

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

MARCIA KIMBLE, *individually, and
on behalf of all others similarly
situated,*

Case. No. 2:23-cv-10037-DML-EAS

Plaintiff,

District Judge David M. Lawson

v.

FIRST AMERICAN HOME
WARRANTY CORP. and
FIVESTRATA LLC,

Magistrate Judge Elizabeth A.
Stafford

Defendants.

**PLAINTIFF’S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL
OF CLASS SETTLEMENT**

Pursuant to Federal Rule of Civil Procedure 23, Plaintiff Marcia Kimble seeks preliminary approval of a class action settlement with Defendants First American Home Warranty Corp. and FiveStrata, LLC. As this Court is aware, Plaintiff filed a class action complaint against Defendants under the Telephone Consumer Protection Act, 47 U.S.C. § 227(c). Specifically, Plaintiff alleged Defendants violated the TCPA by calling her and a class of persons whose phone numbers were on the National Do-Not-Call Registry. Defendants deny these allegations.

The parties conducted formal and informal discovery before mediation. The parties then mediated the case with Judge Gerald E. Rosen (Ret.) and were able to achieve reach the terms of a class action settlement. Notably, the case resolved on

the terms recommended by Judge Rosen after a mediation that extended into the evening, and which required multiple conferences with Judge Rosen after the mediation.

Per Judge Rosen's recommendation, Defendants will create a settlement fund of \$700,000 to pay class members' claims, the cost of settlement administration, a representative service award and counsel's attorneys' fees and litigation expenses. None of the \$700,000.00 will revert to the Defendants. Plaintiff's counsel estimates that each class member who submits a valid claim will receive approximately \$110.00.

As detailed in Plaintiff's brief in support of this motion, for settlement purposes, the requirements of Rule 23(a) and (b)(3) are satisfied. Moreover, the factors considered by the Court when considering approval of the settlement all warrant approval.

Ultimately, The settlement achieves an outstanding result for class members, particularly in light of the uncertainty of the litigation and compared to other TCPA class action settlements. Plaintiff respectfully requests that the Court preliminarily approve the parties' settlement agreement, approve the class notice set forth in the agreement, direct that notice be issued and schedule a hearing for final approval of the settlement.

PLAINTIFF’S BRIEF IN SUPPORT OF HER UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT

Pursuant to Federal Rule of Civil Procedure 23, Plaintiff Marcia Kimble (“Plaintiff” or “Kimble”) submits this brief in support of her unopposed motion for preliminary approval of a class action settlement reached with Defendants First American Home Warranty Corp. (“FAHWC”) and FiveStrata, LLC (“FiveStrata”) (collectively “Defendants”).

I. STATEMENT OF ISSUES PRESENTED

1. Does the class-wide settlement Agreement entered into between the parties on the terms recommended by Judge Gerald E. Rosen (Ret.) warrant this Court’s preliminary approval?

2. Are the requirements of Federal Rule of Civil Procedure 23(a), (b)(3) and (e) satisfied for settlement purposes?

II. CONTROLLING AUTHORITIES

The authorities set forth in this brief all carry equal weight. However, pursuant to Federal Rule of Civil Procedure 23, this Court should grant preliminary approval of the parties’ settlement.

III. INTRODUCTION

Plaintiff seeks preliminary approval of a class action Settlement Agreement (“Agreement”). A copy of the Agreement is attached as Exhibit 1. The essential terms of the Agreement were reached at a September 21, 2023 mediation in Detroit

with retired Judge Gerald E. Rosen of JAMS, on the terms recommended by Judge Rosen. The Agreement provides relief to a class of 21,953 members entitled to submit claims for a *pro rata* share of a common non-reversionary fund of \$700,000.00 paid by Defendants. Based on historical claims rates, it is estimated that each claimant in the Settlement Class would receive approximately \$110.00. Plaintiff seeks to be appointed as the Class Representative and her counsel Christopher E. Roberts of Butsch Roberts & Associates, LLC and Jacob U. Ginsburg of Kimmel & Silverman, P.C. as class counsel. Plaintiff also requests the settlement be administered by Atticus Administration, LLC.

The elements of Rule 23(a) and Rule(b) have been met and the class should be certified for settlement purposes. Furthermore, the Agreement was reached at arms-length, and is fair, reasonable, adequate and in the best interests of the class members.” FED. R. CIV. P. 23(e)(2). Accordingly, for the reasons set forth in this brief, the Agreement warrants the Court’s preliminary approval and Plaintiff respectfully requests that the Court preliminarily approve the settlement.

IV. BACKGROUND AND PROCEDURAL HISTORY

A. This Lawsuit.

Plaintiff alleges that Defendants violated Section 227(c) of the TCPA (and the TCPA’s corresponding regulations) by placing calls to her despite her phone number being registered on the National Do-Not-Call Registry. *See* ECF 32. Throughout the

litigation, Defendants filed multiple motions to dismiss, a motion to stay discovery, and the parties met conferred met in-person in Court on multiple occasions. ECF 12, 28, 34, 35, (3/20/23 docket entry), and 37. In addition, Plaintiff served Defendants with written discovery in the form of interrogatories and requests for production of documents. Ex. 3, Ginsburg Declaration, ¶¶ 29-31. After the Parties' discovery impasse was resolved by the Court on July 18, 2023, the Parties cooperated and worked in good-faith to produce class information to identify the size and scope of the class. Ex. 3, Ginsburg Declaration, ¶¶ 36-42.

B. Settlement Negotiations

After an in-person conference with the Court on July 18, 2023, the parties agreed to mediate the case with Judge Gerald E. Rosen (Ret.) on September 21, 2023. For purposes of brevity and repeatedly citing the Declaration of Christopher E. Roberts, the details of the parties' settlement negotiations are provided in Ex. 2, Declaration of Christopher E. Roberts, ¶¶ 11-17. Before mediation, the parties held multiple meetings to ensure Defendants provided Plaintiff's counsel the information necessary for the parties to be able to effectively mediate the case. Ginsburg Dec. ¶¶ 36-42. Defendants provided the agreed-upon class-related information before mediation. This information included, among other things, a redacted list of 21,953 individuals called by FiveStrata on behalf of First American, with numbers registered on the National Do-Not-Call registry. *Id.*

In the weeks leading up to mediation, the Parties exchanged written settlement demands and offers. Further, Plaintiff's counsel prepared a mediation statement. Plaintiff herself assisted counsel with preparing for mediation.

After an all-day in-person mediation (at which Plaintiff attended), at approximately 7:00 p.m., the parties agreed on the essential terms of a settlement, which were recommended by Judge Rosen. In the subsequent weeks, Plaintiff's counsel held multiple conferences with Judge Rosen and Defendants' counsel to finalize the details of the Agreement, and to resolve any remaining differences between the parties.

C. Summary of the Settlement Terms.

Ultimately, the parties resolved the case on the terms recommended by Judge Rosen. Through the efforts of Judge Rosen and counsel, the parties have agreed on a non-reversionary \$700,000.00 class settlement fund. The fund will be used to pay class members claims, the cost of settlement administration, a representative service award, and class counsel's attorneys' fees and reasonable litigation expenses. Ex. 1, Agreement, Section 8. Settlement Class members who submit valid claims to be distributed to 21,953 members on a *pro-rata* claims-made basis after accounting for the cost of administration, a representative service award, attorneys' fees and litigation expenses. *Id.* Plaintiff now seeks to certify the following class for purposes of settlement:

The 21,953 persons identified by the records of FiveStrata whose numbers were registered on the National Do-Not-Call Registry and such persons were called by FiveStrata allegedly on behalf of First American.

These persons are defined as members of the “Settlement Class.” *Id.* at Section 3.

Based on historical claims’ rates for TCPA class-action settlements, Plaintiff’s counsel estimates that each member of the Settlement Class, based on historical claims rates, will receive a payment of at least \$110. Ex. 2, Roberts Declaration ¶¶ 18-29. Plaintiff and members of the Settlement Class who do not opt out of the settlement will release Defendants from any past claims concerning communications sent, received or transmitted to them. Ex. 1, Agreement, Section 19.

D. Class Notice and Claims Administration

On October 12, 2023, the parties’ counsel had a conference call with the settlement administrator, Atticus Administration LLC (“Atticus”). After the call, the representative from Atticus sent counsel for all parties a detailed estimate for the cost of administration, of \$55,842.00. A true and correct copy of the estimate is attached as Exhibit A to the Declaration of Christopher E. Roberts.

As part of the settlement administration, FiveStrata will provide to Atticus the last known names, addresses, and phone numbers of the members of the Settlement Class. Ex. 1, Agreement, Sections 5, 6 and 9. In addition, FiveStrata will provide the last known e-mail address, to the extent available to Atticus. *Id.* Atticus will then

mail the Class Notice and Claim Form (attached as Exhibits 1 and 2 to the Agreement) to each member of the Settlement Class. *See id.* If a notice is returned as undeliverable, Atticus will then run the address through the National Change of Address database to determine if there is an updated address for the person and send to the new address (if available) accordingly. *See id.* In addition, Atticus will also send the Class Notice and Claim Form to each e-mail address provided to them by FiveStrata. *See id.*

Atticus will also maintain a settlement website. *Id.* The settlement website will contain information about the case, relevant documents (including the settlement agreement, operative complaint and any pertinent orders from the Court), a copy of the long form notice and a copy of the claim form. *Id.* Class members will have the ability to submit claims by mail, by uploading the claim form to the settlement website, or by directly making a claim through the settlement website. *Id.*

V. ARGUMENT

A. This Court Should Certify the Class for Settlement Purposes.

The proposed settlement comes prior to formal class certification and seeks to certify a class simultaneous with a settlement, commonly referred to as a “settlement class.” As such, this Court must first ensure that the proposed class certification meets the requirements of Rule 23(a) and (b)(3), with the exception that the Court need not consider, in analyzing a proposed settlement class, whether trial would

present intractable management problems. *See generally* William B. Rubenstein, 4 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 13:18 (6th ed. June 2022 Update) (hereafter “NEWBERG”); Wright and Miller, 7B FEDERAL PRAC. AND PROC. § 1797.2 (3d ed.) (Apr. 2020 Update).

When analyzing a proposed settlement class, the Court must first ensure that the proposed class meets the requirements of Fed. R. Civ. P. 23(a) and (b)(3), with the exception that the Court need not consider, in analyzing a proposed settlement class, whether trial would present intractable management problems. *See generally* NEWBERG ON CLASS ACTIONS § 13:12 (5th ed.) (Dec. 2021 Update). The Supreme Court reiterated that a trial court must conduct a “rigorous analysis” to confirm that the requirements of Rule 23 have been met, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Nonetheless, the requisite “rigorous analysis” of the record and consideration of the merits is limited to the question whether the class certification requirements have been established in the context of a proposed settlement class. *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 851-52 (6th Cir. 2013). As set forth below, the class certification requirements are readily satisfied for the proposed settlement class.

1. The class meets the numerosity requirement of Rule 23(a)(1).

Rule 23(a) requires that the number of class members be “so numerous that joinder of all members is impracticable.” FED. R. CIV. P. 23(a). As to numerosity, the

parties identified approximately 21,953 class members- persons called by FiveStrata in connection with FiveStrata's campaign for First American, whose numbers were on the National Do-Not-Call Registry. Roberts Dec. ¶¶ 12-18. Rule 23(a)(1)'s numerosity requirement is met if the class is "so numerous that joinder of all members is impracticable." *Turnage v. Norfolk S. Corp.*, 307 F. App'x 918, 921 (6th Cir. 2009) A plaintiff can meet this requirement by showing joinder would be difficult and inconvenient. *Id. see, e.g., Arkona, LLC v. Cnty. of Cheboygan*, 2020 WL 4366027, at *3-4 (E.D. Mich. July 30, 2020) (a class size of 40 or more meets the numerosity requirement). Clearly, numerosity is met here with 21,953 members.

2. The class meets the commonality requirement of Rule 23(a)(2).

Commonality only requires that "there are questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). "[T]he commonality requirement is not usually a contentious one ... and is easily met in most cases." NEWBERG §13:18. To demonstrate commonality, plaintiff's "claims must depend upon a common contention...that is capable of class wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350. "[E]ven a single common question will do." *Id.* at 359.

Here, there are numerous questions common to all members of the class. Some of those questions include whether: (1) FiveStrata's calls were part of a campaign of

“telephone solicitations” as defined by 47 U.S.C. § 227(a)(4); (2) the contract between FiveStrata and First American was sufficient to create an agency relationship for purposes of vicarious liability; (3) FiveStrata was acting with actual authority of First American; (4) First American ratified FiveStrata’s conduct; (5) FiveStrata had policies and procedures in place to warrant application of the “safe harbor”; (6) First American had policies and procedures in place to warrant the application of the safe harbor; and, (7) the calls at issue violate Section 227(c) of the TCPA and the TCPA’s corresponding regulations. The commonality requirement of Rule 23(a)(2) is met.

3. Plaintiff satisfies the typicality requirement of Rule 23(a)(3).

Typicality requires that “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” FED. R. CIV. P. 23(a)(3). Typicality requires that a “sufficient relationship exists between the injury to the named plaintiff and conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct.” *Stout v. Byrider*, 228 F.3d 709, 717 (6th Cir. 2000). Here, Plaintiff’s claims are typical of the claims of all class members, as they are predicated on allegations of solicitation calls by or on behalf of Five Strata and First American, to a phone number registered on the National Do-Not-Call Registry. *See generally Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 649 (4th Cir. 2019) (certifying a Do-Not-Call Registry class). Plaintiff alleges that she

registered her number on the do-not-call registry, and FiveStrata called her number and the putative class members on behalf of First American for solicitation purposes. *See* ECF 32. Plaintiff's claims are therefore typical to the claims of class members.

4. Plaintiff and her counsel satisfy the adequacy requirement of Rule 23(a)(4).

Rule 23(a)(4) requires “the representative parties will fairly and adequately protect the interests of the class.” FED. R. CIV. P. 23(a)(4). Adequate representation invokes two inquiries: (1) whether the class counsel are “qualified, experienced and generally able to conduct the litigation” and (2) whether the named plaintiffs have interests that are “antagonistic” to the other class members. *Stout*, 228 F.3d at 717. “Interests are antagonistic when there is evidence that the representative plaintiffs appear unable to vigorously prosecute the interests of the class.” *Id.* at 717. “The adequate representation requirement overlaps with the typicality requirement because in the absence of typical claims, the class representative has no incentives to pursue the claims of the other class members.” *In re Am. Med. Sys.*, 75 F.3d 1069, 1083 (6th Cir. 1996).

Here, Plaintiff has retained counsel experienced in class-actions and consumer litigation- especially the TCPA. Roberts Declaration, ¶¶ 4-11; Ex. 3, Ginsburg Declaration ¶¶ 11-12. Plaintiff and her counsel vigorously prosecuted this case and efficiently and effectively reached a settlement on behalf of the class, that exceeds the per claimant recovery in most TCPA class settlements. *See* Section V.B.3.

Plaintiff and her counsel's interests are not antagonistic to the members of the Settlement Class. Moreover, Plaintiff's meticulous record keeping, and her consistent communication with her counsel, and active participation in the case make her a superb class representative. *See* Ex. 4, Declaration of Marcia Kimble, ¶ 8-13; *See* Ginsburg Dec. ¶ 17-19.

5. The settlement class satisfies the requirements of Rule 23(b).

To qualify for certification under Rule 23(b)(3), common questions among the entire settlement class must predominate over any questions affecting individual members; and class resolution must be superior to other available methods for the fair and efficient adjudication of the controversy. FED. R. CIV. P. 23(b)(3); *see generally Amchem Prods. Inc.*, 521 U.S. at 615. However, when reviewing a class settlement, the Court does not inquire whether the “case, if tried, would present intractable management problems, for the proposal is that there be no trial.” *Id.* at 620. As to predominance, this Court must decide whether common, aggregation-enabling issues are more prevalent or important than individualized issues. *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016).

Here, it is clear that class-wide questions predominate over individualized inquiries. Issues that predominate include: (1) whether the subject calls were “telephone solicitations” as defined by 47 U.S.C. § 227(a)(4) turns on the objectives of the entire call campaign to the class; (2) whether the contractual relationship

between FiveStrata and First American creates an agency relationship; (3) whether First American's oversight of FiveStrata warrants a finding of "ratification" of alleged violations; (4) whether either Defendant's policies and procedures - and implementation of same - warrant the application of the good-faith "safe harbor" defense set forth in 47 U.S.C. § 227(c)(5). Each of those items requires general proofs, not specific to any individual member.

Where the requisite elements for class certification under Rules 23(a) and 23(b) have been met, as here, the class should be certified for settlement purposes.

B. This Settlement Should Be Preliminarily Approved

The "question at the preliminary approval stage is simply whether the settlement is fair enough to begin the class-notice process." *Thomsen v. Morley Cos., Inc.*, 639 F.Supp.3d 758, 764 (E.D. Mich. 2022). Courts preliminarily consider the Rule 23(e) factors when determining whether to preliminarily approve a class action settlement. *See id.*; *see* FED. R. CIV. P. 23(e)(1)-(2). In the context of preliminary approval, Rule 23(e) directs putative class counsel to provide the Court with information sufficient to enable the court to determine that the settlement is fair, reasonable and adequate, and that notice is justified because the Court will likely grant final approval to the settlement. *See id.*

Before class notice can issue, the putative class representatives must demonstrate "that the Court will likely be able to" approve the settlement under Rule

23(e)(2); and (ii) “certify the class for purposes of judgment” arising from the settlement. FED. R. CIV. P. 23(e)(1)(B). Under Rule 23(e)(2), a court may only approve a settlement based on a finding that the proposed settlement is “fair, reasonable and adequate” after considering whether:

- (A) the class representatives and class counsel have adequately represented the class;
- (B) the proposal was negotiated at arm’s length;
- (C) the relief provided for the class is adequate, taking into account:
 - (i) the costs, risks, and delay of trial and appeal;
 - (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class member claims;
 - (iii) the terms of any proposed award of attorney’s fees, including timing of payment; and
 - (iv) any agreement required to be identified under Rule 23(e)(3); and,
- (D) the proposal treats class members equitably relative to each other.

FED. R. CIV. P. 23(e)(2).

1. Plaintiff and her counsel have adequately represented the class.

As discussed in Section V.A.4, *supra*, Plaintiff and her counsel have adequately represented the class. Plaintiff has been dedicated to litigating this case to a successful conclusion and has actively participated in this matter. In addition, counsel have achieved a significant result for the class in an efficient manner.

2. The Agreement was negotiated at arm’s length and resolved on the terms recommended by the mediator.

There is a presumption by courts of the absence of fraud or collusion in class action settlements “unless there is evidence to the contrary.” *IUE-CWA v. General Motors Corp.*, 238 F.R.D. 583, 598 (E.D. Mich. 2006); *see also Poplar Creek Dev. Co. v. Chesapeake Appalachia, L.L.C.*, 636 F.3d 235 (6th Cir. 2011) (same). The “participation of an independent mediator in settlement negotiations virtually insures that the negotiations were conducted at arm's length and without collusion between the parties.” *Bowman v. Art Van Furniture, Inc.*, 2018 WL 6445389 at *4 (E.D. Mich. Dec. 10, 2018).

Here, the parties only reached a resolution after mediating the case with Judge Rosen, on the terms he recommended to the parties. Moreover, the record reflects the parties acted as arms-length adversaries throughout the process, including Defendants filing various motions and counsel appearing from Philadelphia, Atlanta and St. Louis to address an impasse the Parties had regarding discovery and mediation. *See* ECF No. 33, Docket Entry for July 19, 2023. Ultimately, after months of preparation and negotiations, an all-day mediation that went into the evening, and weeks of working out various impasses on the settlement terms, the parties have reached a fair, adequate and arm's-length settlement that provides satisfactory relief for the class members.

3. The Agreement affords significant relief to the Settlement Class.

The Agreement provides significant relief to members of the Settlement Class. Settlement Class members who submit a valid claim form will receive approximately \$110. Roberts Dec., ¶¶ 19-28. This amount is in excess of many TCPA class settlements and on par with other approved TCPA class settlements. *See e.g. Bowman v. Art Van Furniture, Inc.*, 2018 WL 6444514, at *2, 5 (E.D. Mich. Dec. 10, 2018) (approximately \$99 per claimant); *Boger v. Citrix Sys., Inc.*, 2023 WL 3763974, at *11 (D. Md. June 1, 2023) (“the expected settlement payment for each Class Member is \$44.14, which exceeds the typical value of claims in similar settlements and the likely statutory damages for TCPA claims”); *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 789 (N.D. Ill. 2015) (recovery of \$34.60 per claimant “falls within the range of recoveries in other TCPA actions”); *Markos v. Wells Fargo Bank, N.A.*, 2017 WL 416425, at *4 (N.D. Ga. Jan. 30, 2017) (recovery of \$24 per claimant “an excellent result when compared to the issues Plaintiffs would face if they had to litigate the matter”); *Vasco v. Power Home Remodeling Group LLC*, 2016 WL 5930876, at *8 (E.D. Pa. Oct. 12, 2016) (approximately \$27.00 per claimant). In short, the significant relief afforded here warrants preliminary approval of the settlement.

- a. **The complexity, risks of litigation expense and likely duration of this litigation favor preliminary approval.**

The Sixth Circuit recognizes that complex litigation is “notoriously difficult and unpredictable.” *Granada Investments, Inc. v. DWG Corp.*, 962 F.2d 1203, 1205 (6th Cir. 1992). Therefore, it is not surprising that “[t]here is a strong public interest in encouraging settlement of complex litigation and class action suits because they are notoriously difficult and unpredictable and settlement conserves judicial resources.” *In re Cardizem CD Antitrust Litig.*, 218 F.R.D. 508, 530 (E.D. Mich. 2003).

TCPA class actions can be immensely challenging and can result in protracted litigation. For instance, the case *Krakauer v. Dish Network L.L.C.*, was filed in 2014 and received final approval in 2023. *See Krakauer*, No. 1:14-CV-333, 2023 WL 5237091 (M.D.N.C. Aug. 15, 2023). Similarly, the TCPA class-action *Williams v. Pisa Grp., Inc.*, No. 18-4752, 2023 WL 2227697, (E.D. Pa. Feb. 24, 2023) was filed in 2018, certified in 2023, and litigation remains ongoing.

Here, the trajectory of this case looked the same. Defendants had already filed multiple motions to dismiss, a motion to stay discovery, and the parties had already encountered discovery-related disputes. *See* ECF 12, 28, 34, 35, (3/20/23 docket entry), and 37. Yet, in accordance with Rule 1’s edict to litigate cases in a “just, speedy, and inexpensive” manner, the parties worked efficiently and diligently to achieve a fair class settlement. FED. R. CIV. P. 1. When contrasted with the possibility of protracted litigation, this settlement is the superior outcome.

Moreover, recovery was not a certainty for Plaintiff and the Settlement Class. The “likelihood of success . . . provides a gauge from which the benefits of the settlement must be measured.” *In re Gen. Tire & Rubber Co. Sec. Litig.*, 726 F.2d 1075, 1086 (6th Cir. 1984). The legal landscape of the TCPA Do-Not-Call claims is uncertain. For instance, some courts have held that the TCPA’s Do-Not-Call protections do not apply to cell phones. *Cunningham v. Politi*, 2019 WL 2519702, at *4 (E.D. Tex. Apr. 26, 2019). In addition to the instability that comes with the statute, the facts of this case may also present uncertainty, which favors approval of this class settlement. Here, the class faced hurdles on the claims asserted under the theory of vicarious liability against First American, as such claims can be difficult in the TCPA context. *See* ECF 32 (alleging vicarious liability against First American); *see also Keating v. Peterson's Nelnet, LLC*, 615 Fed. App’x. 365, 374-75 (6th Cir. 2015) (affirming the district court's order of summary judgment in favor of the TCPA defendants, as to the plaintiff’s vicarious liability claims).

Furthermore, class certification would not be guaranteed. For example, because there appears to be multiple digital lead sources for persons called by FiveStrata, if the Court could ultimately decline to certify a class. *See Gordon v. Caribbean Cruise Line, Inc.*, 2019 WL 498937, at *10 (N.D. Ill. Feb. 8, 2019) (different proofs for different purported “consent” information creates various “mini-trials”). In light of the risks and uncertainties of continued litigation, the

certainty of settlement on favorable terms renders such a settlement the prudent and superior outcome.¹

b. Class members have a simply way to receive relief from the settlement.

Under Rule 23(e)(2)(C)(ii), the Court also considers “the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims.” FED. R. CIV. P. 23(e)(2)(C)(ii). This factor is particularly concerned with “methods of processing claims so complex that they discourage class members from pursuing valid claims.” *T.K. Through Leshore v. Bytedance Tech. Co.*, 2022 WL 888943, at *14 (N.D. Ill. Mar. 25, 2022). Here, the claims process is straight-forward. A class member simply needs to sign their name, and confirm their name, address and phone number on which they received the calls. Ex. 1, Agreement (Claim Form). Moreover, the claim form can be submitted via mail or through the settlement website. *See id.* A request that a claimant submit a claim form that requires “claimants provide their names, addresses, and signature” does not raise concerns with the claims process. *T.K. Through Leshore*, 2022 WL 888943, at *14 (internal quotation and citation omitted).

c. The parties’ completed sufficient discovery to determine the strength of the claims and defenses and ascertain the size and scope of the class.

¹ The Roberts declaration further details the risks of continued litigation. Roberts Dec., ¶¶ 32-40.

The Court’s consideration of the stage of proceedings and the nature and extent of discovery in evaluating the fairness of a settlement is focused on whether the parties have obtained sufficient information to evaluate the merits of competing positions. That said, courts “encourage parties to settle class actions early, without expending unnecessary resources.” *Ivery v. RMH Franchise Corp.*, 2019 WL 13256098, at *1 (N.D. Ill. July 10, 2019).

Here, Plaintiff and First American exchanged discovery and critical information at the very outset of discovery, which led to amendment and adding FiveStrata as a co-Defendant. Ginsburg Dec. ¶¶ 23-26 . Shortly thereafter, the Parties commenced with individual and class-based discovery. In July, the Parties appeared at a conference to address a dispute regarding the scope of discovery to occur. Shortly thereafter, the Parties engaged in a laborious, good-faith process to stratify and organize data, exchange documents and information, so the parties could ascertain the size and scope of the class. *See* Roberts Dec. ¶ 12. Ultimately, because of the diligent and good-faith efforts of counsel to all parties, there exists a sufficiently developed a factual record to guide the parties’ settlement discussions and to identify the size and scope of the class and to ascertain the identities of members.

d. The opinions of the class representative and class counsel favor preliminary approval.

When it comes to class action settlements, courts accord great weight to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation. *See generally Thacker v. Chesapeake Appalachia, L.L.C.*, 695 F. Supp. 2d at 521, 532 (E.D. Ky. 2010) (“In deciding whether a proposed settlement warrants approval, the informed and reasoned judgment of plaintiffs’ counsel and their weighing of the relative risks and benefits of protracted litigation are entitled to great deference.”). Here, Plaintiff participated throughout the entirety of settlement discussions. Plaintiff carefully considered each offer conveyed by the defendants and only accepted when she was satisfied with the relief the class members would get. *See Ex. 4, Kimble Dec.* ¶¶ 18-22. Class counsel also strongly support the agreement and believe class members are receiving adequate compensation, in light of the risks of continuing litigating the case. *Roberts Dec.* ¶¶ 32-41.

4. Plaintiff will request attorneys’ fees, costs and a class incentive fee that are fair and reasonable.

If preliminary approval is granted, after notices have been sent and claims returned, Plaintiff’s counsel will seek seeks attorneys’ fees of up to 27.85% of the settlement fund, or \$195,000.00 of the \$700,000 common fund, less than what the Agreement provides. *Roberts Dec.* ¶¶ 26, 31. In addition, Kimble will also seek an

amount up to \$5,000, as a representative service award, which is also less than what the Agreement provides. *See id.*

The 27.85% percentage is in line or below many other approved TCPA class-action settlements. *Sheean v. Convergent Outsourcing, Inc.*, 2019 WL 6039921, at *4 (E.D. Mich. Nov. 14, 2019) (award of 33.3% of common fund); *Johansen v. One Planet Ops, Inc.*, 2020 WL 7062806, at *4 (S.D. Ohio Mar. 25, 2020) (award of 33% of common fund); *Wright v. Nationstar Mortg. LLC*, 2016 U.S. Dist. LEXIS 115729, at *4 (N.D. Ill. Aug. 29, 2016) (30% of fund); *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 503 (N.D. Ill. 2015) (36% of fund); *Boger v. Citrix Sys., Inc.*, 2023 WL 3763974, at *12 (D. Md. June 1, 2023) (33% of fund); *Gergetz v. Telenav, Inc.*, 2018 WL 4691169, at *7 (N.D. Cal. Sep. 27, 2018) (30% of fund).

Counsel worked diligently and efficiently, traveled three times to Detroit for the case, navigated challenges on discovery, and worked assiduously to prepare for an all-day mediation and arrived at a satisfactory class settlement an efficient manner. The attorney fee of 27.85% of the common fund is fair and reasonable compensation for the work performed and result obtained.

The proposed class representative incentive award is also reasonable for TCPA cases. *See Sheean v. Convergent Outsourcing, Inc.*, 2019 WL 6039921, at *4 (E.D. Mich. Nov. 14, 2019) (\$5,000.00 incentive award); *Charvat v. Valente*, 2019 U.S. Dist. LEXIS 187225, at *33 (N.D. Ill. Oct. 28, 2019) (\$25,000 award);

Johansen v. One Planet Ops, Inc., 2020 WL 7062806, at *5 (S.D. Ohio Mar. 25, 2020) (\$10,000 award); See. *Wright v. Nationstar Mortg. LLC*, No. 14 C 10457, 2016 U.S. Dist. LEXIS 115729, at *4 (N.D. Ill. Aug. 29, 2016) (representative incentive award of \$5,000.00); *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 503 (N.D. Ill. 2015) (\$5,000 award); *Douglas v. W. Union Co.*, 328 F.R.D. 204, 224 (N.D. Ill. 2018).

Here, Plaintiff fought for the class dutifully, and actively stayed involved in and participated in the case (including attending an all-day mediation). Kimble Dec. ¶¶ 18-22. An incentive award of \$5,000.00 incentive award is fair and reasonable.

Under the Settlement Agreement, and pursuant to FED. R. CIV. P. 23(e), Class Members will receive notice that fees, costs, and litigation expenses will be sought, and will be provided information about how they can object, assuming the Court preliminarily approves the Settlement. Plaintiff's counsel will then file a motion for fees and expenses pursuant to both the Settlement Agreement and FED. R. CIV. P. 23. In turn, this Court will then award the attorneys' fees, costs, and service awards, if any, that it determines appropriate assuming the Settlement is finally approved.

VI. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests the Court: (1) preliminarily approve the Agreement and find that the requirements of Rule 23 are satisfied for settlement purposes; (2) approve Plaintiff Marcia Kimble to serve as the

class representative; (3) approve Christopher E. Roberts of Butsch Roberts & Associates LLC and Jacob U. Ginsburg to serve as Class Counsel; (4) approve Atticus Administration LLC to serve as the settlement administrator; (5) direct that notice be issued by the Administrator; and, (6) to schedule a hearing for final approval of the settlement.

/s/ Christopher E. Roberts

Christopher E. Roberts (#61895MO)
Butsch Roberts & Associates LLC
7777 Bonhomme Avenue, Suite 1300
Clayton, Missouri 63105
Phone: (314) 863-5700
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/s/ Jacob U. Ginsburg

Jacob U. Ginsburg, Esq.
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Facsimile: (877) 788-2864
Email: jginsburg@creditlaw.com
teamkimmel@creditlaw.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2023, a copy of the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon all counsel of record.

/s/ Christopher E. Roberts

EXHIBIT 1

SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) is made by and between Plaintiff Marcia Kimble (“Kimble” or “Plaintiff”), on behalf of herself and a putative class of persons (identified and defined below as the “Settlement Class”), and Defendant First American Home Warranty Corporation (“First American”) and Defendant FiveStrata (“FiveStrata”)¹, subject to court approval. First American and FiveStrata are collectively referred to as “Defendants.” Plaintiff and Defendants are collectively referred to as the “Parties.”

WHEREAS Plaintiff has filed a class action under the Telephone Consumer Protection Act (“TCPA”) against Defendants, alleging Defendants placed calls (or had calls placed on their behalf) to Plaintiff and the members of the Settlement Class, and this case is currently pending in the United States District Court for the Eastern District of Michigan, Case No. 2:23-cv-10037-DML-EAS (the “Lawsuit”);

WHEREAS, on September 21, 2023, the Parties conducted an all-day mediation before Retired Judge Gerald E. Rosen and agreed to a settlement at the mediation on terms recommended by the mediator;

WHEREAS, Defendants deny and continue to deny liability for any claims under the TCPA asserted by Plaintiff, deny Plaintiff and/or the Settlement Class are entitled to any damages, and maintain that they have meritorious defenses to the claims alleged in the Lawsuit;

WHEREAS, while denying all liability and without admitting or conceding fault or liability or the validity of Plaintiff’s claims, or that Plaintiff or any individual in the Settlement Class is

¹ NewStrata, Inc. d/b/a FiveStrata assumed substantially all liabilities and purchased substantially all assets of FiveStrata LLC pursuant to an asset purchase agreement. . Accordingly, NewStrata, Inc. d/b/a FiveStrata is the successor in interest to FiveStrata, LLC to the extent specified in that certain asset purchase agreement.

entitled to any relief as a result of Defendants' conduct, Defendants have agreed to settle the claims that are the subject of the Lawsuit as set forth in this Agreement;

WHEREAS, the Settlement Class likely includes approximately 21,953 people;

WHEREFORE, the Parties stipulate and agree that the claims of Plaintiff and the Settlement Class should be and are hereby compromised and settled, subject to approval by the District Court, upon the following terms and conditions:

1. Recitals. The above-described recitals are incorporated into this Agreement.
2. For Settlement Only. This Agreement is entered into for purposes of resolving the disputes between Defendants, and between Defendants and Plaintiff and the Settlement Class, concerning the claims asserted in the Lawsuit. Assertions, statements, and representations herein are for settlement purposes only. The Parties desire and intend to seek the trial court's approval of the settlement and a final judgment approving the settlement between the Parties concerning the claims of Plaintiff and the Settlement Class Members as set forth in this Agreement. The Parties agree to undertake all steps necessary to effectuate the purpose of the settlement, to secure the district court's approval of the settlement, and to oppose any interventions and objections to the settlement. If the trial court does not finally approve the Agreement the Parties expressly agree that this Agreement is a nullity as described in Section 20.
3. Certification of the Settlement Class. For settlement purposes only, the Parties hereby stipulate to seek certification of the following settlement class defined as follows: The 21,953 persons identified by the records of FiveStrata whose numbers were registered on the National Do-Not-Call Registry and such persons were called by FiveStrata allegedly on behalf of First American ("Settlement Class"). The class members bound by the class definition are those included on the data produced by FiveStrata. "Settlement Class Member" means any person

included in the Settlement Class who does not timely and properly opt out of this settlement. Defendants will not oppose the certification of the Settlement Class for settlement purposes only and reserve all of their defenses and objections to certification of the proposed class in the event the Parties' settlement is not approved.

4. Representation of the Settlement Class. Plaintiff will request to be appointed as the "Class Representative." Christopher E. Roberts of Butsch Roberts & Associates LLC and Jacob U. Ginsburg of Kimmel & Silverman, P.C. will request to be appointed as "Settlement Class Counsel." Defendants will not oppose these requests.

5. Settlement Administrator. The Parties agree to request that the Court appoint Atticus Administration, LLC, (the "Settlement Administrator"), to serve as the Settlement Administrator. The Settlement Administrator shall have the following duties, as described more fully below:

- a. Issue the notice information to the Settlement Class as set forth in Section 6 below;
- b. Track and provide information on any returned notices as well as update addresses and remail any returned notices;
- c. Create and maintain a website with information regarding this Settlement;
- d. Prepare and issue notice of proposed settlement to the appropriate Federal officials and State officials as required by the Class Action Fairness Act;
- e. Process contact information forms received from Settlement Class members to insure those class members' contact information is accurate;
- f. Calculate, prepare, and distribute Settlement Class members' settlement payments;

- g. Distribute any incentive award and award of attorney's fees and costs to Settlement Class Counsel;
- h. Provide a declaration to submit to the Court in support of final approval of the settlement;
- i. Monitor whether settlement payment checks are cashed and within 180 days after the date settlement checks were issued, prepare a report in Excel format and provide it to counsel for the Parties, listing all settlement checks issued, the check number, the check date, the name and address of the payee and indicate whether the check was negotiated; and calculate, prepare and make any payments according to the escheatment requirements of the state in which the class members reside of any funds remaining in the Settlement Fund and from uncashed settlement checks.

Defendants and their counsel shall have no obligation to supervise or control the actions of the Settlement Administrator or to ensure that it complies with its obligations under this Agreement.

6. Notice Information: After entry of an agreed-upon protective order by the Court and upon agreement by the Settlement Administrator to be bound by the protective order, FiveStrata will provide the Settlement Administrator with the last known name, address and e-mail of each Settlement Class Member, to the extent FiveStrata can reasonably determine this information from its records. This information is referred to as the "Notice Information." FiveStrata will provide the Notice Information to the Settlement Administrator within a reasonable time after the Court enters an agreed-upon protective order and the Settlement Administrator agrees to be bound thereby.

7. Preliminary Approval. Plaintiff will file an unopposed motion with the District Court for preliminary approval of the Settlement on or before October 18, 2023. The motion for preliminary approval will seek an order that: (a) preliminarily approves the settlement of the Lawsuit; (b) certifies the Settlement Class as defined in Section 3 above; (c) approves and appoints Plaintiff as representative of the Settlement Class; (d) approves and appoints attorneys Christopher E. Roberts of Butsch Roberts & Associates LLC and Jacob U. Ginsburg of Kimmel & Silverman, P.C. as Settlement Class Counsel; (e) approves the forms prepared by the Parties for giving notice of the settlement to the members of the Settlement Class, copies of which are attached to this Agreement as **Exhibit 1**; (f) approves the methods agreed to by the Parties for giving notice of the settlement to the Settlement Class; and, (g) sets deadlines for: (1) providing notice to the Settlement Class; (2) members of the Settlement Class to submit requests for exclusion/opt-out and objections to the proposed settlement; and, (3) members of the Settlement Class to submit claims, substantially in the form attached hereto as **Exhibit 3** (the “Preliminary Approval Order”). The Parties will then seek final approval of the settlement and entry of a “Final Approval Order and Judgment” (as defined in section 14).

8. The Settlement Fund. In full settlement of the Lawsuit and any claims that were or could have been brought in the Lawsuit, Defendants will pay to the Settlement Administrator the total amount of \$700,000.00 (“Settlement Fund”) to settle this case on a common fund basis, which funds will be used to pay the claims of each member of the Settlement Class, the cost of settlement administration, including any amounts due to the Settlement Administrator, a class representative service award, and Class Counsel’s attorneys’ fees and litigation expenses. First American shall contribute \$450,000 to the Settlement Fund, and FiveStrata shall contribute \$250,000 to the Settlement Fund. No amount of the Settlement Fund will revert to Defendants.

The Settlement Fund shall be paid by the Defendants to the Settlement Administrator within five business days of the Effective Date, as set forth below. The Settlement Administrator shall provide Defendants' counsel at least 30 days before the Effective Date with a complete executed W-9 from the Settlement Administrator and written wire instructions to transfer the Settlement Fund to the account designated by the Settlement Administrator. The Settlement Administrator will administer the Settlement Fund. Once Defendants make the Settlement Fund payment to the Settlement Administrator in accordance with this Agreement, Defendants shall not have any further payment obligation to the Settlement Class.

Each member of the Settlement Class who submits a valid claim shall be entitled to a *pro rata* cash payment from the Settlement Fund, net after accounting for the following amounts awarded by the Court: the cost of settlement administration, including the Settlement Administrator, a class representative service award, and Class Counsel's attorneys' fees and litigation expenses. Payments shall be made by check or electronic payment from the Settlement Administrator to each Settlement Class Member who submits a valid claim.

All Class Members will be informed that settlement checks must be cashed within 180 days of issuance and that Class Members who fail to timely cash their checks will have no further right or entitlement to any payment under the terms of the Settlement but will be bound by the terms of the Settlement, including the Releases contained herein.

The amount of all checks uncashed within 180 days of distribution by the settlement administrator shall be distributed by the Settlement Administrator in accordance with the escheatment requirements of the state in which the Settlement Class Member is located.

9. Notice to Settlement Class. In the event the District Court enters the Preliminary Approval Order as described in Section 6, notice of the settlement will be mailed by the Settlement

Administrator to the individuals in the Settlement Class within fourteen days after entry of the Preliminary Approval Order. The Settlement Administrator will send the class notice by first class U.S. mail to persons in the Settlement Class at such persons' last known address, as listed in the Notice Information, and will also send the notice by e-mail to all members of the Settlement Class for whom FiveStrata has an e-mail address. Prior to mailing the notice, the Settlement Administrator will update the address information provided by FiveStrata through the National Change of Address (“NCOA”) database maintained by the U.S. Postal Service. Any mailed notice returned to the Settlement Administrator with a new forwarding address will be re-mailed one time to the individual at the new forwarding address. The mail notice to the Settlement Class will contain a summary description of the Agreement, include a claim form, identify the Settlement Administrator, and direct recipients to the website, from which information about the settlement can also be obtained and through which claim forms may be uploaded (in addition to being mailed). The Settlement Administrator will provide a declaration or affidavit to file with the trial court, as part of the final approval papers, stating that these notice procedures were followed.

The Settlement Administrator shall set up a dedicated website to advise persons of the settlement and through which members of the Settlement Class may submit claims. Members of the Settlement Class will also have the option to mail in claim forms. The content and format of the website will be agreed upon by the Parties, and the website will be operational on the date the notice is mailed to the Settlement Class. Individuals in the Settlement Class shall be able to opt-out and exclude themselves from the settlement or object to the settlement within sixty days after the notice is first mailed to exclude themselves from or object to the settlement.

The parties agree that Notice will be substantially similar to that attached as Exhibit 1.

10. Objections and Opt Outs. Any class member may object to this Settlement and ask the Court to deny approval. Any written objection and supporting papers must be filed with the Clerk of the Court on or before the date specified in the Preliminary Approval Order and must include the person's name, street address, all attorneys who assisted in the preparation and filing of the objection, a list of all other class actions in which that person or counsel have filed objections to settlements, and a statement of the reasons why the Court should find that the settlement is not in the best interests of the Settlement Class. The objector may also appear in person or through his or her attorney at the Final Approval Hearing. Copies of any objection must also be served on Class Counsel and Counsel for Defendants as required by the Federal Rules of Civil Procedure.

11. CAFA Notice: Within ten (10) days of filing this Settlement Agreement with the Clerk of the Court as part of the Motion for Preliminary Approval, the Settlement Administrator will cause the notice of proposed settlement required by the Class Action Fairness Act, 28 U.S.C. § 1715(b), to be issued to the appropriate Federal officials and appropriate State officials as provided for in that statute. Pursuant to 28 U.S.C. § 1715(d), the Parties will seek to schedule the Final Approval Hearing so that the Final Approval and Judgment is entered more than 90 days after this notice of proposed settlement is provided.

12. Claims Process: Any member of the Settlement Class who wishes to receive a cash payment shall submit a valid claim form within 90 days of the Settlement Administrator sending out notice. The claim form shall be signed physically or digitally by the member of the Settlement Class to receive relief. The parties agree that all members of the Settlement Class who wish to exclude themselves or object to the settlement shall also do so within 90 days and must advise the Settlement Administrator of their exclusion or objection to the settlement.

The parties agree that the Claim Form will be substantially similar to that attached to this Agreement as **Exhibit 2**.

13. Incentive Award and Attorneys' Fees. Class Counsel will apply for an award of up to 33 1/3% of the settlement fund for their attorneys' fees and reasonable litigation expenses. Class Counsel will also request an incentive award for Plaintiff of up to \$6,000.00. The incentive award and attorney fee award will be set forth in the Final Approval Order and Judgment and is within the Court's discretion to award.

14. Final Approval. The preliminary approval order described in Section 6 will set a date for a Final Approval Hearing, at which the Parties will request that the District Court enter a Final Approval Order and Judgment, consistent with this Agreement and the Parties' efforts to consummate the settlement. With the exception of their portion of the up-front costs required by the Settlement Administrator, Defendants shall not be obligated to pay any sum pursuant to this Agreement except after a Final Approval Order and Judgment is entered, as described in Section 13.

15. Effective Date. If there are no objections to the settlement, the "Effective Date" of this Agreement shall be the fourteen calendar days after the trial court has signed the Final Approval Order and Judgment as applied to Plaintiff and the Settlement Class Members. If there are objections to the settlement, the Effective Date shall be fourteen days after all of the following conditions have occurred and been satisfied:

(a) The trial court has entered: (i) a final order approving this Settlement Agreement under Federal Rule of Civil Procedure 23; and (ii) a final judgment granting the relief and releases described in this Agreement, including that in Sections 7 and 14; and

(b) The time for appeal or to seek permission to appeal from the trial court's approval of this Agreement and entry of final judgment described in subsection (a) of this paragraph has expired or, if appealed, approvals of this Agreement and any final judgment have been affirmed by the court of last resort to which such appeal can be taken, and such affirmance has become no longer subject to further appeal or review.

16. Payments. Within fourteen days after the Effective Date, the Settlement Administrator shall distribute the Settlement Class Member payments described in Section 8, and the attorney's fees and incentive award described in Section 8, consistent with the Final Approval Order and Judgment.

17. Right to Rescind. First American and FiveStrata shall have the right to rescind this Agreement in the event that more than 10% of the Settlement Class submit a timely and valid request to be excluded from the Class. Defendants may exercise their right to rescind by filing a Notice of Exercise of Right to Rescind with the Clerk of the Court at any time before the entry of the Final Approval Order by the Court.

18. FiveStrata and First American Releases as to each other: FiveStrata, and its parents, subsidiaries, owners, members, current and former related entities, or persons with control over FiveStrata, along with its and their successors, predecessors, heirs or assigns, officers, directors, agents acting on behalf of First American or FiveStrata, servants, employees, and insurers ("FiveStrata Releasing Parties"), release from any and all liability for any and all claims, causes of action, demands, judgments, costs, attorney's fees and expenses, whether in law or in equity, whether known or unknown, which FiveStrata Releasing Parties has or had against First American, and its and their parents, subsidiaries, owners, insurers, current and former related entities, or persons with control over First American, along with its and their successors, predecessors, heirs

or assigns, officers, directors, agents acting on behalf of First American or FiveStrata, servants, employees (“First American Released Parties”). This release expressly excludes any and all claims, causes of action, demands, judgments, costs, indemnification claims, attorney’s fees and expenses, whether in law or in equity, whether known or unknown, relating to any Telephone Consumer Protection Act or related state or federal privacy claims that the FiveStrata Releasing Parties may have against the First American Home Warranty Released Parties other than those asserted in the Lawsuit.

First American Home Warranty, and its parents, subsidiaries, owners, members, current and former related entities, or persons with control over First American Home Warranty, along with its and their successors, predecessors, heirs or assigns, officers, directors, agents acting on behalf of First American or FiveStrata, servants, employees, and insurers (“First American Home Warranty Releasing Parties”), release from any and all liability for any and all claims, causes of action, demands, judgments, costs, attorney’s fees and expenses, whether in law or in equity, whether known or unknown, which First American Home Warranty Releasing Parties have or had against FiveStrata, and its and their parents, subsidiaries, owners, insurers, current and former related entities, or persons with control over FiveStrata, along with its and their successors, predecessors, heirs or assigns, officers, directors, agents acting on behalf of First American or FiveStrata, servants, employees (“FiveStrata Released Parties”). This release expressly excludes and all claims, causes of action, demands, judgments, costs, indemnification claims, attorney’s fees and expenses, whether in law or in equity, whether known or unknown, relating to any Telephone Consumer Protection Act or related state or federal privacy claims that First American Home Warranty Releasing Parties may have against FiveStrata Released Parties other than those asserted in the Lawsuit.

19. Settlement Class Members' Release. Upon the Effective Date, the FiveStrata Released Parties and First American Released Parties shall be released and forever discharged by the Class Representative, the Settlement Class, and each Settlement Class Member from all Released Claims. "Released Claims" means any and all claims, actions, causes of action, rights, suits, defenses, debts, sums of money, payments, obligations, promises, damages, penalties, attorneys' fees, costs, liens, judgments, and demands of any kind whatsoever that each member of the Settlement Class may have or may have had in the past, whether in arbitration, administrative, or judicial proceedings, whether as individual claims or as claims asserted on a class basis, whether past or present, mature or not yet mature, known or unknown, suspected or unsuspected, whether based on federal, state, or local law, statute, ordinance, regulations, contract, common law, or any other source, that were asserted in the Complaint, the Action, or that arise out of or relate to any communication, sent to, received by, or otherwise transmitted between Class Members by or on behalf of FiveStrata Released Parties and First American Released Parties.

20. Effect of Trial Court's Denial of Preliminary or Final Approval. This Agreement is null and void if the District Court does not preliminarily approve the settlement in substantially the same form as set forth in this Agreement, or if the settlement or the judgment approving the settlement is appealed and not approved on appeal in substantially the same form as set forth in this Agreement. In such event, and upon the District Court entering an order unconditionally and finally adjudicating that this Agreement and settlement will not be approved in substantially the same form as set forth in this Agreement, then: (a) this Agreement is terminated and is of no force and effect, and no party shall be bound by any of its terms, except that the Settlement Administrator's expenses shall be split equally among Plaintiff, First American, and FiveStrata; (b) to the extent applicable, any preliminary order approving the settlement, certifying the

Settlement Class, approving the notice or notice procedure, and providing notice to the Settlement Class shall be vacated; (c) the Agreement and all of its provisions and all negotiations, statements, and proceedings shall be without prejudice to the rights of any of the Parties; (d) each of the Parties shall be restored to their respective positions as of the date this Agreement was fully executed; and, (e) neither the settlement nor any of its provisions or the fact that this Agreement has been made shall be admissible in this Lawsuit, or discoverable or admissible in any other action for any purpose whatsoever.

21. Requests by Individuals in Settlement Class. Requests for exclusion, objections to the settlement, and all other notices regarding the settlement, to the extent received by either Party, shall be sent to the Settlement Administrator.

22. No Admission of Liability. This Agreement affects the settlement of claims that are denied and contested, and nothing contained herein shall be construed as an admission by Defendants of any fact, commission of any wrong, or liability of any kind. Defendants deny any liability in connection with any claims and intends merely to avoid further litigation.

23. Entire Agreement. This Agreement contains the entire agreement and understanding between the Parties concerning the subject matter hereof, and any and all prior oral or written agreements or understandings between the Parties related hereto are superseded. This Agreement may not be altered, amended or otherwise changed or modified, except in writing signed by all Parties.

24. Headings. Headings contained in this Agreement are for convenience of reference only and are not intended to alter or vary the construction and meaning of this Agreement.

25. Warranties. The Parties further represent, warrant, and agree that, in executing this Agreement, they do so with full knowledge of any and all rights they may have with respect to the

claims released in this Agreement, and that they have received legal counsel from their attorneys with regard to the facts involved and the controversy herein compromised and with regard to their rights arising out of such facts. Each Party represents such party has not assigned, transferred or granted, or purported to assign, transfer, or grant, any of the claims, demands and cause(s) of action asserted in the Lawsuit. Each of the Parties executing this Agreement warrants that he or she has the authority to enter into this Agreement and to legally bind the Party for which he or she is signing.

26. Successors and Assigns. This Agreement is binding upon, and shall inure to the benefit of, the Parties hereto and their respective successors, assigns, heirs, agents, employees, attorneys, representatives, officers, parents, affiliates, and subsidiaries.

27. Further Cooperation. The Parties agree to execute such further and additional documents and instruments, as shall be necessary or expedient to carry out the provisions of this Agreement, and shall in good faith undertake all reasonable acts to effectuate the provisions of this Agreement.

28. Governing Law. The contractual terms of this Agreement shall be interpreted and enforced in accordance with the substantive law of the State of Michigan, without regard to its conflict of laws or choice of law provisions. All suits to enforce this Agreement shall be brought in the United States District Court for the Eastern District of Michigan.

29. Mutual Interpretation. The Parties agree and stipulate that the settlement was negotiated on an “arm’s-length” basis between parties of equal bargaining power. The Agreement has been drafted jointly by Class Counsel and Defendants’ counsel. Accordingly, this Agreement is mutually created, and no ambiguity shall be construed in favor of or against any of the Parties.

This Agreement was prepared after an agreement in principle to resolve the case was reached after a mediation with Retired Judge Gerald E. Rosen and on the terms recommended by Judge Rosen.

30. Counterparts. This Agreement may be executed in counterparts, each of which shall be an original, and such counterparts together shall constitute one instrument. Electronically scanned signatures are acceptable for the execution of this Agreement.

31. Severability. Each term and provision of this Agreement shall be construed and interpreted so as to render it enforceable. In the event any provision of this Agreement is held to be illegal or unenforceable, the remainder of this Agreement shall be binding and enforceable.

32. Dispute Resolution. Any dispute over the terms of the Settlement Agreement shall be mediated before Judge Rosen of JAMS in Detroit, Michigan and, if unsuccessful, binding arbitration before Judge Rosen and JAMS in Detroit, Michigan according to JAMS' Arbitration Rules. Judge Rosen's final award or determination may be confirmed and enforced by a court of competent jurisdiction. Any arbitration shall be conducted according to the JAMS Comprehensive Rules, except the Federal Rules of Evidence will apply during the arbitration proceeding.

IN WITNESS WHEREOF, the Parties have executed this Agreement on the date(s) set forth below.

[Remainder of page intentionally left blank]

Dated:

Oct 18, 2023

Marcia Kimble
Marcia Kimble

Dated: _____

First American Home Warranty Corporation

By: _____

Printed Name: _____

Title: _____

Dated: _____

NewStrata, Inc. d/b/a FiveStrata as successor in interest to
FiveStrata LLC pursuant to the asset purchase agreement

By: _____

Printed Name: _____

Title: _____

Dated: _____

Marcia Kimble

Dated: 10/18/2023

First American Home Warranty Corporation

By: ^{DocuSigned by:}
Matthew Wendl
15838C59DE0B4AD...

Printed Name: Matthew Wendl

Title: MattWendl

Dated: _____

NewStrata, Inc. d/b/a FiveStrata as successor in interest to
FiveStrata LLC pursuant to the asset purchase agreement

By: _____

Printed Name: _____

Title: _____

Dated: _____
Marcia Kimble

Dated: _____
First American Home Warranty Corporation
By: _____
Printed Name: _____
Title: _____

Dated: 10/18/23
NewStrata, Inc. d/b/a FiveStrata as successor in interest to
FiveStrata LLC pursuant to the asset purchase agreement
By:  _____
Printed Name: Matt Gardner
Title: CEO

**SETTLEMENT
AGREEMENT
EXHIBIT 1**

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

MARCIA KIMBLE, *individually, and on
behalf of all others similarly situated,*

Case. No. 2:23-cv-10037-DML-EAS

Plaintiff,

v.

FIRST AMERICAN HOME WARRANTY
CORP. and FIVESTRATA LLC,

Defendants.

NOTICE OF CLASS ACTION SETTLEMENT [QR code to claim form/settlement site]

The United States District Court for the Eastern District of Michigan has authorized this Notice. This is **NOT** a solicitation from a lawyer. Please read this Notice carefully as it may affect your legal rights. **Do not be alarmed. You have not been sued; nor have you “filed” a lawsuit.**

This notice is being sent to you because you may be among a group or “class” of persons who received calls from or on behalf of First American Home Warranty Corporation and/or FiveStrata, LLC (“First American” and “FiveStrata” are collectively referred to as “Defendants”), and your phone number was registered on the National Do-Not-Call Registry.

YOUR LEGAL RIGHTS AND OPTIONS IN THIS CASE

These rights and options and the deadlines to exercise them are explained below.

IF YOU WANT TO PARTICIPATE FULLY IN THIS CASE	If you want to be included in this case, <u>then you must submit a valid claim form, a copy of which is included with this notice.</u> If you do not submit a claim form you will not receive any payment and will give up claims against Defendants regarding any communications with you. The relief afforded to you is described in Section 7 below and in the settlement agreement is available on the settlement website, www.FAFSSettlement.com .
IF YOU <u>DO NOT</u> WANT TO PARTICIPATE IN THIS CASE AT ALL	If you do not want to participate or be included in this case, then you must send written notice by mail that you wish to exclude yourself from the settlement, postmarked or uploaded to www.FAFSSettlement.com no later than [90 days after notice is mailed] . Instructions for doing so are in paragraph 8 below.

	If you choose not to participate in this case, you give up the possibility of getting money or benefits that may come from the settlement of this case. You keep any rights to sue Defendants about certain legal claims arising from communications directed to you, but the statute of limitations (the deadline for you to file your potential claims) continues to run.
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Your options are explained in this Notice.

1. WHAT IS THIS LAWSUIT ABOUT?

Plaintiff Marcia Kimble (“Plaintiff”) filed a civil lawsuit against Defendants. Plaintiff filed the lawsuit on behalf of herself and as a class action on behalf of the group or “class” of persons who were called by or on behalf of Defendants, despite their phone numbers being registered on the National Do-Not-Call Registry. Plaintiff alleges Defendants violated the Telephone Consumer Protection Act (“TCPA”) by placing such calls. Defendants deny these allegations.

2. WHAT IS A CLASS ACTION AND WHO IS INVOLVED?

In a class action case, one or more persons sue on behalf of other people who have similar claims. The person who sues is called the named Plaintiff. The named Plaintiff represents all similarly situated people in the court. The named Plaintiff in this lawsuit is Marcia Kimble

3. WHY DID I RECEIVE THIS NOTICE?

This notice is being made available to you because FiveStrata’s records reflect that a phone call(s) was placed to you by or on behalf Defendants and your phone number was registered on the National Do-Not-Call Registry. If this is the case, you may be a member of the “class.”

Do not be alarmed. **You have not been sued; nor have you “filed” a lawsuit.** This Notice simply informs you of the named Plaintiff’s lawsuit and lets you know that you have been identified as a potential member of the Class and to advise you of your rights and options as a Class member.

4. HAS THE JUDGE DECIDED WHO IS RIGHT?

No. By certifying the Class and issuing this Notice, the judge is not suggesting that the named Plaintiff or the Class would have won or lost the case.

5. HOW DO I KNOW IF I AM A MEMBER OF THE CLASS?

By Order dated XXXXXX, the Court certified the following class of persons in the Lawsuit, for settlement purposes:

The 21,953 persons identified by the records of FiveStrata whose numbers were registered on the National Do-Not-Call Registry and such persons were called by FiveStrata allegedly on behalf of First American.

If you are not sure whether you are a member of the Class, you should contact the lawyers representing the class, who are listed in paragraph 6 below.

6. WHO IS CLASS COUNSEL?

The Court appointed the named Plaintiff's attorneys in the Lawsuit as Counsel for the Class ("Class Counsel"). Class Counsel are Christopher E. Roberts of Butsch Roberts & Associates LLC and Jacob U. Ginsburg of Kimmel & Silverman, P.C. You are not required to hire your own lawyer because Class Counsel will be working on your behalf as a member of the Class. If you want to hire your own lawyer you are permitted to do so at your own expense.

7. WHAT WILL I RECEIVE AS PART OF THE SETTLEMENT?

Defendants will make available \$700,000.00 to pay all valid class members' claims, the cost of settlement administration, a representative service award for Plaintiff and Class Counsels' attorneys' fees and expenses.

Class Counsel estimate that each class member who submits a valid claim will receive approximately \$110. This amount may be more or less based on the number of valid claims, or the amounts awarded by the Court for the cost of settlement administration, a representative service award or for Class Counsel's attorneys' fees and expenses.

8. WHAT DO I NEED TO DO TO RECEIVE THE BENEFIT OF THE SETTLEMENT?

If you wish to receive the settlement benefits, you **must submit a valid claim form, a copy of which is included with this notice, and which is also available at www.FAFSSettlement.com**. You may submit a completed claim form at **www.FAFSSettlement.com** or send to:

First American-FiveStrata TCPA Settlement
c/o Atticus Administration, LLC
1250 Northland Drive, Suite 240
Mendota Heights, Minnesota 55120

Your claim must be submitted at www.FAFSSettlement.com by 90 days after notice is mailed or postmarked by 90 days after notice is mailed.

Failing to make a claim, will mean you will not receive compensation and will give up certain claims against Defendants regarding any communications with you. However, you have a choice. You also have the right to exclude yourself from the Lawsuit and the Class or object to the settlement. You can also enter an appearance in the Lawsuit individually or through your own attorney, or you can seek to intervene as a party. Each of these choices has consequences that you should understand before making your decision.

A. If you want to participate as a member of the Class.

You must submit a valid claim form to receive the financial benefit of this settlement. Your rights and claims against Defendants, if any, concerning the communications Defendants placed to you (or had communications placed on your behalf), will be determined in the Lawsuit.

If you do not exclude yourself from the settlement:

1. The named Plaintiff and Class Counsel will represent you in the Lawsuit. By joining this case, you designate the named Plaintiff, to the fullest extent possible, to make decisions on your behalf concerning the case, the method and manner of conducting the case, the entering of an agreement with Class Counsel regarding payment of attorney's fees and litigation costs, the approval of settlements and all other matters pertaining to this case. These decisions and agreements made and entered into will be binding on you if you do not opt out of the case. You may be required to provide information and documents, appear for a deposition and/or testify in court. You will also be permitted to attend any hearings in this matter. You will also release certain claims against Defendants regarding communications placed to you by Defendants or those acting on their behalf as detailed more thoroughly in the settlement agreement available on the settlement website www.FAFSSettlement.com.
2. As a member of the Class, you will be entitled to share in any monetary recovery that the named Plaintiff obtains for the Class. You will also receive the benefit of any other relief that the Court may award the Class.
3. Your ability to recover from Defendants will depend on the results of the Lawsuit. It is important to understand that as a member of the Class in this case **you will be bound by any judgment entered by the Court, whether favorable or unfavorable.**

B. If you want to exclude yourself from the Class or object to the Settlement.

If you do not want to be a member of the Class and participate in this Lawsuit, you can ask the Court to exclude you from the Lawsuit and allow you to "opt out" by sending such correspondence in writing to:

First American-FiveStrata TCPA Settlement
c/o Atticus Administration, LLC
1250 Northland Drive, Suite 240
Mendota Heights, Minnesota 55120

To be effective, the request to exclude yourself to the settlement must be completed, signed and postmarked by [90 days from the date notice is mailed].

If you choose to be excluded from the Class:

1. Your claims against Defendants, if any, will not be decided in the Lawsuit and you will not share in any recovery that the named Plaintiff obtains for the Class.
2. You will not be bound by any determinations or any judgment that the Court makes or enters in the Lawsuit, whether favorable or unfavorable.
3. You will not be entitled to any further notice with regard to the Lawsuit.
4. You may pursue any claims you have against Defendants at your own expense and risk by filing your own separate lawsuit, should you choose to do so, and assuming you have a claim and the applicable statute of limitations to file a case has not run.
5. Be aware that any claims that you have or may have against Defendants are limited by the applicable statute of limitations and declining to participate in this case by opting out, or by proceeding separately, may result in some or all of your claims expiring as a matter of law.

Any Class Member who wishes to object to the settlement or wishes to appear at the Final Approval Hearing and show cause, if any, why the same should not be approved as fair, reasonable, adequate, and in the best interests of the Settlement Class, or why a final judgment should not be entered thereon, must serve and file written objections. The objection must contain the objector's full name, telephone number, and current address; must declare that the objector is a member of the Class; and must provide a detailed statement of the objector's specific objections to any matter before the Court and the grounds of the objection. Said objections must be mailed to:

First American-FiveStrata TCPA Settlement
c/o Atticus Administration, LLC
1250 Northland Drive, Suite 240
Mendota Heights, Minnesota 55120

To be effective, the request to object to the settlement must be completed, signed and postmarked by [90 days from the date notice is mailed].

9. HOW WILL CLASS COUNSEL AND THE CLASS REPRESENTATIVE BE PAID?

Class Counsel may seek an award of attorney's fees and expenses of up to 33 1/3% of the settlement fund (\$233,333.33). The Court will determine the amount of fees and expenses that should be awarded to class counsel. Plaintiff may seek an award of up to \$6,000.00 for her service as class representative.

10. WHAT IF I HAVE QUESTIONS?

You should not contact the Clerk of The Court, Judge, or Defendants' Counsel with questions about this case. Instead, if you have any questions about your claim or rights or would like more information, you should call Class Counsel Christopher E. Roberts of Butsch Roberts & Associates LLC at 314-863-5700 or Jacob U. Ginsburg of Kimmel & Silverman, P.C. at 267-468-5374. You can also speak with your own attorney.

You can review and obtain copies of the Lawsuit, The Court's Order granting Preliminary Approval of the Settlement and any other pleadings and filings in the Lawsuit directly from Class Counsel, by contacting Class Counsel at the number above. You can also review and obtain copies of these papers at your own expense at the Clerk of the Court for the United States District Court for the Eastern District of Michigan.

11. IMPORTANT DEADLINE AND DATE TO REMEMBER

[90 days after notice is mailed] is the deadline to exclude yourself from the settlement, object to the settlement, for filing a Notice/Entry of Appearance in the Lawsuit, and for filing a motion to intervene in the Lawsuit.

The Final Approval Hearing will take place on XXXXXXX, 2024 at XX:00 X.m. before Judge David M. Lawson of the United States District Court for the Eastern District of Michigan, 231 W. Lafayette Boulevard, Room 775, Detroit, Michigan 48226.

Dated: _____, 2023

This Notice is being made available pursuant to Federal Rule of Civil Procedure 23 and by Order of the Court.

**SETTLEMENT
AGREEMENT
EXHIBIT 2**

CLAIM FORM

Please select whether you want to receive your payment as a check or as an electronic payment. Please note that if you select payment by check, the check will expire 180 days after the date of issuance to you and said amount will be provided in accordance to the state in which you are located in accordance with the escheatment laws of the state in which you are located.

All information provided is subject to verification by the Claims Administrator. The Parties have the right to seek discovery to further verify the accuracy of the information contained on this claim form, including requiring you to appear for an expedited deposition or in court, where you may be required to testify under oath.

This form must be postmarked or received by **90 days after mailing** or else your claim will not be considered timely. You can submit this electronically at **www.FAFSSettlement.com** or via mail by sending to **First American-Five Strata TCPA Settlement, c/o Atticus Administration, PO Box 64053, Saint Paul, MN 55164.**

Required Information

I wish to receive: **Electronic Payment** or **Check**

Name: [pre-populated from FiveStrata's records]

Current Address: [pre-populated from FiveStrata's records]

Phone number: [pre-populated from FiveStrata's records]

I certify, under the penalty of perjury, that the above information is true and accurate.

Signature: _____

Date: _____

**SETTLEMENT
AGREEMENT
EXHIBIT 3**

EXHIBIT __

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

MARCIA KIMBLE, *individually,
and on behalf of all others similarly
situated,*

Case. No. 2:23-cv-10037-DML-
EAS

District Judge David M. Lawson

Plaintiff,

v.

FIRST AMERICAN HOME
WARRANTY CORP. and
FIVESTRATA LLC,

Defendants.

**[PROPOSED] ORDER GRANTING MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION SETTLEMENT, CERTIFYING
SETTLEMENT CLASS, DIRECTING CLASS NOTICE, AND
SCHEDULING A FINAL APPROVAL HEARING**

Upon review and consideration of Motion for Preliminary Approval of Class Action Settlement of Plaintiff Marcia Kimble, (the “Representative Plaintiff”), with Defendants First American Home Warranty Corp. and FiveStrata, LLC (“Defendants”) (“Representative Plaintiff” and “Defendants” are collectively referred to as “Parties”), including the Parties’ executed Settlement Agreement attached as Exhibit 1, to the Motion for Preliminary Approval (the “Agreement”) and all corresponding exhibits, the Court hereby orders as follows:

1. Settlement

The Parties have negotiated a proposed settlement of the Representative Plaintiff's claims in this action, individually, and on behalf of a class of persons whose numbers were on the National Do-Not-Call Registry who were called by FiveStrata, allegedly on behalf of First American. These persons are described below as the Settlement Class. The Parties entered into this Agreement, on the terms recommended by Judge Gerald E. Rosen (Ret.) to avoid the expense, uncertainties, and burden of protracted litigation, and to resolve the claims set forth in the Agreement. The Court has reviewed the Agreement, and the proceedings to date in this matter. The terms and conditions in the Agreement are incorporated here as though fully set forth in this Order, and, unless otherwise indicated, capitalized terms in this Order shall have the same definitions that are in the Agreement.

2. Preliminary Approval

The Agreement entered into, by and among the Parties, was negotiated at arm's length and a settlement was achieved on the terms recommended by Judge Gerald E. Rosen (Ret.). The Agreement is approved on a preliminary basis as fair, reasonable, and adequate, subject to further consideration at the Final Approval Hearing.

3. Settlement Class Relief

Defendants, consistent with the terms of the Agreement, shall make a settlement fund of \$700,000.00 available to pay class members' claims, Class Counsel's (defined below) attorneys' fees and litigation expenses, settlement administration and a representative service award. Each class member who submits a valid claim shall receive a *pro rata* cash payment (by check or electronically) net of attorneys' fees and litigation expenses, settlement administration and a representative service award. Class Counsel estimates that each class member who submits a valid claim will receive over \$100, based on historical claims rates. In accordance with the terms of the Agreement, the members of the Settlement Class in exchange agree to release Defendants (independently and collectively) from claims concerning communications made to them and the Defendants agree to release certain claims against each other.

4. Preliminary Certification of Settlement Class

For settlement purposes only, the Court certifies the following class:

The 21,953 persons identified by the records of FiveStrata whose numbers were registered on the National Do-Not-Call Registry and such persons were called by FiveStrata allegedly on behalf of First American.

These persons are referred to as members of the "Settlement Class."

The Court makes the following determinations as to certification of the Settlement Class:

a. The Court preliminarily certifies the Settlement Class for purposes of settlement, under Federal Rule of Civil Procedure 23;

b. The Settlement Class is so numerous that joinder of all members is impracticable, as the number of settlement class members is 21,953;

c. There are questions of law or fact common to the members of the Settlement Class, namely, whether such calls placed to the members of the Settlement Class violate the Telephone Consumer Protection Act, and whether vicarious liability should be imposed against First American, and such common questions predominate over any questions affecting only individual members;

d. The Representative Plaintiff is capable of fairly and adequately protecting the interests of the members of the Settlement Class;

e. The Representative Plaintiff's counsel is capable of fairly and adequately protecting the interests of the members of the Settlement Class; and,

f. The class action is an appropriate method for the fair and efficient adjudication of this controversy.

5. Designation of Class Representative

The Representative Plaintiff is designated as the representative of the Settlement Class for the purpose of seeking approval of and administering the Agreement.

6. Designation of Class Counsel

The Court finds that the Representative Plaintiff's counsel are qualified to serve as Class Counsel in this case. Christopher E. Roberts of Butsch Roberts & Associates LLC and Jacob U. Ginsburg of Kimmel & Silverman, P.C. are designated as Class Counsel for the Settlement Class for the sole purpose of the Settlement.

7. Final Approval Hearing

A hearing regarding final approval of the Settlement ("Final Approval Hearing") will be held at :00 .m. on 2024, in the United States District Court for the Eastern District of Michigan before the Honorable Judge David M. Lawson, to determine, among other things: (i) whether final judgment should be entered resolving and approving the proposed Settlement of the Representative Plaintiff's and the Settlement Class member's claims against the Defendants in the Action as fair, reasonable, and adequate; (ii) whether the members of the Settlement Class Members should be bound by the terms of the Agreement; and (iii) whether the application of Class Counsel for an award of attorneys' fees and expenses, and for a proposed service award to the Representative Plaintiff, should be approved and in what amount.

8. Class Notice

The Court approves the Class Notice and Claim Form (attached as Exhibits 1 and 2 to the Settlement Agreement) and directs the Administrator (defined below) to send out the Class Notice and Claim Form within 21 days of the entry of this Order. The settlement website detailed in the Agreement shall also be fully operable as of the date the Administrator sends out the Class Notice and Claim Form. The Class Notice and Claim Form shall be sent to the last known mailing address for each member of the Settlement Class. If the Class Notice and Claim Form are returned as undeliverable, the Administrator shall run the address against the National Change of Address Database and send another Class Notice and Claim Form to the newly obtained address, if any. If the Administrator has received a valid e-mail address from FiveStrata, then the Administrator shall also send the Class Notice and Claim Form to the class member's e-mail address.

Claim forms may be sent via mail or e-mail to the Administrator. In addition, the settlement website shall have an option for a member of the Settlement Class to upload their claim form on the settlement website and to also submit a claim directly through the settlement website.

9. Administrator

The Court approves and authorizes the retention of Atticus Administration LLC, as the Administrator, to implement the terms of the Agreement, and authorizes

and directs the Administrator to (a) mail the Class Notice and the Claim Form; (b); establish the settlement website; (c) receive and process Claim Forms; (d) respond to class members' questions and inquiries; and, (e) carry out such other responsibilities as are provided for in the Agreement or as may be agreed to by Class Counsel and the Defendants, all according to and as provided in the Agreement.

10. Claims, Exclusions and Objections

Members of the Settlement Class shall have 90 days from the date the Administrator sends the Class Notice and Claim Form to submit their respective Claim Forms. If a Claim Form is mailed, said Claim Form must be postmarked within 90 days of the date the Administrator sends the Class Notice and Claim Form. If a Claim Form is submitted through the settlement website, then said Claim Form shall be uploaded or submitted through the settlement website within 90 days of the Administrator sending the Class Notice and Claim Form.

Any Class Member who wishes to be excluded from the Settlement Class must complete and send to the Administrator, at the address listed in the Class Notice and on the Settlement website, a request for exclusion postmarked no later than [REDACTED] (“Opt Out Deadline”), which is no less than thirty days before the Final Approval Hearing of [REDACTED], 2024.

Any member of the Settlement Class may object to this Settlement and ask the Court to deny approval. Any written objection and supporting papers must be

filed with the Clerk of the Court no later than _____ (“Objection Deadline”), which is no less than thirty days before the Final Approval Hearing of _____, 2024, and must include the person's name, street address, all attorneys who assisted in the preparation and filing of the objection, a list of all other class actions in which that person or counsel have filed objections to settlements, and a statement of the reasons why the Court should find that the settlement is not in the best interests of the Settlement Class. The objector may also appear in person or through his or her attorney at the Final Approval Hearing. Copies of any objection must also be served on Class Counsel and Counsel for Defendants as required by the Federal Rules of Civil Procedure.

11. Attorneys’ Fees and Expenses, and Case Contribution Awards

Class Counsel shall not seek an award of attorneys’ fees in a total amount that exceeds \$195,000.00. Class Counsel shall not seek reasonable litigation expenses in excess of \$18,000.00. Class Counsel and the Representative Plaintiff agree not to seek a service award that exceeds \$5,000.00 to the Representative Plaintiff for her work and assistance in this action.

12. Service of Papers

Class Counsel and the Defendants’ Counsel shall promptly furnish to each other any objections or requests for exclusion that they receive and shall file such

objections with the Court on or before the Final Approval Hearing unless such documents already appear on the Court's docket.

13. Termination of Settlement

This Order shall become null and void, and shall be without prejudice to the rights of the Parties, all of whom shall be restored to their respective positions existing immediately before this Court entered this Order, if: (a) the proposed Settlement is not finally approved by the Court, or Final Judgment is not entered or does not become Final, or the Effective Date does not occur; or (b) the Settlement Agreement is terminated, pursuant to the terms of the Agreement, for any reason. In such event, the Agreement shall have no further force or effect, and all proceedings that have occurred, with regard to the Agreement, shall be without prejudice to the rights and contentions of the Parties and any members of the Settlement Class and the Court's orders, including this Order, shall not be used or referred to for any purpose whatsoever; and the Parties shall retain, without prejudice, any and all objections, arguments, and defenses with respect to class certification.

14. Stay

All proceedings in this action are stayed, except as necessary to effectuate the terms of the Agreement.

15. Necessary Steps

The Court hereby preliminarily approves the Agreement entered into between the Parties. The Court authorizes and directs the Parties to take all other necessary and appropriate steps to implement the terms of the Agreement.

So Ordered: _____
Hon. David M. Lawson

Date: _____

EXHIBIT 2

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
EASTERN DIVISION

MARCIA KIMBLE, individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

FIRST AMERICAN HOME WARRANTY
CORP. and FIVESTRATA, LLC,

Defendants.

Case No. 2:23-cv-10037-DML-EAS

District Judge David M. Lawson

Magistrate Judge Elizabeth A. Stafford

**DECLARATION OF CHRISTOPHER E. ROBERTS IN SUPPORT OF
PLAINTIFF’S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF
CLASS SETTLEMENT**

I, Christopher E. Roberts, hereby declare, pursuant to 28 U.S.C. § 1746:

1. This Declaration is submitted in support of Plaintiff’s Unopposed Motion for Preliminary Approval of Class Settlement.

2. I am over the age of 18 years, am of sound mind and am otherwise competent to make this declaration. I have personal knowledge of the matters asserted in this Declaration.

3. I represent Plaintiff Marcia Kimble in the above-captioned matter. I am not related to Ms. Kimble. This matter concerns whether Defendants violated the Telephone Consumer Protection Act (“TCPA”) for allegedly calling Plaintiff and a putative class of people whose phone numbers were registered on the National Do-Not-Call Registry.

Biographical Information

4. I am a partner with the firm of Butsch Roberts & Associates LLC. I submit this declaration in support of plaintiff’s motion for preliminary approval of settlement in the above-

captioned action. I am a member in good standing of the Illinois, Missouri and Kansas Bars, and I have never been the subject of any disciplinary proceeding. Furthermore, I am admitted to practice before this Court, The United States Court of Appeals for the Eighth Circuit, the United States Court of Appeals for the Ninth Circuit, the United States Court of Appeals for the Tenth Circuit, the United States District Court for the Northern District of Illinois, the United States District Court for the Southern District of Illinois, the United States District Court for the Eastern District of Missouri, the United States District Court for the Western District of Missouri, the United States District Court for the District of Kansas, the United States District Court for the Southern District of Texas, the United States District Court for the Northern District of Texas and the United States District Court for the District of Colorado.

5. I am a 2009 graduate of the University of Missouri-Kansas City School of Law, where I received my Juris Doctor degree. I was admitted to the Missouri Bar in 2009, the Illinois Bar in 2010 and the Kansas Bar in 2010.

6. I frequently speak to members of the Missouri Bar on class action practice and consumer law-related issues. I spoke most recently in 2022 at the Solo and Small Firm Conference sponsored by The Missouri Bar about class action practice and procedure.

7. In addition, I am a frequent contributor to the American Bar Association on class action-related issues. I am the author of a chapter in the 2018, 2020, 2021, 2022 and 2023 books published by the American Bar Association about class action law from each Circuit Court of Appeals. The chapter I authored in each publication focuses on class action jurisprudence in the Eighth Circuit Court of Appeals. I have also written multiple articles on class action-related issues that have been published by the American Bar Association.

8. I have been appointed to serve as class counsel in numerous cases, including, but not limited to: *Ruby v. Build-A-Bear, Inc.*, Case No. 4:21-cv-01152-JAR (E.D. Mo. 2023) (TCPA case); *Staunton Lodge No. 177, A.F. & A.M. v. Pekin Insurance Company*, Case No. 2020-L-001297, Circuit Court of Madison County, Illinois; *Smith v. Leif Johnson Ford, Inc.*, Case No. 19SL-CC01942, Circuit Court of St. Louis County, Missouri (TCPA case); *Martin v. Wakefield & Associates, Inc.*, Case No. 19SL-AC12801-01, Circuit Court of St. Louis County; *Harding and Moore v. Wakefield & Associates, Inc.*, Case No. 18SL-AC26348-01, Circuit Court of St. Louis County; *Maierhoffer v. Blitt & Gaines, P.C.*, Case No. 17SL-CC04297, Circuit Court of St. Louis County; *Harris v. Wakefield & Associates, Inc.*, Case No. 1722-CC11907, Circuit Court of the City of St. Louis; *Moore v. Family Dollar Stores, Inc.*, No. 14-01542-JAR (E.D. Mo. 2016) (TCPA case); *Wallach v. Federal Financial Group LLC*, Circuit Court of St. Louis County, No. 15SL-CC01040-01 (TCPA case); *Kissel v. Liberty Acquisitions Servicing, LLC*, Case No. 1411-CC00504, Circuit Court of St. Charles County; *Lewis v. Spinnaker Resorts, Inc.*, Circuit Court of Christian County, No. 14AF-CC00413-01; *Harbison v. Litow & Pech, P.C.*, Circuit Court of St. Louis County, No. 12SL-CC03776-01; *Lemay v. Rocket Lawyer, Inc.*, Circuit Court of St. Louis County, No. 11SL-CC04557. In addition, I performed substantial work on *In re: Life Time Fitness Telephone Consumer Protection Act (TCPA) Litigation*, No. 14-MD-2564, 2015 WL 77337334 (D. Minn. 2015) affirmed by *In re: Life Time Fitness, Inc., Tel. Consumer Protection Act (TCPA) Litig.*, 847 F.3d 619 (8th Cir. 2017) (TCPA Case). My law partner, David T. Butsch, was named as the class counsel from our firm in the *Life Time Fitness* case.

9. Butsch Roberts & Associates LLC is an AV rated law firm which began operating under my law partner, David T. Butsch, on November 1, 2008. The firm specializes in complex civil litigation, with an emphasis on consumer class litigation. The two members of the firm, David

T. Butsch and Christopher E. Roberts, have a combined litigation experience of more than 40 years.

10. My firm is familiar with the laws and rules applicable to this case. My firm is prepared to prosecute this case on behalf of the plaintiff and the putative class. My firm has participated in numerous cases involving the TCPA.

11. This Declaration sets forth a brief summary of the settlement negotiations that ultimately led to the proposed settlement and the bases upon which Plaintiff's counsel recommend that the Court preliminarily approve the settlement. The following recitation is not all-inclusive, but rather, it is intended to give an overview of the settlement, and the analysis that Plaintiff's counsel incorporated in agreeing to a settlement on behalf of the putative class. I believe that these facts demonstrate that the settlement is fair, reasonable, and adequate, and should be preliminarily approved by the Court.

Settlement Negotiations

12. In connection with a status conference held with the Court on July 19, 2023, the parties agreed to mediate the case with Judge Gerald E. Rosen (Ret.). The parties agreed to mediate the case so long as FiveStrata agreed to provide Plaintiff information regarding the number of persons whose phone numbers were on the National Do-Not-Call Registry who were called by Defendant FiveStrata and any purported consent information FiveStrata had concerning Ms. Kimble. In addition, prior to mediation, FiveStrata provided general information regarding the consent it purportedly obtained from the persons who were on the National-Do-Not-Call Registry and called by FiveStrata.

13. On August 18, 2023, defense counsel and I held a conference call with Judge Rosen to discuss our respective positions and Judge Rosen's expectations prior to and at the mediation.

Prior to the mediation, Plaintiff's counsel submitted a 14-page mediation statement to Judge Rosen and a separate mediation statement to defense counsel. I also received and reviewed the mediation statements of both Defendants. Prior to mediation, Plaintiff's counsel also made a class-wide settlement demand after receiving the necessary information from opposing counsel.

14. The parties mediated the case before Judge Rosen on September 21, 2023. Ms. Kimble arrived at 8:30 a.m. before the mediation began at 9:00 a.m. The parties had hard-fought and extensive settlement discussions throughout the day.

15. Toward the end of the mediation, Judge Rosen recommended to Plaintiff's counsel and Plaintiff the terms of the settlement upon which he recommended settling the case. Ms. Kimble advised Judge Rosen she would accept the terms he recommended. Ms. Kimble stayed at the mediation until after 5:00 p.m. The parties agreed to the essential terms of a settlement on the terms recommended by Judge Rosen.

16. After mediation, the parties began drafting the more comprehensive settlement agreement and negotiating certain terms. The parties required Judge Rosen's assistance to work through and resolve these issues. Ultimately, the parties entered into a settlement agreement on terms recommended by Judge Rosen.

17. The parties have since worked diligently to formally consummate their agreement via a written settlement agreement, which has now been completed and executed, and is submitted as part of Plaintiffs' preliminary approval submission.

The Settlement Terms, Notice Plan and Estimated Payments

18. The Settlement Class consists of:

The 21,953 persons identified by the records of FiveStrata whose numbers were registered on the National Do-Not-Call Registry and such persons were called by FiveStrata allegedly on behalf of First American ("Settlement Class").

Settlement Agreement, Section 3.

19. Each member of the Settlement Class who submits a valid claim will receive significant relief under the terms of the settlement. Defendants, through Atticus, will create a settlement fund of \$700,000.00. No amount of this fund will revert to Defendants. Each class member who submits a valid claim will receive a *pro rata* share of the remaining fund after accounting for the cost of settlement administration, a representative service award and Plaintiff's counsel's attorneys' fees and reasonable litigation expenses. *Id.* at Section 8.

20. The Settlement Class members who do not opt out of the settlement will release Defendants (and those acting on their behalf) from certain past claims regarding any communications sent to, received or transmitted to them by or on behalf of Defendants (and those acting on their behalf). *See id.* at Section 19.

21. The parties' counsel have agreed to use Atticus to serve as the settlement administrator in this matter. Atticus prepared a bid for \$55,842.00 to administer the settlement as to the 21,953 class members. A copy of Atticus's bid is attached to this declaration as Exhibit A.

22. Counsel have worked with Atticus to develop a robust notice program with the goal of receiving as many claims as possible. This process includes mailing the class notice and claim form to the last known address of each putative class member, running the address through a national change of address database if the notice is undeliverable and resending the notice to the new address, to the extent such an address is available. In addition, the class notice and claim form will also be e-mailed to the last known e-mail address in the records of Defendant FiveStrata, LLC, to the extent available. In other words, many class members may receive notice in two forms so as to ensure they are notified of this settlement.

23. Atticus will also create and maintain a settlement website. The settlement website will include a copy of the operative complaint, settlement agreement, class notice, claim form and other documents relevant to the settlement. In addition, the settlement will contain important dates and deadlines and will also provide answers to common questions regarding the settlement. The website will also include contact information for Plaintiff's counsel and the settlement administrator. The website will also include the options to upload a claim form or to submit a claim directly through the website.

24. In addition, counsel have developed a claim process that is simple for the members of the settlement class. The class member simply needs to sign the claim form and verify their name, address, and the phone number at which they received the calls at issue. The claim form can also be submitted in a variety of ways – by mail, being uploaded through the settlement website or by submitting a claim directly on the settlement website.

25. I have been in direct contact with Chris Longley, the CEO of Atticus Administration, LLC (“Atticus”). Atticus has served as the settlement administrator for numerous class action settlements, including TCPA cases. Mr. Longley has advised me that an average claim rate in a TCPA case is 7-8% with a typical range of 5-10%. This is consistent with my own personal experience as well as with my review of certain TCPA cases. *See Vasco v. Power Home Remodeling Grp. LLC*, 2016 WL 5930876, at *12 (E.D. Pa. Oct. 12, 2016) (9% claim rate); *Lee v. Glob. Tel*Link Corp.*, 2018 WL 4625677, at *7 (C.D. Cal. Sep. 24, 2018) (1.8% claim rate); *Couser v. Comenity Bank*, 125 F. Supp. 3d 1034, 1044 (S.D. Cal. 2015) (7.7% claim rate).

26. Given this robust notice plan and the ease for claim submissions, I hope that the claims rate exceeds the typical claims rate in TCPA cases of 5-10%. As detailed further below, while counsel may seek up to \$233,333.33 in attorneys' fees plus their reasonable litigation

expenses, counsel will only be seeking \$195,000.00 in attorneys' fees, plus their reasonable litigation expenses of up to \$18,000.00. In addition, while the representative Plaintiff may seek up to \$6,000.00 for her service in this case, at the recommendation of Judge Rosen, she will only be seeking \$5,000.00. In addition, Atticus has agreed to administer the settlement amount for \$55,842.00.

27. The total of these amounts is \$273,842.00. After subtracting this amount from the \$700,000 settlement fund, this leaves a total of \$426,158.00 to pay class members' claims. At a claims rate of 20% (4,391 claims), each class member who submits a valid claim would receive a payment of \$97.05. At a claims rate of 15% (3,293 claims), each class member who submits a valid claim would receive a payment of \$129.41. At a claims rate of 10% (2,195 claims), each class member who submits a valid claim would receive a payment of \$194.15.

28. Given the robust notice plan, the ease of submitting claims, and the significant relief afforded, I am hopeful that the claim rate will exceed the average rate. As such, in the class notice we have advised that we estimate the payment for each person who submits a valid claim will be approximately \$110 (between a 15% and 20% claims rate). Of course, that amount may be more or less depending on the number of claims submitted.

29. Plaintiff's counsel strongly believe this is an excellent result for the putative class, particularly given the many risk factors discussed below.

Service Award and Class Counsel Fees and Expenses

30. Pursuant to the parties' agreement, subject to Court approval, Plaintiff may seek an award of up to \$6,000.00 for her service as the class representative and class counsel may seek up to \$233,333.33, plus their reasonable litigation expenses.

31. Plaintiff and her counsel, will, however, seek less than these amounts. Plaintiff will seek \$5,000.00 for her service as the class representative. Counsel will seek \$195,000.00 for their attorneys' fees and up to \$18,000.00 in reasonable litigation expenses. Counsel's litigation expenses may be less than \$18,000.00 at the time of final approval, but these amounts have yet to be finalized. To date, JAMS has billed Plaintiff's counsel \$11,698.96 for Judge Rosen's services in mediating this case, through September 29. It is possible JAMS will send another bill as Plaintiff's counsel has worked with Judge Rosen since September 29 to finalize the specific terms of the settlement agreement. In addition, counsel may incur additional expense for traveling to Detroit in the future in connection with this case. In short, at the time of final approval, Plaintiff's counsel will submit a final bill detailing their reasonable litigation expenses and will not seek more than \$18,000.00 for said expenses.

Factors Supporting Approval of the Settlement

32. The risk of continuing to pursue this case and not reaching a settlement was and remains substantial. The law is quickly-evolving in TCPA cases and courts often reach conflicting rulings regarding the issues presented in this case. Some of these risks are identified below.

33. First, while Plaintiff received calls on her cell phones despite her phone number being registered on the National Do-Not-Call Registry, some courts hold that cell phones are afforded the protections of the Do-Not-Call Registry, while other courts hold cell phones are not afforded such protections. *Compare Tessu v. AdaptHealth, LLC*, 2023 WL 5337121, at *5 (D. Md. Aug. 17, 2023) with *Cunningham v. Politi*, 2019 WL 2519702, at *4 (E.D. Tex. Apr. 26, 2019).

34. Second, Defendants provided information (albeit disputed) that Plaintiff and the putative class members each provided the requisite form of consent to be contacted. *See generally Herrick v. QLess, Inc.*, 216 F. Supp. 3d 816, 818 (E.D. Mich. 2016) (noting that under the TCPA,

advertising calls may be placed upon obtaining the recipient's prior express written consent to receive such calls). Had Defendants established consent, Plaintiff and the class members may not receive any recovery.

35. Third, and relatedly, class certification was not a certainty in light of the consent-related information provided by Defendants. *See Gordon v. Caribbean Cruise Line, Inc.*, 2019 WL 498937, at *10 (N.D. Ill. Feb. 8, 2019) (different proofs for different purported "consent" information creates various "mini-trials")

36. Fourth, there was no guarantee that Plaintiff would be able to establish Defendant First American was vicariously liable for the calls placed by Defendant FirstStrata. Courts have reached different results as to applicability of vicarious liability in TCPA cases. *Compare Williams v. PillPack LLC*, 644 F. Supp.3d 845, 851-56 (W.D. Wash. 2022) (genuine issue of material fact exists as to vicarious liability in TCPA case) *with Reo v. Caribbean Cruise Line, Inc.*, 2016 WL 1109042, at *5 (N.D. Ohio Mar. 18, 2016) (insufficient allegations of vicarious liability in TCPA case).

37. Finally, Defendant FiveStrata retained experienced and effective counsel in Herman D. Hoffman of Varnum LLP and Defendant First American retained experienced and effective counsel in Mark Silver of Dentons and Mike Turco of Brooks Wilkins Sharkey & Turco PLLC. Absent settlement, defense counsel would have continued to put forward several grounds for avoiding both liability and class certification. Indeed, Defendants already filed multiple motions to dismiss in the case and Defendant FiveStrata filed a motion to stay discovery.

38. Assuming *arguendo* that class certification could have been obtained and sustained over any appeals or decertification motions, the next hurdle would be to establish class-wide liability and damages.

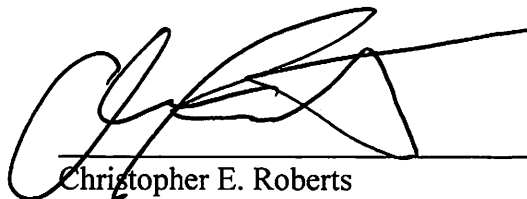
39. This settlement was not reached until Plaintiffs' counsel had conducted extensive analysis and investigation, thoroughly researched the law and facts, and assessed the risks of prevailing at both the district court and appellate levels, and the time and expense of doing so.

40. Plaintiff's counsels' analysis leads to the conclusion that the proposed settlement is a fair and reasonable result for the putative class. In the end, the risk assessment process conducted by counsel resulted in the conclusion that the proposed settlement is the best result for the class. This is true for several reasons, including the risk of losing at the class certification, liability, or damages stages, including on appeal.

41. Based upon these and other factors and considerations, I believe the settlement warrants preliminary approval.

As provided by 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: October 18, 2023



Christopher E. Roberts
croberts@butschroberts.com

EXHIBIT A

Atticus Administration, LLC
Chris Longley - CEO

Kimball v. Five Strata & First American

Prepared for

Christopher E. Roberts | Attorney
croberts@butschroberts.com
P: 314.863.5700

Butsch Roberts & Associates LLC
231 S. Bemiston Avenue, Suite 260
Clayton, MO 63105



Class Action Administration

Estimate E2023-09-E15
Kimball v. Five Strata & First American

Prepared on October 12, 2023
By Chris Longley – CEO | Atticus Administration LLC

Estimate Summary

Atticus Services & Cost Description

NOTICE MAILING-POSTCARD (Mailing First Class)	\$31,213
<i>Initial Notice – 7pg (includes a claim form)</i>	Included
<i>Undeliverables catalogued and skip-traced and re-mails</i>	Included
<i>Notice via Email (to all valid email addresses)</i>	Included
<i>English only</i>	Included
PROJECT MANAGEMENT/ADMIN FEES/Technical	\$5,400
CLAIMS - including cures	\$3,430
CAFA (full scope)	\$1,800
COMMUNICATIONS	\$4,974
<i>PO Box rental</i>	Included
<i>IVR and 800#, Live phone operators (claims period)</i>	Included
<i>Correspondence including call backs, Opt-Outs, Exclusions</i>	Included
<i>Website – claims filing capability & court documents</i>	Included
FUND, TAX, EMPLOYMENT REPORTING	\$1,560
<i>setup QSF, file annual tax returns</i>	included
DISTRIBUTION	\$7,465
<i>Digital disbursements and check printing (or vouchers), payment calculation & verification, bank fees, check reissues</i>	included

TOTAL: \$55,842

Key Assumptions

- Class Size: **22,000 class members.**
- Notices in English only – 7-page packet (includes a claim form). Notices also sent via Email.
- Data review, cleansing and preparing file for mailing; including NCOA,
- Undeliverable mail skip-traced and remailed for new address 'hits'.
- Includes full scope CAFA.
- Communications includes PO box rental and correspondence. Also includes dedicated 800# with IVR and live operator coverage.
- Case website to host all court documents including long-form notice. Website will also have claims filing functionality.
- Live operator phone coverage through claims period.
- Distribution sent to all class members that file a valid claim.
- Digital Disbursement (5 different options) encouraged. Otherwise, checks sent for distribution.

Options

- Addition of enhanced search/skip tracing services, an additional [range of] \$850 to \$2,400.

PRINT NAME

ROLE

Client Signature

Date

By signing above, I understand and agree to the pricing terms and services to be provided by Atticus Administration for the stated project.

Payment Terms:

40% at Notice
Final 60% at Distribution

PLEASE NOTE: *This estimate and pricing is for the services stated herein and is valid for 30 days from the date of the estimate. If the Settlement Agreement or other service scope document(s) require additional services not included or priced in this estimate, we will separately price those scope changes and submit an updated quote prior to proceeding with the work.*



Detailed Budget

Atticus Services & Cost Description

DESCRIPTION		UNITS		SUBTOTAL
NOTICE MAILING (Data Cleansing & Analysis) Mailed First Class		22,000	Class Mbrs	\$31,213
<i>Class Data List - Cleaning & Processing</i>		24.00	Hrs	\$2,964
<i>Class Notice Review - Proof/Finalize/Print Set-Up</i>		5.00	Hrs	\$618
<i>PRINTING Class Notice 7-page Notice</i>		22,000	postcards	\$9,724
<i>Postage Stamp (within 1 ounce max weight)</i>		22,000	ct to mail	\$12,590
<i>Email Notice</i>		22,000	ct to email	\$969
<i>Undeliverable/ NCOA /Return Mail Processing & Remail (7%)</i>		1,540	7% of class	\$1,627
<i>Notice Request Re-Mailing</i>		660	3% of class	\$2,723
PROJECT MANAGEMENT		37	hrs	\$4,995
TECHNICAL SET UP (includes project kick-off)		3	hrs	\$405
CAFA (50 states + applicable territories)				\$1,800
CLAIMS (including cures)		1,540	7%	\$3,430
COMMUNICATIONS - English only				\$4,974
<i>Telephone - Set-Up + Monthly Fee</i>		6 Months		\$285
<i>Website (interactive)</i>		6 Months		\$2,500
<i>Telephone - Messages/IVR live operators</i>		6 Months		\$1,160
<i>PO Box - Setup & Monthly Fee</i>		6 Months		\$100
<i>Correspondence - Mail Telephone call backs</i>		various		\$930
FUND, TREASURY & TAX Reporting				\$1,560
<i>Set-Up QSF</i>		4.00	Hrs	\$520
<i>Prepare/File Annual Fund Return</i>		8.00	Hrs	\$1,040
DISTRIBUTION, Payment Calculations & Reporting				\$7,465
<i>Cover Letter & Check - Design/Review/Finalize</i>		4.00	Hrs	\$494
<i>Payment Data - Calculate & Verify Payments</i>		14.00	Hrs	\$1,729
<i>Prepare Payment Reports + check reissues</i>		12.00	Hrs	\$1,482
<i>Check - Print Set-up/Printing/Mail Prep + replacements</i>		1,540	checks	\$1,091
<i>Check Mailing Postage (will be 1x mailings)</i>		1,540	mailed	\$922
<i>Check - Undeliverable/ NCOA /Return Mail Processing & Remail</i>		154	10.0% est	\$963
<i>Bank Fees (Account Set-Up & Monthly Fee)</i>		9	months	\$784
DATA STORAGE		n/a		\$0
		TOTAL		\$55,842

Operating Assumptions

- Class Size: **22,000 - class members.**
- Class Notice, 7-page long-form includes a claim form. Notices also sent via Email (to all valid email addresses).
- Notice in English only.
- Claims rate anticipated at 7%.
- Includes full CAFA filings.
- Data review, cleansing, NCOA and preparing file for mailing. Returned or undeliverable mail will be skip-traced.
- Communications includes, PO BOX, Mail Correspondence. Also includes dedicated 800# and IVR. Live operator phone coverage during claims period.
- Project management assumes 68 hours at a blended rate of \$135 per hour. Includes summary reporting on a weekly basis.
- Qualified Settlement fund assumes 6 months. Price includes tax reporting both state and federal returns. All bank fees are included in pricing.
- Disbursement includes positive pay "anti-fraud" features.
- Digital payments options available upon request.



Thank you



Chris Longley – CEO

612-315-9007 (Direct)
651-755-2552 (Cell)
clongley@atticusadmin.com

1250 Northland Drive Suite 240
Mendota Heights MN 55120

EXHIBIT 3

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

MARCIA KIMBLE, *individually, and
on behalf of all others similarly
situated,*

Plaintiff,

v.

FIRST AMERICAN HOME
WARRANTY CORP. and
FIVESTRATA LLC,

Defendants.

Case. No. 2:23-cv-10037-DML-EAS

District Judge David M. Lawson

Magistrate Judge Elizabeth A.
Stafford

**DECLARATION OF JACOB U. GINSBURG IN SUPPORT OF
PLAINTIFF’S UNOPPOSED MOTION FOR PRELIMINARY
APPROVAL OF CLASS SETTLEMENT**

I, Jacob U. Ginsburg, Esq., hereby declare as follows:

1. I am an adult resident of the Commonwealth of Pennsylvania.
2. I have personal knowledge of the statements made in this declaration.
3. I am of sound mind and am otherwise competent to make this declaration.
4. I am counsel for the Plaintiff, Marcia Kimble, in this matter.
5. I submit this Declaration in support of Kimble’s unopposed motion for preliminary approval of class settlement.

Professional Background

6. I am a 2011 graduate of Temple University School of Law, where I was a Deans' List student and Articles Editor of the Temple International and Comparative Law Journal.

7. I have been licensed to practice law before the Supreme Court of Pennsylvania since 2011, the Supreme Court of New Jersey since 2011 and the Supreme Court of Michigan since 2020. I am a member in good standing in each of those jurisdictions.

8. I have been admitted to practice law in the United States District Court for the Eastern District of Pennsylvania since 2011; the U.S. District Court for the District of New Jersey since 2011; the U.S. District Court for the Western District of Pennsylvania since 2011; the U.S. District Court for the District of New Jersey since 2011; the U.S. District Court for the Middle District of Pennsylvania since 2016; the U.S. District Court for the Eastern District of Michigan since 2018; the U.S. District Court for the Northern District of Ohio since 2019; the U.S. District Court for the Eastern District of Texas since 2020; the U.S. District Court for the Eastern District of Wisconsin since 2021; the U.S. District Court for the Northern District of Texas since 2021; the U.S. District Court for the Southern District of Texas since 2021; the U.S. District Court for the Southern District of Indiana since 2021; the U.S. District Court for the Eastern District of Arkansas since 2021; the

U.S. District Court for the Western District of Arkansas since 2021; the U.S. District Court for the Northern District of Illinois since 2021; the U.S. District Court for the Western District of Texas since 2021; the Ninth Circuit Court of Appeals since 2022; the Third Circuit Court of Appeals since 2022 and the U.S. District Court for the District of Colorado since 2023.

9. I have never had my license suspended or been subject to any disciplinary proceedings.

10. For most of the time I have been an attorney, my practice has consisted of representing consumers in various types of consumer protection litigation.

11. I have argued, arbitrated and tried cases to verdict under various state consumer protection statutes, the Fair Debt Collection Practices, the Magnuson-Moss Warranty Improvement Act, and the Telephone Consumer Protection Act (“TCPA”).

12. I have represented hundreds of plaintiffs in claims asserted under the TCPA in federal court and private arbitration. Several recent notable TCPA decisions on matters I have argued, tried and/or briefed follow below:

- Successfully appealed a district court’s dismissal of a TCPA claim for lack of standing, to the Ninth Circuit, where a 3-0 panel expanded Article III standing to subscribers who are not the “customary user” of a given phone registered on the Do-Not-Call Registry. *Hall v. Smosh Dot Com, Inc.*, 72 F.4th 983 (9th Cir. 2023);
- Obtained a unanimous jury verdict for a plaintiff with claims under the federal do-not-call rules, despite the fact he used his phone for business purposes.

Noviello v. Adam Wines Consulting, LLC, 3:22-cv-52-BN (ECF 74); *See also Noviello v. Holloway Funding Grp., No. 3:22-cv-52-BN*, 2023 WL 128395 2023 U.S. Dist. LEXIS 3060 (N.D. Tex. Jan. 9, 2023) (overcoming summary judgment earlier in same case); and,

- Successfully argued that text messages offering to buy a home could constitute the “solicitations” as defined by the TCPA, even though the texting party was offering to buy, rather than sell property. *Pepper v. GVG Capital LLC*, No. H-22-2912, 2023 U.S. Dist. LEXIS 100425, 2023 WL 3914291 (S.D. Tex. June 9, 2023).

13. I am a member in good standing of National Association of Consumer Advocates.

In August 2016, I taught a seminar with the National Business Institute on the FDCPA, the Truth-in-Lending Act and Consumer Financial Protection Bureau’s regulations as they relate to mortgage foreclosures. NATIONAL BUSINESS INSTITUTE, *Foreclosure Bootcamp: FDCPA, TILA and CFPB Regulations as to Foreclosures* (Sonesta Hotel, Philadelphia, PA, (Aug. 2, 2016).

The Kimble Litigation

14. In December 2022, I first spoke with Marcia Kimble, who advised she believed she had a case against First American Home Warranty Corp. and was interested in pursuing a lawsuit and wished to be represented by my firm.

15. Ms. Kimble maintained very detailed records, including screenshots, notes and recordings. Ultimately, Ms. Kimble produced a call recording neither

Defendant produced, which helped to significantly advance the case and move the case toward a resolution.

16. After speaking with Ms. Kimble at length, learning of her background in public service and carefully reviewing the documentation and records she provided, I discussed with her the possibility of pursuing the case as a class-action. Ms. Kimble expressed eagerness serve as a class representative.

17. I filed suit against First American on January 6, 2023. ECF 1.

18. In late January 2023, I had preliminary discussions with Mark Silver, counsel for First American, about the case.

19. In February and early March of 2023, Mr. Silver and I worked on a joint discovery plan, where First American proposed bifurcated discovery and I maintained that “class” and “merits” discovery could not reasonably be severed. ECF 11.

20. On March 20, 2023, counsel for the parties convened in Detroit for a Rule 16 scheduling conference before the Court. I appeared for Kimble. Mr. Silver and his co-counsel Mike Turco, appeared on behalf of First American. ECF entry 3/20/2023.

21. At the conference, the Court indicated it would be antithetical to judicial economy to attempt to stratify “class” discovery from “merits” discovery and ordered the parties to proceed with discovery generally. ECF 14.

22. When Mr. Silver disclosed the initial call(s) to Kimble were dialed by a vendor of First American, I indicated Kimble would like to file an Amended Complaint, which included that vendor as a co-defendant.

23. The Court Ordered the Amended Complaint be filed shortly after Rule 26(a) Disclosures were exchanged, so information learned from the disclosures could be included in the First Amended Complaint. *See* ECF 14.

24. First American then disclosed that its vendor that dialed Marcia Kimble was FiveStrata. First American also produced its contract with FiveStrata and several recordings it had.

25. On April 6, 2023, I filed a First Amended Complaint naming FiveStrata as a Co-Defendant. ECF 16.

26. Shortly thereafter, Herman Hofman entered an appearance for FiveStrata. ECF 21.

27. After discussions with both Defendants, we stipulated to Plaintiff filing a Second Amended Complaint, which included additional information learned and more detailed allegations, with the Defendants being afforded additional time to file a responsive pleading. ECF 30; 32.

28. On June 7, 2023, I served interrogatories and requests for production on First American, seeking information about the number of persons called by FiveStrata on its behalf, and the number of persons First American directly called,

as well as information about purported “consent” and other defenses it raised, and inquiries about the telemarketing campaign launched by the Defendants.

29. On June 28, 2023, after FiveStrata filed a responsive pleading, I served FiveStrata with = interrogatories and requests for production of documents.

30. In early July 2023, it became apparent that FiveStrata sought to bifurcate discovery, notwithstanding the Court’s scheduling order and that FiveStrata was not agreeable to producing “class” discovery.

31. I wrote correspondence to the Court about this impasse on July 13, 2023. ECF 33.

32. The next day FiveStrata filed a formal motion to bifurcate. ECF 34.

33. On July 19, 2023, the Parties appeared in Detroit for an in-person conference about the discovery impasse and disagreement about mediation. ECF July 19, 2023.

34. After the Court directed the Parties to schedule mediation and reiterated discovery would not be bifurcated, the Parties agreed to an in-person class-based mediation with retired Judge Gerald E. Rosen on September 21, 2023.

35. In the weeks leading up to mediation, counsel for the Parties held several phone and Zoom conferences, where we discussed how to efficiently produce class information and data.

36. In those conferences we also discussed the parameters of mediation.

37. Ms. Kimble attended several telephone conferences with my co-counsel Chris Roberts and I, in order to prepare for mediation.

38. We had several conference calls with Judge Rosen in anticipation of mediation.

39. On August 24, 2023, Herman Hofman produced the data FiveStrata had reflecting the 21,953 numbers on the do-not-call registry called by FiveStrata as well as an initial settlement offer.

40. We also conveyed a settlement demand to both Defendants.

41. On September 21, 2023 I appeared with Marcia Kimble and Chris Roberts before Judge Rosen.

42. After a full day mediation, the Parties agreed on the mediator's recommended terms, of a \$700,000 non-reversionary *pro rata* settlement. I was pleased with the result, and Marcia Kimble accepted upon the recommendation of myself, my co-counsel and Judge Rosen.

43. After mediation, the Parties and Judge Rosen had numerous calls and a zoom session to discuss the fine details of the settlement, administration and the mechanics of filing the preliminary approval motion.

44. I believe this settlement is in the best interest of the class, given the excellent per claimant recovery. That is especially true given the risk, difficulties and delay that comes from protracted class litigation.

I Jacob U. Ginsburg hereby declare the foregoing is true and correct subject to the penalties of perjury.



JACOB U. GINSBURG

Dated: October 18, 2023

EXHIBIT 4

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

MARCIA KIMBLE, *individually, and
on behalf of all others similarly
situated,*

Case. No. 2:23-cv-10037-DML-EMS

Plaintiff,

District Judge David M. Lawson

v.

FIRST AMERICAN HOME
WARRANTY CORP. and
FIVESTRATA LLC,

Defendants. /

DECLARATION OF MARCIA KIMBLE

I, Marcia Kimble, hereby declare the following under the penalty of perjury:

1. I am an adult citizen of the State of Michigan.
2. I am over the age of 18 and am fully competent to make this declaration.
3. I have personal knowledge of all statements made in this declaration.
4. I am the Plaintiff and putative class-representative in the above-captioned matter.
5. I am not related to my counsel, nor am I related to any person associated with either of the Defendants, First American Home Warranty or FiveStrata.

6. I am a resident of Detroit, Michigan, where I have lived for most of my life, since childhood.

7. I graduated from Detroit Martin Luther King, Jr. High School in 1981 and the Detroit Business Institute in 1987, where I obtained a certificate in marketing and management.

8. In my professional career, I worked for public and non-profit institutions, including the Volunteers of America, Detroit Medical Center and the Detroit Housing Commission.

9. I currently serve on the board of the Charlevoix Village Association, through which I advocate to the City of Detroit on behalf of residents of my neighborhood.

10. At all times relevant to this matter, I was (and still am) the owner, subscriber and primary user of a telephone with the number (313) xxx-4318.

11. In pursuit of this case, I gathered screenshots and recordings, as well as other documents, which I provided to my attorneys in order to file this lawsuit.

12. Given my interest and background in public service, the role of class-representative in a consumer-protection matter appealed to me. Therefore, I embraced the opportunity to file this case as a class-action and serve as class representative.

13. While this suit was pending, I communicated frequently and regularly with my attorneys, answered their questions and participated in the various aspects of litigation.

14. In July of 2023, I learned that the case would go to mediation in September 2023 with retired Judge Rosen of JAMS.

15. In the weeks leading up to the mediation, I provided my lawyers information to assist them with preparing a mediation statement and conferred with my counsel about a possible class settlement.

16. I also had multiple conferences with my lawyers to prepare for the mediation.

17. I appeared in-person for mediation at JAMS in Detroit on September 21, 2023.

18. I arrived at mediation at 8:30 a.m. (thirty minutes before the 9:00 am start time) and stayed until after 5:30 p.m., once the parties had agreed to the terms of the settlement.

19. I participated in each step of the mediation, including answering questions from Judge Rosen, and fought to obtain the best possible result for class members.

20. Finally, toward the end of mediation, the Defendants agreed to pay a total of \$700,000.00 to resolve this case.

21. After consulting with my attorneys, and, at the recommendation of Judge Rosen during mediation, I accepted that offer, which I believe to be a fair and positive outcome for class members.

22. Since mediation, I have communicated regularly with my attorneys regarding the negotiations about the release/agreement language.

23. I will continue to stay in touch with my counsel and make myself available to assist with the prosecution of this case.

I, Marcia Kimble, hereby certify and declare under penalty of perjury the foregoing is true and correct.

Date: *Oct. 13, 2023*


MARCIA KIMBLE