

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 18-62108-CIV-ALTONAGA/Seltzer

DANIEL GERSTENHABER,
on behalf of himself and
others similarly situated,

Plaintiff,

v.

GALLERIA FITNESS CLUB, LLC
and **CLAYTON FLOTZ,**

Defendants.

**ORDER PRELIMINARILY APPROVING CLASS ACTION
SETTLEMENT AND CERTIFYING THE SETTLEMENT CLASS**

THIS CAUSE came before the Court on Plaintiff, Daniel Gerstenhaber’s Unopposed Motion for Preliminary Approval of Class Action Settlement [ECF No. 58], filed March 11, 2019. On December 12, 2018, Plaintiff brought the operative First Amended Class Action Complaint [ECF No. 38] against Defendants, Galleria Fitness Club, LLC and Clayton Flotz, alleging they engaged in unsolicited telemarketing directed towards certain customers in violation of the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. section 227. (*See generally id.*).

The parties have agreed to settle the case, memorializing their settlement in a Settlement Agreement and Release [ECF No. 58-1] (“Settlement Agreement”). Under the Settlement Agreement, subject to its terms and conditions and the Court’s approval, Plaintiff and the proposed Settlement Class will fully, finally, and forever resolve, discharge, and release their claims.

After considering the Motion, the Settlement Agreement, the record, and applicable law,

the Court finds: (1) the Court has jurisdiction over the subject matter and the parties in this case; (2) the proposed Settlement Class on its face meets the requirements of Federal Rule of Civil Procedure 23 and should be certified for settlement purposes only; (3) the persons and entities identified below should be appointed Class Representative and Class Counsel; (4) the Settlement Agreement is the result of informed, good-faith, arm's-length negotiations between the parties and their capable and experienced counsel, and is not the result of collusion; (5) the Settlement Agreement is within the range of reasonableness and should be preliminarily approved; (6) the proposed Notice program and proposed forms of Notice satisfy Federal Rule of Civil Procedure 23 and constitutional due process requirements, and are reasonably calculated under the circumstances to apprise the Settlement Class of the pendency of the case, class certification, the terms of the Settlement Agreement, and their rights to opt-out of the Settlement Class or object to the Settlement Agreement, Class Counsel's Fee Application, and/or the request for a Service Award for Plaintiff; (7) good cause exists to schedule and conduct a Final Approval Hearing, under Federal Rule of Civil Procedure 23(e), to assist the Court in determining whether to grant Final Approval of the Settlement Agreement and enter the Final Approval Order, and whether to grant Class Counsel's Fee Application and request for a Service Award for Plaintiff; and (8) the other related matters relevant to the Preliminary Approval of the Settlement should also be approved.

Being fully advised, it is

ORDERED AND ADJUDGED that Plaintiff, Daniel Gerstenhaber's Unopposed Motion for Preliminary Approval of Class Action Settlement [ECF No. 58] is **GRANTED** as follows:

1. The Court has jurisdiction over the subject matter and parties in this case under 28 U.S.C. sections 133 and 1332.

2. Venue is proper in this District.

I. **Provisional Class Certification and Appointment of Class Representative and Class Counsel**

3. It is well established that “[a] class may be certified solely for purposes of settlement [if] a settlement is reached before a litigated determination of the class certification issue.” *Borcea v. Carnival Corp.*, 238 F.R.D. 664, 671 (S.D. Fla. 2006) (internal quotation marks and citation omitted; alterations added). In deciding whether to provisionally certify a settlement class, a court must consider the same factors that it would consider in connection with a proposed litigation class — *i.e.*, all Rule 23(a) factors and at least one subsection of Rule 23(b) must be satisfied — except that the Court need not consider the manageability of a potential trial, since the settlement, if approved, would obviate the need for a trial. *Id.*; *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997).
4. The Court finds, for settlement purposes, that the Federal Rule of Civil Procedure 23 factors are present and that certification of the proposed Settlement Class is appropriate under Rule 23. The Court therefore provisionally certifies the following Settlement Class.

All individuals within the United States (i) who were sent and received a text message call (ii) on his or her cellular telephone (iii) by or on behalf of Defendants (iv) from June 16, 2017, the date of formation of Galleria Fitness, through the date of certification.

Excluded from the Settlement Class are: (1) the district judge and magistrate judge presiding over this case, the judges of the U.S. Court of Appeals for the Eleventh Circuit, their spouses, and persons within the third degree of relationship to either of them; (2) individuals who are or were during the Class Period agents, directors, employees, officers, or servants of Defendants or of any affiliate or parent of Defendants; (3) Plaintiff’s counsel and their employees, and (4) all persons who file a timely and proper request to be excluded from the Settlement Class.

5. Specifically, the Court finds, for settlement purposes and conditioned on final certification of the proposed class and on the entry of the Final Approval Order, that the Settlement Class satisfies the following factors of Federal Rule of Civil Procedure 23:

- a. Numerosity: In this case, text message calls were sent to consumers by Defendants. Individuals who received at least one text message call are members of the proposed Settlement Class. The proposed Settlement Class is thus so numerous that joinder of all members is impracticable.
- b. Commonality: “[C]ommonality requires the plaintiff to demonstrate that the class members ‘have suffered the same injury,’” and the plaintiff’s common contention “must be of such a nature that it is 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. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–50 (2011) (citation omitted). Here, the commonality requirement is satisfied. Multiple questions of law and fact centering on Defendants’ class-wide practices are common to the Plaintiff and the Settlement Class, are alleged to have injured all members of the Settlement Class in the same way, and would generate common answers central to the viability of the claims were this case to proceed to trial.
- c. Typicality: Plaintiff’s claims are typical of the Settlement Class because they concern the same alleged practices, arise from the same legal theories, and allege the same types of harm and entitlement to relief. Rule 23(a)(3) is therefore satisfied. *See Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984) (typicality satisfied where claims “arise from the same event or pattern

or practice and are based on the same legal theory”); *Murray v. Auslander*, 244 F.3d 807, 811 (11th Cir. 2001) (named plaintiffs are typical of the class where they “possess the same interest and suffer the same injury as the class members” (alteration added; citation omitted)).

- d. Adequacy: Adequacy under Rule 23(a)(4) relates to: (1) whether the proposed class representatives have interests antagonistic to the class; and (2) whether the proposed class counsel has the competence to undertake the litigation at issue. *See Fabricant v. Sears Roebuck*, 202 F.R.D. 310, 314 (S.D. Fla. 2001). Here, Rule 23(a)(4) is satisfied because the record demonstrates no conflicts of interest between the Plaintiff and the Settlement Class, and Plaintiff has retained competent counsel to represent him and the Settlement Class. Class Counsel regularly engage in consumer class litigation, complex litigation, and other litigation similar to this case, and have dedicated substantial resources to the prosecution of the case. Moreover, Plaintiff and Class Counsel have vigorously and competently represented the Settlement Class in the Action. *See Lyons v. Georgia-Pacific Corp. Salaried Employees Rel. Plan*, 221 F.3d 1235, 1253 (11th Cir. 2000).
- e. Predominance and Superiority: Rule 23(b)(3) is satisfied because the common legal and alleged factual issues here predominate over individualized issues, and resolution of the common issues for the members of the Settlement Class in a single, coordinated proceeding is superior to thousands of individual lawsuits addressing the same legal and factual issues. With respect to predominance, Rule 23(b)(3) requires that “[c]ommon issues of fact and law . . . ha[ve] a direct

impact on every class member's effort to establish liability that is more substantial than the impact of individualized issues in resolving the claim or claims of each class member." *Sacred Heart Health Sys., Inc. v. Humana Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1170 (11th Cir. 2010) (first and second alteration added, third alteration in original; internal quotation marks and citation omitted). Here, common questions present a significant aspect of the case and can be resolved for all members of the Settlement Class in a single adjudication. In a liability determination, those common issues would predominate over any issues that are unique to individual members of the Settlement Class. Moreover, each member of the Settlement Class as defined has claims that arise from the same or similar alleged Defendants practices as well as the same legal theories.

6. The Court appoints Plaintiff, Daniel Gerstenhaber, as Class Representative.
7. The Court appoints the following people and firms as Class Counsel: Manuel S. Hiraldo of Hiraldo P.A; Ignacio J. Hiraldo of IJH Law; and Michael Eisenband of Eisenband Law, P.A.
8. The Court recognizes that Defendants reserve all of their defenses and objections against and rights to oppose any request for class certification in the event that the proposed Settlement Agreement does not become final for any reason. Defendants also reserve their defenses to the merits of the claims asserted in the event the Settlement Agreement does not become final for any reason.

II. Preliminary Approval of the Settlement

9. At the preliminary approval stage, the Court's task is to evaluate whether the

Settlement is within the “range of reasonableness.” 4 *Newberg on Class Actions* § 11.26. “Preliminary approval is appropriate where the proposed settlement is the result of the parties’ good faith negotiations, there are no obvious deficiencies and the settlement falls within the range of reason.” *Smith v. Wm. Wrigley Jr. Co.*, No. 09-60646-CIV, 2010 WL 2401149, at *2 (S.D. Fla. Jun. 15, 2010) (citations omitted). Settlement negotiations that involve arm’s length, informed bargaining with the aid of experienced counsel support a preliminary finding of fairness. *See Manual for Complex Litigation*, Third, § 30.42 (1995).

10. The Court preliminarily approves the Settlement, together with all its exhibits, as fair, reasonable, and adequate. The Court finds the Settlement Agreement was reached in the absence of collusion, is the product of informed, good-faith, arm’s-length negotiations between the Parties and their capable and experienced counsel. The Court also finds the Settlement Agreement is within the range of reasonableness and possible judicial approval, such that: (a) a presumption of fairness is appropriate for the purposes of preliminary settlement approval; and (b) it is appropriate to effectuate notice to the Settlement Class, as set forth below and in the Settlement, and schedule a Final Approval Hearing to assist the Court in determining whether to grant Final Approval to the Settlement and enter a Final Approval Order.

III. Approval of Class Notice and the Claims Process

11. The Court approves the form and content of the Class notices, substantially in the forms attached as Exhibits 2, 3 and 5 to the Settlement Agreement, and the Claim Form attached as Exhibit 1. The Court also finds that the Class Notice program described in the Settlement is the best practicable under the circumstances. The Class Notice

program is reasonably calculated under the circumstances to inform the Settlement Class of the pendency of the Action, certification of a Settlement Class, the terms of the Settlement, Class Counsel's attorney's fees application and the request for Service Award for Plaintiff, and their rights to opt-out of the Settlement Class or object to the Settlement. The Class notices and Class Notice program constitute sufficient notice to all persons entitled to notice. The Class notices and Class Notice program satisfy all applicable requirements of law, including, but not limited to, Federal Rule of Civil Procedure 23 and constitutional principles of due process.

12. Heffler Claims Group shall serve as the Administrator.
13. The Administrator shall implement the Class Notice program, as set forth below and in the Settlement, using the Class notices substantially in the forms attached as Exhibits 2, 3 and 5 to the Settlement Agreement and approved by this Order. Notice shall be provided to the members of the Settlement Class pursuant to the Class Notice program, as specified in the Settlement and approved by this Order. The Class Notice program shall include, to the extent necessary, Email Notice, Mail Notice, and Long-Form Notice, as set forth in the Settlement and below.
 - a. *Mail Notice*: The Administrator shall administer Mail Notice as set forth in the Settlement. Mail Notice shall be completed no later than **April 19, 2019**.
 - b. *Email Notice*: The Administrator shall administer Email Notice as set forth in the Settlement. Email Notice shall be completed no later than **April 19, 2019**.
 - c. *Settlement Website*: The Administrator shall establish a Settlement Website as a means for Settlement Class members to obtain notice of, and information about, the Settlement. The Settlement Website shall be established as soon as practicable

following Preliminary Approval, but no later than before commencement of the Class Notice program. The Settlement Website shall, hyperlinks to the Settlement, the Long-Form Notice, the Preliminary Approval Order, and other such documents as Class Counsel and counsel for Defendant agree to include.

- d. The Administrator is directed to perform all substantive responsibilities with respect to effectuating the Class Notice program, as set forth in the Settlement Agreement.

IV. Final Approval Hearing, Opt-Outs, and Objections

14. A Final Approval Hearing shall be held before the Court on **June 12, 2019 at 9:00 a.m.** to determine whether to grant Final Approval to the Settlement Agreement and to enter a Final Approval Order, and whether Class Counsel's Fee Application and request for a Service Award for the Class Representative should be granted.
15. Any person within the Settlement Class who wishes to be excluded from the Settlement Class may exercise their right to opt-out of the Settlement Class by following the opt-out procedures set forth in the Settlement and in the Notices at any time during the Opt-Out Period. To be valid and timely, opt-out requests must be received by all those listed in the Long-Form Notice by **May 20, 2019**.
16. Any Settlement Class Member may object to the Settlement Agreement, Class Counsel's Fee Application, or the request for a Service Award for Plaintiff. Any such objections must be mailed to the Clerk of the Court, Class Counsel, and Defendants' Counsel, at the addresses indicated in the Long-Form Notice. For an objection to be considered by the Court, the objection must be postmarked by **May 20, 2019**. To be valid, an objection must include the following information:

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- a. the name of the case;
- b. the objector's full name, address, and telephone number;
- c. an explanation of the basis upon which the objector claims to be a Settlement Class Member;
- d. all grounds for the objection, accompanied by any legal support for the objection known to the objector or his counsel;
- e. the number of times in which the objector has objected to a class action settlement within the five years preceding the date that the objector files the objection, the caption of each case in which the objector has made such an objection, and a copy of any orders related to or ruling upon the objector's prior such objections that were issued by the trial and appellate courts in each listed case;
- f. the identity of all counsel who represent the objector, including any former or current counsel who may be entitled to compensation for any reason related to the objection to the Settlement Agreement or Fee Application;
- g. a copy of any orders related to or ruling upon counsel's or the counsel's law firm's prior objections made by individuals or organizations represented by that were issued by the trial and appellate courts in each listed case in which the objector's counsel and/or counsel's law firm have objected to a class action settlement within the preceding five years the objector's counsel;
- h. any and all agreements that relate to the objection or the process of objecting — whether written or oral—between objector or objector's counsel and any other person or entity;
- i. the identity of all counsel (if any) representing the objector who will appear at the

Final Approval Hearing;

- j. a statement confirming whether the objector intends to personally appear and/or testify at the Final Approval Hearing;
- k. a list of all persons who will be called to testify at the Final Approval Hearing in support of the objection; and
- l. the objector's signature (an attorney's signature is not sufficient).

V. Further Papers in Support of Settlement and Attorney's Fee Application

17. Plaintiff and Class Counsel shall file their Motion for Final Approval of the Settlement, Fee Application and request for a Service Award for Plaintiff, no later than **May 24, 2019**.

18. Plaintiff and Class Counsel shall file their responses to timely filed objections to the Motion for Final Approval of the Settlement, the Fee Application and/or request a Service Award for Plaintiff no later than **June 7, 2019**.

VI. Effect of Failure to Approve Settlement

19. If the Settlement Agreement is not finally approved by the Court, or for any reason the Parties fail to obtain a Final Approval Order as contemplated in the Settlement Agreement, or the Settlement is terminated pursuant to its terms for any reason, then the following shall apply:

- a. All orders and findings entered in connection with the Settlement Agreement shall become null and void and have no further force and effect, shall not be used or referred to for any purpose whatsoever, and shall not be admissible or discoverable in any other proceeding;
- b. Nothing in this Order is, or may be construed as, any admission or concession by

or against Defendants or Plaintiff on any point of fact or law; and

- c. Neither the Settlement Agreement’s terms nor any publicly disseminated information regarding the Settlement, including, without limitation, the Class Notice, court filings, orders and public statements, may be used as evidence. In addition, neither the fact of, nor any documents relating to, either party’s withdrawal from the Settlement, any failure of the Court to approve the Settlement Agreement and/or any objections or interventions may be used as evidence.

VII. Stay/Bar of Other Proceedings

20. All proceedings in the case are **STAYED**, and the case **ADMINISTRATIVELY CLOSED**, until further order of the Court, except as may be necessary to implement the terms of the Settlement Agreement. Pending final determination of whether the Settlement Agreement should be approved, Plaintiff, all persons in the Settlement Class, and persons purporting to act on their behalf are enjoined from commencing or prosecuting (either directly, representatively or in any other capacity) against any of the Released Parties any action or proceeding in any court, arbitration forum or tribunal asserting any of the Released Claims.

21. Based on the foregoing, the Court sets the following schedule for the Final Approval Hearing and the actions which must take place before and after it:

<u>Event</u>	<u>Timeline</u>
Deadline for Defendants to notify appropriate federal and state officials under the Class Action Fairness Act, 28 U.S.C. § 1715	March 22, 2019
Deadline for Completion of Notice	April 19, 2019

Deadline for opting-out of the Settlement Agreement and for submission of Objections	May 20, 2019
Deadline for filing Motion for Final Approval of the Settlement and Class Counsel's Fee Application and expenses, and for a Service Award	May 24, 2019
Deadline for Responses to Objections	June 4, 2019
Last day Class Claimants may submit a Claim Form	June 5, 2019
Final Approval Hearing	June 12, 2019 at 9:00 a.m.

DONE AND ORDERED in Miami, Florida, this 12th day of March, 2019.



CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record