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

MARK FITZHENRY, individually and on behalf of a class of all persons and entities similarly situated, Plaintiff vs. THE INDEPENDENT ORDER OF FORESTERS, THAD MICHAEL SIPPLE and SAVANT INSURANCE SOLUTIONS Defendants	Case No. 2:14-cv-03690-DCN

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 classes under Fed. R. Civ. P. 23(b)(3):

> All persons within the United States who received a non-emergency telephone call from Savant or Mr. Sipple, placed while acting on behalf of Foresters, through the use of an artificial or prerecorded voice within the four years prior to the filing of the Complaint in this action.

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).

II. RELEVANT FACTS

On June 17, 2014, the Plaintiff received a phone call from the Defendant Savant Insurance Solutions. When the phone was answered, a pre-recorded message played, that pre-recorded message was automated and stated

> Hello, this is a benefit information update regarding a new state-approved funeral insurance program that is now available in your state. The state-approved and state-regulated funeral insurance program will pay up to $35,000 tax-free for your burial and final expenses with no health questions and no waiting period. To receive this information, please press the 1 key on your phone now. To be added to our no-calls list, press 9 now, but for more information, please press the 1 key now.

When Plaintiff spoke with a representative, that representative informed the Plaintiff that he was calling from the company Savant Insurance Solutions, and gave a call back number of (866) 434-8181, which is the number that Savant Insurance Solutions has registered with the South Carolina Department of Insurance. *See* https://online.doi.sc.gov/Eng/Public/Queries/IndvdlDemogrphLicInfo.aspx?txtIndividualNbr=578955 (Last Visited September 15, 2014). Savant Insurance Solutions is owned and operated by Thad Michael Sipple. Mr. Sipple personally called Mr. Fitzhenry and informed him that the call was being made promoting Fosters insurance. Plaintiff did not provide prior express written consent to receive the pre-recorded phone call, and has not done business with either of the defendants.

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 Defendant and its agents. However, the fact that the Defendant used a pre-recorded message to make the calls supports the likelihood that the calls were made *en masse*. 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 Defendant. None of the class members consented to receive the calls at issue. This case presents many common questions applicable to the Class:

a. Whether Savant and Mr. Sipple, acting on behalf of Foresters, used an artificial or prerecorded voice in its non-emergency calls to Class members' telephones.

b. Whether the Defendants can meet their burden of showing they obtained consent (*i.e.*, written consent that is clearly and unmistakably stated), to make such calls;

c. Whether the Defendants' conduct was knowing and/or willful;

d. Whether the Defendants are liable for statutory damages; and

e. Whether the Defendants should be enjoined from engaging in such conduct in the future.

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 Plaintiff's 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 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 Plaintiff's 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 have regularly engaged in major TCPA litigation, and have extensive experience in consumer class action lawsuits.

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."[1] *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

[1] 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).

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 Defendant's calling 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 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 Defendant 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,[2] and TCPA cases in particular.[3] The overriding justification for certification of these claims is compelling, and applies with equal force here:

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[2] *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 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).

[3] 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,

> 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.

IV. CONCLUSION

For the reasons discussed above, the requirements of Rule 23 are satisfied. However, the Plaintiff 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.

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).

Dated: September 18, 2014

Respectfully submitted,

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