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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SAN DIEGO DIVISION

In re JIFFY LUBE INTERNATIONAL, INC. TEXT SPAM LITIGATION This filing relates to: ALL CASES	No. 3:11-MD-02261-JM-JMA MDL No. 2261 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AGREEMENT** Location: Courtroom 16 Date: September 17, 2012 Time: 10:00 a.m. The Honorable Jeffrey T. Miller

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On April 21, 2011, the cellular phones of more than 2.3 million consumers beeped, rang, and/or buzzed alerting their owners of the receipt of an incoming text message. Instead of the well-wishing's of a friend or a message from a son or daughter about baseball practice running late, these consumers checked their phones to find a commercial text message promoting a Jiffy Lube oil change. Instances such as this are no longer isolated occurrences in America. Accompanying the saturation and continued evolution of the cell phone has been a dramatic increase in the practice of *en masse* text message solicitation with 57% of adults reporting that they have received unwanted or spam text messages on their cell phones.[1]

In the weeks that followed the transmission of the Jiffy Lube promotional text message, Plaintiffs Joseph Crowl, Lawrence Cushnie, Tramy Duong, Rene Heuscher, Edward Koeller, and Dawn Souder (each a "Plaintiff" and collectively with Jacob Barr, the "Plaintiffs") each independently initiated a class action alleging that Heartland Automotive Services, Inc. ("Heartland")—the largest Jiffy Lube franchisee in America—through its co-Defendant mobile marketer TextMarks, Inc. ("TextMarks" and, together with Heartland, the "Defendants") violated the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. §227 *et seq.* by sending text messages to a list of Jiffy Lube customers it developed.[2] Ultimately, Plaintiffs' cases were consolidated in this Court for coordinated proceedings by the Judicial Panel on Multidistrict Litigation ("JPML"). (Dkt. 1.)

Following the Court's denial of Heartland's motions to dismiss and to compel arbitration, the Parties were ordered to attend an Early Neutral Evaluation Conference (the "Conference") presided over by the Honorable Magistrate Judge Jan M. Adler. (Dkt. 55.) On April 30, 2012,

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[1] Amanda Lenhart, *Cell Phones and American Adults: They Make Just as Many Calls, but Text Less than Teens*, Pew Research Center (2010); *see also* Nicole Perlroth, *Spam Invades the Last Refuge, the Cellphone*, N.Y. Times, Apr. 7, 2012, available at http://www.nytimes.com/2012/04/08/technology/text-message-spam-difficult-to-stop-is-a-growing-menace.html?_r=1("In the United States, consumers received roughly 4.5 billion spam texts last year, more than double the 2.2 billion received in 2009 . . .").

[2] Each of the Plaintiffs, with the exception of Plaintiff Dawn Souder, had previously patronized a Heartland Jiffy Lube. Prior Customers or not, all members of the proposed class are afforded relief pursuant to the terms of the Settlement Agreement described herein.

representatives of Defendants, Heartland's Counsel, TextMarks' Counsel, and Interim Lead and Liaison Class Counsel met with Magistrate Judge Adler to discuss the potential resolution of this MDL. Much of the negotiations concerned how to create a settlement that provides a proposed class of Jiffy Lube customers with meaningful relief, when TextMarks was financially unable to contribute and where Heartland demonstrated it was financially unable to resolve the case under traditional settlement models. At the end of a full day of supervised negotiations, Judge Adler was able to assist Parties in reaching resolution on the structure and several key terms of a class action settlement. After ongoing settlement discussions and two additional status calls with Judge Adler, the Parties were able to agree on all terms of the Settlement, a copy of which is attached as Exhibit 1 hereto.

The resultant settlement is—under the facts and circumstances—an exceptional result for the members of the proposed class. First, the Settlement provides for an injunction designed to prevent the reoccurrence of the alleged conduct by requiring Defendants to ensure that informed written consent be obtained by affirmative action on the part of the consumer through a clear statement regarding the receipt of text message advertisements. Additionally, Defendants are required to retain proof of all consumer consent to receive text message advertisements. (*See* Class Action Settlement Agreement; Ex. 1, § 2.1.)

More importantly, each member of the class with a valid mailing address will automatically be sent a Certificate with the class notice that can be redeemed in one of two ways: (1) the Certificate can be exchanged for a number of Jiffy Lube services, such as Antifreeze Top Off service, or approximately $17.29 off any service Jiffy Lube offers; or (2) after the period for use for Jiffy Lube services expires, class members can redeem the Certificate for up to $12.97 in cash. The services and cash value of the Certificates being made available to the Class is $46,844,780 and $35,133,585, respectively.

The results achieved by the Settlement Agreement are well beyond those required for preliminary approval, and Plaintiffs thus move the Court to preliminarily approve the instant Settlement, certify the proposed class, and confirm the appointment of Jay Edelson of Edelson McGuire LLC and Michael J. McMorrow of Smith & McMorrow, P.C. as Lead Class Counsel and

Douglas J. Campion of the Law Offices of Douglas J. Campion as Liaison Class Counsel.

I. NATURE OF THE LITIGATION, MEDIATION, AND SETTLEMENT

A. The Plaintiffs' Allegations

Like most cases arising under the TCPA, the operative facts are not particularly complex. Plaintiffs allege that Heartland sought to promote Jiffy Lube's "signature oil change" by enticing former Jiffy Lube customers with a "one time offer" to join its "EClub." In doing so, Heartland chose text messages as its promotional vehicle to advertise its services and EClub, and it enlisted the help of Co-Defendant TextMarks to effectuate the transmission of those text messages.

On or around April 21, 2011, each of the Plaintiffs and the putative class members in this Action received a text message from the SMS short codes "72345" and "41411" sent by Defendants that stated:

> JIFFY LUBE CUSTOMERS 1 TIME OFFER:
> REPLY Y TO JOIN OUR ECLUB FOR 45% OFF A
> SIGNATURE SERVICE OIL CHANGE! STOP TO UNSUB
> MSG&DATA RATES MAY APPLY T&C: JIFFYTOS.COM

Plaintiffs allege that through the use of an SMS short code and related autodialing technology, Defendants were able to upload a list of more than 2.3 million former Jiffy Lube customers and to rapidly transmit these text messages *en masse* to those former customers without human intervention. Plaintiffs further allege that they never provided Defendants with their express consent to receive such text messages.

In the immediate wake of this text messaging campaign, each of the six Plaintiffs filed suit claiming the transmission of these text messages violated Section 227(b)(1)(A)(iii) of the TCPA.

B. The Defendants' Position

Defendants deny the claims asserted against them in the Action. In particular, Defendants were prepared to defend the claims on the grounds that (1) Heartland could not be held liable for the alleged conduct of TextMarks, or vice versa, (2) the alleged text message was not sent using an automatic telephone dialing system, (3) Plaintiffs had provided their prior express consent to receiving the text message, (4) a substantial number of potential class members had agreed to arbitrate their claims against Heartland, and (5) the operative TCPA provisions are

unconstitutional. Absent this consensual settlement, Defendants are prepared to litigate the case through summary judgment and trial, and Heartland will pursue its appeal on its motion to compel arbitration currently pending before the Ninth Circuit.

C. The TCPA

Congress passed the TCPA in response to "voluminous consumer complaints," and to prohibit "intrusive nuisance calls" it determined were invasive of privacy. *Mims v. Arrow Fin. Servs. LLC*, 132 S. Ct. 740, 744 (2012); *see also Satterfield v. Simon & Schuster, Inc.,* 569 F.3d 946, 954 (9th Cir. 2009) (finding that in enacting the TCPA, Congress sought to "protect the privacy interests of telephone subscribers"). The TCPA exists as a means to combat the growing threat to privacy being caused by the automated telemarketing practices, and it states that:

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

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

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

The TCPA sets statutory damages in the amount of $500 per violation, and provides for

injunctive relief prohibiting the further transmission of such messages. *See* 47 U.S.C. § 227(b)(3)(A-B).

D. The Litigation History

In April and June 2011, Plaintiffs Crowl, Cushnie, Duoung, Heuscher, Koeller, and Souder initiated class actions against Defendants in the United States District Courts for the Southern District of California, the Northern District of California, and the Western District of Washington. On August 8, 2011, the JPML consolidated and transferred these cases to this Court for coordinated proceedings. (Dkt. 1.) After the actions were centralized in this Court, the Plaintiffs filed a Consolidated Complaint. (*See* Dkt. 7.) The Consolidated Complaint sought an injunction requiring Defendants to discontinue the transmission of unauthorized text messages, an award of actual damages and statutory damages under the TCPA. (*Id*.) Heartland responded to the Consolidated Complaint by filing a motion to compel arbitration (Dkt. 15) and to dismiss the Action on October 26, 2011, arguing that Plaintiffs failed to state a claim under the TCPA, that Plaintiffs gave consent to the text message promotion by releasing their telephone numbers to Heartland while having automobile service performed at Jiffy Lube, and that imposing TCPA liability on Heartland would violate Heartland's constitutional rights under the First and Fifth Amendments. (Dkt. 16.) Because the motions called the constitutionality of the TCPA into question, the United States Department of Justice was given notice of the challenges and subsequently intervened in the case for the purpose of opposing the constitutional challenges. (Dkt. 45.) After extensive briefing and oral argument, the Court issued its opinion denying both motions. (Dkt. 54.) Heartland has since appealed the Court's denial of its motion to compel arbitration and the appeal is currently pending before the Ninth Circuit.

On January 10, 2012, Jacob Barr filed a class action lawsuit in Washington State Superior Court against Heartland and its subsidiary Oil Express. Barr's allegations mirror those of the of the original six actions, but claimed Defendants' alleged transmission of the same text message violated the Washington Consumer Protection Act ("CPA") and the Washington Commercial

Electronic Mail Act ("CEMA"), codified as RCW 19.86.010 *et seq*. and RCW 19.190.010 *et seq*., respectively.[3] Heartland removed Barr's case to the Western District of Washington pursuant to the Class Action Fairness Act of 2005. On June 8, 2012, the JPML transferred Plaintiff Barr's action into this MDL.

Following the Court's denial of Heartland's motion to compel arbitration and to dismiss in this Action, the Court ordered the Parties to attend an Early Neutral Evaluation Conference presided over by the Honorable Magistrate Judge Jan M. Adler. (Dkt. No. 55.) In order to facilitate a more meaningful discussion at the Conference, Plaintiffs requested and Heartland provided discovery material on an informal and confidential basis in advance of the Conference. This informal discovery material included information regarding the scope of the proposed Class, information about the text messaging campaign, as well as documents regarding Heartland's financial condition. The Plaintiffs prepared submissions to Judge Adler presenting their view of the litigation and possible resolution through settlement. With representatives of Defendants, Heartland's Counsel, TextMarks' Counsel, and Class Counsel in attendance, Judge Adler conducted a full day of mediation on April 30, 2012. Under Judge Adler's supervision and guidance, the Parties engaged in several rounds of negotiations and made significant progress towards a settlement. (Ex. 1, Recital F.) At the end of the day certain terms remained unresolved, but the Parties agreed to continue negotiations and to return for another round of negotiations with Judge Adler if necessary.

Arms' length negotiations continued throughout the following months and included additional status calls with Judge Adler on May 15, 2012 and July 26, 2012.[4] (Declaration of Jay Edelson "Edelson Decl.", ¶¶ 5-7, attached hereto as Exhibit 2.) The result of these negotiations

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[3] These Washington statutes prohibit unsolicited commercial text messages and are analogous to the TCPA.

[4] Shortly before the Settlement was executed, Class Counsel spoke with counsel for Barr and explained the terms of the agreement that had been reached, whereupon Plaintiff Barr agreed to support the settlement and serve as an additional Class Representative. (Edelson Decl. ¶ 11.) Barr's support of the Settlement was not conditioned upon any specific consideration other than the sufficiency of the relief afforded to the class. (*Id*.)

was the instant Settlement, which provides both meaningful relief for individual Class Members and strong injunctive relief going forward. The Parties now seek preliminary approval of this Settlement Agreement.

II. TERMS OF THE SETTLEMENT

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

A. Class Definition

The Settlement Agreement applies to, and provides relief for, a narrowly defined Settlement Class that includes all persons or entities in the United States and its Territories who in April 2011 were sent the text message promoting Jiffy Lube from short codes 72345 or 41411, as set forth in Section I(A) above. (*See* Ex. 1, § 1.32.)

B. Class Injunctive Relief

At all times during settlement negotiations, proposed Class Counsel maintained that any class settlement agreement would require injunctive relief primarily designed to ensure that prior express consent is obtained from consumers before they receive any text message advertisements by or on behalf of Defendants. (Edelson Decl. ¶ 8.) The instant Settlement Agreement includes such provisions. (Ex. 1, § 2.1.)

Defendants have consented to the entry of an injunction prohibiting them from sending or directing the sending of any commercial text message unless each potential text message recipient has given explicit prior express consent to receive such messages in writing. Any method of obtaining consent going forward must contain a clear and conspicuous disclosure that the individual is agreeing to receive text messages from Heartland and its related entities. Defendants are then required to keep on file documented proof of any consent received for two years after the consent is obtained. (Ex 1, § 2.1.)

C. Individual Class Member Relief

Heartland has agreed to provide each member of the Class a Certificate with a goods/services value of up to $46,844,780.00, and a cash redemption value of up to $35,133,585.00. Upon approval of the Settlement, the Certificate can be redeemed in two ways,

subject to various terms and conditions. First, upon approval, the Certificate may be redeemed for a period of eighteen months at any Heartland-owned Jiffy Lube store for a defined list of goods or services, inclusive of any sales tax, disposal fees, or service-related costs, including: PCV Valve Replacement, Radiator Cap Replacement, Mini Light Bulb Replacement, and Aquapel Windshield Treatment.[5] The Certificate may alternatively be redeemed for an estimated $17.29 off any goods or services at Heartland owned Jiffy Lube stores, and it may also be used in connection with Jiffy Lube's "Early Bird" oil change promotional offer—a common recurring promotion.

Members of the Class who do not wish to redeem their Certificates for services at Jiffy Lube may redeem each unused Certificate at the conclusion of the 18-month validity period for an estimated $12.97 cash payment. Certificates can be redeemed on-line or by filling in the information requested on the Certificate and mailing it to a designated address. In addition, each Settlement Certificate may be transferred once by Settlement Class members. (Ex. 1, § 2.3(a).)

Although the exact amount of the certificates cannot be calculated at this time (*See* Ex. 1 §§ 1.4, 1.5), the settlement website and toll-free number will be updated with the exact value of the Certificates when known.

D. Other Relief

In addition to the individual and injunctive relief discussed above, the Defendants have agreed to the following relief:

1. ***Payment of Notice and Administrative Fees*****:** Defendants have agreed to pay the full cost of sending the settlement class notice as well as all costs of administration of the Settlement.

2. ***Compensation for the Class Representatives*****:** In addition to any award under the Settlement, and in recognition of their time and effort on behalf of the proposed Settlement Class, Heartland has agreed to provide each Class Representative an incentive award in

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[5] In most instances, the Certificate will also cover the full cost of Windshield Rock Chip Repair Service, Windshield Repair - 2nd Chip, Wiper Blade Refill / Replace, Registration Renewal, Safety / Brake Check, Safety Check, Motorcycle Inspection, and Emission Inspection.

the amount of five thousand dollars ($5,000.00), or its equivalent, in the same Certificates being provided to the Class, subject to the Court's approval. Defendants have agreed that such an award to the Class Representatives is reasonable and that they will not oppose such an award either directly or indirectly. (Ex. 1, § 9.5.)

3. ***Payment of Attorneys' Fees and Expenses*****:** Under the Settlement and subject to Court approval, that fees and costs be provided to proposed Class Counsel in the form of up to 366,300 of the same Certificates being issued to the Class (with a cash equivalent of $4,750,000, representing approximately 13.51 percent of the cash value made available to the class). Defendants have agreed that such an award to the proposed Class Counsel is reasonable, and that they will not oppose such an award either directly or indirectly. (Ex. 1, § 9.1.)

E. Release

In exchange for the relief provided above, and upon the entry of a final order approving this settlement, Defendants and each of their related affiliates and entities will be released from any claims, whether known or unknown, arising out of or relating to Heartland's or TextMark's involvement in the transmission of any unauthorized text messages from Short Code 72345 or 41411. (*See* Ex. 1, §§ 3, 1.25-1.27 for the full release language.)

III. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED

Before granting preliminary approval of a settlement, the Court should determine that the proposed settlement class is proper for settlement purposes, and thus appropriate for certification. MANUAL FOR COMPLEX LITIGATION § 21.632 (4th ed. 2004); *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *Staton v. Boeing*, 327 F.3d 938, 952 (9th Cir. 2003). To certify a class, the Plaintiffs must demonstrate that the proposed class and proposed class representatives meet four prerequisites: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. Fed. R. Civ. P. 23(a)(1-4).

In addition to meeting the requirements of Rule 23(a), plaintiffs seeking class certification must also meet at least one of the three provisions of Rule 23(b). Fed. R. Civ. P. 23(b); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2548 (2011)*; Blake v. Arnett*, 663 F.2d 906, 912 (9th Cir. 1981). Where, as here, plaintiffs seek certification under Rule 23(b)(3), they must demonstrate

that common questions of law or fact predominate over individual issues and that maintaining the suit as a class action is superior to other methods of adjudication. Fed. R. Civ. P. 23(b)(3); *Amchem*, 521 U.S. at 615-16; *In re Nat'l W. Life Ins. Deferred Annuities Litig.*, 268 F.R.D. 652, 662 (S.D. Cal. 2010). Further, the Court should accept the allegations of the plaintiff's complaint as true, but may consider matters beyond the pleadings to determine if the claims are suitable for resolution on a class-wide basis. *Dilts v. Penske Logistics,* LLC, 267 F.R.D. 625, 630 (S.D. Cal. 2010). In this case, Plaintiffs meet each of the prerequisites for the certification of the Settlement Class, as defined above and in the Settlement Agreement, for settlement purposes only.

A. The Requirement of Numerosity is Satisfied

The first prerequisite of class certification is numerosity, which requires that "the class [be] so numerous that joinder of all members is impractical." Fed. R. Civ. P. 23(a)(1). The exact number of class members need not be known, so long as the class is readily ascertainable. *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998). In addition, there is no specific number of class members required, though the numerosity requirement is typically satisfied when the class comprises at least forty members. *In re Cooper Cos. Inc. Sec. Litig.*, 254 F.R.D. 628, 634 (C.D. Cal. 2009). In TCPA class actions, numerosity has been satisfied with as few as 203 class members. *Lo v. Oxnard European Motors, LLC*, No. 11-cv-1009, 2011 WL 6300050, at *2 (S.D. Cal. Dec. 15, 2011); *see also Kavu, Inc. v. Omnipak Corp.*, 246 F.R.D. 642, 646-47 (W.D. Wash. 2007) (numerosity satisfied with 3000 class members).

Here, the proposed Settlement Class is comprised of 2,342,239 members whose cellular telephone numbers are known to Defendants, and the Class therefore easily satisfies the numerosity requirement of Rule 23. (Ex. 1 § 1.32) Accordingly, the proposed class is so numerous that joinder of their claims is impracticable.

B. The Requirement of Commonality is Satisfied

The second threshold to certification requires that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Commonality may be demonstrated when the claims of all class members "depend upon a common contention . . . that []is capable of classwide resolution" and "even a single common question will do." *Dukes*, 131 S. Ct. at 2545, 2556

(quotations omitted); *see also Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1019 (9th Cir. 1998) ("[t]he existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class"). The common contention must be of such a nature that it is capable of class-wide resolution, and that the "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes,* 131 S. Ct. at 2545. Moreover, the permissive standard of commonality provides that "[w]here the circumstances of each particular class member vary but retain a common core of factual or legal issues with the rest of the class, commonality exists." *Parra v. Bashas', Inc.*, 536 F.3d 975, 978-79 (9th Cir. 2008).

In the instant case, all members of the Settlement Class share a common claim arising out of the same alleged activity—having been sent text message advertisements to their cellular phones from Defendants without their prior express consent. As a result, all members of the Settlement Class share a common statutory TCPA claim[6] that hinges on shared factual and legal questions such as: (1) the validity of the consent claimed to have been given by members of the proposed class to receive text messages, (2) whether the equipment TextMarks used to send the text messages at issue was an "automatic telephone dialing system" as defined by the TCPA, and (3) whether Plaintiffs and the other members of the proposed class are entitled to statutory relief as a result of the alleged conduct. Determination of these issues, regardless of the answers, will resolve the allegations for the whole Class "in one stroke." *Dukes,* 131 S. Ct. at at 2545. As such, the commonality requirement is satisfied.

C. The Requirement of Typicality is Satisfied

Rule 23 next requires that the representative plaintiffs' claims are typical of those of the putative class they seek to represent. Fed. R. Civ. P. 23(a)(3). The typicality requirement ensures that "the interest of the named representative aligns with the interests of the class." *Wolin v. Jaguar Land Rover North Am. LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) (*citing Hanon v.*

[6] Plaintiff Barr brought his claims under Washington statutes that are analogous to the TCPA.

Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992)). When analyzing typicality, courts look to whether the defendant acted uniformly to the class members, whether that uniform conduct resulted in injury to the class members, and whether the named plaintiff suffered a similar injury to the class members. *Hanon,* 976 F.2d at 508. Typicality is also satisfied if the named plaintiff shares the same legal theories as those of the class. *Westways World Travel, Inc. v. AMR Corp.*, 218 F.R.D. 223, 235 (C.D. Cal. 2003).

In the instant action, Defendants' alleged transmission of the Jiffy Lube text message ads without obtaining prior express consent from their customers resulted in uniform statutory injuries to the members of the Class. As a result, because Plaintiffs have each alleged that they received the identical text message on or about the same day, their injuries are identical to not only to each other, but to the other members of the proposed class as well. In addition, Plaintiffs' claims are based on the same legal theories as the Class since Defendants' alleged conduct provides each of them with the same cause of action. Accordingly, Plaintiffs' claim for relief under the TCPA is typical, if not wholly identical, to those of the proposed class, in satisfaction of Rule 23(a)(3).

D. The Requirement of Adequate Representation is Satisfied

The final Rule 23(a) prerequisite requires that the proposed class representatives have and will continue to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). To determine if representation is in fact adequate, the Court must ask: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon*, 150 F.3d at 1020.

Plaintiffs' interests are entirely representative of and consistent with the interests of the proposed class—all have allegedly received unauthorized text message advertisements sent by or on behalf of the Defendants. Further, Plaintiffs' active participation as Class Representatives in this litigation, as well as the time and effort they have expended in the process resulting in the Settlement Agreement, demonstrates that they have and will continue to protect the interests of the proposed class. (Edelson Decl. ¶ 12.)

Throughout this litigation, Class Counsel have forcefully advocated for the Class through

creating this MDL, defeating Heartland's Motions to Dismiss and to Compel Arbitration, and in negotiating the excellent results achieved by this Settlement for the Class's benefit. Class Counsel have used the experience they have gained through regularly engaging in major complex litigation, and in consumer class action lawsuits—including suits related to telecommunications and the TCPA—that are similar in size, scope and complexity to the present case. (Edelson Decl. ¶¶ 13-14; *see also Satterfield v. Simon & Schuster*, No. 06-cv-2893 CW (N.D. Cal.), *Kramer v. Autobytel,* No. 10-cv-2722 (N.D. Cal.); *Lozano v. Twentieth Century Fox Film Corp.*, No. 09-CV-6344 (N.D. Ill. 2011); *Weinstein, et al. v. The Timberland Company,* No. 06-cv-0454 (N.D. Ill.); *Espinal v. Burger King Corp. et al*., No. 09-20982 (S.D. Fla. 2010); and Firm Resume of Edelson McGuire, LLC, a copy of which is attached to the Edelson Decl. as Exhibit A; *see also* Declaration of Douglas J. Campion attached hereto as Exhibit 3.) Both Plaintiffs and Class Counsel will adequately represent the proposed class and their interests.

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

Once the prerequisites of Rule 23(a) have been met, Plaintiffs must also demonstrate one of the three requirements of Rule 23(b) in order to certify the proposed class. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Rule 23(b)(3) provides that a class action can be maintained where: (1) the questions of law and fact common to members of the class predominate over any questions affecting only individuals, and (2) the class action mechanism is superior to the other available methods for the fair and efficient adjudication of the controversy. Fed. R. Civ. P. 23(b)(3); *Pierce v. County of Orange*, 526 F.3d 1190, 1197 n.5 (9th Cir. 2008). Certification under Rule 23(b)(3) is appropriate and encouraged "whenever the actual interests of the parties can be served best by settling their differences in a single action." *Hanlon,* 150 F.3d at 1022 (citation omitted).

1. Common Questions of Law and Fact Predominate

The focus of the predominance requirement is "whether the proposed class[] [is] sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. Predominance exists "[w]hen common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication." *Hanlon,* 150 F.3d at 1022.

Common legal and factual issues have been found to predominate where the class members' claims arose under the TCPA, and where the claims focused on the defendants' advertising practices. *Lo*, 2011 WL 6300050, at *2, 3; *CE Design v. Beaty Constr. Inc.,* 2009 WL 192481, *8-9 (N.D. Ill. Jan. 26, 2009).

In this case, the core issues of fact and law that predominate are whether text messages advertisements promoting Heartland Jiffy Lube's products and services with equipment meeting the statutory requirements to be an ATDS and whether the collection of customer cell phone numbers, without more, meets the requisite "prior express consent" to send the text messages at issue. As such, the answers to these common factual and legal questions that resulted from Defendants' alleged conduct are the primary focus and central issue of this class action and thus predominate over any individual issues that may exist.

2. *This Class Action is the Superior Method of Adjudication*

The certification of this suit as a class action is superior to any other method available to fairly, adequately, and efficiently resolve the claims of the members of the proposed class. The purpose of the superiority requirement is one of judicial economy and assurance that a class action is the "most efficient and effective means of resolving the controversy." *Wolin*, 617 F.3d at 1175-76 (citation omitted). Absent a class action and considering the fact that class membership in this case is in excess of two million people, most members of the proposed class would find the cost of litigating their claims to be prohibitive, and such an influx of individual actions would be judicially inefficient. Also, if preliminary approval of the Settlement Agreement is granted, the Court need not consider issues of manageability relating to trial. *See Amchem*, 521 U.S. at 620 (citation omitted) ("[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial") (internal citation omitted). Accordingly, common questions predominate and a class action is the superior method of adjudicating this controversy.

IV. THE COURT SHOULD CONFIRM THE APPOINTMENT OF CLASS COUNSEL

After certifying a class, Rule 23 requires a court to appoint class counsel that will fairly and adequately represent the class members. Fed. R. Civ. P. 23(g)(1)(B). In making this

determination, the Court must consider counsel's: (1) work in identifying or investigating potential claims; (2) experience in handling class actions or other complex litigation, and the types of claims asserted in the case; (3) knowledge of the applicable law; and (4) resources committed to representing the class. Fed. R. Civ. P. 23(g)(1)(A)(i-iv).

This Court has already made a preliminary determination of the suitability of proposed Class Counsel, ordering their appointment as Interim Lead Class Counsel and Liaison Class Counsel on October 31, 2011. (Dkt. 25.) As described at length in Class Counsel's memorandum in support of their motion to be appointed Interim Lead Class Counsel—and as discussed briefly above—Class Counsel have extensive experience in prosecuting similar class actions and other complex litigation, and they specifically have substantial knowledge and experience prosecuting class actions related to technology, privacy, and the TCPA. (Edelson Decl. ¶ 14; Exhibit A.) Further, since the occurrence of the alleged conduct, Class Counsel have diligently investigated and prosecuted this matter, dedicating substantial resources to the litigation of the claims at issue in the Action, and they have successfully negotiated the settlement of this matter to the benefit of the proposed class. (Edelson Decl. ¶¶ 13, 15.) Accordingly, the Court should confirm its earlier ruling and appoint Jay Edelson of Edelson McGuire LLC and Michael J. McMorrow of Smith & McMorrow PC as Lead Class Counsel and Douglas J. Campion of the Law Offices of Douglas J. Campion as Liaison Class Counsel.

V. THE PROPOSED SETTLEMENT IS FUNDAMENTALLY FAIR, REASONABLE, AND ADEQUATE, AND THUS WARRANTS PRELIMINARY APPROVAL

After certifying the proposed class, the Court should preliminarily approve the settlement. The procedure leading to approval of a proposed class action settlement is a well-established two-step process. Fed. R. Civ. P. 23(e); *see also* CONTE & NEWBERG, 4 NEWBERG ON CLASS ACTIONS, §11.25, at 3839 (4th ed. 2002). The first step is a preliminary, pre-notification hearing to determine whether the proposed settlement is "within the range of possible approval." NEWBERG, §11.25, at 3839 (*quoting* MANUAL FOR COMPLEX LITIGATION §30.41 (3d ed. 1995)); *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1100 (9th Cir. 2008); *Singer v. Becton Dickinson & Co.*, 08-CV-821-IEG (BLM), 2009 WL 4809646, at *7 (S.D. Cal. Dec. 9, 2009). This hearing is not a fairness

hearing; its purpose, rather, is to ascertain whether there is any reason to notify the putative Class members of the proposed settlement and to proceed with a fairness hearing. *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007). Notice of a settlement should be sent where "the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval." *Id.* (citation omitted).

The Manual for Complex Litigation characterizes the preliminary approval stage as an "initial evaluation" of the fairness of the proposed settlement made by a court on the basis of written submissions and informal presentation from the settling parties. MANUAL FOR COMPLEX LITIGATION § 21.632 (4th ed. 2004). If the Court finds a settlement proposal "within the range of possible approval," it then proceeds to the second step in the review process—the final approval hearing. NEWBERG, §11.25, at 3839.

A strong judicial policy exists that favors the voluntary conciliation and settlement of complex class action litigation. *In re Syncor,* 516 F.3d at 1101 (*citing Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615 (9th Cir. 1982)). While the district court has discretion regarding the approval of a proposed settlement, it should give "proper deference to the private consensual decision of the parties." *Hanlon*, 150 F.3d at 1027. In fact, when a settlement is negotiated at arm's length by experienced counsel, there is a presumption that it is fair and reasonable. *In re Pac. Enterprises Sec. Litig*., 47 F.3d 373, 378 (9th Cir. 1995). Ultimately, the court's role is to ensure that the settlement is fundamentally fair, reasonable, and adequate. Fed. R. Civ. P. 23(e)(2); *In re Syncor*, 516 F.3d at 1100. In essence, preliminary approval should be granted if the Court determines that both the substance of the Settlement and the procedure used to reached its terms are fair.

There can be little question that the process used to reach resolution in this case was void of collusion as the general terms of the settlement were reached during Court-supervised negotiations with Judge Adler. Moreover, the Parties agreed on the terms of the settlement through experienced counsel, who made sure they had ample information at their disposal during

the ENE conference and during subsequent negotiations necessary to reach a fair and reasonable agreement. Specifically, in advance of the Conference, Plaintiffs requested and Heartland provided discovery material related to information about the Settlement Class and documents regarding Heartland's financial condition, which helped facilitate a meaningful discussion between the Parties and informed the terms of the Settlement Agreement. (Ex. 1, Recital E.)

The substance of the Settlement's terms are also fair and reasonable. The Settlement fulfills the twin goals each of the Class Representatives had when bringing these suits: to stop Defendants from sending allegedly spam text messages and to provide statutory monetary compensation. Under the Settlement, both Defendants have consented to the entry of an injunction prohibiting the transmission of any text messages ads to consumers unless they have obtained the cell phone owner's express written permission through a clear and conspicuous disclosure to receive such ads. Further, each Defendant is required to keep documented proof of any such person's consent. (Ex. 1, § 2.1.) These injunctive provisions are designed to—and in practice should—prevent any reoccurrence of the violations alleged in this Action.

The Settlement also provides each class member with real, immediate compensation for the invasion of privacy allegedly caused by Defendants' transmission of the text messages at issue. When negotiating the terms of the individual relief with Judge Adler, Plaintiffs were facing a situation where TextMarks was financially unable to contribute to any meaningful settlement relief and Heartland's financial condition was such that the creation of a cash settlement fund sufficient to mail each person a check approaching the $500 statutory damage amount was impossible. Instead, the Parties took a novel approach to ensure that the Class, comprised of Jiffy Lube Customers, was compensated for their statutory injuries. Should the Court approve the Settlement, each member[7] of the Class will be mailed a Certificate along with the Notice advising them of their rights. Each Certificate can be taken into a Heartland Jiffy Lube—a place each of

[7] As noted below, the Settlement Administrator and Full Circle have valid U.S. Mailing addresses for over 83% of the Class members who were sent the text messages at issue. Any Class Member who does not receive a Certificate can obtain one from the Settlement Administrator with only minimal effort.

the Class members has patronized before—and it can be exchanged for a defined list of services free of charge. The total value of the Certificates being offered to the Class is $46,844,780. Alternatively, each Certificate can be used for approximately $17.29 off any good /service provided. Further, for anyone who does not want or need Jiffy Lube goods or services, the Certificate can be exchanged for approximately $12.97 in cash after its 18-month term of validity expires. The total cash value of all of the Certificates available to the Class is $35,133,585.

Although Plaintiffs and their counsel are confident in the strength of their claims and that they would ultimately prevail at trial, they also recognize that litigation is inherently risky, and that even if victorious, it is unlikely that Defendants would have been able to financially withstand the judgment. (Edelson Decl. ¶ 16.) Further, Defendants presented several factual and legal obstacles to proving Plaintiffs' claims, any of which, if successful, would have resulted in the Class obtaining no relief whatsoever. When the strengths of Plaintiffs' claims are weighed against the legal and factual obstacles combined with the complexity of class action practice against experienced defense counsel, it is apparent that the proposed settlement is clearly in the best interest of members of the proposed class, as it provides real individual recovery and immediate injunctive relief. (*Id.*)

VI. THE PROPOSED PLAN OF CLASS NOTICE

To satisfy the requirements of both Rule 23 and Due Process, Rule 23(c)(2)(B) provides that, "[f]or any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). Rule 23(e)(1) similarly says, "[t]he court must 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). Notice is "adequate if it may be understood by the average class member." NEWBERG, § 11:53 at 167. The substance of the notice to the settlement class must describe the nature of the action, the definition of the class to be certified, and the class claims and defenses at issue, and it must explain that settlement class members may enter an appearance through counsel if so desired, request to be excluded from the settlement class, and that the effect of a class

judgment shall be binding on all class members. *See* Fed. R. Civ. P. 23 (c)(2)(B).

In order to ensure that the Class is notified of their rights and delivered the Certificate, both a professional Settlement Administrator (Epiq Systems) and a highly-experienced direct-mail program administrator (Full Circle Solutions) have been retained by the Parties to ensure that the Settlement's Notice Plan satisfies the requirements of Rule 23 and Due Process. Heartland has assembled a list of all 2,342,239 cellular telephone numbers to which the Text Messages were sent and sought to obtain the full names and U.S. Mail addresses associated with the cellular telephone numbers from its records. Full Circle compiled a listed of addresses obtained from Class members at the point of sale at Heartland Jiffy Lubes, performed a reverse cell phone look-up comparing the addresses associated with the cellular phone numbers to several consumer databases, and updated each of these with the National Post Office Database to obtain the most current addresses for the Settlement Class List before notice is mailed to class members. (Ex. 1, § 2.4(a).) All told, Full Circle has obtained 1,961,655 valid mailing addresses for the Settlement Class members. Full Circle, under the supervision of the Settlement Administrator, will send these Notices within twenty-one days of Preliminary Approval, should it be granted by the Court. The Settlement Administrator will ensure that a toll-free telephone number is established that will allow Class Members to obtain information about the settlement and obtain a Certificate if they did not receive one.

Each of the summary notices that are mailed to the Class will reference the settlement website: www.HeartlandTextSettlement.com. This website will contain the traditional "long form" notice of the settlement and will provide electronic copies of the Settlement Agreement and other relevant documents. Additional summary notices will be posted in each of Heartland's 515 Jiffy Lube locations, referring consumers to the settlement website, which will also be linked to both Defendants' own webpages. Prior to the hearing on Preliminary Approval, the Settlement Administrator, Epiq Systems, and Full Circle Solutions shall submit supplemental declarations in support of the Notice and Administration program, providing their opinion on the anticipated reach of the Notice Plan and whether the Notice Plan satisfies Rule 23 and Due Process.

VII. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully asks that for the purposes of settlement only the Court certify the Settlement Class, appoint Plaintiffs Crowl, Cushnie, Duoung, Heuscher, Koeller, Souder, and Barr as class representatives, confirm the appointment of Class Counsel, grant preliminary approval of the proposed Settlement Agreement, approve the form and manner of notice described above, and grant such further relief the Court deems reasonable and just.

Dated: August 1, 2012

Respectfully Submitted,

Plaintiffs Crowl, Cushnie, Duoung, Heuscher, Koeller, Souder, and Barr, individually and on behalf of all others similarly situated,

/s/ Michael J. McMorrow

One of Plaintiffs' Attorneys

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CERTIFICATE OF SERVICE

The undersigned certifies that, on August 1, 2012, I caused this document to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of filing to counsel of record for each party.

Dated: August 1, 2012

SMITH & MCMORROW P.C.

By: /s/ Michael J. McMorrow