IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIAN KEIM, an individual, on behalf of himself and all others similarly situated, Plaintiff, v. ADF MIDATLANTIC, LLC, a foreign limited liability company, AMERICAN HUTS INC., a foreign corporation, ADF PIZZA I, LLC, a foreign limited liability company, ADF PA, LLC, a foreign limited liability company, and PIZZA HUT, INC.,* a foreign corporation Defendants.	)	Case No. 9:12-cv-80577 Hon. Judge Kenneth A. Marra Magistrate Judge William Matthewman

DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

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* Effective as of May 20, 2016, Pizza Hut, Inc. was merged into Pizza Hut, LLC, and thus no longer exists. To avoid confusion, this brief will continue to use Pizza Hut, Inc.

REQUEST FOR HEARING

Pursuant to Local Rule 7.1(b)(2), Defendants respectfully request oral argument on Plaintiff's Motion for Class Certification. Plaintiff's Motion involves the novel attempt to certify a putative "friend-forwarded" class, predicated on the provision of a party's phone number to Defendants by a third party. Defendants believe that, given the "rigorous analysis" required of each of the Rule 23 factors, and the novel nature of Plaintiff's putative class, oral argument will aid the Court's analysis. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011). Further, Defendants believe that, in light of the voluminous evidence submitted through both Plaintiff's Motion and Defendants' opposition, oral argument will further aid the Court. *See, e.g.*, *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1267 (11th Cir. 2009) ("[A] district court's factual findings must find support in the evidence before it.").

Oral argument on this motion should last approximately one hour.

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Defendants ADF Midatlantic, LLC, American Huts Inc., ADF Pizza I, LLC, ADF PA, LLC (the "ADF Defendants") and Pizza Hut, Inc. (collectively, "Defendants") respectfully submit this Opposition to Plaintiff's Motion for Class Certification.

PRELIMINARY STATEMENT

This case involves friend-forwarded text messages, which are messages for which persons signed up their friends and family and, notably, other numbers on their own family plans. From 2011 through 2012, the ADF Defendants conducted a text messaging program that allowed customers to enroll to receive text messages. At the time this program began—and throughout its duration—it was legal to send such messages based on prior express consent. That is, consent could be manifested in myriad ways including orally or by simply sending in one's number in response to a call to action. The FCC did not begin to require prior express *written* consent until October 16, 2013. Plaintiff does not challenge this aspect of the program.

From late 2010 through 2011, the ADF Defendants implemented the "friend-forwarder" aspect where those that had already signed up were sent a text message asking whether they wanted to sign up their friends and family for similar messages. Then, and only then, did the registrants (the "friend-forwarders") make the decision to send in the numbers of their friends and family or other numbers for which they subscribed. This putative class action lawsuit challenges this aspect of the text program, and Plaintiff seeks to certify a nationwide class of "friend-forwardees." This case cannot be maintained as a class action for a multitude of reasons.

First, and foremost, individualized issues of consent necessarily predominate. Consent is a threshold and dispositive issue in TCPA cases. Put another way, Plaintiff must establish that the issue of consent can be addressed on a class-wide basis. Where individualized evidence of consent among the putative class exists, courts—including numerous courts in this District—routinely deny certification. Notably, this case **does not** involve Defendants speculating that friend-forwardees may have consented; rather, the following evidence of consent exists:

- Subpoena responses from Verizon, US Cellular and Sprint establish that over **1,000** members of Plaintiff's putative class—at least 10%—were forwarded by a person on the same plan (*i.e.*, the family plan account holder), and thus consented;
- **53** declarations were collected establishing (i) prior express consent was routinely obtained prior to forwarding any numbers, (ii) friends often forwarded in numbers on their family plans for which they themselves could consent; and (iii) friends often forwarded in close acquaintances and family members after first obtaining their verbal consent.

- Over **600** members of Plaintiff's putative class consists of persons who were forwarded in and then subsequently participated in the text program and signed up their own friends. This is evidence that the friend-forwardees who subsequently participated wanted the messages at issue and provided prior express consent.

- Over **500** members of Plaintiff's putative class subsequently responded "yes" to a message asking if they wished to continue receiving the messages at issue, which is strongly indicative that consent was obtained in the first place.

Defendants have not relied on conjecture in arguing that individualized issues predominate; ratther this evidence establishes consent will be a fact-intensive, individualized inquiry.[1]

Plaintiff seeks to represent a class of persons whose phone numbers were forwarded into the text message program by their friends and family and the account holders of their cell phones. There is absolutely no way to adjudicate the issue of consent on a general basis because the existence of consent or lack thereof necessarily depends on the conversation and relationship between the friend-forwarder and friend-forwardee—an inherently individualized process. Plaintiff simply presumes anyone whose number was forwarded by a third party *ipso facto* could not have consented. This self-serving assumption is directly contradicted by the evidence, which establishes consent is the predominating issue in this case. Indeed, Plaintiff's counsel made an identical argument in *Ung v. Universal Acceptance Corporation*, which was rejected just a few weeks ago. *See* No. 15-127, 2017 WL 354238 (D. Minn. Jan. 24, 2017) (denying class certification) (attached as Exhibit 1.) As in *Ung*, there is no theory or common evidence that will allow this Court to resolve the issue of consent on a class basis. Under Rule 23(b), *Plaintiff* has the burden to advance a theory of generalized proof to address consent on a class-wide basis. Plaintiff has not done so, and the evidence proves he cannot.

Plaintiff's failure to meet Rule 23(b)'s predominance requirement notwithstanding, Plaintiff cannot satisfy Rule 23's threshold ascertainability requirement or Rule 23(a). First, controlling Eleventh Circuit precedent—which Plaintiff ignores in its entirety—imposes a heightened ascertainability threshold that requires Plaintiff to establish that he has both a

[1] Plaintiff attached one declaration to his motion in an attempt to establish that consent was not obtained. (*See* DE 199-13.) This declaration proves—in conjunction with the **53** obtained by Defendants—exactly why consent is an individualized issue. That is, in order for this Court to determine whether the friend-forwardee provided consent to the forwarder, this Court would necessarily have to examine the relationship between the two as well as determine if the forwardee was a customary user or on a family plan with the forwarder. The Court would have to conduct this examination for each and every putative class member.

manageable and *feasible* means of identifying the putative class members. Plaintiff has failed to establish either. Plaintiff simply states he will use subpoenas and reverse lookups to ascertain the class. Absent from this contention, however, is any analysis that such a procedure would actually bear any fruit absent a highly individualized process. As detailed below, Plaintiff seeks to include, as he must, the "customary users" of the cell phone numbers at issue within his class. Plaintiff does not offer any method to identify such persons (nor could he). Further, Plaintiff seeks to include only text message "recipients" in his class, but fails to cite any evidence that "recipients" can be identified (they cannot). Plaintiff's method of ascertainability is unreliable.

Second, defenses unique to Plaintiff preclude a finding of typicality here. The evidence—and, in fact, the last year of litigation—demonstrates that Plaintiff will be preoccupied with Defendants' defense that Plaintiff provided prior express consent through a third party (his ex-girlfriend, Allison Worsena) to receive the messages at issue. The evidence proves:

- On February 25, 2011: Plaintiff was registered to receive the text messages at issue by the number **305-331-0419** (Allison Worsena);
- From February 18, 2011 to March 11, 2011: Plaintiff exchanged at least **fifty-six** messages with Ms. Worsena;
- Plaintiff registered with the CashTexts.com website to receive text message advertisements from *any* third party pertaining to over three dozen topics, including fast food; and
- Plaintiff discussed the CashTexts.com program with Ms. Worsena, making it entirely plausibly (in fact, likely) that he provided consent through her to receive the text messages at issue.

Plaintiff has already spent the last year litigating these issues, including (i) a motion for protective order, (ii) a motion to compel and (iii) a motion for Rule 37(e)(1) sanctions (Plaintiff evidently did not feel it necessary to preserve the texts over which he is now suing). It is clear Plaintiff is not typical of the putative class in light of the number of defenses regarding his consent—namely, the evidence pertaining to Ms. Worsena and cashtexts.com.

Third, Plaintiff's putative class is inherently dissimilar and thus lacking commonality. The evidence establishes widely varying circumstances among the putative class. Subpoena responses from Verizon, US Cellular and Sprint prove that ***over 1,000*** putative class members were forwarded in by persons on the same plan (*i.e.*, the family plan account holder). Account holders can consent for any numbers to which they are the subscriber, as Plaintiff's own expert testified. Defendants also obtained **24** declarations establishing friend-forwarders routinely obtained consent prior to forwarding in friend-forwardees. Likewise, strong circumstantial

evidence indicates putative class members consented. For example, over ***600*** friend-forwardees subsequently participated in the friend-forwarder program. And, over ***500*** friend-forwardees responded "yes" when asked if they wanted to continue receiving texts. Plaintiff's motion for class certification does not account for any of these inherent variations among his putative class.

And, fourth, neither Plaintiff nor his counsel are adequate to act as fiduciaries of the putative class. As established by his deposition, Plaintiff entirely abdicated his responsibilities as class representative. Plaintiff was unaware of class settlement offers made by Defendants in this case; and, what is more, Plaintiff testified that he ***did not care*** what the offers to the putative class were. This creates a clear conflict between Plaintiff and the class he purports to represent. Likewise, Plaintiff's counsel committed serious ethical breaches by failing to inform him of the class settlement offers, depriving him of the ability to oversee the prosecution of this case.

For these reasons and those detailed below, this Court should "join[] the chorus of other courts faced with TCPA class actions" and deny class certification. *Newhart v. Quicken Loans Inc.*, No. 9:15-CV-81250, 2016 WL 7118998, at *5 (S.D. Fla. Oct. 12, 2016) (Rosenberg, J.).

BACKGROUND

I. THE ADF DEFENDANTS' TEXT MESSAGE PROGRAM.

This action stems from Plaintiff's receipt of text messages through a text message program (the "Text Program") operated by the ADF Defendants from late 2010 through 2012. (*See* DE 97 ¶ 47; *see also* Declaration of Mark Eisen ["Eisen Decl."], attached hereto as Exhibit 2, Exhibit A [AHI's 30(b)(6) Deposition] at 43:23-44:7; 62-17-25.)[2] As detailed further below, the Text Program consisted of three discrete campaigns run through two different vendors, Songwhale and Cellit. (*See id.*)

[2] Plaintiff seeks to establish Pizza Hut corporate's involvement in this action by defining all Defendants collectively as "Pizza Hut." To be clear, Pizza Hut, Inc. (now Pizza Hut, LLC) is the *franchisor*. Plaintiff's attempt to brand all defendants collectively is both extremely disingenuous and unsupported. Pizza Hut was never involved in any aspect of the Text Program. It did not know the ADF Defendants were engaging in a text message program, nor did it have any control or knowledge regarding the manner and means of sending the messages at issue. (*See* AHI's 30(b)(6) Dep. at 176:15-177:12; Eisen Decl., Exhibit G [Deposition of Kristin Hairabedian] at 136:8-137:15; 144:12-145:6; Eisen Decl., Exhibit FF [30(b)(6) Deposition of Pizza Hut, Inc.] at 63:20-64:12, 66:20-68:3); *see also Thomas v. Taco Bell Corp.*, 582 F. App'x 678, 679 (9th Cir. 2014) (holding that agency liability in the TCPA context turns on whether the principal controlled "the manner and means of the text message campaign"). Plaintiff admits no such specific control was exercised. (*See* DE 199 at 18.)

A. Songwhale and the Friend-Forwarder Component.

The ADF Defendants began their relationship with Songwhale in late 2010 to begin crafting a text message campaign that would encourage consumers to sign up in response to in-store signage, boxtops (*i.e.*, flyers on top of pizza boxes) and coupons. The signage read:

> **Win Pizza For a Year. Text MyHut to 94253 & Receive Pizza Hut deals on your phone**

(*See* Eisen Dec., Exhibit B.)

Consumers who signed up were also encouraged to have their friends sign up, which became known as the "friend-forwarder" component of the Text Program. Consumers who signed up thus received a "bounceback" message upon texting in "MyHut" and consenting to join the Text Program. (*See id.*, Exhibits C, D.) This message read:

> **PIZZAHUT! Enter friends and u win!**
> **1=FREE Breadsticks**
> **5=FREE 2 Liter Pepsi**
> **10=FREE Pizza Rollers**
> **Rply FRIEND+10digit cell# (eg FRIEND2223334444)**

(*See id.*) After obtaining the consent of the friend or family member and sending in the phone number, the friend-forwardee would receive the following message:

> **PIZZAHUT! (222) 333-4444 entered u 2win pizza 4 a year and Pizza Hut Deals! Rply STOP 2quit or HELP**

(*See id.*; *see also id.*, Exhibit K.)[3]

As detailed further in Section III, *infra*, the evidence obtained in this case indicates that those who forwarded in phone numbers (i) routinely obtained prior express consent from the friend-forwardee prior to texting in their number and (ii) forwarded in phone numbers to which they were also the subscriber (*i.e.*, numbers on a family plan). (*See id.*, Exhibit E.)

B. Cellit and the Double Opt-In Text.

In late 2011, the ADF Defendants contracted with Cellit to continue the Text Program for 2012. (*See id.*, Exhibit F.) Cellit never conducted a friend-forwarder component to the Text Program. (*See id.*, Exhibit G [Deposition of Kristin Hairabedian] at 27:15-28:8.)

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[3] The language of this text message—which Plaintiff quotes in full—proves entirely false his allegation that the messages at issue "do not provide any instructions as to one might opt out from receiving future text messages." (*See* DE 97 ¶ 50; *see also* DE 199 at 3.) Plaintiff routinely misled the Court and Defendants throughout this action, as detailed below.

On January 11, 2012, Cellit transmitted a "double opt-in text" to the Text Program subscribers in order to confirm those subscribers that desired to continue receiving offers from the ADF Defendants in 2012. (*See id.*, Exhibit H; *see* DE 97 ¶ 47.) The double opt-in text read:

> **To receive great weekly mobile offers from your local Pizza Hut . . . reply YES now! Msg/data rates may apply. U may receive up to 4 mobile offers/mo.**

(*See id.*) Of the previous Text Program subscriber base, 2,622 persons immediately responded "YES" to confirm their continued interest in remaining in the Text Program. (*See id.*, Exhibit I.) As detailed in Section III, *infra*, these persons included both friend-forwarders and friend-forwardees from the original Songwhale friend-forwarder component.

II. PLAINTIFF BRIAN KEIM.

Plaintiff initiated this action on May 27, 2012, alleging the receipt of "unwanted commercial text messages" from the ADF Defendants. (*See* DE 1.)[4] Although alleging the receipt of numerous unsolicited text messages from the ADF Defendants, only one message was ever produced in discovery. (*See id.*, Exhibit J.)[5]

A. Plaintiff's Registration for the Text Messages at Issue.

Plaintiff was registered for the Text Program on February 25, 2011 by Allison Worsena, Plaintiff's ex-girlfriend. (*See id.*, Exhibit K at 40; *see also id.*, Exhibit L [Plaintiff's Response to AHI's First Set of Interrogatories (hereinafter "AHI Rogg.")] at No. 6.) Specifically, on February 25, 2011, Plaintiff received the following:

> **PIZZAHUT! (305) 331-0419 entered u 2win pizza 4 a year and Pizza Hut Deals! Rply STOP 2quit or HELP.**

(*Id.*, Exhibit K.) The 305 number belonged to Ms. Worsena during the relevant time period. (DE 151-4.)

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[4] Plaintiff actually initiated this action on March 3, 2012, filing suit against Pizza Hut of America, Inc. *See Keim v. Pizza Hut of America, Inc.*, No 12-cv-80242. Plaintiff voluntarily dismissed that action on May 17, 2012 and then refiled the instant case against the ADF Defendants (Plaintiff later filed an amended complaint naming Pizza Hut, Inc.).

[5] As detailed in Section II(A)(ii), *infra*, Plaintiff's document retention practices have been the subject of significant litigation. Specifically, Plaintiff testified that he provided **22** text messages from the ADF Defendants to his counsel. (*See* Eisen Decl., Exhibit M [Deposition of Brian Keim (hereinafter "Keim Dep.")] at 310:20-311:20.) Plaintiff's phone, however, was not preserved until, at the very earliest, November of 2013. (*See* DE 176 at 38:18-24, 40:12-18.) These messages, as well as the messages relevant to Plaintiff's consent, no longer exist.

From February 18, 2011 to March 11, 2011—directly before and after Plaintiff was registered for the Text Program—Plaintiff exchanged **56** text messages with Ms. Worsena. (*See* Eisen Decl., Exhibit N.) Further, during this time, Plaintiff and Ms. Worsena discussed signing up for third-party text message advertisements through the CashTexts.com site, a site that allows users to sign up to receive third-party text message ads about selected categories. (*See* Keim Dep. at 161:17-170:15.) Plaintiff, for his part, selected to receive text message advertisements on the CashTexts website concerning dozens of topics, including ***fast food***. (*See* Declaration of Atticus Killough, attached hereto as Exhibit 3, Exhibit A thereto.) Plaintiff's decision to do so calls into serious question his boldface claim that he "has never provided [Defendants] with his cellular telephone number ***in any manner whatsoever***." (DE 97 ¶ 46).

B. Plaintiff Is Never Informed About Class Settlement Offers.

In order to avoid the very expenses that this litigation has inflicted, on February 6, 2015, the ADF Defendants tendered to Plaintiff's counsel a class-wide settlement proposal. (*See* Eisen Decl. ¶ 4.) On February 20, 2015, despite receiving no counteroffer, the ADF Defendants put forth a second class settlement offer. (*See id.*) On February 22, 2015, Plaintiff's counsel provided a counteroffer. (*See id.*)

During his deposition, Plaintiff testified that he had no knowledge of the class-wide settlement proposals exchanged in February of 2015. (*See* Keim Dep. at 55:25-60:12, 307:10-23.) Plaintiff's counsel never provided the proposals—including the settlement amounts—to his client, the proposed class representative. (*See id.*) Of course, Plaintiff, unaware of the proposals, could not discharge his fiduciary duty to the putative class members. Unbelievably, Plaintiff stated that he "did not care" to know the settlement proposals. (*See id.* at 307:10-23.)

III. PLAINTIFF'S PUTATIVE CLASS DEFINITION.

Plaintiff seeks to certify the following class pursuant to Rule 23(b)(3):

> All persons within the United States (1) who received a text message from Defendants (2) wherein their cellular telephone number was provided by a third-party (3) and said text messages were sent using hardware and software owned or licensed to Songwhale or Cellit (4) during the four year period prior to the filing of the original complaint in this action through the date of certification (between November 2010 and January 2013).

(*See* DE 199 at 5.) Plaintiff contends this definition excludes "people who opted themselves into the campaign," and further that "there is no problem identifying the class members." (*Id.* at 4-5.) As detailed below, these assertions are false, and certification must be denied.

LEGAL STANDARD

The Eleventh Circuit instructs that "[t]he burden of proof to establish the propriety of class certification rests with the advocate of the class." *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1187 (11th Cir. 2003). In evaluating class certification, the Court must engage in a "***rigorous analysis*** of the Rule 23 prerequisites . . . ." *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1266 (11th Cir. 2009) (internal quotations and citation omitted, emphasis added).[6]

As a prerequisite to the elements of Rule 23, "Rule 23 implicitly requires that the proposed class is adequately defined and clearly ascertainable." *Karhu v. Vital Pharm., Inc.*, 621 F. App'x 945, 946 (11th Cir. 2015) (internal quotations and citation omitted); *see also Little v. T-Mobile USA*, 691 F.3d 1302, 1304 (11th Cir. 2012). If a plaintiff meets the ascertainability threshold, it must then establish all the elements of Rule 23(a) and one of the requirements of Rule 23(b). *See Valley Drug Co.*, 350 F.3d at 1188. Under Rule 23(a), a plaintiff must establish:

> (1) the class is so numerous that joinder of all members would be impracticable; (2) there are questions of fact and law common to the class; (3) the claims or defenses of the representatives are typical of the claims and defenses of the unnamed members; and (4) the named representatives will be able to represent the interests of the class adequately and fairly.

Id. at 1187-88. Because Plaintiff here seeks certification under Rule 23(b)(3), Plaintiff also bears the burden of establishing: (i) that common questions of law or fact predominate over questions affecting individual class members ("predominance"); and (ii) that a class action is superior to other available methods for adjudicating the case ("superiority"). *See, e.g.*, *Vega*, 564 F.3d at 1265. Notably, class certification must be denied if ***any one*** of the above 23(a) or (b) elements is not met. *See, e.g., Valley Drug Co.*, 350 F.3d at 1187.

I. PLAINTIFF'S PUTATIVE CLASS IS NOT ASCERTAINABLE BECAUSE MEMBERSHIP WOULD REQUIRE IMPERMISSIBLE INDIVIDUALIZED INQUIRIES.

A. The Eleventh Circuit Imposes a High Ascertainability Threshold.

The Eleventh Circuit has recently clarified and, it is safe to say, raised the bar on ascertainability. To establish his class is ascertainable, Plaintiff must:

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[6] Rather than seek to meet his burden, Plaintiff instead relies on a full-page string cite of prior TCPA decisions without any analysis of how those cases are relevant in any respect to the facts at hand, hoping that this Court will simply follow suit. (*See* DE 199 at 6-7.) As detailed below, this authority—most of which pertains to ***fax*** cases—is irrelevant and unpersuasive.

(i) "[P]ropose an administratively feasible method by which class members can be identified;" and

(ii) "[E]stablish that the records [at issue] are in fact useful for identification purposes, and that identification will be administratively feasible."

Karhu, 621 F. App'x at 947. In other words, Plaintiff cannot simply state "class members can be identified," but must propose the method of identification and prove that method will be both manageable and feasible. *Id.*; *see also Christie v. Bank of Am., N.A.*, No. 8:13-CV-1371-T-23TGW, 2016 WL 654818, at *8 (M.D. Fla. Jan. 7, 2016) ("The plaintiffs cannot merely point to BANA's computer system for their argument that the putative class is easily ascertainable."). Further, a process is administratively feasible only if it does "not require much, if any, individualized inquiry." *See, e.g.*, *Bussey v. Macon Cty. Greyhound Park, Inc.*, 562 F. App'x 782, 787 (11th Cir. 2014) (internal quotations and citation omitted).

Plaintiff fails to even mention this standard and Eleventh Circuit precedent, declining to so much as cite *Karhu*. (*See* DE 199 at 8-10.) Instead, Plaintiff cites to Seventh and Ninth Circuit precedent, ignoring that this precedent stands in stark distinction to the Eleventh Circuit's controlling approach to ascertainability. (*See id.* at 8, citing *Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015), and *Briseno v. ConAgra Foods, Inc.*, No. 15-55727, 2017 WL 24618 (9th Cir. Jan. 3, 2017).) In *Mullins*, for example, the Seventh Circuit distinguished *Karhu*, noting that the Eleventh Circuit "applie[s] a fairly strong version of an ascertainability requirement," and finding it analogous to the heightened ascertainability standard imposed in the Third Circuit in *Carrera v. Bayer Corp.*, 727 F.3d 300, 306–08 (3d Cir. 2013). *Mullins*, 795 F.3d at 661 n.2. The Ninth Circuit, in *Briseno*, followed *Mullins*, distinguishing itself from the Third Circuit. *See Briseno*, 2017 WL 24618, at *5. Plaintiff also seeks to rely on *Juris v. Inamed Corp.*, an inapposite case analyzing a class member's due process rights to receive actual notice—an issue entirely separate and distinct from ascertainability. *See* 685 F.3d 1294, 1320 (11th Cir. 2012).[7]

[7] Plaintiff's citation to class ***notice*** procedures approved in *Johnson v. Yahoo!*, (*see* DE 199 at 9), is equally unpersuasive. As an initial matter, *Johnson* is a Northern District of Illinois case, governed in relevant part by *Mullins*. As a more substantive matter, what is permissible for purposes of ***notice*** is irrelevant to ascertainability, as the two are governed by entirely different legal standards. *See* Fed. R. Civ. P. 23(c)(2) (requiring merely the best notice practicable under the circumstances). The former is governed by due process, while the latter is governed by principles of judicial administration and manageability.

Florida courts, as would be expected, follow *Karhu* and *Carrera*. *See, e.g.*, *Christie*, 2016 WL 654818, at *8 (following *Karhu*); *Riffle v. Convergent Outsourcing, Inc.*, 311 F.R.D. 677, 681 (M.D. Fla. 2015) (following *Karhu*); *Randolph v. J.M. Smucker Co.*, 303 F.R.D. 679, 685 (S.D. Fla. 2014) (following district court order in *Karhu* and *Carrera*); *Haight v. Bluestem Brands*, No. 13-1400, 2015 WL 12830482, at *3 (M.D. Fla. May 14, 2015) (following *Carrera*).

B. Plaintiff Does Not Propose an Administratively Feasible Method of Class Member Identification.

Plaintiff contends, in conclusory fashion, that his putative class is ascertainable simply because "the class members' telephone numbers are already identified." (*See* DE 199 at 8.) In support, Plaintiff cites inapposite TCPA fax cases and out-of-Circuit authority (which also declines to consider *Karhu*). (*See id.* at 8-9.) Plaintiff, however, fails entirely to put forth an (i) administratively feasible and (ii) reliable means of class member identification. Indeed, Plaintiff does not explain how the phone number records to which he references are useful for purposes of identifying who is actually in or out of the putative class.

i. Plaintiff Does Not Distinguish "Subscribers" From "Customary Users."

As a preliminary matter, Plaintiff fails to take into account the crucial distinction between a subscriber and a customary user to a cell phone. This alone is fatal to Plaintiff's motion.

The FCC recently clarified that under the TCPA, both the "customary user" of a given phone number (*i.e.*, a minor on a family plan) and the subscriber (the account holder) to that number can provide consent to receive text messages. *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961 ¶ 73 (2015) (hereinafter "Omnibus Order") ("We find that the 'called party' is the subscriber . . . or the non-subscriber customary user of a telephone number included in a family or business calling plan. Both such individuals can give prior express consent to be called at that number."); *see also Leyse v. Bank of Am. Nat. Ass'n*, 804 F.3d 316, 327 (3d Cir. 2015) ("[C]onsent from either [the subscriber or the customary user] would shield Bank of America from liability."). In other words, either the customary user or the subscriber may have standing to pursue a claim. *See, e.g.*, *Leyse v. Lifetime Entm't Servs.*, No. 13 CIV. 5794, 2015 WL 5837897, at *4 (S.D.N.Y. Sept. 22, 2015) ("[O]nly 'called parties' under the statute have standing to bring suit under the TCPA . . . .").

Plaintiff has defined the class to consist of "recipients" of the text messages at issue. Through discovery, Plaintiff concedes that "recipients" is intended to encompass both

subscribers and customary users. (*See* Eisen Decl., Exhibit P [Plaintiff's Response to American Huts' Second Set of Interrogatories (hereinafter "Second Rogg.")] at No. 23.) In his motion for class certification, however, Plaintiff does not address "customary users" or how he seeks to possibly identify them. "Customary users" include, for example, "close relative[s] on a subscriber's family calling plan or an employee on a company's business calling plan." *Omnibus Order*, 30 F.C.C. Rcd. 7961 ¶ 75. Plaintiff declines to proffer a method to distinguish or locate customary users that fall within his class definition without necessitating a consumer-by-consumer inquiry. Identifying customary users would require in the first instance a practical method by which such persons can be identified (as detailed below, this is impossible). It would then require individualized inquiries to determine (i) if someone qualified as a customary user and (ii) whether that person was a customary user in 2011-2012 (over ***six years ago***).

ii. Plaintiff's Proposed Method of Ascertainability Fails.

Plaintiff provides no basis to believe his proposed methods of identifying putative class members—subpoenas to phone carriers and reverse lookups—will actually succeed in identifying class members. (*See* DE 199 at 9.) They will not. It is also telling here that Plaintiff only proposes methods of identification. Despite conducting ***nine months*** of discovery, Plaintiff has not issued a single subpoena to a carrier or performed a single reverse look-up.

First, as set forth in the expert report of Kenneth R. Sponsler, subpoenas to cell phone carriers will not enable the ascertainability of the putative class. (*See* Eisen Decl., Exhibit Q [Report of Kenneth Sponsler (hereinafter "Sponsler Report")] at 17-18.) As a preliminary matter, Plaintiff has not identified which carriers even retain cell phone subscriber data reaching back to 2011 and earlier. Many do not. *See, e.g.*, *Smith v. Microsoft Corp.*, 297 F.R.D. 464, 473 (S.D. Cal. 2014) ("Moreover, in light of the record retention policies of some of the major cellular service providers, it is likely that even subpoenaing the cellular service providers will not yield the necessary identification and contact information [going back five years]."); *Balschmiter v. TD Auto Fin. LLC*, 303 F.R.D. 508, 525 (E.D. Wis. 2014) (finding subpoenas unlikely to be helpful in identifying putative class members).

Furthermore, hundreds of putative class members' cellular telephone numbers appeared on prepaid plans during the relevant time period. (*See* Sponsler Report at 13-14.) These carriers—including Boost Mobile, Cricket Wireless and Metro PCS—are not even required to verify subscriber data upon activation, which is typically done over the phone. (*Id.*) Because

these carriers do not utilize normal monthly bills (as they operate on a prepaid basis) they do not require (and cannot possibly verify) accurate subscriber information. (*Id.*) The term "burner phone" encompasses this very problem. (*Id.*) Even if subpoenas were sent to these carriers, they would not maintain any reliable information, let alone information dating back eight years. (*Id.*) The subpoena response in this case from T-Mobile (which owns MetroPCS) specifically states that records for prepaid phones are kept for approximately ***24 months***. (*See* Eisen Decl., Exhibit O at 5.) The earliest records Plaintiff could thus obtain through subpoena would reach back only to early 2015—two years ***after*** the texts at issue. Plaintiff relies throughout his motion on the *Birchmeier v. Caribbean Cruise Line* case. Plaintiff's counsel in *Birchmeier*, however, found that subpoenas to prepaid carriers Cricket and MetroPCS were fruitless as their "customers are not required to provide the company with contact information." *See Birchmeier*, No. 12-cv-04069, DE 265 (N.D. Ill. Dec. 31, 2014) (attached hereto as Exhibit 4.)

Plaintiff also fails to set forth which carriers will even respond to subpoenas without jumping through the additional hoops of providing notice to the relevant consumers with an opportunity to respond. AT&T—which declined to respond to the subpoena issued to it by Defendants in this case—will not respond to a subpoena without providing notice to each consumer and allowing 14-days for each consumer to respond. (Sponsler Report at 17.) And even when it does respond, it will do so only at a cost of $10 per record for each month sought. (*Id.* at 18.) AT&T (formerly Cingular) customers make up approximately 25% of the putative class. (*See* Eisen Decl., Exhibit R [Second Report of Robert Biggerstaff (hereinafter "Second Biggerstaff Report)] ¶ 18.) A subpoena to AT&T covering just 2008 to the present would thus be prohibitively expensive (hundreds of thousands of dollars).

Even if Plaintiff were to find a carrier willing to provide a cost-effective response to a subpoena, carriers do not maintain records relating to customary users. In other words, for a family plan, the carrier would not know (i) the names of the non-subscriber users, (ii) who uses each phone and (iii) where to find those other users. (*See* Sponsler Report at 17-18.) Plaintiff's expert testified to this very fact. (*See* Eisen Decl., Exhibit S [Deposition of Robert Biggerstaff (hereinafter "Biggerstaff Dep.")] at 77:22-78:25.) For example, Ms. Worsena—who registered Plaintiff for the messages at issue—was on her father's cell phone plan and thus AT&T's records reflect his name, not hers. (*See* DE 149-1.) AT&T has no record that would identify Ms. Worsena as the customary user of the 305 number, though she plainly was. (*See id.*; *see also* DE

151-4.)[8] And, Plaintiff fails to identify how he will subpoena the 230 numbers that show up without a carrier as "Unknown," and thus are indicative of residential numbers (which could not have received the messages). (*See* Eisen Decl., Exhibit T [Deposition of Jonathan Greenlee (hereinafter "Greenlee Dep.")] at 204:19-205:7; Second Biggerstaff Report ¶ 18.)

Second, Plaintiff's use of reverse look-ups will get him no closer to identifying class members. Reverse look-up databases are notoriously unreliable. (*See* Sponsler Report at 16.) They often associate numbers with the (i) wrong owners, (ii) wrong address and (iii) wrong carriers. (*Id.*) Similarly, reverse look-ups cannot identify *historic* subscriber information. Courts have often lamented about the use of reverse look-ups to identify putative class members. *See, e.g.*, *Jamison v. First Credit Servs., Inc.*, 290 F.R.D. 92, 109 (N.D. Ill. 2013) (finding reverse look-up database "may identify the current regular user of a cellphone number" but could not identify historic information); *Microsoft Corp.*, 297 F.R.D. at 473 ("[T]hird-party services do not have information about subscribers' text messaging plans, and thus the concerns identified above concerning identifying who is a member of the class remain."). Plaintiff cites to no authority attesting to the accuracy and reliability of *any* third-party reverse look-up database.

C. Determining Membership in Plaintiff's Putative Class Requires Individualized Inquiry.

As noted above, ascertaining a putative class definition is only "administratively feasible" where little or no "individual inquiry" is required to determine membership. *Bussey*, 562 F. App'x at 787; *see also Conigliaro v. Norwegian Cruise Line Ltd.*, No. 05-21584-CIV, 2006 WL 7346844, at *2 (S.D. Fla. Sept. 1, 2006) ("[C]ourts have declined to certify a class where the proposed definition would not enable identification of class members short of individualized fact-finding.") (internal quotations and citation omitted).

Here, significant individualized inquiries must be undertaken to determine putative class membership. First, Plaintiff's putative class definition only includes ***recipients*** of the text messages at issue. However, Plaintiff fails to put forth any documentation indicating who ***received*** the messages at issue. No such evidence exists. Jonathan Greenlee, Chief Technology Officer of Songwhale, testified that Songwhale never obtained any documentation indicating whether messages were actually ***received***. (*See* Greenlee Dep. at 106:11-25; 205:8-206:9.)

[8] In other words, if Plaintiff had signed up Ms. Worsena, there is no method by which she could be identified other than asking the subscriber who the customary users were **six** years ago.

Indeed, Mr. Greenlee testified that Songwhale never even got confirmation that the messages at issue were ever successfully ***sent***, let alone received. (*See id.*) Mr. Greenlee further testified that he believed the only way to know who received a message would be "to ask each person." (*Id.* at 206:7-9.) Plaintiff's expert, Robert Biggerstaff, confirmed that he did not see any evidence that would indicate the successful transmission and receipt of the text messages at issue. (*See* Biggerstaff Dep. at 71:19-72:22.). Plaintiff's contention that "Pizza Hut's records identify texts that were received by each cellular number" is entirely unsupported. (DE 199 at 13.) Plaintiff's citation to his expert's report is meritless in light of his expert's clear testimony and the fact that the cited section of the report nowhere uses the word "receive." (*See id.*)

The sent versus received distinction is crucial here, not only as a result of Plaintiff's putative class definition, but also because persons who did not receive an allegedly violative text message likely do not have Article III standing to pursue a claim or to recover damages. *See, e.g., Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) ("A 'concrete' injury must be 'de facto'; that is, it must actually exist."); *Romero v. Dep't Stores Nat'l Bank*, No. 15-CV-193-CAB-MDD, 2016 WL 4184099, at *4 (S.D. Cal. Aug. 5, 2016) ("[B]ecause Plaintiff has not, and likely could not, present evidence of an injury in fact as a result of calls placed by Defendants to Plaintiff's cell phone of which Plaintiff was not aware, Plaintiff lacks standing to assert a claim for a TCPA violation based on any of these calls."). Redrafting Plaintiff's putative class to include those that were simply sent a message would not remedy the individualized inquiry here, as it would thus result in an overbroad class. *See, e.g.*, *Conigliaro*, 2006 WL 7346844, at *6 (rejecting as overbroad a class that included persons without Article III standing).

Second, Plaintiff's proposed method of ascertainability requires an individualized inquiry to determine customary users. Plaintiff's own expert testified there is no method of identifying customary users short of asking each consumer. (*See* Biggerstaff Dep. at 77:22-78:25.) Plaintiff cites no authority from the Eleventh Circuit supporting such an extensive and individualized procedure. Indeed, Eleventh Circuit case law indicates such a highly individualized procedure of identification renders a putative class unascertainable. *See Bussey*, 562 F. App'x at 787.

And third, assuming for the sake of argument that customary users *could* be identified and located (they cannot), an individualized inquiry would have to be undertaken to determine whether any given user meets the FCC's customary user definition. The FCC has stated that relatives on a family calling plan, for instance, and employees on a company plan are customary

users such that they have standing to pursue a TCPA claim. *See Omnibus Order*, 30 FCC Rcd. 7691 ¶ 75. The FCC allowed that others may qualify "due to their relationship to the subscriber." *Id.* The relationship between each putative customary user and the subscriber would thus have to be evaluated one at a time to determine class membership.

Here, Plaintiff fails to meet either prong of the Eleventh Circuit's ascertainability test set forth in *Karhu*. *See* 621 F. App'x at 947. Certification should be denied on this basis alone.

II. PLAINTIFF FAILS TO MEET RULE 23(A)'S TYPICALITY, COMMONALITY OR ADEQUACY PRONGS.

A. Defenses Unique to Plaintiff Foreclose Typicality.

i. Typicality Is Defeated by Unique Defenses.

Rule 23(a)'s typicality requirement focuses on "whether the class representative is aligned enough with the proposed class members to stand in their shoes for purposes of the litigation and bind them in a judgment on the merits." *Boca Raton Cmty. Hosp., Inc. v. Tenet Healthcare Corp.*, 238 F.R.D. 679, 692 (S.D. Fla. 2006). Courts in this District hold that "[t]ypicality is undermined when a unique defense would impair the alignment of interests between the named plaintiff and the class." *Morales v. Progressive Cas. Ins. Co.*, No. CV 13-60199-CIV, 2014 WL 12531280, at *5 (S.D. Fla. Nov. 26, 2014) (internal quotations and citation omitted); *Muzuco v. Re$ubmitIt, LLC*, 297 F.R.D. 504, 516 (S.D. Fla. 2013) ("Typicality will not be present, however, if the class representative's claim is subject to unique defenses that will preoccupy the litigation to the detriment of absent class members."); *Boca Raton*, 238 F.R.D. at 692 (same); *Ross v. Bank S., N.A.*, 837 F.2d 980, 990-91 (11th Cir. 1988), *reh'g granted* ("The existence of even an arguable defense can vitiate the adequacy of representation if it will distract the named plaintiff's attention from the issues common to the class.").

Indeed, the Seventh Circuit has addressed this issue in the TCPA context specifically, finding the existence of an arguable consent defense defeats typicality as it goes to the heart of the plaintiff's claim. In *CE Design Ltd. v. King Architectural Metals, Inc.*, the Court reversed the district court's grant of class certification in a TCPA junk fax case. *See* 637 F.3d 721, 723 (7th Cir. 2011). In evaluating typicality and adequacy, the Court noted that "[t]he presence of even an ***arguable defense*** peculiar to the named plaintiff or a small subset of the plaintiff class may destroy the required typicality of the class as well as bring into question the adequacy of the named plaintiff's representation." *Id.* at 726 (emphasis added, internal quotations and citation

omitted); *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir. 1990) (same).[9] Specifically, the Court held that "CE cannot be an adequate representative of the class of unconsenting recipients of King Architectural Metals' faxes if it is subject to a defense that couldn't be sustained against other class members." *CE Design*, 637 F.3d at 725. The Court took into account several pieces of circumstantial evidence of consent: (i) the publication of the plaintiff's fax number in a trade book and (ii) the legend "contact us" next to the plaintiff's fax number on its website. *Id.* at 726. Taking this evidence, the Court held there were significant issues pertaining to the plaintiff's consent that undermined its typicality and adequacy. *Id.* at 727-28. Certification was thus reversed and remanded.

Courts in this District and elsewhere have heeded that advice and denied certification where defenses unique to the named plaintiff exist, including in TCPA cases. *See, e.g., Pines Nursing Home, Inc v. Rehabcare Grp., Inc.*, No. 14-20039, 2014 WL 12531512, at *4 (S.D. Fla. June 20, 2014) ("Plaintiff will not serve as an adequate representative because these issues threaten its ability to fulfill its fiduciary role and vigorously represent the class."); *Davies v. W.W. Grainger, Inc.*, No. 13-cv-3546, 2014 WL 2935905, at *4 (N.D. Ill. June 27, 2014) ("Davies' effort to oppose all of Grainger's defenses only serves to underscore that there exist significant factual issues with respect to these defenses that would have to be resolved separately as to Davies if the case proceeded as a class action."); *Morales*, 2014 WL 12531280, at *5.

The central concern regarding defenses unique to the named plaintiff is that "[w]here it is predictable that a major focus of the litigation will be on an arguable defense unique to the named plaintiff or a small subclass, then the named plaintiff is not a proper class representative." *Koos v. First Nat. Bank of Peoria*, 496 F.2d 1162, 1164 (7th Cir. 1974). In other words, the named plaintiff will have to devote significant effort "to their own problems," thus detracting from the issues facing the rest of the class. *Id.*; *see also Hall v. Burger King Corp.*, 1992 WL 372354, at *9 (S.D. Fla. Oct. 26, 1992) (quoting *Koos*); *Ross*, 837 F.2d at 990-91 (same); *Amswiss Int'l Corp. v. Heublein, Inc.*, 69 F.R.D. 663, 667 (N.D. Ga. 1975) ("[R]epresentative plaintiffs should not be distracted by a relatively unique personal defense.") (internal quotations

[9] The existence of arguable defenses unique to the named plaintiff has been evaluated both under the typicality and adequacy. *See, e.g., CE Design*, 637 F.3d at 724. Indeed, to a large extent the two requirements merge on this issue. While Defendants have addressed this concern under the typicality prong, the same result is warranted under either typicality or adequacy.

and citation omitted); *Gary Plastic*, 903 F.2d at 180 ("[T]here is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it.").

ii. The Evidence Indicates Plaintiff Consented Through a Third Party to Receive the Messages at Issue.

Here, Plaintiff will be undeniably distracted by defenses unique to him, and has already been so throughout this litigation. Specifically, there is certainly an arguable (frankly, probable) defense that Plaintiff provided consent to Allison Worsena to receive the messages at issue. The evidence demonstrates that:

- On February 25, 2011: Plaintiff was registered to receive the text messages at issue by the number **305-331-0419** (Allison Worsena); and
- On February 18, 2011 to March 11, 2011: Plaintiff's phone records and testimony establish he exchanged at least **fifty-six** messages with Ms. Worsena.

(*See* Eisen Decl., Exhibits K, N.) In other words, Plaintiff (i) was signed up to receive the messages at issue by the 305 number and (ii) communicated with that individual at least fifty-six times in the days directly before and after he was registered. It is also clear that Plaintiff and Ms. Worsena had a history of discussing signing up for third-party text messages advertisements through the CashTexts.com program. (*See* Keim Dep. at 161:17-170:15.)[10]

Consent is an absolute defense to a TCPA claim. *See* 47 U.S.C. § 227(b)(1); *see also Orr v. Credit Prot. Ass'n*, No. 13-cv-1530, 2015 WL 439343, at *2 (M.D. Fla. Feb. 3, 2015) (finding consent is the "key issue" in TCPA case). The Eleventh Circuit and FCC hold that, under the TCPA, consent may be "obtained and conveyed by an intermediary." *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1123 (11th Cir. 2014) (quoting *In re GroupMe, Inc./Skype Commc'ns S.A.R.L. Petition*, 29 FCC Rcd. 3442, 3447 (2014).) Indeed, the FCC stated—in a situation directly analogous to the facts at hand:

> To the extent that a consumer, in the absence of instructions to the contrary, agrees to participate in a GroupMe group, agrees to receive associated calls and texts, and provides his or her wireless telephone number to the group organizer for that purpose, we interpret that as encompassing consent for GroupMe to send certain administrative texts that relate to the operation of that GroupMe group.

Id. at 3446. In GroupMe, consent was (i) obtained by Party A from Party B and (ii) conveyed to GroupMe by Party A simply texting in Party B's phone number. *Id.* at 3444; *see also Baisden v.*

[10] Unfortunately, Ms. Worsena passed away in 2012 and thus is unavailable as a witness.

Credit Adjustments, Inc., 813 F.3d 338, 346 (6th Cir. 2016) ("[T]he FCC's GroupMe ruling and 2015 [Omnibus] Order make clear that there is no one way for a caller to obtain consent, and that such consent can be conveyed by another party."); *see also Lawrence v. Bayview Loan Servicing*, -- F. App'x. --, 2016 WL 7407243 at *3 (11th Cir. Dec. 22, 2016) (holding that the TCPA incorporates the common law of consent).

Plaintiff's contention that consent through third parties is untenable here because such consent was never "conveyed" to Defendants is meritless. (*See* DE 199 at 14-15.) Exactly as in GroupMe, consent was conveyed to Defendants by persons forwarding in their friends' phone numbers. (*See* Eisen Decl., Exhibit U [30(b)(6) Deposition of ADF Midaltantic, *et al*.] at 81:2-24.) Likewise, Plaintiff points to no authority whatsoever requiring a magic phrase to demonstrate the requisite "conveyance." The Eleventh Circuit authority is directly to the contrary; "[n]o specific method is required under the TCPA for a caller to obtain prior consent to place automated calls or to subsequently revoke that consent." *Lawrence*, 2016 WL 7407243, at *3. Likewise, consent can be obtained and conveyed merely by providing a cell phone number. *See id.* at *3-4. Indeed, in analyzing GroupMe, the Eleventh Circuit specifically held that "the appropriate analysis turns on whether the called party granted permission or authorization, not on whether the creditor received the number directly," and did not find any specific form of "conveyance" was necessary. *Mais*, 768 F.3d at 1123. The requirement Plaintiff seeks to impose finds no basis in FCC authority nor, especially, Eleventh Circuit authority.[11]

Further, one district court recently rejected this exact argument (also made by Plaintiff's counsel in this case). In *Ung v. Universal Acceptance*, Universal (the finance arm for a seller of used cars) required that buyers provide the phone number of third parties so that Universal could contact them if the buyer fell behind on vehicle payments. *See Ung*, 2017 WL 354238, at *1. As in this case, the plaintiff sought to certify a class of persons whose numbers had been provided by third parties. *Id.* In denying class certification, the Court found persuasive that Universal proffered evidence that at least some buyers did obtain consent from the third parties

[11] Plaintiff's citation to the *Johnson v. Yahoo* case is unpersuasive. (*See* DE 199 at 15.) Apart from the fact that the case comes from the Northern District of Illinois, there was no evidence in *Yahoo* that the third party at issue ever had contact with Yahoo. *See Johnson v. Yahoo!, Inc.*, No. 14 CV 2028, 2016 WL 25711, at *5 (N.D. Ill. Jan. 4, 2016). Here, to the contrary, Plaintiff *admits* that the numbers the ADF Defendants received came *directly* from (*i.e.*, were conveyed by) the third parties at issue. (*See* DE 199 at 3.)

prior to submitting the third party's phone number. *Id.* at *3-4. Relying on the FCC's *GroupMe* Order, the Court denied certification, finding the provision of a third party's phone number sufficient "conveyance." *Id.*

The evidence indicates there is *at the least* an arguable defense of consent that Plaintiff will have to combat on the merits. Plaintiff has already spent significant time addressing this defense, including (i) a fully-briefed motion for protective order, (ii) a fully-briefed motion to compel and (iii) a fully-briefed motion for sanctions under Rule 37(e)(1) (including supplemental briefing), and significant oral arguments on each. (*See* DEs 129, 130, 133, 140, 144, 149, 151, 158, 165, 166, 168, 172, 177, 179, 186.) Judge Matthewman has already twice held Plaintiff's communications with Ms. Worsena are relevant to Defendants' consent defense. (*See* DE 140 at 4; 158 at 2-3.) As Judge Matthewman indicated during the Rule 37(e)(1) sanctions hearing, at trial, Plaintiff may have to (i) explain the contents of these fifty-six messages and (ii) why he failed to preserve this evidence. (*See* DE 176 at 47:15-49:16.) Plaintiff's counsel, for their part, did not bother to preserve ***any*** evidence on Plaintiff's phone for a full ***two years*** after litigation became reasonably anticipated. (*See id.* at 27:21-23, 38:18-24.) This failure to preserve evidence has caused immeasurable prejudice to Defendants, which would otherwise have the content of these fifty-six messages with Ms. Worsena.

Furthermore, Plaintiff has participated in at least two different programs to intentionally receive text message advertisements from third-parties. Plaintiff participated in CashTexts.com and the TextCashNetwork, both of which allow participants to provide blanket advance consent to receive text message advertisements from third party companies. (*See* Keim Dep. at 139:9-10; 157:20-23.) Plaintiff, in fact, specifically requested through CashTexts.com to receive text message advertisements regarding dozens of topics, including ***fast food***. (*See* Killough Decl, Ex. A.) Plaintiff could not have known in advance which companies would send him texts through the CashTexts.com program. (*See* Killough Decl. ¶ 11.) Nonetheless, he provided his blanket prior express consent to receive messages from anyone and everyone regarding the selected topics, and then lied about it during discovery. (*See id.* ¶¶ 8-11; *see also* Keim Dep. at 143:6-148:24.) Plaintiff encouraged Ms. Worsena and others to participate in CashTexts.com. (*See* Keim Dep. at 159:16-161:21.)

The jury could thus very plausibly infer from (i) the timing of the messages with Ms. Worsena, (ii) Plaintiff's history of communicating with Ms. Worsena about third-party text

message advertising, (iii) Plaintiff's failure to preserve his messages with Ms. Worsena and (iv) Plaintiff's history of participating in third-party text message advertisement programs (including about fast food) that he provided consent through Ms. Worsena to receive the messages at issue. At his deposition, Plaintiff could not recall (i) what the fifty-six messages concerned or (ii) who the 305 number belonged to (despite exchanging fifty-six messages within three weeks with this individual). (*See* Keim Dep. at 216:15-217:10, 316:17-21.) Plaintiff's credibility on this issue will thus also present an inherently unique hurdle to overcome, distracting and detracting from the class. *See, e.g.*, *Gary Plastic*, 903 F.2d at 180 ("[T]here is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it."). This evidence is well in excess of the evidence of consent that was before the Seventh Circuit in *CE Design*. *See CE Design*, 637 F.3d at 726.

B. Plaintiff's Putative Class Is Inherently Dissimilar, Thus Defeating Commonality.

As the Supreme Court recently set forth, commonality is not met upon the mere showing of a common question; rather, Plaintiff must establish "the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (internal quotations and citation omitted). The Court further noted that "[d]issimilarities within the proposed class are what have the potential to impede the generation of common answers." *Id.* (internal quotations and citation omitted); *see also Oginski v. Paragon Properties of Costa Rica, LLC*, 282 F.R.D. 672, 679 (S.D. Fla. 2012) (noting dissimilarities among the class precluded commonality). Accordingly, for Plaintiff to establish commonality, he must put forth a common question "capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350; *see also Shamblin v. Obama for Am.*, No. 8:13-CV-2428-T-33TBM, 2015 WL 1909765, at *6 (M.D. Fla. Apr. 27, 2015) (noting that "the use of generalized questions to establish commonality" is no longer acceptable).

In light of the variations among class members, it is evident commonality cannot be satisfied. As a preliminary matter, the common questions Plaintiff sets forth—*i.e.*, whether an ATDS was used, whether Pizza Hut can be vicariously liable and whether the Defendants can be held liable for Songwhale and Cellit—are generalized questions that are not apt to drive the

resolution of this case. *See Shamblin*, 2015 WL 1909765, at *7 (rejecting materially identical "generic" common questions because there could be no common answer to the issue of consent).

The putative class at issue is predicated on a single key question—whether consent was obtained from the putative class members prior to sending the messages at issue. Plaintiff presumes that by drafting his class definition to include only those who had their numbers forwarded in by third parties, he has uncovered a proxy for consent or lack thereof, and thus the question of consent can be answered for the entire class in one fell swoop. This is plainly contradicted by the evidence at hand—which demonstrates the variability even in the circumstances through which intermediary consent was obtained—and is exactly why commonality fails. *See, e.g.*, *Ung*, 2017 WL 354238, at *4 ("Liability in each instance, or the extent thereof, will hinge on whether the class member orally consented to be called when contacted by Universal; voluntarily provided his or her cell phone number, either directly or through the car purchaser; appeared at the time of the purchase and agreed to be contacted; or provided his or her consent in some other way."); *Warnick v. Dish Network LLC*, 301 F.R.D. 551, 559 (D. Colo. 2014) (rejecting a similar approach, finding "the fact DISH had consent to call a particular number does not turn on whether the called party was the actual, named customer in DISH's records."); *Shamblin*, 2015 WL 1909765, at *7 ("Shamblin is not entitled to a presumption that all class members failed to consent and Defendants have a constitutional right to a jury determination as to whether any person consented to receiving calls to their cellular telephone."); *Vigus v. S. Illinois Riverboat/Casino Cruises, Inc.*, 274 F.R.D. 229, 236 (S.D. Ill. 2011) (analyzing this issue under the typicality prong and finding "[t]he proposed class includes a substantial number of people who voluntarily gave their residential telephone numbers . . . .")

Plaintiff implicitly admits, as he must, that individuals that forwarded in their own phone number consented to receive the messages at issue. Plaintiff, for this very reason, did not even include these persons in his putative class. (*See* DE 199 at 5.) The FCC did not require prior express *written* consent until October 16, 2013.[12] For texts sent prior to that time, the TCPA

[12] Specifically, the FCC adopted its regulations pertaining to express *written* consent in its February 15, 2012 Order, and provided for a waiting period before the rule went into effect. Accordingly, "express written consent [was not] required until October 16, 2013." *Pinkard v. Wal-Mart Stores, Inc.*, No. 12-CV-02902, 2012 WL 5511039, at *4 (N.D. Ala. Nov. 9, 2012).

allows consent to be provided in writing, orally or by any other means. *See, e.g.*, *Shamblin*, 2015 WL 1909765, at *12.

For text messages sent prior to October 16, 2013, it is widely recognized—including by the Eleventh Circuit and this Court—that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary." *In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 7 F.C.C. Rcd. 8752 (1992); *see also Lawrence*, 2016 WL 7407243, at *2 ("[T]he provision of a mobile phone number, without limiting instructions, suffices to establish the consumer's general consent to be called under the TCPA."); *Baird v. Sabre*, 995 F. Supp. 2d 1100, 1102–03 (C.D. Cal. 2014), *aff'd*, 636 F. App'x 715 (9th Cir. 2016) ("Myriad federal district courts have . . . conclude[d] that plaintiffs who provided a business with their telephone number and then received a text message from the business had no claim under the act."); *Pinkard v. Wal-Mart Stores*, No. 12-02902, 2012 WL 5511039, at *6 (N.D. Ala. Nov. 9, 2012) (same). This Court has acknowledged the validity of this approach for calls predating October 16, 2013. *See Johnson v. Credit Prot. Ass'n, L.P.*, No. 11-80604, 2012 WL 5875605, at *4 (S.D. Fla. Nov. 20, 2012) (quoting the 1992 FCC Order).

Plaintiff's presumption regarding consent—that persons who had their phone numbers forwarded by third parties did not consent—runs directly contrary to the evidence at hand. First, the evidence proves that a significant percentage of the individuals forwarding in numbers were forwarding in numbers ***for which they were also the subscriber***. Specifically, Plaintiff's putative class consists of 2,367 individuals on Verizon. In response to a subpoena issued to Verizon concerning these numbers, 443 of these individuals—approximately 20%—were forwarded by numbers on the same plan. (*See* Second Biggerstaff Report at 11.) Likewise, Plaintiff's putative class consists of 266 individuals on US Cellular. In response to a subpoena issued to US Cellular concerning these numbers, approximately 33% were forwarded by numbers on the same plan. (*See id.*) Plaintiff's putative class also consists of over 500 persons on Sprint. Over 6% were forwarded by numbers on the same plan. (*See id.*)[13] Plaintiff has

[13] For the sake of judicial economy, Defendants have cited to the analysis performed by Plaintiff's expert, Robert Biggerstaff, on the data subpoenaed by Defendants from Verizon, US Cellular and Sprint. Defendants can provide the full subpoena responses from which Mr. Biggerstaff derived his data if the Court finds that such documentation would beneficial.

made no effort whatsoever to separate those who forwarded in numbers for which they were the subscriber, though such parties plainly consented to receive the messages at issue—indeed, they were very plausibly forwarding in *their own numbers* (*i.e.*, a business line). *See, e.g.*, *Omnibus Order*, 30 FCC Rcd. 7961 ¶ 73 ("Both [subscribers and customary users] can give prior express consent to be called at that number."); (*see also* Biggerstaff Dep. at 79:13-80:1, 83:2-9.).

Second, as detailed further in Section III, *infra*, Plaintiff's putative class is inherently dissimilar for myriad other reasons. Again, Plaintiff simply presumes that those whose numbers were forwarded by third parties *ipso facto* could not have consented and therefore these individuals must be treated the same. The evidence disproves this presumption. **Fifty-two** declarations were obtained from those who forwarded numbers. (*See* Eisen Decl., Exhibit E.) These declarations provide a clear cross-section of the persons forwarding numbers, and undermines Plaintiff's boldfaced contention. These friend-forwarders testified that they:

- Forwarded numbers *only* after obtaining prior express consent from the recipients to participate in the text program at issue (*see, e.g.*, *id*. at AHI 5602, 5604, 5606, 5609, 5613, 5615, 5617, 5627, 5635-38, 5639, 5641, 5651, 5652, 5755);
- Forwarded numbers that were also on their phone plan (*see, e.g.*, *id.* at AHI 5603, 5605, 5607, 5610, 5642, 5747, 5748, 5750, 5753, 5754); and
- Forwarded numbers that belonged to immediate family (*see, e.g.*, *id.* at AHI 5604, 5605, 5609, 5613, 5627, 5633, 5643, 56425644, 5652).

Plaintiff, for his part, obtained a declaration which he claims proves that friend-forwardees *could not* have provided prior express consent. (*See* DE 199-13.) To the contrary, however, the juxtaposition of Plaintiff's single declaration and the ***fifty-two*** obtained by Defendants simply proves the point that consent will be a highly individualized issue, as the Court would have to delve into the specific experiences and conversations of each friend-forwardee and forwarder.

Furthermore, of Plaintiff's putative class of 13,046, over **600** of those persons subsequently referred their own friends to participate in the text message program at issue. (*See* Second Biggerstaff Report at 7; *see also* Eisen Decl., Exhibit V [Declaration of Kenneth Sponsler (hereinafter "Sponsler Decl.")] ¶¶ 5-7.) In other words, over 600 persons who were themselves forwarded in subsequently participated in the referral program. Plaintiff's presumption that those who were referred by third-parties simply did not consent is rebutted by the fact that a significant number of those persons plainly wanted to participate in the text program at issue, and in fact did so. Whether this proves prior express consent is an inquiry left

for the merits of this case. However, such evidence is clearly, at this stage, probative of consent.

Likewise, of Plaintiff's putative class of 13,046, over **570** of those persons subsequently responded "yes" to the Double Opt-In Message in early 2012. (*See* Exhibit I; *see also* Sponsler Decl. ¶¶ 8, 9.) In other words, over 570 persons who were forwarded in to the text program at issue subsequently expressed affirmative consent to continue receiving the text messages at issue. Again, Plaintiff's presumption that those who were referred by third-parties could not have possibly consented is meritless. A significant percentage of Plaintiff's putative class in fact plainly wanted the text messages at issue. And again, whether this proves prior express consent is an issue for a later day. Suffice at this stage that this evidence is plainly indicative that Plaintiff's putative class members are inherently dissimilar.

As evidenced by the subpoena responses from the phone carriers and the 53 declarations, the dissimilarities between Plaintiff's putative class members precludes a finding of commonality. *See, e.g.*, *Dukes*, 564 U.S. at 350 ("Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.").

C. Plaintiff and His Counsel Are Inadequate.

The adequacy prong of Rule 23(a)(4) consists of two related elements—the adequacy of the class representative and the adequacy of the class counsel. *See, e.g.*, *Piazza v. Ebsco Indus., Inc.*, 273 F.3d 1341, 1346 (11th Cir. 2001) ("'Adequacy of representation' means that the class representative has common interests with unnamed class members and will vigorously prosecute the interests of the class through qualified counsel."); *Kirkpatrick v. J.C. Bradford*, 827 F.2d 718, 726 (11th Cir. 1987) (same). In other words, "[t]he adequacy-of-representation requirement encompasses two separate inquiries: (1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representatives will adequately prosecute the action." *Busby v. JRHBW Realty, Inc.*, 513 F.3d 1314, 1323 (11th Cir. 2008) (internal citation omitted). Here, Plaintiff and his counsel fail to satisfy either inquiry.[14]

[14] As noted above, defenses unique to the named plaintiff are often evaluated under both typicality and adequacy. *See, e.g.*, *CE Design*, 637 F.3d at 724. Likewise, courts often find adequacy is not met where the named plaintiff fails to establish typicality and commonality. *See, e.g.*, *Dyer v. Publix Super Markets, Inc.*, No. 97-2706-CIV-T25E, 2000 WL 33339613, at *10 (M.D. Fla. Mar. 22, 2000) ("[T]he Court does note that if the proposed class representatives do not meet the typicality requirement of Rule 23(a)(3) the named plaintiffs could not adequately

i. Plaintiff's Complete Abdication of His Responsibilities as Putative Class Representative Renders Him Inadequate.

It is well-settled that Rule 23(a)(4) is not met "where the named plaintiffs demonstrated insufficient participation in and awareness of the litigation." *Kirkpatrick*, 827 F.2d at 727. A class representative must be able to act with the "forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class." *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1253 (11th Cir. 2003) (internal quotations and citation omitted).

Here, Plaintiff has completely abdicated his participation in and oversight of class-wide settlement discussions—an issue Plaintiff does not so much as mention in his motion for class certification. (*See* DE 199 at 12.) Specifically, *multiple* class-wide settlement proposals have been exchanged in this case, and Plaintiff has *never* been informed of any of the offers, nor does he care to know what they were. His reaction to these offers is simply to accept whatever his counsel has chosen to do. At Plaintiff's deposition, the following colloquy occurred:

> Q: Are you personally aware of any offers by us, the Defendants, in this case to settle it on a class basis?
> A: All I'm aware of is there was maybe an offer but I don't know the amount as far as a class action.
> Q: Okay. So—so were you consulted about that potential class settlement?
> A: I wasn't presented like the amount. I knew we were part of –
> Q: I don't think I understood that. So you weren't aware of the amounts of the potential class resolution; is that correct?
> . . .
> A: Not the amount, no.
> Q: Not aware of that amount – were you aware of any of the specifics of the deal?
> A: Not really specifics, no.
> . . .
> Q: Are you aware, are you personally aware, of the contours or the terms of any settlement on a class basis in this case?
> A: No.
> . . .
> Q: So if you're representing or seeking to represent other people and someone comes to you with a deal to resolve that case, whatever case that might be, wouldn't you have to know what they're offering to pay you and the class members?
> A: The actual number?
> Q: Yes.

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represent the class . . . ."). To avoid repetition, Defendants to not revisit their typicality and commonality arguments, but incorporate them here to the extent the Court finds them relevant.

> A: No.
> . . .
> Q: So the only decision, if you want to call it that, is to rely on what Mr. Owens [his counsel] said and reject the deal; is that correct?
> . . .
> A: Correct. On the advice of Mr. Owens, yeah.

(*See* Keim Dep. at 55:25-60:12.) Plaintiff's complete abdication of his duties as class representative became even clearer later in his deposition where the following colloquy occurred:

> Q: But you don't need to know the terms of the class deal? You didn't care? . . . As long as – whatever your attorney says you're going to do?
> A: I trust him, correct.
> Q: So you weren't even curious as to what the offer was? Don't care?
> A: I trust my attorney, correct.
> Q: That wasn't the question.
> A: I don't care.
> Q: You don't care what the offer was?
> A: Correct, yeah.

(*See id.* at 307:10-23.)[15]

Detailed class settlement discussions were held over the course of February of 2016. (*See* Eisen Decl. ¶ 4.) Plaintiff was neither (i) informed of the settlement proposals nor (ii) cared. It is beyond comprehension Plaintiff would represent to this Court that he could represent a class of individuals without any care for even the amount being offered to settle their claims, let alone the contours of the offer itself. Plaintiff cannot possibly be adequate to "assert and defend the interests of the members of the class" where he has no idea what Defendants even offered the putative class. *See London*, 340 F.3d at 1253. Indeed, Plaintiff's complete disinterest in the settlement of this case—and the per-claim amount being offered to the putative class members—can only be described as directly antagonistic to the rest of the putative class. *See, e.g., Bruhl v. Price Waterhousecoopers*, 257 F.R.D. 684, 690 (S.D. Fla. 2008) (Marra, J.) (noting the putative class representative cannot have "interests antagonistic to the interests of the class")

This scenario is directly analogous to that addressed by Judge Covington in *Spinelli v. Capital One Bank*, which involved a putative class representative in a Florida Deceptive Trade Practices Act case who testified that she had no involvement in "talk[ing] about possible settlement of the case" and instead relied solely on the advice of counsel. 265 F.R.D. 598, 614

[15] For ease of reference, Defendants have lodged a DVD of the block-quoted excerpts of Plaintiff's deposition simultaneously with this filing.

(M.D. Fla. 2009). Specifically, the putative class representative testified that her counsel "just tells me what is going on, and I take it in . . . he lets me know what's going on, and I just go along with what he says, which I didn't think he would lead me in the wrong direction." *Id.* The Court found "most troubling" that the putative class representative just "goes along with what counsel says" and thus cannot possibly be able to "protect the interests of the class . . . ." *Id.* at 615; *see also A Aventura Chiro. Care Ctr., Inc. v. BB Franch. LLC*, No. 1:15-CV-20137-UU, 2015 WL 11051056, at *4 (S.D. Fla. Aug. 26, 2015) ("Based on the deposition of David Muransky, the owner and corporate representative of Plaintiff, the Court finds that Plaintiff is not an adequate class representative because it has virtually abdicated to its attorneys the conduct of the case, it is unaware of its responsibilities as a class representative, and it is certainly not capable of controlling or prosecuting this action.").

Plaintiff's assertion that "his interests are squarely aligned with the class" is plainly false. (DE 199 at 12.) It is difficult to envision more divergent interests than a plaintiff that simply "does not care" about the relief offered to the putative class he seeks to represent.

ii. Plaintiff's Counsel's Ethical Violations Relating to This Case Render Them Inadequate.

Courts in this District uniformly hold that "[m]isconduct by class counsel that creates a serious doubt that counsel will represent the class loyally requires denial of class certification." *Alhassid v. Bank of Am.*, 307 F.R.D. 684, 699 (S.D. Fla. 2015); *see also Harris v. Nortek Glob. HVAC LLC*, No. 14-CIV-21884, 2016 WL 4543108, at *9 (S.D. Fla. Jan. 29, 2016) (same); *see also Creative Montessori Learning Centers v. Ashford Gear LLC*, 662 F.3d 913, 917 (7th Cir. 2011) ("[Where] class counsel have demonstrated a lack of integrity that casts serious doubt on their trustworthiness as representatives of the class . . . [t]here is no basis for confidence that they would prosecute the case in the interest of the class, of which they are the fiduciaries."). The misconduct here goes to the very heart of the attorney-client relationship and creates an clear conflict of interest.[16]

[16] Courts in this district often quote from the Eleventh Circuit's *Busby* case, which states "[o]nly the most egregious misconduct on the part of plaintiffs' lawyer could ever arguably justify denial of class status." *Busby*, 513 F.3d at 1323 (quoting *Halverson v. Convenient Food Mart, Inc.*, 458 F.2d 927, 932 (7th Cir. 1972)). Notably, this language from *Halverson* was expressly rejected and overruled by the Seventh Circuit in *Creative Montessori*, where the Court stated that the *Halverson* quote was "a throwaway line" and held that the quote, "if taken literally

Plaintiff's counsel's ethical misconduct in this action is twofold. First, as detailed above, Plaintiff's counsel have declined to even share class settlement offers with their client. (*See* Keim Dep. at 55:25-60:12.) As a preliminary matter, this plainly violates Florida Rule of Professional Conduct 4-1.4, which requires counsel "promptly inform the client" of the substance of settlement offers. *See* Fla. R. Prof. Conduct 4-1.4. Indeed, the Florida Rules of Professional Conduct expressly forbid counsel from "withhold[ing] information to serve the lawyer's own interest or convenience . . . ." *Id.* at Comment *Withholding Information*. Rather than provide information to permit their client to make an informed decision as to settlement, Plaintiff had no idea whether class settlement offers had been made. (*See* Keim Dep. at 55:25-60:12.) That Plaintiff apparently did not care does not absolve counsel of their ethical duty.

The failure to convey settlement offers to a client has been held *per se* as grounds to deny class certification. Just two years ago, in *Kulig v. Midland Funding, LLC*, Judge Castel evaluated the plaintiff's motion to certify a class concerning putative violations of the Fair Debt Collection Practices Act and related state laws. No. 13-4715, 2014 WL 5017817, at *1 (S.D.N.Y. Sept. 26, 2014). The Court focused exclusively on the adequacy of class counsel in light of settlement offers exchanged and New York Rule of Professional Conduct 1.4. *Id.* at *4. Like this case, the named plaintiff had no knowledge of settlement offers exchanged, including a classwide offer. *Id.* The Court found counsel's actions inexcusable, holding:

> [T]he main provision of the NYRPC at issue—Rule 1.4—goes to the core of whether counsel will adequately represent the class. . . . The discussion and evaluation of settlement offers is perhaps the single most significant point of contact between class counsel and a class representative throughout the pendency of the action. Moreover, in a civil matter the receipt of a settlement offer is the sole enumerated "material development" of which an attorney is affirmatively required to promptly communicate something to a client.

Id. at *6. The Court denied certification. Indeed, on reconsideration the Court noted held conveying a settlement offer is "a bedrock duty [pursuant to Rule 1.4] subject to no exceptions." *Kulig v. Midland Funding, LLC*, No. 13-4715, 2014 WL 6769741, at *4 (S.D.N.Y. Nov. 20, 2014). Further, a class representative cannot fulfill his duty to be "vigilant, competent and independent" and "actively monitor class counsel and the conduct of the litigation" if the he is

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condone[s], and by condoning invite[s], unethical conduct." *Creative Montessori*, 662 F.3d at 918. It instead adopted the current standard: "[m]isconduct by class counsel that creates a serious doubt that counsel will represent the class loyally requires denial of class certification." *Id.*

not provided basic settlement information. *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1221 (S.D. Fla. 2006); *see also Singletery v. Equifax Info. Servs., LLC*, No. 09-cv-489, 2011 WL 9133115, at *22 (N.D. Ala. Sept. 22, 2011) ("Class representatives serve the important fiduciary role of exercising the independent judgment and decision-making authority . . . .").

Second, Plaintiff's counsel have utilized a plainly unethical retention agreement with Plaintiff, depriving Plaintiff of the ability to exercise independent decision-making. Specifically, Plaintiff's retention letter with both his co-counsels (who frequently prosecute class actions together) crafts a contingency-fee arrangement with a nefarious caveat:

[redacted][17]

As the former-Fifth Circuit made abundantly clear:

> [A]n attorney never has the right to prohibit his client from settling an action in good faith. A client by virtue of a contract with his attorney is not made an indentured servant, a puppet on counsel's string, nor a chair in the courtroom. Counsel should advise, analyze, argue, and recommend, but his role is not that of an imperator whose edicts must prevail over the client's desire. He has no authoritarian settlement thwarting rights by virtue of his employment.

Singleton v. Foreman, 435 F.2d 962, 970 (5th Cir. 1970). Florida case law and the Florida Rules of Professional Conduct make this pronouncement clear. *See Watson v. Stewart Tilghman Fox & Bianchi*, 2010 WL 3805171 (Fla. App. 4 Dist.) ("A litigant is [not] required to hazard the outcome of litigation rather than settle the suit, simply because his attorneys are employed on a

[redacted]

contingency fee basis. Rule 4-1.2(a), Rules Regulating the Florida Bar, provides: 'A lawyer shall abide by a client's decision whether to settle a matter.'"); *Sentco, Inc. v. McCulloh*, 84 So. 2d 498, 499 (Fla. 1955) ("Counsel have cited no case which holds that a litigant is required to hazard the outcome of litigation, rather than settle the suit, simply because his attorneys are employed on a contingent fee basis. In fact, the authority is to the contrary.").

[redacted]

Judge Castel found an even less egregious provision to render class counsel inadequate in *Kulig*. Specifically, Judge Castel found language in an engagement letter that "strongly implie[d] that a class representative accepting an individual settlement instead of a classwide settlement is a wrongful act" was "troubling" and "wrong." *Kulig*, 2014 WL 5017817, at *5.

[redacted] Plaintiff's counsel has violated Florida ethical rules and created a clear conflict of interest by irrevocably tying Plaintiff's interest to his counsels' demands. *See, e.g.*, *Singletery*, 2011 WL 9133115, at *22 ("Class representatives are not mere ciphers, wholly dependent upon and subservient to class counsel. . . . The role of the class representative is too important, as a bulwark protecting the interest of absent class members, to fail to assure that the class representative can make mature, informed decisions for himself."). In light of Plaintiff's counsels' ethical violations, they are plainly inadequate under Rule 23(g) to "fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(4).

iii. Plaintiff's Participation in Fraudulent Enterprises During the Pendency of This Litigation Renders Him Inadequate.

As this Court has stated, "[t]o adequately represent a class, a named plaintiff must show that he possesses the integrity and personal characteristics necessary to act in a fiduciary role

representing the interests of the class . . . ." *Bruhl*, 257 F.R.D. at 690. Plaintiff's continuous and ongoing participation in fraudulent schemes during the pendency of this case renders him incapable of acting as a fiduciary to the class.

Specifically, since 2011, Plaintiff has participated in at least five get-rich-quick schemes that were subsequently shut down as Ponzi and/or pyramid schemes by the federal government. Unrepentant participation in these schemes renders Plaintiff inadequate to act as a fiduciary of the class. *See, e.g.*, *Pines Nursing Home*, 2014 WL 12531512, at *3 (finding plaintiff charged with fraud and with serious credibility problems was inadequate); *Hall*, 1992 WL 372354, at *9 ("Many of the plaintiffs have displayed a lack of credibility or honesty which is fatal to their representative status."); *Harris v. Vector Mktg. Corp.*, 753 F. Supp. 2d 996, 1015 (N.D. Cal. 2010) (noting "confirmed examples of dishonesty" indicates inadequacy).

First, Plaintiff had been an active participant in the Zeek Rewards Ponzi scheme until it was shut down by the SEC in August of 2012—five months after this case was filed. Zeek Rewards was an internet-based penny auction site that was, in reality, a massive Ponzi scheme that defrauded thousands of consumers out of hundreds of millions of dollars. (*See* Eisen Decl., Exhibit X; *see also* Keim Dep. at 241:24-242:15.)[18] The site was shut down and assets frozen by the SEC in August of 2012 and a receiver, Kenneth Bell, was appointed by the Court to get money back to the defrauded consumers. *See SEC v. Rex Venture Group, LLC*, No. 12-cv-519, DE 4 (W.D.N.C. Aug. 17, 2012). Thereafter, Mr. Bell filed a claw back case against a handful of individual participants in Zeek Rewards and a defendant class of Net Winners under the scheme. *See Bell v. Disner, et al.*, No. 14-cv-00091 (W.D.N.C.). Plaintiff is named as a Net Winner, and the defendant Net Winner class was certified on February 10, 2015. *See id.* at DE 101; (*see also* Keim Dep. at 249:19-250:4.)

Plaintiff's participation in Zeek Rewards was far from passive. On July 19, 2012—*after* this litigation was initiated—Plaintiff incorporated R & B Auctions LLC in Florida to shield his Zeek Rewards "assets." (*See* Eisen Decl., Exhibit Y; *see also* Eisen Decl., Exhibit Z at 6.)[19]

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[18] Those in charge of Zeek Rewards have subsequently either pleaded to criminal charges or been convicted. (*See* Keim Dep. at 245:9-246:1, 259:24-260:3.)

[19] Plaintiff's counsel's effort to portray Plaintiff's participation in Zeek Rewards as "akin to the thousands of other individuals who were taken advantage of in this scheme" is grossly contradicted by the evidence. (*See* DE 149 n.2.) Plaintiff (i) incorporated a business to shield

Plaintiff was so heavily involved in Zeek Rewards that Kenneth Bell is presently going after Plaintiff to collect $19,953.98. (*See* DE 151-3.) Plaintiff, for his part, stated at his deposition that he has "no intention" of paying any restitution to the Zeek Rewards receiver. (*See* Keim Dep. at 256:21-257:1.) Plaintiff's refusal to pay the receiver could result in litigation given that judgment was entered as to liability against the class of Net Winners on November 29, 2016. *See Bell*, No. 14-cv-00091, DE 142 (W.D.N.C. Nov. 29, 2016). Further, despite multiple criminal convictions and SEC proceedings, Plaintiff refuses to acknowledge that Zeek Rewards was in fact illegal. (*See* Keim Dep. at 259:24-160:9.) Plaintiff even went so far as to instruct individuals with whom he participated in Zeek Rewards to disregard lawful subpoenas relating to Zeek Rewards *after* this lawsuit was filed. (*See id.* at 264:20-267:5; *see also* Eisen Decl., Exhibit AA.) Plaintiff's hope was to obstruct the court-appointed receiver, whose sole purpose is to collect and distribute money to the innocent victims of the Zeek Rewards scam. (*See id.*)

Second, Plaintiff's participation in Zeek Rewards is certainly not anomalous. Plaintiff also participated in a company called BurnLounge, Inc., a recruitment-based music downloading site that was shut down by the Federal Trade Commission as a pyramid scheme. (*See* Keim Dep. at 267:9-10); *see also FTC v. BurnLounge, Inc.*, 7-cv-3654 (C.D. Cal.); *F.T.C. v. BurnLounge, Inc.*, 753 F.3d 878, 889 (9th Cir. 2014) ("We affirm the district court's holding that BurnLounge was an illegal pyramid scheme, in violation of § 5(a) of the FTCA.").

Plaintiff also encouraged people to participate in and in fact participated in—as recently as 2014—companies such as Go Fun Rewards (shut down by the SEC as a pyramid scheme), Trading Coalition (shut down for "regulation" issues), Profitable Sunrise (shut down by the SEC as a pyramid scheme) and Telex (shut down by the SEC as a pyramid scheme). (*See* Keim Dep. at 272:3-275:25; 279:20-281:18; 294:16-295:21; *see also* Eisen Decl., Exhibit BB.) Throughout his involvement in these fraudulent companies, Plaintiff continuously pitched these companies to others as "just like Zeek" and "Zeek 2.0," despite the fact that Zeek Rewards had been shut down as a Ponzi scheme years earlier. (*See* Keim Dep. at 296:6-25; *see also* Eisen Decl., Exhibit CC.)

Apart from urging persons to participate in fraudulent companies, he also urged his contacts to participate in offshore companies so as to evade the reach of federal regulators and

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Zeek Rewards assets and (ii) owes nearly $20,000 to the Zeek Rewards receiver. This indicates he *took advantage of* thousands of other individuals.

US regulations. (*See* Keim Dep. at 282:2-291:18, 294:1-5; *see also* Eisen Decl., Exhibit DD.) Indeed, Plaintiff specifically encouraged his contacts to get involved in a company called AddWallet, which he portrayed as "just like Zeek," but run offshore in Ecuador. Plaintiff believed the fact that the company was based in Ecuador would allow it to evade federal law and regulators, and that this was a benefit. (*See* Keim Dep. at 282:2-291:18, 294:1-5.)

Plaintiff's participation in fraudulent enterprises was so habitual, that he formed sham companies with known fraudsters during the pendency of this case. Plaintiff formed Unity Medical Alliance, LLC and United Medical Alliance, LLC in 2014 (in Texas and Nevada, respectively) with an individual named Ryan Moses. When asked about him, Plaintiff testified:

> Q: But you formed both business with Ryan Moses?
> A: Yes.
> Q: Are you aware that Ryan Moses has a number of prior criminal convictions?
> A: Yes.
> . . .
> Q: Are you aware a number of people complained about Ryan Moses operating sham companies to rip people off?
> A: Yes, but I got paid through them.
> Q: Excuse me?
> A: I did receive money from that company. So they didn't rip me off.
> Q: So you're aware that Ryan Moses was accused of operating sham companies but he didn't rip you off specifically. He may have ripped other people off but no you?
> A: Correct.
> . . .
> Q: So to bring this full circle you were okay with forming businesses with Ryan Moses who had in the past ripped people off through what has been referred to as sham companies so long as he didn't rip you off?
> A: Correct, yeah.

(Keim Dep. at 304:5-305:16.) Given Plaintiff's history of involvement in fraudulent enterprises, especially during the pendency of this action, Plaintiff clearly lacks the integrity necessary to act as a fiduciary to the class. *Bruhl*, 257 F.R.D. at 690.

iv. Plaintiff's Evasive and False Discovery Responses Render Him an Inadequate Class Representative.

Plaintiffs who are "unable to credibly testify as to basic facts" and routinely provide evasive discovery responses are inadequate to act as a fiduciary for the class. *See, e.g.*, *A Aventura Chiro.*, 2015 WL 11051056, at *5; *see also Hall*, 1992 WL 372354, at *9 ("Many of the plaintiffs have displayed a lack of credibility or honesty which is fatal to their representative status."); *Friedman-Katz v. Lindt & Sprungli, Inc.*, 270 F.R.D. 150, 160 (S.D.N.Y. 2010)

("Although a minor discrepancy in testimony should not prevent certification, the serious misrepresentations made here by the Plaintiff weigh heavily in favor of finding that she is not an adequate class representative."). The reason for this is clear: "inconsistent or false testimony could create serious problems with respect to plaintiff's credibility and could become the focus of cross examination . . . to the detriment of the class." *Id.* (internal quotations and citation omitted).

Here, Plaintiff provided evasive, misleading and false testimony and discovery responses. At two points during Plaintiff's deposition, he refused to answer questions regarding potentially fraudulent activity, which plainly bears on his credibility. (*See* DE 158 at 2 "Plaintiff's participation in ZeekRewards . . . may go to the adequacy of Plaintiff as a class representative in this action.") When asked about his solicitation of others to join in an Ecuador-based scam in early 2013, he stated the following:

> Q: So why is it a big deal it's offshore?
> A: I can't answer that.
> Q: You can't answer that?
> A: No.
> . . .
> Q: It was February 19, 2013. Not a clue as to why joining a company based in Ecuador would be a good idea?
> . . .
> A: No answer.

(Keim Dep. at 285:19-287:2.)

Plaintiff's deposition testimony also made it clear that he provided evasive and demonstrably false written discovery responses. For example, when asked to identify all of his email addresses, he identified exactly one: bksburnlounge@hotmail.com. (*See* Exhibit L at 19.) By doing so, he avoided identifying ZeekBK66@gmail.com (among many others), his email used to engage in his Zeek Rewards scheme. (*See* Keim Dep. at 126:23-128:30, 130:9-17, 132:1-3; *see also* Eisen Decl., Exhibit Y.) On April 27, 2016, Plaintiff's counsel stated before Judge Matthewman that "there are no responsive documents" relating to Zeek Rewards. (*See id.*) This, however, proved to be completely false. Only after Plaintiff's September 15, 2016 deposition—six months *after* Plaintiff's counsel's false representation to the Court—did Plaintiff's counsel even bother to search Plaintiff's ZeekBK66@gmail.com email address.

Likewise, in response to Defendants' requests to admit, Plaintiff—and his counsel, apparently—believed that it was appropriate to deny a dozen requests simply because he could

not recall the answer and did not deign it necessary to undertake a reasonable inquiry. Specifically, Plaintiff engaged in the following colloquy at his deposition:

> Q: So in your mind, again, if you don't recall it, you just deny it in these answers [to the requests to admit]?
> A: I do not recall.
> . . .
> Q: If you don't recall something, then you in turn just deny it in your response to our Request for Admission. Is that fair to say?
> A: Correct, yeah.

(Keim Dep. at 187:13-22.) This tactic is clearly improper. *See* Fed. R. Civ. P. 36(a)(4)(requiring parties to admit or deny requests, or alternatively to state "it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny."); *see also Marchand v. Mercy Med. Ctr*., 22 F.3d 933, 936 (9th Cir. 1994) ("Parties may not view requests for admission as a mere procedural exercise requiring minimally acceptable conduct.").

Plaintiff's failure to conduct a reasonable inquiry resulted in the denial of numerous requests to admit despite readily available evidence to the contrary. Specifically, Plaintiff denied signing up to receive third-party text message advertisements on CashTexts.com concerning **44** different topics, including fast food. (*See* Eisen Decl., Exhibit EE at 27, 28.) Readily available evidence from CashTexts, however, indicates the true scope of Plaintiff's involvement and his specific request to receive text messages from third parties relating to fast food. (*See* Killough Decl, Ex. A.) Indeed, Plaintiff likewise denied recruiting others to participate in CashTexts.com and participating in so-called referral networks, designed to enable Plaintiff to make money off of those he recruited. (*See* Exhibit EE at 31, 33.) Plaintiff's own evidence indicates the extent of Plaintiff's prolonged recruitment efforts through a variety of different online media. (*See* Keim Dep. at 155:23-161:21; 168:7-171:24; Killough Decl., Ex. B.) Plaintiff recruited Allison Worsena—the individual that signed him up to receive the messages at issue—to participate in CashTexts.com. (*See* Keim Dep. at 161:17-170:15.) Plaintiff also, it turns out, participated in a referral network of *over 400 people*. (*See* Killough Decl., Ex. B.)

Plaintiff similarly denied basic requests pertaining to his involvement in Zeek Rewards, including his ownership of the affiliated entity BKPennyAuction. (*See* Exhibit EE at 52, 53.) Again, publicly available evidence directly contradicts Plaintiff's responses, establishing that he both owned and recruited others to participate in BKPennyAuction. (*See* Keim Dep. at 179:17-182:18.) Again, Plaintiff plainly sought to evade the true nature of his involvement in a

fraudulent enterprise. Plaintiff's evasive and false discovery responses undermine his credibility, and thus he is not adequate to serve as class representative.

III. THE EVIDENCE ESTABLISHES THAT INDIVIDUAL QUESTIONS CONCERNING CONSENT NECESSARILY PREDOMINATE OVER ANY COMMON QUESTIONS.

In order to satisfy Rule 23(b)(3)'s predominance requirement, "the issues in the class action that are subject to generalized proof and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof." *Babineau v. Fed. Exp. Corp.*, 576 F.3d 1183, 1191 (11th Cir. 2009) (internal quotations and citation omitted). As the Supreme Court has made clear, "[e]ven if Rule 23(a)'s commonality requirement may be satisfied by that shared experience, the predominance criterion is far more demanding." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997).

It is Plaintiff's burden to "advance a viable theory employing generalized proof to establish liability with respect to the class involved." *Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 328 (5th Cir. 2008). The predominance inquiry thus "requires an examination of the claims, defenses, relevant facts, and applicable substantive law,' . . . to assess the degree to which resolution of the classwide issues will further each individual class member's claim against the defendant." *Babineau*, 576 F.3d at 1191. Accordingly, predominance is not satisfied where "separate trials are required for each class member in order to determine each member's entitlement to the requested relief." *Perez v. Metabolife*, 218 F.R.D. 262, 273 (S.D. Fla. 2003).

A. Evidence of Consent Defeats Predominance in TCPA Cases.

Consent is integral to the ability to pursue a TCPA action. *See* 47 U.S.C. § 227(b)(1); *see also Shamblin*, 2015 WL 1909765, at *7 (finding consent is an "outcome-determinative issue[]"). Accordingly, a plaintiff must establish that consent is amenable to a classwide resolution in order to meet Rule 23(b)(3)'s predominance requirement. *See, e.g.*, *Shamblin*, 2015 WL 1909765, at *11 (denying certification in a TCPA class action where "the issue of consent remains to be individually determined as to each putative class member."); *Barrett v. ADT Corp.*, No. 2:15-CV-1348, 2016 WL 865672, at *9 (S.D. Ohio Mar. 7, 2016) ("[T]he important, individualized question of whether each putative class member gave prior express consent to be contacted remains and overwhelms the common issues."). At this point, "the Court need not decide whether any class member actually consented," but rather must simply "assess whether

the issue can be resolved by common, classwide evidence." *Newhart v. Quicken Loans Inc.*, No. 9:15-CV-81250, 2016 WL 7118998, at *2 (S.D. Fla. Oct. 13, 2016)

As one Southern District of Florida court recently held, "the chorus" of courts "faced with TCPA class actions that have found such individualized inquiries on the consent issue would predominate over any common issues." *Newhart*, 2016 WL 7118998, at *5; *see also Ung*, 2017 WL 354238, at *4 (quoting *Newhart* and joining the "chorus"). Courts within this Circuit and across the country thus routinely deny class certification in TCPA cases where the evidence establishes that individualized inquiries regarding consent predominate.

By way of example, just a few months ago, Judge Rosenberg evaluated a motion for class certification in a putative TCPA class action, *Newhart v. Quicken Loans*. *Newhart* concerned calls placed by Quicken Loans about the federal Home Affordable Refinance Program that the plaintiff contended violated the TCPA. *See* 2016 WL 7118998, at *1. The way Quicken Loans obtained the phone numbers varied, and it was clear that numerous called parties requested to be called. *Id.* The Court found that "Quicken Loans has adduced substantial (and unrefuted) evidence that borrowers provided written and oral prior express consent to receive calls on their cell phones from Quicken Loans in a variety of ways." *Id.* at *5. Judge Rosenberg thus found that the plaintiff failed to meet the predominance element of Rule 23(b)(3).

More recently, Judge Kyle in Minnesota, relying heavily on *Newhart*, similarly found issues of consent predominated in a nearly identical TCPA case to this action, where the putative class was drawn around the provision of a phone number by a third party. *See Ung*, 2017 WL 354238, at *3-4. *Ung*, as noted above, stemmed from calls placed to phone numbers provided by car buyers to Universal Acceptance (the finance arm to a seller of used cars) as secondary numbers to contact in case of missed payments. *Id.* at *1. Universal provided limited evidence of consent—namely, that one third party specifically advised the company that it could call her and various business records indicating that third parties often accompanied the car buyer (thus making that third parties' consent likely). In the face of that evidence, the Court held that:

> Liability in each instance . . . will hinge on whether the class member orally consented to be called when contacted by Universal; voluntarily provided his or her cell phone number, either directly or through the car purchaser; appeared at the time of the purchase and agreed to be contacted; or provided his or her consent in some other way.

Id. at *4. The Court denied certification.

Judge Cohn reached an identical conclusion in *Balthazor v. Central Credit*, which pertained to debt collection calls placed by the defendants that plaintiff alleged violated the TCPA. *See* No. 10-62435-CIV, 2012 WL 6725872, at *1 (S.D. Fla. Dec. 27, 2012). Relying heavily on Judge Dimitrouleas's *Hicks v. Client Services* decision, Judge Cohn held that "[r]esolution of each putative class member's TCPA claim would necessarily involve an individual assessment of whether each class member consented to receive telephone calls on their cellular telephone." *Id.* at *4 (citing *Hicks v. Client Servs., Inc.*, No. 07-61822-CIV, 2008 WL 5479111, at *7 (S.D. Fla. Dec. 11, 2008)).

Likewise, Judge Middlebrooks recently evaluated a motion for class certification in a putative TCPA class action, *Fitzhenry v. ADT Corp.*, which concerned calls placed by or on behalf of ADT, a home security provider, which the plaintiff alleged violated the TCPA. *See* No. 14-80180, 2014 WL 6663379, at *1 (S.D. Fla. Nov. 3, 2014). At the time of the calls at issue, the TCPA contained an "established business relationship" exception to telemarketing calls placed to residential landlines. *See id.* at *6. ADT put forth evidence that a sample **26** calls (out of the **36,748** at issue) were to existing customers and thus potentially exempted. *Id.* The Court found this evidence sufficient to demonstrate that "individual issues exist as to whether the call recipients had an established business relationship with Defendants." *Id.* at *7; *see also Hicks*, 2008 WL 5479111, at *7 ("Several courts have held that proof of consent is an essential individual issue under the TCPA that makes class certification inappropriate.")

The weight of authority across the country is in accord. Where evidence indicates consent will be an individualized issue, consent predominates and thus class certification is improper.[20]

- *Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318 (5th Cir. 2008): *Gene* involved a TCPA class action brought against BioPay relating to unsolicited faxes. The Court held that "the predominant issue of fact is undoubtedly one of individual consent." *Id.* at 327. BioPay proffered evidence that the fax numbers were obtained through different means. The Court thus held "the determinative question of whether consent can be established via class-wide proof must, given the particular facts of this case, be answered in the negative." *Id.* at 329.

[20] Plaintiff contends certification of TCPA fax cases is relevant to predominance here. Those cases are inapposite. Consent is typically not an issue in TCPA fax cases due to a particular FCC regulation requiring certain opt out language on consented-to faxes. *See, e.g., A Aventura Chiro. Ctr., Inc. v. Med Waste Mgmt.*, No. 12-21695, 2013 WL 3463489, at *4 (S.D. Fla. July 3, 2013) (noting consent would not be an issue and "the singular issue of the absence of the correct opt-out language does not portend individual trials or individualized inquiries").

- *Connelly v. Hilton Grand Vacations Co., LLC*, 294 F.R.D. 574 (S.D. Cal. 2013): *Connelly* involved a TCPA class action against Hilton for calls relating to resort properties. Hilton established consumers consented in myriad different ways, including online, over the phone and through travel agencies. The Court held that "the differing circumstances under which putative class members provided their cell phone numbers to Hilton are, at the very least, relevant to a determination of prior express consent," thus defeating predominance. *Id.* at 579.

- *Warnick v. Dish Network*, 301 F.R.D. 551 (D. Colo. 2014): *Warnick* involved a TCPA class action against Dish for unsolicited calls. The plaintiff presumed anyone not in Dish's database did not consent. *Id.* at 558. Dish provided evidence that "there are many different scenarios in which the numbers provided to it may have been associated with someone other than the named account holder on Dish records." *Id.* at 558-9. The Court denied certification. *Id.* at 559.

- *Shamblin v. Obama for Am.*, 2015 WL 1909765 (M.D. Fla. Apr. 27, 2015): *Shamblin* involved a TCPA class action against Obama for America stemming from alleged unsolicited autodialed calls. OFA established consent for the calls at issue was obtained in myriad ways, including via website signups, event signups, contributions, etc. The Court thus concluded "[i]ndividualized inquiries into consent (including where, how, and when) will predominate." *Id.* at *12.

- *Gannon v. Network Tel. Servs., Inc.*, 2013 WL 2450199 (C.D. Cal. June 5, 2013), *aff'd*, 628 F. App'x 551 (9th Cir. 2016): *Gannon* involved a TCPA class action brought against Network Telephone Services ("NTS"), a provider of adult phone entertainment, relating to allegedly unsolicited text messages. NTS "provide[d] evidence that some of the recipients may have consented . . . ." *Id.* at *3. Accordingly, the Court held that "Plaintiff's class definition would require individual inquiry into whether the potential class members consented to receiving text messages." *Id.*

- *Vigus v. S. Illinois Riverboat/Casino Cruises, Inc.*, 274 F.R.D. 229 (S.D. Ill. 2011): *Vigus* involved a TCPA class action brought against a local casino concerning the alleged receipt of unsolicited advertising calls. Given that the casino called predominantly customers, the Court held that "it would burden the Court and the litigants with the arduous task of sifting through each putative class member's claim to determine its merits on a case-by-case basis." *Id.* at 238.

The evidence establishes individualized consent issues predominate over generic common issues (that do not advance the resolution of this case). Certification should therefore be denied.[21]

[21] Plaintiff relies on *Manno v. Healthcare Revenue Recovery Grp., LLC*, 289 F.R.D. 674 (S.D. Fla. 2013), to establish that individualized issues of consent do not predominate. (*See* DE 199 at 13-15.) That case, however, is distinguishable. In *Manno*, "the way in which the discovery was performed weeded out the individuals who had previously contacted HRRG and, thus, weeded out those individuals who may have consented to be called." *Id.* at 686; *see also*

B. The Evidence Establishes That Consent Will Require Substantial Individualized Inquiries.

The Eleventh Circuit teaches that "[s]erious drawbacks to the maintenance of a class action are presented where initial determinations, such as the issue of liability *vel non*, turn upon highly individualized facts." *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1235-36 (11th Cir. 2000) (internal quotations and citation omitted). While Defendants may have the burden to establish consent *on the merits*, it is Plaintiff's burden to establish here that this action will not "degenerate[e] into mini-trials on consent of every class member." *Hicks*, 2008 WL 5479111, at *8. Not only has Plaintiff failed to do this, but the evidence proves it is impossible.

Plaintiff's contention that Defendants' consent argument is "speculative or hypothetical" is contradicted by the voluminous evidence. (DE 199 at 14.)[22] Consent was obtained in myriad ways. First, the evidence obtained from Verizon, U.S. Cellular and Sprint establishes hundreds of persons forwarded in numbers for which they were also the subscriber (*i.e.*, numbers on family plans and business lines). (*See* Sponsler Report at 13; Second Biggerstaff Report at 11.) Controlling FCC authority establishes that subscribers can consent for all phone numbers to which they are the subscriber. *See, e.g.*, *Omnibus Order*, 30 FCC Rcd. 7961 ¶ 73 ("Both [subscribers and customary users] can give prior express consent to be called at that number."); *see also Leyse*, 804 F.3d at 327 n.14 (noting that both the subscriber and customary user "qualify as 'called parties,' and consent from either would shield Bank of America from liability."). Plaintiff's own expert testified to this fact. (*See also* Biggerstaff Dep. at 79:13-80:1, 83:2-9.)

Plaintiff claims that "although two persons shared a cellular phone plan, this does not demonstrate the requisite authority to consent for one another as a matter of law." (DE 199 at 16.) This statement runs contrary to the testimony of Plaintiff's own expert. (*See* Biggerstaff

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Shamblin, 2015 WL 1909765, at *11 (distinguishing *Manno* on this basis). Plaintiff has made no effort to weed out those who may have consented in this case. Of course, the only way to do so would be to personally ask each and every one of the friend-forwarders.

[22] Plaintiff's contention that "Pizza Hut admits consent was never conveyed to them before or during the campaign" is sanctionable. (DE 199 at 15.) To support this assertion, Plaintiff quotes the deposition ***question*** of Plaintiff's ***own counsel*** as though it were a statement made by Defendants. (*See id.*) This is blatant gamesmanship. Plaintiff cannot use his own counsel's deposition to evade the evidence. Further, the ***deponent***—Kristin Hairabedian—specifically testified that friend-forwarders would speak to friend-forwardees and obtain consent *before* sending in their phone number. (*See* Third Hairabedian Dep. at 70:5-9; 71:23-72:11.)

Dep. at 79:13-80:1, 83:2-9.) Further, and more importantly, Plaintiff's cited authority for this proposition demonstrates exactly why consent will predominate. Plaintiff cites *McCaskill v. Navient Solutions*, a case involving student debt collection calls intended for the plaintiff's daughter. 178 F. Supp. 3d 1281, 1290 (M.D. Fla. 2016). The court issued a nearly twenty-page order, going into extreme detail analyzing the nature of the plaintiff's relationship with her daughter and whether her daughter had the ability to use her mother's number. *See id.* at 1290-94; *see also id.* at 1293 ("[T]he scope of consent must be determined upon the facts of each situation . . . .") (quoting *GroupMe*); *see also Osorio v. State Farm Bank*, 746 F.3d 1242 (11th Cir. 2014) (going into a detailed discussion of the parties' agency relationship). This is exactly the kind of analysis that will be required for each putative class member on a family plan and for each and every class member who was forwarded in by a non-subscriber family member. (*See* Eisen Decl., Exhibit E (*e.g.*, AHI 5604, 5605, 5609, 5613, 5627, 5633, 5643, 5642, 5644, 5652).)

Furthermore, Plaintiff ignores that a subscriber can consent for every cell phone number to which they are the account holder. *See, e.g.*, *Omnibus Order*, 30 FCC Rcd. 7961 ¶ 73; *Leyse*, 804 F.3d at 327 n.14; (Biggerstaff Dep. at 79:13-80:1, 83:2-9.) Neither *McCaskill* nor *Osorio* involved a situation in which the *subscriber* provided the number at issue to the defendant, and thus did not reach that question. Here, numerous subscribers provided numbers to which they were the account holder and thus indisputably consented. (*See* Eisen Decl., Exhibit E (*e.g.*, AHI 5603, 5605, 5607, 5610, 5642, 5747, 5748, 5750, 5753, 5754); Second Biggerstaff Report at 11.) Plaintiff also ignores that his class consists of individuals who forwarded in *their own* alternate phone numbers (*i.e.*, business lines) and thus necessarily consented. (*See, e.g.*, Eisen Decl., Exhibit E at AHI 5747.)

Plaintiff has provided no mechanism to separate out from his putative class those who forwarded in other numbers for which they themselves were the subscriber and thus unquestionably consented.[23] Plaintiff has also provided no mechanism by which to determine

[23] Plaintiff makes an offhand statement that "the Court can exclude any cellular telephone number that was associated with a shared plan." (DE 199 at 17.) Plaintiff offers no method by which to identify these individuals, and provides no explanation for what "associated with a shared plan" means. More importantly, Plaintiff's willingness to sacrifice 10% of his class renders him plainly inadequate and in conflict with those putative class members. *Cf. Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 606 (S.D.N.Y. 1982) (finding willingness to sacrifice claims of putative class members renders plaintiff inadequate class representative).

the issue of consent for friend-forwardees who shared accounts with their friend-forwarders. Given the number of friend-forwardees for which this occurred—likely over **1,000** persons—this is no trivial matter. (*See* Second Biggerstaff Report at 11.) The above evidence also does not take into account AT&T or T-Mobile, which did not respond in substance to their subpoenas.

Second, Defendants obtained **53** declarations establishing friend-forwarders forwarded phone numbers (i) of persons for which they obtained prior express consent or (ii) for which they were either the subscriber or which were part of their family plan. (*See* Eisen Decl., Exhibit E.)[24] Over two dozen declarants stated that they in fact obtained prior express consent prior to forwarding in any phone numbers to Defendants. (*See id.* (*e.g.*, AHI 5602, 5604, 5606, 5609, 5613, 5615, 5617, 5627, 5635-38, 5639, 5641, 5651, 5652, 5755).) Further, these declarations establish that friend-forwarders typically forwarded in their close friends and family members, not random strangers. (*See id.* (*e.g.*, 5604, 5605, 5609, 5613, 5627, 5633, 5643, 5642, 5644, 5652).) Plaintiff, for his part, was forwarded by an ex-girlfriend with whom he communicated ***constantly*** during the time she forwarded his number. This plainly indicates the issue of consent will require a person-by-person inquiry to determine what each friend-forwarder said to each friend-forwardee and vice-versa prior to forwarding in their number. *See, e.g.*, *Gannon*, 628 F. App'x at 551–52 (9th Cir. 2016) ("To determine liability, the district court would be required to determine whether under each of these different factual scenarios—and undoubtedly others—the caller agreed to receive text messages."); *Gene & Gene*, 541 F.3d at 327 ("Whether established by BioPay as an affirmative defense or by Gene as an element of the cause of action, the issue of consent will entirely determine how the proposed class-action trial will be conducted on the merits."). Again, Plaintiff has provided no mechanism through which to determine the issue of consent on a class-wide basis, but instead merely assumes—despite the substantial evidence to the contrary—that consent *was never* obtained from any friend-forwardee.

Third, Plaintiff's putative class consists of numerous individuals who were forwarded in by spouses and other family members. (*See* Eisen Decl, Exhibit E (*e.g.*, AHI 5604, 5605, 5609,

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[24] Plaintiff's contention that "the friend-forward senders had no way of knowing what Pizza Hut would do with the cellular numbers they provided," (DE 199 at 16), is directly contradicted by the ***two dozen*** declarations obtained in this case demonstrating consent was obtained. (*See, e.g.*, Eisen Decl., Exhibit E (*e.g.*, AHI 005627.) Plaintiff's effort to litigate the scope of consent proves that consent will be an individualized issue incapable of classwide resolution.

5613, 5627, 5633, 5643, 5642, 5644, 5652).) This issue alone indicates that consent will be a highly individualized inquiry. *See, e.g.*, *Ung*, 2017 WL 354238, at *3 (finding persuasive that consent may have been obtained from third parties because "often these individuals were family members or close friends"). The Eleventh Circuit has had occasion to visit this exact issue, finding that consent provided by a wife on behalf of her husband sufficed as prior express consent. *See Mais*, 768 F.3d at 1113. *Mais v. Gulf Coast Collection Bureau* concerned a TCPA action brought by Mark Mais regarding debt collection calls he received following a hospital visit. *Id.* at 1113-14. While Mark Mais was admitted for treatment, his wife signed his admission forms, which, among other things, provided consent to be contacted concerning payment. *Id.* The Eleventh Circuit ruled that—despite not delving into the scope of spousal authority to consent—Mark Mais provided prior express consent to receive debt collection calls through his wife. *Id.* at 1123-26 ("We have little doubt that by signing the admissions forms Mais's wife agreed . . . ."). Apart from those who forwarded numbers for which they were also the subscriber, a separate individualized inquiry must be undertaken into the relationship between the friend-forwarder and friend-forwardee. The Court would also have to evaluate whether the same authority recognized in *Mais* applies to any other familiar or personal relationships (like, here, an ex-girlfriend).

And fourth, substantial circumstantial evidence of consent exists indicating that numerous individuals within Plaintiff's putative class consented. Specifically, of Plaintiff's putative class of 13,046, over **600** of those persons subsequently referred their own friends to participate in the text message program at issue. (*See* Sponsler Decl. ¶¶ 6, 7.) In other words, over 600 persons who were themselves forwarded in subsequently participated in the referral program. Likewise, of Plaintiff's putative class of 13,046, over **570** of those persons subsequently responded "yes" to the Double Opt-In Message sent in early 2012. (*See id.* ¶¶ 9, 10; *see also* Eisen Decl., Exhibit H.) In other words, over 570 persons who were forwarded in to the text program at issue subsequently expressed affirmative consent to continue receiving the text messages at issue. The subsequent participation in—and affirmance of desire to participate in—the text Program at issue is strong circumstantial evidence of consent. *See, e.g.*, *Ung*, 2017 WL 354238, at *3 ("Although [subsequent affirmance of consent] does not necessarily confirm that Trina had provided *prior* consent, it would be reasonable to *infer* that such consent had in fact been provided."); *Fitzhenry*, 2014 WL 6663379, at *7 (finding individualized issues

predominated based on a sample of 26 out of 36,748 calls that indicated a potential established business relationship defense); *Gene & Gene*, 541 F.3d at 329 (finding circumstantial evidence relating to fax number data collection sufficient to establish that "there is no class-wide proof available to decide consent and only mini-trials can determine this issue.").

Plaintiff has "failed to advance a viable theory of generalized proof" to address the issue of consent, and class certification should be denied for this reason alone. *See Gene & Gene*, 541 F.3d at 329; *Newhart*, 2016 WL 7118998, at *4 ("Plaintiff has failed to sustain his burden to demonstrate that the prior express written consent issue can be resolved for all class members by common evidence."); *Shamblin*, 2015 WL 1909765, at *12 (same). Plaintiff simply assumes that because persons were signed up for the Text Program at issue by third-parties, there was no consent. The evidence is directly to the contrary. *See, e.g.*, *Shamblin*, 2015 WL 1909765, at *7 ("Shamblin is not entitled to a presumption that all class members failed to consent . . . .") *Connelly*, 294 F.R.D. at 578 ("HGV's position is not only that the class members consented 'ipso facto' by providing a cell phone number; rather, HGV contends that there was consent under the circumstances of "the individualized experience that each guest shared with Hilton.").

IV. IN LIGHT OF THE MYRIAD DEFECTS IN PLAINTIFF'S PUTATIVE CLASS, THE CLASS MECHANISM IS PLAINLY NOT SUPERIOR HERE.

The focus of the superiority analysis "is on the relative advantages of a class action suit over whatever other forms of litigation might be realistically available to the plaintiffs." *Sacred Heart Health Sys., Inc. v. Humana Mil. Healthcare Servs., Inc.*, 601 F.3d 1159, 1183–84 (11th Cir. 2010) (internal quotations and citation omitted); *see also* Fed. R. Civ. P. 23(b)(3) (setting forth the four factors to be considered under the superiority analysis, including "the likely difficulties in managing a class action"). As a result, the remaining certification factors significantly impact the superiority analysis. *See id.*; *see also Williams v. Mohawk Indus.*, 568 F.3d 1350, 1358 (11th Cir. 2009) ("If a district court determines that issues common to all class members predominate over individual issues, then a class action will likely be more manageable than and superior to individual actions."); *Gannon*, 2013 WL 2450199, at *4 ("[B]ecause Plaintiff fails to satisfy the predominance requirement, the Court finds a class action would not be superior to other methods for fairly and efficiently adjudicating the controversy."); *Shamblin*, 2015 WL 1909765, at *13 (finding superiority not met "because the Court has already determined that Shamblin has not satisfied the predominance prong of Rule 23(b)(3)").

In light of the analysis and evidence set forth above, Plaintiff has failed to meet Rule 23's implicit ascertainability standard and well as Rule 23(a)'s typicality, commonality and adequacy requirements and well as Rule 23(b)'s predominance requirement. A class action suit is thus not a superior means of adjudication. As set forth in Section I(B), *supra*, Plaintiff has failed to propose an administratively feasible means of establishing class membership. Further, as set forth in Section II(C), *supra*, Plaintiff and his counsel are plainly inadequate to act on behalf of the putative class. Perhaps most importantly, however, this case is certain to "degenerate[e] into mini-trials on consent of every class member." *Hicks*, 2008 WL 5479111, at *8.

CONCLUSION

Defendants respectfully request this Court (i) deny Plaintiff's Motion for Class Certification and (ii) award all relief deemed equitable and just.

Dated: February 9, 2017

/s/ David S. Almeida

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing **DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION** was served upon all interested parties using this Court's ECF filing system this 9th day of February, 2017.

/s/ *David V. King*