**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

KEITH SNYDER and SUSAN MANSANAREZ, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

OCWEN LOAN SERVICING, LLC,

Defendant.

TRACEE A. BEECROFT,

Plaintiff,

v.

OCWEN LOAN SERVICING, LLC,

Defendant.

CONSOLIDATED NO. 1:14-cv-08461

Class Action

Jury Trial Demand

Honorable Matthew F. Kennelly

Case No.: 1:16−cv−08677

**PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

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## I. INTRODUCTION

Plaintiffs Keith Snyder, Susan Mansanarez, and Tracee Beecroft ("Plaintiffs") respectfully move the Court for preliminary approval of the class action settlement ("Settlement") reached between Plaintiffs and Defendant Ocwen Loan Servicing, LLC ("Ocwen"). The proposed Settlement would resolve claims in this action brought under the Telephone Consumer Protection Act, 47 U.S.C. § 227 (the "TCPA").

After three years of heated litigation and three contentious, in-person mediations, the Parties to this TCPA class action have reached a proposed settlement calling for Ocwen to pay $17,500,000 into a non-reversionary common fund ("Settlement Fund" or "Fund") for a class of persons called on 1,685,757 unique cellular telephone numbers ("Settlement Class"). The Settlement Fund will be used to pay the Settlement Class, as well as notice and administration costs, attorneys' fees and expenses, and incentive awards for the named Plaintiffs.

Eligible Settlement Class Members who file qualified claims will receive a *pro rata* cash payment from the Fund, estimated to be between $55 and $90, depending on the claims rate and other expenses and fees that come from the Fund.

Ocwen has also agreed to an injunction requiring it to alter its consent-gathering practices, and has agreed to pay enhanced damages to people who may receive automated calls in the future because of gaps in Ocwen's consent recordkeeping practices.

The Settlement provides for direct notice (via email and/or first-class mail) to addresses and emails associated in Ocwen's records with any phone number on the class list, and calls for reverse-lookups to locate mailing addresses for phone numbers that are not associated with an address in Ocwen's records. Additionally, the Settlement Administrator will supplement the direct notice with a targeted internet banner ad campaign, and will establish an easy-to-understand, interactive website where Settlement Class Members may receive up-to-date

information regarding these proceedings, review the Settlement Agreement and other important documents, and submit claims. The process is designed to efficiently and effectively provide meaningful information to Settlement Class Members, so that they may make an informed decision about their rights under the Settlement.

As explained below, this Settlement is fair, reasonable, and adequate, and it should be approved by this Court.

## II. STATEMENT OF FACTS

### A. Procedural background.

On October 27, 2014, Plaintiff Keith Snyder filed a class action complaint in the Northern District of Illinois, alleging nationwide violations of the TCPA and the Fair Debt Collections Practices Act ("FDCPA"). Dkt. No. 1. On April 16, 2016, Plaintiff Snyder amended his class action complaint to add Plaintiff Susan Mansanarez as a class representative for the TCPA class. Dkt. No. 29. On January 25, 2015, Tracee Beecroft filed a second nationwide class action in the District of Minnesota, *Beecroft v. Ocwen Loan Servicing, LLC*, No. 15- 94 (D. Minn.), also alleging violations of the TCPA, along with individual claims for violations of the FDCPA and Fair Credit Reporting Act, invasion of privacy, and credit defamation.

Subsequently, the Minnesota action was transferred to the Northern District of Illinois, where the two actions were consolidated (the "Action"). Dkt. No. 93. Ocwen has consistently asserted that it obtained "the called parties' prior express consent before making the calls that allegedly violated the TCPA." Dkt. No. 40 at p. 23. Plaintiffs disagree, and on October 4, 2016, they filed a motion seeking limited class certification under Rule 23(b)(2) for purposes of obtaining preliminary injunctive relief. Dkt. No. 97. Although Ocwen opposed this motion (Dkt. No. 128), on June 28, 2017, the Court held that Plaintiffs had established the basis for certification of a limited class under Rule 23(b)(2) and were entitled to preliminary injunctive

relief. Dkt. No. 223. However, the Court deferred a class certification order and a preliminary injunction pending further submissions by the Parties. *Id*.

On May 26, 2017, Plaintiffs moved to certify a damages class under Rule 23(b)(3). Dkt. No. 216. Ocwen opposed this motion on July 24, 2017. Dkt. No. 141. On July 20, 2017, before the Parties completed their submissions regarding the merits of certifying a damages class, the Parties engaged in mediation before the Honorable Morton Denlow (Ret.) of JAMS in Chicago, where they came close to reaching a settlement. Several days later, the Parties reached a Settlement in principle, and ultimately finalized the terms in a Settlement Agreement. *See* Ex. 2 (Declaration of Beth E. Terrell ("Terrell Decl.")) ¶ 13.

**B. Discovery.**

Plaintiffs have engaged in extensive discovery. Together, they served Ocwen with seven sets of written discovery. Terrell Decl. ¶ 14. In response, Ocwen produced documents numbered at nearly 600,000 pages, which Plaintiffs reviewed. *Id*. Plaintiffs also deposed four of Ocwen's representatives: Diksha Dutt, Marc Trees, Crystal Kearse, and Sherri Goodman. *Id*. Through their review of Ocwen's voluminous production, and the depositions of Ocwen's representatives, Plaintiffs learned that, prior to December 2014, Ocwen had no policies, practices, or procedures for obtaining consent before it made calls to cell phones using its Aspect autodialer. *Id*. Ocwen called phone numbers logged as "home," "work," or "other" without first scrubbing to determine whether they were cell phones, and without regard to consent. *Id*. In addition, Ocwen had a practice of not honoring borrowers' verbal requests to stop calling. *Id*. Plaintiffs hired expert Jeff Hansen to review the Aspect calling records. *Id*. His analysis shows that Ocwen made over one hundred million Aspect calls to cell phones belonging to consumers, for whom Plaintiffs allege Ocwen had no record of consent. *Id*.

Obtaining discovery from Ocwen was no easy feat. Terrell Decl. ¶ 15. Ocwen resisted producing important discovery, including insurance policies, information about its proprietary systems and databases, discovery relating to when and how Ocwen tracked consent, evidence that Ocwen ever obtained consent, and discovery on Ocwen's handling of revocation requests. *Id*. Ocwen's resistance to complying with discovery requests forced Plaintiffs to bring multiple motions to compel production and related discovery motions. *See* Dkt. Nos. 49, 58, 74, 103, and 179. Because of the adversarial nature of the litigation, the Parties appeared before the Court telephonically or in person on a monthly, and sometimes weekly basis, and ultimately appeared for an evidentiary hearing to address whether the Court would impose a preliminary injunction. *See* Dkt. No. 61, 67, 72, 78, 84, 102, 106, 115, 119, 126, 175, 182, 193, 204, 208.

Plaintiffs, along with their expert Jeff Hansen, also responded to written discovery propounded by Ocwen. Terrell Decl. ¶ 16. Moreover, Ocwen deposed each Plaintiff, along with several of Plaintiffs' family members. *Id*. Plaintiffs also conducted a months-long investigation into Ocwen's past and present calling practices by interviewing nearly one hundred persons who received calls from Ocwen, borrowers and non-borrowers alike, supporting Plaintiffs' motion for a preliminary injunction. *See* Ex. 4, Declaration of Mark Ankcorn ("Ankcorn Decl.") ¶ 15. Ocwen deposed three non-party witnesses who offered testimony in support of that motion and Plaintiffs' counsel represented them at the depositions after reviewing thousands of pages of documents and dozens of audio recordings relating to their specific loan files. *Id.* at ¶ 16. Finally, Plaintiffs served subpoenas on the Better Business Bureau, where they obtained additional consumer complaints against Ocwen, and Ocwen's insurance broker, McGriff, Seibels & Williams, in an effort to obtain information regarding insurance coverage (if any). Terrell Decl. ¶ 16.

**C. The Parties' mediations.**

The Parties participated in three mediations before finally reaching an agreement. Terrell Decl. ¶ 17. On May 25, 2016, the Parties participated in an in-person mediation session before the Honorable James Holderman (Ret.) of JAMS in Chicago. *Id*. On October 14, 2016, the Parties held a second mediation with Rodney A. Max, Esq., in Florida. *Id*. Finally, the Parties participated in a third mediation before the Honorable Morton Denlow (Ret.) of JAMS in Chicago. *Id*. Prior to each mediation, Plaintiffs and Ocwen submitted detailed mediation briefs setting forth their respective views on the strengths of their cases. *Id*.

At each mediation, the Parties discussed their relative views of the law and the facts and potential relief for the proposed Settlement Class. Terrell Decl. ¶ 18. Counsel exchanged counterproposals on key aspects of the Settlement. *Id*. At all times, the settlement negotiations were adversarial, non-collusive, and at arm's length. *Id*. Just days after the third mediation, the Parties reached an agreement, which they finalized shortly thereafter. *Id*.

**D. The proposed Settlement.**

The proposed Settlement establishes a fund of $17,500,000. The key terms are as follows:

1. <u>The Settlement Class.</u>

The Settlement Class is defined as follows:

> All persons who were called by Ocwen on the 1,685,757 unique cell phone numbers listed on Exhibit G to the Settlement Agreement (filed with the Court under seal) using its Aspect dialing system between October 27, 2010 and through and including the date of the Preliminary Approval Order ("Settlement Class Period"). Excluded from the Settlement Class are: (i) those persons who were called by Ocwen using its Aspect dialing system during the Settlement Class Period only on numbers not included on Exhibit G; (ii) individuals who are or were during the Settlement Class Period officers or directors of Ocwen or any of its Affiliates; (iii) any justice, judge, or magistrate judge of the United States or any State, their spouses, and persons within the third degree of relationship to either of them, or the spouses of such

> persons; and (iii) all individuals who file a timely and proper request to be excluded from the Settlement Class.

Settlement Agreement ("Agr.") § 3.1.

2. The Settlement Fund.

The proposed Settlement establishes a $17,500,000 non-reversionary "Settlement Fund." *Id.* § 4.5.1. The Settlement Fund will be used to pay the following:

a. *Notice and claims administration*

Under the Settlement Agreement, notice costs will be paid from the Settlement Fund. Agr. § 5.3. The Parties will choose a Settlement Administrator who will agree to cap notice and claims administration costs.[1] Terrell Decl. ¶ 19. The proposed notice plan will consist of direct notice by email and U.S. mail where such information is available. Agr. §§ 6.1, 6.2. If a particular phone number is associated with both an email and a mailing address, then *both* an email and a postcard will be sent. *Id*. In the event that calls were made to phone numbers that are not associated with addresses in Ocwen's records, the Settlement also calls for use of reverse-lookup procedures to search for mailing addresses. *Id.* § 6.1.5. In addition, the Settlement Administrator will supplement the direct notice with a targeted internet banner ad campaign. *Id*. § 6.4. The Settlement Administrator will also maintain a website and a toll-free informational hotline. *Id.* § 6.5. If the proposed Settlement receives final approval, the Settlement Administrator will process claims and distribute awards to class members. *Id*. § 7.5.

b. *Attorneys' fees and costs*

Under the Settlement Agreement, Plaintiffs' counsel may request that the Court approve an award of attorneys' fees and expenses. Agr. § 15.1. Plaintiffs' counsel will apply for

[1] The Parties anticipate they will have chosen the Settlement Administrator by the September 28, 2017 hearing. Terrell Decl. ¶ 19.

reimbursement of their actual expenses up to $100,000, and an award of attorneys' fees that is no greater than one-third of the Settlement Fund. *See* Terrell Decl. ¶ 20.

c. *Service awards*

The Settlement Agreement provides that Plaintiffs' counsel may request that the Court approve an incentive award to Plaintiffs. Agr. § 15.2. If approved by the Court, Plaintiffs Keith Snyder, Susan Mansanarez, and Tracee Beecroft each will receive an incentive award of $25,000. Terrell Decl. ¶ 21. Plaintiffs assisted with drafting the complaints, provided information about their interactions with Ocwen, responded to discovery, and they and family members sat for contentious depositions. *Id*. They were also ready to testify at trial. *Id*. These awards compensate Plaintiffs for their time, effort, and risks undertaken in prosecuting the case.

d. *Payments to Settlement Class Members*

The remainder of the Settlement Fund will be distributed proportionately to all Settlement Class Members who submit a valid claim form by mail, or through the Settlement Website utilizing an e-signature format. Agr. § 7.1.

Once all the claims have been received, the Settlement Administrator will calculate the amount of an individual Settlement Class Member's award on a *pro rata* basis, for up to three cell phone numbers called, after deducting any Court-awarded attorneys' fees and expenses, notice and claims administration expenses, and any Court-awarded incentive awards for the named Plaintiffs. Agr. § 4.5.4.

If administratively feasible, the Settlement Administrator will make a second distribution to valid Claimants of any amounts remaining after the initial distribution. *Id*. § 4.5.6. Assuming the Court grants the requested attorneys' fees and expenses, incentive awards, and administration

costs, Plaintiffs estimate that each Claimant will receive between approximately $55 and $90. Terrell Decl. ¶ 22.

e. *Uncashed checks*

Any funds remaining from uncashed checks after the second distribution will be distributed evenly to the National Consumer Law Center and Public Justice Foundation. Agr. § 4.5.6. No amount of the Settlement Fund will revert to Ocwen. *Id.*

3. Injunctive relief.

The Settlement also provides Settlement Class Members with meaningful injunctive relief, with an eye toward the items the Court identified in its June 28, 2017 opinion regarding injunctive relief. Agr. § 4.2; Dkt. No. 223. Because of gaps in Ocwen's consent practices, Ocwen has agreed to an injunction that will require it to alter the manner in which it obtains and tracks consent so that Ocwen keeps track of whether it has consent for all newly-obtained phone numbers on a prospective basis. *Id*. at §§ 4.2.1 – 4.2.3. The Settlement requires Ocwen to proactively separate accounts for which its REALServicing system shows a NEWP and NVLS code (indicating a "non-voice locate" skip trace and "new phone number" added) on the same day, and mark all such accounts as "P," which means "Pending" consent. On a prospective basis, Ocwen will implement a drop-down menu to its system, which requires that the agent working the file log how the phone number was obtained. *Id*. at § 4.2.3. Phone numbers obtained from sources other than from the borrower himself will be marked as "P." Ocwen will not call accounts indicated with a P using its Aspect dialer. *Id*. at § 4.2.3(e).

The Parties have also addressed the possibility that problems with Ocwen's past recordkeeping on the issue of consent may lead to future nonconsensual calls. If found in the future to have violated the TCPA as a result of these prior recordkeeping gaps, Ocwen has

agreed it will pay enhanced damages. *Id*. at § 4.2.6. Statutory damages under the TCPA are set between $500 and $1,500 per violation. 47 U.S.C. §227(b)(3). For cases commenced between preliminary approval and two years after final approval, Ocwen has agreed to pay a minimum of $1,000 for the first ten illegal calls, $1,250 for the next 11-50 calls and $1,500 for any calls over 50. *Id*. at § 4.2.6. Persons who seek higher amounts – for example $1,500 per call for *all* calls – are free to do so; these amounts represent guaranteed minimums.

4. Class release.

In exchange for the benefits allowed under the Settlement, the Settlement Class Members who do not opt out will provide a release tailored to the practices at issue in this case. Agr. §§ 2.3.1, 10.1. Specifically, they will release all claims against Ocwen and its Affiliates[2] "that relate to or arise out of Ocwen's use of equipment or methods to contact or attempt to contact Settlement Class Members by telephone for servicing or debt collection purposes during the Settlement Class Period[,]" but the release "do[es] not include claims based on other aspects of calls, such as the substance of the calls, or the time/date of any such calls." *Id*. Class Counsel believe this release is appropriately tailored so as to only affect claims directly related to the subject matter of this case.

5. Objections and opt-outs.

If Settlement Class Members wish to object to or opt out of the Settlement, they will have ninety (90) calendar days from the Notice Deadline to do so. Agr. §§ 2.14.3, 2.14.4.

[2] "Released Persons" and "Released Claims" does not extend to claims against Altisource Portfolio Solutions S.A., Altisource Solutions S.à r.l., Altisource Business Solutions Pvt. Ltd., or any other Affiliate or member of the Altisource family of companies. Likewise, no claims arising in *Beecroft v. Altisource Business Solutions Pvt. Ltd.*, No.15-2184 (D. Minn.), are released. Agr. § 10.1.

## III. AUTHORITY AND ARGUMENT

### A. The Settlement approval process.

Federal courts strongly favor and encourage settlements, particularly in class actions and other complex matters, where the inherent costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996) ("Federal courts naturally favor the settlement of class action litigation."); 4 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* ("Newberg") § 11:41 (4th ed. 2002) (citing cases).

Under Fed. R. Civ. P. 23(e)(1)(C), a court may approve a class action settlement if it is "fair, adequate, and reasonable, and not a product of collusion." A proposed class settlement is presumptively fair where it "is the product of arm's length negotiations, sufficient discovery has been taken to allow the parties and the court to act intelligently, and counsel involved are competent and experienced." *Newberg* § 11:41; *Am. Int'l Grp., Inc, v. ACE INA Holdings,* Nos. 07-cv-2898, 09 C 2026, 2012 WL 651727, at *2 (N.D. Ill. Feb. 28, 2012) ("A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.") (quotation and internal citation omitted).

The *Manual for Complex Litigation* (Fourth) (2004) § 21.63 describes a three-step procedure for approval of class action settlements:

> (1) Preliminary approval of the proposed settlement at an informal hearing;
>
> (2) Dissemination of mailed and/or published notice of the settlement to all affected class members; and
>
> (3) A "formal fairness hearing" or final settlement approval hearing, at which class members may be heard regarding the settlement, and at which evidence and argument concerning the

> fairness, adequacy, and reasonableness of the settlement may be presented.

Plaintiffs request that the Court take the first step in the settlement approval process by granting preliminary approval of the proposed Settlement. The purpose of preliminary evaluation of proposed class action settlements is merely to determine whether the settlement is within the "range of possible approval," and thus whether notice to the class of the settlement's terms and holding a formal fairness hearing would be worthwhile. *Am. Int'l Grp., Inc. v. ACE INA Holdings, Inc.*, No. 07 C 2898, 2011 WL 3290302, at *6 (N.D. Ill. July 26, 2011) (quoting *Armstrong v. Bd. of Sch. Dirs. of City of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980)). Accordingly, at the preliminary approval stage, courts need not "conduct a full-fledged inquiry into whether the settlement meets Rule 23(e)'s standards." *Id.*

When determining whether a settlement is ultimately fair, adequate, and reasonable at the final approval stage, courts in this Circuit consider the following factors:

> (1) the strength of plaintiffs' case compared to the terms of the proposed settlement;
>
> (2) the likely complexity, length, and expense of continued litigation;
>
> (3) the amount of opposition to settlement among affected parties;
>
> (4) the opinion of competent counsel; and
>
> (5) the stage of the proceedings and the amount of discovery completed.

*Isby*, 75 F.3d at 1199; *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006).

Granting preliminary approval of this Settlement will allow all Settlement Class Members to receive notice of the proposed Settlement's terms and the date and time of the final approval hearing, at which Settlement Class Members may voice approval of or opposition to the

Settlement, and at which the Parties and Settlement Class Members may present further evidence and argument concerning the fairness, adequacy, and reasonableness of the Settlement. *See Manual for Complex Litigation*, at §§ 13.14, 21.632.

**B. The Settlement is within the "range of reasonableness" for preliminary approval.**

In evaluating a settlement, a district court must consider "the strength of plaintiffs' case compared to the amount of defendants' settlement offer, an assessment of the likely complexity, length and expense of the litigation, an evaluation of the amount of opposition to settlement among affected parties, the opinion of competent counsel, and the stage of the proceedings and the amount of discovery completed at the time of settlement." *Synfuel Techs., Inc.*, 463 F.3d at 653 (quoting *Isby*, 75 F.3d at 1999); *see also Martin v. Reid*, 8018 F.3d 302, 306-307 (7th Cir. 2016) (same). "The 'most important factor relevant to the fairness of a class action settlement' is the first one listed: 'the strength of plaintiff's case on the merits balanced against the amount offered in the settlement.'" *Synfuel*, 463 F.3d at 653 (quoting *In re Gen. Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1132 (7th Cir. 1979)).

The judge also "must assess the value of the settlement to the class and the reasonableness of the agreed-upon attorneys' fees for class counsel, bearing in mind that the higher the fees the less compensation will be received by the class members." *Redman v. RadioShack Corp.*, 768 F.3d 622, 629 (7th Cir. 2014). The judge evaluating the settlement is "a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries." *Pearson v. NBTY, Inc.*, 772 F.3d 778, 780 (7th Cir. 2014).

1. <u>The strength of Plaintiffs' case compared to the amount of the Settlement.</u>

The Settlement requires Ocwen to pay $17,500,000 into a Settlement Fund. Out of this Fund, all eligible Settlement Class Members will receive their *pro rata* share of cash payments after the cost of notice and administration, attorneys' fees and expenses, and any service awards.

Although the precise amount of each Settlement Class Member's award cannot be determined until all claims have been submitted, Plaintiffs' counsel estimate that claimants will receive awards in the range of $55 to $90. Terrell Decl. ¶ 22. The Settlement Fund is non-reversionary. No amount will return to Ocwen.

The cash award does not constitute the full measure of statutory damages potentially available to the Settlement Class, who theoretically could recover $500, or up to $1,500, in statutory damages for each violation of the TCPA if they were to prevail in litigation. *See* 47 U.S.C. § 227(b)(3). But this fact alone should not weigh against settlement approval. Settlement is a compromise, and courts need not reject a settlement "solely because it does not provide a complete victory to plaintiffs." *In re AT&T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 347 (N.D. Ill. 2010) (St. Eve, J.). The settlement compares favorably to other TCPA settlements in the Seventh Circuit and elsewhere. *See Wright v. Nationstar Mortg., LLC*, No. 14 C 10457, 2016 WL 4505169, at *8-9 (N.D. Ill. Aug. 29, 2016) (approving TCPA settlement where each claimant receive $45); *Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 228 (N.D. Ill. 2016) (approving settlement where recovery per claimant was $52.50); *In re Capital One TCPA Litig.*, 80 F. Supp. 3d 781, 789 (N.D. Ill. 2015) (granting final approval where each class member would be awarded $39.66); *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 493-94 (N.D. Ill. 2015) ($30) (Kennelly, J.); *Franklin v. Wells Fargo Bank, N.A.*, Case No. 14cv2349-MMA (BGS), 2016 WL 402249 (S.D. Cal. Jan. 29, 2016) (approving settlement class members received approximately $71.16); *Estrada v. iYogi, Inc.*, No. 2:13–01989 WBS CKD, 2015 WL 5895942, at *7 (E.D. Cal. Oct. 6, 2015) (granting preliminary approval to TCPA settlement where class members estimated to receive $40).

Although Plaintiffs thoroughly investigated the factual and legal bases for their claims, they faced several difficult challenges if the litigation were to continue. First, Plaintiffs faced the very real prospect of losing on the merits at trial. Ocwen insists that many of the Settlement Class Members consented to the calls by giving their cell phone numbers to Ocwen verbally or in writing. Consent is an affirmative defense for which Ocwen carries the burden of proof. *Thrasher-Lyon v. Illinois Farmers Ins. Co*., 861 F. Supp. 2d 898, 905 (N.D. Ill. 2012); *see also Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1044 (9th Cir. 2017) ("Express consent is not an element of a plaintiff's prima facie case but is an affirmative defense for which the defendant bears the burden of proof."). Plaintiffs dispute that Ocwen could meet this burden at trial because Ocwen admits that determining which borrowers consented *en masse* is nearly impossible. According to Ocwen, evidence of consent exists in three separate systems that cannot be searched by a computer, or can only be searched on a loan-by-loan basis. Dkt. No. 239 at 4-5. However, if the Court agreed with Ocwen that many class members provided consent, Plaintiffs risked losing on the merits at summary judgment or trial.

Second, Plaintiffs faced challenges identifying class members, creating a risk that their motion to certify a Rule 23(b)(3) would not succeed. Ocwen maintains that many class members consented to receive calls to their cell phones, but that determining who consented is an individualized issue that requires a loan-by-loan analysis. "There is a split of opinion in TCPA cases on whether issues of individualized consent predominate over common questions of law or fact so as to prevent class certification." *Jamison v. First Credit Servs., Inc.*, 290 F.R.D. 92, 106-07 (N.D. Ill. 2013) (declining to certify class where defendant presented evidence that some proposed class members had consented to calls and where determining whether a person had consented would require a "labor intensive review" of defendant's account notes); *see also G.M.*

*Sign, Inc. v. Finish Thompson, Inc.*, No. 07 C 5953, 2009 WL 2581324, at *6 (N.D. Ill. Aug. 20, 2009) ("[H]ypothetical defenses do not overcome the predominance of common questions of law and fact among potential class members"). Plaintiffs believe they would have successfully certified one or more Rule 23(b)(3) classes. However, there is a risk that the Court would decline to grant certification, leaving only the named Plaintiffs to pursue their individual claims.

Third, there has been an ongoing challenge to Federal Communications Commission ("FCC") rules regarding the TCPA, including rules on what constitutes an automatic dialer. Specifically, in *ACA Int'l v. FCC,* No. 15-1211 (D.C. Cir.), the D.C. Circuit is considering a challenge to the proscription on calls initiated from a telephone dialing system when such calls are initiated manually. Many of the calls made by Ocwen were initiated manually. The outcome of this appeal could alter the legal landscape to the Settlement Class Members' detriment.

Fourth, Plaintiffs faced challenges even if they prevailed at trial. This case involves nearly two million class members and nearly one hundred million calls, resulting in large statutory damages. Some courts view awards of aggregate, statutory damages with skepticism and either refuse to certify a class or reduce such awards on due process grounds. *See, e.g., Aliano v. Joe Caputo & Sons-Algonquin, Inc.*, No. 09 C 910, 2011 WL 1706061, at *13 (N.D. Ill. May 5, 2011) ("[T]he Court cannot fathom how the minimum statutory damages award for willful FACTA violations in this case — between $100 and $1,000 per violation — would not violate Defendant's due process rights …. Such an award, although authorized by statute, would be shocking, grossly excessive, and punitive in nature."); *Golan v. Veritas Entm't, LLC*, No. 4:14-cv-69-ERW, 2017 WL 3923162, *4 (E.D. Mo. Sept. 7, 2017) (holding TCPA damages of $1.6 billion ($500 per call) was "obviously unreasonable," and awarding damages of $32.4 million ($10 per call) instead). And even if this Court permitted such an award, Ocwen would

almost certainly appeal and fight paying the judgment, further delaying or limiting any ultimate relief to the class.

Under the settlement, Settlement Class Members avoid all of those risks and obstacles to recovery. The Settlement provides substantial monetary and injunctive relief to Settlement Class Members without delay, and it is an excellent result for the Settlement Class.

2. Continued litigation is likely to be complex, lengthy, and expensive.

"Settlement allows the class to avoid the inherent risk, complexity, time, and cost associated with continued litigation." *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 586 (N.D. Ill. 2011). At the time of settlement, Plaintiffs' motion for certification of Rule 23(b)(3) classes had been fully briefed, but oral argument had not taken place. And although the Court already held that Plaintiffs established the basis for certification of a limited class under Rule 23(b)(2) and were entitled to preliminary injunctive relief, the Court nonetheless deferred the entry of a class certification order and preliminary injunction. Depending on the outcome of these motions, Plaintiffs could face motions for decertification. In addition, Ocwen very likely would have filed one or more motions for summary judgment. Assuming Plaintiffs successfully certified one or more Rule 23(b)(3) classes and defeated any motions for summary judgment, there is a substantial risk of losing inherent in any jury trial. Moreover, any judgment obtained in favor of Plaintiffs and the proposed class could be further delayed by the appeal process. This factor favors settlement approval.

3. There is currently no opposition to the Settlement.

All Parties favor settlement. But because notice has not yet been sent to the Settlement Class, this factor cannot be fully evaluated prior to the final fairness hearing.

4. Plaintiffs' counsel strongly endorse the Settlement.

Plaintiffs' counsel strongly endorse this Settlement. Terrell Decl. ¶ 23; Ex. 3 (Declaration of Alexander H. Burke ("Burke Decl.")) ¶ 11; Ankcorn Decl. ¶ 14; Ex. 5, (Declaration of Gil Cabrera ("Cabrera Decl.")) ¶ 6; Ex. 6 (Declaration of Mark Heaney ("Heaney Decl.")) ¶ 8. Counsel's opinion on Settlement is entitled to substantial weight, particularly because: (1) Plaintiffs' counsel are competent and experienced in class action litigation (particularly in similar TCPA class action cases) (*see generally id.*); (2) Plaintiffs' counsel engaged in extensive formal discovery and carefully evaluated the claims in the context of settlement negotiations (Terrell Decl. ¶ 14); and (3) the Settlement was reached at arm's-length through negotiations between experienced counsel, after three robust mediation sessions before experienced mediators, two of whom are former judges (*see id.* ¶ 17). *See McKinnie v. JP Morgan Am. Express Bank, N.A.,* 678 F. Supp. 2d 806, 812 (E.D. Wis. 2009) (factors including that "counsel endorses the settlement and it was achieved after arms-length negotiations facilitated by a mediator . . . suggest that the settlement is fair and merits final approval."); *see also In re Mexico Money Transfer Litig.,* 164 F. Supp. 2d 1002, 1020 (N.D. Ill. 2000) (placing "significant weight on the unanimously strong endorsement of these settlements" by "well-respected attorneys"). Therefore, this factor weighs in favor of preliminary approval.

5. The stage of the proceedings and the amount of discovery completed supports preliminary approval.

Courts consider the extent of discovery completed and the stage of the proceedings in determining whether a class action settlement is fair, adequate and reasonable. *See Synfuel*, 463 F.3d at 653; *see also Isby*, 75 F.3d at 1200 (noting "the discovery and investigation conducted by class counsel prior to entering into settlement negotiations was 'extensive and thorough'").

Here, Class Counsel have thoroughly analyzed the factual and legal issues involved. Settlement was reached after three years of adversarial litigation. Plaintiffs propounded multiple sets of written discovery and obtained hundreds of thousands of pages of documents from Ocwen regarding, among other topics, its policies and procedures for obtaining and tracking consent. Terrell Decl. ¶ 14. Plaintiffs also took four depositions of Ocwen representatives regarding these policies and procedures, Ocwen's use of the Aspect autodialer, and the design and operation of Ocwen's borrower database, REALServicing. *Id.* As a result of their extensive discovery efforts, by the time the Parties reached a settlement, they understood the strengths and weaknesses of their claims and defenses and the extent of class wide damages. Counsel's thorough legal and factual analyses informed the Settlement. This factor weighs in favor of preliminary approval.

**E. The Settlement resulted from arm's-length negotiations and is not the product of collusion.**

A proposed class settlement is presumptively fair when sufficient discovery has been provided and "the settlement is the product of arms-length negotiation, untainted by collusion." William B. Rubenstein, *Newberg on Class Actions* § 13:45 (5th ed. 2016). The Settlement here satisfies this test. The Parties are represented by highly competent counsel who have years of experience litigating and settling complex class actions, including actions involving alleged violations of the TCPA. *See* Terrell Decl. ¶¶ 24-27; Burke Decl. ¶¶ 2-10; Ankcorn Decl. ¶¶ 2-6; Cabrera Decl. ¶¶ 2-3; Heaney Decl. ¶¶ 2-3. The litigation has been highly adversarial, with the Parties appearing before the Court on a monthly (and sometimes weekly) basis to address numerous discovery disputes and motion practice. To reach this Settlement, the Parties participated in three day-long mediations, the last with Judge Denlow (Ret.). Terrell Decl. ¶ 17. The last full-day mediation and subsequent additional negotiations finally put an end to the

contentious litigation, culminating in a Settlement Agreement that provides outstanding benefits to the Settlement Class. *Id*. ¶ 18.

**F. Provisional certification of the Settlement Class is appropriate.**

For settlement purposes, Plaintiffs respectfully request that the Court provisionally certify the Settlement Class defined in the Settlement Agreement so that the Settlement Administrator can send notice of the Settlement to the Settlement Class. This Court has already held that Plaintiffs have certified a Rule 23(b)(2) class. *See, generally,* Dkt. No. 223. Although Ocwen contends that no damages class could be certified, Ocwen has agreed to provisional certification of the Rule 23(b)(3) Settlement Class for purposes of this Settlement.

This Court previously found that Plaintiffs have met the numerosity requirement of Rule 23(a). Dkt. No. 223 at 14. The Settlement Class consists of persons called on 1,685,757 cell phones throughout the United States, and joinder of all such persons is impracticable. *See Chapman v. Wagener Equities Inc.*, 747 F.3d 489, 492 (7th Cir. 2014) (under the numerosity requirement, a court can certify a class so long as it is reasonable to believe the class is large enough to make joinder impracticable); *see also McCabe v. Crawford & Co.*, 210 F.R.D. 631, 643 (N.D. Ill. 2002) (a class of forty or more is generally sufficient to establish numerosity).

This Court also previously found that Plaintiffs satisfied the commonality requirement because common questions "regarding whether Ocwen's practices and use of the Aspect software violate the TCPA" are resolvable "in one stroke." Dkt. No. 223 at 14 (citing *Phillips v. Sheriff of Cook Cty*., 828 F.3d 541, 550 (7th Cir. 2016)).

In the context of a Rule 23(b)(2) class, this Court has also previously held that Plaintiffs satisfied both the typicality and adequacy of representation requirements for class certification because: (1) "Plaintiffs' claims arise from the same practice or course of conduct that gives rise to the claims of the proposed class members—namely, that Ocwen's use of an autodialer to make

phone calls to consumers who have not consented violates the TCPA"; and (2) "Plaintiffs do not have interests that conflict with those of the other class members, as both named plaintiffs and the class seek to end Ocwen's practice of using the Aspect software to call consumers on their cellphones without their consent." Dkt. No. 223 at 15. Although the adequacy analysis is different under Rule 23(b)(3), where "the typicality and adequacy requirements are ultimately intended to address the concern that a plaintiff seeking damages might agree to a settlement of his own claims in exchange for selling out the other class members," *Id.* at 16, such concern does not arise here, where Plaintiffs' interests are coextensive with, and not antagonistic to, the interests of the Settlement Class, and Plaintiffs have achieved an excellent result for the Class. *See G.M. Sign*, 2009 WL 2581324, at *15-16. Finally, Plaintiffs are represented by qualified and competent counsel who have extensive experience and expertise in prosecuting complex class actions, including TCPA actions. *See* Terrell Decl. ¶¶ 24–27; Burke Decl. ¶¶ 2-10; Ankcorn Decl. ¶¶ 2-6; Cabrera Decl. ¶¶ 2-3; Heaney Decl. ¶¶ 2-3.

Rule 23(b)(3)'s predominance requirement tests whether proposed classes are "sufficiently cohesive to warrant adjudication by representation." *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). Predominance is satisfied so long as individual issues do not "overwhelm" common issues. *Id.* (quoting *Amgen Inc. v. Ct. Ret. Plans & Trust Funds*, 568 U.S. 455, 468 (2013)). Common issues predominate here because the central liability question in this case—whether Ocwen placed autodialed calls to borrowers' cell phones without their consent—can be established through evidence from Ocwen's own records. *See Sadowski v. Med1 Online, LLC*, No. 07 C 2973, 2008 WL 2224892, at *4 (N.D. Ill. May 27, 2008) (finding common issues such

as "how numbers were generated from Defendant's database" and whether sending unsolicited faxes "violated the TCPA" predominated over individualized defenses and damages issues).

With respect to superiority, since the claims are being certified for purposes of settlement, there are no issues with manageability. *Amchem Prods.*, 521 U.S. at 620. "Confronted 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 be no trial."). And, resolution of nearly two million claims in one action is far superior to individual lawsuits, promoting consistency and efficiency of adjudication. *See Sadowski*, 2008 WL 2224892, at *5 (quoting *Murray v. New Cingular Wireless Servs.*, 232 F.R.D. 295, 303 (N.D. Ill. 2005)) ("In consumer actions involving small individual claims, such as this one, class treatment is often appropriate because each member's damages 'may be too insignificant to provide class members with incentive to pursue a claim individually.'").

For these reasons, certification of the Settlement Class for purposes of settlement is appropriate.

**G. The proposed notice program is constitutionally sound.**

"Rule 23(e)(1)(B) requires the court to 'direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise' regardless of whether the class was certified under Rule 23(b)(1), (b)(2), or (b)(3)." *Manual for Complex Litigation, supra*, at § 21.312. The best practicable notice is that which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). According to the *Manual*, *supra*, at § 21.312, the settlement notice should do the following:

- Define the class;

- Describe clearly the options open to the class members and the deadlines for taking action;
- Describe the essential terms of the proposed settlement;
- Disclose any special benefits provided to the class representatives;
- Provide information regarding attorneys' fees;
- Indicate the time and place of the hearing to consider approval of the settlement, and the method for objecting to or opting out of the settlement;
- Explain the procedures for allocating and distributing settlement funds, and, if the settlement provides different kinds of relief for different categories of class members, clearly set out those variations;
- Provide information that will enable class members to calculate or at least estimate their individual recoveries; and
- Prominently display the address and phone number of class counsel and the procedure for making inquiries.

The proposed forms of Notice, attached as Exhibits A-C to the Settlement Agreement, satisfy all of the criteria above. The notice plan provides for direct, individual notice via either email or postal mail. Agr. §§ 6.1-6.2. In addition, the Settlement Administrator will utilize the National Change of Address database to locate the most recent addresses before mailing notice (*Id*. at § 6.1.3), as well as a reverse-phone lookup process to identify mailing addresses marked as undeliverable (*Id.* § 6.1.5).

In addition, documents and information will be provided to Settlement Class Members online through the Settlement Website, with further notice bolstered through a targeted internet banner ad campaign. Agr. §§ 6.3-6.4. An automated, toll-free phone line will also be made available to provide information regarding the Settlement and permit Class Members to leave messages for further clarification regarding the Settlement. Agr. § 6.5.

The Parties proposed Settlement notice is designed to reach as many Settlement Class Members as possible, including through direct notice to all Settlement Class Members who can be reasonably identified through Defendants' records, and thus satisfies Due Process and the requirements of Rule 23.

**H. Counsel's requested fees and expenses are reasonable.**

Plaintiffs' counsel will seek reimbursement for up to $100,000 in out-of-pocket expenses they incurred prosecuting and settling this litigation. Agr. § 15.2. They will also request an award of attorneys' fees not to exceed one-third of the Settlement Fund. *Id*.

Counsel's requested fee is reasonable. In the Seventh Circuit, "courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) (citing cases). Plaintiffs' counsel have achieved an excellent result for the Settlement Class in the face of substantial risk. The Settlement creates a non-reversionary Settlement Fund of $17,500,000. The majority of the Settlement Fund will be distributed as monetary awards to Settlement Class Members. Because Plaintiffs' counsel agreed to prosecute this case on contingency with no guarantee of ever being paid, they faced substantial risk in prosecuting this contentiously-litigation action for the past three years.

Sixty days before the deadline to opt out or object to the Settlement, Plaintiffs' counsel will file a separate motion for an award of attorneys' fees and expenses, addressing in greater detail the facts and law supporting their fee request in light of all of the relevant facts.

**I. The requested service awards are reasonable.**

Incentive awards for class representatives like those requested here are appropriate. Such awards, which serve as premiums in addition to any claims-based recovery from the settlement, promote the public policy of encouraging individuals to undertake the responsibility of

representative lawsuits. *See Manual for Complex Litigation* § 21.62, n. 971 (incentive awards may be "merited for time spent meeting with class members, monitoring cases, or responding to discovery"). Such awards are generally proportional to the representatives' losses or claims, and can range from several hundred dollars to many thousands of dollars.

Here, Plaintiffs request incentive awards of $25,000 each. Plaintiffs worked with counsel to investigate the case, engaged in discovery, including depositions of themselves and family members, were kept abreast of the proceedings through litigation and Settlement, and reviewed and approved the proposed Settlement. The amount requested here is in line with awards approved by federal courts in Illinois, and should, respectfully, be approved. *See, e.g., Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (affirming $25,000 service award to plaintiff); *Heekin v. Anthem, Inc.*, No. 1:05-01908, 2012 WL 5878032, *1 (S.D. Ind. Nov. 20, 2012) (approving $25,000 service award to lead class plaintiff over objection); *Will v. Gen. Dynamics Corp.*, Civil No. 06-698-GPM, 2010 WL 4818174, *4 (S.D. Ill. Nov. 22, 2010) (awarding $25,000 each to three named plaintiffs).

## IV. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court do the following: (1) preliminarily approve the proposed Settlement; (2) conditionally certify the Settlement Class and appoint Plaintiffs as class representatives; (3) appoint their attorneys Terrell Marshall Law Group PLLC, Burke Law Offices, LLC, Ankcorn Law Firm PLLC, Heaney Law Firm, LLC and The Cabrera Firm as Class Counsel; (4) approve the proposed notice and claims program; (5) direct that Notice be provided to the Settlement Class pursuant to the terms of the Settlement Agreement within forty five (45) days following entry of the preliminary approval order; (6) establish a procedure for Settlement Class members to object to the Settlement or exclude themselves from the Class; (7) set a deadline ninety (90) days after the Notice Deadline,

after which no one shall be allowed to object to the Settlement, exclude himself or herself from the Settlement Class, or seek to intervene or submit a Claim; and (8) schedule a hearing to consider final approval of the Settlement, which shall be scheduled no earlier than 120 days after the Notice Deadline.

RESPECTFULLY SUBMITTED AND DATED this 15th day of September, 2017.

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CERTIFICATE OF SERVICE

I, Beth E. Terrell, hereby certify that on September 15, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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