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UNITED STATE DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TERRY FABRICANT, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

AMERISAVE MORTGAGE CORPORATION, and DOES 1 through 10, inclusive, and each of them,

Defendant.

Case No. 2:19-cv-04659-AB-AS

CLASS ACTION

DECLARATION OF TODD M. FRIEDMAN IN SUPPORT OF PLAINTIFF'S MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT

Assigned to the Honorable Andre' Birotte, Jr.

DATE: MARCH 6, 2020
TIME: 10:00 A.M.
COURTROOM: 7D

[Filed and Served Concurrently with Motion for Final Approval of Class Settlement and Certification of Settlement Class; [Proposed] Order]

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DECLARATION OF TODD M. FRIEDMAN

I, TODD M. FRIEDMAN, declare:

1. I am one of the attorneys for the plaintiff in this action, Terry Fabricant ("Mr. Fabricant" or "Plaintiff"). I am an attorney licensed to practice law in the State of California since 2001, the State of Illinois since 2002, and the State of Pennsylvania since 2011. I have been continuously licensed in California since 2001, Illinois since 2002, and Pennsylvania since 2011, and am in good standing with the California State Bar, Illinois State Bar, and Pennsylvania State Bar. I have litigated cases in both state and federal courts in California and Illinois. I am also admitted in every Federal district in California and have handled federal litigation in the federal districts of California.
2. The declaration is based upon my personal knowledge, except where expressly noted otherwise.
3. I submit this declaration in support of the Plaintiff's Motion for Final Approval of Class Action Settlement and Certification of Settlement Class in the action against defendant, AmeriSave Mortgage Corporation ("AmeriSave" or "Defendant").

CASE HISTORY

4. Plaintiff filed the initial class action complaint ("Complaint") on May 30, 2019. In the Complaint, Plaintiff alleged causes of action for unintentional and intentional violations of the TCPA. Based on those allegations, Plaintiff sought $500 per violation and $1,500 for each intentional violation, as well as injunctive relief. Plaintiff's claims were brought on behalf of a class of individuals who allegedly received solicitation phone calls and/or text messages calls to their mobile phones from AmeriSave without consent using an automatic telephone dialing system or artificial or prerecorded voice technology, or without an established business relationship. (Dkt. No. 1.)
5. Plaintiff subsequently amended his complaint on August 8, 2019. (Dkt. No.

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10).

6. AmeriSave filed is Answer on August 22, 2019 (Dkt. No. 11).

7. Thereafter, the Parties engaged in extensive informal discovery in an effort to investigate and resolve the matter. Defendant produced information and data regarding the calls and texts that were sent to class members from its dialing platform, as well as information relating to the dialing system used to place calls and sent text messages. Defendant also provided information regarding the source of its leads, including the identities of its lead generators, and the number of leads purchased from each entity, so Plaintiff could review the strength of Defendant's consent defense both from a merits and class certification perspective. Defendant also provided financial information over its last three years. In other words, there was very little, if any, pertinent information that was not disclosed or produced to my office that was not analyzed or considered before making any settlement determinations in this case.

8. Following informal discovery, the Parties attended mediation with the Hon. George H. King, Ret. of Jams on January 8, 2020. My office prepared a mediation brief, extensively reviewing the law and the facts, as yielded by the evidence to date. The Parties did not resolve the case at the mediation on January 8, 2020, requiring two additional sessions with Judge King after mediation in order to resolve the case.

9. Defendant strongly contested the legal issues in this matter. Defendant took numerous colorable positions in this matter, any one of which could have resulted in a defeat of the action either on the merits or to certification issues. First, Defendant contended that the systems used to send text messages and place calls to Class Members was not an ATDS as defined under the TCPA, because it required human intervention. In fact, the Eleventh Circuit just last week held that a very similar dialing system was not an ATDS, leaving the

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Ninth Circuit more isolated with respect to its ATDS definition, and giving credence to a prospective interest in this issue from the Supreme Court. Defendant also took the position that it obtained prior express written consent from the consumers it contacted (and therefore also had an established business relationship), because these consumers provided their phone numbers to reputable lead generation organizations on Defendant's behalf in a manner that facially appeared to comply with the requirements of the TCPA. Defendant contested class certification on numerous grounds, not least of which was the assertion that there were individualized issues of consent that would require individualized proof and lead to mini trials. Defendant further cited to authority which held that damages under the TCPA, when aggregated, should be heavily reduced in light of due process concerns, which were fair concerns given the financial limitations, as well as the relatively low level of direct culpability with respect to the alleged illegitimacy of the leads purchased from third parties. These and other concerns played a role in resolution of the case.

10. With Judge King's guidance, a Settlement Agreement and Release ("Settlement Agreement") was ultimately agreed upon in principle by the Parties on or about January 31, 2020. The Settlement agreement was attached to my declaration in support of preliminary approval as Exhibit A. See Dkt. No. 180-1 Ex. A.

11. Plaintiff filed a Motion for Preliminary Approval on February 7, 2020. Dkt. No. 18.

12. On February 28, 2020. Intervenor Hans Tiefenthaler filed a Motion to Intervene, which my office opposed for a number of reasons. Tiefenthaler's counsel subsequently withdrew the Motion by stipulation that resulted in the record being sealed by the Court. This occurred after considerable briefing by the Parties and a vigorous defense of the settlement mounted by Class

Counsel and Mr. Fabricant. See Docket entries 28, 28-1, 28-2, 28-3, 36, 36-1, 37, 37-1, 37-2, 37-3, 37-4, 37-5, 37-6, 37-7, 37-8, 37-9, 37-10, 39, 39-1, 40, 40-1, 40-2, 40-3, and 40-4.

13. On April 27, 2020, the Court requested supplemental briefing from Class Counsel regarding the amended Rule 23 standards. Dkt. No. 42. My office filed supplemental briefing on May 8, 2020. The Court thereafter granted preliminary approval on May 21, 2020 finding preliminarily that the class settlement was fair and reasonable to the class and the proposed notice appeared to be the best notice practicable. Dkt. No. 46.

SETTLEMENT TERMS AND CLASS DEFINITION

14. Pursuant to the Settlement Agreement (the "Agreement"), those persons in the Settlement Class (defined below) will submit a valid claim form, receive a pro rata distribution from the Settlement Fund after payment of administration costs, attorneys' fees, costs of litigation, and any incentive payment.

15. As part of that Agreement, Defendant will make a Payment of $6,250,000 as the settlement benefits (the "Settlement Fund") for all approved claims. Defendant will also pay all attorneys' fees and expenses, and costs of notice and claims administration from the Settlement Fund. Further, Defendant will pay for the Class Action Fairness Act Notice.

16. Available Settlement Funds will be apportioned in the form of a check mailed to all Class Members who submit valid claim forms. The amount of the check received by each such claimant will be calculated on a pro rata basis by deducting all attorney's fees, costs, administration expenses and incentive award distributions from the net Settlement Fund and dividing the remainder by the total number of valid claims submitted by Class Members. The Claims Administrator will send payment via mail by check to each such claimant.

17. The Class or Settlement Class Members refers to:

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> "All persons or entities within the United States who received on their cellular telephones communications placed by AmeriSave using its CCT dialer and/or that were placed to a number on the National Do Not Call list or AmeriSave's Internal Do Not Call list between April 1, 2018 and December 31, 2019" (Agreement § 2.1, p. 4.)

18. Plaintiff contends that the class as so defined satisfies the requirements of Rule 23 because all persons in the Settlement Class are persons who received calls or text messages from AmeriSave on their cell phones between April 1, 2018 and December 31, 2019. The total number of cell phone numbers that were called was 2,375,245. This was confirmed in discovery from AmeriSave, and with experts that my firm hired to analyze call data.

19. After approval of Preliminary Approval of Settlement, the pertinent names, addresses, email addresses and phone numbers of Class Members were disclosed by Defendant to the claims administrator approved by the Court to create the Notice Database. The administrator conducted reverse lookups on the phone numbers to accurately identify the subscriber of the number at the time the call was received. This resulted in an incredibly high rate of success at identifying Class Members, as described int eh contemporaneous declaration of the Claims Administrator.

20. The information used to achieve such a high identification rater was produced by Defendant to my office, and analyzed by experts hired by my firm to scrub the outbound dial list for cellular phones, and then cross referenced with additional diligence conducted by the Administrator with oversight and direction of my firm.

21. The Court previously approved Postlethwaite & Netterville ("P&N") as claims administrator due to their expertise in providing administrative services in class action litigation and their extensive experience in

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administering consumer protection and privacy class action settlements. To date they have diligently completed all assignments on time and to my satisfaction.

22. Regarding the class notice, The Parties and Settlement Administrator have engaged in the robust notice program proposed during Preliminary Approval which has generally been met with positive enthusiasm by Class Members that Class Counsel have directly heard from. As laid forth in the Settlement Administrator's declaration, it was able to reach 98% of Class Members through direct notice, with an additional publication supplementing those high reach numbers.

23. The overall positive response to the settlement resulted in a 9.3% claims rate (220,925 total claims to date), which is well above average for cases like this. Further telling is the low opt out rate, with only 118 members opting out. This is a very low number of exemptions, and there were zero objections to date as well, which also signifies a strong response from Class Members, demonstrating the fairness and reasonableness of the settlement.

ADEQUACY OF SETTLEMENT

24. Defendant shall provide class benefits of $6,250,000. The Settlement Class Members who submit a valid Claim Form stand to receive a cash payment from the Settlement Fund in the form of a check per Approved Claim, on a pro rata basis after deducting Settlement Costs. Based on the current participation rate of 9.3%, which I expect to climb by the deadline of September 18, 2020, participating claimants will be expected to receive each on average approximately $15.46. This is calculated by taking the amount of the common fund ($6,250,000.00) and subtracting the proposed attorneys' fees ($1,250,000), costs ($30,061.51), incentive award ($5,000), and administration expenses ($1,550,000), and dividing the residual balance of $ $3,414,938.49 by the number of current claimants (220,925) resulting in

$15.46 per claim.

25. In addition to monetary relief, AmeriSave is also agreeing to revise its dialing practices, by switching its entire dialing and texting platform over to a manual click to dial and click to text platform, such as LiveVox HCI, which has been held by numerous courts around the country, including district courts in the Ninth Circuit after *Marks*, to not be an ATDS under the TCPA. AmeriSave will not employ a different kind of system unless or until there is clarity from federal courts and/or the FCC that other targeted dialing systems are not "ATDS" systems restricted by the TCPA.

26. Costs of litigation, notice, claims administration and attorneys' fees are being paid by the Defendant from the Settlement Fund.

27. Any incentive payment awarded to the Representative Plaintiff, any attorneys' fees and costs awarded to Class Counsel and certain expenses including Claims Administration Costs, are to be paid from the Settlement Fund by Defendant as follows:

- Administration Expenses and payment of notice, estimated by P&N are anticipated to be approximately $1.4 million;
- Attorneys' fees to Class Counsel, as approved by the Court, up to 20% of the common fund, which is $1,250,000;
- Incentive/Service Award to Representative Plaintiff in an amount up to $5,000; and,
- Payment of reasonable and appropriate costs of litigation (to be itemized), and not to exceed $50,000.

28. To date, my firm has incurred slightly over $30,000 in expenses litigating this matter, which will be described in my contemporaneous declaration. Unless depositions will need to be taken of potential objectors to the Settlement, or an appeal is filed, I do not anticipate my firm's costs at the final approval phase will exceed $35,000.

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29. The costs of notice by mail and claims administration will be paid as part of the Settlement Fund.

30. The proposed Settlement contemplates that Class Counsel will request an incentive award in the amount of $5,000 to Mr. Fabricant, as proposed by Class Counsel, subject to Court approval. Defendant has agreed not to oppose a request for such incentive award in the agreed-upon amount.

31. The proposed Settlement contemplates that Class Counsel shall be entitled to apply to the Court for an award of attorneys' fees, costs, and expenses to be paid from within the Settlement Fund. Defendant has agreed not to oppose an application by Class Counsel for an award of attorneys' fees up to $1,250,000 from the Settlement Fund, which represents 20% of $6,250,000. I believe the excellent results of this Settlement warrant attorney's fees in this amount. The 20% fee request is also well below the standard benchmark in the Ninth Circuit for common fund class action settlements, which is set at 25%. This was a deliberate effort on our part to divert more funds to Class Members and ensure a fair result. Class Counsel also intend to request that the costs of litigation and any costs of Notice and Claims administration, to be paid from the Settlement Benefits. Class Counsel further intend to also ask for costs of litigation not to exceed $50,000 to be paid from the Settlement Benefit. Again, unless exceptional circumstances arise, I do not anticipate such costs to exceed $35,000. Our fees and costs are supported by separate motion.

32. I am unaware of any conflict of interest between Plaintiff and any putative class member or between Plaintiff and Plaintiff's attorneys.

RISKS OF CONTINUED LITIGATION

33. Taking into account the burdens, uncertainty and risks inherent in this litigation, Class Counsel have concluded that further prosecution of this action could be protracted, unduly burdensome, and expensive, and that it is

desirable, fair, and beneficial to the class that the action now be fully and finally compromised, settled and terminated in the manner and upon the terms and conditions set forth in the Settlement Agreement.

34. The named Plaintiff and his counsel believe that the claims asserted in the action have merit. However, taking into account the risks of continued litigation, as well as the delays and uncertainties inherent in such litigation including the risks in any subsequent appeal, they believe that it is desirable that the action be fully and finally compromised, settled and terminated now with prejudice, and forever barred pursuant to the terms and conditions set forth in this Settlement Agreement. Class Counsel have concluded that with the Settlement Benefit and with the deterrent effects of this Settlement, the terms and conditions of this Settlement Agreement are fair, reasonable and adequate to the proposed class, and that it is in the best interests of the proposed class to settle the Action.

35. Further recent developments in case law under the TCPA show substantial risks regarding both merits and certification issues. For example, throughout litigation and mediation, Defendant raised a defense to the merits of its practices on the basis that the dialing systems used to place calls and texts to Class Members was not an ATDS under the TCPA. There is currently a hotly-contested split in authority between numerous circuit courts on what the proper standard is to determine whether a dialing system is or is not an ATDS, with the Ninth Circuit falling on a more broad and liberal interpretation of the statute, and the Third and recently 11th Circuit falling on a more conservative and narrow reading of the statute. The FCC promulgated a Rule interpreting the ATDS standard, which was subject to an appeal before the D.C. Circuit Court of Appeals and resulted in major portions of the Rule being invalidated.

36. Lobbying efforts are being made to reinstate new Rules which potentially

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could result in a binding FCC interpretation that undermines an interpretation of ATDS that Plaintiff is advancing in this case. Additionally, the Ninth Circuit decision of *Duguid v. Facebook, Inc.*, 926 F.3d 1146 (9th Cir. 2019) which was previously the subject of a SCOTUS Petition for Cert, has since been taken up by the Supreme Court and will be heard next term. This decision could change the entire landscape of the TCPA, and would potentially have a direct impact on this litigation, and potentially wiping out the entire section b claim of the case. To say that the Facebook case presents an existential threat to this entire litigation is not an overstatement. Class Members could very well get zero in this case if the High Court rules in the manner being advocated by the Chamber of Commerce and Facebook.

37. Previously, Plaintiff advised the Court of a risk under the Supreme Court case of *Barr v. Am. Ass'n of Political Consultants, Inc.*, No. 19-631 (petition for cert filed Nov. 14, 2019). That case has been decided in Plaintiff's favor, however, this nonetheless was a relevant and potential risk at the time settlement was presented to the court, and agreed upon at mediation, and the rationale for approval nonetheless applies, because it was under that prior risk that the case was settled, and it could have easily gone the other direction, as it was not a unanimous decision by the High Court.

38. My firm is heavily involved in the ATDS efforts on behalf of consumers. We were co-counsel on the Ninth Circuit's decision in *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018), which sets forth the current standard for ATDS in the Ninth Circuit. We also have written multiple petitions to the FCC lobbying for strong consumer privacy rights and a broad interpretation of the ATDS standard. Additionally, we are currently involved in the Supreme Court petition which is, in part, attempting to revisit the ATDS standard in *Marks*. My partner Adrian Bacon and I are also filing an Amicus brief in *Duguid* and are assisting with the drafting of the plaintiff's

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brief as well. As such, we are *highly* familiar with and intimately involved in the numerous moving parts surrounding ATDS standards, and well-equipped the evaluate the legitimacy of Defendant's arguments.

39. As part of discovery in this action, we investigated the dialing platform used by AmeriSave in light of these various interpretations and came to the conclusion that the dialing platform was likely an ATDS with respect to its text messaging in the Ninth Circuit, was possibly an ATDS in the Ninth Circuit with respect to its phone calls, and was less likely to be found to be an ATDS in the 3rd and 11th Circuit with respect to both calls and texts, due to recent developments in those Circuits. Specifically, those decisions are *Dominguez v. Yahoo, Inc*., 894 F.3d 116 (3rd Cir. 2018), and *Glasser v. Hilton Grand Vacations Company, LLC*, 2020 WL 415811 (11th Cir. Jan. 27, 2020). The Seventh Circuit has more recently issued another ruling in line with these decisions in *Gadelhak v. AT&T Services, Inc.*, 950 F.3d 458 (7th Cir. 2020).

40. We considered these decisions to be a significant risk if the case were litigated to judgment, because there was a high likelihood that they could persuade the Supreme Court's review on this issue, which may result in a less favorable ATDS interpretation than that which is set forth in *Marks*.

41. Additionally, Defendant had a colorable argument regarding a class certification challenge, on the basis that there were individualized issues of consent. Some courts have held that individualized issues of consent can be a bar to class certification. See *Blaire v The CBE Group, Inc.* 309 F.R.D. 621 (S.D. Cal. 2015). While my office had a theory with which we felt we could certify the action, and while we have had success prosecuting class actions successfully and certifying numerous class actions when faced with arguments involving individualized issues of consent, we have also lost class certification motions on predominance grounds, due to issue of individualized issues. In our experience, the most common and likely to

succeed method of avoiding such challenges is to narrow the class definition at the contested certification stage. We did this recently in a class action we certified (*McCurley v Royal Seas* Cruises) which involved similar issues to those which were involved in this case. Litigating the class through certification may have resulted in a much smaller class, or no class at all depending on how the Court viewed the evidence. It was a significant risk that we factored into negotiations.

42. To that same end, the underlying issue in the case was whether the lead generators were selling legitimate leads to AmeriSave, i.e. leads that legitimately provided prior express written consent and an established business relationship. My office has successfully litigated cases involving manufactured consent leads before, such as the recent case of *McCurley v. Royal Seas Cruises, Inc*., 331 F.R.D. 142 (S.D. Cal. 2019), which set the gold standard for how to certify such a TCPA class action in my opinion. What is striking about the evidence in the case at bar is that AmeriSave had TCPA compliance policies in place that should have resulted (in a perfect world) in fairly decent compliance. AmeriSave only called people with its dialing platform that they believed gave prior express written consent to one of their lead generators on their behalf, and therefore created an established business relationship with the consumer. Such circumstances, assuming the consent was valid, should result in no liability under either Section (b) of the TCPA (governing ATDS calls) or Section (c) of the TCPA (governing the do not call list).

43. Ultimately, there is no good faith defense to the TCPA, per se, but there are other defenses where these circumstances could be used to limit liability. If AmeriSave was being sold bogus leads, or even unreliable leads, but had policies in place to at least attempt compliance, it makes the company's position more sympathetic from a due process standpoint. Recently this came

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into play in an Eight Circuit decision - *Golan v. FreeEats.com, Inc*., 930 F.3d 950 (8th Cir. 2019), where the Court of Appeal reduced statutory damages down from $500 per call to $10 per call in a class action judgment, because the aggregated damages were otherwise shockingly large and violative of due process. A sympathetic defendant who was trying to comply with the regulations but failed due to circumstances that were not entirely in their control would be a prime candidate for a trial court to give credence to the *Golan* decision. This was something we considered at mediation as well when evaluating the fairness of the settlement to Class Members.

44. Defendant also gave us information regarding its financials for the past three years. We felt that if any class was certified by contested motion, and maintained successfully to trial, it would put AmeriSave into bankruptcy. We negotiated a *very significant* portion of the company's earnings over the past three years, to the point where anything greater would not have been sustainable in our view and in the views of the mediator. This is even more true now that we are involved in the COVID-19 pandemic than when the case was originally settled.

45. Ultimately we felt strongly that we could prevail on the claims irrespective of these challenges, but these were legitimate hurdles that the class faced if we litigated the case. The class could not be certified, or narrowly certified. We could lose on ATDS. And even if we won, Class Members may see their recovery reduced drastically by up to 98%, or see their claims go into bankruptcy and dissolve into dust.

46. While Plaintiff strongly contends that claims in this case will survive, irrespective of these issues, Defendant's arguments raise a significant risk to the claims at issue in the case, and were given due weight in settlement discussions.

47. As such, it is my belief as class counsel that this Settlement represents an

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outstanding result for the Class. The result that was achieved is highly favorable in my opinion to the Class, and was achieved without subjecting Class Members to the risks and delay associated with further litigation.

CLASS COUNSEL'S EXPERIENCE

48. The Law Offices of Todd M. Friedman, P.C. has been appointment as Class Counsel in this Action. I am informed and believe that Class Counsel are qualified and able to conduct this litigation as a class action.

49. Our firm's experience is set forth separately in my declaration in support of Plaintiff's motion for fees and costs.

50. For the reasons set forth herein, I believe the settlement is fair and adequate to the class, and meets all requirements of Rule 23.

I declare under penalty of perjury under the laws of California and the United States of America that the foregoing is true and correct, and that this declaration was executed on August 31, 2020.

By:/s/ Todd M. Friedman
Todd M. Friedman, Esq.

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