UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EDWARD ZYBURO, on behalf of himself and all others similarly situated, Plaintiff, v. NCSPLUS INC., Defendant.	)	CASE NO: 12-cv-06677 (JSR)

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Plaintiff Edward Zyburo ("**Plaintiff**" or **"Class Representative"**) respectfully submits this Memorandum of Law in support of his Unopposed Motion for Preliminary Approval of Class Action Settlement, wherein he seeks entry of an order: (i) granting preliminary approval of the proposed settlement ("**Settlement**") set forth in the Stipulation and Agreement of Settlement dated March 4, 2015 ("**Stipulation**"); (ii) approving the form and manner of giving notice of the Settlement to the certified Class; and (iii) setting a hearing date for the final approval of the Settlement and its terms, including the proposed Plan of Distribution, a motion seeking a service award to the Class Representative, and Class Counsel's motion for attorney's fees, costs and expenses ("**Final Settlement Approval Hearing**").[1]

[1] Unless noted otherwise, all capitalized terms are defined in the Stipulation, which is attached hereto as Exhibit A.

I. INTRODUCTION

The proposed Settlement submitted to the Court for preliminary approval provides for the payment of one million, eight-hundred thousand dollars ($1,800,000.00) in cash ("**Settlement Fund**") for the benefit of Plaintiff and the Class. As discussed in detail below, Plaintiff and his counsel, Morgan & Morgan Complex Litigation Group ("**Class Counsel**"), submit that the proposed Settlement is in the best interest of the Class and represents a significant recovery, particularly in light of the risks of litigation and Defendant's lack of available assets to satisfy the claims of Plaintiff and Class Members beyond its professional liability insurance policy, which is a wasting policy issued by Continental Casualty Company in the amount of $2,000,000.00.[2] Accordingly, Plaintiff respectfully moves for preliminary approval of the Stipulation and Agreement of Settlement, and submits this Memorandum of Law in support thereof.

Plaintiff, along with Defendant, NCSPlus Inc. ("**Defendant**"), and Defendant's insurer, Continental Casualty Company ("**Continental**"), (collectively, the "**Settling Parties**"), believe that the proposed Settlement is fair, reasonable and adequate and should be preliminarily approved. The Settlement was achieved only after: (i) extensive litigation; (ii) comprehensive discovery; and (iii) mediation. The Settlement is an excellent result for Plaintiff and the Class, particularly given Defendant's lack of available assets to satisfy the claims of Plaintiff and the Class beyond its insurance coverage, the attendant risks and uncertainty of litigation in complex cases such as this Action, and the difficulties and delays inherent in such litigation if Defendant were to seek appellate review of the Court's Final Judgment, in the event that Plaintiff and the Class were successful at trial. The Settlement provides an immediate and significant recovery

[2] The term "wasting" refers to provisions within general liability policies which cause the overall limits of coverage to be reduced by the incurred defense costs. Here, the more that this case is litigated, including at trial and any subsequent appeals, the sum available under the Continental policy will be reduced to pay the fees, costs and expenses of Defendant's counsel.

for the Class in the form of a Settlement Fund in the amount of $1,800,000.00, which will be funded entirely from the Continental policy. This amount represents almost all of the remaining coverage under Defendant's wasting policy. This "all in" amount was accepted subject to Plaintiff's confirmation that Defendant has no meaningful assets that could be liquidated to satisfy any sum recovered at trial, and that a bad faith claim does not exist in connection with Continental's handling of a claim for coverage under Defendant's policy. The Settlement will result in the dismissal of Plaintiff's class action complaint with prejudice, and the release of all related claims against Defendant in the Action.

As outlined herein, Class Counsel has conducted an extensive investigation of the claims and the underlying events alleged in the Complaint, engaged in aggressive and probing discovery, consulted with an expert, and researched the applicable law with respect to the claims of Plaintiff and the Class against Defendant, and the potential defenses thereto. Based on this factual and legal investigation, Plaintiff and Class Counsel have concluded that the terms and conditions of the Settlement are fair, reasonable and adequate to Class Members, and they respectfully request that the Court preliminarily approve the Settlement.

II. FACTUAL BACKGROUND

A. Nature of the Claims and Procedural History

On August 31, 2012, Plaintiff filed this class action lawsuit in the United States District Court for the Southern District of New York ("**Court**"). The Complaint alleged violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq*. ("**TCPA**"), and sought certification of the proposed class, statutory damages, injunctive relief, and an award of attorney's fees and costs on behalf of Plaintiff and the proposed class. (Doc. 1). Defendant answered the Complaint on September 15, 2012. (Doc. 6). On March 5, 2013, Plaintiff filed his

Motion for Class Certification and supporting documents. (Docs. 19, 20, 22 and 23). Defendant opposed the Motion, and Plaintiff replied in support of his Motion. (Docs. 24 and 27).

Plaintiff proceeded to serve written discovery requests. In its responses, Defendant repeatedly represented that it had no insurance and, therefore, would be unable to cover any class-wide damages. Relying on this representation, Plaintiff petitioned the Court to withdraw his pending Motion for Class Certification and to drop the class claims pled in his original Complaint. (Doc. 29). On April 5, 2013, the Court held a conference on this issue, accepted Plaintiff's petition in full, and instructed the Clerk to close Plaintiff's pending Motion for Class Certification. *Id*. On April 22, 2013, Plaintiff filed his Amended Complaint, alleging individual claims for negligent violations of the TCPA (Count I), knowing and/or willful violations of the TCPA (Count II), and violations of the Fair Debt Collection Practices Act (Count III). (Doc. 28).

On July 17, 2013, Plaintiff took the Rule 30(b)(6) deposition of Christopher Rekhow, a co-owner of Defendant. During the deposition, Rekhow divulged that, contrary to prior representations, Defendant did have insurance. (Doc. 65, Ex. A). A copy of the insurance policy, issued by Continental Casualty Company on November 15, 2011 and providing miscellaneous professional liability coverage in the amount of $2,000,000, was subsequently provided to Plaintiff's counsel. (Doc. 65, Ex. B). On July 23, 2013, the parties contacted the Court regarding Defendant's belated and contradictory revelation of insurance coverage. The Court held an evidentiary hearing on this matter, which began on October 3, 2013, and continued on October 18, 2013. (Doc. 45). At the hearing, Christopher Rekhow and Lynn Goldberg – co-owners of Defendant – admitted that they had jointly concealed the existence of the insurance policy from their counsel. (Docs. 45 and 46). As a direct result of this concealment, Defendant's discovery responses failed to disclose that Defendant had an insurance policy. *Id*.

On October 23, 2013, the Court reinstated the original class action Complaint and Motion for Class Certification, and permitted Plaintiff to submit an application for reimbursement of fees and costs arising from Defendant's misconduct. (Doc. 45).

On November 5, 2013, Plaintiff applied to the Court for fees and costs incurred as a result of Defendant's misconduct, and on May 1, 2014, the Court ordered Defendant to pay the sum of $30,513.63 to Class Counsel by May 16, 2014. (Docs. 50 and 54). "[R]ather than considering itself fortunate to have escaped punitive sanctions," Defendant filed a motion for reconsideration. (Doc. 57). Defendant's motion was devoid of citations to any intervening change of controlling law or new or overlooked factual matters. *Id*. Accordingly, the Court denied the motion and ordered Defendant to pay the sum of $30,513.63 to Class Counsel by June 30, 2014. *Id*.

On August 1, 2014, Plaintiff filed his Notice of Amended Motion for Class Certification, and on September 16, 2014, the Court granted Plaintiff's Amended Motion for Class Certification and certified a class consisting of "all persons within the United States whose cellular telephones were called by NCSPlus Inc. using an automatic telephone dialing system with the capacity to store or produce telephone numbers, including, but not limited to, an automated dialing machine, auto-dialer or predictive dialer and/or utilizing an artificial or prerecorded voice, without such persons' prior express consent, between August 31, 2008 and August 31, 2012." (Docs. 64 and 77).

Prior to the scheduled trial of this Action, the Settling Parties met before a mediator, the Honorable Garrett Brown, Jr. (retired), a former United States District Judge in the District of New Jersey, to explore the potential resolution of the claims on a class-wide basis. Soon afterwards, Defendant agreed to explore resolution. These discussions were prompted by the Settling Parties' desire to avoid the burden, expense and uncertainties inherent to protracted

litigation, and to put to rest any and all claims or causes of actions that have been, or could have been, asserted against Defendant arising out of the claims contained in the complaint. To facilitate settlement negotiations, the Settling Parties agreed to the appointment of Judge Brown as a mediator. Judge Brown is well known as a highly skilled and experienced mediator who has mediated many complex cases and class actions. The Settling Parties conducted a mediation session on February 10, 2015 in New York. During this session, the Settling Parties set forth and discussed their respective positions on the merits of the Class claims and the potential for a settlement that would involve class-wide relief. A significant portion of the session was spent discussing Defendant's lack of available assets to satisfy the claims of Plaintiff and the Class in the event that Plaintiff was successful at trial, the presence or lack of a bad faith claim against Continental, and the remaining coverage available under the wasting policy issued by Continental in the amount of $2,000,000.00. The Settling Parties exchanged offers and counter-offers and negotiated the points of each vigorously. Ultimately, the Settling Parties were unable to agree to a settlement during the in-person mediation session.

Following this failed attempt at mediation, Judge Brown continued to keep the Settling Parties engaged in settlement discussions, and he organized and facilitated additional mediation sessions by telephone. Ultimately, the Settling Parties were able to reach a settlement whereby a Settlement Fund in the amount of $1,800,000.00 will be funded entirely from the Continental policy. This amount represents almost all of the remaining coverage under Defendant's wasting policy. This "all in" amount was accepted subject to Plaintiff's confirmation that Defendant has no meaningful assets which could be liquidated to satisfy any sum recovered at trial, and that a bad faith claim does not exist in connection with Continental's handling of a claim for coverage under Defendant's policy.

B. Summary of the Proposed Settlement

The Settlement will be funded by a $1,800,000.00 cash payment made by Continental out of the remaining amount of Defendant's liability policy, which was issued in the amount of $2,000,000.00. These funds shall constitute the Settlement Fund. These monies will be transferred by Continental to the Escrow Agent within fifteen (15) calendar days of the later of: (i) the date that the Court enters an order preliminarily approving the Settlement; or (ii) the date that Defendant receives instructions from Class Counsel referencing a taxpayer identification number for the Settlement Fund. As discussed below, notice will, among other things, provide Class Members with an opportunity to object to the Settlement.

The detailed terms of the Settlement are set forth in the Stipulation. The $1,800,000.00 in cash, less any service award given to Plaintiff, any attorney's fees, costs and expenses awarded to Class Counsel, and the fees and costs associated with the administration and notice of the Settlement ("**Net Settlement Fund**"), will be distributed to Class Members in accordance with the Plan of Distribution, which is described in the Stipulation, Notice of Proposed Settlement of Class Action ("**Notice**"), and on the case website located at www.NCSPlusLitigation.com (or some other website established and maintained by the Settlement Administrator) which is attached to the Stipulation as Exhibit A-3.

The Plan of Distribution calls for checks to be issued by the Settlement Administrator to all Class Members in equal *pro rata* amounts of the Net Settlement Fund, which ensures that all Class Members are treated in a fair and equitable fashion.

As set forth below, the Settlement meets the standards for preliminary approval, as it falls well within the range of possible approval, was the product of hard-fought litigation and arm's length settlement negotiations between experienced counsel, with the assistance of a well-

established mediator, and contains no facial deficiencies. The proposed form of the Notice advises Class Members of the key elements of the Settlement, and the proposed notice program is the best practicable under the circumstances and should be approved.

III. ARGUMENT

A. The Settlement Merits Preliminary Approval

As discussed herein, the proposed Settlement is an outstanding result for Plaintiff and the Class. The Settlement provides a substantial recovery in a case where Plaintiff faced significant hurdles in connection with the recovery of any judgment from Defendant, who has no significant assets, and is certainly within the range of what would be determined to be fair, reasonable, and adequate. Accordingly, Plaintiff respectfully submits that an analysis of the *Grinnell* factors (*City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974)) set forth below, which apply to a court's determination of final approval of a settlement, also supports preliminary approval of this Settlement. *See In re Warner Chilcott Ltd. Sec. Litig.*, No. 06 Civ. 11515, 2008 WL 5110904, at *2 (S.D.N.Y. Nov. 20, 2008) ("Although a complete analysis of [the *Grinnell*] factors is required for final approval, at the preliminary stage, 'the Court need only find that the proposed settlement fits "within the range of possible approval" to proceed.'").[3]

1. The Standards to be Applied in Granting Preliminary Approval of the Settlement

Federal Rule of Civil Procedure 23(e) requires that any compromise of claims brought on a class basis be subject to judicial review and approval. The issue of whether a proposed settlement should be approved is within the sound discretion of the district court, which should be exercised in the context of public policy strongly favoring the pretrial settlement of class action lawsuits. 2 Herbert B. Newberg, Alba Conte, NEWBERG ON CLASS ACTIONS §11.41 (3d ed. 1992). Where the proposed settlement appears to be the product of serious, informed, non-

[3] Internal citations have been omitted unless otherwise noted.

collusive negotiations, has no obvious deficiencies, and falls within the range of approval, preliminary approval is generally granted. *See Menkes v. Stolt-Nielsen S.A.*, 270 F.R.D. 80, 101 (D. Conn. 2010); *In re Currency Conversion Fee Antitrust Litig.*, No. 01 MDL 1409, 2006 WL 3247396, at *4-*5 (S.D.N.Y. Nov. 8, 2006). Recognizing that a settlement represents an exercise of judgment by the negotiating parties, the Second Circuit has noted a strong initial presumption of fairness that attaches to proposed settlements that, as here, are reached by experienced counsel after arm's-length negotiations with the assistance of a mediator. *See In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 57, 66 (S.D.N.Y. 1993); *Chatelain v Prudential-Bache Sec., Inc.*, 805 F. Supp. 209, 212 (S.D.N.Y. 1992). The general standard by which courts are guided when deciding whether to grant preliminary approval of a class action settlement is whether the proposed settlement falls within the range of what could be found "fair, reasonable and adequate," so that notice may be given to the certified class and a hearing for final approval of the settlement can be scheduled. *In re Currency Conversion Fee Antitrust Litigation*, No. 04-cv-5723 (WHP), 2006 WL 3247396, at *5 (S.D.N.Y., Nov. 8, 2006). As demonstrated below, the Settlement satisfies the criteria for preliminary approval.

2. Preliminary Approval of the Settlement Should Be Granted

The Second Circuit has identified nine (9) factors that courts should consider in deciding whether to grant final approval of a class action settlement, including: the complexity, expense, and likely duration of the litigation; the reaction of the class; the stage of the proceedings; the risks of establishing liability and establishing damages; the risks of maintaining the class action through trial; the ability of defendant to withstand a greater judgment; the range of reasonableness of the settlement fund in light of the best possible recovery; and the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of

litigation. *Grinnell*, 495 F.2d at 463. As discussed in detail below, each of the applicable *Grinnell* factors also supports preliminary approval of the Settlement.

a. The Complexity, Expense and Likely Duration of the Litigation Support Approval of the Settlement

Courts have consistently recognized the complexity, expense, and likely duration of litigation as critical factors in evaluating the reasonableness of a class action settlement. *See, e.g.*, *Charron v. Weiner,* 731 F.3d 241, 247 (2d DCA 2013); *see also Meredith Corp. v. SESAC, LLC*, No. 09 Civ. 9177 (PAE), 2015 WL 728026, at *9 (S.D.N.Y., Feb. 19, 2015) (finding strong basis for approving settlement where prosecuting case for five years "has already imposed significant monetary costs on plaintiffs" which "would have continued to mount had the case proceeded to trial … and, potentially, appeal.").

A significant amount has already been spent in connection with the litigation of this Action, including discovery, expert testimony and class notice. The Settling Parties' opposing positions regarding the merits on the eve of trial ensure that a trial of this matter would only add to the cost and duration of the litigation, and post-trial proceedings in the Court, as well as appeal proceedings, would be a near certainty in the absence of settlement. All of which would result in additional wasting of Defendant's insurance policy – the only viable source of coverage for the claims of Plaintiff and the Class.

In contrast to the aforementioned risks, approval of the Settlement will mean a present recovery for Class Members. While Plaintiff continues to believe that the Action has merit and that he would ultimately prevail upon his claims at trial, continued litigation would last for an extensive period of time before a final judgment might be entered in favor of the Class. If not for this Settlement, a trial would have occupied multiple days of attorney and Court time, and would have required costly expert testimony. Then, a judgment favorable to the Class, in light of the

contested nature of virtually every aspect of this case, would unquestionably be the subject of post-trial motions and appeals, which could significantly prolong the lifespan of this Action. Delay, not just at the trial stage, but through post-trial motions and the appellate process as well, could force Class Members to wait even longer for any recovery, further reducing its value. *See, e.g.*, *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 745 (S.D.N.Y. 1985) (delay from appeals is a factor to be considered); *City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132, 2014 WL 1883494, at *5 (S.D.N.Y. May 9, 2014) (finding that "[e]ven if the Class could recover a judgment at trial, the additional delay through trial, post-trial motions, and the appellate process could prevent the Class from obtaining any recovery for years."). Settlement of this litigation ensures a recovery now and for a larger sum than would be available at the conclusion of a trial and any subsequent motion practice and/or appeals, and eliminates the risk of no recovery at all. It is, therefore, in the best interest of the Class. *See Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003) ("even if a shareholder or class member was willing to assume all the risks of pursuing the actions through further litigation . . . the passage of time would introduce yet more risks . . . and would, in light of the time value of money, make future recoveries less valuable than this current recovery").

b. The Reaction of the Class to the Settlement

The Settlement is supported by Plaintiff, who has been at the helm of this Action, participated throughout the prosecution of his claims, and was involved in the decision to enter into the Settlement with Defendant. With respect to absent Class Members, Notice regarding the Settlement has not yet been mailed or otherwise distributed. Thus, their reaction cannot be gauged until such time that any objections are filed in accord with the terms of the Stipulation, which are also set forth in the Notice to be provided to the Class. Notably, only 29 of the

137,399 Class Members excluded themselves in response to the notice of class certification. In the event any objections are received after the Notice is disseminated, they will be addressed by Class Counsel at the Final Settlement Approval Hearing.

c. The Stage of the Proceedings

The stage of the proceedings and the amount of information available to the Settling Parties to assess the strengths and weaknesses of their cases is one factor that courts consider in determining the fairness, reasonableness, and adequacy of a settlement. *See Weinberger v. Kendrick,* 698 F.2d 61, 74 (2d Cir. 1982); *In re Mego Fin. Corp. Securities Litigation*, 213 F.3d 454, 459 (9th Cir. 2000); *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975). The trial of this matter was scheduled to begin within days of the Settlement being reached. Given the stage of proceedings, the Settling Parties possessed practically every piece of information that ever would be available to them regarding this matter at the time that Settlement was reached. The information available to Plaintiff and Class Counsel at the time of the Settlement came from the extensive investigation, litigation and preparation for trial of Plaintiff and Class Members' claims, including, *inter alia*: (i) serving written discovery requests; (ii) deposing Defendant's corporate representative; (iii) participating in multiple hearings before the Court; (iv) extensive briefing of the factual and legal matters at issue; (v) expert analysis and evaluation of Defendant's call records; (vi) review of Defendant's bank statements; (vii) review of Defendant's declaration regarding its available assets or lack thereof; (viii) review of Defendant and Continental's correspondence regarding insurance coverage and the defense of this Action; (ix) review of Defendant's trial exhibits; (x) research of the applicable law with respect to the claims asserted in this Action and the potential defenses thereto; (xi) discussion of the Settling Parties' respective positions at mediation; and (xii) negotiating the Settlement with Defendant.

The accumulation of the information found in the above sources permitted Plaintiff and Class Counsel to be well informed about the strengths and weaknesses of their case and to engage in effective settlement discussions with Defendant. *See In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 458 (S.D.N.Y. 2004) ("the question is whether the parties had adequate information about their claims"). Therefore, this Court should find that this factor also supports the Settlement.

d. The Risks of Establishing Liability and Damages

In assessing the Settlement, the Court should balance the benefits afforded the Class, including the immediacy and certainty of a recovery, against the continuing risks of litigation. *See Grinnell*, 495 F.2d at 463. Securities class actions present hurdles to proving liability that are difficult for plaintiffs to meet. *See In re AOL Time Warner, Inc. & "ERISA" Litig.*, No. mdl 1500, 02 Civ. 5575, 2006 WL 903236, at *11 (S.D.N.Y. April 6, 2006) (noting that "[t]he difficulty of establishing liability is a common risk of securities litigation"); *In re Alloy Inc. Sec. Litig.*, No. 03 civ. 1597 (WHP), 2004 WL 2750089, at *2 (S.D.N.Y. Dec. 2, 2004) (finding that issues present in securities action presented "significant hurdles" to proving liability). While Plaintiff believes that the claims alleged in the Complaint would ultimately be borne out by the evidence, he also recognizes that he could face hurdles to proving liability. Defendant has articulated specific defenses to Plaintiff's allegations, including the pivotal issue of whether Defendant used an automatic telephone dialing system, as defined by the TCPA. Notwithstanding his confidence, Plaintiff recognizes there is no guarantee that he would successfully prove his case at a trial on the merits, or that judgment in his favor would be upheld on appeal.

e. The Risks of Maintaining the Class Action Through Trial

The sixth *Grinnell* factor – the risk of maintaining the class action throughout the trial – is typically considered in the context of cases wherein the plaintiff is seeking unopposed certification for settlement purposes. *See Odom v. Hazen Transport, Inc.*, 275 F.R.D. 400, 411 (W.D.N.Y. 2011) ("Although class certification has been approved by this Court for the purpose of settlement, it is not certain that the case would be certified in the absence of settlement."). In cases where, as here, a class is certified in advance of settlement, the Court has found this Grinnell factor to be neutral "given that it was highly unlikely that the previously certified class would subsequently be decertified." *In re Independent Energy Holdings PLC*, No. 00 Civ. 6689, 2003 WL 22244676, at *3 (S.D.N.Y. Sept. 29, 2003). Thus, this factor does not weigh in favor of or against the Settlement.

f. The Ability of Defendant to Withstand a Greater Judgment

A court may also consider a defendant's ability to withstand a judgment greater than that secured by settlement. This *Grinnell* factor weighs heavily in favor of settlement in this Action, because, as discussed above, Defendant has no meaningful assets to cover Plaintiff and Class Members' claims beyond its insurance policy. And because Defendant's policy is wasting, the continued litigation of this matter would only lessen the Settlement Fund available to Plaintiff and the Class. As set forth above, Continental will exclusively fund the Settlement Fund with $1,800,000.00, which represents almost all of the money available under Defendant's $2,000,000.00 policy. While Class Members' statutory damages exceed the Settlement Fund, such an amount, if awarded, would not be collectable from Defendant. Thus, further recovery beyond that set forth in the Settlement is extremely improbable, if not impossible.

g. The Reasonableness of the Settlement in Light of the Best Possible Recovery and the Attendant Risks of Litigation

The adequacy of the amount offered in settlement must be judged "not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987). The Court need only determine whether the Settlement falls within a "range of reasonableness" – a range which "recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972). Given the many risks inherent in continuing to litigate this case, and Defendant's lack of assets beyond the Continental policy, this factor strongly favors the granting of preliminary approval.

V. THE PROPOSED FORM AND METHOD OF CLASS NOTICE ARE APPROPRIATE

A. The Scope of the Notice Program

The Settlement Administrator, Angeion Group, anticipates mailing the short-form Notice of Proposed Settlement of Class Action, in the form attached to the Stipulation as Exhibit A-3, to those Class Members who were previously mailed the notice of class certification and who did not exclude themselves from the Class. The Notice provides an abbreviated, but informative, description of the Action and the proposed Settlement, and also explains how to obtain the more detailed long-form notice and how to submit any objections.

Class Counsel proposes making a long-form notice available to Class Members upon request in the form attached to the Stipulation as Exhibit A-4, and posting an electronic version of the long-form notice on the case website located at www.NCSPlusLitigation.com (or some other website established and maintained by the Settlement Administrator).

B. The Scope of the Notice Program Is Adequate

There are no "rigid rules" that apply when determining the adequacy of notice for a class action settlement. Rather, when measuring the adequacy of a settlement notice in a class action under either the Due Process Clause or the Federal Rules of Civil Procedure, the court should look to its reasonableness. *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, No. 02 MDL 1484 (JFK), 2007 WL 313474, at *8 (S.D.N.Y. Feb. 1, 2007). It is clearly established that "[n]otice need not be perfect, but need be only the best notice practicable under the circumstances, and each and every class member need not receive actual notice, so long as class counsel acted reasonably in choosing the means likely to inform potential class members." *Id*. (citing *Weigner v. City of New York*, 852 F.2d 646, 649 (2d Cir. 1988)). In fact, notice programs such as the one proposed by Class Counsel have been approved as adequate under the Due Process Clause and Rule 23 of the Federal Rules of Civil Procedure in a multitude of class action settlements. *See, e.g*., *In re Gilat Satellite Networks, Ltd*., No. CV-02-1510 (CPS), 2007 WL 1191048, at *11 (E.D.N.Y. Apr. 19, 2007) (approving proposed notice program where notice mailed to shareholders of record listed on transfer records and to "more than 2500 of the largest banks, brokerages, and other nominees"); *In re Luxottica Group S.P.A. Sec. Litig.*, No. CV 01-3285 (JBW) (MDG), 2005 WL 3046686, at *2 (E.D.N.Y. Nov. 15, 2005) (approving notice program, consisting of broker mailing and summary notice publication in *The Wall Street Journal* and *The New York Times*).

Here, the cellular telephone numbers of the Class Members were provided directly by Defendant at the Court's direction. Analytics Consulting, LLC – the class administration company responsible for the mailing of the notice of class certification – utilized Defendant's data to create a database of Class Members by performing reverse look-ups, using the National

Change of Address database, and researching and updating any undeliverable addresses. This database will be utilized by the Settlement Administrator to ensure that the Notice will be disseminated to all Class Members who did not previously exclude themselves from the Class. Therefore, it is reasonable to conclude that the Notice will reach the vast majority of the Class Members. Class Counsel respectfully submits that the proposed notice program is adequate and should be approved by the Court.

C. The Proposed Form of Notice Comports With the Requirements of Due Process and Rule 23 and Is the Same or Similar to the Form(s) of Notice Routinely Approved By Courts in This Jurisdiction

The content of a notice is generally found to be reasonable if "the average class member understands the terms of the proposed settlement and the options provided to class members thereunder." *In re Stock Exchs. Options Trading Antitrust Litig.*, No. 99 Civ. 0962 (RCC), 2006 WL 3498590, at *6 (S.D.N.Y. Dec. 4, 2006). *See also Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir. 1982) (the settlement notice must "'fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with [the] proceedings'").

The proposed Notice provides all relevant information in a format that is accessible to the reader. In addition, the Notice advises recipients that they have the right to object to any aspect of the Settlement. Furthermore, the Notice provides recipients with the contact information for the Settlement Administrator. Finally, the proposed format is the same or similar to formats that have been approved by many other courts in this jurisdiction. Therefore, Class Counsel respectfully submits that the Court should approve the form of notice.

VI. PROPOSED SCHEDULE

If the Court grants preliminary approval of the proposed Settlement, the Settling Parties respectfully submit the following procedural schedule for the Court's review:

March 12: Preliminary Settlement Approval Hearing

March 24: Mailing of Settlement Notice to Class

April 23: Class Member Objection Deadline

June 25: Final Settlement Approval Hearing

VII. CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that the Court enter the proposed Order Preliminarily Approving Settlement and Providing for Notice in connection with the settlement proceedings, which will provide: (i) preliminary approval of the Settlement; (ii) approval of the form and manner of giving notice of the Settlement to the Class; and (iii) a hearing date and time to consider final approval of the Settlement, a motion seeking a service award to the Class Representative, and Class Counsel's motion for attorney's fees, costs and expenses.

Dated: March 6, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of March, 2015, I electronically filed the foregoing Memorandum of Law in Support of Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to Defendant's attorneys of record in this matter, who are listed below:

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