UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 12-80577-CIV-MARRA

BRIAN KEIM, an individual, on behalf of himself and all others similarly situated,

Plaintiff,

vs.

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.
_____/

ORDER

This cause is before the Court upon Plaintiff's Motion for Class Certification ("Motion") (ECF No. 199) in this action, which is based upon asserted violations of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. Plaintiff proposes certification of a class of individuals numbering over 13,000 who began receiving text messages from Defendants after third parties texted the cellular telephone numbers of the putative class members to Defendants. Defendants ADF MidAtlantic, LLC, American Huts Inc., ADF Pizza I, LLC, ADF PA, LLC and Pizza Hut, Inc. (collectively "Defendants") filed a brief in opposition to the Motion, and Plaintiff filed a reply in further support of the Motion. (ECF Nos. 211, 219.) The Court has carefully considered the Motion and the arguments of counsel and is otherwise fully advised in the premises.

After carefully reviewing the arguments of counsel and the present record, and as explained

in greater detail below, the Court concludes that Plaintiff has met the class-certification requirements of Rule 23 of the Federal Rules of Civil Procedure. As to ascertainability, Plaintiff has proposed a multi-step administratively feasible plan to identify class members based primarily upon the use of subpoenas to major telephone carriers, which have already proven effective in this litigation.

To satisfy the requirements of commonality and typicality, the Court finds, and Plaintiff appears to concede, that the class definition must exclude any individuals whose cellular telephone numbers were provided by a subscriber of a telephone calling plan, since in those circumstances the subscriber provided the requisite consent for the text messages. Once the class is so modified, the Court finds that the case presents common issues that can be resolved on a classwide basis because all of the class members began receiving text messages from Defendants under the same circumstances: an individual who was a member of Defendants' texting club sent Defendants the telephone number of a class member in response to Defendants' solicitation to enter friends in the texting program in exchange for Pizza Hut deals. Contrary to Defendants' suggestion otherwise, the present record does not support the defense of consent through an intermediary under applicable FCC rulings and interpretative case law or the defense of consent by an agent under principles of agency law.

As to adequacy, the Court finds that Plaintiff has demonstrated that he will protect the interests of the class by his knowledge and participation in the case. Plaintiff has reviewed the allegations of the Complaint, participated in written discovery, appeared for an eight-hour deposition, and expended a substantial amount of time consulting with counsel. He has also demonstrated an understanding of the facts of this case and his role as a class representative. Neither Plaintiff's lack of interest in the terms of settlement offers that his counsel deemed wholly

inadequate at an earlier stage in the litigation nor his innocent participation in unrelated pyramid schemes raises a sufficient question about his ability to fulfill the fiduciary role of class representative. Likewise, regarding the adequacy of counsel, the Court finds that the nebulous matter of whether Plaintiff's counsel's multiple conversations with Plaintiff about Defendants' classwide settlement proposals were specific enough does not render counsel inadequate.

As to predominance and superiority, the Court finds, based upon the present record, that common classwide issues will predominate over individual issues, and that it is unlikely that the issue of consent will raise individualized inquiries. Furthermore, based upon the large number of claims and the predominance of common issues, coupled with the relatively small amount of statutory damages, the Court finds that a class action would be a superior method of adjudicating the TCPA action. For these reasons, and because the class meets the numerosity requirement, the Court concludes that this action is well-suited for class treatment and therefore will permit the action to proceed as a class.

I. BACKGROUND

Plaintiff Brian Keim allegedly began receiving unwanted text messages containing Pizza Hut advertisements without his prior express consent in February 2011. (Am. Compl. ¶¶ 6, 47, ECF No. 97.) The text messages were received as part of a "Friend Forwarded" program implemented by Defendants.[1]

By way of background, Defendants operated a "texting club" through which customers could voluntarily sign up to receive Pizza Hut deals texted to their cellular telephone numbers. One

[1] For ease of reference, the Court will refer to one or more of the defendants in this case simply as "Defendants." By doing so, the Court does not intend to make any substantive decisions in this case.

component of the texting club was the "Friend Forwarded" marketing program. The Friend Forwarded marketing program encouraged customers in the texting club to text their friends' cellular phone numbers to Defendants in exchange for Pizza Hut coupons. (*Id.* ¶¶ 31-32.) Defendants sent the following relevant text message to customers in their "texting club" asking them to text their friends' telephone numbers:

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

(ECF No. 201-2.)

Once a customer ("forwarder") forwarded their friend's telephone number ("forwardee") to Defendants, Defendants sent text messages to the forwardees, such as Plaintiff and the other putative class members, allegedly using an automatic telephone dialing system. (Am. Compl. ¶ 48, ECF No. 97.) Thereafter, the putative class member received the following two initial text messages:

> PIZZAHUT! [Friend-Forward Sender's number] entered u 2win pizza 4 a year and Pizza Hut deals! Rply STOP 2quit or HELP

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

(ECF No. 201-3.)

An example of a promotional text message sent by Defendants to Plaintiff and the other putative class members is as follows: "PIZZAHUT! Fly into Pizza Hut for WING WEDNESDAY-Wings are just $.50 each (minimum8) Add Pepsi and breadsticks for $5 more!" (*Id.* ¶ 47.)

Based upon these allegations, Plaintiff filed a putative class-action lawsuit against Defendants alleging violations of the TCPA, 47 U.S.C. § 227. Now pending before the Court is Plaintiff's Motion for Class Certification. (ECF No. 199.) Plaintiff seeks certification of a class

consisting of all persons in the United States who received a text message from Defendants wherein their cellular telephone number was provided by a third party and said text messages were sent using hardware and software owned or licensed to Songwhale or Cellit between November 2012 and January 2013. (Mot. at 5, ECF No. 199 at 11.)

II. LEGAL STANDARD

Rule 23 of the Federal Rules of Civil Procedure governs the certification of class actions. Rule 23(a)'s requirements are: (1) the class is so numerous that joinder of all members is impracticable; (2) there is a question of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). In additional to Rule 23(a), the party seeking class certification "must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b)." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). Rule 23(b)(3), the provision under which Plaintiff seeks certification, requires the Court to find "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

In considering the certification issue under Rule 23, "it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Comcast*, 569 U.S. at 33 (citation and internal quotation marks omitted). "[C]ertification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *Id.* (citation and internal quotation marks omitted). Frequently, that "rigorous analysis" will entail some overlap with the merits of the plaintiff's underlying claim. "[T]he class determination generally

involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011).

"[B]ecause class actions are an exception to our constitutional tradition of individual litigation," *Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1233 (11th Cir. 2016), "a court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met." Fed. R. Civ. P. 23 advisory committee note to 2003 amendment.

III. DISCUSSION

A. Ascertainability

"Before a district court may grant a motion for class certification, a plaintiff seeking to represent a proposed class must establish that the proposed class is 'adequately defined and clearly ascertainable.'" *Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012) (quoting *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970)).[2] "The existence of an ascertainable class of persons to be represented by the proposed class representative is an implied prerequisite of Federal Rule of Civil Procedure 23." *John v. Nat' Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007), *cited with approval in Little*, 691 F.3d at 1304.

"Although the text of Rule 23(a) is silent on the matter, a class must not only exist, the class must be susceptible of precise definition. There can be no class action if the proposed class is 'amorphous' or 'imprecise.'" *John*, 501 F.3d at 445 n.3 (citation omitted). Rather, "[a]n identifiable class exists if its members can be ascertained by reference to objective criteria." *Bussey v. Macon Cty. Greyhound Park, Inc.*, 562 F. App'x 782, 787 (11th Cir. 2014) (quoting *Fogarazzo v. Lehman*

[2] *See Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1209 (11th Cir. 1981) (holding that decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981, are binding in the Eleventh Circuit).

Bros., Inc., 263 F.R.D. 90, 97 (S.D.N.Y. 2009)). For example, emphasizing the need for objective criteria, in *DeBremaecker*, the court declined to certify a class that was defined to include "residents of this State active in the peace movement." 433 F.2d at 734. Based upon the "patent uncertainty" inherent in the term "peace movement," the court held that the class was not adequately defined or clearly ascertainable. *Id.*

In addition to objective criteria, in an unpublished opinion in *Karhu v. Vital Pharmaceuticals*, a three-judge panel in this circuit took the view that ascertainability also requires that the plaintiff propose an administratively feasible method, supported by useful evidentiary support, by which class members can be identified. *Karhu v. Vital Pharm., Inc*., 621 F. App'x 945, 947-48 (11th Cir. 2015). Plaintiff does not dispute that administrative feasability is part of the ascertainablity requirement but instead argues that it has been met.[3]

In *Karhu*, the appellate court affirmed the district court's denial of class certification based upon its conclusion that the plaintiff had failed to propose a viable method for identifying class members. *Id.* at 949. There, the plaintiff sought to certify a class of purchasers of a diet supplement marketed by the defendant Vital Pharmaceuticals, Inc. ("VPX"). *Id.* at 946. VPX sold the diet supplement to distributors and retailers, not to the ultimate consumers of its product. Even though VPX's records did not contain information about the ultimate consumers, the plaintiff proposed the use of VPX's sales data to determine the identities of the class members. *Id.* at 949. The appellate court found this inappropriate and affirmed the denial of class certification because the evidence that

[3] Because the parties do not dispute that Plaintiff must propose an evidentiary-based administratively feasible method of identification, the Court need not consider whether the Eleventh Circuit would formally adopt this view in a published opinion. Instead, the Court will assume that such a requirement exists and will proceed to the issue of whether a multi-faceted ascertainability requirement has been met.

the plaintiff proposed to use was not useful for determining class membership. *Id.*

Here, Defendants do not argue that the class definition lacks objective criteria. Instead, Defendants focus their argument on whether Plaintiff has proposed an administratively feasible method by which class members can be identified. As discussed below, this Court finds that unlike the plaintiff's plan in *Karhu*, Plaintiff's proposal to identify the individual class members is based upon useful evidence and is administratively feasible.

Plaintiff seeks certification of a class consisting of all persons in the United States who received a text message from Defendants wherein their cellular telephone number was provided by a third party and said text messages were sent using hardware and software owned or licensed to Songwhale or Cellit between November 2012 and January 2013. (Mot. 5, ECF No. 199 at 11.) To identify the class members, Plaintiff proposes the following basic plan: (1) use the data provided by Defendants, which lists the cellular telephone numbers that received the text messages in question and the associated phone carriers; and (2) subpoena the phone carriers for their records as to the names and addresses of the subscribers (and users, if available) of those telephone numbers during the relevant time frame. (Mot. 8-9, ECF No. 199 at 14-15.) To account for group plans where the user of the telephone number might be different than the subscriber and the carrier does not retain user identification information (and any missing subscriber data), Plaintiff's proposal (as supplemented in his reply brief) also includes the following additional steps: (3) in cases of group plans where the carriers do not retain records of the users of each line, send the notice to the subscriber's address to the attention of the user of the cellular phone number; and (4) use reverse lookups for any subscriber information not retained by the carriers. (*Id.*; Pl.'s Reply 4-5, ECF No. 219 at 9-10.) Plaintiff emphasizes, and even Defendants admit, that the subscribers of a group

calling plan generally can identify the names and addresses of the users on their own group calling plan.

Defendants' challenge to Plaintiff's proposed plan for identifying class members centers upon two main arguments: (1) historical subscriber data is unavailable, time-consuming and costly to retrieve, or both; and (2) there are no actual records that identify the names and address of any non-subscribing users. However, the Court concludes that Defendants' concerns are unsupported or unjustified at this juncture, as discussed below.

1. Historical Records

After careful review of the record evidence, the Court finds that the expert testimony and other evidence in the record supports Plaintiff's view that carrier-retained historical subscriber data is available. Plaintiff's expert, Robert Biggerstaff, expressly states in his report that based upon his experience carriers (and, especially major carriers) typically retain subscriber identification records for "many years" after a subscriber is no longer a customer for business purposes and that carrier subpoenas would be an effective way to obtain subscriber data. (Second Expert Report of Robert Biggerstaff ("Biggerstaff's Report") 6-7, ECF No. 211-20 at 7-8.) Notably, according to Mr. Biggerstaff, the five major carriers comprise 87.75% of the telephone numbers used by the class in this case. (*Id.* at 8 (chart).) Specifically, Mr. Biggerstaff states:

> [Defendant's expert] has previously made similar broad categorical claims that a means of identifying historical subscribers is unavailable. For example he said in another report "there is no available data source to identify the historical subscribers associated with facsimile numbers." Ironically, in the same deposition he admits that "some carriers may retain historical records of former subscribers for several months or years." Indeed, he conceded that some carriers do maintain that information and he has received it from carriers in another case.
>
> In my experience, all carriers maintain historical subscriber information for at least

> some period of time. In my experience, carriers such as AT&T that command large portions of market share, do retain historical subscriber information, while carriers that lack that data are more commonly smaller land-line (not cellular) carriers with little market share.
>
> Of all their data, I have found carriers maintain subscriber identification records the longest (typically many years after a subscriber has no longer been a customer) particularly since those records are not voluminous like call detail records, and have continued business uses. In addition, when asking for data for a list of phone numbers, larger carriers such as AT&T have dedicated teams with automated systems that can produce the desired information automatically, efficiently, and at low cost. Experienced law firms and class administrators are adept at securing and processing this data in class actions.
>
> Unlike voluminous call detail records, subscriber data takes up very little space and has particular business value for many years. First, it is obviously kept for decades as long as the customer is an active customer. Second, it is useful to the carrier for identifying returning customers in the future, both to welcome desired applicants, as well as to identify undesirable customers such as those who violated terms of use in the past or had bill payment issues.

(*Id.* at 7-8.)

In comparison, Defendant's expert, Kenneth Sponsler, only vaguely states that "[c]arriers are under no obligation to maintain historical account records when subscribers have ported their numbers to other carriers, which presents growing problems given the frequency with which consumers change providers." (Report of Kenneth Sponsler ("Sponsler's Report") 18, ECF No. 211-19 at 24.) However, the fact that the carriers are under no obligation to maintain historical subscriber records does not answer the question of whether the subscriber identification information is maintained and available. As to the latter, more relevant question, Plaintiff emphasizes that Defendants have "already proved the effectiveness of subpoenas because several carriers responded by producing class data for over half of the putative class." (Pl.'s Reply 1, ECF No. 219 at 6.)

Furthermore, other courts have found subponeas to phone carriers to be useful in obtaining

historical subscriber data. *See e.g.*, *Griffith v. ContextMedia, Inc.*, No. 16 C 2900, 2018 WL 372147, at *2 (N.D. Ill. Jan. 11, 2018) ("[E]ven assuming the [ascertainability] analysis requires inquiry into the ease or difficulty with which class members can reliably be identified, plaintiff proposes several methods for doing so, including through the services of an experienced class action administration firm with access resources for identifying class members based on known phone numbers and/or enlisting the help of cellular carriers whose records can be used to correlate cell phone numbers with the individuals who used them."); *Booth v. Appstack, Inc.*, No. C13-1533JLR, 2015 WL 1466247, at *4 (W.D. Wash. Mar. 30, 2015) ("Defendants' reliance on these limitations [of the dialer's call records] is misplaced because Plaintiffs intend to rely on additional records, such as telephone carrier records and reverse-lookup directories, to identify class members and establish elements of the claims.").

In addition to the lack of record support, Defendants' citation to legal authorities to support their argument that carriers do not retain historical subscriber data is lacking. Defendants cite *Balschmiter v. TD Auto Fin. LLC*, 303 F.R.D. 508, 525 (E.D. Wis. 2014), for the proposition that carrier subpoenas would be unhelpful in identifying class members. However, in *Balschmiter*, the plaintiff's only proposal for identifying class members was the use of reverse-lookups. Indeed, in concluding that reverse-lookups were alone insufficient, the *Balschmiter* court distinguished the facts there from the facts in *Birchmeier v. Caribbean Cruise Line, Inc.*, 302 F.R.D. 240, 243-44 (N.D.Ill. 2014), where the plaintiff also proposed the use of carrier subpoenas: "While class certification was granted in *Birchmeier* and reverse-lookups were to be used, they were also to be used in conjunction with obtaining contact information from 'the telephone carriers themselves.' *Birchmeier*, 302 F.R.D. at 248. Here, only reverse-lookups are proposed." *Balschmiter*, 303 F.R.D. at 525. Unlike

Balschmiter, Plaintiff here has not proposed only reverse-lookups. Rather, Plaintiff has proposed a four-step identification process that, as in *Birchmeier* and *Booth*, includes the use of both carrier subpoenas and reverse-lookups for any membership information not captured by the subpoenas. *See Booth*, 2015 WL 1466247, at *4; *Birchmeier*, 302 F.R.D. at 243-44.

The only other case cited by Defendants in their Response Brief regarding the alleged unavailability of carrier-retained subscriber identification information is *Smith v. Microsoft Corp*., 297 F.R.D. 464, 473 (S.D. Cal. 2014). However, in *Smith*, the court declined to consider the defendant's argument that the class was not ascertainable and instead considered the difficulty of identifying and notifying class members as part of a multi-faceted superiority inquiry under Rule 23(b)(3) of the Federal Rules of Civil Procedure. *See id.* ("Thus, it would be extraordinarily difficult to identify the class members, communicate to the proposed class members the required Rule 23(c)(2)(B) notices, and send the proposed class members their share of any recovery. These concerns are relevant to the manageability.").[4]

Defendants' concern that subscriber identification efforts through carrier subpoenas will be time-consuming is overstated and speculative. Defendants' expert, Kenneth Sponsler, reports that some carriers, such as AT&T, will not respond to subpoenas without providing notice to each consumer and a fourteen-day period to respond:

> AT&T, for example, will not provide subscriber information without first advising subscribers and providing them an opportunity to object. Before it will release any information / call detail records ("CDRs"), it will contact every subscriber associated with the numbers that match the parameters of the subpoena to inform them of the

[4] In contrast, this Court finds that a class action is a superior method of adjudicating these claims under Rule 23(b)(3) of the Federal Rules of Civil Procedure because the relative advantages of a class action outweigh any difficulties in managing the notice stage of the litigation. The Court further discusses the superiority requirement in Section III.E. below.

> subpoena and their rights. AT&T subscribers have up to fourteen days to reply. If AT&T receives the subscribers' consent, it will produce the record. If AT&T receives no reply, it will produce the record. Subscribers who object to the release of their CDRs must file a Motion to Quash with the respective courts. Depending on the location of the court (county, state, etc.) this can be a quick or a very drawn-out process.

(Sponsler's Report 17, ECF No. 211-19 at 23.) A fourteen-day waiting period is not significant enough to warrant a finding of lack of administrative feasibility. Notably, despite this waiting period, Defendants' expert, Mr. Sponsler testified during his deposition that AT&T, the carrier for over 25% of the class in this case, ultimately did comply with a subpoena in another case. (Sponsler Dep. 172, ECF No. 219-3 at 9.)

Regarding the cost of identification, Defendants' concern is misplaced because the plaintiff ordinarily bears the costs of identifying the members of the class. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 356 (1978) ("The general rule must be that the representative plaintiff should perform the tasks [necessary to send the class notice], for it is he who seeks to maintain the suit as a class action and to represent other members of his class. . . . Thus ordinarily there is no warrant for shifting the cost of the representative plaintiff's performance of these tasks to the defendant."); *id.* (holding that it was an abuse of discretion for lower court to require defendants to bear expense of identifying class members). In any event, Plaintiff's expert, Robert Biggerstaff, has testified that he does not anticipate the cost in obtaining subscriber data from AT&T to be prohibitive due to automation and the availability of staff employed by the major carriers. (Biggerstaff's Report 7, ECF No. 211-20 at 8.)

For these reasons, the Court finds that Plaintiff's plan to subpoena the phone carriers for their historical records as to the names and addresses of the subscribers of the cellular telephone numbers

that were texted is administratively feasible.

2 Non-subscribing Users

Defendants have raised the issue of whether Plaintiff has proven a feasible way of obtaining the identification information for users of cellular telephone numbers who are not the subscriber on the plan. A non-subscribing user might be a family member on a family plan or an employee on a business plan. Defendants suggest that carriers typically retain subscriber identification information but might not know the identification information for non-subscribing users on a family or business plan. However, according to Plaintiff's expert, Robert Biggerstaff, "many of the carriers provide[] a way for [customers] to assign names to the multiple phones on an account." (Dep. of Robert Biggerstaff ("Biggerstaff Dep.") 78, ECF No. 219-4 at 9.) In other words, if a customer voluntarily provides the carrier with the name of the users associated with each cellular telephone number on a shared plan, the carriers, including AT&T and T-Mobile, will identify the user of each cellular telephone number on the account. (*Id.*) Based upon this feature, Plaintiff contends that the vast majority of users will be identified via the carrier subpoenas.

For those accounts where the carrier did not provide a feature allowing subscribers to assign users to the numbers on the account or where the subscriber declined to participate in it, Defendants contend that "[identification] is impossible." (Defs.' Resp. 11, ECF No. 211 at 22.) In response, Plaintiff offers a simple solution: ask the subscriber.

In *Coulter-Owens v. Time, Inc.*, 308 F.R.D. 524, 528 (E.D. Mich. 2015), a plaintiff sought to certify a class of consumers who had purchased three magazines through defendant's third-party agents and whose personal information was disclosed to two marketing companies. The class definition turned on whether a person was a purchaser. *Id.* at 530. The defendant claimed that the

class was not ascertainable because although the defendant possessed subscriber identification information, the defendant did not have identification information for the purchaser. *Id.* at 531. The defendant argued that in cases where people purchased subscriptions as gifts, "there [w]as no way of knowing who the purchaser [w]as in these instances." *Id.* However, the court disagreed, reasoning that "this information can easily be obtained through inquiry from the *individual subscriber* or the third party seller." *Id.* (emphasis added).[5]

Hence, because non-subscribing user identification information can be obtained from the phone carriers or through inquiry from the individual subscriber, the Court finds that Plaintiff's plan for identifying the class members is administratively feasible. For all of these reasons, the Court concludes that Plaintiff has established that the proposed class is adequately defined and clearly ascertainable.[6]

B. Commonality

The commonality requirement demands that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Rule 23(a)(2) "does not require that all the questions of law and fact raised by the dispute be common, or that the common questions of law or fact 'predominate' over individual issues." *Vega v. T-Mobile USA, Inc*., 564 F.3d 1256, 1268 (11th Cir. 2009) (internal citation and quotation marks omitted). Commonality requires the plaintiff to demonstrate that the class members "have suffered the same injury." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-

[5] The Court notes that courts commonly approve notice procedures in securities class action litigation cases that require brokers and other nominee purchasers to provide the names and addresses of the beneficial owners to the plaintiff.

[6] Defendants do not dispute that Plaintiff has established numerosity based upon over 10,000 putative class members, and the Court agrees that numerosity is met.

50 (2011). The common issue "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." *Id.* at 350. In other words, class certification depends upon "not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Id.* (citation omitted).

The TCPA prohibits "any person . . . to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a . . . cellular telephone service." 47 U.S.C. § 227(b)(1)(A)(iii). Express consent is not an element of a plaintiff's prima facie case but is an affirmative defense for which the defendant bears the burden of proof. *Van Patten v. Vertical Fitness Grp.*, LLC, 847 F.3d 1037, 1044 (9th Cir. 2017). Plaintiff argues that the class claims present common issues that can be handled on a class-wide basis without the need for individualized inquiries. In particular, Plaintiff emphasizes that the issue of whether Defendants obtained consent through any third-party intermediary can be resolved in "one stroke." Plaintiff contends that all of the class members were entered in Defendants' texting program in the same way, i.e. because a third party texted the word "friend" followed by the class member's ten-digit cellular phone number in response to Defendants' solicitation. Plaintiff contends that as to all of the class members, Defendants cannot rely upon a third party's mere provision of a class member's telephone number as signifying the class member's consent to be texted under relevant FCC rulings.

In response, Defendants argue that the commonality requirement is not met because

variations exist among the class as to the key question of consent. In particular, Defendants first emphasize that the data subpoenaed by Defendants from Verizon, US Cellular, and Sprint indicate that some individuals forwarded numbers for which the forwarder was the subscriber, thereby establishing consent to receive text messages from Defendants at that telephone number. Second, Defendants claim that consent can be accomplished when an intermediary (here, the forwarders) provides the called party's telephone number to the caller (here, Defendants) after allegedly obtaining consent from the called party (here, the forwardee). It is undisputed that Defendants did not ask the forwarders to obtain the consent of the forwardee, nor did the forwarders make an express representation to Defendants that they had obtained the consent of the forwardee. Nevertheless, Defendants have filed with the Court the declarations of several individuals stating that they had in fact obtained the consent of the putative class members prior to forwarding the class members' telephone numbers to Defendants. Third, drawing upon principles of agency law, Defendants speculate that some putative class members may have had an agency relationship with the forwarders that permitted the forwarders to consent on behalf of the class members. The Court takes each of Defendants' arguments in turn below.

1. Subscriber-Forwarded Numbers

Defendants argue that the issue of consent cannot be determined on a classwide basis because the evidence shows that as to some telephone numbers used by putative class members, the subscriber of the telephone number, i.e. the individual billed for the telephone line, consented to receive the text messages by forwarding in the telephone number. In other words, an individual who is the subscriber on a family or business plan may have forwarded another telephone number on the plan, such as the telephone number used by the subscriber's spouse or child. A defendant is not

liable for making calls under the TCPA when the defendant received the "prior express consent of the called party." 47 U.S.C. § 227(b)(1)(A)(iii). The subscriber who is billed for a telephone number or the customary user of the number can provide consent to be called. *See In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 F.C.C. Rcd. 7961, 8000–01 (2015) ("2015 Ruling") (defining the "called party" as "the subscriber, *i.e.*, the consumer assigned the telephone number dialed and billed for the call, or the non-subscriber customary user of a telephone number included in a family or business calling plan").

As Defendants argue, then, the proposed class improperly includes individuals whose telephone numbers were forwarded by subscribers who lawfully provided consent for the text messages. Specifically, Defendants state that the data subpoenaed by Defendants from Verizon, US Cellular, and Sprint indicated that in some cases the sender and recipient shared the same carrier. Defendants sent each carrier a list of the telephone numbers where the sender and recipient shared that carrier and asked the carrier to identify any telephone numbers that shared the same account. For Verizon, 443 numbers of the 2,367 numbers submitted were on the same account, i.e. 18.72%. (Biggerstaff's Report 11, ECF No. 211-20 at 12.) For US Cellular, 88 numbers of the 266 numbers submitted were on the same account, i.e. 33.08%. (*Id.*) For Sprint, 46 numbers of the 765 numbers submitted were on the same account, i.e. 6.01%. (*Id.*) Thus, based upon the subpoena responses from only Verizon, US Cellular and Sprint, there were 577 of the total 3,398 numbers submitted where the sender and the recipient were on the same account, i.e. 16.98%. (*Id.*) Applying 16.98% across the board to all telephone numbers where the sender and recipient had a common carrier (i.e. 5,950), there are approximately 1,011 phone numbers of the 13,046 where the sender and recipient are on the same account, i.e. 7.7%. Moreover, Defendants have provided the declarations of several

individuals who state that they were the subscriber on a family plan and that they forwarded one or more telephone numbers on their family plan. (*See* Defs.' Resp. Ex. E, ECF No. 213-4.)

Defendants emphasize that, despite the fact that approximately 7.7% of the class members were on the same account, Plaintiff has not provided a mechanism for separating out those individuals whose telephone numbers were forwarded by the subscriber on the account. As the class is presently defined, Defendants are correct that the consent issue cannot be resolved uniformly since in some cases Defendants received the lawful consent of the subscriber, i.e. the person billed for service.

In response, Plaintiff agrees that the Court can exclude any numbers for which "a subscriber[] provi[ded] . . . a user's numbers." (Pl.'s Reply 11, ECF No. 219 at 16.) The Court agrees that these subscriber-forwarded numbers, once excluded, would not defeat satisfaction of the commonality requirement. Therefore, the class definition shall include the following: Excluded from the class are persons who received a text message from Defendants wherein their cellular telephone number was provided by a subscriber of the calling plan.

Moreover, the Court concludes that the carrier data could be used to ascertain those individuals whose telephone numbers were forwarded by the subscriber on the account. Following Defendants' lead, the remaining carriers can be subpoenaed to identify which forwarder/forwardee pairs were on the same account. Then, the carrier subscriber identification data can be used to determine whether the forwarders on those accounts were also the subscribers on the accounts. Once, the subscriber-forwarded telephone numbers are excluded from the class, the Court finds that the class will meet the commonality requirement of Rule 23.

2. Consent Through an Intermediary

A defendant can obtain the consent of the called party through a third-party intermediary under a 2014 Declaratory Ruling issued by the Federal Communications Commission ("FCC").[7] *Matter of Groupme, Inc./Skype Commc'ns S.A.R.L. Petition for Expedited Declaratory Ruling Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991* ("*Groupme*"), 29 F.C.C. Rcd. 3442, 3444 (2014) ("[A] consumer's prior express consent may be obtained through and conveyed by an intermediary."); *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1123 (11th Cir. 2014) (same). Under that Declaratory Ruling, the FCC concluded that a provider of text messaging services for groups of fifty or more could send text messages to individuals in the groups without running afoul of the TCPA. 29 F.C.C. Rcd. at 3445. In so concluding, the FCC placed great reliance upon the fact that the provider's terms of service required a group creator to "represent that each individual added to the group has consented to be added and to receive text messages." *Id.* Because the group creator was required to obtain and convey consent, the FCC found that the TCPA's consumer protection goals underlying the prior consent requirement would not be significantly diminished. *Id.* The conveyance requirement is intended "to meaningfully ensure the protections of the TCPA are extended to the recipients of the[] [defendant's] messages." *Id.* The FCC cautioned, however, that the "intermediary may only *convey* consent that has actually been provided by the consumer; the intermediary cannot provide consent on behalf of the consumer." *Id.* at 3447 (emphasis added).

In the *Groupme* ruling, the FCC emphasized, repeatedly, that for consent through an

[7] The TCPA delegated to the FCC the authority to "prescribe regulations to implement [its] requirements." 47 U.S.C. § 227(b)(2).

intermediary to be valid, the intermediary must convey the consent to the caller. *See id.* at 3442 ("consent is conveyed to the [caller] by an intermediary"); *id.* ("third-party representations regarding consent"); *id.* at 3444 ("prior express consent may be obtained through and conveyed by an intermediary"); *id.* at 3445 ("consent to be obtained and conveyed via intermediaries"); *id.* ("allowing intermediaries to obtain and convey consent"); *id.* ("conveys each party's consent, in order to meaningfully ensure the protections of the TCPA"); *id.* at 3446 ("consent can be obtained and conveyed via an intermediary"); *id.* ("consent obtained and conveyed by an intermediary"); *id.* ("assertion of an intermediary that the consumer has consented to the call"); *id.* at 3447 ("a group organizer may only *convey* the consumer's prior express consent" (emphasis in original)); *id.* (caller "relies upon the assertion of an intermediary that the consumer has given such prior express consent"); *id.* ("intermediary may only convey consent that has been actually provided by the consumer"). The FCC even encouraged callers to "take adequate steps to ensure . . . that [intermediaries] do in fact obtain the requisite consent." *Id.* In *Groupme*, the FCC found that the group managers (i.e. the intermediary) conveyed consent to the text-messaging provider through the terms of service, which required the group managers to represent that the consumer has given prior consent to be texted. *Id.* (noting that the provider was "gaining prior express consent based upon its [t]erms of [s]ervice agreement").

In *McCaskill v. Navient Sols., Inc.*, 178 F. Supp. 3d 1281, 1293 (M.D. Fla. 2016), the district court refused to find that defendants had established a genuine issue of material facts regarding whether any of the calls were made with the plaintiff's prior express consent. In so concluding, the court rejected the defendants' argument that the plaintiff provided consent through an intermediary, i.e. the plaintiff's mother. Citing the *Groupme* ruling, the court reasoned that the "[d]efendants point

to no evidence indicating that [the intermediary] conveyed any consent on [p]laintiff's behalf. *See* [*Groupme*, 29 FCC Rcd.] at 3447 ('the intermediary may only convey consent that has actually been provided by the consumer; the intermediary cannot provide consent on behalf of the consumer')." *McCaskill*,178 F. Supp. 3d at 1293.

Here, Defendants argue that the evidence in this case establishes that the key question of consent will require substantial individualized inquiries. Defendants emphasize that they have obtained and filed with the Court about two dozen declarations from individuals who participated in the Friend Forwarded marketing program by texting their friends' cellular telephone numbers to Defendants and affirmatively declare that they obtained the prior express consent of their friends before forwarding their telephone numbers. (*See* Defs.' Resp. Ex. E, ECF No. 213-4.)

The problem with Defendants' argument is that there is no evidence that the forwarders conveyed the consent of the putative class members to Defendants. Unlike the text messaging service in *Groupme*, Defendants did not have an agreement with the forwarders which required the forwarders to represent that they had obtained the requisite consent from the consumer. Indeed, Defendants did not even ask the forwarders whether they had obtained consent from the consumer. Defendants asked only for the telephone number. In return, the forwarders' only communication with Defendants was supplying their friends' cellular telephone number. As a result, Defendants had no way of knowing whether the members of the putative class had consented. Thus, contrary to Defendants' suggestion otherwise, this case is not analogous to the way consent was conveyed in *Groupme*.

Defendants insist that cases in this circuit support their contention that by merely providing their friends' telephone numbers, the forwarders conveyed the consent of their friends. Defendants

first cite *Lawrence v. Bayview Loan Servicing, LLC*, which provides that "[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 v. Bayview Loan Servicing, LLC*, 666 F. App'x 875, 879 (11th Cir. 2016). *Lawrence* did not address the requirements to establish consent through an intermediary and is therefore inapplicable. In *Lawrence*, a debtor argued that when he provided his cellular telephone number on letters sent to a loan servicer concerning a dispute over his homeowner's insurance, his consent to be called did not extend to matters beyond the insurance dispute. The court disagreed, reasoning that "the provision of a mobile phone number, without limiting instructions, suffices to establish the consumer's general consent to be called under the TCPA." *Id.* at 880.

Unlike *Lawrence*, the consumers here did not provide their cellular telephone numbers to the caller at all. Rather, they provided their numbers to an intermediary, which places this case squarely within the ambit of the *Groupme* ruling, requiring the intermediary to make an "assertion . . . that the consumer has consented to the call" upon which the caller can rely. 29 F.C.C. Rcd. at 3446.

Defendants' citation to *Mais v. Gulf Coast Collection Bureau, Inc*., 768 F.3d 1110, 1123 (11th Cir. 2014) is also unavailing. In *Mais*, a patient brought a TCPA action against a creditor and a debt collector for making calls. The patient completed a routine hospital admission form whereby the patient expressly acknowledged receipt of the hospital's privacy policy and authorized the release of the patient's information (including his telephone number) to the healthcare providers for billing purposes. *Id.* at 1115. The hospital then gave the phone number to the creditor. *Id.* The parties disputed the meaning of the word "provided" as used in a 2008 FCC Ruling, which states that "prior express consent is deemed to be granted only if the wireless number was *provided* by the consumer

to the creditor, and that such number was provided during the transaction that resulted in the debt owed." *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 FCC Rcd. 559, 564 (2008) (emphasis added). The patient argued that the 2008 FCC Ruling did not apply because even though the number was provided during the hospital stay that resulted in the debt, the patient did not directly provide the number to his creditor. 768 F.3d at 1123. The court rejected that argument and held that in the debtor-creditor context a consumer provides his wireless number to the creditor within the meaning of the 2008 FCC Ruling by filling out a "form that authorized another party to give the number to the creditor." *Id.* After concluding, the court noted in *dicta* that its conclusion that a debtor can provide his number to a creditor by authorizing an intermediary to disclose his number to the creditor was supported by "[t]he FCC's recognition of 'consent obtained and conveyed by an intermediary.'" *Id.*

Citing *Mais*, Defendants argue that the court there "did not find any specific form of 'conveyance' was necessary." (Defs.' Resp. 18, ECF No. 211 at 29.) However, Defendants gloss over the fact that the *Mais* court acknowledged that consent must be conveyed in accordance with the FCC's ruling. Unlike the forwarders in this case, the hospital in *Mais* provided more than a telephone number as reasonable assurances to the caller that the called party had consented. In *Mais*, the hospital had a business practice of requiring each patient to complete a hospital admission form whereby the patient expressly acknowledged receipt of the hospital's privacy policy and authorized the release of the patient's information (including his or her telephone number) to the healthcare providers for billing purposes. 768 F.3d at 1113-14. In implementing such a business practice, the intermediary (i.e. the hospital) may have adequately conveyed to a healthcare provider with whom it had an ongoing business relationship that each patient who provided a telephone number had

consented to provide his or her telephone number for billing purposes. Hence, in both the *Groupme*[8] and *Mais* situations, the intermediary seemingly provided some kind of meaningfully assurance to the callers (not just the telephone number) that the protections of the TCPA extended to recipients of the voice call or text messages. 29 F.C.C. Rcd. at 3445.

In this case, unlike the situations in *Groupme* and *Mais*, the intermediary here (i.e. the forwarder of the telephone number) did not provide any meaningful assurances to Defendants that the called party had consented to provide his or her telephone number to receive promotional deals. The intermediary did not make an express assertion that the called party had consented to be texted through any terms of service, nor did the intermediary have an established business practice of obtaining consent from the called party. Without a contractual obligation to ensure consent, a business practice of doing so, or any other meaningful way to convey that consent had been obtained, the forwarders did not effectively convey the called party's consent to Defendants. Merely forwarding the called party's telephone number in response to a solicitation to "[e]nter friends and u win," does not convey the consent of the called party or otherwise provide meaningful assurances to Defendants that the called party has consented to be called. Accordingly, based upon the present record, the Court concludes that Defendants cannot rely upon the idea that the consent of the putative class members was obtained and conveyed through an intermediary.[9]

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[8] As noted above, in *Groupme*, by registering and agreeing to the applicable terms of service, the intermediary (i.e. the group creator) represented to the text messaging service provider that each participant has consented to receive text messages.

[9] The Court notes that if Defendants had simply required the forwarders to indicate that they had obtained the consent of their friends, then Defendants could have relied upon consent obtained and conveyed through the forwarders, and the outcome of this class certification motion might have been very different.

3. Consent Under Agency Law

In *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1253 (11th Cir. 2014), the court opined that "agency law developed in a civil context to handle commercial and tort disputes" appropriately applies to the TCPA, explaining as follows:

> To fall within 47 U.S.C. § 227(b)(1)(A)(iii)'s consent exception, [the defendant] must demonstrate that it had the consent of [the called party], as defined by the common law, to call . . . . One way for [the defendant] to do so would be by demonstrating that [the called party's agent] had an agency relationship with [the called party] that permitted her to consent to [the called party] receiving the calls, and by showing that she exercised that authority. . . .

Id. at 1253. For example, under Florida law, an agency relationship can arise by written consent, oral consent, or by implication from the conduct of the parties. *Id.*

Defendants argue that consent is not a common issue capable of classwide resolution because the class includes individuals whose telephone numbers were forwarded by family members and others with whom the class members shared a personal relationship. Defendants speculate that due to their close relationship some of these putative class members may have shared an agency relationship with the forwarder. In support, Defendants cites *McCaskill v. Navient Sols., Inc.*, 178 F. Supp. 3d 1281, 1292 (M.D. Fla. 2016) and *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1123 (11th Cir. 2014). Aside from the speculation behind Defendants' argument, neither of these cases are particularly helpful here.

In *McCaskill*, the court considered whether the evidence created a question of fact as to whether an apparent agency relationship existed between a mother and her daughter. The court held that the evidence did not create a question of fact because there was no evidence that the plaintiff created the appearance that her daughter could act as her agent in consenting to be called on her

behalf. 178 F. Supp. 3d at 1291-92. The court emphasized that an apparent agency relationship is created based upon acts of the principal, not the agent. *Id.*

Here, Defendants had no interactions or contact with the putative class members and had no knowledge of any facts pertinent to the friendship or other relationship between the forwarders and the putative class members when they texted the class members. Thus, Defendants cannot rely upon a principal-agent relationship based upon apparent authority to establish consent.

In *Mais*, which is the other case cited by Defendants in support of their agency theory (and which was discussed above in the separate context of consent through an intermediary), is also unavailing here. In *Mais*, the wife of an ill husband provided consent to be called on behalf of, and as agent for, her husband. 768 F.3d at 1113. Defendants suggest that the Court should determine whether an agency relationship like that in *Mais* exists as to each forwarder/forwardee pair who have a familial or personal relationship. However, none of the declarations in the record support an agency relationship. Under agency law, the agent is not a mere conduit channeling consent from the called party to the caller. Under agency law, the agent herself consents, albeit on behalf of called party. For example, in *Mais*, a wife was authorized to consent on behalf of her ill husband. *Id.*

In this case, on the other hand, none of the declarations in the record state that the declarants themselves consented because the called parties gave them the authority to do so. And unlike the case with important financial or medical matters, where individuals routinely have the foresight to give others the authority to act on their behalf when they cannot do so, there is no evidence that pizza deals garner the same careful planning and attention. The mere possibility that some putative class members consented based upon an agency theory is too speculative at this point and not supported by the present record. *See Manno v. Healthcare Revenue Recovery Grp.*, LLC, 289 F.R.D. 674, 695

(S.D. Fla. 2013) ("The mere possibility that some putative class members may have given express consent on an individualized basis is speculative and not supported on the present record. As stated in the class certification order, this Court is well aware of its continuing obligation to monitor class actions and to decertify if necessary. Should the circumstances change and should the Defendants have more substantial arguments or evidence in their favor suggesting that individualized consent to the hospital, Inphynet, or the billing vendor is pervasive, then they are welcome to move for decertification at a later time. Absent such evidence, the mere possibility that someone in the class may have specifically authorized one of those entities to call them is insufficient to create a predominating individualized issue rendering class treatment inferior." (internal citation omitted)).[10] That being said, the Court does not mean to suggest that Defendants cannot seek to decertify the class if Defendants provide more substantial arguments and evidence to show that some forwarders did have the requisite authority to act on the class members' behalf in regard to the texting program.

In summary, based upon the present record and excluding from the class any persons who received a text message from Defendants wherein their cellular telephone number was provided by a subscriber of the calling plan, the Court finds that the issue of whether Defendants obtained consent can be resolved in "one stroke" because the evidence does do not support Defendants' claims of consent through an intermediary or by an agent at this time.

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[10] Merely being on a shared plan with a forwardee or having a family or close relationship with one is insufficient to show that the forwardee gave his or her prior express consent to the non-subscriber forwarder. Likewise, any participation in the friend-forward program on the part of the forwardees after they received texts does not constitute prior express consent as a matter of law. As Plaintiff contends, these issues present common questions suitable for class treatment.

C. Typicality

"Class members' claims need not be identical to satisfy the typicality requirement; rather, there need only exist "a sufficient nexus . . . between the legal claims of the named class representatives and those of individual class members to warrant class certification." *Prado–Steiman v. Bush*, 221 F.3d 1266, 1278–79 (11th Cir. 2000). "This nexus exists 'if the claims or defenses of the class and the class representative arise from the same event or pattern or practice and are based on the same legal theory.'" *Ault v. Walt Disney World Co.*, 692 F.3d 1212, 1216 (11th Cir. 2012) (quoting *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984)).

Here, Defendants argue that Plaintiff is not typical because he allegedly provided consent to receive the messages at issue. However, this Court has already concluded that Defendants cannot rely upon a class member's consent through an intermediary because the forwarder never conveyed any assurances to Defendants that they had obtained the class member's consent, as required by the FCC's *Groupme* ruling and reiterated by the Eleventh Circuit in *Mais*. Moreover, the evidence in the record does not raise a genuine dispute of material fact as to whether Plaintiff (or any other class member) gave the respective forwarder the requisite and relevant authority to consent. Because Defendants have not argued any other basis for a finding against typicality, and because Plaintiff's claim and the claims of the putative class members are based upon the same theory, the Court finds that the typicality requirement is met.

D. Adequacy

"Among the prerequisites to the maintenance of a class action is the requirement of Rule 23(a)(4) that the class representatives 'will fairly and adequately protect the interests of the class.'" *Lyons v. Georgia–Pacific Corp. Salaried Employees Ret. Plan*, 221 F.3d 1235, 1253 (11th Cir. 2000)

(quoting *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 726 (11th Cir. 1987)). This requirement applies to both the named plaintiff and counsel. *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1253 (11th Cir. 2003). "Because all members of the class are bound by the res judicata effect of the judgment, a principal factor in determining the appropriateness of class certification is the forthrightness and vigor with which the representative party can be expected to assert and defend the interests of the members of the class." *Kirkpatrick*, 827 F.2d at 726.

"The adequate representation requirement involves questions of whether plaintiffs' counsel are qualified, experienced, and generally able to conduct the proposed litigation, and of whether plaintiffs have interests antagonistic to those of the rest of the class." *Griffin v. Carlin*, 755 F.2d 1516, 1533 (11th Cir. 1985). In addition, "named plaintiffs might not qualify as adequate class representatives because they do not possess the personal characteristics and integrity necessary to fulfill the fiduciary role of class representative . . . [or] where the named plaintiffs demonstrated insufficient participation in and awareness of the litigation." *Kirkpatrick*, 827 F.2d at 726.

1. Plaintiff's Participation in the Case

To meet the adequacy requirement, the class representatives cannot have "so little knowledge of and involvement in the class action that they would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys." *Id.* at 727. On the other hand, "[a]dequate class representation generally does not require that the named plaintiffs demonstrate to any particular degree that individually they will pursue with vigor the legal claims of the class." *Id.* at 727. Indeed, given that "the economics of the class action suit often are such that counsel have a greater financial incentive for obtaining a successful resolution of a class suit than do the individual class members, the adequacy requirement does not mean that the named plaintiff must fully

participate in the litigation." *Id.*

Here, the record indicates that Plaintiff personally reviewed the allegations of the Complaint, participated in written discovery, and appeared for an eight-hour deposition. (Decl. of Scott Owens, Esq., ¶ 2, ECF No. 219-14 at 2; Pl.'s Dep. 1, ECF No. 219-10 at 2.) Plaintiff has spent many hours reviewing documents for discovery and discussing the case with his lawyers. (Pl.'s Dep. 76, ECF No. 219-10 at 17.) In addition, Plaintiff's deposition testimony shows that Plaintiff has an understanding of the facts of this case and his role as a class representative. (*Id.* at 3-4, 6.) Regarding his knowledge of class-wide settlement offers, Plaintiff testified that he was aware that Defendants had made a class-wide settlement offer. (*Id.* at 8.)

The Court rejects Defendants' argument that Plaintiff is not sufficiently informed about this case because he did not know the dollar-amounts of the class-wide offers made in February 2015. Although the Court does not condone Plaintiff's cavalier attitude toward the amounts of the class-wide settlement offers that were made in February 2015, Defendants' attempt to liken Plaintiff's lack of knowledge regarding settlement amounts to the representative's complete lack of participation in *Spinelli v. Capital One Bank*, 265 F.R.D. 598, 614–15 (M.D. Fla. 2009), is rejected. In *Spinelli*, the disqualified representative had "little or no understanding" of the class or her responsibilities, did not plan to attend the trial, had not discussed the goals of the case, and simply "[went] along with what counsel says."

Here, on the other hand, Plaintiff has demonstrated an understanding of the facts of the case, has engaged in many conversations with counsel over the course of the litigation, has actively participated in the pleading and discovery stages of the litigation, and has shown at least some awareness of the settlement discussions that have occurred to date. *See Kirkpatrick*, 827 F.2d at 727

("[A]dequate class representation generally does not require that the named plaintiffs demonstrate to any particular degree that individually they will pursue with vigor the legal claims of the class.").

Moreover, this is not the kind of case where the record shows that Plaintiff has ceded all control over the litigation to his attorneys in contravention of his obligations to the class. When asked why Plaintiff did not accept Defendants' offer to pay him $25,000 to settle his individual lawsuit, he answered "[b]ecause I'm representing the class itself." (Pl.'s Dep. 53, ECF No. 219-10 at 6.) When asked about his responsibilities with respect to accepting class settlements, Plaintiff testified emphatically that his responsibility was "the best interest of the class." (*Id.* at 9.) It is true that Plaintiff testified that he trusted his counsel's advice on whether a settlement offer is or is not fair for the class. (*Id*. at 11.) But Plaintiff's disinterest in the amounts of the class-wide settlement offers in February 2015 appears to derive from a practical concern. Plaintiff testified that he could not evaluate the offers because he did not know the number of class members and the number of text messages per class member at the time of the offers. (*Id.* at 10, 15.) Indeed, as Plaintiff notes, the class size quadrupled from the size originally contemplated at the time of the offers. (Pl.'s Reply 15, ECF No. 219 at 20.) Defendants quarrel with the logic of Plaintiff's reasoning, arguing that Plaintiff did not need to know the class size to evaluate these particular offers. However, even if Plaintiff's reasoning was flawed, the fact that Plaintiff had some reason for claiming disinterest in learning the offer amounts suggests that Plaintiff was not arbitrarily ceding all control of settlement authority to his attorneys. At bottom, although Plaintiff could have participated more in the February 2015 settlement discussions, the Court finds that this is not the kind of case where Plaintiff has "so little knowledge of and involvement in the class action that [he] would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys." *See*

Kirkpatrick, 827 F.2d at 727. As recognized by the Eleventh Circuit "the subjective desire to vigorously prosecute a class action, which the district court here found missing in the named plaintiffs, quite often is supplied more by counsel than by the class members themselves." *Id.*

In summary, the Court finds that Plaintiff is knowledgeable about the case and has participated to some degree in every aspect of the lawsuit. Plaintiff's shortcomings are not sufficient to persuade this Court that he would be unwilling to protect the interests of the class and would cede all control over this lawsuit to his counsel.

2. Counsel's Conduct

In determining the adequacy of the plaintiff's representation, courts consider the integrity and trustworthiness of counsel to represent the interests of the class. In the class context, courts often comment that there is an "incentive of class counsel, in complicity with the defendant's counsel, to sell out the class by agreeing with the defendant to recommend that the judge approve a settlement involving a meager recovery for the class but generous compensation for the lawyers." *Creative Montessori Learning Centers v. Ashford Gear LLC*, 662 F.3d 913, 918 (7th Cir. 2011) (citing cases). "Class counsel owe a fiduciary obligation of particular significance to their clients when the class members are consumers, who ordinarily lack both the monetary stake and the sophistication in legal and commercial matters that would motivate and enable them to monitor the efforts of class counsel on their behalf." *Id.* at 917.

On the issue of class counsel's misconduct, the Court of Appeals for the Eleventh Circuit stated in *Busby v. JRHBW Realty, Inc.*:

> In a Seventh Circuit case . . . , addressing the question of attorney misconduct in soliciting named plaintiffs in a class action, the court stated, "only the most egregious misconduct on the part of plaintiffs' lawyer could ever arguably justify denial of class

> status." In the event that class counsel does act improperly, "[t]he ordinary remedy is disciplinary action against the lawyer and remedial notice to class members," not denial of class certification.

Busby, 513 F.3d 1314, 1323-24 (11th Cir. 2008) (quoting *Halverson v. Convenient Food Mart, Inc.*, 458 F.2d 927, 932 (7th Cir. 1972)). In *Busby*, the court held that the district court did not abuse its discretion in finding that the plaintiff was an adequate representative of the class even if his counsel had solicited employment from the plaintiff. *Id.* The defendant argued that plaintiff's counsel's solicitation of plaintiff violated a rule of professional conduct, which prohibited attorneys from soliciting employment from a prospective client except where the attorney had a "prior professional relationship" with the client. *Id.* In concluding that the district court did not abuse its discretion, the appellate court relied upon "the ambiguity of the statute," reasoning that any violation was not a serious infraction because counsel could have reasonably believed that he had a prior relationship with the plaintiff. *Id*. at 1324.

Defendants argue that Plaintiff's counsel is not adequate for purposes of representing the interests of the class due to counsel's alleged failure to share class settlement offers with Plaintiff. Defendants argue that the "egregious misconduct" language in *Busby*, which was based upon language from the Seventh Circuit *Halverson* case, is not the proper standard and that this Court should apply a "serious doubt" standard. In support, Defendants emphasize that after *Halverson*, the Seventh Circuit expressly rejected the "egregious misconduct" standard:

> To suggest as the district court did that "only the most egregious misconduct" by class counsel should require denial of class certification on grounds of lack of adequate representation was bad enough. To rule that only the most egregious misconduct "could ever arguably justify denial of class status," as the court went on to hold, would if taken literally condone, and by condoning invite, unethical conduct. Misconduct by class counsel that creates a serious doubt that counsel will represent the class loyally requires denial of class certification.

Creative Montessori Learning Centers v. Ashford Gear LLC, 662 F.3d 913, 918 (7th Cir. 2011).

The Court need not settle the issue of the proper standard to apply in this case. Based upon the Court's review of the facts and circumstances of this case, the Court concludes that Defendants' position that Plaintiff's counsel never shared class settlement offers with Plaintiff is factually incorrect. As discussed more below, the record shows that Plaintiff's counsel did discuss class-wide settlement offers with Plaintiff. Moreover, because the level of specificity at which those discussions should have occurred is a nebulous matter, the Court concludes that Plaintiff's counsel's conduct cannot support a finding of inadequacy under Rule 23 whether the "serious doubt" or "egregious misconduct" standard applies.

Defendants argue that Plaintiff's counsel violated Florida Rule of Professional Conduct 4-1.4 by allegedly not informing the client of the substance of settlement offers. An attorney's failure to communicate the substance of a settlement offer generally violates Florida Rule of Professional Conduct 4-1.4. Pursuant to Rule 4-1.4, a lawyer shall "promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required by these rules." The comments to Rule 4-1.4 provide

> If these rules require that a particular decision about the representation be made by the client, subdivision (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See rule 4-1.2(a).

Fla. Bar. Rule 4-1.4.[11]

Here, according to Plaintiff's deposition testimony and the Affidavit of Plaintiff's counsel, Scott Owens, Esq., Plaintiff's counsel informed Plaintiff of the settlement discussions that were occurring between defense counsel and Plaintiff's counsel in February 2015. Further, Plaintiff's counsel informed Plaintiff that based upon the interests of the class the amount was "not adequate" and "not fair." (Pl.'s Dep. 59, ECF No. 219-11 at 11.) In Plaintiff's counsel's view, the settlement amounts were "wholly inadequate" to compensate the class. (Scott Owens, Esq. Decl. ¶ 10, ECF No. 219-14 at 3.)

Even though Plaintiff's counsel did inform Plaintiff about the settlement offers and their inadequacy and unfairness, Defendants argue that this case is analogous to *Kulig v. Midland Funding, LLC*, No. 13 CIV. 4175 PKC, 2014 WL 5017817, at *6 (S.D.N.Y. Sept. 26, 2014), where the plaintiff had no knowledge of the settlement offers at all. The Court disagrees. The lack of

[11] The Rules Regulating the Florida Bar presumptively states in blanket terms that "[a] lawyer must abide by a client's decision whether to settle a matter." Fla. Bar. Rule 4-1.2. However, case law suggests that "the traditional notion of the 'client' deciding important litigation questions is often problematic in the class action context because of the difficulty in identifying the client." *Pettway v. Am. Cast Iron Pipe Co.*, 576 F.2d 1157, 1216 (5th Cir. 1978) ("The class itself often speaks in several voices. Where there is disagreement among the class members concerning an appropriate course of action, it may be impossible for the class attorney to do more than act in what he believes to be the best interests of the class as a whole."). "Because of the unique nature of the attorney-client relationship in a class action, the cases . . . holding that an attorney cannot settle his individual client's case without the authorization of the client are simply inapplicable." *Kincade v. Gen. Tire & Rubber Co.*, 635 F.2d 501, 508 (5th Cir. 1981).

The Florida Rules of Professional Conduct does not specifically address the extent of counsel's duties to inform the class representative about settlements in the unique context of a class action. Rule 4.1-4(a)(1) ties an attorney's duty to inform to whether the matter is one as to which the client must make a decision, but settlement in the class context is not a matter left to the discretion of the named plaintiff. The Rules could be clearer with respect to class counsel's ethical obligations to communicate settlement offers to the named plaintiff.

specificity that pervaded Plaintiff's counsel's settlement discussions cannot be likened to counsel's complete failure to inform the class representative of a settlement in *Kulig*. *See Maywalt v. Parker & Parsley Petroleum Co.*, 155 F.R.D. 494, 497 (S.D.N.Y. 1994) ("[T]he heart of this application stems from the perceived inadequacy of communication between Class Counsel and the Moving Representative Plaintiffs, an event which is perhaps unbecoming, but based on the submissions here, does not constitute a level of impropriety necessitating the drastic remedy of a Court ordered discharge of Class Counsel."), *aff'd*, 67 F.3d 1072 (2d Cir. 1995).

At most, the record raises the question of whether the degree to which Plaintiff's counsel's discussed the settlement offers with Plaintiff was adequate. Practically and logically speaking, the extent to which an attorney should discuss and evaluate a settlement offer with his client will somewhat depend upon a host of factors, including the reasonableness of the offer.[12] There is no playbook for class counsel in this regard. Class counsel is tasked with the tall order of balancing the requirements of keeping the class representative informed of the terms of settlements and making settlement decisions in the best interest of the class.[13] The record suggests that Plaintiff's counsel spoke in generalities to Plaintiff about the terms of Defendants' settlement offers because counsel

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[12] Plaintiff testified at his deposition that his counsel showed him Defendants' written offer of judgment in excess of $25,000 to settle his individual case, but that he rejected the amount due to the class allegations. (Pl.'s Dep. 53, ECF No. 219-10 at 6.)

[13] "Attorneys representing a class are responsible for communicating a settlement offer to the class representatives and ultimately to the members of the class. But the attorneys are also responsible for protecting the interests of the class as a whole, even in circumstances where the class representatives take a position that counsel consider contrary to the interests of absent class members. Class counsel must discuss with the class representatives the terms of any settlement offered to the class. Approval or rejection of the offer by the representatives, however, does not end the attorneys' obligations, because they must act in the best interests of the class as a whole." *Role of Class Counsel in Settlement, Ann. Manual Complex Lit*. § 21.641 (4th ed.) (footnotes omitted).

viewed the offers as wholly unreasonable and unfair to the class. Even though Plaintiff's counsel should have gone into greater detail in discussing the terms of the offers, the Court finds that because the adequacy of attorney-client settlement discussions in the class context is largely an ambiguous matter that escapes easy measurement, Plaintiff's counsel's shortfall cannot be considered grounds for rendering them inadequate counsel under Rule 23. *See Busby*, 513 F.3d at 1324 (affirming district court's conclusion that plaintiff was an adequate representative for the class where counsel's alleged ethical violation was based upon an ambiguous statute); *c.f. Victorino v. FCA US LLC*, 322 F.R.D. 403, 409 (S.D. Cal. 2017) (reasoning that "there were reasons, albeit incorrect, why Plaintiffs' counsel did not believe they needed to communicate the settlement offer").

The guiding principle on the adequacy of class counsel is counsel's integrity and trustworthiness to represent the class, and nothing in the present record sufficiently persuades this Court that Plaintiff's counsel cannot be trusted to represent the interests of the class. *See Parker v. Anderson*, 667 F.2d 1204, 1210–11 (5th Cir. 1982) ("The question presented by this appeal is whether class counsel provided fair and adequate legal representation to the class as a whole. Necessarily, much of what counsel does for the class is by and through the class representatives, but that is neither the ultimate nor the key determinant. The compelling obligation of class counsel in class action litigation is to the group which makes up the class. Counsel must be aware of and motivated by that which is in the maximum best interests of the class considered as a unit.").

Before concluding, the Court also considers the clause in Plaintiff's counsel's retainer agreement with Plaintiff that purportedly obligates Plaintiff to pay attorney's fees and expenses if Plaintiff "abandons the class and settles on an individual basis against the advice" of counsel. Defendants argue that the clause deprives Plaintiff of the ability to exercise independent decision-

making. In response, Plaintiff states that "even if [Defendants] could point to a genuine problem with the agreement, the solution would not be to deny class certification, but instead a simple amendment of the Retainer Agreement." (Pl.'s Reply 22, ECF No. 219 at 27.)

Like the court in *Lanteri v. Credit Prot. Ass'n L.P.*, No. 1:13-CV-1501-WTL-MJD, 2018 WL 4625657, at *5 (S.D. Ind. Sept. 26, 2018), which considered an identical clause, the Court notes that "the fee arrangement does not explicitly prohibit the Plaintiff from settling, and the Court notes that the arrangement does not impose any fees, costs, or expenses on the Plaintiff were []he to agree to a class settlement against her attorneys' advice." Again, like the court in *Lanteri*, the Court finds that because Plaintiff appears willing to amend the representation agreement, the best course of action is to conclude that the adequacy determination is satisfied contingent upon Plaintiff's counsel's revision of the representation agreement to remove the offensive language in the "Exception for Individual Settlement Against Attorney's Advice." *See id.*

3. Plaintiff's Participation in other Enterprises

Under certain circumstances prior fraudulent conduct can indicate that a plaintiff does not have the personal integrity to serve as a class representative. *See Weisman v. Darneille*, 78 F.R.D. 669, 671 (S.D.N.Y. 1978). Here, Plaintiff's involvement in the unrelated Ponzi schemes identified by Defendants, even if relevant, does not raise a question about Plaintiff's integrity to serve as a class representative because Plaintiff himself has not been accused of any wrongdoing.

4. Plaintiff's Discovery Responses

"Although a minor discrepancy in testimony should not prevent certification, . . . serious misrepresentations made . . . weigh heavily in favor of finding that [a plaintiff] is not an adequate class representative." *Friedman-Katz v. Lindt & Sprungli (USA), Inc.*, 270 F.R.D. 150, 160

(S.D.N.Y. 2010). Here, the Court finds that any discrepancies or evasiveness in Plaintiff's discovery responses, namely, failing to identify an e-mail address and sidestepping questions about his involvement in unrelated pyramid schemes, do not raise a sufficient question about Plaintiff's integrity to warrant a finding of inadequacy to represent the class.

E. Predominance

The Court of Appeals for the Eleventh Circuit has described the predominance requirement under Rule 23(b)(3) as follows:

> To obtain Rule 23(b)(3) class certification 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. Common issues of fact and law predominate if they have a direct impact on every class member's effort to establish liability and on every class member's entitlement to injunctive and monetary relief. On the other hand, common issues will not predominate over individual questions if, as a practical matter, the resolution of an overarching common issue breaks down into an unmanageable variety of individual legal and factual issues. Certification is inappropriate if the plaintiffs must still introduce a great deal of individualized proof or argue a number of individualized legal points to establish most or all of the elements of their individual claims. The predominance inquiry 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 v. Federal Exp. Corp., 576 F.3d 1183, 1191 (11th Cir. 2009) (internal citations, quotation marks, brackets and ellipses omitted). "A district court must decide all questions of fact and law that b[ear] on the propriety of class certification." *Brown v. Electrolux Home Prod., Inc.*, 817 F.3d 1225, 1237 (11th Cir. 2016) (citation and internal quotation marks omitted). "[B]ecause each requirement of Rule 23 must be met, a district court errs as a matter of law when it fails to resolve a genuine legal or factual dispute relevant to determining the requirements." *Id.* (citation and internal quotation marks omitted).

Here, the Court finds that common issues predominate over individuals questions. Based upon an examination of the present record evidence and the relevant facts in this case (as discussed in Section III.B above), the Court finds, at least at this juncture, that the issue of whether Defendants obtained the consent of the putative class members can be resolved on a classwide basis. As noted above, Defendants acquired the telephone numbers of all of the putative class members in exactly the same way: through a third-party who forwarded in the class member's number. The present record does not suggest that the issue of consent will raise individualized issues. As discussed above, Defendants cannot rely upon having obtained the consent of the putative class members through the forwarders as intermediaries, because there is no evidence that any such consent was conveyed to Defendants, which is required by the 2014 *Groupme* FCC ruling governing the principle of consent obtained through an intermediary. Likewise, based upon the present record, Defendants cannot rely upon the assertion that they obtained the consent of any putative class member through the class member's agent because there is no evidence that any putative class member authorized a forwarder to act on his or her behalf as an agent. Finally, Defendants cannot rely upon a principal-agent relationship based upon apparent authority to establish consent because Defendants never had any interactions or contact with the putative class members, and an agency relationship based upon apparent authority is created based upon acts of the principal (i.e. the class members), not the agent (i.e. the forwarders). Thus, it is unlikely that the issue of consent will raise individualized inquiries under the unique facts of this case.

In addition to a classwide resolution of the consent issue, the record indicates that the following issues can be resolved on a class-wide basis: (1) whether Defendants are liable for the marketing texts sent by their vendors; (2) whether Pizza Hut is liable for the actions of its

franchisees; and (3) whether the text messages were sent using an "automatic telephone dialing system." (Mot. at 10, ECF No. 199 at 16.)

Hence, based upon the present record, the Court finds that the issues in the case will not require individualized proof and that the common issues predominate.

F. Superiority

In addition to predominance, Rule 23(b)(3) requires a court to determine whether "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The superiority prong requires consideration of "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 Military Healthcare Servs., Inc.*, 601 F.3d 1159, 1183–84 (11th Cir. 2010) (citation and quotation marks omitted). In deciding superiority, the district court must consider at least some of the factors set forth in Rule 23(b)(3), including: "the class members' interests in individually controlling the prosecution or defense of separate actions"; "the extent and nature of any litigation concerning the controversy already begun by or against class members"; "the desirability or undesirability of concentrating the litigation of the claims in the particular forum"; and "the likely difficulties in managing a class action." *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1278 n.19 (11th Cir. 2009) ("[A] complete failure to address these factors or any other pertinent consideration when conducting a Rule 23(b)(3) inquiry is an abuse of discretion").

Here, the Court finds that a class action is superior to other available methods for fairly and efficiently adjudicating this controversy. The large number of claims and the predominance of common issues over individualized inquiries, coupled with the relatively small amount of statutory

damages, indicate that a class action would be a superior method of adjudicating the TCPA action. Because of the small amount of statutory damages and the burdens of litigation, requiring individuals to file their own claims would likely deter some individual class members from prosecuting their claims. By concentrating the litigation of the claims in one forum, the Court can resolve many issues on a classwide basis and thereby save itself and the claimants time and resources. Moreover, at this juncture based upon the present record, the Court does not perceive any difficulties in managing the class action that persuade this Court that separate actions by each class member are a superior method of adjudicating these claims.

IV. CONCLUSION

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1) Plaintiff's Motion for Class Certification (ECF No. 199) is **GRANTED**. The class (as defined below) is certified, Plaintiff is appointed class representative, and Plaintiff's counsel is appointed counsel for the class (subject to the caveat below).

2) The following class is certified: a class consisting of all persons in the United States who received a text message from Defendants wherein their cellular telephone number was provided by a third party and said text messages were sent using hardware and software owned or licensed to Songwhale or Cellit between November 2012 and January 2013. Excluded from the class are all persons who received a text message from Defendants wherein their cellular telephone number was provided by a subscriber of the calling plan.

3) Plaintiff's counsel shall revise the representation agreement to remove the offensive language in the "Exception for Individual Settlement Against Attorney's Advice."

4) Plaintiff's Unopposed Motion to Seal (ECF No. 204) is **GRANTED**.

5) The Clerk of the Court shall correct the docket to reflect that the document located at ECF No. 221, which shall remain sealed, is not a motion and should not pending as such on the docket.

6) The Motion to Strike (ECF No. 222) is **DENIED**. The Motion to Supplement (ECF No. 254) is **DENIED** as moot.

7) Within fourteen (14) days of the entry date of this Order, the parties shall confer and file with the Court a joint proposed schedule consistent with the dictates of this Order.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida, this 3rd day of December, 2018.

KENNETH A. MARRA
United States District Judge