UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Craftwood Lumber Company, on behalf of itself and all others similarly situated, Plaintiffs, v. Senco Brands, Inc., Defendant.	Case No. 1:14-cv-06866 **Hon. John Robert Blakey**

Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Final Approval of Settlement and Certification of Settlement Class

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Introduction

The $3 million settlement obtained by Craftwood and its counsel represents an outstanding recovery for the class. The gross settlement provides an average $800 cash recovery for each class member. Unlike the vast majority of TCPA and other consumer settlements, class members need not submit claims or take any other action to receive payment. Rather, class members will be automatically compensated based on the number of successful fax transmissions reflected in SBI's business records. No settlement funds will revert to SBI.

Craftwood now asks the Court to enter an order that finally certifies the settlement class and grants final approval to the settlement. The settlement easily meets the standards for approval. The $800 average recovery dwarfs that of nearly all comparable junk fax settlements that have been approved in the Seventh Circuit in the last decade. Its automatic distribution and non-reversionary features also favorably distinguish it from other TCPA settlements, which typically require class members to submit claims, revert unclaimed funds to the defendant, and often impose artificial caps on class members' recoveries. Here the entire common fund (after fees and expenses are deducted) will be paid to class members.

The notice program approved by the Court and executed by the settlement administrator satisfies due process and Rule 23. Following preliminary approval, the settlement administrator executed a robust class notice plan. Based on SBI's transmission data and additional searches by the settlement administrator, informative class notice packages were received by 91 percent of the 3,731 class members to which SBI had transmitted the ads.

The class's reaction has been overwhelmingly positive. Hundreds of class members have updated their contact information to secure payments, and others have stepped forward to express strong support for settlement. No class members have objected or otherwise expressed dissatisfaction with the settlement. Only two class members−five hundredths of one

percent−have opted out.

The settlement's class-friendly terms, robust notice program, and strong class backing all provide strong support for final settlement approval. And the same considerations that supported the Court's order conditionally certifying the settlement class now warrant final certification.

Argument

I. The Implemented Notice Plan Satisfies Due Process

Rule 23 requires the class receive "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." FED. R. CIV. P. 23(e); *see also Kolinek v. Walgreen Co.,* 311 F.R.D. 483, 501 (N.D. Ill. 2015) (Kennelly, J.). As explained below, the notice procedure here easily satisfies due process and Rule 23.

A. The Class Notice Program Reached 91 Percent of the Class

The settlement administrator, Kurtzman Carson Consultants LLC, has successfully notified, by fax or mail, 91 percent of the class. (Robin Decl. ¶ 9.) To achieve this excellent result, KCC strictly followed the settlement's well-designed notice procedure. (D.E. 152 ¶ 7; Robin Decl. ¶¶ 4-16.)

To implement the notice plan, SBI delivered a Master Facsimile Transmission Record ("MFTR") to KCC. (Robin Decl. ¶ 4.) The MFTR contained the 3,731 unique fax telephone numbers to which SBI had successfully transmitted fax advertisements. The MFTR was organized by these fax telephone numbers, with associated names and addresses to create a list for class notice purposes. (*Id*.) For most entries the database had complete contact information. (*Id*.) For the rest, KCC conducted reverse fax telephone number look ups and Google searches. (*Id*.) Through these efforts, KCC obtained contact information for several more class members. (*Id*.) All told, KCC was able to obtain complete information for over 88 percent of the class.

On January 13, 2017, KCC sent packets containing a short-form notice and class member information form via facsimile to all fax telephone numbers in the MFTR. (D.E. 152 ¶ 7; Robin Decl. ¶ 5.) The class member information form asked members to update or correct their names and addresses so checks could be processed with the correct information. (Robin Decl. ¶ 5.) For class members with missing name or address information, a different version of the class member information form was included with their notice packet asking the member to complete the information form so that the settlement administrator had a current address. (*Id.*) The fax notice was extremely successful. Notice packets were received by 2,843 class members. (*Id.*)

After the first notice, KCC delivered 769 notice packets by mail to class members for whom a fax was unsuccessful. (Robin Decl. ¶ 6; D.E. 152 ¶ 7.) Through this second notice, KCC reached another 531 members. (Robin Decl. ¶ 8.) For the 238 mailed notices that were returned, KCC conducted additional searches for a current address. (*Id.*) KCC located another 48, and sent notices to the updated address; only 20 have been returned. (*Id.*)

All told, KCC appears to have successfully reached 3,394 presumptive class members, representing 91 percent of the class. (Robin Decl. ¶ 9.)[1] Although claim forms are unnecessary for this auto-distribution settlement, fully 584 class members completed and returned information forms to ensure settlement checks are sent to the proper address. (Robin Decl. ¶ 16.)

The notice plan approved by the Court and its implementation by KCC easily satisfy due process and Rule 23(e). Due process does not require that every class member receive actual notice, as long as the court selected a means likely to apprise interested parties. *See* Herbert B.

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[1] In addition to class notice, in compliance with the Class Action Fairness Act, 28 U.S.C. § 1715(b), SBI provided notice of the settlement to the attorney general or other appropriate official of each state and U.S. territory. (D.E. 153.) No objections or requests for hearings from any relevant authority have been filed.

Newberg and Alba Conte, Newberg on Class Actions, § 11:53 (4th ed. 2002); *In re AT&T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F. Supp. 2d 935, 968 (N.D. Ill. 2011) (St. Eve, J.). The notice plan here was likely to, and did in fact apprise interested parties of the settlement.

The exceptional result achieved by the plan speaks for itself. Indeed, although "Due Process…does not require perfection" (*In re Prudential Ins. Co. Sales Pracs. Litig.*, 177 F.R.D. 216, 234 (D.N.J. 1997)), the notice program here came awfully close by actually notifying 91 percent of the class. And even though Rule 23(e) does not require parties to "exhaust every conceivable method of identification," *Burns v. Elrod*, 757 F.2d 151, 154 (7th Cir. 1985), the settlement administrator did virtually that, performing skip traces and conducting Google searches for name and address information for the small number of class members whose addresses could not be located. *In re: Sears, Roebuck & Co. Front-loading Washer Prod. Liab. Litig.*, No. 06 C 7023, 2016 WL 772785, at *7 (N.D. Ill. Feb. 29, 2016) (Rowland, J.) (notice reaching about 89 percent of the class satisfied Rule 23 and Due Process); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 595–97 (N.D. Ill. 2011) (Dow, J.) (same). There should be no question the notice plan was a complete success.

B. The Class Notice Provided Necessary Information to Class Members

The class notice packets gave class members all information they needed to evaluate the settlement. Due process and Rule 23, however, require only that the notice "be reasonably calculated, under all of the circumstances, to apprize interested parties of the pendency of the settlement proposed and to afford them an opportunity to present their objections." William B. Rubenstein, 4 Newberg on Class Actions § 11:53 (4th ed. 2010); *see* 7B Charles Alan Wright, Arthur W. Miller & Mary Kay Kane, Fed. Prac. & Proc. § 1797.6 (3d ed. 2010).

By actually providing the precise settlement details, the class notice went well beyond

Rule 23 and due process. The notice provided a two-page summary of key settlement terms and procedures. The notice informed class members in plain, easily understood English, of: (1) the nature of the lawsuit; (2) the material terms of settlement; (3) how payment amounts will be calculated; (4) the amounts to be sought as attorneys' fees and incentive award; (5) all options available to class members;[2] (6) how members may opt-out; (7) how members may object; (8) the Court's preliminary certification of a settlement class and approval of settlement; and (9) the date, time and place of the final approval hearing. (Robin Decl. ¶ 5, Ex. A.) The notice also informed members how to obtain additional information by visiting the settlement website, by contacting KCC at a toll-free telephone number, and by accessing the Court file on PACER. (*Id.* at 2.) Indeed, 23 class members utilized the call center and there have been 3,748 hits on the website. (*Id.* ¶¶ 10, 14.)

The settlement website, www.sbisettlement.com, has a wealth of information. (Robin Decl. Ex. A at 1.) Since the website went live January 13, members have been able to access and download a more detailed notice of the settlement, a complete copy of the settlement agreement, and the Complaint. And immediately after motions are filed on April 5, the website will be updated to include the motion for final approval (and supporting documents); the motion for attorneys' fees and costs (and supporting documents); and Craftwood's motion for an incentive award (and supporting documents). The website has a tab for Frequently Asked Questions and also directs members to direct additional questions to and obtain additional information from the settlement administrator. (*Id.* ¶ 13, Ex. G.)

Because the parties have fully implemented the approved notice plan and the class notice

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[2] The first option was to "Do Nothing," in which case "you will receive a check for Faxes sent to your facsimile telephone number based on SBI's records." (Robin Decl. Ex. A at 2.)

fully apprised the class of the settlement and of their opportunity to object, the Court should affirm its finding at preliminary approval that the forms and methods of notice comply with Federal Rule of Civil Procedure 23(e) and due process. (D.E. 152 at 2.)

II. All Relevant Factors Strongly Support Final Approval

A proposed class settlement should be approved if the court, after allowing absent class members the opportunity to be heard, finds that the settlement is "fair, reasonable, and adequate." FED. R. CIV. P. 23(e)(2); *American Int'l Group, Inc. v. ACE INA Holdings, Inc.*, Nos. 07 CV 2898, 09 C 2026, 2012 WL 651727, at *1 (N.D. Ill. Feb. 28, 2012) (Gettleman, J.). Even so, "[f]ederal courts naturally favor the settlement of class action litigation." *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996); *see also In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992) (settlement is particularly favored in class actions, where the inherent costs, delays and risks of continued litigation might otherwise overwhelm any potential class benefit).

In deciding whether to give final approval to a class settlement, courts in this circuit consider: (1) the strength of plaintiffs' claims compared to the terms of the proposed settlement; (2) the likely complexity, length and expense of continued litigation; (3) the amount of opposition to settlement among affected parties; (4) the opinion of competent counsel; and (5) the stage of the proceedings and the amount of discovery completed. *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006) (citing *Isby*, 75 F.3d at 1199). Courts also consider the defendant's ability to pay. *Armstrong v. Board of Sch. Directors of City of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980), *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998). This settlement easily satisfies the standards for approval.

A. The Settlement's Guaranteed Financial Benefits for the Class Are a Much Better Result than Continued Litigation

As courts in this District have observed, the most important settlement approval factor is

"the relative 'strength of plaintiff's case on the merits balanced against the amount offered in the settlement.'" *Kolinek*, 311 F.R.D. at 493 (quoting *Synfuel Techologies*, 463 F.3d at 653). The strength of a plaintiff's case can be assessed by examining the expected value of continued litigation to the class. *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 284-85 (7th Cir. 2002); *see also In re Southwest Airlines Voucher Litig.*, No. 11-cv-8176, 2013 WL 4510197, at *7 (N.D. Ill. Aug. 26, 2013) (Kennelly, J.) ("In considering the strength of plaintiffs' case, legal uncertainties at the time of settlement favor approval."). At the same time, "[b]ecause the essence of settlement is compromise, courts should not reject a settlement solely because it does not provide a complete victory to plaintiffs." *Kolinek*, 311 F.R.D. at 494-95 (quotations omitted).

This factor weighs strongly in favor of approval. The $3 million settlement is exemplary under any standard. The gross settlement recovery averages $105 for each documented fax transmission, or about $800 per class member.[3] This settlement compares extremely well to the 24 other Seventh Circuit TCPA/junk fax settlements with common funds between $500,000 and $5 million in the last decade, as summarized in table 1.

TABLE 1.—*Summary of Comparable Seventh Circuit Class Settlements*[4]

Case	Year	Court	Recovery	Average Member Recovery	Structure[5]
Allscripts	2012	N.D. Ill. (Kim)	1,889,000	6	CM
Atlas	2013	E.D. Wis. (Adelman)	900,000	286	CM Rev.

[3] The estimates were made by dividing the $3 million settlement fund by the number of transmissions (28,393) and presumptive class members (3,731). (D.E. 107-5 at 80:20-86:5; D.E. 107-4 at 160:13-23; Robin Decl. ¶ 4.)

[4] The table abstracts cases identified in paragraph 3 of the Lem Declaration.

[5] "CM" indicates a claims-made settlement. "CM Rev." indicates a claims-made settlement with unclaimed funds reverting to the defendant.

Case	Year	Court	Recovery	Average Member Recovery	Structure[5]
CareCredit	2011	N.D. Ill. (Gottschall)	1,400,000	140	CM
CSL Biotherapies	2009	N.D. Ill. (Kendall)	2,750,000	138	CM
Cutera	2010	N.D. Ill. (Hibbler)	950,000	3	CM
Cy's Crab House	2011	N.D. Ill. (Kennelly)	3,647,500	856	CM
Finish Thompson	2010	N.D. Ill. (Kendall)	3,000,000	231	CM Rev.
Foxfire Printing	2013	N.D. Ill (Kapala)	1,545,126	54	CM Rev.
Great Western	2010	N.D. Ill. (Kim)	612,500	18	CM
Handit2 Network	2015	N.D. Ill. (Shah)	1,400,000	22	CM
Illinois Nut	2015	N.D. Ill (Alonso)	2,036,800	50	CM
Kinray	2010	N.D. Ill. (Gettleman)	501,685	47	CM
LaRoche-Posay	2011	N.D. Ill. (Hart)	1,000,000	140	CM
Lay	2010	S.D. Ill. (Regan)	1,737,500	500	CM
M and M Rental	2009	N.D. Ill. (Bucklo)	1,986,312	504	CM Rev.
Pizza Hut	2011	W.D. Wis. (Crabb)	1,296,000	936	CM Rev.
Preferred Chiro	2011	N.D. Ill. (Coleman)	1,551,000	389	CM Rev.
Rooflifters	2011	N.D. Ill. (Cox)	1,400,000	93	CM
Seiko Corp.	2011	N.D. Ill. (Bucklo)	3,500,000	135	CM Rev.
Sepracor	2011	N.D. Ill. (Pallmeyer)	2,430,000	87	CM
Topsail Sportswear	2011	N.D. Ill. (Kennelly)	2,000,000	190	CM Rev.
Trynex	2014	N.D. Ill. (St. Eve)	550,000	311	CM Rev.
UScoot	2010	N.D. Ill. (Keys)	25,000	5	CM
Zydus	2016	N.D. Ill. (Ellis)	1,000,000	11	CM
Average				**215**	

As reflected in the table, this settlement's $800 average is the third highest among comparable settlements on a "recovery per class member" basis. It is also almost four times greater than the $215 mean recovery. Even these favorable statistics, however, undervalue the settlement vis-a-vis those populating the table.

First, unlike the vast majority of junk fax settlements (including all those in table 1), this settlement provides for *automatic* distribution to the class. Members will be compensated without having to prove they received any faxes or even submit claims. (D.E. 145 § 3.C.) Members will be paid pro rata based on the number of successful fax ad transmissions to their phone numbers, as reflected in SBI's transmission records. (*Id.*) This key feature strongly supports a finding of reasonableness. *See In re: Checking Account Overdraft Litig.*, No. 1:09-MD-02036-JLK, 2013 WL 11319244, at *10 (S.D. Fla. Aug. 2, 2013) ("The automatic distribution process…further supports the conclusion that the Settlement is reasonable"). Indeed,

automatic distribution settlements are much more likely to result in meaningful compensation to the class than a claims-made settlement. *See* Brian T. Fitzpatrick & Robert C. Gilbert, *An Empirical Look at Compensation in Consumer Class Actions*, 11 N.Y.U. J.L. & Bus. 767, 770 (2015).[6] This Court is aware of the low claims rate in junk fax litigation from the recent Heidbreder Building matter (*Heidbreder Bldg. Group, LLC v. Ass'n of the Wall and Ceiling Indus.*, Case No. 14 C 6913 (Dkt. 55, 58) (N.D. Ill. June 16 and 28, 2016)), where a mere 59 of 1,841 class members reaped the benefits of that settlement. *Id*.

Second, unlike here, where class members will be paid for *all* faxes, several settlements in the table set arbitrary ceilings on the claimants' recoveries regardless of how many faxes they received. *See, e.g., Sawyer v. Atlas Heating and Sheet Metal Works Inc*., No. 2:10-cv-00331 (Dkt. 53-1) (E.D. Wis. Mar. 8, 2013) (claimants' recovery capped at $400 with potential further reduction if sum of claims exceeds fund); *Sturdy v. Ceva Animal Health, LLC,*, No. 3:12-cv-03201 (Dkt. 18-2) (C.D. Ill. Dec. 5, 2012) (recovery capped at $1,000 per fax number regardless of number of faxes received); *Saf-T-Gard Int'l, Inc. v. Seiko Corp. of Am*., No. 1:09-cv-00776 (Dkt. 98-2) (N.D. Ill. Jan. 7, 2011) (recovery capped at $375 regardless of number of faxes received).

Third, there is no reversion to SBI under this settlement. If a class member can't be located or fails to cash the settlement check, the leftover funds will be redistributed to those that

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[6] The settlement even stands out when compared to "per-claimant" recoveries in recently approved, non-junk fax claims-made TCPA settlements in this District. In these recent settlements, even class members who submitted claims forms received far less than will the class members here who do not need to submit claims forms to be paid. *See, e.g., Gehrich v. Chase Bank, USA, NA*, 316 F.R.D. 215 (N.D. Ill. 2016) (Feinerman, J.) (gross recovery of $1 per class member but $52.50 per claimant); *In re Capital One Tel. Consumer Prot. Act Litig*., 80 F. Supp. 3d 781, 789 (N.D. Ill. 2015) (Holderman, J.) ($2.72 per class member, $34.60 per claimant); *Kolinek,* 311 F.R.D. at 493–94 ($1.20 per class member, $30 per claimant); *Wilkins v. HSBC Bank Nev., N.A.,* No. 14 C 190, 2015 WL 890566, at *5 (N.D. Ill. Feb. 27, 2015) (Holderman, J.) ($2.95 per class member, $93.22 per claimant).

cashed their settlement checks. (D.E. 145 § 3.C.) As reflected in table 1, nearly half of comparable junk fax class settlements in the circuit over the last decade have reverted all unclaimed funds to the defendant. Craftwood's negotiation of a settlement redistributing the funds to the class supports a finding that the settlement is fair and reasonable. *See* William B. Rubenstein, 4 Newberg on Class Actions § 12:29 (5th ed. 2016) (settlements providing for reversion of unclaimed funds are "disfavored").

As a result of these class-friendly features, the parties anticipate that most, if not all, net settlement proceeds will be received by class members at addresses on file or found by the settlement administrator. This automatic distribution, non-reversionary settlement provides an *actual* $3 million gross recovery for the class, as opposed to the majority of TCPA settlements that provide for a "maximum potential recovery" that is never reached due to a low claims rate.

The ultimate benefit to the class of continued litigation, on the other hand, would have been highly uncertain. When the case settled, Craftwood faced two pending motions that sought to prevent Craftwood from proceeding as class representative. The first was a motion for summary judgment alleging that Craftwood had consented to receive the faxed ads. (D.E. 133.) The second sought dismissal under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016), *as revised* (May 24, 2016),[7] or, in the alternative, on mootness grounds because of SBI attempts to

[7] Craftwood and its counsel believe the motion premised on standing would fail because every circuit court to consider the issue has held that receipt of junk faxes confers Article III standing on the recipients. *See, e.g., Imhoff Invest., L.L.C. v. Alfoccino, Inc.*, 792 F.3d 627, 633 (6th Cir. 2015); *Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1251 (11th Cir. 2015). Indeed, "unsolicited fax advertisements impose costs on all recipients, irrespective of ownership and the cost of paper and ink, because such advertisements waste the recipients' time and impede the free flow of commerce." *American Copper & Brass v. Lake City Indus. Prods., Inc.*, 757 F.3d 540, 544 (6th Cir. 2014). (*See* Cordero Decl. ¶ 16.)

pick-off Craftwood with settlement offers and tenders. (D.E. 134.)[8] The Court gave SBI's motions priority and ordered that SBI's motions were to be resolved before SBI would be required to oppose Craftwood's amended class certification motion. (D.E. 140.) Although Craftwood believed it would defeat the motion, conflicting case law created real risk that SBI might prevail. (*See* Cordero Decl. ¶¶ 16-17.)

Class certification presented its own risks. In particular, there was a risk that SBI could successfully argue that individualized inquiries surrounding consent precluded certification. *See Chapman v. First Index, Inc.*, No. 1:09-cv-05555, 2014 WL 840565, at *3 (N.D. Ill. Mar. 4, 2014) (Ellis, J.). Indeed, courts have denied certification where the court "would have to engage in a class-member-specific inquiry to determine whether each recipient" gave permission or had an EBR at the relevant time. *G.M. Sign, Inc. v. Brinks Mfg. Co.*, No. 09 C 5528, 2011 WL 248511, at *8 (N.D. Ill. Jan. 25, 2011) (St. Eve, J.).

Here, SBI contended that it sent faxes only to its customers. (D.E. 107-6 at Resp. to Interrogatory No. 2; *see also* D.E. 107-5 at 24:18-25:6.) To establish the requisite consent, SBI argued that customer permissions acquired by Senco Products, Inc., were transferred to SBI through a 2009 bankruptcy sale. (*Id.*)[9] SBI contended that class members gave permission to

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[8] Craftwood and its counsel believe the motion to dismiss on mootness grounds would fail because, among other things, Craftwood had moved for class certification long before SBI's began its attempts to pick-off Craftwood. (D.E. 3-1, 3-2.) *See Damasco v. Clearwire Corp.*, 662 F.3d 891, 895 (7th Cir. 2011), *overruled on other grounds in Chapman v. First Index, Inc.*, 796 F.3d 783 (7th Cir. 2015). But recently the Supreme Court left open the possibility that a defendant might moot a case by depositing the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court enters judgment for the plaintiff in that amount. *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672 (2016), *as revised* (Feb. 9, 2016). Shortly after *Campbell-Ewald*, SBI twice attempted this strategy by delivering cashier's checks to Craftwood's attorneys for what SBI contended was the full amount due on Craftwood's individual claim. Even after Craftwood failed to accept these offers, SBI was undeterred and moved to deposit funds under authority of Rule 67. (*See* D.E. 134.)

[9] SBI was formed in mid-2009 after its parent company bought the assets of Senco Products, Inc., in bankruptcy. (D.E. 107-5 at 17:8-18, 19:13-20:7, 33:4-36:1.) The court order approving

(footnote continued)

Senco Products (and thus SBI) through a number of methods, including credit applications and discussions with sales representatives. (D.E. 146-2 ¶ 22 n.6, Ex. B, at response 2.) SBI produced almost 300 pages of supposed individualized contacts with customers that it contended identified different instances of permission. (D.E. 107-1 ¶¶ 8-11, Ex. E.)

In addition to arguing that these forms of alleged consent required individualized inquiries, SBI also would have asserted that Craftwood was not an adequate class representative or that its claims failed to satisfy typicality because Craftwood allegedly provided PEP to Senco Products. While Craftwood would counter that this actually supports a finding of adequacy and typicality (and commonality) because the issue of PEP via consents allegedly given to Senco Products is a common issue, the issue still posed a serious risk.

SBI also asserted that it had permission to send fax advertisements to anyone that provided a fax telephone number to the company. (D.E. 107-6 at Resp. to Interrogatory No. 2.) Craftwood believes it could have persuasively argued that SBI did not individually request permission to send faxed ads, but merely collected fax numbers. Indeed, whether this meets the requirements of the TCPA is a common issue. Nonetheless, because there are some cases denying class certification, the certification process carried some risk.

Trial, of course, would carry its own risks. SBI would have advanced its PEP arguments that permissions given to Senco Products transferred to SBI, and that SBI had permission to send faxes to any customer that had previously provided it with a fax number. These PEP defenses would have been bolstered by the D.C. Circuit's recent holding that FCC regulations requiring opt-out notices on *solicited* faxes were outside of its statutory authority. *Bais Yaakov of Spring*

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the transaction, however, made clear that SBI was *not* a successor to the bankrupt Senco Products. (*Id.* 39:23-41:24.)

Valley v. FCC, No. 14-1234, 2017 WL 1192909 (D.C. Cir. Mar. 31, 2017) As a result, if SBI had been able to prove that class members consented to the fax ads, it would have defeated the class's claims.

Even assuming Craftwood overcame these issues, recovery of the full statutory damages would have been far from certain. There remained the serious risk that SBI would have been unable to pay a class-wide judgment. Given 28,000+ documented fax ad transmissions, SBI's potential class liability was around $14 million. Craftwood's expert, Robert Sherwin, reviewed SBI financials and other data, and concluded there were serious questions whether SBI could satisfy a $14 million judgment. (Sherwin Decl. ¶ 10.) Mr. Sherwin opines that SBI would likely commence a bankruptcy proceeding if faced with a judgment of that size. (*Id*.) Given SBI's financial situation and the discounting of assets in a bankruptcy scenario, the class could have received little, if anything—and certainly far less than the settlement provides.

These practical limits on SBI's ability to pay are highly relevant to the fairness question. *See Redman v. RadioShack Corp*., 768 F.3d 622, 632 (7th Cir. 2014). In fact, courts in this district recognize the defendant's practical financial limitations in approving TCPA class settlements. *See, e.g., CE Design Ltd. v. King Supply Co*., No. 09 C 2057, 2012 WL 2976909, at *3-4 (N.D. Ill. July 20, 2012) (Schenkier, J.) (defendant's $200,000 settlement payment warranted, despite $335 million TCPA exposure, because "its ability to pay any judgment was extremely limited").

The uncertainty of these issues heavily supports settlement. As the Seventh Circuit has stressed, "[a] high degree of precision cannot be expected in valuing a litigation, especially regarding the estimation of the probability of particular outcomes." *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 285 (7th Cir. 2002). The settlement is concrete and measurable—a guaranteed $3 million recovery with no reversion to SBI. As Craftwood's expert points out, a

"settlement of $3 million is…in financial terms a superior solution to the plaintiff class compared with going through trial, appeal and a potential bankruptcy proceeding." (Sherwin Decl. ¶ 13.)

B. The Likelihood that Intense Litigation of This Action Would Have Continued for Years Supports Final Approval

Had this case not settled, hard fought litigation would have continued for years, as SBI continued its well-demonstrated delay litigation strategy.[10] The Seventh Circuit has instructed courts to consider the likely complexity, length, and expense of continued litigation when determining whether a class action settlement satisfies Rule 23(e)(2). *Synfuel Technologies*, 463 F.3d at 653. Because final approval is favored in cases such as this where "[s]ettlement allows the class to avoid [these risks] associated with continued litigation" (*Schulte v. Fifth Third Bank,* 805 F. Supp. 2d 560, 586 (N.D. Ill. 2011) (Dow, J.)), this factor weighs in favor of approval.

Through heated and protracted legal battles over discovery, two motions to stay, a motion to dismiss and a motion for summary judgment, SBI and its legal team have proven to be relentless adversaries. As discussed above, when the parties agreed to settle, SBI had two pending motions seeking to prevent Craftwood from proceeding as class representative. If SBI succeeded on either, Craftwood would have been disqualified as a named plaintiff and the ultimate class prospects would have been highly uncertain.

Absent settlement, the parties were headed for interlocutory appeals, trial, post-trial motions and/or appeals. If, as Craftwood expects, the Court would have certified the class, SBI

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[10] For example, SBI moved for, and was granted, a stay between December 2014 and May 2015, because it had filed an application for a retroactive waiver with the FCC. (D.E. 37, 42.) Then, only a few months after that stay was lifted, SBI filed another motion to stay the case, this time until the Supreme Court's rulings in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), and *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). (D.E. 55.) And throughout this time, SBI fought Craftwood and its counsel on nearly all discovery, resulting in delays and, ultimately, Craftwood's filing of multiple discovery motions. (D.E. 57, 87, 121.)

probably would have sought immediate appellate review under Rule 23(f). *See CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 722-723 (7th Cir. 2011). Although a strong showing is required for interlocutory review of class certification orders, *Chapman v. Wagener Equities, Inc.*, 747 F.3d 489, 491 (7th Cir. 2014), SBI likely would have argued that certification would risk a "catastrophic judgment" – an important Rule 23(f) factor. Any appeal would have delayed class relief for a year or more.

Even after trial, any recovery could be delayed for years by another appeal. SBI could have challenged the class certification order and any jury verdict on both the merits and on due process grounds. Additionally, in the Court of Appeals, the class would risk possible dismissal for lack of Article III standing. While Craftwood is confident it would have defeated SBI's "no standing" argument (*e.g., Heather McCombs, D.P.M., L.L.C. v. Cayan LLC,* No. 15 C 10843, 2017 WL 1022013, at *4 (N.D. Ill. Mar. 16, 2017) (Durkin, J.)), there is nevertheless a risk that this Court, the Seventh Circuit or the Supreme Court might disagree. And of course, an SBI bankruptcy filing at any time in this process would delay recovery even longer.

Finally, even if Craftwood was able to successfully obtain a large judgment for the class that was upheld on appeal (and SBI could pay it, which is uncertain), the present value of any such judgment must be significantly reduced. For example, the time value of money would reduce a hypothetical $14 million judgment obtained three years in the future by nearly $4 million. (Sherwin Decl.¶ 12.); *see also In re AT&T Mobility II,* 789 F. Supp. 2d at 961 (recovery of dollars today rather than after appeals supports settlement); *Lipuma v. American Express Co.*, 406 F. Supp. 2d 1298, 1322 (S.D. Fla. 2005) (likelihood that appellate proceedings could delay class recovery "strongly favor[s]" approval of a settlement). The likelihood of substantial continued litigation for years strongly support final approval.

C. The Class Strongly Supports the Settlement

The lack of objectors challenging a settlement supports a finding that the settlement is "fair and reasonable." *American Civil Liberties Union v. United States Gen. Servs. Admin.*, 235 F. Supp. 2d 816, 819 (N.D. Ill. 2002) (Castillo, J.). Only two class members elected to opt-out of the class. (Robin Decl. ¶ 17.)[11] To date no class members have objected to the settlement, and none have expressed dissatisfaction with the settlement. (*Id*. ¶ 17-18.) At the same time, 584 class members have completed class member information forms providing or correcting their current addresses to ensure they receive their settlement check. (*Id*. ¶ 16.) Other class members have provided declarations expressing strong support for the settlement. (*See* Schade Decl.) The class's overwhelming backing is powerful support in favor of the settlement. *See AT&T Mobility II*, 789 F. Supp. 2d at 965 (settlement supported by "remarkably low" .01 opt-out percentage and only 10 specific objections).

D. Class Counsel Favors Approval

The next factor courts consider is the opinion of counsel regarding the fairness, reasonableness and adequacy of the settlement. *Synfuel*, 463 F.3d at 653. Courts are "'entitled to rely heavily on the opinion of competent counsel'" regarding settlement. *Gautreaux v. Pierce*, 690 F.2d 616, 634 (7th Cir. 1982) (quoting *Armstrong*, 616 F.2d at 325). Lead Class Counsel Darryl Cordero has prosecuted numerous TCPA class actions and is experienced in the issues and potential defenses. (Cordero Decl. ¶¶ 4-7.) He strongly recommends the proposed settlement because it ensures substantial compensation to the class and avoids significant risks that the class could recover nothing. (*Id*. ¶ 9, 18; Sherwin Decl. ¶ 10.)

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[11] The deadline for class members to exclude themselves from the settlement was March 17, 2017, and the deadline for objections is May 2, 2017.

E. Stage of the Proceedings

The stage of the proceedings at which this settlement was reached also strongly favors final approval. This factor "is important because it indicates how fully the district court and counsel are able to evaluate the merits of plaintiffs' claims." *Armstrong*, 616 F.2d at 325.

This settlement did not come easy or early. Class Counsel diligently prosecuted this case for over two years. At all times Class Counsel confronted a tenacious, skilled defense by SBI's veteran class action defense team. The Court is well aware of the case's progress from the numerous discovery motions, dispositive motions, and class certification briefing. The Court and counsel, therefore, are in an excellent position to evaluate the merits of the proposed settlement versus continued litigation. As such, the stage of the proceedings and amount of discovery completed support final approval. *See American Int'l Group, Inc. v. ACE INA Holdings, Inc.*, No. 07 C 28998, 2011 WL 3290302, at *8 (N.D. Ill. July 26, 2011) (Gettleman, J.) ("extensive discovery has undisputedly been completed…and it is impossible to say that the court and the parties are unable to evaluate the merits of this case").

III. Certification of the Settlement Class Is Appropriate

In its preliminary approval order, the Court conditionally certified a settlement class of subscribers of telephone numbers to which SBI sent a facsimile advertisement during the class period. (D.E. 152 ¶ 2.) The same considerations now warrant final certification. Indeed, it is the consistent practice in this district to certify TCPA junk fax settlement classes. (*See* table 1, *supra*, p. 8; D.E. 150 at 7 [identifying recent certifications of junk fax classes in this district].) Even in contested class certification proceedings the strong trend line is to certify classes of junk fax recipients. *See Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682,684 (7th Cir. 2013); *CE Design Ltd. v. King Architectural Metals, Inc.*, 271 F.R.D. 595, 600 (N.D. Ill. 2010) (Bucklo, J.) (observing that "the weight of authority, particularly in this District," supports certification of

junk fax class actions); *see also Chapman v. Wagener Equities, Inc.*, No. 09 C 07299, 2014 WL 540250, at *16 (N.D. Ill. Feb. 11, 2014) (Tharp, J.); *Savanna Group, Inc. v. Trynex, Inc.*, No. 10 C 7995, 2013 WL 66181 (N.D. Ill. Jan. 4, 2013), and 2013 WL 626981 (N.D. Ill. Feb. 20, 2013) (St. Eve, J.); *Mussat v. Global Healthcare Res.*, No. 11 C 7035, 2013 WL 1087551 (N.D. Ill. Mar. 13, 2013) (Gottschall, J.). As explained below, this case satisfies all prerequisites for class certification under Rule 23.

A. The Case Satisfies All Rule 23(a) Prerequisites for Class Certification

1. The class is numerous

The class satisfies Rule 23(a)'s numerosity condition because there is a class of over 3,700 fax ad recipients (Robin Decl. ¶ 4), making individual joinder impracticable. *See McCabe v. Crawford & Co.*, 210 F.R.D. 631, 643 (N.D. Ill. 2002) (Castillo, J.) (class of forty sufficient).

2. Common issues affect all class members

Rule 23(a)(2) requires only that class members share at least one common question of law or fact. *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998). And because the "requirement does not necessitate every class member's factual or legal situation to be a carbon copy of those of the named plaintiffs,…the low commonality hurdle is easily surmounted." *Kaufman v. American Express Travel Related Servs.* Co., 264 F.R.D. 438, 442 (N.D. Ill. 2009) (Gottschall, J.) (internal quotation marks omitted). This case comfortably satisfies this minimal standard. All class member claims arise from the same standardized conduct—SBI's mass fax advertising program. Additionally, all class members have the exact same claims and are entitled to the exact same relief under the TCPA.

3. Craftwood's claims are typical of those held by the class

Craftwood's claims also satisfy Rule 23(e)'s typicality requirement. "A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims

of other class members and his or her claims are based on the same legal theory." *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983); *see also Physicians Healthsource, Inc. v. A-S Medication Sols., LLC*, No. 12-CV-05105, 2016 WL 5390952, at *8 (N.D. Ill. Sept. 27, 2016) (Gottschall, J.) (typicality met because defendants "acted consistently toward the entire class, and all claims… are based on the same legal theory, i.e., transmission of faxes in violation of the TCPA."). Merely because there are "factual distinctions between the claims of the named plaintiffs and those of other class members" does not mean that typicality is not present; "similarity of legal theory may control even in the face of differences of fact." *De La Fuente*, 713 F.2d at 231; *see also Bridgeview Health Care Ctr., Ltd. v. Clark,* 816 F.3d 935, 940 (7th Cir. 2016) (class representative belonging to a subclass of fax recipients that could not recover from defendant was adequate since it was in the same position as most fax recipients and "had the same interest: to obtain the $500-per-recipient penalty for faxes violating the TCPA").

Here, the parties stipulated that "Plaintiff's claims are typical and arise from the same event or practice or course of conduct that gives rise [to] the claims of the other Settlement Class members and its claims are based on the same legal theory." (D.E. 145 § 2.) Craftwood's claims arise from the same fax program as all other class members and the claims are all based on the same legal theories—SBI's transmission of faxes in violation of the TCPA. The process by which SBI faxed its ads to Craftwood was the same as the process SBI used to fax its ads to the rest of the class. (D.E. 107-4 at 95:9-19.) Indeed, all the ads were created by SBI's marketing department and sent by a core group of inside sales representatives. (D.E. 134-6 at Resp. to Interrogatory No. 24.) Craftwood and the class received those promos advertising the commercial availability and quality of SBI goods. (D.E. 107-2 at 14:15-19:20, 58:19-60:23; D.E. 107-3 at 59:13-61:7, 74:9-75:15, 92:13-94:8.) All faxes were sent through SBI's Faxmaker program in a process that didn't vary by class member. (*See, e.g.*, D.E. 107-2 at 14:15-19:20, 58:19-60:23, D.E. 107-3 at 59:13-61:7, 95:9-

19; 121-7 ¶¶ 3-8.) Craftwood is also entitled to the same damages and injunctive relief as the rest of the class. The nexus between Craftwood's claim and the claims of the class demonstrates perfectly why courts in this district routinely find the typicality element satisfied in junk fax cases. *See, e.g., Mussat*, 2013 WL 1087551, at *5; *G.M. Sign, Inc. v. Finish Thompson, Inc.*, No. 07 C 5953, 2009 WL 2581324 *5 (N.D. Ill. Aug. 20, 2009) (Kendall, J.); *CE Design v. Beaty Constr., Inc.*, No. 07 C 3340, 2009 WL 192481, at *5 (N.D. Ill. Jan. 26, 2009) (Hibbler, J.).

4. Craftwood and its counsel have adequately protected the class

Rule 23(a)'s final requirement is that the class representative must "fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4). As set forth in greater detail in Plaintiff's motion for preliminary approval, the adequacy analysis is easily met. Craftwood's President, David Brunjes, has demonstrated a strong commitment to the case and to the cause of fighting junk faxing. (D.E. 146-1.) Craftwood remained steadfast in the face of numerous SBI attempts to pick it off with increasing settlement tenders. Likewise, Craftwood's attorneys are highly experienced, have successfully prosecuted numerous junk fax class actions, and have diligently prosecuted this action. (Cordero Decl. ¶¶ 4-10, 21.)

B. The Proposed Class May Be Maintained Under Rule 23(b)(3)

Rule 23(b)(3) requires that common questions of law and fact predominate and that a class action is a superior method of resolution. FED. R. CIV. P. 23(b)(3). Both elements are easily satisfied here.

1. Common questions predominate

A leading treatise recognized that junk fax cases will ordinarily satisfy the predominance requirement because "a coordinated and widespread transmission of similar faxes...to numerous recipients constitutes a common course of conduct by the defendant." Joseph M. McLaughlin, McLaughlin on Class Actions § 2:20 (West 12th ed. 2015) (collecting cases). Class-wide issues

predominate here, as in most other junk fax cases, because liability for mass junk fax transmissions necessarily focuses on standardized conduct by the defendant. Indeed, the evidence determinative of "defendant's liability relate[s] to the transmission of the faxes and do[es] not relate to the individual recipients." *Reliable Money Order, Inc. v. McKnight Sales Co.*, 281 F.R.D. 327, 338 (E.D. Wis. 2012), *aff'd*, 704 F.3d 489 (7th Cir. 2013). Courts regularly find that mass junk fax operations thus satisfy the predominance inquiry. *See, e.g.*, *Hinman v. M & M Rental Ctr., Inc.*, 545 F. Supp. 2d 802, 806 (N.D. Ill. 2008) (Bucklo, J.); *G.M. Sign, Inc. v. Group C Commc'ns, Inc.*, No. 08-CV-4521, 2010 WL 744262, at *6 (N.D. Ill. Feb. 25, 2010) (Darrah, J.).

Common questions define this junk fax case in particular. Among the many case-dispositive questions that can be resolved identically for all class members are: (1) whether the junk faxes were "unsolicited" in violation of the act (including whether permissions allegedly held by Senco Products were transferred to SBI); (2) the legal effect of SBI's failure to place opt-out notices in any faxes; (3) SBI's constitutional defenses; (4) the measure of damages; (5) whether SBI's violations were "knowing" or "willful"; and (6) if so, whether damages should be enhanced on account of a knowing or willful violation. (D.E. 150 at 10-12.)

2. A class action is the superior form of dispute resolution

The second Rule 23(b) element – superiority of class adjudication – is also easily satisfied here. As set forth in Craftwood's preliminary approval brief, the class action device was designed for this case: a large number of claims that would be uneconomical to pursue individually. Because the TCPA lacks a fee-shifting provision, individual litigants would sustain legal fees far exceeding their expected recovery at only $500 per fax transmission or, even less likely, find lawyers willing to prosecute their claims on a contingency basis. Only by aggregating their claims can class members effectively challenge SBI's defiance of the TCPA.

See Chapman, 2014 WL 540250, at *16 (the $500 statutory recovery gives "individual plaintiffs...a low incentive to bring a lawsuit on their own behalf"); *Mussat*, 2013 WL 1087551, at *7 (simple economics make it unlikely individuals will pursue TCPA actions on their own).

For these reasons, courts overwhelmingly hold class actions to be the superior method of adjudicating mass violations of the anti-junk fax laws. *See Dr. Robert L. Meinders, D.C., Ltd v. Emery Wilson Corp.*, No. 14-CV-596-SMY-SCW, 2016 WL 3402621, at *7 (S.D. Ill. June 21, 2016) (junk fax claims "are ideal for resolution as a class action"); *Hinman*, 545 F. Supp. 2d at 807; *Mussat*, 2013 WL 1087551, at *7. This case is no different.

Conclusion

For the foregoing reasons, Craftwood respectfully requests that the Court grant final certification of the settlement class and grant final approval to the class settlement.

DATED: April 5, 2017

PAYNE & FEARS LLP

/s/ C. Darryl Cordero
C. Darryl Cordero
Attorneys for Plaintiff Craftwood Lumber Company, on behalf of itself and all others similary situated

CERTIFICATE OF SERVICE

The undersigned, an attorney, states that on this fifth day of April, 2017, he caused the foregoing **Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Final Approval of Settlement and Certification of Settlement Class** to be filed electronically with the Clerk of Court using the CM/ECF system, and which will send electronic notification to the following:

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