UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF WEST VIRGINIA

IN RE: MONITRONICS INTERNATIONAL, INC., TELEPHONE CONSUMER PROTECTION ACT LITIGATION	No. 1:13-md-02493-JPB-JES
THIS DOCUMENT RELATES TO: ALL CASES	

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

I. INTRODUCTION

Plaintiffs Diana Mey, Phillip Charvat, Jason Bennett, Janet and Michael Hodgin, and Scott Dolemba ("Plaintiffs") have reached a settlement with Defendant Monitronics International, Inc., in this consolidated multi-district proposed class action brought under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. The settlement, which is subject to this Court's approval, requires Monitronics to pay $28,000,000 to establish a non-reversionary settlement fund for the benefit of Plaintiffs and proposed class members. All class members who submit a simple claim form will receive a cash payment.

The settlement fund also will be used to pay (1) all costs associated with administration of the settlement, estimated to be $4,770,889; (2) incentive awards of $50,000 to Plaintiffs Mey and Charvat; $6,012 to Plaintiff Bennett; and $3,500 to Plaintiffs Dolemba and Hodgins, as approved by the Court; (3) an award of attorneys' fees as approved by the Court of up to one-third of the settlement fund, which equals $9,333,333; and (4) an award of litigation costs estimated to be approximately $600,000, as approved by the Court. If the Court approves these

requests, approximately $13,182,766 will be used to pay cash awards to Settlement Class Members who file claims.

The amount each Settlement Class Member will receive depends upon the number of claims submitted. For example, if 10% of the 7,858,232 already-identified Settlement Class members file claims, each Settlement Class member will receive approximately $16.78 ($13,182,766/785,823 claimants = $16.78). Based on their experience with claims rates in TCPA and other class settlements, Plaintiffs' counsel estimate each claimant will receive $15–$25. Of course, this is just an estimate. The final amount could be higher or lower depending on the number of claims.

The parties reached the settlement after six years of hard-fought litigation that required both sides to brief over thirty-five motions, including four motions to dismiss and several motions for summary judgment. The parties conducted extensive discovery that included multiple sets of written discovery requests, twenty-nine depositions, and at least forty-five subpoenas to non-parties. The parties engaged in two full-day mediation sessions with the able assistance of Bruce Friedman of JAMS. By the time the parties reached an agreement, they were well aware of the strengths and weaknesses of their respective positions and of the risks associated with pursuing the case through trial.

The proposed settlement is fair, reasonable, adequate, and the per-claimant awards are well in line with TCPA settlements approved across the country. Accordingly, Plaintiffs respectfully request that the Court: (1) grant preliminary approval of the settlement; (2) provisionally certify the proposed settlement class; (3) appoint as class counsel the law firms Bailey & Glasser LLP, Terrell Marshall Law Group PLLC, Broderick & Paronich, P.C., and the Law Office of Matthew P. McCue; (4) appoint Plaintiffs as class representatives; (5) approve the

proposed notice plan; (6) appoint Kurtzman Carson Consultants LLC ("KCC") to serve as settlement administrator; and (7) schedule the final fairness hearing and related dates.

II. PROCEDURAL BACKGROUND

Monitronics provides alarm-monitoring and customer service for home-security alarm customers nationwide. It does not sell its monitoring services directly to consumers, but instead buys monitoring contracts from a network of "Authorized Dealers" and provides monitoring services to the holders of those contracts. Some of Monitronics' Authorized Dealers have used telemarketing to sell monitoring contracts on behalf of Monitronics.

In lawsuits filed across the country, consumers allege that Monitronics, some of its Authorized Dealers, and the companies that manufacture the security systems are either directly or vicariously liable for millions of telemarketing calls placed in violation of the TCPA.

A. The panel on multidistrict litigation consolidated numerous lawsuits against Monitronics in this Court.

1. The *Mey* lawsuit.

On May 18, 2011 Diana Mey filed a class action lawsuit against Monitronics, UTC Fire & Security, Inc. ("UTC"), and Versatile Marketing Solutions, Inc. ("VMS")[1] alleging that VMS called her home phone sixteen times even though her phone number had been continuously on the national Do-Not-Call registry since 2003, *Mey v. Monitronics Int'l, Inc.*, 5:11-00090 (N.D. W. Va.) ("*Mey* Action"). Ms. Mey alleged that although Monitronics and UTC did not physically place the calls they are vicariously liable under the TCPA because the calls were placed to try to get her to buy a home security system manufactured by UTC and with monitoring by Monitronics.

[1] Alliance Security, Inc., is the successor of VMS.

The parties exchanged written discovery requests, Ms. Mey took four depositions, and Monitronics deposed Ms. Mey. In January 2012, both Monitronics and UTC filed motions for summary judgment on the issue of whether the phrase "on behalf of," contained in 47 U.S.C. § 227(c)(5), exposed them to TCPA liability. The Court denied the motions, rejecting the argument that UTC and Monitronics could not be liable for any calls they did not physically place.

Ms. Mey also moved for summary judgment on the issue of whether she had consented to receive telemarketing calls by participating in a telephonic "safety survey" during which she was informed that she might be randomly selected to receive a "free" home security system. The Court granted Ms. Mey's motion, holding that VMS/Alliance had not obtained the prior, express, written consent necessary to call Ms. Mey's number, which was registered on the national Do Not Call registry.

2. The *Hodgins* lawsuit.

Janet and Michael Hodgin filed a class action lawsuit against Monitronics and Ascent Capital in the Western District of Washington on February 19, 2013, *Hodgin v. Monitronics Int'l, Inc.*, 2:13-00321-JLR (W.D. Wash.) ("*Hodgin* Action"). [2] The Hodgins allege that Monitronics violated the TCPA by placing prerecorded message calls to their home phone. The Hodgins and their co-plaintiffs stipulated to dismiss Ascent Capital and filed an amended complaint. Before the lawsuit was transferred to the MDL, the parties exchanged written discovery responses and the Hodgins filed a second amended complaint.

3. The *Cain* and *O'Shea* lawsuits.

On July 2, 2013, George Cain filed a class action lawsuit in the Southern District of California alleging that Monitronics, or a third party acting on Monitronics' behalf, unlawfully

[2] Edith Bowler and James Hough also were named plaintiffs in the *Hodgins* Action. Ms. Bowler and Mr. Hough accepted individual settlement offers and are no longer a part of this Action.

placed robocalls to residential and cellular telephone numbers, *Cain v. Monitronics Int'l, Inc.*, Case No. 3:13-cv-1549-L-DHB (S.D. Cal.) ("*Cain* Action").

Kerry O'Shea filed a class action lawsuit in the Central District of California two weeks later, alleging that Monitronics, or a third party acting on Monitronics' behalf, unlawfully placed robocalls to residential and cellular telephone numbers, *O'Shea v. Monitronics Int'l, Inc. et al.*, Case No. 8:13-cv-1054 JVA (JPRx) (C.D. Cal.) ("*O'Shea* Action").

4. The MDL

On December 16, 2013, the Judicial Panel on Multidistrict Litigation granted Monitronics' motion to transfer the *Hodgin, Cain,* and *O'Shea* Actions and centralize them, along with the *Mey* Action, in this district, thus creating the multidistrict litigation docket, *In re Monitronics International, Inc. Telephone Consumer Protection Action Litigation,* MDL No. 2493 ("the MDL"). Since that time, more than thirty actions have been transferred to this Court for inclusion in the MDL, many of which remain pending and assert claims against Monitronics, including actions brought by Scott Dolemba, Jason Bennett and Philip Charvat.

Plaintiffs filed a Master Consolidated Amended Complaint on February 28, 2014, Dkt. No. 34. Plaintiffs twice amended their Master Consolidated Amended Complaint to, among other things, add additional transferred lawsuits such as those filed by Mr. Bennett, Mr. Dolemba, and Mr. Charvat. At one point, the MDL comprised over thirty individual and class action lawsuits.

In or around June 2016, Monitronics sent offers of judgment to twenty plaintiffs whose cases had been consolidated in the MDL. Marshall Decl. ¶ 19, Exhibit A to Plaintiffs' Motion for Preliminary Approval of Class Action Settlement Many of those plaintiffs accepted the offers of judgment. *Id.* Monitronics made two offers of judgment to Ms. Mey, one for $50,000 for her claims against Monitronics and Honeywell and another for $120,240 for her claims against

Monitronics and UTC. *Id.* ¶ 20. Monitronics offered Mr. Charvat $50,000. *Id.* Monitronics made an offer of judgment to Mr. Bennett of $6,012. *Id.* And Monitronics made offers of judgment to Mr. Dolemba and Janet and Michael Hodgin of $1,500 each. *Id.* Each of these plaintiffs rejected Monitronics' offers so they could pursue claims on behalf of the proposed classes. *Id.*

B. The parties thoroughly investigated their claims and defenses before reaching a settlement.

In the six years since Ms. Mey filed her lawsuit, the parties have thoroughly investigated and tested their respective claims. *Id.* ¶¶ 8-10. Since the MDL was established in December 2013, the parties have briefed over thirty substantive motions, including multiple motions to dismiss. *Id.* Plaintiffs propounded at least *fifteen* sets of written discovery. *Id.* Monitronics served requests for admission, requests for production, and interrogatories on all of the plaintiffs included in the Second Consolidated Amended Complaint, receiving written answers and documents in response. *Id.* Plaintiffs took *twenty-three* depositions, including eleven in the original *Mey* action and twelve after the MDL was established. *Id.* Monitronics deposed Plaintiffs' experts, Ms. Mey (twice), and Mr. Charvat. *Id.* Monitronics produced hundreds of thousands of pages of documents, including company policies and procedures and email correspondence. *Id.*

Plaintiffs focused much of their discovery efforts on obtaining the calling data necessary to determine the scope and composition of the violations. *Id.* To that end, Plaintiffs served at least forty-five subpoenas on various nonparties. *Id.* Both parties retained multiple experts to review and analyze the data produced by the parties and nonparties, and exchanged detailed expert reports. *Id.*

As a result of this extensive discovery, by the time the parties commenced settlement negotiations, they understood the strength and weaknesses of their claims and defenses and the

extent of class wide damages. *Id*. ¶ 11. The parties mediated with Bruce Friedman of JAMS on December 8 and 9, 2016, but the case did not resolve. *Id*. Soon after the December mediation, this Court entered an order granting Defendants UTC and Honeywell's motion for summary judgment, dismissing Plaintiffs' claims against them. *Id.* The parties resumed litigation in earnest, taking multiple depositions and fully briefing Monitronics' motion for summary judgment on the issue of whether it could be held vicariously liable for calls placed by its Authorized Dealers. *Id.* The parties participated in a second mediation with Mr. Friedman on June 2, 2017.

Throughout the settlement negotiations, Monitronics' insurance carriers insisted that various policy provisions barred insurance coverage. *Id*. ¶ 14. Plaintiffs scrutinized these policies as well as pleadings filed in two declaratory judgment actions that involved Monitronics and one of its carriers. *Id.* Monitronics eventually agreed to pay $28,000,000, which Plaintiffs had demanded as part of a policy limits demand. *Id.*

Following mediation, Plaintiffs continued their discovery efforts, seeking additional information from Alliance Security, Inc. This additional information provides, among other things, information relevant to identifying some members of the proposed Settlement Class. Alliance notified Plaintiffs on July 31, 2017 that it had filed for bankruptcy.

III. THE PROPOSED SETTLEMENT.

A. The Settlement Class.

The proposed "Settlement Class" is comprised of millions of people who, on or after May 18, 2007, and through and including the date the settlement is finally approved, received a telemarketing call made by Monitronics or a Monitronics Authorized Dealer, or an Authorized Dealer's lead generator or subdealer: (a) to a cellular telephone number through the use of an automatic telephone dialing system or an artificial or pre-recorded voice, (b) to a residential

telephone number through the use of an artificial or pre-recorded voice, or (c) to a cellular or residential number registered on the national Do Not Call Registry more than once within any twelve-month period. Settlement Agreement § 1.28. Plaintiffs' experts have analyzed calling data received during discovery and identified 7,858,232 telephone numbers to which calls were placed that allegedly violated the TCPA, and which Plaintiffs assert were on behalf of Monitronics. Marshall Decl. ¶ 17.

B. Settlement relief.

The Settlement Agreement requires Monitronics to pay $28,000,000 into a "Settlement Fund." Settlement Agreement §§ 1.31, 2.1., Exhibit B to Plaintiff's Motion for Preliminary Approval of Class Action Settlement. The Settlement Fund will cover all of the following as approved by the Court: payments to Settlement Class members who timely file valid claims; payments to Class Counsel of up to $9,333,333 in fees, and litigation expenses estimated to be approximately $600,000; costs of administration estimated to be $4,770,889; and incentive awards in the amount of $50,000 each to Plaintiffs Mey and Charvat, $6,012 to Plaintiff Bennett, and $3,500 each to Plaintiffs Dolemba, Janet Hodgin, and Michael Hodgin. *Id.* §§ 2.1, 8.1, 8.4. If any amounts remain in the Settlement Fund as a result of uncashed checks, the parties will redistribute the funds to Settlement Class members who cashed their checks so long as it is administratively feasible to do so. *Id.* § 2.3(c). Any amounts remaining in the Fund, including any amounts remaining after a second distribution will be distributed as a *cy pres* award to the Consumer Federation of America. *Id.* Not a penny of the Fund will revert to Monitronics.

1. Payment to Plaintiffs.

The Settlement Agreement provides that Plaintiffs' counsel may request that the Court approve incentive awards to Plaintiffs. Settlement Agreement § 8.4. If approved by the Court, Plaintiffs Mey and Charvat will receive incentive awards of $50,000 each. Plaintiff Bennett will

receive an incentive award of $6,012. And Plaintiffs Dolemba and Janet and Michael Hodgin will each receive incentive awards of $3,500. *Id.* All of the Plaintiffs assisted with the drafting of the complaint, provided information regarding their interactions with Monitronics, responded to written discovery, and were ready and willing to testify at trial. Marshall Decl. ¶¶ 20-21. Ms. Mey and Mr. Charvat were deposed. Depositions of the Hodgins, Mr. Dolemba, and Mr. Bennett had been scheduled at the time the parties reached settlement. *Id.* The Plaintiffs all rejected substantial offers of judgment so that they could pursue claims on behalf of the proposed classes, and did so at the potential risk and exposure that accompanies rejecting a Rule 68 offer of judgment. *Id.* ¶¶ 19-20. The requested incentive awards compensate Plaintiffs for this time and effort and for the risks they undertook in prosecuting the cases.

2. Attorneys' fees and litigation expenses.

The Settlement Agreement provides that Plaintiffs' counsel may request that the Court approve an award of attorneys' fees and litigation expenses. Settlement Agreement § 8.1. Plaintiffs' counsel will file a fee petition with the Court requesting an attorneys' fee award of one-third of the Settlement Fund to compensate them for the work already performed in the case and the risk they undertook taking this action on a contingent basis. *See* Marshall Decl. ¶¶ 15-16. The Settlement Agreement is not contingent on the amount of attorneys' fees or costs awarded. Counsel will file the fee petition thirty days before the opt-out/objection deadline for Settlement Class members to review. Settlement Agreement § 8.2.

Plaintiffs' Counsel will also seek reimbursement for the out-of-pocket costs they have incurred prosecuting this action. Currently, Plaintiffs' Counsel estimate their costs to be approximately $600,000. Marshall Decl. ¶ 16. This amount includes the over $170,000 Plaintiffs' counsel paid to store the voluminous data produced during discovery. It also includes over $250,000 in expert expenses for their work analyzing data, identifying class members, and

determining the number of TCPA violations. *Id.* The remaining amount includes general litigation expenses such as travel to depositions, transcript costs, and mediation expenses. *Id.* In connection with their fee petition, Plaintiffs' Counsel will provide the Court with an updated detailed report itemizing these expenses. *Id.*

3. Administration costs.

The parties have retained KCC to administer the settlement and process claims. Settlement Agreement § 1.27. KCC will be responsible for conducting reverse lookups to identify names and addresses of Settlement Class members, preparing and sending notice via email and U.S. mail, fielding questions from Settlement Class members regarding the settlement, establishing and maintaining a settlement website, processing claims, serving CAFA notice, and issuing checks to all members of the Settlement Class who submit claims. *Id.* § 6.1.

4. Settlement Class payments.

The remainder of the Settlement Fund, approximately $13,182,766 will be distributed on a *pro rata* basis to all Settlement Class members who submit a valid and timely claim form. Settlement Agreement § 2.3(a). Assuming the Court grants the requested attorneys' fees and litigation expenses, Plaintiffs estimate that each Settlement Class member who submits a claim will receive $15–$25. Marshall Decl. ¶ 18.

To receive a payment, Settlement Class members must submit a claim form. Settlement Agreement § 5.1. The requirements for submitting a claim are minimal. Settlement Class members only need to sign a claim form certifying that they received telemarketing calls at a telephone number that they identify and submit that claim either electronically through the settlement website or by U.S. Mail. *Id*. Once all the claims have been received, KCC will calculate the amount of each Settlement Class member's award on a *pro rata* basis after

deducting any court-awarded attorneys' fees, litigation costs, notice and claims administration expenses, and any court-awarded incentive awards for the named Plaintiffs. *Id.* § 6.1(g).

C. Notice program.

Plaintiffs' experts have identified 7,858,232 telephone numbers to which allegedly unlawful calls were placed. Marshall Decl. ¶ 17. Plaintiffs have obtained names and either email or physical addresses associated with 4,385,199 of these phone numbers. *Id.* Despite Plaintiffs' efforts to investigate and compile information regarding all people who received calls promoting Monitronics' services, there are likely Settlement Class members who were not identified. *Id.*

KCC has designed a notice program it estimates will reach over 74% of Settlement Class members. *See* Declaration of Carla A. Peak ("Peak Decl.") ¶ 11, Exhibit C to Plaintiff's Motion for Preliminary Approval of Class Action Settlement. KCC's proposed notice program calls for direct notice to identified Settlement Class members and a robust publication notice program calculated to reach persons in the Settlement Class who, for whatever reason, may not receive direct notice. *See id.*

1. Direct notice.

KCC will send an email to all Settlement Class members for whom Plaintiffs' counsel has located an email address. Peak Decl. ¶ 19. If Plaintiffs' counsel has not located an email address or if an email "bounces back," KCC will mail a postcard with an attached claim form to the Settlement Class members for whom a physical address can be located. *Id*. ¶¶ 20-21.

The email and postcard that KCC will send to Settlement Class members are written in plain English, summarize the settlement, and clearly set forth the deadline to submit a claim, request exclusion, or object to the settlement. Settlement Agreement, Exs. 1 and 2. The email and postcard include the amount of Class Counsel's requested fee and provide Settlement Class members with an estimate of their cash award if they file a claim. *Id*. The postcard includes a

tear-off claim form that the Settlement Class Member can fill out and mail without having even to pay postage. The postcard also directs the Settlement Class members to a settlement website for further information. *Id.* At the settlement website, Settlement Class members can submit online claims. Copies of the Settlement Agreement, preliminary approval order, and operative complaint will be available for viewing and downloading, and the website will include frequently asked questions. Settlement Agreement § 1.32.

2. Publication notice.

The proposed notice program also includes a nationwide publication notice plan designed to reach those Settlement Class members for whom it is not possible or is impracticable to provide direct notice. Notice of the settlement will be published in two print publications, People and Better Homes and Gardens. Peak Decl. ¶ 24. The publication notice will contain: a description of the nature of the action, the class definition, a summary of the class claims and defenses, information regarding the ability to make an appearance, the exclusion rights, the objection rights, and the binding effect of a class judgment. Settlement Agreement, Ex. 7.

The notice program also will include an internet notice effort in which approximately 235 million internet banner advertisements will be purchased and distributed over desktop and mobile devices via the Google Display network, Yahoo!, and Facebook. Peak Decl. ¶ 26. KCC expects the print and internet media notice effort alone will reach approximately 74% of Settlement Class members. *Id.* ¶ 35. This is in addition to the direct notice provided to the 7,858,232 already-identified Settlement Class members. *Id.*

D. Opt-out and objection procedures.

Settlement Class members will have an opportunity to exclude themselves from the settlement or object to its approval. Settlement Agreement §§ 4.3, 4.4. The procedures and deadlines for filing opt-out requests and objections will be conspicuously stated in the notices

and on the settlement website. With regard to objections, the proposed notices inform Settlement Class members that they will have an opportunity to appear and have their objections heard by this Court at a final approval hearing. The notices also inform Settlement Class members that they will be bound by the release contained in the Settlement Agreement unless they timely exercise their opt-out rights.

E. Release

In exchange for settlement benefits, Plaintiffs and Settlement Class members will release Monitronics from claims related to unlawful telemarketing that could have been asserted in the litigation. Settlement Agreement § 3. The release does not extend to the other defendants in the action, Alliance Security, Inc., UTC, or Honeywell. *Id.* §§ 1.23, 3.1.[3] The release also does not extend to Alarm.com or Alarm.com's dealers and subdealers. Settlement Class Members are free to pursue claims against those entities for any telemarketing calls they received. Finally, the release applies only to telemarketing — and not debt collection — calls. *Id.* § 1.22. Persons who received debt collection calls by or on behalf of Monitronics remain free to pursue claims arising from those calls.

IV. THE SETTLEMENT CLASS SHOULD BE CERTIFIED

Plaintiffs respectfully request that the Court provisionally certify the proposed Settlement Class for settlement purposes under Federal Rule of Civil Procedure 23(a) and (b)(3). Such certification will allow the Settlement Class to receive notice of the settlement and its terms, including the right to submit a claim and recover money if the settlement is approved, the right to be heard on the settlement's fairness, the right to opt out of the settlement, and the date, time and place of the final approval hearing. For the following reasons, certification of the Class for

[3] Defendant ISI Alarms NC, Inc., is not mentioned in the Settlement Agreement because it no longer exists.

settlement purposes is appropriate under Rule 23(a) and (b)(3).

A. Rule 23(a) requirements.

1. Numerosity is satisfied.

The numerosity requirement of Rule 23(a) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). There is no set minimum number of potential class members that fulfills the numerosity requirement. *See Holsey v. Armour & Co.,* 743 F.2d 199, 217 (4th Cir. 1984). Plaintiffs estimate the proposed Settlement Class consists of millions of class members, including 7,858,232 who have already been identified. Numerosity is satisfied.

2. Commonality is satisfied.

Rule 23(a)(2) requires that there is "a common question of law or fact among the members of the class." Fed. R. Civ. P. 23(a)(2). To meet the commonality requirement, the representative plaintiff is required to demonstrate that the proposed class members "have suffered the same injury." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–50 (2011). Here, the common questions are dispositive, apply equally to all class members, and can be resolved using uniform proof and legal analysis. They include: (1) whether an automated telephone dialing system or prerecorded voice was used to place telemarketing calls to Settlement Class members without their consent; (2) whether Monitronics is vicariously liable for those calls; and (3) whether Monitronics' conduct was willful or knowing such that Plaintiffs and Settlement Class members are entitled to trebled damages. These legal and factual questions are shared by all class members, and the uniformity of the applicable law—the TCPA—makes resolution of these questions on a class-wide basis viable and efficient.

3. Plaintiffs' claims are typical of the Settlement Class.

Generally, typicality is satisfied where the claims are based on the same legal theory. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Moodie v. Kiawah Island Inn Co., LLC*, 309 F.R.D. 370, 378 (D.S.C. 2015) ("The typicality requirement is met if a plaintiff's claim arises from the same event or course of conduct that gives rise to the claims of other class members and is based on the same legal theory."). "Typicality does not require that every class representative have exactly the same claims as every member of the class." *Moodie*, 309 F.R.D. at 378. Here, Plaintiffs' and Settlement Class members' claims arise from the same course of conduct: telemarketing calls placed to cell phones and residential phone lines on behalf of Monitronics. Plaintiffs and proposed Settlement Class members all seek statutory damages for these calls pursuant to the same legal theory. Typicality is satisfied.

4. Plaintiffs and their counsel will adequately represent the proposed Settlement Class.

The last Rule 23(a) requirement assures that "representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The adequacy requirement involves "a two-pronged inquiry, requiring evaluation of: (1) whether class counsel are qualified, experienced, and generally able to conduct the proposed litigation; and (2) whether Plaintiffs' claims are sufficiently interrelated with and not antagonistic to the class claims as to ensure fair and adequate representation." *Lott v. Westinghouse Savannah River Co.*, 200 F.R.D. 539, 561 (D.S.C. 2000).

Both of these requirements are met. Plaintiffs' interests in this litigation are aligned with those of the class. All seek recovery for unlawful robocalls. All rejected large offers of judgment in order to pursue risky claims on behalf of the classes. Marshall Decl. ¶ 20. Proposed class

counsel are experienced in class actions generally and TCPA litigation in particular. *See* Marshall Decl. ¶¶ 3-7. Adequacy is satisfied.

B. Rule 23(b)(3) requirements.

Class certification under Rule 23(b)(3) is appropriate where (1) "the questions of law or fact common to class members predominate over any questions affecting only individual members;" and (2) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3); *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011).

1. Common issues predominate.

The predominance requirement tests whether proposed classes are "sufficiently cohesive to warrant adjudication by representation." *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 319 (4th Cir. 2006) (quotation and internal marks omitted). Predominance differs from the commonality requirement because it focuses "not only on the existence of common questions, but also on how those questions relate to the controversy at the heart of the litigation." *EQT Prod. Co. v. Adair*, 764 F.3d 347, 366 (4th Cir. 2014).

This case is particularly well-suited for class treatment. The central issue it presents is whether Monitronics can be held vicariously liable for the telemarketing calls placed by its Authorized Dealers and the Authorized Dealers' subdealers and subvendors. Resolution of the action would also focus on whether the equipment used to place calls qualify as "automated telephone dialing systems" under the TCPA and whether Monitronics' conduct was knowing and willful. Unlike other class actions, Plaintiffs believe that no individualized issues of damages exist. Instead, at a trial, the court would evaluate expert testimony to determine the number of calls placed to class members, if any.

2. A class action is superior.

Rule 23(b)(3) also requires that a class action be superior to other available methods for adjudicating the controversy. The superiority requirement is often met where, as here, class members' claims would be too small to justify individual suits, and a class action would save litigation costs by permitting the parties to assert their claims and defenses in a single proceeding. *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 426 (4th Cir. 2003) (class treatment superior where it lowers litigation costs "through the consolidation of recurring common issues").

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 millions of claims in one action is far superior to individual lawsuits, promoting consistency and efficiency of adjudication. *See Gunnells*, 348 F.3d at 427 (noting class litigation "promotes consistency of results, giving defendants the benefit of finality and repose").

V. THE SETTLEMENT MERITS PRELIMINARY APPROVAL

A. The settlement approval process.

A class action settlement requires court approval. Fed. R. Civ. P. 23(e); *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991). Such approval typically involves a two-step process of "preliminary" and "final" approval. *See Manual for Complex Litig.* ("MCL 4th") § 21.632, at 414 (4th ed. 2004); *Grice v. PNC Mortg. Corp. of Am.*, No. 97-3084, 1998 WL 350581, at *2 (D. Md. May 21, 1998) (endorsing MCL 4th's two-step process). In the first stage, the parties submit the proposed settlement to the Court for preliminary approval. In the second

stage, following preliminary approval, the class is notified and a fairness hearing scheduled at which the Court determines whether to approve the settlement. *See Bicking v. Mitchell Rubenstein & Assocs.*, No. 11-78, 2011 WL 5325674, at *4 (E.D. Va. Nov. 3, 2011). This procedure safeguards class members' due process rights and enables the court to fulfill its role as the guardian of class interests. *See* 5 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 13:1 (5th ed. updated Dec. 2016).

Plaintiffs request that the Court take the first step in the settlement approval process by granting preliminary approval of the proposed Settlement Agreement. The purpose of preliminary evaluation of proposed class action settlements is to determine whether sending notice to the class of the settlement's terms and holding a final fairness hearing would be worthwhile. *Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 855 F. Supp. 825, 827 (E.D.N.C. 1994) (holding that question at preliminary approval stage is simply whether there is "probable cause" to justify notifying class members of proposed settlement).

B. Criteria for settlement approval

Fairness and adequacy are the touchstones of class action settlement approval. *Jiffy Lube*, 927 F.2d at 158. The factors that merit consideration during the approval process may be broken down into two major categories: those which go to "fairness" and those which go to "adequacy" of a settlement. *Id.*

1. The proposed Settlement Agreement is fair.

Courts consider the following factors when determining whether a proposed settlement is fair: (1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that has been conducted, (3) the circumstances surrounding negotiations, and (4) the experience of counsel in the area of class action litigation. *Jiffy Lube*, 927 F.2d at 159. All four factors favor approving the settlement here. The parties reached a settlement after litigating for over six years.

Marshall Decl. ¶¶ 8-11. The parties briefed over thirty substantive motions, including multiple motions to dismiss. *Id.* Monitronics produced hundreds of thousands of pages of documents. *Id.* Plaintiffs sent forty-five third party subpoenas, propounded fifteen sets of discovery, and took twenty-three depositions. *Id.* Both parties retained multiple experts to review the calling data obtained in the case. *Id.* The parties exchanged expert reports and Plaintiffs' experts were working on rebuttal expert reports at the time the parties settled. *Id.*

The parties reached agreement only after mediating for three full days with the assistance of Bruce Friedman, a JAMS mediator with both TCPA and insurance coverage experience. Marshall Decl. ¶¶ 11-14. The mediations involved multiple insurers as well as the other defendants. *Id.* At all times the negotiations were at arms' length and free from collusion. *Id.* Plaintiffs steadfastly advocated for substantial settlement relief, but at the same time were pragmatic about Monitronics' ability to pay a large judgment in excess of insurance proceeds. *Id.* Plaintiffs also were well aware of the risks they faced if they continued to litigate, particularly the risk that they would lose on summary judgment. *Id.* Plaintiffs relied on the judgment of their counsel, who have extensive experience litigating, settling, and trying TCPA and other class actions. *Id.* ¶ 7. In such circumstances, it may be presumed that a settlement is fair. *See Good v. W. Va.-Am. Water Co.*, No. 14-1374, 2017 WL 2884535 (S.D. W. Va. July 6, 2017) (finding "no evidence of chicanery" in the circumstances surrounding the settlement and noting counsel's "abundance of experience" and the advanced stage of the litigation).

2. The proposed settlement is adequate.

In determining whether a settlement is adequate, courts consider (1) the relative strength of the plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration

and expense of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement. *Jiffy Lube*, 927 F.2d at 159.

The most important factor in weighing the adequacy of a proposed settlement is the strength of the plaintiffs' claims on the merits combined with any difficulties the plaintiffs would likely encounter if they chose to litigate on their own. *Berry v. Schulman*, 807 F.3d 600, 614 (4th Cir. 2015). Here, the proposed settlement provides a cash payment to every Settlement Class Member who files a claim. Although the estimated $15-$25 cash awards may appear relatively low, the amounts are very reasonable given that high litigation costs and fees likely would engulf any amounts class members could recoup if they proceeded on an individual basis. For example, Monitronics did not maintain records of the calls which plaintiffs claim were placed on its behalf. To proceed individually, each class member likely would have to send multiple subpoenas to numerous third parties just to determine the Authorized Dealer or subdealer that placed the calls. Each class member also would have to hire an expert to opine about whether the calling equipment used constitutes an "ATDS" under the TCPA. These expenses and fees either make individual litigation prohibitive or would make any recovery de minimis.

Settlement Class members also risked losing on the merits. This Court dismissed Plaintiffs' claims against manufacturers UTC and Honeywell on summary judgment, finding they were not vicariously liable for calls placed by third party Authorized Dealers and their subdealers. *See* Dkt. No. 894. Although Plaintiffs believe their vicarious liability case against Monitronics is strong, they risked losing outright on summary judgment and recovering nothing for the class.

Even if Plaintiffs prevailed on the merits, they faced the challenge of collecting a

judgment that could have been in the hundreds of millions, if not billions, of dollars. Monitronics has limited assets and although it purchased insurance, its insurance carriers dispute that the policies provide any coverage for TCPA claims. Marshall Decl. ¶¶ 12-14. Plaintiffs faced a legitimate concern that Monitronics may have declared bankruptcy had a large judgment been entered against it at trial. *Id.* Given these circumstances, the $28 million settlement, which isMewithin the amount of Monitronics' insurance "policy limits," is an excellent result for the class. It also is in line with other TCPA settlements approved across the country. *See, e.g., 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); *Manouchehri v. Styles for Less, Inc.*, Case No. 14cv2521 NLS, 2016 WL 3387473, at *2, 5 (S.D. Cal. June 20, 2016) (preliminarily approving settlement where class members could choose to receive either a $10 cash award or a $15 voucher).

Furthermore, Plaintiffs are only releasing Monitronics from liability for the millions of calls placed to Settlement Class members. Settlement Class Members will remain free to pursue or continue to pursue claims against any other entity involved with the calls, including the companies that actually made, ordered or otherwise benefited from the telemarketing calls. For example, Plaintiffs have appealed this Court's order granting summary judgment against them on their claims against UTC and Honeywell. If the Fourth Circuit reverses this decision, Plaintiffs will continue to pursue those claims.

The settlement treats all Settlement Class members equally and thus raises no concerns that one segment of the class was given preferential treatment over the other. All Settlement Class members will receive a *pro rata* share of the Settlement Fund after settlement expenses are deducted. For all these reasons, the settlement is well-within the range of reasonableness. It

should be approved and notice sent to the Settlement Class. *See Dewhurst v. Century Aluminum Co.*, No. 2:09-1546, 2017 WL 2374393, at *2 (S.D. W. Va. May 31, 2017) (preliminarily approving settlement and finding settlement relief adequate in light of plaintiffs' risks of losing on the merits).

VI. THE NOTICE PROGRAM IS CONSTITUTIONALLY SOUND

Rule 23(e)(1) requires the Court to "direct notice in a reasonable manner to all class members who would be bound by" a proposed settlement. Fed. R. Civ. P. 23(e)(1); *see also* MCL 4th § 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).

As set forth in Section IIC above, the parties retained experienced class action administrator KCC to design and implement a state-of-the-art notice plan that is estimated to reach 74% of the Settlement Class. The plan includes direct notice to all Settlement Class members who can be identified and located. KCC will email notice to all Settlement Class members for whom an email exists in records obtained in discovery. KCC will mail a postcard with an attached claim form to all Settlement Class members whose emails bounce back or for whom an email address is not available.

Plaintiffs acknowledge that although they identified millions of Settlement Class members, additional Settlement Class members may exist who were not identified in discovery. To reach that segment of the Settlement Class, KCC has designed a stand-alone publication notice program designed to reach 74% of the Settlement Class on its own. Peak Decl. ¶ 35. The publication notice program includes print notice in People and Better Homes and Gardens and

multiple online media campaigns. *Id.* ¶ 24.

The proposed forms of notice, attached as Exhibits to the Settlement Agreement are clear, straightforward, and provide Settlement Class members with enough information to evaluate whether to participate in the settlement. Thus, the Notices satisfy the requirements of Rule 23 and due process. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808 (1985)) (explaining a settlement notice must provide settlement class members with an opportunity to present their objections to the settlement).

This Notice Program satisfies due process, especially because Rule 23 does not require that each potential class member receive actual notice of the class action. *Mullane*, 339 U.S. at 316 (explaining that the Supreme Court "has not hesitated to approve of resort to publication as a customary substitute in [a] class of cases where it is not reasonably possible or practicable to give more adequate warning"); *see also* Peak Decl. ¶ 12. All in all, the Notice Program constitutes the best notice practicable under the circumstances, provides sufficient notice to the Settlement Class, and fully satisfies the requirements of due process and Rule 23.

VII. PROPOSED SETTLEMENT APPROVAL SCHEDULE

The last step in the settlement approval process is a final approval hearing at which the Court may hear all evidence and argument necessary to make its settlement evaluation. Proponents of the settlement may explain the terms and conditions of the Settlement Agreement, and offer argument in support of final approval. The Court will determine after the final approval hearing whether the settlement should be approved, and whether to enter a final order and judgment under Rule 23(e).

Plaintiffs request that the Court set a date for a hearing on final approval at the Court's convenience, but no earlier than 180 days after entry of the preliminary approval order, and

schedule further settlement proceedings pursuant to the schedule set forth below:

ACTION	DATE
Preliminary Approval Order Entered	At the Court's Discretion
Notice Deadline	Within 60 days following entry of Preliminary Approval Order
Class Counsel's Fee Motion Submitted	Within 60 days following the Notice Deadline
Exclusion/Objection Deadline	90 days after Notice Deadline
Deadline to Submit Claims	90 days after Notice Deadline
Final Approval Brief and Response to Objections Due	Within 100 days after Notice Deadline
Final Approval Hearing/Noting Date	No earlier than 180 days after entry of preliminary approval order
Final Approval Order Entered	At the Court's Discretion

VIII. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court grant this Motion and enter the submitted Proposed Order, preliminarily approve the parties' proposed Settlement Agreement, and establish a schedule to complete the tasks necessary to effectuate the proposed settlement.

Dated: August 31, 2017.

Respectfully Submitted,

BAILEY & GLASSER, LLP

By: /s/ Jonathan R. Marshall

Jonathan R. Marshall
209 Capitol Street
Charleston, West Virginia 25301
Telephone: (304) 345-6555
Facsimile: (304) 342-1110
Email: jmarshall@baileyglasser.com
Liaison Counsel

John W. Barrett
Ryan M. Donovan
BAILEY & GLASSER, LLP
209 Capitol Street
Charleston, West Virginia 25301
Telephone: (304) 345-6555
Facsimile: (304) 342-1110
Email: jbarrett@baileyglasser.com
Email: rdonovan@baileyglasser.com

TERRELL MARSHALL LAW GROUP PLLC

By: /s/ Beth E. Terrell
Beth E. Terrell
Mary B. Reiten
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
Telephone: (206) 816-6603
Facsimile: (206) 319-5450
Email: bterrell@terrellmarshall.com
Email: mreiten@terrellmarshall.com

Co-Lead Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 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:

Liaison Counsel for Defendants:

Jeffrey A. Holmstrand
GROVE HOLMSTRAND & DELK, PLLC
44-1/2 15th Street
Wheeling, West Virginia 26003
Telephone: (304) 905-1961
Facsimile: (304) 905-8628
Email: jholmstrand@grovedelklaw.com

Co-Lead Counsel for Defendant Monitronics, Inc.:

Jeffrey A. Holmstrand
GROVE HOLMSTRAND & DELK, PLLC
44-1/2 15th Street
Wheeling, West Virginia 26003
Telephone: (304) 905-1961
Facsimile: (304) 905-8628
Email: jholmstrand@grovedelklaw.com

Meryl C. Maneker
WILSON TURNER KOSMO LLP
550 West C Street, Suite 1050
San Diego, California 92101
Telephone: (619) 236-9600
Facsimile: (619) 236-9669
Email: mmaneker@wilsonturnerkosmo.com

I further certify that I caused foregoing to be mailed by the U.S. Postal Service, from Charleston, West Virginia, postage prepaid, to the following:

Craig Cunningham
5543 Edmondson Pike, Suite 248
Nashville, Tennessee 37211

Bryan Anthony Reo
7143 Rippling Brook Lane
Mentor, Ohio 44060

/s/ Jonathan R. Marshall
Jonathan R. Marshall
209 Capitol Street
Charleston, West Virginia 25301
Telephone: (304) 345-6555
Facsimile: (304) 342-1110
Email: jmarshall@baileyglasser.com