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15 **IN THE UNITED STATES DISTRICT COURT**  
16 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

17 SAMANTHA ELLISON, individually )  
and on behalf of a class of similarly )  
18 situated individuals, )

19 )  
20 Plaintiff, )

21 v. )

22 STEVEN MADDEN, LTD., a )  
23 Delaware corporation, )

24 Defendant, )  
25 )  
26 )

CV-11-05935 PSG-AGR

**PLAINTIFF'S NOTICE OF  
MOTION AND MOTION  
FOR PRELIMINARY  
APPROVAL OF CLASS  
ACTION SETTLEMENT  
AGREEMENT**

**Date: September 24, 2012**

**Time: 1:30 p.m.**

Hon. Phillip S. Gutierrez

1 **NOTICE OF MOTION**

2 NOTICE IS HEREBY GIVEN that Plaintiff will move the Court, pursuant  
3 to Federal Rule of Civil Procedure 23(e), to grant preliminary approval of the  
4 proposed class action settlement entered into by the Parties on September 24, 2012  
5 at 1:30 p.m., or at such other time as may be set by the Court, at 255 East Temple  
6 Street, Los Angeles, California, 90012, Courtroom 880, before the Honorable  
7 Phillip S. Gutierrez.

8 Plaintiff seeks preliminary approval of this class action settlement,  
9 certification of the proposed class, appointment of the Plaintiff as Class  
10 Representative, and appointment of her counsel as Class Counsel. The Motion is  
11 based on this Notice of Motion, the Brief in Support of the Motion attached hereto  
12 and the authorities cited therein, oral argument of counsel, and any other matter  
13 that may be submitted at the hearing.

14  
15 Dated: August 1, 2012

Respectfully Submitted,

16 SAMANTHA ELLISON, individually and  
17 on behalf of a class of similarly situated  
18 individuals,

19 /s/ Ari J. Scharg

20 One of Plaintiff's Attorneys

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1 **I. INTRODUCTION**

2        Though the advent of the cell phone and text messaging<sup>1</sup> has revolutionized  
3 the way people communicate with each other, it has also spawned a new  
4 nuisance—text message spam. The once-intrusive telemarketing calls to  
5 residential phones has expanded to the wireless world, allowing companies to not  
6 only reach people while at home, but also wherever they go. In the past year alone,  
7 the number of spam text messages has increased by 45%, totaling 4.5 billion in  
8 2011<sup>2</sup> and averaging over 12 million spam text messages per day. The proposed  
9 settlement involves allegations that Defendant Steven Madden, Ltd. (“Defendant”  
10 or “Madden”) sent text message advertisements to at least 203,254 cell phone  
11 owners (the “Class”) to promote Steve Madden products and events without first  
12 obtaining the “prior express consent” of the cellular phone owners. Plaintiff  
13 Samantha Ellison (“Plaintiff” or “Ellison”) filed suit against Madden (collectively,  
14 “the Parties”), alleging that Defendant’s actions violated the Telephone Consumer  
15 Protection Act (“TCPA”), 47 U.S.C. §227, *et seq.*, and seeking statutory injunctive  
16 relief and monetary damages. (*See* Docket Number [“Dkt.”] 1.)

17        Ellison initiated this action having herself allegedly received text message  
18 advertisements made for Madden. Though Defendant denies Plaintiff’s allegations,

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19  
20 <sup>1</sup> Text messages are made in two forms—SMS and MMS. SMS, or Short  
21 Message Service, text messages allow cellular phone users to send and receive  
22 messages generally comprised of up to 160 characters. MMS, or Multimedia  
23 Messaging Service, allows users to send multimedia messages, which typically are  
24 in the form of pictures and videos. A text message call, when directed to a cell  
25 phone through the use of the telephone number assigned to the device, causes the  
26 phone to ring or otherwise alert the called party that a text message has been  
27 received.

28 <sup>2</sup> Olga Kharif, *Mobile Spam Texts Hit 4.5 Billion Raising Consumer Ire*,  
BLOOMBERG NEWS, Apr. 29, 2012, <http://www.bloomberg.com/news/2012-04-30/mobile-spam-texts-hit-4-5-billion-raising-consumer-ire.html>.

1 the Parties agreed to mediate with the Honorable Edward A. Infante (ret.) in hopes  
2 of reaching a compromise and avoiding the cost associated with complex litigation.  
3 After a full day of arm's-length negotiations, the Parties arrived at the Settlement  
4 Agreement ("Agreement") now before this Court, a copy of which is attached  
5 hereto as Exhibit 1.

6 The settlement establishes a ten million dollar (\$10,000,000) settlement fund  
7 to pay for the valid claims submitted by Class members, as well as the costs of  
8 notice, administrative expenses, the incentive award, special master fees, and  
9 attorneys' fees. Each Class member who submits a valid claim form will receive  
10 up to a \$150 settlement payment. In addition to the monetary relief provided by  
11 the settlement, Defendant also agrees to refrain from sending such text message  
12 advertisements for four years, unless the cell phone owners have provided clear  
13 and conspicuous prior express consent. Further, Defendant must also document  
14 any prior express consent it received and retain proof of the consent for a period of  
15 four years. Thus, the proposed Agreement provides substantial monetary and  
16 prospective relief for the Class members, as it compensates them for Defendant's  
17 past alleged conduct and prevents Defendant from sending additional text message  
18 advertisements in the future without the recipients prior express consent.

19 In addition, the Settlement Agreement mirrors similar TCPA settlements that  
20 were finally approved in California, Florida, and Illinois, further implicating that  
21 the results achieved in this action are well beyond those required for preliminary  
22 approval. Accordingly, Plaintiff moves the Court to preliminarily approve the  
23 instant Settlement Agreement, certify the proposed Class, and appoint Myles  
24 McGuire, Jay Edelson, Ryan D. Andrews, and Ari J. Scharg of Edelson McGuire  
25 LLC as Class Counsel, and David C. Parisi and Suzanne Havens Beckman of  
26 Parisi & Havens LLP as local Class Counsel.

1 **II. NATURE OF THE LITIGATION**

2 Plaintiff instituted this action in the Central District of California on July 19,  
3 2011, after she and a proposed Class of cell phone owners received text message  
4 advertisements sent for Madden in alleged violation of the TCPA. (Dkt. 1.)  
5 Defendant answered the Complaint on September 15, 2011 denying Plaintiff’s  
6 allegations. (Dkt. 15.) The Parties then propounded substantial merit- and class  
7 certification-based discovery, including more than 300 gigabytes of electronically  
8 stored information produced by Defendant. Plaintiff also obtained additional  
9 discovery from numerous third parties.

10 In an effort to evade continued lengthy litigation, the Parties agreed to  
11 mediate the action in front of the Honorable Edward A. Infante (ret.). (Dkts. 9,  
12 10.) On May 8, 2012, proposed Class Counsel, Defendant’s Counsel, Defendant’s  
13 In-House Counsel, and Defendant’s Senior Vice President met at the JAMS offices  
14 in Santa Monica, California for a formal meeting with Judge Infante. (*See*  
15 *Agreement*, Recital D.) After several rounds of arm’s-length negotiations, the  
16 Parties were unable to reach an agreement. (*Id.*) Hoping to break the impasse,  
17 Judge Infante made a mediator’s proposal as to the principle terms of an  
18 agreement. (*Id.*) The Parties subsequently agreed to Judge Infante’s proposed  
19 principle terms. (*Id.*)

20 **III. TERMS OF THE SETTLEMENT**

21 The terms of the settlement are summarized briefly below. They can be  
22 found in their entirety in the Settlement Agreement (attached as Exhibit 1):

23 **A. Class Definition.** The Settlement Class is comprised of all cell phone  
24 owners who received text message advertisements for Madden from short codes  
25 91919 or 623336 between July 2010 and the date of Preliminary Approval. (*See*  
26 *Ex. 1, Settlement Agreement* [“Agreement”] ¶ 1.33.)

1           **B. Monetary Relief.** Defendant has agreed to provide up to a \$150 cash  
2 settlement payment to each Class member who submits a valid claim form from  
3 the ten million dollar (\$10,000,000) settlement fund. In the event that the total  
4 amount required to pay \$150 for each claim form would exceed the amount in the  
5 settlement fund after payment of the settlement administration expenses, the  
6 incentive award to the Class Representative, the special master fee, and the  
7 attorneys' fees, each Class member shall receive a *pro rata* share of the amount  
8 remaining in the settlement fund. (*See* Agreement ¶ 2.1.)

9           **C. Additional Relief.** In addition to the individual monetary relief  
10 provided to the Class, Defendant has also agreed to provide the following relief:

11           **1. Prospective Relief:** For a period of four years, Defendant  
12 agrees to not make, or cooperate with others through any contractual agreement to  
13 make any text calls to cellular phones unless each cellular phone owner has  
14 provided prior written express consent. Defendant also agrees to document and  
15 retain all written prior express consent for four years after its receipt. (*See*  
16 Agreement ¶ 2.2.)

17           **2. Class Member List Removal Requests:** The claim forms will  
18 provide Class members the opportunity to remove their cell phone numbers from  
19 any list that Defendant may use to send text message advertisements. (*See*  
20 Agreement ¶ 2.3.)

21           **3. Payment of Notice and Settlement Administrator Expenses:**  
22 Defendant also agrees to pay, from the settlement fund, the cost of sending and  
23 processing the notice set forth in the Agreement and any costs incurred in sending  
24 CAFA notices. (*See* Agreement ¶ 1.31.)

25           **4. Incentive Award for Class Representative:** In addition to any  
26 payment Ellison is entitled to receive for submitting a valid claim, Defendant  
27 agrees, subject to Court approval, to pay her an incentive award in recognition of

1 her efforts on behalf of the Settlement Class. Defendant agrees that an incentive  
2 award of \$10,000 is reasonable for her efforts and that it will not oppose any  
3 request limited to this amount. (See Agreement ¶¶ 1.35, 2.1, 8.3.)

4 **5. Payment of Attorneys' Fees and Expenses:** Under the  
5 Agreement, and subject to Court approval, Defendant agrees to pay Class Counsel  
6 two million five hundred thousand dollars (\$2,500,000) for fees and expenses in  
7 this action. Defendant agrees that this fee is reasonable and that it will not object  
8 to, or otherwise challenge, Class Counsel's application for this amount. (See  
9 Agreement ¶¶ 1.35, 2.1, 8.1.)

10 **D. Release of Liability.** In exchange for the relief described above,  
11 Defendant and other related entities will receive a full and final release of all  
12 claims related to text messages advertising Steve Madden brand products and  
13 events sent between July 2010 and the date of Preliminary Approval from the short  
14 codes 91919 and 623336. (See Agreement ¶¶ 1.26-1.28 and 3.1-3.2 for the  
15 complete release language.)

#### 16 **IV. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED**

17 In order to grant preliminary approval of a proposed settlement, the Court  
18 should determine that the proposed settlement class is appropriate for certification.  
19 MANUAL FOR COMPLEX LITIGATION § 21.632 (4th ed. 2004); *Amchem Prods. Inc.*  
20 *v. Windsor*, 521 U.S. 591, 620 (1997); *Staton v. Boeing*, 327 F.3d 938, 952 (9th  
21 Cir. 2003). Class certification is proper if the proposed class, the proposed class  
22 representative, and the proposed class counsel satisfy the numerosity,  
23 commonality, typicality, and adequacy of representation requirements of Rule  
24 23(a). Fed. R. Civ. P. 23(a)(1-4).

25 In addition to meeting the requirements of Rule 23(a), a plaintiff seeking  
26 class certification must also meet at least one of the three provisions of Rule 23(b).  
27 Fed. R. Civ. P. 23(b); *Blake v. Arnett*, 663 F.2d 906, 912 (9th Cir. 1981); *Acosta v.*

1 *Trans Union, LLC*, 243 F.R.D. 377, 384 (C.D. Cal. 2007). When a plaintiff seeks  
2 class certification under Rule 23(b)(3), which Ellison seeks in the instant action,  
3 the representative must demonstrate that common questions of law or fact  
4 predominate over individual issues and that a class action is superior to other  
5 methods of adjudicating the claims. Fed. R. Civ. P. 23(b)(3); *Amchem*, 521 U.S. at  
6 615-16; *Negrete v. Allianz Life Ins. Co. of N. Am.*, 238 F.R.D. 482, 489 (C.D. Cal.  
7 2006). Further, when determining whether a class should be certified, “the Court  
8 must accept the factual allegations in the complaint as true.” *Evans v.*  
9 *IAC/Interactive Corp.*, 244 F.R.D. 568, 574 (C.D. Cal. 2007). Because Plaintiff  
10 meets all of the Rule 23(a) and 23(b)(3) prerequisites, certification of the proposed  
11 Class is proper.

#### 12 **A. The Requirement of Numerosity is Satisfied**

13 The first prerequisite of class certification is numerosity, which requires “the  
14 class [be] so numerous that joinder of all members is impractical.” Fed. R. Civ. P.  
15 23(a)(1). The exact number of class members need not be known, so long as the  
16 class is readily ascertainable. *O’Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311,  
17 319 (C.D. Cal. 1998). In addition, there is no specific number of class members  
18 required, though the numerosity requirement is typically satisfied when the class  
19 comprises at least forty members. *In re Cooper Cos. Inc. Sec. Litig.*, 254 F.R.D.  
20 628, 634 (C.D. Cal. 2009). When focusing specifically on TCPA cases,  
21 numerosity has been satisfied with as few as 203 class members. *Lo v. Oxnard*  
22 *European Motors, LLC*, No. 11-cv-1009, 2011 WL 6300050, at \*2 (S.D. Cal. Dec.  
23 15, 2011); *see also Kavu, Inc. v. Omnipak Corp.*, 246 F.R.D. 642, 646-47 (W.D.  
24 Wash. 2007) (numerosity satisfied with 3000 class members). The proposed Class  
25 is comprised of approximately 203,254 consumers nationwide—about one  
26 thousand times the number of Class members found to satisfy numerosity in *Lo*.  
27 Accordingly, the proposed Class is so numerous that joinder of the claims is

1 impractical and the numerosity requirement is satisfied.

2 **B. The Requirement of Commonality is Satisfied**

3 The second requirement for certification mandates that “there are questions  
4 of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). Commonality is  
5 demonstrated when the claims of all class members “depend upon a common  
6 contention . . . that is capable of classwide resolution.” *Wal-Mart Stores, Inc. v.*  
7 *Dukes*, 131 S. Ct. 2541, 2551 (2011). This requires that the determination of the  
8 common question “will resolve an issue that is central to the validity of each one of  
9 the claims in one stroke.” *Id.* Commonality, however, is a permissive standard.  
10 *Wiener v. Dannon Co., Inc.*, 255 F.R.D. 658, 664 (C.D. Cal. 2009). Thus, “even a  
11 single common question will do.” *Dukes*, 131 S. Ct. at 2556.

12 In the instant case, all Class members share a common cause of action that  
13 stems from Defendant’s alleged activity—each Class member received a text  
14 message advertisement for Madden. In addition, Defendant’s transmission of these  
15 text message advertisements results in common questions of law and fact for the  
16 Class, such as (a) whether Defendant ever obtained prior express consent to send  
17 the text message advertisements and (b) whether the text messages were sent by an  
18 “automatic telephone dialing system” (“ATDS”). Determination of these issues,  
19 regardless of the answers, will resolve the allegations for the whole Class “in one  
20 stroke.” *Id.* at 2545. As such, the commonality requirement is satisfied.

21 **C. The Requirement of Typicality is Satisfied**

22 Rule 23 next requires that the class representative’s claims be typical of  
23 those of the class members. Fed. R. Civ. P. 23(a)(3). The typicality requirement  
24 ensures that “the interest of the named representative aligns with the interests of  
25 the class.” *Wolin v. Jaguar Land Rover N. Am. LLC*, 617 F.3d 1168, 1175 (9th  
26 Cir. 2010). When analyzing typicality, courts look to whether the defendant acted  
27 uniformly to the class members, whether that uniform conduct resulted in injury to

1 the class members, and whether the named plaintiff suffered a similar injury to the  
2 class members. *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)  
3 (quoting *Schwartz v. Harp*, 108 F.R.D. 279, 282 (C.D. Cal. 1985)). Typicality is  
4 also satisfied if the named plaintiff shares the same legal theories as those of the  
5 class. *Westways World Travel, Inc. v. AMR Corp.*, 218 F.R.D. 223, 235 (C.D. Cal.  
6 2003).

7 Defendant’s alleged common course of transmitting text message  
8 advertisements without first obtaining the prior express consent of the recipients  
9 resulted in uniform injuries to the Class members. Thus, because Ellison received  
10 text messages from both short codes at issue, her injury is similar, if not identical,  
11 to the injuries of all Class members. In addition, Ellison’s claim is based on the  
12 same legal theories as the Class since Defendant’s conduct provides each of them  
13 with the same cause of action. Because Ellison and the proposed Class members  
14 were all allegedly sent text message advertisements in violation of the TCPA, her  
15 interests “align[] with the interests of the class,” and the typicality requirement is  
16 satisfied. *Wolin*, 617 F.3d at 1175.

17 **D. The Requirement of Adequate Representation is Satisfied**

18 The final Rule 23(a) prerequisite requires that the proposed class  
19 representative has and will continue to “fairly and adequately protect the interests  
20 of the class.” Fed. R. Civ. P. 23(a)(4). A court requires adequate representation to  
21 satisfy due process, because absent class members will be bound by the court’s  
22 judgment. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998) (citing  
23 *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940)). Thus, to determine if representation  
24 is in fact adequate, the Court must ask whether the named plaintiff’s or her  
25 counsel’s interests conflict with the interests of the class and whether class counsel  
26 can vigorously litigate on the class’ behalf. *Hanlon*, 150 F.3d at 1020. In other  
27 words, the class representative and class counsel must have the “zeal and



1 competence” required to protect the absent class members. *Evans*, 244 F.R.D. at  
2 577 (quoting *Fendler v. Westgate-Cal. Corp.*, 527 F.2d 1168, 1170 (9th Cir.  
3 1975)).

4 Plaintiff Ellison’s interests are entirely representative of and consistent with  
5 the interests of the proposed Class. She, like all absent Class members, received  
6 text message advertisements that were sent for Madden. Further, her participation  
7 throughout the litigation demonstrates that she has and will continue to protect the  
8 interests of the absent Class members. (The Declaration of Jay Edelson [“Edelson  
9 Decl.”] is attached hereto as Exhibit 2, ¶ 7.)

10 Likewise, proposed Class Counsel will also adequately represent the Class,  
11 as they regularly engage in major complex litigation. Not only do they have  
12 extensive experience in litigating consumer class action lawsuits in general, but  
13 they have also successfully litigated multiple class actions concerning text message  
14 violations of the TCPA. (Edelson Decl. ¶ 4; *see also Lozano v. Twentieth Century*  
15 *Fox Film Corp.*, No. 09-cv-6344 (N.D. Ill. 2011); *Weinstein, et al. v. The*  
16 *Timberland Co.*, No. 06-cv-0454 (N.D. Ill.); *Satterfield v. Simon & Schuster*, No.  
17 06-cv-2893 CW (N.D. Cal. 2010); *Espinal v. Burger King Corp. et al.*, No. 09-  
18 20982 (S.D. Fla. 2010). Thus, Ellison’s interests and active involvement as well as  
19 proposed Class Counsel’s extensive experience establish that they both have the  
20 requisite “zeal and competence” to adequately represent the Class. *Evans*, 244  
21 F.R.D. at 577 (citing *Fendler*, 527 F.2d at 1170).

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

24 Once the prerequisites of Rule 23(a) have been met, a plaintiff must also  
25 demonstrate that she satisfies the requirements of Rule 23(b). *Zinser v. Accufix*  
26 *Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). To certify a class under  
27 Rule 23(b)(3), the plaintiff must show that (1) the common questions of law and

1 fact predominate over any questions affecting only individuals and (2) the class  
2 action mechanism is superior to other available methods for adjudicating the  
3 controversy. Fed. R. Civ. P. 23(b)(3); *In re Wells Fargo Home Mortg. Overtime*  
4 *Pay Litig.*, 571 F.3d 953, 957 (9th Cir. 2007). Certification under Rule 23(b)(3) is  
5 encouraged “whenever the actual interests of the parties can be served best by  
6 settling their differences in a single action.” *Hanlon*, 150 F.3d at 1022.

### 7 **1. Common Questions of Law and Fact Predominate**

8 The focus of the predominance requirement is whether the proposed class is  
9 “sufficiently cohesive to warrant adjudication by representation.” *Amchem*, 521  
10 U.S. at 623. Predominance exists “[w]hen common questions present a significant  
11 aspect of the case and they can be resolved for all members of the class in a single  
12 adjudication.” *Hanlon*, 150 F.3d at 1022. In other words, if individual  
13 adjudication is required to determine each class member’s claim or defense, then  
14 common issues do not predominate and certification under Rule 23(b)(3) is  
15 inappropriate. *Pryor v. Aerotek Scientific, LLC*, 278 F.R.D. 516, 531 (C.D. Cal.  
16 2011). Further, common questions predominate when the class members’ claims  
17 arise under the TCPA, including when the claims focus on a defendant’s  
18 advertising practices. *See CE Design v. Beaty Constr. Inc.*, No. 07-c-3340, 2009  
19 WL 192481, at \*8-9 (N.D. Ill. Jan. 26, 2009).

20 The overarching questions in this case, specifically whether the recipients of  
21 the text message advertisements provided prior express consent and whether the  
22 system used to transmit these messages was an ATDS, are common to all Class  
23 members. Thus, a single adjudication can resolve these common questions for the  
24 entire Class and common questions predominate over individual issues.

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

26 The purpose of the superiority requirement is one of judicial economy and  
27 assurance that a class action is the “most efficient and effective means of resolving

1 the controversy.” *Wolin*, 617 F.3d at 1175-76. A class action is superior when it  
2 will reduce the costs inherent in litigation and “no realistic alternative exists” for  
3 the class members. *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234-35 (9th  
4 Cir. 1996). However, when parties have already reached a compromise, courts do  
5 not need to look at issues that could surface at trial, as an approved settlement  
6 would extinguish the need for one. *Amchem*, 521 U.S. at 620.

7 Because of the prohibitive cost of litigation, many members of the Class  
8 would be unable to obtain relief absent class-wide adjudication. In addition, there  
9 is no question that the adjudication of the Class members’ claims will be less  
10 expensive when addressed as a class action as opposed to numerous successive  
11 suits. Cost aside, it would be entirely inefficient for courts across the nation to  
12 individually assess facts and provide judgments for 203,254 individual cases when  
13 all claims could simply be decided in a single action. Accordingly, this action  
14 satisfies Rule 23(b)(3) as common issues predominate and a class action is the  
15 superior method for adjudicating the claims.

16 **V. THE COURT SHOULD APPOINT PLAINTIFF’S COUNSEL AS**  
17 **CLASS COUNSEL**

18 After certifying a class, Rule 23 requires a court to appoint class counsel that  
19 will fairly and adequately represent the class members. Fed. R. Civ. P.  
20 23(g)(1)(B). In making this determination, the Court must consider, *inter alia*,  
21 counsel’s (i) work in identifying or investigating potential claims, (ii) experience in  
22 handling class actions or other complex litigation and the types of claims asserted  
23 in the case, (iii) knowledge of the applicable law, and (iv) resources committed to  
24 representing the class. Fed. R. Civ. P. 23(g)(1)(A)(i-iv).

25 As discussed previously, proposed Class Counsel have extensive experience  
26 in litigating class actions of similar size, scope, and substance. (Edelson Decl. ¶ 4.)  
27 Specifically, they have been instrumental in revolutionizing society’s expectations

1 regarding text message spam, as they have successfully advocated on behalf of  
2 numerous classes regarding text message violations of the TCPA. *See supra* p. 9.  
3 In addition, proposed Class Counsel have already invested a year’s time to  
4 investigating the claims, completing discovery, and advocating for the Class. As a  
5 result of their efforts, proposed Class Counsel have successfully compromised with  
6 Defendant to reach a settlement that not only provides considerable monetary relief  
7 to each of the Class members, but also provides prospective relief to prevent the  
8 Class members, and society at large, from suffering such harm in the future. Thus,  
9 this Court should appoint Jay Edelson, Myles McGuire, Ryan D. Andrews, and Ari  
10 J. Scharg of Edelson McGuire LLC as Class Counsel, and David C. Parisi and  
11 Suzanne Havens Beckman of Parisi & Havens LLP as local Class Counsel.

12 **VI. THE PROPOSED SETTLEMENT IS FUNDAMENTALLY FAIR,**  
13 **REASONABLE, AND ADEQUATE, AND THUS WARRANTS**  
14 **PRELIMINARY APPROVAL**

15 Following certification of the Class, the Court should also grant preliminary  
16 approval of the proposed Settlement Agreement. A court’s ultimate approval of a  
17 class action settlement involves a two-step process that is used to determine  
18 whether a proposed settlement is fair, reasonable, and adequate. Fed. R. Civ. P.  
19 23(e)(2); *Nat’l Rural Telecomms Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525  
20 (C.D. Cal. 2007). The first step is a preliminary, pre-notification hearing to  
21 determine whether the proposed settlement is “within the range of possible  
22 approval.” CONTE & NEWBERG, 4 NEWBERG ON CLASS ACTIONS, §11.25, at 3839  
23 (4th ed. 2002) (*quoting* MANUAL FOR COMPLEX LITIGATION §30.41 (3d ed. 1995));  
24 *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1063 (C.D. Cal. 2010). This  
25 initial hearing is not a fairness hearing. *True*, 749 F. Supp. 2d at 1063. In fact, at  
26 this stage, the court does not even need to closely examine the settlement because  
27 the grant of preliminary approval will provide notice to the class and offer the class

1 members the opportunity to respond later in the settlement process. *In re M.L.*  
2 *Stern Overtime Litig.*, No. 07-cv-0118, 2009 WL 995864, at \*3 (S.D. Cal. Apr. 13,  
3 2009). If the court grants preliminary approval of the settlement, it can then  
4 proceed to the second step of the approval process—the final fairness hearing—at  
5 which the court looks at the settlement in closer detail and considers any objections  
6 made by the class members. *True*, 749 F. Supp. 2d at 1062-63.

7 Judicial policy favors the voluntary resolution of complex class action  
8 litigation. *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008) (citing  
9 *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615 (9th Cir. 1982)). Thus,  
10 though the district court has discretion regarding the approval of a proposed  
11 settlement, the court itself should give its own deference to the compromise made  
12 between the parties. *Hanlon*, 150 F.3d at 1027. In fact, when experienced parties  
13 reach a settlement after engaging in arm’s-length negotiations and discovery, there  
14 is a presumption that the settlement is fair. *In re Heritage Bond Litig.*, No. 02-ml-  
15 1475 DT, 2005 WL 1594403, at \*2 (C.D. Cal. June 10, 2005). In addition, a  
16 settlement negotiated with the assistance of an experienced private mediator is  
17 further proof that that the settlement was reached fairly and provides adequate  
18 relief to the class. *In re Indep. Energy Holdings PLC*, 00-cv-6689, 2003 WL  
19 22244676, at \*4 (S.D.N.Y. Sept. 29, 2003); *see also In re Bluetooth Headset*  
20 *Prods. Liab. Litig.*, 654 F.3d 935, 948 (9th Cir. 2011) (recognizing that use of a  
21 mediator is “a factor weighing in favor of a finding of non-collusiveness”).

22 There is little question that the proposed settlement is at least “within the  
23 range of possible approval.” *True*, 749 F. Supp. 2d at 1063. The Parties reached  
24 the Agreement only after engaging in several rounds of arm’s-length negotiations  
25 and receiving a mediator’s proposal from Judge Infante. In addition, the fairness,  
26 reasonableness, and adequacy of the proposed settlement are apparent from the  
27 relief the proposed Agreement provides the Class members. As noted above, each

1 member of the proposed Class may file a claim and receive up to \$150 in cash,  
2 payable from the \$10,000,000 settlement fund established by Defendant. (Edelson  
3 Decl., ¶ 6; Agreement, ¶ 2.1.) In addition to this monetary relief, Defendant also  
4 agreed to refrain from sending text message advertisements to cell phone numbers  
5 without obtaining written prior express consent from the owners. (See Agreement,  
6 ¶ 2.2.) Further, Defendant has agreed to allow Class members to remove their  
7 phone numbers from Madden’s lists to prevent their future receipt of text message  
8 advertisements. (See Agreement, ¶ 2.3.)

9        Though Plaintiff and her counsel are confident in their ability to succeed  
10 should the case proceed to trial, they still recognize the inherent risks associated  
11 with prolonged litigation. (Edelson Decl., ¶ 5.) In balancing the legal and factual  
12 obstacles and complexity of class action practice against the experience of defense  
13 counsel, there is no question that the proposed settlement is clearly in the best  
14 interest of the proposed Class members, as it provides them substantial prospective  
15 and monetary relief. (Edelson Decl., ¶ 6.)

16        Finally, the Court need not rule on a blank slate regarding the fairness,  
17 reasonableness, and adequacy of the proposed Settlement Agreement, as similar  
18 settlements have received final approval by federal courts nationwide. *See*  
19 *Satterfield v. Simon & Schuster, Inc. et al.*, No. 06-cv-02893 CW (N.D. Cal. 2010);  
20 *Bellows v. NCO Fin. Sys., Inc.*, 3:07-cv-01413-W-AJB, 2008 WL 5458986 (S.D.  
21 Cal. Dec. 10, 2008); *Lozano v. Twentieth Century Fox Film Corp.*, No. 09-cv-6344  
22 (N.D. Ill. 2011). As with these similar cases, this settlement easily falls well  
23 “within the range of possible approval,” and is fair, reasonable, and adequate. As a  
24 result, the proposed settlement should be preliminarily approved.

## 25 **VII. THE PROPOSED PLAN OF CLASS NOTICE**

26        To satisfy the requirements of both Rule 23 and Due Process, Rule  
27 23(c)(2)(B) provides that, “[f]or any class certified under Rule 23(b)(3), the court

1 must direct to class members the best notice that is practicable under the  
2 circumstances, including individual notice to all members who can be identified  
3 through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B); *Eisen v. Carlisle &*  
4 *Jacquelin*, 417 U.S. 156, 173 (1974). Rule 23(e)(1) similarly requires that the  
5 notice be reasonably disseminated to those who would be bound by the court’s  
6 judgment. Fed. R. Civ. P. 23(e)(1). Further, notice is proper as long as the average  
7 class member would be able to understand it. NEWBERG, § 11:53 at 167. The  
8 substance of the notice must describe the nature of the action, the definition of the  
9 class to be certified, and the class claims and defenses at issue. *See* Fed. R. Civ. P.  
10 23(c)(2)(B). It must further explain that settlement class members may enter an  
11 appearance through counsel or request to be excluded from the settlement class so  
12 as not to be bound by the otherwise binding judgment. *Id.*

13 The Parties have agreed upon a multi-part notice plan that easily satisfies the  
14 notice requirements of both Rule 23 and Due Process. (See Agreement, § 4.) The  
15 Parties have obtained a list of 203,254 phone numbers to which Defendant’s text  
16 message advertisements were transmitted. The settlement administrator will use  
17 these phone numbers to look up any associated mailing addresses and email  
18 addresses to which it can provide notice via First Class U.S. mail and email.<sup>4</sup>  
19 (Agreement, ¶ 4.2(c).) The settlement administrator will also purchase half-page  
20 advertisements in *Cosmopolitan* and *People* and use targeted internet advertising.  
21 (Agreement, ¶ 4.2(d), (f).) In addition, the settlement administrator will create a  
22 website, [www.MaddenTextSettlement.net](http://www.MaddenTextSettlement.net), to serve as the “long-form” notice.  
23 (Agreement, ¶ 4.2(e).) This website will provide access to important court  
24 documents and allow Class members to submit their claim forms electronically.

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25  
26 <sup>4</sup> Within a substantial time prior to the hearing on this motion, the settlement  
27 administrator will submit an expert declaration to further establish that the Notice  
28 Plan satisfies the requirements of Rule 23 and Due Process.

1 (*Id.*) The proposed notices and claim form are attached to the Agreement as  
2 Exhibits A – D. In sum, the Court should find that the proposed methods for  
3 providing notice to the Class—including direct mail, internet advertisements, print  
4 advertisements, and a settlement website—comport with both Rule 23 and Due  
5 Process considerations.

6 **VIII. CONCLUSION**

7 For the foregoing reasons, Plaintiff respectfully asks that the Court (i) certify  
8 the Class, (ii) appoint Samantha Ellison as the Class Representative, (iii) appoint  
9 Ellison’s counsel as Class Counsel, (iv) grant preliminary approval of the proposed  
10 Settlement Agreement, (v) approve the form and manner of notice described  
11 above, and (vi) grant such further relief the Court deems reasonable and just. For  
12 convenience, proposed dates and deadlines leading to a final approval hearing are  
13 provided in the proposed order separately submitted to the Court.

14  
15 Dated: August 1, 2012

Respectfully Submitted,

16 SAMANTHA ELLISON, individually and  
17 on behalf of a class of similarly situated  
18 individuals,

19 /s/ Ari J. Scharg

20 One of Plaintiff’s Attorneys

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1 **CERTIFICATE OF SERVICE**

2 **I HEREBY CERTIFY** that I caused to be served the above and foregoing  
3 ***Plaintiff's Notice of Motion and Motion for Preliminary Approval of class***  
4 ***Action Settlement Agreement*** to all counsel of record via email and the court's  
5 CM/ECF system on this, the 1st day of August, 2012.

6  
7 /s/ Ari J. Scharg  
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