

**IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI**

MATTHEW GIANCRISTOFARO and)	
WILLIAM POFFENBERGER, individually,)	
and on behalf of all others similarly situated,)	
)	
Plaintiffs,)	Case Number 23SL-CC04108
)	
v.)	Division 1
)	
IMA PIZZA, LLC d/b/a &Pizza)	
)	
Defendant.)	

**PLAINTIFFS’ MEMORANDUM IN SUPPORT OF UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

The Court should grant preliminary approval of the parties’ settlement. The parties’ settlement agreement is attached as Exhibit 1 to this memorandum. Exhibit 1 also includes the proposed class notice agreed to by the parties.

The Court should preliminarily approve the settlement because this case satisfies the requirements necessary to certify a class under Missouri Supreme Court Rule 52.08. *See* Mo. S. Ct. 52.08(a)-(c) (noting that the elements necessary to certify a class and that the court shall determine whether a case can be maintained as a class action).

Moreover, the Court should also preliminarily approve the settlement because the settlement is “fair, reasonable and adequate” as it provides substantial relief to the settlement class members, particularly in light of the uncertainty of the legal issues presented in this case. *See generally Bachman v. A.G. Edwards, Inc.*, 344 S.W.3d 260, 266 (Mo. App. 2011) (noting that a class settlement must be “fair, reasonable and adequate” to be approved). The Court should therefore grant the Motion for Preliminarily Approval of Class Action Settlement.

I. Background

Plaintiff Matthew Giancristofaro filed suit against Defendant Ima Pizza, LLC d/b/a & Pizza (“Defendant”) on December 12, 2022, in the United States District Court for the Eastern District of New York.¹ Plaintiff alleged that Defendant violated Section 227(c) of the Telephone Consumer Protection Act (“TCPA”) by continuing to send him and the putative class members text messages after affirmatively opting-out from receiving text messages from Defendant. Specifically, Plaintiff Giancristofaro alleged Defendant sent him seven text messages after he opted out from receiving text messages from any further text messages from Defendant. The allegations in the instant case are substantially the same as those presented in the federal court case (which, as discussed below, was dismissed without prejudice). Plaintiff William Poffenberger was named in the instant suit. Plaintiff Poffenberger, like Plaintiff Giancristofaro, also continued to receive multiple text messages from Defendant after opting out of receiving such messages. Defendant disputes the allegations.

Defendant filed an answer to the federal court complaint and the parties proceeded with class-wide discovery. Class-wide discovery revealed that there were approximately 594 people who received post opt-out text messages from Defendant and a total of 1,783 text messages sent to said persons. *See* Settlement Agreement, Preambles.

The parties also mediated the case with Retired Federal District Court Judge Herbert Hoffman on July 26, 2023. The parties were unable to resolve the case at mediation but made progress toward resolution of the case. The parties continued engaging in arm’s length negotiations

¹ Much of the background in this section is set forth in Exhibit 2, Affidavit of Christopher E. Roberts, ¶¶ 7-14.

over the course of the next couple months. The parties agreed to dismiss the federal court case without prejudice. The parties executed the settlement agreement on November 6 and 7, 2023.

The settlement provides the class members significant relief.

Plaintiff seeks to certify the following class for settlement purposes:

All persons identified by the records of Ima Pizza to whom Ima Pizza has sent text messages after the recipient requested to no longer receive text messages from Ima Pizza.

Settlement Agreement, Section 3. As Plaintiffs have satisfied the necessary class certification requirements, the Court should certify the class.

II. Legal Standard

Whether a class should be certified is “based primarily upon the allegations in the petition.” *Elsa v. U.S. Eng’g Co.*, 463 S.W.3d 409, 417 (Mo. App. 2015). Plaintiff’s allegations are accepted as true when determining whether to certify a class. *Id.* A class is properly certified if the evidence in the record, taken as true, satisfies each requirement to certify a class under Rule 52.08. *Id.* While the instant case is a quintessential case to be certified as a class action, “courts should err in close cases in favor of certification because the class can be modified as the case progresses.” *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 715 (Mo. banc 2007).

A class is properly certified when it meets the requirements of Rule 52.08(a) and the requirements of Rule 52.08(b)(1), (2) or (3). Rule 52.08(a) requires that the class be sufficiently numerous (numerosity), that questions of law or fact are common to the class (commonality), that the claims or defenses of the class representatives are typical of the claims or defenses of the class (typicality) and the class representatives will adequately represent the interest of the class (adequacy). MO. S. CT. R. 52.08(a)(1)-(4).

Here, Plaintiff seeks to certify a Rule 52.08(b)(3) class for settlement purposes. Rule 52.08(b)(3) requires that “questions of law or fact common to the members of the class

predominate over any questions affecting only individual members” (predominance) and that a class action be “superior to other available methods for the fair and efficient adjudication of the controversy” (superiority). MO. S. CT. R. 52.08(b)(3).

Plaintiff has satisfied all of the requirements of Rules 52.08(a) and 52.08(b)(3). The court should therefore certify the case as a class action for settlement purposes.

III. The Court should preliminarily approve the settlement because each of the Rule 52.08 requirements necessary to certify a class are satisfied.

A. Each Rule 52.08(a) requirement is satisfied.

1. Numerosity is satisfied.

Numerosity is satisfied when “the class is so numerous that joinder of all members is impracticable.” MO. S. CT. R. 52.08(a)(1). There is no specific number of class members that makes a class sufficiently numerous. However, numerosity has been found to have been satisfied with as few as eighteen class members. *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151, 168 (Mo. App. W.D. 2006) (citing cases).

Here, there are 594 people including the Plaintiffs, who are part of the putative class. Settlement Agreement, Preambles; Roberts Affidavit, ¶ 17. This is a sufficient number of class members. Moreover, joinder of all these persons would be impracticable. Thus, the numerosity requirement is satisfied.

2. Commonality is satisfied.

Commonality is satisfied when “there are questions of law or fact common to the class.” MO. S. CT. R. 52.08(a)(2). The rule “does not require that all issues in the litigation be common, only that common questions exist.” *Elsa*, 463 S.W.3d at 419. Commonality exists if “a single common issue [overrides] the litigation, despite the fact that the suit also entails numerous remaining individual issues.” *Id.* quoting *Meyer*, 220 S.W.3d at 716 (emphasis omitted). In other

words, what matters most in class certification “is not the raising of common questions, but the ability of a classwide proceeding to generate common answers apt to drive resolution of the litigation.” *Id.* (internal quotation and citations omitted). The overarching legal issues applicable to Plaintiffs and the putative class members are whether: (1) Defendant sent post-opt-out text messages to Plaintiffs and the putative class members; and, (2) whether the sending of those text messages violates the Telephone Consumer Protection Act and its corresponding regulations.

Here, the common factual issue is that Plaintiffs and the class members were sent text messages from Defendant after requesting to no longer receive text messages from Defendant. Thus, the commonality requirement of Rule 52.08(a)(2) is satisfied.

3. Typicality is satisfied.

Typicality is satisfied when “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” MO. S. CT. R. 52.08(a)(3).

All three elements of typicality are met in this case. First, Plaintiffs’ and the class members’ claims all arise from receiving post-opt-out text messages from Defendant. Second, this identical conduct gives rise to the claim that Defendant violated the TCPA. Third, the facts underlying Plaintiffs’ and class members’ claims are not markedly different – they are identical. The pertinent fact is that each person received post-opt-out text messages from Defendant. Plaintiffs’ claims are therefore typical of the claims of the class.

4. Adequacy is satisfied.

Adequacy is satisfied when “the representative parties will fairly and adequately protect the interests of the class.” MO. S. CT. R. 52.08(a)(4). The adequacy requirement applies to the class counsel and class representatives. Adequacy is satisfied where “class counsel is competent and qualified to conduct the litigation” and the proposed class representatives have “no interests

antagonistic to the other proposed class members.” *Lucas Subway MidMo, Inc. v. Mandatory Poster Agency, Inc.*, 524 S.W.3d 116, 130 (Mo. App. 2017).

Plaintiffs’ counsel have extensive experience litigating class action cases and are competent and qualified to represent the class. Roberts Affidavit, ¶¶ 7-14; Ex. 3, Affidavit of Jacob U. Ginsburg, ¶¶ 6-14). Counsel are undoubtedly competent and qualified to litigate this matter.

Plaintiffs are also adequate to serve as the class representatives. Class representatives meet the adequacy requirement if they do not have a conflict of interest that will adversely affect the interests of the class. *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151, 172-73 (Mo. App. 2006). Plaintiff is not related to class counsel. Roberts Affidavit, ¶ 5. Plaintiffs’ interests are only antagonistic to those of Defendant, not the class members, as they are pursuing this action to seek recourse from Defendant. *Id.* at ¶ 6.

Each of the Rule 52.08(a) requirements have been satisfied and this case should be certified as a class action.

B. The Requirements of Rule 52.08(b)(3) are satisfied.

1. Common issues of law or fact predominate over individual issues.

The predominance requirement of Rule 52.08(b)(3) is satisfied. Rule 52.08(b)(3) provides that a class may be certified if “the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members.” MO. S. CT. R. 52.08(b)(3).

The predominance inquiry simply requires the court to determine whether the class seeks “to remedy a common legal grievance.” *Karen S. Little, L.L.C. v. Drury Inns, Inc.*, 306 S.W.3d 577, 580 (Mo. App. 2010) quoting *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151, 175 (Mo. App. 2006). Predominance does not require that all questions of law or fact be common to the

class, but that “common issues substantially predominate over individual ones.” *Id.* at 581. To determine whether a question is common or individual, the court looks at the “nature of the evidence required to show the allegations of the petition.” *Id.* A question is common, and therefore predominates, if the same evidence is necessary to answer the pertinent question of law or fact for each class member. *Id.*

The same evidence is necessary to answer the question of whether Plaintiffs and the class members received post-opt-out text messages from Defendant. Specifically, Defendant’s records identify the persons to whom such text messages were sent. Common issues therefore predominate.

2. A class action is a superior method of adjudicating this dispute.

The superiority requirement of Rule 52.08(b)(3) is also satisfied. Rule 52.08(b)(3) provides that a class may be certified if that a class action is “superior to other available methods for the fair and efficient adjudication of the controversy.” MO. S. CT. R. 52.08(b)(3).

The court considers the following factors when analyzing the superiority element:

- (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
- (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
- (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and,
- (D) the difficulties likely to be encountered in the management of a class action.

MO. S. CT. R. 52.08(b)(3)(A)-(D); *see generally Karen S. Little, L.L.C.*, 306 S.W.3d at 583. The ultimate question, however, is whether it is more a class action is more efficient than other methods of adjudication. *Dale*, 204 S.W.3d at 182. Here, each of the Rule 52.08(b)(3) factors establish that a class action is the most efficient mechanism of adjudicating this dispute.

A class action is superior because it is in the interest of the members of the class to adjudicate this case on a class basis rather than by way of hundreds of individual actions. MO. S. CT. R. 52.08(b)(3)(A). To this end, the court considers “the inability of the poor or uninformed to enforce their rights, and the improbability that large numbers of class members would possess the initiative to litigate individually.” *Elsea*, 463 S.W.3d at 417 quoting *Dale*, 204 S.W.3d at 182. Here, there is little incentive to litigate the claims individually, as each text message at issue is worth only up to \$500, and an absolute maximum of \$1,500 per text message under the TCPA. *See* 47 U.S.C. § 227(c)(5).

A class action is also superior because there is no pending litigation concerning this controversy with Defendant. MO. S. CT. R. 52.08(b)(3)(B). Counsel is unaware of any active litigation involving the issues presented in this case. Roberts Affidavit, ¶ 4.

Furthermore, a class action is superior because it is desirable to adjudicate this dispute before this Court. MO. S. CT. R. 52.08(b)(3)(C). The parties have no qualms litigating the case in this Court and agree that this Court is a desirable forum to adjudicate this dispute.

Finally, a class action is superior because there are no difficulties likely to be encountered in the management of a class action. MO. S. CT. R. 52.08(b)(3)(D). Manageability considers the potential practical problems of maintaining the case as a class action. *Elsea*, 463 S.W.3d at 423. Here, there are no practical problems maintaining this case as a class action.

Each of the Rule 52.08(b)(3) requirements have been satisfied and this case should be certified as a class action.

IV. The Court should preliminarily approve the settlement because the settlement is fair, reasonable and adequate.

This settlement should be approved as it provides outstanding relief to the class. The settlement provides that each class member who submit a valid claim will receive up to \$372.00 per post-opt-out text message (excluding confirmatory text messages). Settlement Agreement, Section 7. Defendant will make \$750,000.00 available to pay claims, attorneys' fees, representative service awards and the cost of settlement administration. *See id.*

Ultimately, the Court's primary concern in determining whether to approve a settlement is to determine whether the settlement is "fair, reasonable and adequate." *Bachman*, 344 S.W.3d at 266. To make this determination, the Court considers:

(1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of the plaintiff's success on the merits; (5) the range of potential recovery; and (6) the opinions of class counsel"

Id. Each of these factors support a finding that the settlement is "fair, reasonable and adequate."

First, there is no fraud or collusion behind the settlement. Rather, the settlement was the product of extensive arm's length negotiations, including after a mediation with a retired federal judge. Roberts Affidavit, ¶¶ 18-19.

Second, this case presented an unsettled issue of law as to whether Defendant violated the TCPA by sending the post-opt-out text messages at issue. Had the case progressed further, the parties would have taken multiple depositions, issued subpoenas, briefed class certification, briefed summary judgment, and likely would have prepared for trial. In short, this is an excellent result for the class in light of the uncertainties presented by this case.

As to the third factor, the parties only reach the terms of a settlement after completing written class-wide discovery. As such, this factor also supports approval of the settlement.

The fourth factor, probability of success on the merits, also supports approval of the settlement. Again, as discussed above, Plaintiffs presented issues that have not been clearly resolved by courts.

The fifth factor, the range of potential recovery, also supports approval of the settlement. Under Section 227(c) of the TCPA, the Court may award up to \$500 per violation (and up to \$1,500 if the violation was willful). 47 U.S.C. § 227(c)(5). Here, the class members who submit valid claims will receive significant relief of likely \$372 per post-opt-out text message. This significant relief supports approval of the settlement.

Finally, as to the final factor, class counsel recommends approval of the settlement. *Id.* at ¶ 24-29.

In short, the settlement is “fair, reasonable and adequate” and should be approved by the Court.

V. Conclusion

For the reasons stated in this memorandum, the Court should therefore grant preliminary approval of the parties’ settlement.

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2023, a copy of the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon all counsel of record.

/s/ Christopher E. Roberts

SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) is made by and between Plaintiffs Matthew Giancristofaro and William Poffenberger (collectively “Plaintiffs”), on behalf of themselves and a putative class of persons (identified and defined below as the “Settlement Class”), and Defendant Ima Pizza, LLC d/b/a &Pizza (“Defendant”), subject to court approval. Plaintiffs and Defendant are collectively referred to as the “Parties.”

WHEREAS Plaintiffs filed a class action under the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227 *et seq.* against Defendant alleging Defendant violated the TCPA by sending text messages to Plaintiff and the members of the Settlement Class after said persons requested that Defendant stop texting them;

WHEREAS Plaintiff Giancristofaro filed suit in the United States District Court for the Eastern District of New York, Case No. 1:22-cv-07526-ARR-CLP, which was dismissed without prejudice by stipulation of Plaintiff Giancristofaro and Defendant;

WHEREAS Plaintiffs subsequently filed suit in the Circuit Court of St. Louis County, Missouri, Case No. 23SL-CC04108 (the federal and state court cases are collectively referred to as the “Lawsuits”);

WHEREAS the Parties conducted a mediation before Judge Herbert Hoffman, and, while they did not resolve the case at mediation, made progress in their settlement discussions;

WHEREAS the parties reached the terms of this Agreement after extensive arm’s length negotiations after their mediation;

WHEREAS, Defendant denies and continues to deny the claims under the TCPA asserted by Plaintiffs, deny Plaintiffs and/or the Settlement Class are entitled to damages and maintains that they have meritorious defenses to the claims alleged in the Lawsuits;

WHEREAS, while denying all liability and without admitting or conceding fault or liability or the validity of Plaintiffs' claims, or that Plaintiffs or any individual in the Settlement Class is entitled to any relief as a result of Defendant's conduct, Defendant has agreed to settle the claims that are the subject of the Lawsuits as set forth in this Agreement;

WHEREAS, the Settlement Class includes approximately 594 people and a total of 1,783 text messages;

WHEREFORE, the Parties stipulate and agree that the claims of Plaintiffs and the Settlement Class should be and are hereby compromised and settled, subject to approval by the trial court, upon the following terms and conditions:

1. Recitals. The above-described recitals are incorporated into this Agreement.
2. For Settlement Only. This Agreement is entered into for purposes of resolving the disputes between Defendant on one hand, and Plaintiffs and the Settlement Class on the other, concerning the claims asserted in the Lawsuits. Assertions, statements, and representations herein are for settlement purposes only. The Parties desire and intend to seek the trial court's approval of the settlement and a final judgment approving the settlement between the Parties concerning the claims of Plaintiffs and the Settlement Class Members as set forth in this Agreement. The Parties agree to undertake all steps necessary to effectuate the purpose of the settlement, to secure the district court's approval of the settlement, and to oppose any interventions and objections to the settlement. If the trial court does not finally approve the Agreement the Parties expressly agree that this Agreement is a nullity as described in Section 15.
3. Certification of the Settlement Class. For settlement purposes only, the Parties hereby stipulate to seek certification of the following settlement classes defined as follows: All persons identified by the records of Ima Pizza to whom

Ima Pizza has sent text messages after the recipient requested to no longer receive text messages from Ima Pizza. (“Settlement Class”). The class members bound by the class definition are those included on the data produced by Defendant. “Settlement Class Member” means any person included in the Settlement Class who does not timely and properly opt out of this settlement. Defendant does not oppose and hereby agrees to certification of the Settlement Class for settlement purposes only, but that will not be deemed a concession that certification of any litigation class in the Lawsuits is, or was, appropriate, nor would Defendant be precluded from challenging class certification in further proceedings in the Lawsuits or in any other action if the Settlement is not finalized or finally approved. If the Settlement is not finally approved by the Court for any reason whatsoever, the certification of the Settlement Class resulting from this Agreement will be void, and no doctrine of waiver, estoppel or preclusion will be asserted in any proceedings involving Defendant. No agreements made by or entered into by Defendant in connection with the Settlement may be used by Plaintiff, any person in the Settlement Class or any other person to establish any of the elements of class certification in any litigated certification proceedings, whether in the Lawsuits, or any other judicial proceeding.

4. Representation of the Settlement Class. Plaintiffs will request to be appointed as the “Class Representatives.” Christopher E. Roberts and David T. Butsch of Butsch Roberts & Associates LLC and Jacob U. Ginsburg of Kimmel & Silverman, P.C. will request to be appointed as “Class Counsel.” Defendant will not oppose these requests.

5. Notice Information: To the extent Defendant can reasonably determine from its records, Defendant will provide the Settlement Administrator (defined in section 10) and Class Counsel with the last known name, address and e-mail of each Settlement Class Member. This information is referred to as the “Notice Information.” Defendant will provide an affidavit

attesting to the authenticity of the Notice Information to Class Counsel. Defendant will provide the Notice Information to the Settlement Administrator within seven days of the Parties signing the Agreement.

6. Preliminary Approval. Plaintiff will file a motion with the District Court for preliminary approval of the Settlement on or before October 11, 2023. The motion for preliminary approval will seek an order that: (a) preliminarily approves the settlement of the Lawsuit; (b) certifies the Settlement Class as defined in Section 3 above; (c) approves and appoints Plaintiffs as representatives of the Settlement Class; (d) approves and appoints attorneys Christopher E. Roberts and David T. Butsch of Butsch Roberts & Associates LLC and Jacob U. Ginsburg of Kimmel & Silverman, P.C. as Class Counsel; (e) approves the forms prepared by the Parties for giving notice of the settlement to the members of the Settlement Class, copies of which are attached to this Agreement; (f) approves the methods agreed to by the Parties for giving notice of the settlement to the Settlement Class; and, (g) sets deadlines for: (1) providing notice to the Settlement Class; (2) members of the Settlement Class to submit requests for exclusion/opt-out and objections to the proposed settlement; and, (3) members of the Settlement Class to submit claims. The Parties will then seek final approval of the settlement and entry of a “Final Approval Order and Judgment” (as defined in section 12).

7. The Relief. Defendant will make available up to \$750,000.00 to pay the claims of each member of the Settlement Class, the cost of settlement administration, class representative service awards, and Class Counsel’s attorneys’ fees and litigation expenses. All unclaimed amounts will revert to Defendant. With the exception of the settlement administrator’s payment requirements, Defendant need not pay class members claims, the class representative service

awards and class counsel's attorneys' fees and litigation and costs, until 10 days after the Effective Date.

Each member of the Settlement Class who submits a valid claim shall be entitled to \$372.00 per post-opt-out text message (excluding confirmatory texts). In the event the amounts of the claims would result in more than a total of \$750,000.00 payout after accounting for the cost of settlement administration, representative service awards and Class Counsel's attorneys' fees and expenses, a *pro rata* adjustment will be made as to each member of the Settlement Class Member's claim so that Defendant will not pay more than \$750,000.00 under any circumstance. Payments shall be made by check or electronic payment from the Settlement Administrator to each Settlement Class Member who submits a valid claim.

The amount of all checks uncashed within 120 days of distribution by the settlement administrator shall be distributed by the Settlement Administrator in accordance with the escheatment requirements of the state in which the Settlement Class Member is located.

8. Notice to Settlement Class. In the event of an order granting preliminary approval of the settlement by the trial court as described in Section 6, notice of the settlement will be mailed to the individuals in the Settlement Class within fourteen days after such order. The Settlement Administrator will send the class notice by first class U.S. mail to persons in the Settlement Class at such persons last known address, as listed in the Notice Information, and will also send the notice by e-mail to all members of the Settlement Class for whom Defendant has an e-mail address. Prior to mailing the notice, the Settlement Administrator will update the address information provided by Defendant through the National Change of Address ("NCOA") database maintained by the U.S. Postal Service. Any mailed notice returned to the Settlement Administrator with a new forwarding address will be re-mailed one time to the individual at the new forwarding address.

The mail notice to the Settlement Class will contain a summary description of the Agreement, include a claim form, identify the Settlement Administrator, and direct recipients to the website, from which information about the settlement can also be obtained and through which claim forms may be uploaded (in addition to being mailed). The Settlement Administrator will provide a declaration or affidavit to file with the trial court, as part of the final approval papers, stating that these notice procedures were followed.

The Settlement Administrator shall set up a dedicated website to advise persons of the settlement and through which members of the Settlement Class may submit claims. Members of the Settlement Class will also have the option to mail in claim forms. The content and format of the website will be agreed upon by the Parties, and the website will be operational on the date the notice is mailed to the Settlement Class. Individuals in the Settlement Class shall be able to opt-out and exclude themselves from the settlement or object to the settlement within sixty (60) days after the notice is first mailed to exclude themselves from or object to the settlement.

The parties agree that Class Notice, which will be sent, will be substantially similar to that attached as Exhibit 1. The parties agree that the Long Form Class Notice, which will only appear on the settlement website, will be substantially similar to that attached as Exhibit 2.

9. Claims Process: Any member of the Settlement Class who wishes to receive a cash payment shall submit a valid claim form within ninety (90) days of the Settlement Administrator sending out notice. The claim form shall be signed physically or digitally by the member of the Settlement Class to receive relief. The parties agree that all members of the Settlement Class who wish to exclude themselves or object to the settlement shall also do so within sixty (60) days and must advise the Settlement Administrator of their exclusion or objection to the settlement. All

checks not cashed within 120 days will be distributed in accordance with the escheatment procedures of the state in which the Class Member is located.

The parties agree that the Claim Form will be substantially similar to that attached to this Agreement as Exhibit 3.

10. Incentive Award and Attorneys' Fees. Class Counsel will apply for an award of up to \$240,000.00 for their attorneys' fees and reasonable litigation expenses. Class Counsel will also request an incentive award for Plaintiff Giancristofaro of \$10,000.00 and Plaintiff Poffenberger of \$5,000.00. Defendant will not oppose these amounts. The incentive award and attorney fee award will be set forth in the Final Approval Order and Judgment and is within the Court's discretion to award.

11. Settlement Administration and Expenses. Plaintiffs, with approval of Defendant, shall select a settlement administrator for purposes of issuing notice to the Settlement Class and administering the settlement ("Settlement Administrator"). Defendant shall pay the administrator's costs and expenses. The Parties will consult with the Settlement Administrator to design a notice campaign that satisfies due process. The Settlement Administrator shall also comply with all notice requirements set forth in this Agreement.

12. Final Approval. The preliminary approval order described in Section 6 will set a date for a Final Approval Hearing, at which the Parties will request that the District Court enter a Final Approval Order and Judgment, consistent with this Agreement and the Parties' efforts to consummate the settlement. With the exception of up-front costs required by the Settlement Administrator, Defendant shall not be obligated to pay any sum pursuant to this Agreement except after the "Effective Date", as described in Section 13.

13. Effective Date. If there are no objections to the settlement, the “Effective Date” of this Agreement shall be the fourteen calendar days after the trial court has signed the Final Approval Order and Judgment as applied to Plaintiff and the Settlement Class Members. If there are objections to the settlement, the Effective Date shall be fourteen days after all of the following conditions have occurred and been satisfied:

(a) The trial court has entered: (i) a final order approving this Settlement Agreement under Federal Rule of Civil Procedure 23; and (ii) a final judgment granting the relief and releases described in this Agreement, including that in Sections 7 and 14; and

(b) The time for appeal or to seek permission to appeal from the trial court’s approval of this Agreement and entry of final judgment described in subsection (a) of this paragraph has expired or, if appealed, approvals of this Agreement and any final judgment have been affirmed by the court of last resort to which such appeal can be taken, and such affirmance has become no longer subject to further appeal or review.

14. Payments. Within fourteen days after the Effective Date, the Settlement Administrator shall distribute the Settlement Class Member payments described in Section 7, and the attorney’s fees and incentive awards described in Section 9, consistent with the Final Approval Order and Judgment.

15. Release. Upon entry of Final Approval and Judgment (as defined in section 12), Plaintiff and each member of the Settlement Class who do not opt out or otherwise exclude themselves from the settlement will be deemed to have, and by operation of the Judgment will have, fully, finally, and forever released, relinquished, and discharged Defendant and its past, present, and future corporate parent and subsidiary companies, along with each of their current, former, and future owners (which include shareholders, principals, members, or partners, and the

following officers and directors: Michael Lastoria, Steve Kassin, William Jacob, Ian Reynolds, Kevin Reddy, Matthew Higgins, Sandy Beall, Robert Nitkin, David Strasser, Mark Verdi, Uday Ahuja), from any and all claims under the Telephone Consumer Protection Act relating to the sending of text messages regarding &Pizza's products and services through the date the Settlement Agreement is signed by the Parties ("Released Claims").

16. Effect of Trial Court's Denial of Preliminary or Final Approval. This Agreement is null and void, if the District Court does not preliminarily approve the settlement in substantially the same form as set forth in this Agreement, or if the settlement or the judgment approving the settlement is appealed and not approved on appeal in substantially the same form as set forth in this Agreement. In such event, and upon the trial court entering an order unconditionally and finally adjudicating that this Agreement and settlement will not be approved in substantially the same form as set forth in this Agreement, then: (a) this Agreement is terminated and is of no force and effect, and no party shall be bound by any of its terms, except for Defendants' reimbursement of the Settlement Administrator's expenses; (b) to the extent applicable, any preliminary order approving the settlement, certifying the Settlement Class, approving the notice or notice procedure, and providing notice to the Settlement Class shall be vacated; (c) the Agreement and all of its provisions and all negotiations, statements, and proceedings shall be without prejudice to the rights of any of the Parties; (d) each of the Parties shall be restored to their respective positions as of the date this Agreement was fully executed; and, (e) neither the settlement nor any of its provisions or the fact that this Agreement has been made shall be admissible in this Lawsuit, or discoverable or admissible in any other action for any purpose whatsoever.

Moreover, the filing in St. Louis County will relate back to the date of the filing of the original case formerly pending in federal court. The statute of limitations will be tolled/not

impacted for Plaintiffs or any of the putative class members by the dismissal and refile of the new suit in St. Louis County, Missouri. The parties agree to seek approval of the settlement in the Circuit Court of St. Louis County, Missouri. If the settlement is not approved, the parties agree to dismiss the case without prejudice and to re-file the case in the same federal court in which the former case is pending, and to tag the case as related. The parties further agree that the dismissals without prejudice filed do not impact Plaintiff's ability to pursue their, and the class members' claims. If the case is refiled in federal court, the suit will relate back to the date of the original case formerly pending in federal court. The statute of limitations will be tolled/not impacted for Plaintiff or any of the putative class members. The parties also agree to use the discovery obtained and issued for purposes of the refiled federal court case. Defendant also consents to the Circuit Court of St. Louis County having personal and subject matter jurisdiction over the Lawsuits and the approval of the Agreement.

17. Requests by Individuals in Settlement Class. Requests for exclusion, objections to the settlement, and all other notices regarding the settlement, to the extent received by either Party, shall be sent to the Settlement Administrator.

18. No Admission of Liability. This Agreement affects the settlement of claims that are denied and contested, and nothing contained herein shall be construed as an admission by Defendant of any liability of any kind. Defendant denies any liability in connection with any claims made in the Lawsuits. Defendant enters into this Agreement merely to avoid further litigation.

19. Entire Agreement. This Agreement contains the entire agreement and understanding between the Parties concerning the subject matter hereof, and any and all prior oral or written agreements or understandings between the Parties related hereto are superseded. This

Agreement may not be altered, amended or otherwise changed or modified, except in writing signed by all Parties.

20. Headings. Headings contained in this Agreement are for convenience of reference only and are not intended to alter or vary the construction and meaning of this Agreement.

21. Warranties. The Parties further represent, warrant, and agree that, in executing this Agreement, they do so with full knowledge of any and all rights they may have with respect to the claims released in this Agreement, and that they have received legal counsel from their attorneys with regard to the facts involved and the controversy herein compromised and with regard to their rights arising out of such facts. Each Party represents such party has not assigned, transferred or granted, or purported to assign, transfer, or grant, any of the claims, demands and cause(s) of action asserted in the Lawsuit. Each of the Parties executing this Agreement warrants that he or she has the authority to enter into this Agreement and to legally bind the Party for which he or she is signing.

22. Successors and Assigns. This Agreement is binding upon, and shall inure to the benefit of, the Parties hereto and their respective successors, assigns, heirs, agents, employees, attorneys, representatives, officers, parents, affiliates, and subsidiaries.

23. Further Cooperation. The Parties agree to execute such further and additional documents and instruments, as shall be necessary or expedient to carry out the provisions of this Agreement and shall in good faith undertake all reasonable acts to effectuate the provisions of this Agreement.

24. Governing Law. The contractual terms of this Agreement shall be interpreted and enforced in accordance with the substantive law of the State of Missouri, without regard to its

conflict of laws or choice of law provisions. All suits to enforce this Agreement shall be brought in the Circuit Court of St. Louis County, Missouri.

25. Mutual Interpretation. The Parties agree and stipulate that the settlement was negotiated on an “arm’s-length” basis between parties of equal bargaining power. The Agreement has been drafted jointly by Class Counsel and Defendants’ counsel. Accordingly, this Agreement is mutually created, and no ambiguity shall be construed in favor of or against any of the Parties. This Agreement was prepared after an agreement in principle to resolve the case was reached after a mediation with Retired Judge Herbert Hoffman and extensive arm’s length negotiations between the Parties.

26. Counterparts. This Agreement may be executed in counterparts, each of which shall be an original, and such counterparts together shall constitute one instrument. Electronically scanned signatures are acceptable for the execution of this Agreement.

27. Severability. Each term and provision of this Agreement shall be construed and interpreted so as to render it enforceable. In the event any provision of this Agreement is held to be illegal or unenforceable, the remainder of this Agreement shall be binding and enforceable.

IN WITNESS WHEREOF, the Parties have executed this Agreement on the date(s) set forth below.

Dated: 11/6/2023

DocuSigned by:
Matthew Giancrisofaro
45ADA33C4D2C4BB...
Matthew Giancrisofaro

Dated: 11/6/2023

DocuSigned by:
William Poffenberger
ED3484F45991450...
William Poffenberger

Dated: 11/7/2023 | 2:06:28 PM PST Ima Pizza, LLC d/b/a &Pizza

By: DocuSigned by:
Michael Lastoria
25C864F8A2BC4A3...

Printed Name: Michael Lastoria

Title: President

EXHIBIT 1

*Giancristofaro et al. vs
Ima Pizza, LLC d/b/a &Pizza*
Circuit Court of St. Louis County, Missouri
Case No. 23SL-CC04108

IMPORTANT LEGAL NOTICE

**IF YOU RECEIVED A SETTLEMENT LETTER
CONCERNING A TEXT MESSAGE FROM
&PIZZA AFTER YOU ASKED TO NO LONGER
RECEIVE TEXT MESSAGES FROM &PIZZA,
YOU MAY BE ELIGIBLE FOR A SETTLEMENT
PAYMENT.**

A proposed Settlement has been reached in a class action lawsuit that may affect your rights. The lawsuit alleges that &Pizza violated the Telephone Consumer Protection Act by sending text messages to people after they requested &Pizza stop sending them text messages. &Pizza denies any wrongdoing.

- &Pizza's records indicate that you are a potential settlement class member. You may be eligible for a payment of approximately **\$372.00 per post-opt out text message sent to you (excluding confirmatory opt-out text messages).**

&PIZZA SETTLEMENT
C/O ATTICUS ADMINISTRATION
PO BOX 64053
SAINT PAUL MN 55164

<<barcode>>
<<barcode>>

CLAIMANT ID: <<Unique ID>>
<<FIRST NAME>> <<LAST NAME>>
<<ADDRESS 1>> <<ADDRESS 2>>
<<CITY>> <<ST>> <<ZIP>>

Presorted First-
Class Mail
U.S. Postage
PAID
Twin Cities MN
Permit #XXX

To receive a payment from this Settlement you **must** submit a completed Claim Form by **[90 days after notice]**.

To complete a Claim Form, please do one of the following by:

1. Scan the QR Code at the right to complete and submit an online Claim Form.
2. Go to www.optoutpizzasettlement.com and use your Claimant ID to submit an online Claim Form.
3. Go to www.optoutpizzasettlement.com to print a paper Claim Form to submit by mail.



Opt-Out Option: If you do not wish to participate in the Settlement, you **must** mail an “Opt-Out” Request to the Settlement Administrator postmarked no later than **[60 days after notice is sent]** or submit your opt-out request online at www.optoutpizzasettlement.com. If you “opt-out”, you will not be legally bound by anything that happens in this lawsuit, but you will not be eligible to receive a Settlement payment. If you do not “opt-out,” and the Court grants final approval of the Settlement, you will release the claims asserted in the lawsuit against &Pizza.

Objection Option: If you do not “opt-out” and wish to object to the Settlement, you must inform the Court through a written objection of why you do not like the settlement. The objection must contain specific information that can be found in the full Class Notice on the settlement website and must be mailed to the Settlement Administrator by **[60 days after notice]**. The Court will consider objections at the Final Approval Hearing. If you object and wish to speak at the hearing, you may file a Notice of Intent to Appear with the Court through your own attorney and at your own expense.

The Court appointed the law firm of Butsch Roberts & Associates LLC and Kimmel & Silverman, P.C. as Class Counsel to represent the interests of the Settlement Class. The Court will hold a **Final Approval Hearing** on **[hearing date]** at **[hearing time]** in Division 1 of the Circuit Court of St. Louis County, Missouri at 105 S. Central Ave., Clayton, MO 63105.

To review the complete Class Notice and for more information about the Settlement, including details on how to File a Claim, “Opt-Out” or submit an Objection, please visit the Settlement Website at www.optoutpizzasettlement.com. You may also call or email the Settlement Administrator at **1-800-XXX-XXXX** or &Pizzasettlement@atticusadmin.com with any questions or to have the full Class Notice mailed or e-mailed to you.

This Notice was authorized by Circuit Court of St. Louis County, Missouri. It is not a solicitation from an attorney.

EXHIBIT 2

**IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI**

MATTHEW GIANCRISTOARO and
WILLIAM POFFENBERGER, *individually,*
and on behalf of all others similarly situated,

Case. No. 23SL-CC04108

Plaintiff,

v.

IMA PIZZA, LLC d/b/a &Pizza,

Defendant.

NOTICE OF CLASS ACTION SETTLEMENT

The Circuit Court has authorized this Notice. This is **NOT** a solicitation from a lawyer. Please read this Notice carefully as it may affect your legal rights. **Do not be alarmed. You have not been sued; nor have you “filed” a lawsuit.**

This notice is being sent to you because you may be among a group or “class” of persons who received text messages from Ima Pizza, LLC d/b/a &Pizza (“Defendant”) after requesting that Defendant stop texting you.

YOUR LEGAL RIGHTS AND OPTIONS IN THIS CASE

These rights and options and the deadlines to exercise them are explained below.

IF YOU WANT TO PARTICIPATE FULLY IN THIS CASE	If you want to be included in this case, <u>then you must submit a valid claim form, a copy of which is included with this notice. If you submit a valid claim, you are expected to receive \$372 per post-opt out text received from Defendant.</u> If you do not submit a claim form you will not receive any payment and will give up claims against Defendant regarding the Telephone Consumer Protection Act. You must submit a claim by [90 days after notice is mailed] The relief afforded to you is described in Section 7 below and in the settlement agreement available on the settlement website, <u>www.optoutpizzasettlement.com.</u>
IF YOU <u>DO NOT</u> WANT TO PARTICIPATE IN THIS CASE AT ALL	If you do not want to participate or be included in this case, then you must send written notice by mail that you wish to exclude yourself from the settlement, postmarked or uploaded to <u>www.optoutpizzasettlement.com</u> no later than [60 days after notice is mailed] . Instructions for doing so are in paragraph 8 below.

	<p>If you choose not to participate in this case, you give up the possibility of getting money or benefits that may come from the settlement of this case. You keep any rights to sue Defendants about certain legal claims arising from communications directed to you, but the statute of limitations (the deadline for you to file your potential claims) continues to run.</p>
--	--

Your options are explained in this Notice.

1. WHAT IS THIS LAWSUIT ABOUT?

Plaintiffs Matthew Giancristofaro and William Poffenberger (“Plaintiffs”) filed a civil lawsuit against Defendant. Plaintiffs filed the lawsuit on behalf of themselves and as a class action on behalf of the group or “class” of persons who were sent text messages after requesting Defendant stop sending them text messages. Plaintiffs allege Defendant violated the Telephone Consumer Protection Act (“TCPA”) by sending these post opt-out text messages. Defendant denies these allegations.

2. WHAT IS A CLASS ACTION AND WHO IS INVOLVED?

In a class action case, one or more persons sue on behalf of other people who have similar claims. The person who sues is called the named Plaintiff or the named Plaintiffs. The named Plaintiff(s) represent all similarly situated people in the court. The named Plaintiffs in this lawsuit are Matthew Giancristofaro and William Poffenberger.

3. WHY DID I RECEIVE THIS NOTICE?

This notice is being made available to you because Defendant’s records reflect that a text message was sent to you after you requested that Defendant no longer send you text messages. If this is the case, you may be a member of the “class.”

Do not be alarmed. **You have not been sued; nor have you “filed” a lawsuit.** This Notice simply informs you of the named Plaintiffs’ lawsuit and lets you know that you have been identified as a potential member of the Class and to advise you of your rights and options as a Class member.

4. HAS THE JUDGE DECIDED WHO IS RIGHT?

No. By certifying the Class and issuing this Notice, the judge is not suggesting that the named Plaintiffs or the Class would have won or lost the case.

5. HOW DO I KNOW IF I AM A MEMBER OF THE CLASS?

By Order dated XXXXX, the Court certified the following class of persons in the Lawsuit, for settlement purposes:

All persons identified by the records of Defendant to whom Defendant has sent text messages after the recipient requested to no longer receive text messages from Defendant.

If you are not sure whether you are a member of the Class, you should contact the lawyers representing the class, who are listed in paragraph 6 below.

6. WHO IS CLASS COUNSEL?

The Court appointed the named Plaintiffs’ attorneys in the Lawsuit as Counsel for the Class (“Class Counsel”). Class Counsel are Christopher E. Roberts and David T. Butsch of Butsch Roberts & Associates LLC and Jacob U. Ginsburg of Kimmel & Silverman, P.C. You are not required to hire your own lawyer because Class Counsel will be working on your behalf as a member of the Class. If you want to hire your own lawyer you are permitted to do so at your own expense.

7. WHAT WILL I RECEIVE AS PART OF THE SETTLEMENT?

If you submit a valid claim form, you will receive \$372 per post-opt out text message you received from Defendant (excluding any confirmatory opt-out text messages).

Defendant will pay no more than \$750,000.00 to pay class members’ claims, the cost of settlement administration, class representative service awards and Class Counsel’s attorneys’ fees and expenses. In the event the number of claims would cause the amount of payout to exceed \$750,000.00, then your claim could be subject to a pro rata reduction from \$372 per text.

8. WHAT DO I NEED TO DO TO RECEIVE THE BENEFIT OF THE SETTLEMENT?

If you wish to receive the settlement benefits, you **must submit a valid claim form, a copy of which is included with this notice, and which is also available at www.optoutpizzasettlement.com**. You may submit a completed claim form at **www.optoutpizzasettlement.com** or send to:

&Pizza TCPA Settlement
c/o Atticus Administration, LLC
1250 Northland Drive, Suite 240
Mendota Heights, Minnesota 55120

Your claim must be submitted at www.optoutpizzasettlement.com by [90 days after notice is mailed] or postmarked by [90 days after notice is mailed].

Failing to make a claim, will mean you will not receive compensation and will give up certain TCPA claims against Defendant. However, you have a choice. You also have the right to exclude yourself from the Lawsuit and the Class or object to the settlement. Each of these choices has consequences that you should understand before making your decision.

A. If you want to participate as a member of the Class.

You must submit a valid claim form to receive the financial benefit of this settlement. Your rights and claims against Defendant, if any, concerning the text messages Defendant placed to you (or had communications placed on your behalf), will be determined in the Lawsuit.

If you do not exclude yourself from the settlement:

1. The named Plaintiffs and Class Counsel will represent you in the Lawsuit. By joining this case, you designate the named Plaintiffs, to the fullest extent possible, to make decisions on your behalf concerning the case, the method and manner of conducting the case, the entering of an agreement with Class Counsel regarding payment of attorney's fees and litigation costs, the approval of settlements and all other matters pertaining to this case. These decisions and agreements made and entered into will be binding on you if you do not opt out of the case. You may be required to provide information and documents, appear for a deposition and/or testify in court. You will also be permitted to attend any hearings in this matter. You will also release certain claims against Defendant regarding communications placed to you by Defendants or those acting on their behalf as detailed more thoroughly in the settlement agreement available on the settlement website www.optoutpizzasettlement.com.
2. As a member of the Class, you will be entitled to share in any monetary recovery that the named Plaintiff obtains for the Class. You will also receive the benefit of any other relief that the Court may award the Class.
3. Your ability to recover from Defendant will depend on the results of the Lawsuit. It is important to understand that as a member of the Class in this case **you will be bound by any judgment entered by the Court, whether favorable or unfavorable.**

B. If you want to exclude yourself from the Class or object to the Settlement.

If you do not want to be a member of the Class and participate in this Lawsuit, you can ask the Court to exclude you from the Lawsuit and allow you to "opt out" by sending such correspondence in writing to:

&Pizza TCPA Settlement
 c/o Atticus Administration, LLC
 1250 Northland Drive, Suite 240
 Mendota Heights, Minnesota 55120

To be effective, the request to exclude yourself to the settlement must be completed, signed and postmarked by [60 days from the date notice is mailed].

If you choose to be excluded from the Class:

1. Your claims against Defendant, if any, will not be decided in the Lawsuit and you will not share in any recovery that the named Plaintiffs obtain for the Class.
2. You will not be bound by any determinations or any judgment that the Court makes or enters in the Lawsuit, whether favorable or unfavorable.
3. You will not be entitled to any further notice with regard to the Lawsuit.
4. You may pursue any claims you have against Defendant at your own expense and risk by filing your own separate lawsuit, should you choose to do so, and assuming you have a claim and the applicable statute of limitations to file a case has not run.
5. Be aware that any claims that you have or may have against Defendant are limited by the applicable statute of limitations and declining to participate in this case by opting out, or by proceeding separately, may result in some or all of your claims expiring as a matter of law.

Any Class Member who wishes to object to the settlement or wishes to appear at the Final Approval Hearing and show cause, if any, why the same should not be approved as fair, reasonable, adequate, and in the best interests of the Settlement Class, or why a final judgment should not be entered thereon, must serve and file written objections. The objection must contain the objector's full name, telephone number, and current address; must declare that the objector is a member of the Class; and must provide a detailed statement of the objector's specific objections to any matter before the Court and the grounds of the objection. Said objections must be mailed to:

&Pizza TCPA Settlement
 c/o Atticus Administration, LLC
 1250 Northland Drive, Suite 240
 Mendota Heights, Minnesota 55120

To be effective, the request to object to the settlement must be completed, signed and postmarked by [60 days from the date notice is mailed].

9. HOW WILL CLASS COUNSEL AND THE CLASS REPRESENTATIVE BE PAID?

Class Counsel will seek an award of attorney's fees and expenses of up to \$240,000.00. The Court will determine the amount of fees and expenses that should be awarded to class counsel. Plaintiff Giancristofaro will seek an award of \$10,000.00 for his service as class representative. Plaintiff Poffenberger will seek an award of \$5,000.00 for his service as class representative.

10. WHAT IF I HAVE QUESTIONS?

You should not contact the Clerk of The Court, Judge, or Defendants' Counsel with questions about this case. Instead, if you have any questions about your claim or rights or would like more information, you should call Class Counsel Christopher E. Roberts of Butsch Roberts & Associates LLC at 314-863-5700 or Jacob U. Ginsburg of Kimmel & Silverman, P.C. at 267-468-5374. You can also speak with your own attorney.

You can review and obtain copies of the Lawsuit, The Court's Order granting Preliminary Approval of the Settlement and any other pleadings and filings in the Lawsuit directly from Class Counsel, by contacting Class Counsel at the number above. You can also review and obtain copies of these papers at your own expense at the Clerk of the Court for the United States District Court for the Eastern District of Michigan.

11. IMPORTANT DEADLINES AND DATES TO REMEMBER

[90 days after notice is mailed] is the deadline to submit your claim form. **[60 days after notice is mailed]** is the deadline to exclude yourself from the settlement or object to the settlement.

The Final Approval Hearing will take place on **XXXXXXXX, 2024 at XX:00 a.m.** before Judge Brian May, Division 1, of the Circuit Court of St. Louis County, Missouri, 105 South Central Avenue, Clayton, MO 63105. The hearing may also take place via video conference at: **[link]**

Dated: _____, 2023

This Notice is being made available pursuant to Federal Rule of Civil Procedure 23 and by Order of the Court.

EXHIBIT 3

CLAIM FORM

Please select whether you want to receive your payment as a check or as an electronic payment. Please note that if you select payment by check, the check will expire 180 days after the date of issuance to you and said amount will be provided in accordance to the state in which you are located in accordance with the escheatment laws of the state in which you are located.

All information provided is subject to verification by the Claims Administrator. The Parties have the right to seek discovery to further verify the accuracy of the information contained on this claim form.

This form must be postmarked or received by **90 days after mailing** or else your claim will not be considered timely. You can submit this electronically at **www.optoutpizzasettlement.com** or via mail by sending to **&Pizza TCPA Settlement, c/o Atticus Administration, PO Box 64053, Saint Paul, MN 55164.**

Required Information

I wish to receive: **Electronic Payment** or **Check**

Name: **[pre-populated from &Pizza's records]**

Current Address: **[pre-populated from &Pizza's records]**

Phone number: **[pre-populated from &Pizzas records]**

If your name and/or address information has changed, please provide your name and address below:

Name:

Current Address:

I certify, under the penalty of perjury, that the above information is true and accurate.

Signature: _____

Date: _____

**IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI**

MATTHEW GIANCRISTOFARO and)	
WILLIAM POFFENBERGER, individually,)	
and on behalf of all others similarly situated,)	
)	
Plaintiffs,)	Case Number 23SL-CC04108
)	
v.)	Division 1
)	
IMA PIZZA, LLC d/b/a &Pizza)	
)	
Defendant.)	

**AFFIDAVIT OF CHRISTOPHER E. ROBERTS IN SUPPORT OF PLAINTIFFS’
MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT**

I, Christopher E. Roberts, being sworn on my oath, state:

1. I am over the age of eighteen, am of sound mind and am otherwise competent to make this affidavit. I have personal knowledge of the matters set forth in this affidavit.
2. This Affidavit is submitted in support of Plaintiffs’ Motion for Preliminary Approval of Class Settlement.
3. I represent Plaintiffs Matthew Giancristofaro and William Poffenberger (“Plaintiffs”). This matter concerns whether Defendant violated the Telephone Consumer Protection Act by continuing to send marketing text messages to Plaintiffs and the class members after Plaintiffs and the class members requested that Defendant no longer send them text messages.
4. I am unaware of any active litigation against Defendant concerning the issues presented in this case.
5. I am not related to either Plaintiff, nor is my law partner or co-counsel.
6. Plaintiffs have been active in this litigation by: (1) producing information and documents, when requested; (2) meeting with counsel; and, (3) staying in contact with counsel

about the status of the case. In addition, Plaintiff Poffenberger participated in the mediation of this case. Plaintiffs interests are antagonistic the interests of Defendant, and the Plaintiffs have advocating for getting the largest recovery possible from Defendant.

Biographical Information

7. I am a partner with the firm of Butsch Roberts & Associates LLC. I submit this declaration in support of Plaintiffs' motion for preliminary approval of settlement in the above-entitled action. I am a member in good standing of the Missouri Bar and I have never been the subject of any disciplinary proceeding. In addition to being admitted to Missouri, I am also licensed to practice in the States of Illinois and Kansas. Furthermore, I am admitted to practice before The United States Court of Appeals for the Eighth Circuit, the United States Court of Appeals for the Ninth Circuit, the United States Court of Appeals for the Tenth Circuit, the United States District Court for the Northern District of Illinois, the United States District Court for the Southern District of Illinois, the United States District Court for the Eastern District of Missouri, the United States District Court for the Western District of Missouri, the United States District Court for the District of Kansas, the United States District Court for the Southern District of Texas, the United States District Court for the Northern District of Texas, the United States District Court for the Eastern District of Michigan and the United States District Court for the District of Colorado.

8. I am a 2009 graduate of the University of Missouri-Kansas City School of Law, where I received my Juris Doctor degree. I was admitted to the Missouri Bar in 2009, the Illinois Bar in 2010 and the Kansas Bar in 2010.

9. I frequently speak to members of the Missouri Bar on class action practice and consumer law-related issues. I spoke most recently in 2022 at the Solo and Small Firm Conference sponsored by The Missouri Bar about class action practice and procedure.

10. In addition, I am a frequent contributor to the American Bar Association on class action-related issues. I am the author of a chapter in the 2018, 2020, 2021, 2022 and 2023 books published by the American Bar Association about class action law from each Circuit Court of Appeals. The chapter I authored in each publication focuses on class action jurisprudence in the Eighth Circuit Court of Appeals. I have also written multiple articles on class action-related issues that have been published by the American Bar Association.

11. I have been appointed to serve as class counsel in numerous cases, including, but not limited to: *Smith v. Leif Johnson Ford, Inc.*, Case No. 19SL-CC01942, Circuit Court of St. Louis County (TCPA case); *Ruby v. Build A Bear Workshop, Inc.*, No. 4:21-cv-01152-JAR (E.D. Mo. 2021) (TCPA case); *Hester et al. v. Allstate Vehicle and Property Insurance Company*, Case No. 20-L-0462, Circuit Court of St. Clair County, Illinois; *Burnett v. Professional Credit Management*, Case No. 21OZ-CC00192, Circuit Court of Ozark County; *Staunton Lodge No. 177, A.F. & A.M. v. Pekin Insurance Company*, Case No. 2020-L-001297, Circuit Court of Madison County, Illinois; *Martin v. Wakefield & Associates, Inc.*, Case No. 19SL-AC12801-01, Circuit Court of St. Louis County (FDCPA class action); *Harding and Moore v. Wakefield & Associates, Inc.*, Case No. 18SL-AC26348-01, Circuit Court of St. Louis County; *Maierhoffer v. Blitt & Gaines, P.C.*, Case No. 17SL-CC04297, Circuit Court of St. Louis County; *Harris v. Wakefield & Associates, Inc.*, Case No. 1722-CC11907, Circuit Court of the City of St. Louis (FDCPA class action); *Moore v. Family Dollar Stores, Inc.*, No. 14-01542-JAR (E.D. Mo. 2016); *Wallach v. Federal Financial Group LLC*, Circuit Court of St. Louis County, No. 15SL-CC01040-01 (TCPA

case); *Kissel v. Liberty Acquisitions Servicing, LLC*, Case No. 1411-CC00504, Circuit Court of St. Charles County; *Lewis v. Spinnaker Resorts, Inc.*, Circuit Court of Christian County, No. 14AF-CC00413-01; *Harbison v. Litow & Pech, P.C.*, Circuit Court of St. Louis County, No. 12SL-CC03776-01; *Lemay v. Rocket Lawyer, Inc.*, Circuit Court of St. Louis County, No. 11SL-CC04557. In addition, I performed substantial work on *In re: Life Time Fitness Telephone Consumer Protection Act (TCPA) Litigation*, No. 14-MD-2564, 2015 WL 77337334 (D. Minn. 2015) affirmed by *In re: Life Time Fitness, Inc., Tel. Consumer Protection Act (TCPA) Litig.*, 847 F.3d 619 (8th Cir. 2017). My law partner, David T. Butsch, was named as the class counsel from our firm in this case.

12. Butsch Roberts & Associates LLC is an AV rated law firm which began operating under my law partner, David T. Butsch, on November 1, 2008. The firm specializes in complex civil litigation, with an emphasis on consumer class litigation. The two members of the firm, David T. Butsch and Christopher E. Roberts, have a combined litigation experience of more than 40 years.

13. Our firm is familiar with the laws and rules applicable to this case. Our firm is prepared to prosecute this case on behalf of the plaintiffs and the putative class and dedicate the resources necessary to do so. Our firm has participated in numerous cases involving the issue of labor depreciation.

14. This Declaration sets forth a brief summary of the background of this lawsuit and the settlement negotiations upon which Plaintiffs' counsel recommend that the Court preliminarily approve the settlement. I believe that these facts demonstrate that the settlement is fair, reasonable, and adequate, and should be preliminarily approved by the Court.

History of the Litigation, Discovery and Settlement

15. Plaintiff Giancristofaro filed suit against Defendant on December 12, 2022, in the United States District Court for the Eastern District of New York.

16. Plaintiff issued class-wide discovery to Defendant and Defendant responded to certain of Plaintiff's discovery requests.

17. Through discovery, I learned that there were 594 people who received post-opt out text messages from Defendant, and a total of 1,783 post-opt-out text messages to said persons.

18. The parties mediated the case with Retired Federal District Court Judge Herbert Hoffman on July 26, 2023. While the parties were unable to resolve the case at mediation, they made some progress toward settlement.

19. Over the course of the next few months, I continued to engage in arm's length negotiations with Defendant's counsel. The parties eventually reached the terms of a settlement and executed a formal settlement agreement in November 2023.

The Settlement Terms

20. The settlement class is defined as:

All persons identified by the records of Ima Pizza to whom Ima Pizza has sent text messages after the recipient requested to no longer receive text messages from Ima Pizza.

Settlement, Section 3. A "Settlement Class Member" includes any person included in the Settlement Class who does not properly opt out of the settlement. *Id.*

21. The Settlement provides that Defendant will make available up to \$750,000.00 to pay class members' claims, the cost of settlement administration, the representative service awards and attorneys' fees and litigation expenses. Each class member who submits a valid claim will receive up to \$372 per post-opt-out text message. This amount could be less depending on the number of valid claims submitted. However, based on my experience with claims-made

settlements and a review of historical claims rates, I currently expect each class member who makes a valid claim to receive \$372 per post-opt-out text message.

22. I believe this is an excellent result for the putative class, particularly given the many risk factors discussed below.

Service Award and Class Counsel Fees and Expenses

23. Pursuant to the parties' agreement, ERC agreed to pay, subject to Court approval, an amount no greater than \$240,000.00 in attorneys' fees and litigation expenses and amounts no greater than \$10,000.00 to Plaintiff Giancristofaro and \$5,000 to Plaintiff Poffenberger for their service in this case.

Factors Supporting Approval of the Settlement

24. The risk at the time of suit and settlement was and remains substantial. For example, there was considerable risk as to whether Plaintiff stated a viable claim for relief.

25. Moreover, damages were also not a guarantee. Section 227(c)(5) provides for *up to* \$500 per violation (and up to \$1,500 if the violation was willful). Thus, a Court of a jury could have awarded less than the amount made available to the class.

26. Defendant retained experienced litigators in this matter. Absent settlement, defense counsel would have continued to put forward several grounds for avoiding both liability and class certification.

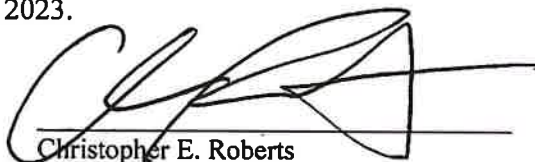
27. This settlement was not reached until Plaintiffs' counsel had conducted extensive pre- and post-suit analysis and investigation, completed written discovery, completed mediation, thoroughly researched the law and facts, and assessed the risks of prevailing at both the trial court and appellate levels.

28. Plaintiffs' counsel's analysis leads to the conclusion that the proposed settlement is a fair and reasonable result for the putative class. In the end, the risk assessment process conducted by Plaintiffs' counsel resulted in the conclusion that the proposed settlement is the best result for the class. This is true for several reasons, including the risk of losing at the class certification, liability, or damages stages. For example, the Court may not have certified a class. Even if the class prevailed upon certification as well as the liability and damages stages at one or more trials, Plaintiffs' counsel would likely have to incur substantial non-recoverable costs for, e.g., expert witnesses, jury consultant fees, etc. These costs would be set off against any recovery. Moreover, Plaintiffs' counsel's risk assessment had to account for the time value of money.

29. Based upon these and other factors and considerations, Plaintiffs' counsel recommends preliminary approval of the settlement.

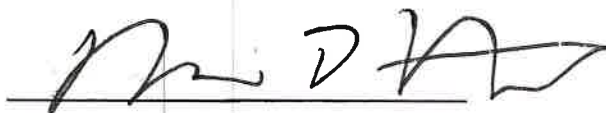
I declare under penalty of perjury that the foregoing is true and correct.

Executed this 20th day of November, 2023.


Christopher E. Roberts

Subscribed and sworn to before me this 20th day of November 2023.




Notary Public

IN THE CIRCUIT COURT FOR SAINT LOUIS COUNTY
STATE OF MISSOURI

MATTHEW GIANCRISTOFARO and)	
WILLIAM POFFENBERGER,)	
<i>individually, and on behalf of all others</i>)	
<i>similarly situated,</i>)	Case. No. 23SL-CC04108
)	
Plaintiffs,)	
v.)	
)	CLASS-ACTION
IMA PIZZA, LLC d/b/a &Pizza)	
)	
Defendant.)	

AFFIDAVIT OF JACOB U. GINSBURG

I, Jacob U. Ginsburg, Esq. hereby aver as follows:

1. I have been retained by Plaintiffs Matthew Giancristofaro and William Poffenberger for this matter.
2. I am an adult resident of the Commonwealth of Pennsylvania.
3. I have personal knowledge of the statements made in this affidavit.
4. I am of sound mind and am otherwise competent to make this affidavit.
5. I am counsel for the Plaintiffs Matthew Giancristofaro and William Poffenberger in this matter, and submit this affidavit in support of Plaintiffs’ unopposed motion for preliminary approval of class settlement.

Professional Background

6. I am a 2011 graduate of Temple University School of Law, where I was a Deans’ List student and Articles Editor of the Temple International and Comparative Law Journal.

7. I have been licensed to practice law before the Supreme Court of Pennsylvania since 2011, the Supreme Court of New Jersey since 2011 and the Supreme Court of Michigan since 2020. I am a member in good standing in each of those jurisdictions.

8. I have been admitted to practice law in the United States District Court for the Eastern District of Pennsylvania since 2011; the U.S. District Court for the District of New Jersey since 2011; the U.S. District Court for the Western District of Pennsylvania since 2011; the U.S. District Court for the District of New Jersey since 2011; the U.S. District Court for the Middle District of Pennsylvania since 2016; the U.S. District Court for the Eastern District of Michigan since 2018; the U.S. District Court for the Northern District of Ohio since 2019; the U.S. District Court for the Eastern District of Texas since 2020; the U.S. District Court for the Eastern District of Wisconsin since 2021; the U.S. District Court for the Northern District of Texas since 2021; the U.S. District Court for the Southern District of Texas since 2021; the U.S. District Court for the Southern District of Indiana since 2021; the U.S. District Court for the Eastern District of Arkansas since 2021; the U.S. District Court for the Western District of Arkansas since 2021; the U.S. District Court for the Northern District of Illinois since 2021; the U.S. District Court for the Western District of Texas since 2021; the Ninth Circuit Court of Appeals since 2022; the Third Circuit Court of Appeals since 2022 and the U.S. District Court for the District of Colorado since 2023.

9. I have never had my license suspended or been subject to any disciplinary proceedings.

10. For most of the time I have been an attorney, my practice has consisted of representing consumers in various types of consumer protection litigation.

11. I have argued, arbitrated and tried cases to verdict under various state consumer protection statutes, the Fair Debt Collection Practices, the Magnuson-Moss Warranty Improvement Act, and the Telephone Consumer Protection Act (“TCPA”).

12. I have represented hundreds of plaintiffs in claims asserted under the TCPA in federal court and private arbitration. Several recent notable TCPA decisions on matters I have argued, tried and/or briefed follow below:

- Successfully appealed a district court’s dismissal of a TCPA claim for lack of standing, to the Ninth Circuit, where a 3-0 panel expanded Article III standing to subscribers who are not the “customary user” of a given phone registered on the Do-Not-Call Registry. *Hall v. Smosh Dot Com, Inc.*, 72 F.4th 983 (9th Cir. 2023);
- Obtained a unanimous jury verdict for a plaintiff with claims under the federal do-not-call rules, despite the fact he used his phone for business purposes. *Noviello v. Adam Wines Consulting, LLC*, 3:22-cv-52-BN (ECF 74); *See also Noviello v. Holloway Funding Grp.*, No. 3:22-cv-52-BN, 2023 WL 128395 2023 U.S. Dist. LEXIS 3060 (N.D. Tex. Jan. 9, 2023) (overcoming summary judgment earlier in same case); and,
- Successfully argued that text messages offering to buy a home could constitute the “solicitations” as defined by the TCPA, even though the texting party was offering to buy, rather than sell property. *Pepper v. GVG Capital LLC*, No. H-22-2912, 2023 U.S. Dist. LEXIS 100425, 2023 WL 3914291 (S.D. Tex. June 9, 2023).

13. I am a member in good standing of National Association of Consumer Advocates.

14. In August 2016, I taught a seminar with the National Business Institute on the FDCPA, the Truth-in-Lending Act and Consumer Financial Protection Bureau’s regulations as they relate to mortgage foreclosures. NATIONAL BUSINESS INSTITUTE, Foreclosure Bootcamp: FDCPA, TILA and CFPB Regulations as to Foreclosures (Sonesta Hotel, Philadelphia, PA, (Aug. 2, 2016).

The &Pizza Litigation

15. I am co-counsel with Christopher Roberts of Butsch Roberts & Associates in this TCPA class-action against Ima Pizza, LLC d/b/a &Pizza.

16. I have been in communication with Matthew Giancristofaro and William Poffenberger throughout this litigation and the settlement negotiations.

17. I have been actively involved in the litigation and resolution of this case.

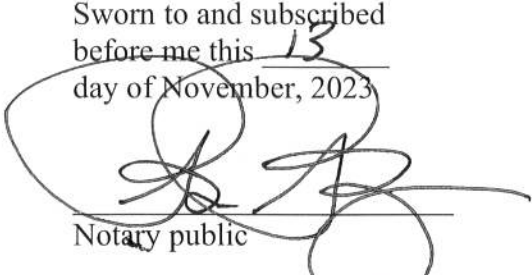
18. On October 12, 2023, I submitted a motion for admission *pro hac vice* for this action along with a receipt of payment to the Missouri Supreme Court.

19. I submit this affidavit in support of the motion for preliminary approval of the settlement agreement reached between the parties of this action.

I, Jacob U. Ginsburg hereby aver on this November 13, 2023, that the foregoing is true and correct, pursuant to 28 U.S.C. § 1746.


JACOB U. GINSBURG

Sworn to and subscribed
before me this 13
day of November, 2023


Notary public

Commonwealth of Pennsylvania - Notary Seal
Patricia Boyle, Notary Public
Montgomery County
My Commission Expires July 12, 2027
Commission Number 1229797