UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

TONI SPILLMAN, Individually and as representative of the Class	* CIVIL ACTION NO. 10-349-BAJ-SCR *
vs.	* JUDGE BRIAN JACKSON *
DOMINO'S PIZZA LLC and RPM PIZZA, LLC	* * MAGISTRATE JUDGE REIDLINGER

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MEMORANDUM IN SUPPORT OF UNCONTESTED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT, FORM, CONTENT AND MANNER OF NOTICE DISTRIBUTION AND PUBLICATION, AND CERTIFICATION FOR SETTLEMENT PURPOSES ONLY

MAY IT PLEASE THE COURT:

Plaintiff TONI SPILLMAN, on her behalf and on behalf of all others similarly situated, presents this Memorandum in Support of her Uncontested Motion for Preliminary Approval of Settlement Agreement, Form, Content, and Manner of Notice Distribution and Publication, and Certification for Settlement Purposes Only. RPM PIZZA, LLC ("RPM"), and DOMINO"S PIZZA LLC ("Domino's") (collectively "Defendants") do not object to this Motion and consent to the relief sought by plaintiff. The Settlement Agreement, attached as Exhibit A to the Motion, is incorporated herein by reference.

I. INTRODUCTION

This Motion seeks preliminary approval by the Court of an agreement reached by the parties to settle this class action case involving the transmission of pre-recorded message advertisements ("robo-calls") to the class members' cellular telephones. Plaintiff alleges the

Defendants violated the Telephone Consumer Protection Act (47 U.S.C. § 227) (TCPA) by transmitting calls to the class members' cellular telephones without their prior express consent.

The proposed class is comprised of recipients of robo-calls sent by or on behalf of RPM between the dates of May 20, 2006 and May 20, 2010. The total class is comprised of 1,152,617 members and is divided into sub-classes by the dates of receipt of the robo-calls. In particular, the Monetary Sub-Class is comprised of recipient of calls between May 20, 2009 and May 20, 2010 and is entitled to recover monetary settlement benefits. The Voucher Sub-Class includes recipients of calls between May 20, 2006 and May 19, 2009. They may receive a merchandise voucher entitling them to one free large, one topping pizza for in-store pick-up only.

While the Defendants deny the allegations made in this suit, the parties engaged in two full day mediation sessions, and numerous other negotiations, occurring over several months. The parties engaged in significant discussions to attempt resolution of this complex, and document intensive, litigation. The result of those negotiations was the attached Settlement Agreement (SA) (Exhibit A), which creates a $9.75 million settlement fund, in addition to other non-monetary settlement benefits.

The $9.75 million ($9,750,000) settlement fund is created to pay valid claims submitted by Class members, as well as the costs of notice, administrative expenses, a class representative incentive award, and attorneys' fees. Each class member within the Monetary

Sub-Class who submits a valid claim form will receive a $15.00 settlement payment. All class members within the Merchandise Voucher Sub-Class will receive a merchandise voucher for a free large, one topping pizza from an RPM-owned store, redeemable only for in-store pick-up. Further, the Defendants have agreed to injunctive relief. Thus, the SA provides substantial monetary, voucher, and prospective relief for the class members, as it compensates them for Defendants' past alleged conduct and prevents Defendants from sending additional robo-calls in the future without the recipient's prior express consent.

II. NATURE OF THE LITIGATION

Plaintiff filed this suit on May 20, 2010 in the Middle District of Louisiana (R.Doc. 1-1) after she and others received multiple robo-calls that Plaintiff alleges violated the TCPA. The initial Complaint was amended several times. The most recent, and operative, Complaint, is the Fourth Supplemental and Amending Class Action Complaint (R.Doc. 91-2).

During the course of the litigation, the parties engaged in significant discovery. In this regard, the parties exchanged tens of thousands of pages of documents. Besides the substantial document production, the parties participated in several depositions, including the corporate deposition of Domino's, as well as the depositions of third party vendors Call em All, LLC and Fidelity Communications Corporation. Leading up to this settlement, Class Counsel prepared for the corporate deposition of RPM, which was ultimately continued because of the settlement. Notably, Plaintiff contends that the corporate deposition of

Domino's was not completed, and the parties engaged in motion practice with respect to the scope of that deposition.

During this discovery, the parties agreed to participate in a mediation session. This initial session occurred in Boston, Massachusetts and was conducted by Professor Eric Green of Resolutions, LLC. After a full day of mediation, the parties did not reach an agreement. Thereafter, the parties agreed to return to Boston to participate in another session. That second session occurred but the parties again did not reach an agreement.

Despite the inability to reach an agreement at mediation, the parties continued to negotiate. Ultimately, the parties reached an agreement to the terms of the settlement. One of the last pieces to the agreement was the resolution of the inclusion of RPM's insurer, Argonaut Great Central Insurance Company ("Argonaut"), and the scope of its participation, in the settlement. After those issues were resolved, the SA was executed by all parties.

III. TERMS OF THE SETTLEMENT

The terms of the settlement are summarized briefly below. The full terms of the agreement are included in the Settlement Agreement, which is attached as Exhibit A.

A. Class Definition. The Settlement Class is defined as all recipients of prerecorded telephone messages on a cellular telephone transmitted by or on behalf of RPM or one or more of its Domino's franchised stores between the dates of May 20, 2006 and May 20, 2010, and as further subdivided into the following two sub-classes:

a. Monetary Sub-Class: All recipients of prerecorded telephone messages on a

cellular telephone transmitted by or on behalf of RPM or one or more of its Domino's franchised stores between the dates of May 20, 2009 and May 20, 2010; and

b. Merchandise Voucher Sub-Class: All recipients of prerecorded telephone messages on a cellular telephone transmitted by or on behalf of RPM or one or more of its Domino's franchised stores between the dates of May 20, 2006 and May 19, 2009.

(See Ex. A, Settlement Agreement at § 1.11-12)

B. Monetary Relief. RPM and Argonaut have agreed to create a Common Fund totaling $9,750,000. Participating class members in the Monetary Sub-Class shall receive $15.00 cash. In the event the total amount required to pay $15.00 for each claim exceeds the amount in the Common Fund after payment of the Claims Administration Costs, the incentive award to the Class Representative, and the attorneys' fees and costs, each class member shall receive a pro rata share of the amount remaining in the Common Fund. (See SA at § 4.6)

C. Merchandise Voucher Relief. The participating class members in the Voucher Sub-Class shall receive a merchandise voucher redeemable for one large, one topping pizza for in-store pick up only. It shall be redeemable at any RPM-owned store and is fully transferable. (See SA at § 4.6)

D. Additional Relief. In addition to the individual monetary and voucher relief provided to the Class, Defendants have also agreed to provide the following relief:

1. Injunctive Relief: RPM agrees that it shall comply with the requirements of the TCPA and regulations of the Federal Communications Commission implementing the TCPA as amended from time to time and as applicable to pre-recorded phone messages. (See SA at § 4.17)

2. Payment of Notice Expert and Claims Administrator Expenses: RPM also agrees to pay, from the Common Fund, the cost of retaining a Notice Expert to develop a notice plan, as well as the costs of a Court-approved Claims Administrator to disseminate notice, administer the settlement, and pay claims. (See SA at § 4.11-12)

3. Incentive Award for Class Representative: In addition to any payment Spillman is entitled to receive for submitting a valid claim, Defendants agree, subject to Court approval, that she will be paid an incentive award from the Common Fund in recognition her efforts on behalf of the Settlement Class. Defendants agree that an incentive award of $5,000 is reasonable for her efforts and that they will not oppose any request limited to this amount. (See SA at § 9.4)

4. Payment of Attorneys' Fees and Expenses: Under the SA, and subject to Court approval, Defendants agree that Class Counsel will be paid from the Common Fund up to Three Million dollars ($3,000,000) for fees and expenses in this action. Defendants agree that they will not object to, or otherwise challenge, Class Counsel's application for this

amount. (See SA at § 9.1)

E. Release of Liability. In exchange for the relief described above, Defendants and other related entities will receive a full and final release of all claims related to robo-calls sent by or on behalf of RPM between May 20, 2006 and May 20, 2010 (See SA at § 5.1-10 for the complete release language).

IV. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED

In order to grant preliminary approval of a proposed settlement, the Court should determine that the proposed settlement class is appropriate for certification. MANUAL FOR COMPLEX LITIGATION § 21.632 (4th ed. 2004); *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Class certification is proper if the proposed class, the proposed class representative, and the proposed class counsel satisfy the numerosity, commonality, typicality, and adequacy of representation requirements of Rule 23(a). Fed. R. Civ. P. 23(a)(1-4).

In addition to meeting the requirements of Rule 23(a), a plaintiff seeking class certification must also meet at least one of the three provisions of Rule 23(b). Fed. R. Civ. P. 23(b). When a plaintiff seeks class certification under Rule 23(b)(3), which Spillman seeks in the instant action, the representative must demonstrate that common questions of law or fact predominate over individual issues and that a class action is superior to other methods of adjudicating the claims. Fed. R. Civ. P. 23(b)(3); *Amchem*, 521 U.S. at 615-16. Because Plaintiff meets all of the Rule 23(a) and 23(b)(3) prerequisites, certification of the proposed

Class is proper.

A. The Requirement of Numerosity is Satisfied

The first prerequisite of class certification is numerosity, which requires "the class [be] so numerous that joinder of all members is impractical." Fed. R. Civ. P. 23(a)(1). The exact number of class members need not be known, so long as the class is readily ascertainable. *Carpenter v. Davis*, 424 F.2d 257, 260 (5th Cir. 1970). In addition, there is no specific number of class members required, though the numerosity requirement is typically satisfied when the class comprises at least forty members. *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999) (citing 1 Newberg on Class Actions § 3.05, at 3-25 (3d ed. 1992)). When focusing specifically on TCPA cases, numerosity has been satisfied with as few as 203 class members. *Lo v. Oxnard European Motors, LLC*, No. 11-cv-1009, 2011 WL 6300050, at *2 (S.D. Cal. Dec. 15, 2011); see also *Kavu, Inc. v. Omnipak Corp.*, 246 F.R.D. 642, 646-47 (W.D. Wash. 2007) (numerosity satisfied with 3000 class members). The proposed Class is comprised of approximately 1.1 million consumers primarily in the states of Louisiana, Mississippi and Alabama. This number clearly satisfies the numerosity requirement. Accordingly, the proposed Class is so numerous that joinder of the claims is impractical and the numerosity requirement is satisfied.

B. The Requirement of Commonality is Satisfied

The second requirement for certification mandates that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Commonality is demonstrated when the

claims of all class members "depend upon a common contention . . . that is capable of classwide resolution." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). This requires that the determination of the common question "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* "Even a single common question will do." *Dukes*, 131 S. Ct. at 2556.

In the instant case, all Class members share a common cause of action that stems from Defendants' alleged activity—each Class member received at least one pre-recorded phone message advertisement on their cellular phones. Defendants' transmission of these robo-calls results in common questions of law and fact for the Class, such as (a) whether provision of a phone number constitutes prior express consent to send the robo-calls and (b) whether the robo-calls were sent by an "automatic telephone dialing system" ("ATDS"). Determination of these issues, regardless of the answers, will resolve the allegations for the whole Class "in one stroke." *Id.* at 2545. As such, the commonality requirement is satisfied.

C. The Requirement of Typicality is Satisfied

Rule 23 next requires that the class representative's claims be typical of those of the class members. Fed. R. Civ. P. 23(a)(3). The test for typicality is not demanding, *Shipes v. Trinity Inds.*, 987 F.2d 311, 316 (5th Cir. 1993), and it focuses on the general similarity of the legal and remedial theories behind the plaintiffs' claims. *Jenkins v. Raymark Inds., Inc.*, 782 F.2d 468, 472 (5th Cir. 1986); *see also* 1 Newberg on Class Actions § 3.13, at 3-76 (3d ed. 1992). One of the purposes of the typicality requirement is to ensure that the representative's

interest is "aligned with those of the represented group, and in pursuing his own claims, the named plaintiff will also advance the interests of the class members." *In re American Medical Systems, Inc.*, 75 F.3d 1069, 1082 (6th Cir.1996); *see also In re Ford Motor Co. Bronco II*, 177 F.R.D. 360, 366–67 (E.D.La.1997) (noting that purpose of typicality element is to ensure that interests of absent class members are protected).

Defendants' alleged common course of transmitting robo-calls to cellular phones without first obtaining the prior express consent of the recipients resulted in uniform damages to the Class members. Thus, because Spillman received identical calls to those received by the class members, her damage is similar, if not identical, to the damages of all class members. In addition, Spillman's claim is based on the same legal theories as the class since Defendants' conduct provides each of them with the same cause of action. Because Spillman and the proposed class members were all allegedly sent robo-calls in violation of the TCPA, her interests align with the interests of the class, and the typicality requirement is satisfied.

D. The Requirement of Adequate Representation is Satisfied

The final Rule 23(a) prerequisite requires that the proposed class representative has and will continue to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). A court requires adequate representation to satisfy due process, because absent class members will be bound by the court's judgment. *In re Asbestos Litigation*, 134 F.3d 668, 676 (5th Cir. 1998). As with the typicality requirement, this element requires that the interests of

the named plaintiffs are aligned with the unnamed class members to ensure that the class representative has an incentive to pursue and protect the claims of the absent class members. *See Amchem*, 521 U.S. at 626 n. 20, 117 S.Ct. 2231 ("The adequacy-of-representation requirement 'tends to merge' with the commonality and typicality criteria of Rule 23(a), which 'serve as guideposts for determining whether ... maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.' ") (*quoting General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n. 13, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)).

Plaintiff Spillman's interests are entirely representative of and consistent with the interests of the proposed class. She, like all absent Class members, received robo-calls on her cellular phone that were sent for RPM. Further, her participation throughout the litigation demonstrates that she has and will continue to protect the interests of the absent class members. See Affidavit of Spillman, attached as Exhibit B, and Affidavit of Christopher K. Jones, attached as Exhibit C.

Likewise, proposed Class Counsel will also adequately represent the class, as they regularly engage in major complex litigation. Not only do they have extensive experience in litigating consumer class action lawsuits in general, but they have also successfully litigated multiple class actions concerning violations of the TCPA. See Jones Affidavit, Exhibit C and the CV's of Jones, John Wolff, III, and Philip Bohrer, attached as Exhibits D, E, and F; see

also *e.g. Accounting Outsourcing, LLC v. Verizon Wireless Personal Communications, LP*, Case No. 03-161 (M.D. La.). Thus, Spillman's interests and active involvement as well as proposed Class Counsel's extensive experience establish that they both meet the requirements to adequately represent the class.

E. The Proposed Settlement Class Meets the Requirements of Rule 23(b)(3)

Once the prerequisites of Rule 23(a) have been met, a plaintiff must also demonstrate that she satisfies the requirements of Rule 23(b). *Bell Atlantic Corp. v. AT&T Corp.*, 339 F.3d 294, 301 (5th Cir. 2003). To certify a class under Rule 23(b)(3), the plaintiff must show that (1) the common questions of law and fact predominate over any questions affecting only individuals and (2) the class action mechanism is superior to other available methods for adjudicating the controversy. Fed. R. Civ. P. 23(b)(3); *Unger v. Amedisys, Inc.*, 401 F.3d 316, 320 (5th Cir. 2005).

1. Common Questions of Law and Fact Predominate

The focus of the predominance requirement is whether the proposed class is "sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. "To predominate, common issues must form a significant part of individual cases." *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 460 (E.D.La.2006) (citing *Mullen*, 186 F.3d at 626). "Judicial economy factors and advantages over other methods for handling the litigation as a practical matter underlie the predominance and superiority requirements for class actions certified under Rule 23(b)(3)." Rubinstein, et al., 2 Newberg on Class Actions §

4:24. In other words, if individual adjudication is required to determine each class member's claim or defense, then common issues do not predominate and certification under Rule 23(b)(3) is inappropriate. With respect to the claims in this case, common questions predominate when the class members' claims arise under the TCPA, including when the claims focus on a defendant's advertising practices. *See CE Design v. Beaty Constr. Inc*., No. 07-c-3340, 2009 WL 192481, at *8-9 (N.D. Ill. Jan. 26, 2009).

The overarching questions in this case, specifically whether the recipients of the robo-calls provided prior express consent and whether the system used to transmit these messages was an ATDS, are common to all class members. Thus, a single adjudication can resolve these common questions for the entire class and common questions predominate over individual issues.

2. This Class Action is the Superior Method of Adjudication

Rule 23(b)(3) also requires that the Court make a finding that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b)(3). The Fifth Circuit has observed the "interrelationship between predominance and superiority," *Steering Committee v. Exxon Mobil Corp.*, 461 F.3d 598, 604 (5th Cir. 2006). Most importantly, the Fifth Circuit has noted that class actions are superior particularly for "negative value" suits, i.e., suits where the possible recovery is less than the cost of bringing the suit. *See Castano v. American Tobacco Co.*, 84 F.3d 734, 748 (5th Cir. 1996) (the "most compelling rationale for finding superiority in a class action" is "the

existence of a negative value suit"). This is a particularly relevant point in TCPA cases.

Because of the prohibitive cost of litigation, many members of the class would be unable to obtain relief absent class-wide adjudication. In addition, there is no question that the adjudication of the class members' claims will be less expensive when addressed as a class action as opposed to numerous successive suits. Cost aside, it would be entirely inefficient for courts across three states to individually assess facts and provide judgments for over 1.1 million individual cases when all claims could simply be decided in a single action. Accordingly, this action satisfies Rule 23(b)(3) as common issues predominate and a class action is the superior method for adjudicating the claims.

V. THE COURT SHOULD APPOINT PLAINTIFF'S COUNSEL AS CLASS COUNSEL

After certifying a class, Rule 23 requires a court to appoint class counsel that will fairly and adequately represent the class members. Fed. R. Civ. P. 23(g)(1)(B). In making this determination, the Court must consider, inter alia, counsel's (i) work in identifying or investigating potential claims, (ii) experience in handling class actions or other complex litigation and the types of claims asserted in the case, (iii) knowledge of the applicable law, and (iv) resources committed to representing the class. Fed. R. Civ. P. 23(g)(1)(A)(i-iv).

As discussed previously, proposed Class Counsel have extensive experience in litigating TCPA class actions of similar size, scope, and substance. See Jones Affidavit, Exhibit C and the CV's of Jones, Wolff, and Bohrer, Exhibits D-F. They have successfully litigated and settled over 10 TCPA class actions in this Court and are uniquely qualified to

handle this TCPA claim. In addition, proposed Class Counsel have invested over two year's time to investigating the claims, conducting discovery, and advocating for the class. As a result of their efforts, proposed Class Counsel have negotiated a settlement that not only provides considerable monetary relief to each of the Class members, but also provides prospective relief to prevent the Class members, and society at large, from suffering such harm in the future. Thus, this Court should appoint Christopher K. Jones and John P. Wolff, III of Keogh, Cox & Wilson, Ltd. and Philip Bohrer of Bohrer Law Firm, LLC as Class Counsel.

VI. THE PROPOSED SETTLEMENT IS FUNDAMENTALLY FAIR, REASONABLE, AND ADEQUATE, AND THUS WARRANTS PRELIMINARY APPROVAL

Following certification of the Class, the Court should also grant preliminary approval of the proposed Settlement Agreement. A court's ultimate approval of a class action settlement involves the consideration of six factors to determine whether a proposed settlement is fair, reasonable, and adequate. Fed. R. Civ. P. 23(e)(2); *Reed v. Gen. Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983). The *Reed* factors include the following: (1) evidence that the settlement was obtained by fraud or collusion; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the factual and legal obstacles to plaintiffs prevailing on the merits; (5) the range of possible recovery and certainty of damages; and (6) the opinions of class counsel, class representatives and absent class members.

Importantly, this Motion seeks preliminary approval of this settlement, not final approval. Accordingly, the standards are not as stringent as those applied to a motion for final approval. *In re OCA, Inc. Securities and Derivative Litigation*, 2008 WL 4681369, at * 10 (E.D. La. 2008); Manual for Complex Litigation § 21.63 ("At the stage of preliminary approval, the questions are simpler, and the court is not expected to, and probably should not, engage in analysis as rigorous as is appropriate for final approval."). If the proposed settlement discloses no reason to doubt its fairness, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, does not grant excessive compensation to attorneys, and appears to fall within the range of possible approval, the court should grant preliminary approval. For the following reasons, this settlement should be preliminarily approved.

A. Fraud or Collusion

The court may presume that a proposed settlement is fair and reasonable when it is the result of arm's-length negotiations. 4 Newberg on Class Actions § 11.41 (4th ed.); accord *Liger v. New Orleans Hornets NBA Limited Partnership*, 2009 WL 2856246, at *3 (E.D. La. 2009). In this case, there is no evidence the settlement involves fraud or collusion. In addition, there is also a presumption that no fraud or collusion occurred between counsel, in the absence of any evidence to the contrary. Id.

The parties offer evidence, in the form of Affidavits, that the settlement was the result of arm's length negotiations after two mediation sessions before Professor Joseph Green, an

experienced mediator. See Affidavits of Jones, Exhibit C, Dennis Blunt, attached as Exhibit G, and Beth Levene, attached as Exhibit H. In addition, a settlement negotiated with the assistance of an experienced private mediator is further proof that the settlement was reached fairly and provides adequate relief to the class. *In re Indep. Energy Holdings PLC*, 00-cv-6689, 2003 WL 22244676, at *4 (S.D.N.Y. Sept. 29, 2003); see also *In re Bluetooth Headset Prods. Liab. Litig*., 654 F.3d 935, 948 (9th Cir. 2011) (recognizing that use of a mediator is "a factor weighing in favor of a finding of non-collusiveness"). The parties attach an Affidavit executed by Professor Green who mediated the case. See Affidavit of Professor Eric Green, attached as Exhibit I. The Affidavits of counsel for all parties (Exhibits C, G, and H) similarly support the conclusion that no fraud or collusion exists. The Court is keenly aware of the discovery disputes between the parties, and the length of this litigation. There is no evidence of fraud or collusion between the parties.

B. Complexity, Expense, and Likely Duration of the Litigation

Of course, class action cases present many complex issues. These issues, paired with the unique legal questions raised by the TCPA, create complex litigation for all parties. At this point in the litigation, the parties have engaged in discovery that produced tens of thousands of documents relating to the plaintiff's claims. The case is now pending for over two years. The Court has allowed additional time to conduct additional discovery on at least two occasions. The complexity of this case is apparent, and evidenced by the record.

This litigation, including the settlement negotiations that involved two mediation

sessions and months of discussions, has been complex, expensive and time-consuming for all parties. This factor weighs in favor of preliminary approval.

C. Stage of the Proceedings

This factor asks whether the parties obtained sufficient information "to evaluate the merits of the competing positions." *Ayers v. Thompson*, 358 F.3d 356, 369 (5th Cir. 2004). The question is not whether the parties have completed a particular amount of discovery, but whether the parties have obtained sufficient information about the strengths and weaknesses of their respective cases to make a reasoned judgment about the desirability of settling the case on the terms proposed or continuing to litigate it. *In re Educ. Testing Serv. Praxis Principles of Learning and Teaching: Grades 7-12 Litig.*, 447 F.Supp.2d 612, 620–21 (E.D. La. 2006) (citing *In re Train Derailment Near Amite, La.*, 2006 WL 1561470 at *22 (E.D.La.2006)). The parties need not undertake extensive formal discovery or build a voluminous record before settlement. *Cotton v. Hinton*, 559 F.2d 1326, 1332 (5th Cir. 1977). Rather, if the settlement proponents have taken affirmative steps to gather data on the claims at issue and the terms of the settlement are not patently unfair, the Court may rely on counsel's judgment that the information gathered was enough to support a settlement. *In re Corrugated Container Litig.*, 643 F.2d 195, 211 (5th Cir. 1981).

Plaintiff obtained information about these claims both formally through extensive discovery and document production, and informally in the context of settlement discussions. This information led the parties to settle this matter. In addition, pending dispositive motions

by Domino's, and RPM's insurer in a companion case, impacted the settlement discussions. In sum, sufficient information was obtained to properly evaluate whether settlement was appropriate, and settlement at this stage is appropriate given the pending unresolved issues currently before the Court that would impact the parties' willingness to participate in a settlement.

D. Obstacles to Prevailing on the Merits

The most significant issue is the legal standard for recovering statutory damages under the TCPA. If the Defendants successfully convinced this Court that factual issues precluded certification, or that plaintiff and the Class as a whole gave "prior express consent" to receive the robo-calls based on voluntary disclosure of a cell phone number, the plaintiff's recovery is zero. On the other hand, if it was established that Defendants' obtained the consent from none of the class members, the exposure for statutory damages ($500 per call) is significant. In other words, this is an all or nothing case. If Defendants win, their exposure is nothing. However, if plaintiff won, the exposure is enormous. In addition, pending insurance issues drove this settlement. In particular, RPM's insurers have denied coverage for the damages sought in this suit. The disagreement on coverage resulted in two declaratory judgment actions and multiple motions seeking rulings on coverage and the duty to defend. Resolution of this suit occurred primarily because of Argonaut's agreement to pay its policy limits toward settlement.

E. Range of Possible Recovery

There is little question that the proposed settlement is at least within the range of possible approval. The parties reached the settlement only after engaging in several rounds of arm's-length negotiations, two if which were with the assistance of a mediator. The fairness, reasonableness, and adequacy of the proposed settlement is apparent from the relief the proposed settlement provides the Class members. As noted above, each member of the Monetary Sub-Class may file a claim and receive $15.00 in cash, payable from the $9,750,000 Common Fund established by the Defendants. See SA at §4.6, Exhibit A. The Merchandise Voucher Sub-Class will receive a voucher for a free one large, one topping pizza. Id. In addition to this monetary and voucher relief, Defendants also agreed to injunctive relief to prevent future robo-calls to cell phones without the recipients' prior express consent. See SA at §4.17, Exhibit A.

Though Plaintiff and her counsel are confident in their ability to succeed should the case proceed to trial, they still recognize the inherent risks associated with prolonged litigation. In balancing the legal and factual obstacles and complexity of class action practice against the experience of defense counsel, there is no question that the proposed settlement is clearly in the best interest of the proposed Class members, as it provides them substantial prospective and monetary relief.

Finally, the Court need not rule on a blank slate regarding the fairness, reasonableness, and adequacy of the proposed Settlement Agreement, as similar settlements have received

final approval by federal courts nationwide. This Court has preliminarily and finally approved over thirty TCPA class action settlement over the last ten years. See *e.g. Accounting Outsourcing, LLC v. Verizon Wireless, et al.*, Case No. 03-161 (M.D. La.), *Accounting Outsourcing, LLC v. Kappa Publishing Group, et al.*, Case No. 03-169 (M.D. La.), *Survey Communications, Inc. v. Masterman's, LLP*, Case No. 04-829 (M.D. La.); *Survey Communications, Inc. v. Corporate Express, Inc.*, Case No. 05-40 (M.D. La.). In addition, other courts across the country have similarly approved TCPA settlements of similar recovery. See *Satterfield v. Simon & Schuster, Inc. et al.*, No. 06-cv-02893 CW (N.D. Cal. 2010); *Bellows v. NCO Fin. Sys., Inc.*, 3:07-cv-01413-W-AJB, 2008 WL 5458986 (S.D. Cal. Dec. 10, 2008); *Lozano v. Twentieth Century Fox Film Corp.*, No. 09-cv-6344 (N.D. Ill. 2011). As with these similar cases, this settlement easily falls well "within the range of possible approval," and is fair, reasonable, and adequate. As a result, the proposed settlement should be preliminarily approved.

F. Opinions of Class Counsel and Class Representative

"The Court is entitled to rely on the judgment of experienced counsel in its evaluation of the merits of a class action settlement. *Liger*, 2009 WL 2856246, at *4 (*citing Cotton*, 559 F.2d at 1330). Each of the counsel is this action offer Affidavit testimony (Exhibits C, G, and H) affirming to the fairness of the terms of this proposed settlement. Proposed Class Counsel has handled numerous TCPA class action settlements and is aware of the fairness of this settlement from their experience in these prior cases. Likewise, based on their research

of other similar cases nationwide, they are aware of the fairness of this agreement. Similarly, counsel for the other parties attest to the fairness of this settlement, especially considering the viability and insurance issues impacting the availability of settlement funds.

VII. THE PROPOSED PLAN OF CLASS NOTICE

To satisfy the requirements of both Rule 23 and Due Process, Rule 23(c)(2)(B) provides that, "[f]or any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). Rule 23(e)(1) similarly requires that the notice be reasonably disseminated to those who would be bound by the court's judgment. Fed. R. Civ. P. 23(e)(1).

In this instance, RPM has provided a list of all class members, based on its records. In this regard, it has produced a list of all persons who received calls during the relevant time periods. Based on this information, RPM generated a list, including cell phone numbers and some names and addresses, of all class members who fall into either the Monetary or Merchandise Voucher Sub-Classes.

To effectively reach this Class, the Notice Expert has recommended a broad-based notice program that utilizes statewide consumer magazines, statewide newspaper supplements, national Internet ads, and statewide Internet ads. A Summary Notice will appear in the Alabama, Louisiana, and Mississippi editions of three consumer magazines

(Cosmopolitan, People, and Sports Illustrated) and two newspaper supplements (American Profile and Parade). Notice will also appear in the form of banner ads to be displayed on a variety of Internet websites. At least 80% of the Settlement Class will be reached through Publication Notice. It is the opinion of the Notice Expert, whose Declaration is attached as Exhibit J, that the proposed notice program will effectively reach the Class and will satisfy due process and the best notice practicable requirements of Rule 23. The Notice Plan and various notices to be used to publish notice to the class members is outlined in and attached to the Notice Expert's Declaration.

Besides publication notice, the Claims Administrator will create a settlement website that will contain information for class members and provide an opportunity for class members to submit a claim form online. In addition, the Claims Administrator will be prepared to answer class members' questions, communicate directly with class members who do not access the settlement information online, and accept claim forms by mail. A Declaration by Kim Schmidt with Rust Consulting, Inc., the claims administrator, outlining the claims administration process, is attached as Exhibit K.

The proposed claim form, as it will appear in its written form, is attached to this Motion as Exhibit L. The same content will be used in the online form. The proposed Notice Plan and Notices are attached to Wheatman's Declaration at Exhibit J. In sum, the Court should find that the proposed methods for providing notice to the Class—including direct mail, internet advertisements, print advertisements, and a settlement website—comport

with both Rule 23 and Due Process considerations.

VIII. CONCLUSION

For the foregoing reasons, Plaintiff respectfully asks that the Court (i) certify the Class for settlement purposes only, (ii) appoint Toni Spillman as the Class Representative, (iii) appoint Spillman's counsel as Class Counsel, (iv) grant preliminary approval of the proposed Settlement Agreement, (v) approve the form and manner of notice described above, and (vi) grant such further relief the Court deems reasonable and just. For convenience, proposed dates and deadlines leading to a final approval hearing are provided in the proposed order separately submitted to the Court.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been mailed and/or e-mailed this date, postage prepaid, and/or disseminated by the Court's e-notification system to all counsel of record.

Baton Rouge, Louisiana, this 7th day of November, 2012.

s/ Christopher K. Jones .
CHRISTOPHER K. JONES