IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA CHARLESTON DIVISION

MARK FITZHENRY, individually and on behalf of a class of all persons and entities similarly situated, Plaintiff vs. LOWE'S COMPANIES, INC. GE CAPITAL RETAIL BANK Defendants	Case No. 2:14-CV-02081-RMG

PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND MEMORANDUM IN SUPPORT

Plaintiff Mark Fitzhenry ("Plaintiff" or "Mr. Fitzhenry") petitions the Court to certify the class defined herein, appoint Plaintiff as Class Representatives, and appoint his attorney as Class Counsel. Plaintiff seeks certification of the following class under Fed. R. Civ. P. 23(b)(3):

> All persons within the United States who Defendants directly, or through its agents, called on a cellular telephone line by the use of an automatic telephone dialing system, and with respect to whom Defendants do not have evidence of prior express consent of the called party.

The Plaintiff files this motion along with the complaint in order to avoid a frequent defense tactic to "pick off" the representative plaintiffs through a Rule 68 or individual settlement offer and provide no relief to the class. *See e.g. Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011). *See Keim v. ADF MidAtlantic, LLC*, 2013 U.S. Dist. LEXIS 98373 at *23-25 (S.D. Fla. July 12, 2013) (allowing a defense "pick off" motion to dismiss for lack of jurisdiction in a TCPA case where the individual offer of judgment was made prior to the filing of a motion for

class certification, and recognizing that plaintiff can avoid such a tactic by filing a motion for class certification along with the complaint.).

The Plaintiff respectfully submits the instant motion to preclude a "pick off" attempt from being made in this case and respectfully request that this Court stay briefing on the motion so as to allow the Plaintiff, and his counsel, an opportunity to fully investigate the instant allegations so they may supplement the instant filing at a later date so the Court has an adequate record upon which to conduct its own inquiry as to whether the plaintiffs have satisfied the requirements of Rule 23.

I. SUMMARY OF APPLICABLE LAW

In 1991, Congress enacted the Telephone Consumer Protection Act ("TCPA") to regulate the explosive growth of the telemarketing industry. In so doing, Congress recognized that "[u]nrestricted telemarketing . . . can be an intrusive invasion of privacy . . . ." Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(5) (1991) (codified at 47 U.S.C. § 227). Through the TCPA, Congress outlawed telemarketing via unsolicited automated or pre-recorded telephone calls ("robocalls"), finding:

> [R]esidential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy.
>
> . . . .
>
> Banning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call[,] . . . is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.

Id. § 2(10) and (12); *see also Mims*, 132 S. Ct. at 745. *See also Martin v. Leading Edge Recovery Solutions, LLC*, 2012 WL 3292838, at *4 (N.D.Ill. Aug. 10, 2012) (citing Congressional findings on the TCPA's purpose).

The TCPA regulates, among other things, the use of automated telephone equipment, or "autodialers." Specifically, the plain language of section 227(b)(1)(A)(iii) prohibits the use of autodialers to make any call to a wireless number in the absence of an emergency or the prior express consent of the called party. According to findings by the FCC, the agency Congress vested with authority to issue regulations implementing the TCPA, such calls are prohibited because, as Congress found, automated or prerecorded telephone calls are a greater nuisance and invasion of privacy than live solicitation calls, and such calls can be costly and inconvenient. The FCC also recognized that wireless customers are charged for incoming calls whether they pay in advance or after the minutes are used. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014 (2003).

On January 4, 2008, the FCC released a Declaratory Ruling wherein it confirmed that autodialed and prerecorded message calls to a wireless number by a creditor (or on behalf of a creditor) are permitted only if the calls are made with the "prior express consent" of the called party. *See In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* ("FCC Declaratory Ruling"), 23 F.C.C.R. 559, 23 FCC Rcd. 559, 43 Communications Reg. (P&F) 877, 2008 WL 65485 (F.C.C.) (2008). The FCC "emphasize[d] that prior express consent is deemed to be granted only if the wireless number was provided by the consumer to the creditor, and that such number was provided during the transaction that resulted in the debt owed." *See FCC Declaratory Ruling,* 23 F.C.C.R. at 564-65 (¶ 10).

In the same Declaratory Ruling, the FCC emphasized that both the creditors, such as Defendants, and the third party debt collector may be held liable under the TCPA for debt collection calls. ("A creditor on whose behalf an autodialed or prerecorded message call is made

to a wireless number bears the responsibility for any violation of the Commission's rules. Calls placed by a third party collector on behalf of that creditor are treated as if the creditor itself placed the call... A third party collector may also be liable for a violation of the Commission's rules."). As Judge Easterbrook of the Seventh Circuit explained in a TCPA case regarding calls to a non-debtor similar to this one:

> The Telephone Consumer Protection Act … is well known for its provisions limiting junk-fax transmissions. A less-litigated part of the Act curtails the use of automated dialers and prerecorded messages to cell phones, whose subscribers often are billed by the minute as soon as the call is answered—and routing a call to voicemail counts as answering the call. An automated call to a landline phone can be an annoyance; an automated call to a cell phone adds expense to annoyance.

Soppet v. Enhanced Recovery Co., LLC, 679 F.3d 637, 638 (7th Cir. 2012).

Not surprisingly, given the scope of illegal telemarketing previously recognized by Congress in implementing the TCPA, the relatively small monetary recovery under the TCPA for each claim, and the simple elements to prove a TCPA violation, many consumers have sought to enforce their rights under the TCPA via class action. Over the past two decades trial[1] and

[1] State Trial Court Decisions
Uesco v. Poolman, 2011 TCPA Rep. 2156 (Ill. Cir. Ct. Aug. 10, 2011); *Windmill Nursing Pavillion, LTD. v. Res-Care Ill., Inc.*, 2011 TCPA Rep. 2112 (Ill. Cir. Ct. Mar. 18, 2011); *Ambassador Home Improvements, Inc. v. Hiqu Italian Am. Stone Corp.*, 2010 WL 5678598 (Pa. C.P. Dec. 29, 2010); *Anderson Office Supply, Inc. v. Adv. Med. Assocs., P.A.*, 2010 WL 6537289 (Kan.Dist. Ct. Nov. 17, 2010); *Fla. First Fin. Group, Inc. v. Magnum Painting, Inc.*, 2010 TCPA Rep. 2046 (Fla. Cir. Oct. 21, 2010); C.E. Design LTD v. Matrix LS, Inc., 2010 TCPA Rep. 1974 (C. Ct. Ill 2010).

Federal Trial Court Decisions:
Babb Real Estate, LLC v. Bennett, 2011 TCPA Rep. 2146 (W.D. Wis. July 29, 2011); *Creative Montessori Learning Center v. Ashford Gear*, 2011 TCPA Rep. 2149 (N.D. Ill. July 27, 2011); Garo v. Global Credit & Collection Corp., 2011 TCPA Rep. 2087 (D. Az. 2011) *C.E. Design LTD v. King Architectural Metals, Inc.*, 2010 TCPA Rep. 2068, 2010 WL 5146641 (N.D. Ill. Dec. 13, 2010); *Garrett v. Ragle Dental Lab., Inc.* 2010 U.S. Dist. LEXIS 108339 (N.D. Ill, October 12, 2010); *Ira Holtzman v. Gregory Turza*, 2009 WL 3334909 (N.D.Ill. Oct. 14, 2009); *CE Design v. Cy's Crabhouse North, Inc*, 259 F.R.D. 135 (N.D. Ill. July 27, 2009); *Green v. Service Master on Location Services*, 2009 WL 1810769 (N.D.Ill. June 22, 2009); *G.M. Sign v. Finish Thompson, Inc.*, 2009 WL 2581324 (N.D.Ill. Aug. 20, 2009).

appellate[2] courts nationwide have scrutinized and approved consumers' use of the class action vehicle to combat illegal telemarketing.

II. RELEVANT FACTS

On September 19, September 20, September 21, and September 23, 2013, and on other dates and/or times, the Plaintiff received a phone call from a debt collector calling from or on behalf of Defendants. The caller ID for the calls was (800) 568-0156. All of the calls were received on the Plaintiff's cellular telephone, (843) 991-XXXX.

When each of the calls connected, there was an audible click from the receiver. After a significant pause, the following pre-recorded message played:

> This is an important message from GE Capital Retail Banks regarding Lowe's credit services. Please call today at 1-800-568-0156 or visit our website at Lowescredit.com. Our mailing address is 170 West Election Road, Suite 125, Draper, UT 84020. Thank you.

Despite the fact that the Defendants repeatedly contacted the Plaintiff, they were attempting to collect a debt for a Lowe's consumer credit card for William Beasley, an individual the Plaintiff has never met, or had any contact with. Both calls were placed through an automatic telephone dialing system. Both calls were placed without the Plaintiff's prior express consent as Plaintiff is not a customer of Defendant, and has not provided Defendant with the cellular telephone number he was called on.

[2] Appellate court decisions relating to the enforcement of the TCPA via class action include: *Jonathan Blitz v. Agean, Inc*., 677 S.E.2d 1 (North Carolina Court of Appeals, June 2, 2009); *American Home Services, Inc. v. A Fast Sign Company*, 287 Ga.App. 161, 651 S.E.2d 119 (2007); *Display South, Inc. v. Graphics House Sports Promotions, Inc.* --- So.2d ----, 2008 WL 2329929 (La.App. 1 Cir. 2008); *Lampkin v. GCH, Inc*., 146 P.3d 847 (2006); *Kaufman v. ACS Systems, Inc*., 2 Cal.Rptr.3d. 296 (Court of Appeal, Second District, Division 1, July 2003), review denied, 2003 Cal. LEXIS 7790; *ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc., et al.*, 203 Ariz. 94, 50 P.3d 844 (Ariz. App. 2002); *Hooters of Augusta, Inc. v. Nicholson, et. al.*, 245 Ga.App. 363, 537 S.E.2d 468 (2000).

III. ARGUMENT

A. The Standards for Class Certification Are Satisfied.

Plaintiff seeks certification under Rule 23(b)(3) of the Federal Rules of Civil Procedure. Class certification is appropriate when the proponent of certification demonstrates that each of the requirements of Rule 23(a) and at least one of the subsections under Rule 23(b) has been satisfied. Fed. R. Civ. P. 23. Rule 23(a) requires that (i) the proposed class is so numerous that joinder of all individual class members is impracticable (numerosity); (ii) that there are common questions of law or fact amongst class members (commonality); (iii) that the proposed representative's claims are typical of those of the class (typicality); and (iv) that both the named-representative and his counsel have and will continue to adequately represent the interests of the class (adequacy). Fed. R. Civ. P. 23(a). In this case, the evidence already gathered is more than sufficient to support class certification.

1. The Numerosity Requirement Is Satisfied.

The first requirement of Rule 23(a) is met when "the class is so numerous that joinder of all members is impractical." Fed. R. Civ. P. 23(a)(1); *see also Brady v. Thurston Motor Lines*, 726 F.2d 136, 145 (4th Cir. 1984).. The Fourth Circuit has held that "[n]o specified number is needed to maintain a class action," *Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n*, 375 F.2d 648, 653 (4th Cir. 1967), though a class containing "74 persons is well within the range appropriate for class certification" and classes as small as 18 have been certified. *Brady*, 726 F.2d at 145. District courts have broad discretion in deciding whether to allow the maintenance of a class action. *Id.*

In this case evidence of numerosity is in the sole possession of Defendants and its agents. However, the impersonal nature of the calls and the fact that the Defendants used an automatic

telephone dialing system to make the calls, as evidenced by, among other things, the use of prerecorded voice messages, and in fact, when the Plaintiff contacted the Defendant GE Capital Bank about the unwelcomed calls, he was told that an automatic dialer makes the calls. The Plaintiff suspects that once discovery is complete, the numerosity requirement will be easily satisfied.

2. The Commonality Requirement Is Satisfied.

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." To meet the commonality requirement, the plaintiff must demonstrate that the proposed class members "have suffered the same injury." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). In other words, commonality requires that the claims of the class "depend upon a common contention…of such a nature that it is capable of classwide resolution -- which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* Commonality may be shown when the claims of all class members "depend upon a common contention" and "even a single common question will do." *Dukes*, 131 S. Ct. at 2545, 2556.

In this case, all class members received virtually identical contact from the Defendants using a pre-recorded voice message. None of the class members consented to receive the calls at issue. This case presents many common questions applicable to the Class:

- Are Defendants liable under the TCPA for illegal calls transmitted?
- Can Defendants demonstrate that it had prior express consent to send the telephone calls?
- Are class members entitled to TCPA statutory damages?
- Was Defendants' violation of the TCPA knowing or willful?

In sum, as there are many common questions between class members, the commonality requirement of Rule 23 is easily satisfied.

3. The Typicality Requirement Is Satisfied.

Typicality requires that Plaintiffs' claims be typical of other class members. Fed. R. Civ. P. 23(a)(3). The Fourth Circuit has commented that "The United States Supreme Court 'has repeatedly held that a class representative must be part of the class and possess the same interest and suffer the same injury as the class members.' *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 338 (4th Cir. 1998) (internal citation omitted). Essentially, the typicality requirement ensures that "only those plaintiffs who can advance the same factual and legal arguments may be grouped together as a class." *Id.* at 340. 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." *Simpson v. Specialty Retail Concepts*, 149 F.R.D. 94, 99 (M.D.N.C. 1993). Finally, "a finding of commonality will ordinarily support a finding of typicality." *see General Tel. Co. v. Falcon*, 457 U.S. 147, 157 n.13 (1982) (noting how the requirements of commonality and typicality "merge").

Here, Plaintiff's claims are identical to the claims of the proposed Class members. All claims arise out of the same legal theories, as typicality requires. All class members received identical contact from the Defendants using a pre-recorded voice message. Individualized inquiries are not material to establish the TCPA violations, and are therefore irrelevant to the Rule 23 analysis. Plaintiff's claims under the TCPA arise out of the same course of conduct, are based on the same legal theory, and resulted in the same injury. The damages claims of all class members are typical as damages under the TCPA are statutory. Accordingly, the typicality requirement is satisfied.

4. The Requirement of Adequate Representation Is Satisfied.

Finally, Rule 23(a) requires that the representative parties have and will continue to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This rule involves two components: (1) that Plaintiffs' attorneys are qualified, experienced and generally able to conduct the litigation; and (2) that the class representatives' interests are not antagonistic to or in conflict with those of other class members. *South Carolina Nat'l Bank* v. *Stone*, 139 F.R.D. 325, 330 (D.S.C. 1991). "In making the appropriate inquiry as to Rule 23(a)(4), adequacy, the district court should seek to 'uncover conflicts of interest between named parties and the class they seek to represent,' and ask whether class representatives 'possess the same interest and suffer the same injury as the class members.'" *Alston v. Virginia High School League, Inc*., 184 F.R.D. 574, 578 (W.D. Va. 1999).

Plaintiff has no conflicting interests with class members. In fact, by investigating, filing, and vigorously pursuing this case, the Plaintiff has demonstrated a desire and ability to protect class members' interests. Plaintiff has elected not to pursue solely his individual claims in this matter, but instead is prosecuting the case on behalf of a class of persons who, like themselves, have been subjected to unlawful telemarketing.

Plaintiff's counsels are experienced and competent litigators and able to adequately represent the Plaintiff and class members.

5. The Proposed Class Satisfies Fed. R. Civ. P. 23(b)(3).

A class action may be maintained under Rule 23(b)(3) if all Rule 23(a) requirements are met and "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other

available methods for fairly and efficiently adjudicating the controversy."[3] *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615-616 (1997) (addressing predominance and superiority requirements). The predominance requirement under Rule 23(b)(3) "is similar but 'more stringent' than the commonality requirement of Rule 23(a)." *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 319 (4th Cir. 2006).

i. Common questions of law and fact predominate.

"Whereas commonality requires little more than the presence of common questions of law and fact, Rule 23(b)(3) requires that 'questions of law or fact common to the members of the class predominate over any questions affecting only individual members." *Id.* Essentially, the predominance requirement tests whether the class is sufficiently cohesive to warrant adjudication by representation. *Id.* In fact, common legal and factual issues have been found to predominate where the class members' claims arose under the TCPA and where the claims focused on the defendants' telemarketing campaign. *Kavu, Inc.*, 246 F.R.D. at 650-51; *Paldo Sign & Display Co. v. Topsail Sportswear, Inc.*, No. 08-5959, 2010 WL 4931001, at *3 (N.D. Ill. Nov. 29, 2010).

All claims in this case arise under the same federal statute, all involve the same elements of proof, and all involve the same alleged misconduct. The predominate question in this case—the answers to which will be dispositive of the Plaintiff's and the class members' claims alike—is whether Defendants is liable for the transmission of the calls at issue. The answers to these questions win or lose, will decide the outcome of the entire case. As the Seventh Circuit recently held, '[c]lass certification is normal in litigation under § 227, because the main questions, such as

[3] Pertinent matters include: (1) the class members' interests in individually controlling the prosecution or defense of separate actions, (2) the extent and nature of any litigation concerning the controversy already begun by or against class members, (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum, and (4) the likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3)(A)-(D).

whether a given [communication] is an advertisement, are common to all recipients. *Holtzman, v. Turza*, --- F.3d ----, 2013 WL 4506176 (7th Cir. August 26, 2013) (emphasis added).

ii. A class action is a superior method for the adjudication of this controversy.

Finally, the class action is superior to any other method available to fairly and efficiently adjudicate the Class members' claims. "The inquiry into whether the class action is the superior method for a particular case focuses on 'increased efficiency.'" *Agan*, 222 F.R.D. at 700 (quoting *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1359 (11th Cir. 2002)). Class actions are particularly appropriate where, as here, "it is necessary to permit the plaintiffs to pool claims which would be uneconomical to litigate individually." *In re Terazosin Hydrochloride Antitrust Litig.*, 220 F.R.D. 672, 700 (S.D. Fla. 2004) (internal citations omitted).

The TCPA, its allocation of statutory damages in an amount not to exceed $1,500, and its lack of a mechanism to award attorneys' fees, effectively means that it is not economically viable for class members to pursue claims against Defendants on an individual basis. This consideration is particularly compelling here. As the United States Supreme Court has stated:

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

Amchem Prods., 521 U.S. at 609 (citing *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)). Many decisions recognize the benefits of class certification in cases involving small individual recoveries, in the context of consumer cases generally,[4] and TCPA cases in

[4] *See, e.g., Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 567 (6th Cir. 2007) ("Such a small possible recovery [of approximately $125] would not encourage individuals to bring suit, thereby making a class action a superior mechanism for adjudicating this dispute."), *cert denied*, 129 S. Ct. 608 (2008); *Jermyn v. Best Buy Stores, L.P.*, 256 F.R.D. 418 (S.D. N.Y. 2009); *Drossin v. National*

particular.[5] The overriding justification for certification of these claims is compelling, and applies with equal force here:

> A class action permits a large group of claimants to have their claims adjudicated in a single lawsuit. This is particularly important where, as here, a large number of small and medium sized claimants may be involved. In light of the awesome costs of discovery and trial, many of them would not be able to secure relief if class certification were denied.

In re Folding Carton Antitrust Litig., 75 F.R.D. 727, 732 (N.D. Ill. 1977); *Knutson v. Schwan's Home Service, Inc.*, 2013 WL 4774763 (S.D.Cal. Sept. 5, 2013) ("Given the relatively minimal amount of damages that an individual may recover in suing for violation of the TCPA, see 47 U.S.C. § 227(b)(3), the Court finds a class action would achieve Plaintiffs' objective better than if class members were required to bring individual actions."); *see also Brown v. Kelly*, 244 F.R.D. 222, 238-39 (S.D. N.Y. 2007); *see also Lake v. First Nationwide Bank*, 156 F.R.D. 615, 626 (E.D. Pa. 1994) ("The public interest in seeing that the rights of consumers are vindicated favors the disposition of the instant claims in a class action form."). For all these reasons, the class action device is the superior means of resolving this case.

Action Fin. Servs., Inc., 255 F.R.D. 608, 617 (S.D. Fla. 2009); *Del Campo v. American Corrective Counseling Servs., Inc*., 254 F.R.D. 585 (N.D. Cal. 2008); *In re Farmers Inc. Co. FCRA Litig*., 2006 WL 1042450, *11 (W.D. Okla. April 13, 2006).

[5] Many federal courts have certified TCPA actions. *See e.g.*, *Agne v. Papa John's Int'l, Inc.*, No. C10-1139-JCC, 2012 WL 5473719 (W.D. Wash. Nov. 9, 2012); *Van Sweden Jewelers, Inc. v. 101 VT, Inc*., No. 1:10-cv-253, 2012 WL 4127824 (W.D. Mich. Sept. 19, 2012); *Sparkle Hill, Inc. v. Interstate Mat Corp.*, No. 11-10271, 2012 WL 6589258 (D. Mass. Dec. 18, 2012); *Am. Copper & Brass, Inc. v. Lake City Indus. Prods., Inc.*, 2012 WL 3027953 (W.D. Mich. July 24, 2012); *Reliable Money Order, Inc. v. McKnight Sales Co., Inc*., 281 F.R.D. 327 (E.D. Wis. 2012); *Silbaugh v. Viking Magazine Servs*., 278 F.R.D. 389 (N.D. Ohio 2012); *Siding & Insulation Co. v. Combined Ins. Group, Ltd.*, No. 1:11 CV 1062, 2012 WL 1425093 (N.D. Ohio Apr. 23, 2012).

IV. CONCLUSION

For the reasons discussed above, the requirements of Rule 23 are satisfied. Therefore, Plaintiff respectfully requests that the Court enter an order certifying the class and appointing his attorney as Class Counsel. However, the Plaintiff submits the instant motion to preclude a "pick off" attempt from being made in this case and respectfully requests that this Court stay briefing on the motion so as to allow the Plaintiff, and its counsel, an opportunity to fully investigate the instant allegations so he may supplement the instant filing at a later date so the Court has an adequate record upon which to conduct its own inquiry as to whether the Plaintiff has satisfied the requirements of Rule 23.

Dated: May 30, 2014

Respectfully submitted,

s/ Lance S. Boozer
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