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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

JUVENAL ROBLES and ABEL FIGUEROA, individually and on behalf of a class of similarly situated individuals,

Plaintiffs,

v.

LUCKY BRAND DUNGAREES, INC., a Delaware corporation, KIRSHENBAUM BOND SENECAL & PARTNERS LLC f/k/a KIRSHENBAUM BOND & PARTNERS LLC, a Delaware limited liability company, d/b/a Lime Public Relations + Promotion, and KIRSHENBAUM BOND & PARTNERS WEST LLC, a Delaware limited liability company,

Defendants and Third-Party Plaintiffs,

v.

Case No. 10-cv-04846 MMC (HRL)

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AGREEMENT

Location: Courtroom 7, 19th Floor
450 Golden Gate Avenue
San Francisco, CA 94102
Date: November 16, 2012
Time: 9:00 a.m.

The Honorable Maxine M. Chesney

Magistrate Judge Howard R. Lloyd

MERKLE INC., a Maryland Corporation,

Third-Party Defendant and Fourth-Party Plaintiff,

v.

RGAR HOLDINGS, LLC, a Florida limited liability company, formerly known as TAKE 5 SOLUTIONS, LLC., a Florida limited liability company,

Fourth-Party Defendant.

Notice of Motion

NOTICE IS HEREBY GIVEN that the Plaintiffs will move the Court, pursuant to Federal Rule of Civil Procedure 23, to grant preliminary approval of the Proposed Class Action Settlement Agreement on November 16, 2012 at 9:00 a.m. or at such other time as may be set by the Court, at 450 Golden Gate Avenue, San Francisco, CA 94102, Courtroom 7, 19th Floor, before the Honorable Maxine M. Chesney.

Plaintiffs seek preliminary approval of this class action settlement, certification of the proposed class, appointment of the Plaintiffs as Class Representatives, and appointment of their counsel as Class Counsel. The Motion is based on this Notice of Motion, the Brief in Support of the Motion attached hereto and the authorities cited therein, oral argument of counsel, and any other matter that may be submitted at the hearing.

Dated: October 5, 2012

Respectfully Submitted,

JUVENAL ROBLES and ABEL FIGUEROA, individually and on behalf of a class of similarly situated individuals,

By: /s/ Ryan D. Andrews

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I. Introduction

The proliferation of mobile phones and the resulting spread of related SMS text message technology[1] have revolutionized the marketing and advertising industries in recent years. Although primarily a means of personal communication, brands and advertisers are turning to *en masse* text message solicitation as a cheap and direct way to target individual consumers.[2] This litigation (the "Action") arose out of the evolving mobile marketing landscape and involves allegations that Defendants Lucky Brand Dungarees, Inc. ("Lucky"), Kirshenbaum Bond Senecal & Partners LLC f/k/a Kirshenbaum Bond & Partners LLC d/b/a Lime Public Relations + Promotion, and Kirshenbaum Bond & Partners West LLC (together "Lime"), Third-Party Defendant Merkle, Inc. ("Merkle"), and Fourth-Party Defendant RGAR Holdings, LLC f/k/a Take 5 Solutions, LLC ("Take 5") (Lucky, Lime, Merkle, and Take 5 are collectively referred to as the "Defendants") sent or caused to be sent text message advertisements with an automatic telephone dialing system ("ATDS") to 216,711 cellular phone owners without first obtaining the requisite "prior express consent" in violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. §227 *et seq*. (*See* Docket Numbers ("Dkts.") 1 & 39.)

Plaintiff Juvenal Robles initiated this class action after having received an allegedly unsolicited text message advertisement by or on behalf of Defendants to which he did not consent. At the outset of the litigation Judge Jeremy Fogel, to whom the Action was initially assigned, ordered the Parties to explore settlement options. In the eighteen months since commencing the settlement process, the Parties have formally mediated on three separate occasions with two different neutrals, and only when trying to schedule a fourth mediation did the Parties come to an

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[1] Text messaging—also known as "SMS," or "Short Message Service"—is a messaging system that in normal use allows individuals to send and receive short text messages, usually limited to 160 or so characters, on their cellular telephones.

[2] Although not all text message marketing runs afoul of the law, a recent study by the Pew Research center, published on August 2, 2012, found that 69% of cell phone owners receive unwanted or spam text messages, with 25% of such users receiving spam text messages on at least a weekly basis. *See* http://www.pewinternet.org/Reports/2012/Mobile-phone-problems/Main-findings/Mobile-phone-problems.aspx.

agreement in principle.

The resulting settlement agreement ("Settlement Agreement" or "Settlement"), a copy of which is attached hereto as Exhibit 1, is an exceptional result for the Settlement Class Members.[3] The Settlement Agreement creates a fund totaling $9,900,000 from which members of the class who submit a short and simple claim form will receive up to a $100 cash settlement payment. The Settlement Agreement also provides for important prospective relief as well. First, Defendants Lime, Merkle, and Take 5 have agreed to ensure that express consent, in the form of a clear and conspicuous writing, is obtained from a consumer before any future text message advertisements are sent. Also, should Lucky choose to engage in any text messaging campaigns in the future, it has agreed to review, and instruct its agents to review, all current laws and regulations surrounding the transmission of text message advertisements to consumers. Finally, each claim form will include an option to allow class members to remove their cellular phone numbers from databases from which future text messages could be sent by or on behalf of Take 5.

The results achieved by the Settlement Agreement—which was structured on similar settlements that have received final approval by courts in this, and other, federal districts—are well beyond those required for preliminary approval. Plaintiffs thus move the Court to preliminarily approve the instant Settlement Agreement, certify the proposed class, and appoint Jay Edelson, Myles McGuire and Ryan D. Andrews of Edelson McGuire LLC as class counsel ("Class Counsel"). For convenience, proposed dates and deadlines leading to a final approval hearing are provided in the Proposed Order separately submitted to the Court.

II. The TCPA

A brief summary of the law that forms the basis of Plaintiffs' claims will put the Settlement in context. Congress passed the TCPA in response to "voluminous consumer complaints" and to prohibit "intrusive nuisance calls" it determined were invasive of privacy. *Mims v. Arrow Fin. Servs. LLC*, 132 S. Ct. 740, 744 (2012); *see also Satterfield v. Simon &*

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[3] Settlement Class Members are defined in sections 1.37 & 1.42 of the Settlement Agreement and in § II(A) *infra*.

Schuster, Inc., 569 F.3d 946, 954 (9th Cir. 2009) (finding that in enacting the TCPA, Congress sought to "protect the privacy interests of telephone subscribers"). The TCPA exists as a means to combat the growing threat to privacy being caused by automated telemarketing practices, and states that:

> It shall be unlawful for any person within the United States . . . (A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system[.]

47 U.S.C. § 227(b)(1)(A)(iii). The TCPA applies with equal force to text message calls as it does to voice calls made to cellular phones. *Satterfield*, 569 F.3d at 954.

The TCPA's prohibitions at issue require the calls to be made with certain equipment termed an "automatic telephone dialing system" ("ATDS"), which Congress defines as "equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). In addition, liability under the TCPA extends not only to the entity that physically transmitted the text messages, but also to any party responsible for the text messages. *In re Jiffy Lube Int'l, Inc. Text Spam Litig*, --- F. Supp. 2d ---, No. 11-md-2261, 2012 WL 762888, *2-3 (S.D. Cal. March 9, 2012) (citing *Satterfield*, 569 F.3d at 955); *see also Kramer v. Autobytel, Inc.,* 759 F. Supp. 2d 1165, 1170 (N.D. Cal. 2010) ("courts have held both advertisers and advertisement broadcasters subject to liability under the TCPA.").

The TCPA sets statutory damages in the amount of $500 per violation, and provides for injunctive relief prohibiting the further transmission of such messages. *See* 47 U.S.C. § 227(b)(3)(A-B). Having put Plaintiffs' claims in legal perspective, a review of the process leading up to the Settlement supports the procedural fairness of the agreement.

III. Summary of the Litigation, Mediation & Settlement

On October 26, 2010, Plaintiff Juvenal Robles filed his Class Action Complaint alleging that he received an unauthorized text message advertisement promoting Lucky Brand Jeans in violation of the TCPA. (Dkt. 1.) On January 10, 2011, after Plaintiff afforded Lucky three extensions of time while counsel initially exchanged information and debated the merits of

Robles's claim, Lucky filed an Answer to the Complaint. (Dkts. 5, 9, 11, & 15.)

On April 29, 2011, at the order of Judge Fogel, Plaintiff Robles and Defendant Lucky participated in a settlement conference before Magistrate Judge Howard Lloyd. (*See* Dkt. 18.) Through informal discovery, counsel for Plaintiff and Lucky determined that Lime, Merkle, and Take 5 each played a role in the Lucky "Back to School" ad campaign of which the allegedly unsolicited text messages were part. Thus, counsel for Plaintiff and Lucky believed that the attendance of Lime, Merkle, and Take 5 at the settlement conference was necessary to reach any settlement agreement. (*See* Dkt. 32.)

At the initial April 29, 2011 settlement conference, the participants—which included both counsel and representatives of the Defendants and insurers—candidly discussed their various positions on the merits of Plaintiffs' claims and the likely defenses. (*Id.*) Throughout the settlement conference, Judge Lloyd ensured that the Parties fairly and openly discussed the merits of their claims and defenses and, upon conclusion, recommended that the participants return for a further settlement conference. (*Id.*)

Before the Parties returned to the negotiation table, however, Defendants insisted on Plaintiff obtaining certain information about the identity of the class through third-party discovery. (*See* Dkt. 33.) Upon receiving additional third-party discovery, Plaintiff Robles amended his complaint on July 25, 2011 to include Abel Figueroa as an additional Plaintiff and Lime as an additional Defendant. (Dkt. 39.) Thereafter, on September 6, 2011, Lime answered the Amended Complaint and filed a Third-Party Complaint against Merkle seeking contractual indemnification, and making claims for breach of contract, contribution, and declaratory relief. (Dkt. 44.) Then, on September 9, 2011, Lucky answered the Amended Complaint. (Dkt. 48.) On November 7, 2011, Merkle filed its answer to Lime's Third-Party Complaint (Dkt. 64), and on November 21, 2011, Merkle filed a Fourth-Party Complaint against Take 5 pleading ten causes of action. (Dkt. 66.) Finally, after several months, on February 28, 2012, Take 5 answered the Fourth-Party Complaint of Merkle. (Dkt. 72.)

In the midst of the filing of these pleadings by Defendants, progress towards settlement was again made at a subsequent September 21, 2011 settlement conference with Judge Lloyd.

Judge Lloyd's calendar prevented the Parties' negotiations from continuing for the entire day, but to continue the progress made towards settlement, the Parties agreed to one day of intensive private mediation with the Honorable Nicholas H. Politan (Ret.). On January 26, 2012, counsel for the Parties, representatives for Defendants and their insurers met for an intensive, one-day private mediation with Judge Politan. (*See* Dkts. 70, ¶ 11; 78 ¶ 12.) While the Parties were at an impasse after several rounds of arm's-length negotiations, it was clear that the foundations of a settlement were being laid. (Dkt. 78 ¶ 12.) At the end of this day-long mediation, Judge Politan crafted a mediator's proposal as to the settlement's general framework and its terms. (*Id.*)

So as to effectuate Judge Politan's proposal, the Parties agreed to consider it for a period of 30 days and confidentially report back to Judge Politan with an acceptance or rejection of its terms. (*Id*.) Unfortunately, on February 20, 2012, while his proposal was still pending, Judge Politan unexpectedly passed away. (*Id.*) Ultimately, not all of the Parties accepted Judge Politan's proposal in its entirety.

At the Court's scheduled Joint Case Management Conference on March 23, 2012, the Parties informed the Court that settlement negotiations were ongoing despite Judge Politian's passing and that the Parties were considering returning to mediation. (*See* Dkts. 83; 86; 89.) Ultimately, the Parties were able to utilize most of Judge Politian's proposal and reach a compromise in a few key areas necessary to reach the Settlement Agreement, including Plaintiffs' counsel agreeing to seek less attorneys' fees. Thus, before the Parties scheduled their fourth mediation, they were able to agree to the Settlement Agreement in principle. Now, following several rounds of additional settlement negotiations spanning the past few months, Plaintiffs seek preliminary approval of this Settlement Agreement.

IV. Terms of the Settlement

The terms of the settlement are set forth in the Settlement Agreement attached hereto as Exhibit 1 and are briefly summarized as follows:

A. Class Definition

The settlement class is defined as all Persons Nationwide who from August 24, 2008 until September 15, 2008, were sent one of nine text messages which are set forth in the Agreement,

from short code "88202" that promoted Lucky's jeans as part of a "Back to School" campaign. (Ex. 1, §§ 1.37, 1.42.)

B. Monetary Relief

Defendants have agreed to pay up to $100 to each Settlement Class Member who submits a valid claim form, to be paid from a $9,900,000 settlement fund. (Ex. 1, §§ 1.38, 2.2.) If the total amount required to pay each approved claim would exceed the amount in the settlement fund after payment of settlement administration expenses, the fee award to proposed Class Counsel, and the incentive award to Juvenal Robles and Abel Figueroa (together the "Class Representatives"), then each Settlement Class Member with an approved claim will receive a *pro rata* share of the amount of the settlement fund remaining after payment of such amounts. (Ex. 1, § 2.2(a).)

C. Prospective Relief

Defendants Lime, Merkle, and Take 5 have agreed to institute certain best practices for a term of one year prohibiting them, or any company with whom they contract, from advertising any offer, product, or service via text messages, unless each potential recipient has given explicit consent in the form of a clear and conspicuous writing, prior to the receipt of any such messages. (Ex. 1, § 2.3.) In addition, prior to engaging in any text messaging campaign in the future, Lucky has agreed to review, and instruct its agents to review, all current laws and regulations surrounding the transmission of text message advertisements to consumers. (Ex. 1, § 2.3.)

D. Additional Relief

Along with the individual relief to the Settlement Class Members provided above, Defendants have agreed to provide the following additional relief:

1. Class Member List Removal

Every claim form will contain the option for any Settlement Class Member to remove his or her cell phone number from any list or database of numbers to which text messages could be sent by or on behalf of Take 5. (Ex. 1, § 2.4.)

2. Payment of Notice and Settlement Administrative Expenses

Defendants have agreed to pay, from the settlement fund, the cost of sending notice set forth in the Settlement Agreement and any other notice as required by the Court, as well as the

costs of administration of the settlement. (Ex. 1, § 1.39.)

3. Payment of Attorneys' Fees and Expenses

Under the Settlement Agreement, Defendants have agreed as reasonable and not to oppose proposed Class Counsel's request, subject to Court approval, of up to $2,400,000 for attorneys' fees and reimbursement of expenses if proposed Class Counsel limits its request to this amount. (Ex. 1, § 8.1.)

E. Release of Liability

In exchange for the relief described above, Lucky, Lime, Merkle, Take 5, and each of their related and affiliated entities will receive a full release of all claims related to the transmission of text messages to Settlement Class Members as part of the "Back to School" campaign. (*See* Ex. 1, §§ 1.28, 1.30 for full release language.) Additionally, Lucky, Lime, Lime's Insurer, Merkle, and Take 5 agree to release any actions or claims that were, could be, or could have been brought against each other related to the facts, matters, or agreements on which the claims in the Action were based. (Ex. 1, § 1.29.)

V. The Proposed Settlement Class Should be Certified

The Court's first step in the process of granting preliminary approval of a settlement is to 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). To certify a class, the plaintiff must demonstrate that the proposed class and proposed class representatives meet four requirements: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. Fed. R. Civ. P. 23(a)(1)-(4).

In addition, a plaintiff seeking class certification must also meet at least one of the requirements of Rule 23(b). Fed. R. Civ. P. 23(b); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2548 (2011). Where, as here, plaintiffs seek certification of a class under Rule 23(b)(3), they must demonstrate "that questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3); *Kagan v. Wachovia Sec., L.L.C.*, No. 09-5337 SC, 2012 WL 1109987, at *4 (N.D. Cal.

Apr. 2, 2012) (citing *Amchem*, 521 U.S. at 615). Here, Plaintiffs meet each of the elements of class certification under Rule 23(a) and satisfy the requirements of Rule 23(b)(3).

A. The Requirement for Numerosity is Satisfied

The first prerequisite to class certification under Rule 23 is that the "class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). There is no specific minimum number of proposed class members required to satisfy the numerosity requirement, but generally a class of forty or more members is considered sufficient. *Moshogiannis v. Sec. Consultants Grp., Inc.*, No. 5:10-CV-05971 EJD, 2012 WL 423860, at *3 (N.D. Cal. Feb. 8, 2012) (holding that numerosity is satisfied by class of 254 members); *see also Hopkins v. Stryker Sales Corp.*, No. 5:11-CV-02786-LHK, 2012 WL 1715091, at *4 n.9 (N.D. Cal. May 14, 2012) (finding numerosity satisfied by class of 130); *Algee v. Nordstrom, Inc.*, No. C 11-301 CW MEJ, 2012 WL 1575314, at *2 (N.D. Cal. May 3, 2012) (finding a class of 60 sufficient).

Here, the proposed class is comprised of 216,711 cell phone owners nationwide. (Ex. 1, § 4.2(a).) Thus, "common sense indicate[s] that [the proposed class] is large" and that the "numerosity requirement is satisfied." *Bryant v. Serv. Corp. Int'l*, No. C 08-01190 SI, 2011 WL 855815, at *7 (N.D. Cal. Mar. 9, 2011) (quoting 1 Conte & Newberg, *Newberg on Class Actions* § 3.3 (4th ed.2002)). Accordingly, the proposed class is so numerous that joinder of their claims is impracticable, and the numerosity requirement is easily satisfied.[4]

B. The Requirement of Commonality is Satisfied

Second, Rule 23 requires that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Commonality may be demonstrated when the claims of all class members "depend upon a common contention," with "even a single common question" sufficing. *Dukes*, 131 S. Ct. at 2545, 2557 (citation omitted); *see also Hanlon v. Chrysler Corp.*, 150 F.3d

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[4] The class is not only numerous but is easily ascertainable. Here, the Parties posses a list of phone numbers of every individual who received the offending text messages, and every submitted claim will be cross-referenced with that list. Thus, the class definition is "definite enough so that it is administratively feasible for the court to ascertain whether an individual is a member." *Herrera v. LCS Fin. Srvs. Corp.*, 274 F.R.D. 666, 673 (N.D. Cal. 2011).

1011, 1019 (9th Cir. 1998) ("[t]he existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class.") The common contention must be of such a nature that it is capable of class-wide resolution, and that the "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 131 S. Ct. at 2545. Moreover, the permissive standard of commonality provides that "[w]here the circumstances of each particular class member vary but retain a common core of factual or legal issues with the rest of the class, commonality exists." *Parra v. Bashas', Inc.*, 536 F.3d 975, 978-79 (9th Cir. 2008).

Here, the class shares a common statutory TCPA claim premised on Plaintiffs' allegations that Defendants sent a text message with an ATDS promoting Lucky Brand Jeans as part of a "Back to School" campaign without the prior express consent of the class. (Dkt. 39, ¶¶ 35-36.) The transmission of these text messages leads to common factual and legal questions for the class, such as: (a) whether Defendants or their agents obtained prior express consent from members of the class to send the text messages at issue; and (b) whether the equipment used to send the allegedly offending text messages fits within Congress's definition of an ATDS. Answering these questions, regardless of the outcome, will resolve the allegations for the whole class "in one stroke," thereby effectuating "class wide resolution." Thus, Plaintiffs have satisfied the requirement of commonality.

C. The Requirement of Typicality is Satisfied

Rule 23 next requires that the class representative's claims be typical of those of the putative class she seeks to represent. Fed. R. Civ. P. 23(a)(3). The typicality requirement ensures that "the interests of the named representative aligns with the interests of the class." *Wolin v. Jaguar Land Rover N. Am. LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010). Typicality is measured under a permissive standard and does not require that the representative's claims be substantially identical, but only that they are "reasonably coextensive with [the claims] of absent class members." *Hanlon*, 150 F.3d at 1020. Typicality is present when a defendant acts uniformly toward the class members, where that uniform conduct results in injury to the class members, and where the named plaintiffs suffer a similar injury to that of the class members as a result. *Hanon*

v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992).

In the instant case, Plaintiffs and the proposed class all share identical claims based on Defendants' allegedly common course of sending text messages advertisements from the same short code without obtaining prior express consent, resulting in uniform statutory injury. Because both Robles and Figueroa each received text messages as part of the "Back to School" campaign in alleged violation of the TCPA and were damaged in the same way, their interests align with those of the class in satisfaction of the typicality requirement.

D. The Requirement of Adequate Representation is Satisfied

Finally, Rule 23(a) requires that the proposed class representatives have and will continue to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). To determine if representation is in fact adequate, the Court must ask "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon*, 150 F.3d at 1020. Further, where a plaintiff's claims are found to be typical of those of the Class, appointing that plaintiff as the class representative will also ensure that interests of the class remain adequately protected. *See Dukes*, 131 S. Ct. at 2551 n.5 (discussing how the fulfillment of the typicality requirement usually also supports a finding of adequacy because an adequate representative will have claims that are typical of those of the class).

Here, the adequacy of the two proposed Class Representatives is beyond dispute. First, as discussed above, Plaintiffs' interests are entirely representative of and consistent with the interests of the class. In addition, discovery did not reveal that the proposed Class Representatives are subject to any unique defenses. Both Plaintiffs have demonstrated their continued willingness to vigorously prosecute this case and have regularly consulted with proposed Class Counsel, have aided in the prosecution of the litigation, have reviewed documents, and have indicated their desire to continue protecting the interests of the class. (*See* Declaration of Ryan D. Andrews Decl. ¶ 8, attached hereto as Exhibit 2.) Thus, because the proposed Class Representatives' claims and damages are identical to those of the other class members, no conflicts of interests exist.

Second, proposed Class Counsel will also continue to adequately protect the interest of the

class, as they have regularly engaged in major complex litigation and have extensive experience in consumer class action lawsuits. Specifically, proposed Class Counsel have substantial experience litigating class action lawsuits related to telecommunications and the TCPA that are similar in size, scope and complexity to the present case. (Andrews Decl. ¶ 3; *see also, e.g., Kramer v. Autobytel Inc.*, No. 10-cv-02722-CW (N.D. Cal. Feb. 10, 2012); *Satterfield v. Simon & Schuster*, No. 06-cv-2893-CW (N.D. Cal. Aug. 6, 2010); *Lozano v. Twentieth Century Fox Films Corp.*, No. 09-CV-6344 (N.D. Ill. Apr. 15, 2011); Firm Resume of Edelson McGuire, LLC, a copy of which is attached to the Andrews Decl. as Exhibit A.) As such, the Plaintiffs and proposed Class Counsel will adequately represent the members of the Settlement Class and their interests.

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

Upon meeting the requirements of Rule 23(a), a plaintiff must also then satisfy one of the three requirements of Rule 23(b) in order to certify the proposed class. *Dukes*, 131 S. Ct. at 2548. Rule 23(b)(3) provides that a class action can be maintained where: (1) the questions of law and fact common to members of the class predominate over any questions affecting only individuals; and (2) the class action mechanism is superior to the other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3); *Pierce v. Cnty. of Orange*, 526 F.3d 1190, 1197 n.5 (9th Cir. 2008). Certification under Rule 23(b)(3) is appropriate and encouraged "whenever the actual interests of the parties can be served best by settling their differences in a single action." *Hanlon*, 150 F.3d at 1022. Here, common questions of law and fact predominate, and the present class action is the best method of adjudication.

1. Common Questions of Law and Fact Predominate

The predominance requirement focuses on whether the proposed class is sufficiently cohesive to warrant adjudication by representation. *Amchem*, 521 U.S. at 623. Predominance exists "[w]hen common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication." *Hanlon*, 150 F.3d at 1022. Common legal and factual issues have been found to predominate where the class members' claims arose under the TCPA, *Grannan v. Alliant Law Grp., P.C.*, No. C10-02803 HRL, 2012 WL 216522, at *5 (N.D. Cal. Jan. 24, 2012), and where the TCPA claims focused on the defendant's advertising

practices. *CE Design v. Beaty Constr. Inc.*, No. 07 C 3340, 2009 WL 192481, at *8-9 (N.D. Ill. Jan. 26, 2009).

Here, the common factual and legal questions—whether text message advertisements promoting Lucky Brand Jeans during the "Back to School" campaign were transmitted by and on behalf of the Defendants with an ATDS, and whether the requisite "prior express consent" to send the messages was obtained—are the central focus of this class action. Because the class-wide determination of these issues looms large over any individual issues that exist, the predominance requirement is satisfied.

2. This Class Action is the Superior Method of Adjudication

Finally, certification of this suit as a class action is superior to other methods available to fairly, adequately, and efficiently resolve the claims of the class. To meet the requirement of superiority, a plaintiff must show that a class action is the "most efficient and effective means of resolving the controversy." *Wolin*, 617 F.3d at 1175-76. Here, the class is comprised of 216,711 individuals; the individual prosecution of their TCPA claims would be prohibitively expensive due to the relatively low amount of statutory damages available, would flood the court with an influx of individual actions, and would needlessly delay resolution. Because this Action will settle on a class-wide basis, these potential inefficiencies are resolved and the Court need not consider further issues of manageability relating to trial. *See Amchem*, 521 U.S. at 620 ("[c]onfronted with a request 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 will be no trial") (citation omitted). Accordingly, the Court should certify the Settlement Class pursuant to Rule 23(b)(3).

VI. The Court Should Appoint Plaintiffs' Counsel as Class Counsel

Under Rule 23, "a court that certifies a class must appoint class counsel . . . [who] must fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B). In making this determination, the Court must consider counsel's following attributes: (1) work in identifying or investigating potential claims; (2) experience in handling class actions or other complex litigation, and the types of claims asserted in the case; (3) knowledge of the applicable law; and (4)

resources committed to representing the class. Fed. R. Civ. P. 23(g)(1)(A)(i-iv).

As discussed above, proposed Class Counsel have extensive experience in prosecuting similar class actions and other complex litigation. (Andrews Decl. ¶ 3.) Importantly, proposed Class Counsel have diligently investigated and prosecuted *this* matter by dedicating substantial resources to the investigation of the claims at issue in the Action and have successfully negotiated the present settlement for over eighteen months to the benefit of the Settlement Class. (Andrews Decl. ¶ 4-6.) Accordingly, the Court should appoint Jay Edelson, Myles McGuire and Ryan D. Andrews of Edelson McGuire, LLC as Class Counsel.

VII. The Proposed Settlement is Fundamentally Fair, Reasonable, and Adequate, and Thus Warrants Preliminary Approval

Following class certification, the Court should preliminarily approve the settlement. The procedure for review of the fairness of a proposed class action settlement is a well-established two-step process. Fed. R. Civ. P. 23(e); *see also* Conte & Newberg, 4 Newberg on Class Actions, §11.25, 3839 (4th ed. 2002). The first step is a preliminary, pre-notification hearing to determine whether the proposed settlement is "within the range of possible approval." Newberg, §11.25, at 3839 (quoting Manual for Complex Litigation §30.41 (3d ed. 1995)); *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1110 (9th Cir. 2008); *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007). This hearing is not a fairness hearing; rather, its purpose is to ascertain whether there is any reason to notify the putative class members of the proposed settlement and whether to proceed with a fairness hearing. *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d at 1079. Notice of a settlement should be sent where the settlement "appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval." *Id.*

The Manual for Complex Litigation characterizes the preliminary approval stage as an "initial evaluation" of the fairness of the proposed settlement made by a court on the basis of written submissions and informal presentations from the settling parties. § 21.632 (4th ed. 2004). "[W]hether a settlement is fundamentally fair within the meaning of Rule 23(e) is different from

the question whether the settlement is perfect in the estimation of the reviewing court." *Lane v. Facebook, Inc*., No. 10-16380, 2012 WL 4125857, at * 3 (9th Cir. Sept. 20, 2012). If a court finds a settlement proposal "within the range of possible approval," it then proceeds to the second step in the review process—the final approval hearing. Newberg, §11.25, at 3839.

A strong judicial policy exists favoring the voluntary conciliation and settlement of complex class action litigation. *In re Syncor*, 516 F.3d at 1101 (citing *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615 (9th Cir. 1982)). While a district court has discretion regarding the approval of a proposed settlement, it should give "proper deference to the private consensual decision of the parties." *Hanlon*, 150 F.3d at 1027. In fact, when a settlement is negotiated at arm's-length by experienced counsel, there is a presumption that it is fair and reasonable. *In re Pac. Enterprises Sec. Litig*., 47 F.3d 373, 378 (9th Cir. 1995). Though not dispositive, the presence of a neutral mediator who assisted the settlement negotiations is further proof that the settlement was reached fairly and provides adequate relief. *In re Bluetooth Headset Prods. Liab. Litig*., 654 F.3d 935, 948 (9th Cir. 2011).

In addition, a court is not required to ascertain "a specific monetary value corresponding to each of the plaintiff class's statutory claims and compare the value of those claims to the proffered settlement award." *Lane*, 2012 WL 4125857, at * 7. It need not determine the potential recovery for each plaintiff's cause of action, even in those cases involving statutory damages, given that questions of fact discernible only at trial would render any finding "speculative and contingent." *Id*. (finding that a $9.5 million class recovery "would be substantial under most circumstances.") Ultimately, the Court's role is to ensure that the settlement is fundamentally fair, reasonable, and adequate. Fed. R. Civ. P. 23(e)(2); *In re Bluetooth*, 654 F.3d at 950.

There is little question that the proposed settlement is at least "within the range of possible approval." The Parties have exchanged both formal and informal discovery, have obtained discovery from numerous third-parties, have taken oral discovery and have engaged in settlement discussions for well over a year. (*See* Dkt. 78, ¶ 8; Andrews Decl. ¶ 6.) Moreover, Magistrate Judge Lloyd presided over the two initial settlement conferences and assisted the Parties in furtherance of the negotiations. (Dkt. 86, ¶¶ 4, 7.) Further, the late Judge Politan facilitated an

intense day-long mediation session with multiple rounds of arm's-length negotiations, helping to lay the framework for the instant Settlement Agreement which was premised on his mediator's proposal. (*Id.*¶ 8.)

The terms of the Settlement Agreement build off of the foundation laid with the help of Judge Lloyd and the late Judge Politan. First, Settlement Class Members will receive up to $100, payable from a settlement fund totaling $9,900,000. (Ex 1, § 2.1(a).) This relief was heavily influenced by the financial conditions of certain Defendants and the limitations of available insurance. (Andrews Decl. ¶ 5.) Importantly, Defendants have agreed to focused prospective relief, the crux of which restricts Defendants or their business partners from transmitting any text message advertisements without first adhering to procedures to ensure that prior express consent from the potential recipients is obtained. (Ex. 1, § 2.3.) Finally, to further benefit the class, the claim form allows Settlement Class Members to opt out from any list or database of numbers to which future text messages could be sent by or on behalf of Take 5. (Ex. 1, § 2.4.)

Although Plaintiffs and proposed Class Counsel are confident in the strength of their claims and that they would ultimately prevail at trial, they also recognize that litigation is inherently risky. (Andrews Decl. ¶ 4.) When the strength of Plaintiffs' claims are weighed against the legal and factual obstacles remaining, combined with the complexity of class action practice against experienced defense counsel, it is apparent that the proposed settlement is clearly in the best interest of the Settlement Class Members, as it immediately provides substantial monetary recovery and prospective relief. (*Id.* ¶ 5.)

Finally, the Court need not rule on the fairness, reasonableness, and adequacy of the proposed Settlement Agreement in a vacuum—similar class action settlements have been approved by this Court, and other similar settlements have received final approval by federal courts nationwide. *See e.g. Kramer*, No. 10-cv-02722-CW; *Satterfield*, No. 06-cv-2893-CW; *Lozano*, No. 09-CV-6344. As with these similar cases, this Settlement easily falls well "within the range of possible approval," is fair, reasonable, and adequate, and should thus be preliminarily approved.

VIII. The Proposed Plan of Class Notice is the Best Practicable Under the Circumstances

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 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); *Dukes*, 131 S. Ct. at 2558. Rule 23(e)(1) similarly states that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise." Fed. R. Civ. P. 23(e)(1). Notice is "adequate if it may be understood by the average class member." Newberg, § 11:53 at 167. The substance of the notice to the settlement class must describe the nature of the action, the definition of the class to be certified, the class claims and defenses at issue, as well as explain that settlement class members may enter an appearance through counsel if so desired, request to be excluded from the settlement class, and that the effect of a class judgment shall be binding on all class members. *See* Fed. R. Civ. 23(c)(2)(B).

After having solicited notice proposals from multiple respected class action settlement administrators, the Parties agreed upon the instant Notice Plan developed by Kurtzman Carson Consultants LLC ("KCC"), which will easily satisfy both the substantive and manner of distribution requirements of Rule 23 and Due Process. (*See* Andrews Decl. ¶ 7; *see also* Declaration of Daniel Rosenthal, ("Rosenthal Decl.") ¶ 13, attached hereto as Exhibit 3.) First, KCC will use the list of 216,711 unique cell phone numbers obtained through discovery to perform a reverse look-up to determine any U.S. mailing and email address associated with those cell phone numbers. KCC will then send direct notice through First Class U.S. Mail and email to the addresses obtained. (Ex. 1, § 4.2(c); Rosenthal Decl., ¶ 7.) Second, KCC will supplement the direct mail notice, to the extent necessary, by one of two ways depending on the number of addresses obtained in the reverse look-up. Should the mailing addresses and email addresses compiled be greater or equal to 45% of the total amount of the cell phone numbers, then KCC will publish notice in *People, Cosmopolitan, Ebony* and *Newsweek*. (Ex. 1, § 4.2(d); Rosenthal Decl., ¶ 8.) Should the reverse look-up yield addresses for less than 45% of the cell phone numbers of the Class, then KCC will supplement the direct mailed notice via Internet banner ads on the "24/7

Real Media Global Alliance." (*Id.*) Both the direct notice and either method of supplemental notice will direct Class Members to a settlement website, www.BackToSchoolTextSettlement.net, that will be created and maintained by KCC. This website will serve as the traditional "long form" notice, will provide access to relevant Court documents, and will offer Settlement Class Members the ability to file claim forms online. (Ex. 1, § 4.2(e); Rosenthal Decl., ¶ 10.) Finally, KCC will distribute a press release to local, national, and syndicated news organizations discussing the terms of the Settlement. (Ex. 1, § 4.2(f); Rosenthal Decl., ¶ 5.)

The direct mailing, the publications, the website, and the press release represent a wide cross section of media specifically chosen to reach as many Settlement Class Members as possible under the circumstances. (Rosenthal Decl., ¶ 13.) Copies of the proposed notices and the claim form are attached as Exhibits A, B, C, and D to the Settlement Agreement. The format and language of each form of notice has been drafted so that it is in plain language, is easy to read, will be readily understood by the members of the proposed class, and thus will satisfy the requirements of Rule 23 and Due Process.[5] (*Id.* ¶ 13.)

IX. Conclusion

For the foregoing reasons, Plaintiffs respectfully ask that the Court certify the class, appoint Juvenal Robles and Abel Figueroa as the Class Representatives, appoint Jay Edelson, Myles McGuire, and Ryan D. Andrews as Class Counsel, grant preliminary approval of the proposed Settlement Agreement, approve the form and manner of notice described above, and grant such further relief the Court deems reasonable and just.

Dated: October 5, 2012

Respectfully Submitted,

JUVENAL ROBLES and ABEL FIGUEROA, individually and on behalf of a class of similarly situated individuals,

[5] KCC will also send notice to the required government officials pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715. (Ex. 1, § 4.2(g).)

/s/ Ryan D. Andrews
One of Plaintiffs' Attorneys

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CERTIFICATE OF SERVICE

The undersigned certifies that, on October 5, 2012, I caused this document to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of filing to counsel of record for each party.

/s/ Ryan D. Andrews
Ryan D. Andrews