory damages pursuant to the TCPA in the amount of $500 per violation of 47 U.S.C. § 227 *et seq*. and $1,500 per knowing and/or willful violation. [SAC, at ¶¶ 99 and 101.] JPMC has denied and continues to deny that it violated the TCPA,

denies all charges of wrongdoing or liability against it in the Action and denies that any class could be certified. Agr., § I.B.

To reach a settlement, the Parties participated in two (2) mediation sessions, one before the Honorable Morton Denlow (Ret.) and the second before Bruce Friedman (JAMS). Agr. § I.C.; Kazerounian Decl., ¶ 10. The Parties conducted both formal and information discovery, including written discovery requests and a confirmatory deposition pursuant to Rule 30(b)(6). Kazerounian Decl., ¶ 11.

II. THE SETTLEMENT

A. THE SETTLEMENT CLASS

The "Settlement Class" means the persons in the following definition:

> All persons in the United States to whom JPMorgan Chase Bank, N.A., or any affiliate or agent acting on its behalf, made one or more telephone calls to a cellular telephone through the use of an automatic telephone dialing system or a prerecorded or artificial voice on or after April 20, 2012, through the date of preliminary approval, regarding a mortgage or home equity line of credit account and who, prior to being called, orally requested that they not be called by JPMC.

Agr. § II.A.26; *see generally*, SAC, ¶¶ 42, 65 and 84.

The "Class Period" is the period during which Defendant is alleged to have placed the unlawful telephone calls to cell phones, ranging from April 20, 2012, through the date of entry of the Preliminary Approval Order. Agr. § II.A.26.

While JPMC contends that the settlement class cannot be identified using its

records, Plaintiffs proposed a process wherein JPMC would use certain keywords to search its records relating to mortgage and home equity line of credit accounts to identify the settlement class. To assist it in developing and implementing this search, JPMC retained Cornerstone Research ("Cornerstone"). Cornerstone is a financial consulting firm that provides analysis for litigation investigations. [https://www.cornerstone.com.]

Using this methodology, Plaintiffs believe the estimated size of the settlement class to be 242,359.[1] *See* Ibey Decl., ¶¶ 9-13. To arrive at this estimate, Cornerstone applied a keyword search of mortgage and home equity line accounts for phrases that would suggest revocation of consent to be called. Ibey Decl., ¶ 10. The identified accounts were then limited to calls to a cell phone using a dialer subsequent to the oral requests for calls to stop. *Id*. at ¶ 11. This information was confirmed by a deposition of Cornerstone. *Id*. at ¶ 7.

B. SETTLEMENT PAYMENT

1. Monetary Award to Class Members

Defendant has agreed to pay $2,250,000 as full and complete consideration for the Settlement. The non-reversionary Settlement Fund will be used to make payments to claiming Settlement Class Members, any Redistribution, and the

[1] The actual number could be either higher (if an oral request that calls stop was not documented in the account notes) or lower (if the search terms used identified an instance where no oral request that calls stop was made).

Settlement Costs as defined in the Agreement. Agr. §§ II.A.28; III.C.1.

2. Non-Monetary Award

Class Members (and non-Class Members) will also benefit from the deterrent effect of this TCPA Settlement. *See Lo v. Oxnard European Motors, LLC*, 2012 WL 1932283, *5 (S.D. Cal., May 29, 2012); *see also Texas v. American Blast Fax, Inc.*, 121 F. Supp. 2d 1085, 1090 (W.D. Tex. 2000) (noting the TCPA's statutory damages provision designed to address and deter the overall public harm caused by such conduct); Kazerounian Decl., ¶ 14.

C. CLASS NOTICE

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). As such, "[t]he adequacy of class notice is measured by reasonableness," *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, Settlement Class Members will be notified of the Settlement through the following methods: E-Mail Notice (Exhibit B to Agr.), Mail Notice (Exhibit C to Agr.), Publication Notice (Exhibit E), and Website Notice (Exhibit D to Agr.). Agr. §§ II.A.5.; III.E. Class notice is to be provided within sixty (60) days of preliminary approval. Agr. §

III.B.1. This satisfies Due Process.

1. E-Mail Notice/Mail Notice

Within thirty (30) days following Preliminary Approval, JPMC will provide the Claims Administrator with a Class List. *See* Agr. § III.D.

The Claims Administrator shall rely on e-mail ("E-Mail Notice") to notify Settlement Class Members (Agr. § III.E.1.a) where available.[2] Direct mail ("Mail Notice") may then be used to provide notice to those persons if the Claims Administrator cannot locate an e-mail address through the reverse look-up process, but is able to locate a mailing address, or if the Claims Administrator learns that an e-mail was undeliverable. Agr. § III.E.1.b. To the extent necessary, the Claims Administrator will perform a search using the National Change of Address database and update its records prior to mailing. *Id*. The E-Mail Notice shall have a return receipt or other such function that permits the Claims Administrator to reasonably determine whether emails have been delivered and/or opened. Agr. § III.E.1.a. E-Mail Notice also shall have a hyperlink that Class Member recipients may click and be taken to a landing page on the Settlement Website. *Ibid.*

[2] JPMC has email addresses for approximate 15% of the Settlement Class members for whom JPMC has cellular telephone records. Ibey Decl., ¶ 12. Courts "are beginning to embrace the belief that internet notice may be preferable to traditional methods of publication notice." *Making Class Actions Work: The Untapped Potential of The Internet*, 69 U. Pitt. L. Rev. 727, 733-734.

Class notice by email here is appropriate and complies with due process, especially when combined with other forms of notice described below. *See Morey v. Louis Vuitton N. Am., Inc*., 2014 U.S. Dist. LEXIS 3331, *7 (S.D. Cal. Jan. 9, 2014) (finally approving settlement with notice provided in four ways: email, mail, publication and website to approximately 327,718 class members. Email notice was sent to all class members with a valid email address, and mail notice was sent to all class members with a valid mailing address); *Family Med. Pharm., LLC v. Trxade Grp., Inc.*, 2016 U.S. Dist. LEXIS 153272, at *26-27 (S.D. Ala. Nov. 4, 2016) ("the Court finds that the email notice, post card notice, and other forms of class notice are reasonable, adequate and sufficient notice to the class members and meet the requirements of due process").

2. Publication Notice

To provide notice to Settlement Class Members for whom address information is unknown (Ibey Decl., ¶ 13), notice will be provided through a nationwide print publication in *People* magazine designed and conducted by the Claims Administrator. Agr. § III.E.1.c.; Declaration of Carla A. Peak ("Peak Decl."), ¶ 11. The Publication Notice is attached to the Agreement as Exhibit E.

3. Settlement Website and Toll-Free Number

The Claims Administrator will establish and maintain the Settlement Website dedicated to the Settlement. Agr. § III.E.2. The Website Notice (Exhibit D

to Agr.), the Claim Form (Exhibit A to Agr.), a copy of this Agreement, the Preliminary Approval Order and the Second Amended Complaint, in addition to other relevant case documents, will be available on the Settlement Website. Agr. § III.E.2. The Settlement Website will provide for online submission of Claim Forms (*id*. at III.E.1.) and W-9 forms (*id*. at. III.F.3.). Anyone can obtain information about the Settlement through the automated toll-free phone number. *Id.* at § III.E.3.

D. CLAIM PROCESS

Class Members will be paid on a claims-made, *pro rata* basis. Agr. §§ III.F. Each Settlement Class member who submits a valid claim (*id*. at § III.F.3) will be paid a Settlement Award, which shall be calculated by dividing the amount remaining in the Settlement Fund (after deducting all Settlement Costs, which includes attorneys' fees) by the total number of valid claims. Agr. at § II.A.28.

To make a claim, a Settlement Class member must submit a valid and timely Claim Form, substantially in the form attached as Exhibit A to the Agreement (*id*. at § III.F.2 and 3) and also provide a completed W-9 form (*id*. at § III.F.3). The Claim Form and W-9 form must be submitted online or postmarked on or before 90 days from the Notice Deadline. *Id.* at §§ III.B.1; III.E.1. Only one valid Claim Form will be honored per Settlement Class member per cellular telephone number called, regardless of the number of calls received. *Id.* at § III.F.1. JPMC has the right to review and research submitted claims and suggest denial; and if the Parties

cannot agree on whether to approve a claim, they will request a ruling by the Court at the Final Approval Hearing. Agr. § III.F.3.

E. OPPORTUNITY TO OPT OUT AND OBJECT

Settlement Class members will be permitted to exclude themselves from the Settlement by sending a written letter to the Claims Administrator by the Opt-Out and Objection Deadline, which shall be 90 days following the Notice Deadline. *Id.* at § III.K.1. Exclusion requests must: (a) be signed by the person in the Settlement Class who is requesting exclusion; (b) include the full name and address of the person in the Settlement Class requesting exclusion; and (c) include the following statement: "I/we request to be excluded from the settlement in the Barrow action." *See* Agr. at § III.K.1.

Settlement Class Members may object to the Settlement, and to do so they must file a written objection with the Court within 90 days following the Notice Deadline. *Id.* at § See Agr. § III.B.1. The objection must also be mailed to counsel for the Parties and postmarked no later than the last day to file the objection. *Id.* at § III.L.2. Any Settlement Class member may appear at the Final Approval Hearing to object to the proposed Settlement and/or to the application of Class Counsel for an award of attorneys' fees and costs and/or a Service Awards, but only if the Settlement Class member has first filed a written objection meeting the requirements described in Section III.L. of the Agreement.

F. SCOPE OF RELEASE

The scope of Release by all Settlement Class members (other than those who validly and timely elect not to participate in the Settlement), is in line with the scope of the Plaintiffs' allegations in the Second Amended Complaint. Only claims under the TCPA and similar federal or state laws involving the making, placing or initiating calls using an automatic telephone dialing system and/or an artificial or prerecorded voice are within the scope of the Release. *See* Agr. § III.H.

G. TERMINATION OF SETTLEMENT

JPMC may terminate the Agreement pursuant to Section III.O (Agr. § III).

H. PAYMENT OF NOTICE AND ADMINISTRATION COSTS

The Agreement provides that all reasonable costs and expenses associated with giving notice to the Settlement Class Members and for administration of the Settlement shall be deducted from the Settlement Fund prior to paying any Settlement Awards to Settlement Class Members. *See* Agr. § II.A.28.

I. CLASS REPRESENTATIVES' APPLICATION FOR SERVICE AWARD

The proposed Settlement contemplates that Class Counsel will request Service Awards in the amount of $5,000 to be distributed from the Settlement Fund to each of the two named Plaintiffs (Tomeka Barrow and Anthony Diaz), subject to Court approval, and shall be paid at the same time as the attorneys' fees and costs payments to Class Counsel. Agr. § III.J. *See Morey*, 2014 U.S. Dist.

LEXIS 3331 at *31 (approving $5,000 service award). Court approval of the Service Awards or their amount is not a condition of the Settlement. Agr. § III.J.

J. CLASS COUNSEL'S APPLICATION FOR ATTORNEYS' FEES AND COSTS

The proposed Settlement contemplates that Class Counsel may apply to the Court for an award of attorneys' fees of up to 30% of the Settlement Fund ($675,000) to be distributed from the Settlement Fund, as well as actual litigation expenses approved by the Court which are not expected to exceed $40,000. Agr. § III.I; Kazerounian Decl., ¶ 19. *See Wreyford v. Citizens for Transp. Mobility, Inc*., 2014 U.S. Dist. LEXIS 188522, at *5 (N.D. Ga. Oct. 16, 2014) (awarding 33 1/3% of the $325,000 settlement fund as attorneys' fees). Court approval of Class Counsel's request for fees or costs, or their amount, is not a condition of the Settlement. Agr. § III.I. No interest will accrue on such amounts. *Id*. JPMC reserves the right to oppose such motion. *Id*.

K. REDISTRIBUTION AND CY PRES DISTRIBUTION

Settlement checks shall remain valid for 120 days from date of issuance. If checks remain uncashed more than 180 days, the amounts of such checks will be redistributed on a *pro rata* basis to the eligible Settlement Class Members who cashed their first check, where the residual amount of uncashed checks is sufficient to pay each eligible recipient $10.00. Agr. §§ III.F.1. and III.G.2. If there is any money remaining in the Settlement Fund after payment of the Settlement Costs,

including awards to Settlement Class Members and any Redistributions, such monies will be distributed to one or more non-profit charitable organizations selected by the Parties and approved by the Court. *Id*. § III.G.3.

III. LEGAL STANDARD FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT

"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) (Duffey, Jr., J.) (quoting Fed. R. Civ. P. 23(e)(2)). The purpose of the Court's preliminary evaluation of the settlement is to determine whether it is within the "range of reasonableness," and thus whether notice to the class of the terms and conditions of the settlement, and the scheduling of a formal fairness hearing, are worthwhile. *See* 4 Herbert B. Newberg, Newberg on Class Actions § 11.25 *et seq*., and § 13.64 (4th ed. 2002 and Supp. 2004).

"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). The first step in the process is a preliminary fairness determination, which requires "counsel submit the proposed terms of settlement" to the Court so that it can 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). 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.* The second step in the process is a final fairness hearing. *See* Manual for Complex Litigation, § 21.633-34.

It is well established that "[t]he factors considered are (1) the influence of fraud or collusion on the parties' reaching a settlement, (2) 'the likelihood of success at trial,' (3) 'the range of possible recovery,' (4) 'the complexity, expense[,] and duration of litigation,' (5) 'the substance and amount of opposition to the settlement,' and (6) 'the stage of proceedings at which the settlement was achieved.'" *Melanie K.*, 2015 WL 1799808, at *2 (quoting *Bennet v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984)). The judgment of experienced counsel is also to be considered. *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 691 (N.D. Ga. 2001) (Story, J.). Courts should exercise their discretion to approve settlements "in recognition of the policy encouraging settlement of disputed claims." *In re Prudential Sec. Inc. Ltd. Partnerships Litig.*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995).

Preliminary approval of the settlement should be granted if there are no "reservations about the settlement, such as unduly preferential treatment of class representatives or segments of the class, inadequate compensation or harms to the classes, the need for subclasses, or excessive compensation for attorneys." *Manual*

§ 21.632, at 321 (4th ed. 2004). This proposed settlement satisfies those standards.

IV. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE AND SHOULD BE PRELIMINARILY APPROVED

A. LIABILITY IS HIGHLY CONTESTED AND BOTH SIDES FACE SIGNIFICANT CHALLENGES IN LITIGATING THIS CASE

JPMC contests the claims asserted by Plaintiffs in this Action. *See* Dkt. No. 25; *see also* Agr. § I.B. While both sides strongly believe in the merits of their respective cases, there are risks to both sides in continuing the litigation. Class Counsel understands there are uncertainties associated with class action litigation and that no one can predict the outcome of the case (Kazerounian Decl., ¶ 20), as some courts have declined to certify TCPA class actions, *see e.g.*, *Fitzhenry v. ADT Corp*., 2014 U.S. Dist. LEXIS 166243, at *22 (S.D. Fla. Nov. 3, 2014).

Here, the Court has not certified this case as a class action. However, if the Action were to continue, challenges would be made to the propriety of class certification, and additional substantive challenges to the claims might also be raised. For example, ACA International filed an appeal in the D.C. Circuit from the FCC's 2015 Omnibus Order, arguing, among other things, that the FCC unlawfully expanded the definition of an ATDS (*see ACA Int'l, et al. v. FCC*, No. 15-1211 (D.C. Cir. Nov. 25, 2015)), and no ruling has been issued. Also, the real possibility of losing at trial further makes this Settlement an acceptable compromise. *See generally*, *Sabet v. Olde Discount Corp.*, 2001 WL 1246860, at *3 (Ariz. Sup. Ct.

2001) (internal citations omitted.)

In considering the Settlement, Plaintiffs and Class Counsel carefully balanced the risks of continuing to engage in protracted and contentious litigation against the benefits to the Settlement Class, including the significant Settlement Fund and the deterrent effects it would likely have. Kazerounian Decl., ¶¶ 14 and 20; Swigart Decl. ¶¶ 8 and 10;[3] Barrow Decl. ¶ 8; Diaz Decl. ¶ 8. 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).

Similarly, JPMC must recognize that if this case were certified as a class action and Plaintiffs prevailed at trial, the potential amount of damages could be substantially higher than the Settlement agreed upon here. Plaintiffs would contend that damages should be trebled in light of calls after oral revocation of consent (*see* 47 U.S.C. § 227(b))(3)). On the other hand, JPMC would likely argue that any violations were not willful due to its policy in place at the time to honor verbal or written cease and desist requests regarding debt collection phone calls.

[3] "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).

Ibey Decl., ¶ 14. The Settlement avoids that risk. Due to the costs and risks to both sides, and delays of continued litigation, the Settlement presents a fair and reasonable alternative to continuing to pursue the action as a class action for the alleged violations of the TCPA. Indeed, this Settlement is similar to the TCPA action in *Abdeljalil v. GE Capital Corp*., 306 F.R.D. 303, 306 (S.D. Cal. 2015), where a keyword search was suggested to identify class members; that action was settled after class certification and finally approved, Kazeroiunian Decl., ¶ 26(gg).

B. THE $2,250,000 FUND PROVIDES A FAIR AND SUBSTANTIAL BENEFIT

As set forth above, JPMC will provide for a $2,250,000 Settlement Fund to be used to pay all claiming Settlement Class Members, any Redistribution, and all Settlement Costs. Agr. § III.C.1. Class Counsel estimate that the individual Settlement Class Members award will be approximately $101 per claim based on an anticipated claims rate of 5%.[4] *See* Kazerounian Decl., ¶ 17; Exhibit B to Kazerounian Decl. (indicating a 5.7% claims rate in *Wojcik v. Buffalo Bills, Inc*., No. 8:12-cv-02414 (M.D. Florida).

Thus, the settlement award that each member of the Settlement Class will receive is fair, appropriate, and reasonable given the purposes of the TCPA and in

[4] $2,250,000 (Settlement Fund) - $675,000 (attorneys' fees) – $40,000 (litigation costs) - $10,000 (Service Awards) – $296,571 (notice/administration expenses, estimated) = $1,228,429. $1,228,429 / 12118 (5% of Settlement Class Members) = approximately $101.37. If 10% of the Settlement Class Members were to submit a valid claim, the estimated individual recovery would be approximately $50.68.

light of the anticipated risk, expense, and uncertainty of continued litigation. *See, e.g., Wojcik v. Buffalo Bills Inc*., No. 8:12-cv-02414-SDM-TBM (M.D. Florida August 25, 2014) (awarding a gift card valued at $57.50 to $75.00 for each class member[5]) [Exhibit C to Kazerounian Decl.]; *Amadek v. Capital One Fin. Corp. (In re Capital One Tel.* Consumer *Prot. Act Litig.)*, 80 F. Supp. 3d. 781, 787 (N.D. Ill 2015) (awarding $34.60 per claiming class member).

The purpose of the TCPA is to protect the privacy interests of telephone subscribers by placing restrictions on unsolicited, automated telephone calls. S. Rep. No. 102-178, at 6 (1991), as reprinted in 1991 U.S.C.C.A.N. 1968, 1973. Although the TCPA provides for statutory damages of $500 for each negligent violation and $1,500 for each willful violation, it is well-settled that a proposed settlement may be acceptable even though it amounts to only a small percentage of the potential recovery that might be available to the class members at trial. *See In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 460 (E.D. Pa. 2000) ("that a proposed settlement constitutes a relatively small percentage of the most optimistic estimate does not, in itself, weigh against the settlement; rather, the percentage should be considered in light of strength of the claims").

[5] *See Knutson v. Schwan's Home Serv.,* 2014 U.S. Dist. LEXIS 99637, at *12 (S.D. Cal. July 14, 2014) (recognizing "[t]he tiered claim amounts [in *Wojcik*] ranged from merchandise debit cards in the amount of $57.50 to $75.00.").

C. THE SETTLEMENT WAS REACHED AS THE RESULT OF ARM'S-LENGTH NEGOTIATION WITH THE ASSISTANCE OF MEDIATORS

The proposed Settlement is the result of a series of several arm's length negotiations since early 2016.[6] The Parties participated in two mediation sessions before respected mediators. Agr. § I.C. At the second mediation, the Parties agreed to a settlement for this Action, subject to further negotiations and the approval of the Court. Kazerounian Decl., ¶¶ 10-12. The time and effort spent on settlement negotiations, as well as the time spent in mediation militate in favor of preliminary approval of the proposed Settlement, as they strongly indicate there was no collusion. *See 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."); *see also*, *Johnson v. Brennan*, 2011 WL 1872405, at *1 (S.D.N.Y. May 17, 2011).

D. EXPERIENCED COUNSEL HAVE DETERMINED THAT THE SETTLEMENT IS APPROPRIATE AND FAIR TO THE CLASS

The Parties are represented by counsel experienced in class action litigation. Class Counsel have extensive experience in class actions, in particular under the TCPA. Kazerounian Decl., ¶¶ 22-54; Swigart Decl., ¶¶ 11-16. Similarly, Counsel for JPMC have extensive experience based upon a long track record in class action

[6] The claims of Mr. Diaz were added to this Action on March 21, 2017 (Dkt. No. 19), following voluntary dismissal of his prior suit in *Diaz v. JPMorgan Chase Bank* ("*Diaz*") that was commenced on April 20, 2016. Kazerounian Decl., ¶ 9.

cases (*see* http://www.stroock.com/people/JStrickland; https://www.stroock.com/people/arao). Class Counsel believe that under the circumstances, the proposed Settlement is fair, reasonable and adequate and in the best interests of the Class Members. *See* Kazerounian Decl., ¶¶ 20-21; Swigart Decl., ¶¶ 8 and 10.

E. THE COURT SHOULD PRELIMINARILY CERTIFY THE CLASS FOR PURPOSES OF SETTLEMENT

Courts have long acknowledged the propriety of class certification for purposes of class action settlements. *See In re Wireless Facilities*, 253 F.R.D. at 610 ("Parties may settle a class action before class certification and stipulate that a defined class be conditionally certified for settlement purposes"). Certification of a class for settlement purposes requires a determination that the requirements of Rule 23 are met. *Id*. Certification of a settlement class is appropriate here because the action meets the requirements of Rule 23(a) and Rule 23(b)(3).

1. The Proposed Class Is Sufficiently Numerous

The Settlement Class here consists of approximately 242,359 Settlement Class Members (Ibey Decl., ¶ 12), which satisfies numerosity under Rule (a)(1); *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986).

2. The Commonality Requirement Is Satisfied

Plaintiffs' claims present several questions of law and fact that are common to all members of the Class for settlement purposes, including: (1) whether JPMC

called "cellular" telephone numbers (2) for debt collection purposes on mortgage or home equity line accounts; (3) using an ATDS [47 U.S.C. § 227(a)(1)] or an artificial or prerecorded voice; (4) after an oral request for JPMC to stop calling as documented in JPMC's business records (or in other words, call made without the recipient's "express consent" (47 U.S.C. § 227(b)(1)(A)(iii)). *See* SAC, ¶ 89.

3. The Typicality Requirement Is Satisfied

For purposes of settlement, Plaintiffs' claims are typical of the claims of the whole class because they arise from the same factual basis – (i.e. debt collection calls made to Plaintiffs on certain types of accounts using autodialing equipment, after JPMC had been orally requested to stop calling) and are based on the same legal theory as applies to the Class as a whole, i.e. that the calls violated the TCPA. SAC, ¶ 86; *see Gehrich v. Chase Bank United States*, 316 F.R.D. 215, 224 (N.D. Ill. 2016) ("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.") Therefore, the typicality is satisfied.

4. The Adequacy Requirement Is Satisfied

Rule 23(a)(4) is satisfied if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Counsel for a plaintiff must be "qualified, experienced, and generally able to conduct the proposed litigation," and the plaintiff may 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).

Plaintiffs and their counsel have no known conflicts of interest with other Settlement Class Members because, for purposes of the Settlement, Plaintiffs' claims are virtually identical to those of other Settlement Class Members allegedly called without their consent after oral revocation. *See* Barrow Decl., ¶ 14; Diaz Decl., ¶ 14; Kazerounian Decl., ¶ 18; Swigart Decl., ¶ 9.

Plaintiffs and their counsel have diligently prosecuted this action since September 23, 2016 (and even before that time beginning with *Diaz*, Kazerounian Decl., ¶ 7), kept in contact with counsel for JPMC while it developed and implemented the search described above, and the parties participated in two mediation sessions. Agr. § I.C.; Kazerounian Decl., ¶¶ 8-11; Ibey Decl., ¶ 12, 13. Plaintiffs and their counsel also share the common goal of protecting and improving consumer and privacy rights. *See* Barrow Decl., ¶ 15; Diaz Decl., ¶ 15; Kazerounian Decl., ¶¶ 8-14; Swigart Decl., ¶¶ 8 and 14. Lastly, Plaintiffs' counsel all have extensive experience in litigating TCPA class actions. Kazerounian Decl., ¶¶ 22-54; Swigart Decl., ¶¶ 11-14. Therefore, Rule 23(a)(4) is satisfied.

5. Common Questions Predominate

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).

Here, the central legal issue is whether the calls made by JPMC using an ATDS or artificial or prerecorded voice violated the TCPA after JPMC received an oral request to stop calling, which was documented in JPMC's records. 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)."); *Malta v. Fed. Home Loan Mortg. Corp.*, 2013 U.S. Dist. LEXIS 15731, at *10 (S.D. Cal. Feb. 4, 2013) ("The central inquiry is whether Wells Fargo violated the TCPA by making calls to the class members. Accordingly, the predominance requirement is met."); *see also C-Mart, Inc. v. Metropolitan Life Ins. Co.*, 299 F.R.D. 679, 691 (S.D. Fla. 2014).

For purposes of settlement, the proposed Settlement Class Members' claims all stem from the same factual circumstances, specifically that debt collection calls on mortgage or home equity line account were made by JPMC to between April 20, 2012, and the date of preliminary approval, allegedly using autodialing equipment or an artificial or prerecorded voice message, after the persons called had orally requested that JPMC stop calling. *See* Agr. § II.A.26; *see generally, Abdeljalil*, 306 F.R.D. at 308. The Plaintiffs all seek the same remedies of statutory damages. [SAC, ¶ 87.] Under these circumstances, the commonality requirement is satisfied for purposes of certifying a settlement class.

6. The Superiority Requirement Is Satisfied

To determine whether the superiority under Rule 23(b)(3) is satisfied, a court must compare a class action with alternative methods for adjudicating the parties' claims. Ordinarily, consideration of the factors listed in Rule 23(b)(3) supports the conclusion that, for purposes of a settlement class, certification is appropriate; however, when a court reviews a class action settlement, the fourth factor does not apply, *see Strube v. Am. Equity Inv. Life Ins. Co.*, 226 F.R.D. 688, 697 (M.D. Fla. 2005) (Rule 23(b)(3)(C) and (D) factors are "'conceptually irrelevant in the context of settlement'") (citation omitted). In deciding whether to certify a settlement class, a district court "need not inquire whether the case, if tried, would present intractable management problems." *Amchem Prods. Inc. v.*

Woodward, 521 U.S. 591, 620 (1997). Further, "[w]ith the settlement in hand, the desirability of concentrating the litigation in one forum is obvious…" *Elkins v. Equitable Life Ins. of Iowa*, 1998 WL 133741, at *20 (M.D. Fla. Jan. 27, 1998).

Here, the Rule 23(b)(3) factors favor class certification. *See Malta*, 2013 U.S. Dist. LEXIS 15731 at *11. There is only one other similar action against JPMC is *Newkirk v. JP Morgan Chase Bank, N.A.*, U.S.D.C., M.D. Fla., No. 8:17-cv-00630-RAL-ASS, filed on March 16, 2017, which has an April 27, 2018, discovery cut-off, and is set for a pretrial conference in August. [Exhibit A to Ibey Decl.] Notably, it is unlikely that many additional individual actions will be filed because of the small individual claims of Class Members (*Palm Beach Golf Ctr.-Boca, Inc. v. Sarris*, 311 F.R.D. 688, 699 (S.D. Fla. 2015)) and because consumers find individual TCPA actions complex and time consuming (*see Mainstream Mktg. Servs. v. FTC*, 284 F. Supp. 2d 1266, 1273 (D. Colo. 2003)). The superiority requirement is therefore satisfied.

F. CLASS REPRESENTATIVES AND CLASS COUNSEL

For settlement purposes, Plaintiffs (Barrow and Diaz) should be appointed as Class Representatives, and Abbas Kazerounian (Kazerouni Law Group, APC) and Joshua B. Swigart (Hyde & Swigart) should be appointed as Class Counsel for Plaintiffs and for all other purposes of the Settlement. Agr. § III.B.1.

G. KURTZMAN CARSON CONSULTANTS AS CLAIMS ADMINISTRATOR

The Parties have agreed upon and propose that the Court appoint Kurtzman Carson Consultants ("KCC") to serve as the Claims Administrator. Agr. § II.A.24. KCC specializes in providing administrative services in class action litigation and has extensive experience in administering consumer protection and privacy class action settlements. Peak Decl., ¶¶ 3-4.

H. A FINAL APPROVAL HEARING SHOULD BE SCHEDULED

Plaintiffs request that the formal Final Approval Hearing or Fairness Hearing be scheduled no earlier than thirty (30) days after the Opt-Out and Objection Deadline to allow sufficient time for providing class notice as well as for objections, exclusion requests and submission of claims. Agr. § III.B.1.

VI. CLASS ACTION FAIRNESS ACT NOTICE

JPMC is responsible for notice required by 28 U.S.C. § 1715. Agr. § III.E.4.

VII. CONCLUSION

In sum, Plaintiffs respectfully request that the Court grant this unopposed Motion.

Dated: February 23, 2018

Respectfully submitted,
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L.R. 7.1(D) CERTIFICATION

I hereby certify that this filing has been prepared with one of the font and point selections approved by the Court in L.R. 5.1(C)—in this case, Times New Roman, 14-point font.

/s/ Abbas Kazerounian

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2018, I filed the foregoing with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to all counsel of record.

/s/ Abbas Kazerounian