UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

JEFFERSON RADIATION ONCOLOGY, LLC	*	**CIVIL ACTION NO. 15-01399**
VERSUS	*	**JUDGE: MILAZZO**
ADVANCED CARE SCRIPTS, INC.	*	**MAGISTRATE: KNOWLES**

* *

MEMORANDUM IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT AND CLASS CERTIFICATION

MAY IT PLEASE THE COURT:

Plaintiff, Jefferson Radiation Oncology, LLC (hereinafter "Jefferson Radiation"), on behalf of itself and all others similarly situated, respectfully submits this memorandum in support of its Unopposed Motion for Preliminary Approval of Settlement and Class Certification.

I. FACTUAL AND PROCEDURAL BACKGROUND

Jefferson Radiation brought this litigation as a class action to recover damages for and to enjoin what it alleges to be massive junk faxing by defendant, Advanced Care Scripts, Inc. (hereinafter "ACS"). Jefferson Radiation alleged that ACS blasted thousands of junk faxes nationwide in direct violation of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (hereinafter "TCPA") and the Junk Fax Prevention Act of 2005 (hereinafter "JFPA"). More than

two decades ago, the TCPA was enacted into law in response to countless complaints by American consumers and businesses about the cost, disruption and nuisance imposed by junk faxes. As the legislative history explained, because facsimile machines "are designed to accept, process, and print all messages which arrive over their dedicated lines," facsimile advertising imposes burdens on unwilling recipients that are distinct from the burdens imposed by other types of advertising. H.R. Rep. No. 317, 102d Cong., 1st Sess. 11 (1991). *See Missouri ex. Rel. Nixon v. Am. Blast Fax, Inc.*, 323 F.3d 649 (8th Cir. 2003), cert. denied, 540 U.S. 1104 (2004). Among other things, the law today requires fax senders to include in their faxed advertisements a clear and conspicuous notice that discloses to their recipients their right to stop future junk faxes and that explains how to exercise that right. It is Jefferson Radiation's contention that ACS failed to comply with this basic requirement in its fax advertisements.

ACS responded to the lawsuit filed by Jefferson Radiation by denying any and all liability under the TCPA, and setting forth numerous affirmative defenses. Among those defenses, ACS contends that it had express permission from a substantial majority, if not all, of the fax recipients to send these faxes. ACS also filed claims against WestFax, Inc. ("WestFax") –the fax broadcasting company utilized by ACS.

The parties thereafter engaged in both written discovery, which resulted in large scale document production (over 600,000 pages produced by ACS alone), and numerous depositions both locally and in Orlando, Florida where ACS' corporate offices are located.

During the pendency of this litigation ACS also filed a Petition for Waiver with the Federal Communications Commission (hereinafter "FCC") in November 2015 seeking a retroactive waiver for any violation of the opt-out notice requirements, as alleged by Jefferson Radiation, that occurred

before April 2015. As a result of the waiver request filed by ACS, the parties engaged in extensive briefing before the FCC. Thus, this litigation has proceeded along two tracks, both here in the Eastern District and also before the FCC.

Following key depositions, the parties to the litigation, namely Jefferson Radiation, ACS, and WestFax (the third party defendant) agreed to mediation, which took place at MAPS with Tommy Usdin serving as mediator, on January 21, 2016. Although the initial mediation proved unsuccessful, Jefferson Radiation and ACS, exclusively through Mr. Usdin, continued settlement discussions and ultimately reached a proposed settlement and signed a settlement term sheet on February 29, 2016. Jefferson Radiation and ACS thereafter entered into a proposed settlement agreement, which is attached hereto as Exhibit 1. In the proposed settlement agreement, ACS will pay $9.25 million to the settlement class. Class members need not submit claims to receive payment, but will be automatically compensated based on the number of successful fax transmissions reflected in records maintained and produced by ACS.

Jefferson Radiation now asks the Court to enter an order preliminarily approving the settlement agreement (including its notice plan); certifying the proposed settlement class; appointing Jefferson Radiation as class representative; appointing Jefferson Radiation's attorneys as class counsel; appointing the Angeion Group as the notice and settlement administrator; authorizing notice to class members with deadlines for opt-outs and objections; and scheduling a fairness hearing. Jefferson Radiation respectfully submits that the proposed settlement, settlement class, and notice plan satisfy Rule 23 of the Federal Rule of Civil Procedure.

The proposed settlement class consists of all persons and entities that received facsimile transmissions from ACS or its vendor that allegedly advertise, promote, or describe ACS's products

or services, and do not contain the statutorily required opt-out notice during the time period of April 29, 2011 to February 19, 2016. The records produced in the case, including the Job Summary Reports of Westfax identify the fax telephone numbers to which the faxes were sent and the number of fax transmissions to such numbers. The class easily meets all Rule 23(a) prerequisites for the maintenance of a class action—the class is numerous, consisting of approximately 24,000 members; Jefferson Radiations claims are typical of the class; Jefferson Radiation and the class sustained the same violations and are entitled to the same relief under the TCPA; Jefferson Radiation and its attorneys have well protected the class; and Jefferson Radiation has no interests antagonistic to the class. The class qualifies for class treatment under Rule 23(b) because common questions of law and fact predominate, and a class action is by far a superior method of resolving this controversy. Because the proposed settlement agreement is fair, reasonable, adequate, and the proposed settlement class meets the criteria set forth in Rule 23, this Court should grant the instant motion for preliminary approval and related relief.

II. THE PROPOSED CLASS SETTLEMENT AGREEMENT

The proposed settlement agreement is attached hereto as Exhibit 1.

The key settlement terms are:

The Proposed Settlement Class. Class members shall include all persons and entities that received facsimile transmissions from ACS or its vendor that advertise, promote, or describe ACS's products or services and do not contain the notice required by 47 U.S.C. § 227(b)(1)(C)(iii), (b)(2)(D), (b)(2)(E), (d)(2) or 47 C.F.R. § 64.1200(a)(4)(iii)-(vii), during the period from April 29, 2011, to February 19, 2016. The settling parties agree that ACS will use the fax reports set forth in Exhibit 1 to the settlement agreement to identify class members. The settlement class is an opt-out

class under Rule 23(b)(3).

Payments to the Class. ACS will pay $9.25 million to the settlement class, without the possibility of reversion. All net settlement funds, after payment of settlement administration costs, attorneys fees and costs and any incentive award, will be automatically distributed to class members using, in the first instance, name and address information in ACS's records, or the address provided by the class member. Each class member will receive payment for each facsimile transmission to the members unique fax telephone number, as reflected in WestFax's Job Summary Reports and ACSs internal records. As detailed below, any remaining funds shall be given to the American Cancer Society as a *cy pres* beneficiary subject to Court approval.

Class Member Releases. All class members who do not opt-out will release ACS and related parties when the settlement becomes final. Released claims under the terms of the settlement agreement means any and all claims, liabilities, demands, causes of action, or lawsuits, debts, damages, costs, attorneys' fees, obligations, judgments, expenses, compensation, or liabilities relating to the subject matter of the Complaint, whether known or unknown (including unknown claims), and whether anticipated or unanticipated, of whatever kind or nature, character, and description—whether legal, statutory, equitable, or of any other type or form, whether under state or federal law, and whether brought in a representative or any other capacity—that were or could have been raised in the action. The released claims include all claims arising prior to the date of the settlement agreement meeting this description under all applicable statutes, regulations, or common law, including but not limited to claims under the TCPA.

The Notice Plan. The notice plan is designed to reach as many class members as possible. ACS will bear the costs of the class settlement notice, as well as administration of the class

settlement fund. These costs are separate and independent from the class settlement fund.

Within thirty (30) days following preliminary approval, the Angeion Group (settlement administrator) will send notice of the action and class settlement to the class members. ACS has determined that, of the approximately 24,000 unique fax numbers that it has records of sending one or more faxes to during the applicable period, it has an associated physical address for approximately 19,000 of them. Prior to the time the class settlement notice is transmitted via fax, the settlement administrator will attempt to ascertain a physical address for the remaining 5,000 numbers, and depending on whether an address is located, the recipients will get one of two versions of the class settlement notice.

Fax Notice 1: For those recipients who have an associated address (either derived from ACS's records, or via the efforts of the settlement administrator), their notice will request that they log on to the Settlement website, using the unique identifier provided, and update the address listed in the notice if it has changed. Regardless of whether the recipient updates the address, a settlement check will be sent to the address of record on file at the time of distribution.

Fax Notice 2: For those recipients, after reasonable efforts by the settlement administrator, still do not have a physical address associated with the fax number, their notice will clearly indicate that if they do not log onto the website using the unique identifier provided or otherwise inform the settlement administrator of their physical address, they will not receive a settlement check but will still be bound by the preclusive effect of the settlement.

For any settlement class members in which the initial fax notice is not deliverable and a physical address is available, the settlement administrator will mail a paper version of the notice.

If the mailing is returned as undeliverable, the settlement administrator will conduct a trace on the returned notice and mail to an updated address if located. Class members have a total of seventy-five (75) days from the Preliminary Approval Order to notify parties by any reasonable means (e.g., by mail or fax) that they would like to opt-out of the settlement class.

The notice itself informs members of the pendency and status of the case, terms of the settlement, the benefits available to members under it, how the case and the settlement may affect their legal rights, important settlement deadlines, instructions for objecting to settlement or opting-out of the class, and the date of the fairness hearing. It also informs class members that class counsel will move for an award of attorneys fees and expenses and that Jefferson Radiation will move for an incentive award. The notice also informs class members how to contact the settlement administrator for additional information.

Settlement Administration. The settlement will be administered by the Angeion Group, a leading class action settlement administrator.

Class Representative Service Award. The settlement agreement permits Jefferson Radiation to seek, subject to Court approval, an award for service as class representative, not to exceed $20,000. If the Court approves an award, it will be paid from the settlement fund.

Class Counsel's Attorneys' Fees and Costs. The settlement acknowledges that Class Counsel will move for an award of attorneys' fees and costs from the settlement fund. Class Counsel may seek fees in an amount no greater than 1/3rd of the total settlement fund. However, the amount of attorneys' fees and costs ultimately awarded shall be in the sole discretion of the Court, and settlement of the claims of the settlement class is not conditioned upon the approval of fees, costs, and expenses to class counsel by the Court in any given amount.

III. THE PROPOSED SETTLEMENT IS SUFFICIENTLY FAIR, REASONABLE AND ADEQUATE

Rule 23(e) of the Federal Rules of Civil Procedure dictates that the claims of a certified class may be settled only with the court's approval. *See In re OCA, Inc. Sec. & Deriv. Litig.* 2008 WL 4681369, at 11 (E.D.La 2008). The Fifth Circuit, however, has held that, "there is an overriding public interest in favor of settlement," because such class action suits "have a well deserved reputation as being most complex." *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977).

The approval of a class action settlement is a two-step process: (1) preliminary approval; and (2) a fairness hearing, after notice to the class, to determine final approval of the proposed settlement. *McNamara v. Bre-X Minerals Ltd.*, 214 F.R.D. 424, 426 (E.D. Tex. 2002); *see* Manual for Complex Litigation (Fourth) § 21.63 (2004). As it relates to preliminary approval, Judge Vance in *In re Pool Products Distribution Market Antitrust Litigation*, 310 F.R.D. 300, 314-15 (E.D. La. 2015) surmised as follows:

> As this motion is for preliminary approval of a class action settlement, the standards are not as stringent as those applied to a motion for final approval. *Karvaly v. eBay, Inc*., 245 F.R.D. 71, 86 (E.D.N.Y. 2007); Manual, *supra* § 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 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. *In re Stock Exchs. Options Trading Antitrust Litig.*, No. 99 Civ. 0962(RCC), MDL No.1283, 2005 WL 1635158, at 5 (S.D.N.Y. 2005); *McNamara v. Bre-X Minerals Ltd.,* 214 F.R.D. 424, 430 (E.D. Tex. 2002).

In this case, the proposed settlement easily falls within the range of possible approval, and is fair to the entire class. All settlement negotiations between the parties were conducted at arms-length, and through an experienced mediator. Courts have held that there is typically an initial

presumption that a proposed settlement is fair and reasonable when it is the result of arms-length negotiations. *Faircloth v. Certified Fin. Inc.*, 2001 WL 527489 at 4 (E.D. La. 2001). Moreover, if the terms of the settlement agreement seem to be fair, courts generally assume that negotiations were proper. *See In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 212 (5th Cir. 1981).

The potential duration of this litigation, including the uncertainties for both parties, further supports settlement of the class claims. ACS has asserted various affirmative defenses in this matter, and has vigorously defended against the allegations of Jefferson Radiation. Aside from the litigation pending before this Court, the FCC has provided entities such as ACS with an avenue to seek a retroactive waiver for failure to provide the statutorily mandated opt-out notice on its faxes. If the FCC were to determine that ACS met certain criteria set forth by the FCC, it could potentially be absolved of liability for any private rights of action which arose prior to April 2015, including those brought in this litigation. ACS filed its Petition for Waiver with the FCC in November 2015. At the time that the proposed settlement was reached, the issues raised in ACS's Petition for Waiver had been fully briefed by the parties, and it was the belief of all counsel involved that a decision from the FCC was imminent.[1] The degree of uncertainty regarding the potential recovery of the class, along with the potential duration of future litigation, supports preliminary approval.

The parties have also conducted sufficient discovery to understand the strengths and weaknesses of the case. Jefferson Radiation's counsel has taken the corporate depositions of ACS, as well as the depositions of lay witnesses. Counsel has also reviewed hundreds of thousands of pages of discovery material produced by ACS, reviewed documents subpoenaed from Westfax, and

[1] ACS and Jefferson Radiation filed a Joint Motion to Withdraw the petition and related briefing without prejudice, in light of the proposed settlement and pending Court approval.

conducted extensive legal research regarding the merits of the claims of the class and the defenses raised by ACS.

Lastly, counsel for Jefferson Radiation believe that the settlement terms are fair. "Counsel are the Court's main source of information about the settlement... and therefore the Court will give weight to class counsel's opinion regarding the fairness of settlement." *Turner v. Murphy Oil USA, Inc*, 472 F.Supp.2d 830, 852 (E.D. La. 2007). Counsel is of the opinion that, consistent with the litigation risks to both sides, the settlement agreement provides for compensation between the best-case scenarios envisioned by either side, and will result in a substantial benefit to the class. Thus, the proposed settlement of $9.25 million is fair to the class. Furthermore, there is no possibility of reversion of unclaimed funds to ACS. Because class members need not submit claims, the parties anticipate that most net settlement proceeds will be received by class members at addresses on file with ACS, provided by the class members or located by the settlement administrator.

To achieve the maximum benefit to the class members, the class administrator shall cause a reverse fax-append to be conducted on those fax numbers where no name and address information is provided.[2] *See* (Exhibit 2, Declaration of Steven Weisbrot). Once the address append is completed, the class administrator shall divide the class members into two (2) groups: (1) "Group A" will consist of class members in which a complete mailing address is present and (2) "Group B" will consist of class members where a complete mailing address is not present. Next, the class administrator shall cause one (1) of two (2) notices, as detailed in the section above, to be sent via facsimile to each class member of the respective groups.

[2] Of the approximate 24,000 unique fax numbers, ACS is currently in possession of addresses for 19,000 of those fax numbers.

The class members included in Group A shall receive a fax notice advising them of their legal rights and options under the settlement. Additionally, the notice to Group A, will instruct them of the name and address information currently on file and will provide the class member the opportunity to visit the case specific website and update its address data to ensure that the correct information is captured and currently on file for distribution. All class members in Group A shall participate in the settlement and distribution unless they opt-out under the terms of the settlement agreement.

Class members in Group B will receive a notice via facsimile apprising the class member of their legal rights and options under the settlement. The notice will further advise that in order to participate in the settlement the class member must go to the case specific website, enter its unique identification number and the fax number at issue in order to provide their name and address so the settlement administrator has the relevant information at the time of distribution. Group B class members who do not provide their name and address information will not be able to participate in the settlement and any allocated distribution payable to nonparticipating class members will be redistributed pro rata to the remainder of the class.

In accordance with the settlement agreement and final approval of the Court, the claims administrator will calculate the per infraction share of the net settlement fund and allocate payments to each class member in Group A as well as Group B class members who have completed the registration process. Any check that is returned as undeliverable will be skip traced and re-mailed to class members if a new address is located through the skip trace process. Upon the expiration of the time allocated to negotiate the checks issued, the claims administrator will cause the remaining funds to be donated or distributed as a *cy pres* award in accordance with the terms of the settlement agreement and Court orders.

Given the foregoing, the proposed settlement is fair, reasonable, and adequate.

IV. CERTIFICATION OF THE PROPOSED SETTLEMENT CLASS IS WARRANTED UNDER RULE 23 OF THE FEDERAL RULES OF PROCEDURE

Another function of this Court in reviewing class settlement is to determine if a settlement class may be certified under Rule 23 of the Federal Rules of Civil Procedure. Rule 23 specifically states that: One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (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. The standards for certification of a settlement class, however, are less rigorous than in a litigated certification contest: "Confronted with a respect for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems. . . for the proposal is that there be no trial." *Amchem Prods, Inc. v. Windsor*, 521 U.S. 591, 620 (1997).[3]

A. Numerosity.

To satisfy the numerosity prong, "a plaintiff must ordinarily demonstrate some evidence or reasonable estimate of the number of purported class members." *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1038 (5th Cir. 1981). Courts have held that relatively small amounts of plaintiffs can also satisfy the numerosity requirement and Courts in the Fifth Circuit have not required evidence of exact class size or identity of class members to satisfy the numerosity

[3] The Seventh Circuit observed that [c]lass certification is normal in litigation under § 227, because the main questions, such as whether a given fax is an advertisement, are common to all recipients. *Ira Holtzman, C.P.A., & Assocs. Ltd. v. Turza*, 728 F.3d 682, 684 (7th Cir. 2013).

requirement and there is no set number above or below which a class is considered to have or have not satisfied the numerosity requirement. *See Mullen v. Treasure Chest Casino*, 186 F.3d 620 (5th Cir. 1999). The Fifth Circuit, considering a request to certify a class consisting of thirty-three members, emphasized "[t]hat proper focus is not on numbers alone, but on whether joinder of all members is practicable in view of the numerosity of the class and all other relevant factors." *Phillips v. Joint Legislative Committee on Performance and Expenditure of the State of Mississippi*, 637 F.2d 1014, 1022 (5th Cir. 1981). Here, numerosity is evident by ACS's use of a facsimile broadcast company (Westfax), which is designed to contact a large number of individuals through automated, unmanned faxing. As previously stated, the number of class members in this case is approximately 24,000 individuals and entities. Joinder is therefore impracticable and, based on the settlement standard applicable here, the numerosity requirement is satisfied for certification purposes. *See* Fed. R. Civ. P. 23(a)(1).

B. Commonality.

Commonality exists where a question of law linking class members is substantially related to resolution of the litigation even where the individuals may not be identically situated. *M.D. ex rel Stukenberg v. Perry*, 675 F.3d 832 (5th Cir. 2012); Fed. R. Civ. P. 23(a)(2) & 23(b)(3). In *General Telephone Co. v. Falcon*, 457 U.S. 147, 155 (1982), the Supreme Court stated:

> The class device was designed 'as an exception to the usual rule that of the individual named parties only.' *Califano v. Yamasaki*, 442 US 682. Class relief is 'peculiarly appropriate when the issues involved are common to the class as a whole' and they turn on questions of law applicable in the same manner to each member of the class. *Id*. at 701. For in such cases, the class device saves the resources of both the courts and the parties by permitting an issue potentially affecting every class member to be litigated in conomical fashion under Rule 23.

The Supreme Court has confirmed, "We quite agree that for purposes of Rule 23(a)(2), [e]ven a single [common] question 'will do'..." *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct 2541, 2556 (2011). This case comfortably satisfies this minimal standard. All class member claims arise out of the same standardized conduct—ACS's fax-blasting advertising program. All class members have the same claims, and are entitled to the same relief, under the TCPA.

C. Typicality.

Plaintiff's claims are typical of the other class members, as all of the claims are based upon a substantially identical set of facts and circumstances. *See* Fed. R . Civ. P. 23(a)(3). In order for the typicality standard to be met, the claims of the named plaintiffs must be consistent with those of the class; however, the claims need not be identical. *In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico*, 910 F.Supp.2d 891, 911 (E.D. La. 2012). To put it another way, a plaintiff's claim is typical if it arises from the same events or practices or course of conduct that gives rise to the claims of the other class members, and the named plaintiff's claims are based on the same legal theory. *See Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 340 (4th Cir. 1998); *accord Deiter v. Microsoft Corp.*, 436 F.3d 461, 466-67 (4th Cir. 2006) (discussing the typicality requirement); *Baricuatro v. Industrial Personnel and Management Services, Inc.*, 2013 WL 6072702 (E.D. La 2013).

In this case, the claims of Plaintiff and the class all arise from the same facsimile campaign for which ACS is responsible. Jefferson Radiation, like all class members, has sustained identical statutory damages for faxes received. The claims of Plaintiff are "typical" and "similar" to all other class members as they arise from the same event, practice or course of conduct that gives rise to the claims of other class members, and are based on the same legal theory as the members of the class.

Particularly, Jefferson Radiaition's claims arise out of ACS's fax program, which is the source of claims held by all class members, and all claims are based on the same legal theories—ACS's violation of the TCPA and FCC regulations.

D. Adequacy.

As stated by the U.S. Supreme Court in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591:

> The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. A class representative must be part of the class and possess the same interest and suffer the same injury as the class members.

Id. at 625-26; Fed. R. Civ. P. 23(a)(4). The same course of conduct by ACS that relates to Jefferson Radiation also relates to all class members. Jefferson Radiation and every class member suffered the same injury and are entitled to the same statutory damages under the TCPA. Jefferson Radiation's interests are co-extensive and not in conflict with those of the class members. There are no antagonistic or conflicting interests existing between Jefferson Radiation and the proposed class. Indeed, Jefferson Radiation and the class members have suffered the same type of harm and share the same interests. Jefferson Radiation has also hired counsel who are experienced in class action and consumer litigation. In this regard, please see the Declarations of George B. Recile, Preston L. Hayes, Ryan P. Monsour, Matthew A. Sherman, and Patrick R. Follette previously filed as Exhibits 1 through 5 to the previously filed Motion to Certify Class [Rec. Doc. 4], setting forth their qualifications to represent the interests of the class.

The Elements Set Forth in FRCP 23(b) Are also Satisfied.

Once the four prerequisites of Rule 23(a) are met, Jefferson Radiation is required to show that the proposed settlement class satisfies one of the requirements of Rule 23(b). Here, the

settlement class qualifies under Rule 23(b)(3), which authorizes class certification if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). Based on the settlement standards applicable here, 23(b)(3) is satisfied.

Rule 23(b)(3) is "designed to secure judgments binding all class members, save those who affirmatively elect[] to be excluded, " where a class action will "achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem,* 521 U.S. at 614-15. Certification of this settlement class under 23(b)(3) will achieve these goals.

A. Common Questions of Law and Fact Predominate.

Although similar to the commonality requirement of Rule 23(a)(2), this requirement is more demanding because it tests whether a proposed class is sufficiently cohesive to warrant adjudication through class representation. *In re Pool Products Distribution Market Antitrust Litigation*, 310 F.R.D. at 311. Analysis of the predominance requirement "begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S.Ct. 2179, 2184. In determining whether predominance exists, a district court must also understand the facts, claims, defenses, and applicable law. *In re Pool Products Distribution Market Antitrust Litigation*, 310 F.R.D. at 311; *See* also *M.D. ex rel. Stukenberg*, 675 F.3d at 841. The Court should analyze how resolution of an allegedly common question of law or fact will decide an issue central to an element or defense of each of the class members' claims at once. *Id.*

In this case, Plaintiff believes that common questions of law do not merely predominate, but are virtually exclusive. All class members' claims arise out of the same standardized conduct – ACS's fax-blasting advertising program. All class members have the same claims, and are entitled to the identical relief under the TCPA. The merits of each class members' case under the TCPA also turn on identical issues: whether the faxes received through the fax-blasting program are advertisements, and whether the faxes received by the class members contained the statutorily mandated opt-out language. Moreover, Plaintiff believes that the defenses raised by ACS in this matter are generally applicable to each and every class members' claim.

B. Superiority.

Plaintiff believes that it is desirable to have this case settled as a class action because the class mechanism is superior to individual actions. Based on the settlement standards applicable here, the second Rule 23(b)(3) element –superiority of class adjudication–is clearly fulfilled here. This case is tailor-made for class treatment; a large number of claims that would be uneconomical to pursue on an individual basis. As the Supreme Court stressed:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

Amchem, 521 U.S. at 617 (quoting *Mace v. Van Ru Credit Corp.,* 109 F.3d 338, 344 (7th Cir. 1997)).

This explains why courts have held that proceeding as a class is a superior method of adjudicating TCPA violations. See *Mussat v. Global Healthcare Resource, LLC*, 2013 WL 1087551, at 7; *see also Turza*, 728 F.3d at 684 (certification of TCPA classes is the norm); *Savanna Group,* 2013 WL 66181, at 16 ("[A] class action is superior to other methods of adjudicating the putative

class members' TCPA claims."); *Group C Communications*, 2010 WL 744262, at 6 ("[c]lass actions were designed for these types of claims."). When, as here, an advertiser operates a mass fax-blasting program, literally thousands of individuals and entities are impacted.

Moreover, because the TCPA lacks an attorneys' fees clause, individual litigants would sustain legal fees far exceeding their expected recovery at only $500 per fax transmission or find lawyers unwilling to prosecute individual claims on a contingency basis. Only by aggregating their claims can consumers and businesses impacted by ACS's fax advertisements effectively seek relief. *See Mussat*, 2013 WL 1087551, at 7 (simple economics make it unlikely individuals would pursue TCPA actions on their own); *Group C Communications*, 2010 WL 744262, at 6 (large number of claims, small potential recovery for each); *Sadowski*, 2008 WL 2224892, at 5 (certifying TCPA class because damages too small to justify individual action); *see also Kavu*, 246 F.R.D. at 650 (TCPA claims are small and unlikely to be litigated individually). In this case, class treatment is clearly the superior method of litigating and resolving TCPA claims

V. REQUEST TO APPOINT ANGEION GROUP AS CLAIMS ADMINISTRATOR

Pursuant to the terms of the settlement agreement, and after rigorous evaluation, ACS has selected and nominates for approval Angeion Group ("Angeion") as the claims administrator for the proposed settlement. Further, proposed class counsel has reviewed Angeion's credentials and believes them to be more than capable of managing the claims administration process. Angeion would handle all aspects of providing notice to the class and claims administration including mailing and publishing the notice, managing a call center and website to handle all questions regarding completion and submission of the claim forms, physically processing the claims and inputting the data on computers, reviewing claims, and ultimately, distributing the Settlement Fund subject to

Court approval. Angeion is one of the country's largest and most experienced settlement administration firms, and has personnel well-versed in the administration of complex class action settlements. The company is headed by a group of executives with more than 60 combined years of experience implementing claims administration and notice solutions for class action settlements and judgments. Collectively, the management team at Angeion has overseen more than 2,000 settlements and distributed $10 billion to class members. Pertinent to the instant case, Angeion has administered settlements arising from alleged violations of the TCPA and its state law counterparts. Specifically, these administrations include *Soto, et. al. v. The Gallup Organization, Inc.,* Case Number 0:13-CIV-MGC/EGT (S.D. Fla.) and *Ott v. Mortgage Investors Corp.*, Case Number 3:14-cv-00645-ST (D. Or.), each involving the notice and administration of millions of class members. *See* (Exhibit 2, Declaration of Steven Weisbrot).

VI. REQUEST TO AUTHORIZE NOTICE TO CLASS MEMBERS WITH DEADLINES FOR OPT-OUTS AND OBJECTIONS

Rule 23(e) of the Federal Rules of Civil Procedure, which pertains to class action settlements, mandates that "notice of the proposed compromise shall be given to all members of the class in such manner as the court directs." Fed. R. Civ. P. 23(e).

Thus, Rule 23(e) "leaves the trial court with virtually complete discretion as to the manner and method of notice." *Quigley v. Braniff Airways, Inc.*, 85 F.R.D. 74, 77 (N.D. Tex. 1979) (citing 7B C. Wright & A. Miller, *Federal Practice and Procedure* § 1797, at 237 (1986)); *see also Zimmer Paper Prods., Inc. v. Berger & Montague*, 758 F.2d 86, 90 (3d Cir.), *cert. denied*, 474 U.S. 902 (1985) (Rule 23(e) "commits the form of the notice to the court's discretion"). Like-wise, due process is a "flexible concept," intended to ensure "fundamental fairness." *See*, *e.g.*, *Walters v. National*

Ass'n of Radiation Survivors, 473 U.S. 305, 320 (1985); *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).

The Fifth Circuit has held that in order to satisfy the requirements of Rule 23(e) and the Due Process Clause, a notice of a class action settlement should contain enough information about the settlement to enable class members to make an informed choice. *See In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 223 (5th Cir. 1981). "Notice in a class suit must present a fair recital of the subject matter and of the proposed terms and must give the class an opportunity to be heard." *Miller v. Republic Nat'l Life Ins. Co.*, 559 F.2d 426, 429 (5th Cir. 1977) (citing *Eisen v. Carlisle and Jacguelin*, 417 U.S. 156 (1974) and *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)).

The notice should "fairly, accurately, and neutrally" "apprise[] prospective [class] members of the terms of the Proposed Settlement, the identity of persons entitled to participate in it and the options that are open to the [class] members in connection with the proceedings." *In re Drexel Burnham Lambert Group, Inc.*, 130 B.R. 910, 924 (S.D.N.Y. 1991), *aff'd*, 960 F.2d 285 (2d Cir. 1992). *See also Ruiz v. McKaskle*, 724 F.2d 1149, 1153 (5th Cir. 1984) (approving district court's notice plan that "fairly recited the [settlement] agreement's terms and did not employ unnecessary legalisms."); *Miller*, *supra*, 559 F.2d at 429 (approving notice plan where "[t]he individual notices mailed to the class members described the litigation and summarized the proposed settlement terms. The notices also told of the time and place of the settlement hearing . . . ."). There is, however, no requirement that the entire settlement agreement be sent to class members. *See Grunin v. International House of Pancakes*, 513 F.2d 114, 122 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975).

The proposed Notice is attached hereto as Exhibit 3 for the Court's review and approval. The proposed Notice sets forth all important deadlines relating to the class member's claims, as well fair recital of the subject matter and of the proposed terms. As such, this Court should approve the attached proposed Notice, and authorize that the Notice be sent to the class members.

VII. JEFFERSON RADIATION MOVES THIS COURT TO ESTABLISH A DATE FOR THE FAIRNESS HEARING

Under the terms of the settlement agreement, class members have a total of seventy-five (75) days from the Preliminary Approval Order to notify Jefferson Radiation and ACS that they would like to opt-out of the settlement class. Any class member who wishes to object to the proposed settlement must file written objections with the Court and such objections must be received within seventy-five (75) days of entry of the Preliminary Approval Order. Furthermore, class counsel is required to submit a motion for final approval of the settlement class within ninety (90) days of the Preliminary Approval Order. The parties also agree to seek a Fairness Hearing within one hundred twenty days (120) of the Preliminary Approval Order, or as soon thereafter as the Court deems appropriate.

Given the foregoing deadlines, class counsel requests that the Fairness Hearing be set before this Court on August 10, 2016 at 9:30 a.m. If this date is established by the Court, the Fairness Hearing would occur approximately 124 days from the filing date of this Motion for Preliminary Approval and related relief. A hearing date of August 10, 2016 at 9:30 a.m. also comfortably accommodates the aforementioned deadlines.

CONCLUSION

For the foregoing reasons, Jefferson Radiation prays that this Court enter an Order:

1) Certifying the class for settlement purposes only against defendant, ACS;

2) Preliminarily approving a Class Settlement;

3) Appointing Jefferson Radiation as the Class Representative;

4) Appointing Class Counsel and Settlement Class Counsel;

5) Appointing the Angeion Group as Notice and Settlement Administrator;

6) Authorizing notice to class members with deadlines for Opt-Outs and Objections; and

7) Scheduling a Fairness Hearing.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of April, 2016, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all counsel. I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to all non-CM/ECF participants.

/s/ Preston L. Hayes
PRESTON L. HAYES