

**IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA**

CASE NO. 2022-CA-010840-O

ALEJANDRO BORGES,
*individually and on behalf of all others
similarly situated,*

Plaintiff,

v.

SMILEDIRECTCLUB, LLC

Defendant.

_____ /

CLASS ACTION

JURY TRIAL DEMANDED

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

Plaintiff Alejandro Borges, on behalf of himself and all members of the Settlement Class, and Defendant SmileDirectClub, LLC (“Defendant”) (collectively, the “Parties”) reached a Settlement through arm’s-length negotiations with the help of experienced mediator, Lance A. Harke. Under the Settlement, subject to the terms and conditions therein and subject to Court approval, Plaintiff and the proposed Settlement Class will fully, finally, and forever resolve, discharge, and release their claims.

The Settlement has been filed with the Court, and Plaintiff and Class Counsel have filed an Unopposed Motion for Preliminary Approval of Class Settlement. Upon considering the Motion, the Settlement and all exhibits thereto, the record in these proceedings, the representations and recommendations of counsel, and the requirements of law, the Court finds that: (1) this Court has jurisdiction over the subject matter and the Parties to this Action; (2) the proposed Settlement Class meets the requirements of Florida Rule of Civil Procedure 1.220 and should be preliminarily certified for settlement purposes only; (3) the persons and entities identified below should be

preliminarily appointed Class Representative and Class Counsel; (4) the Settlement appears to be the result of informed, good-faith, arm's-length negotiations between the Parties and their capable and experienced counsel, and there is no evidence of collusion in the record; (5) the Settlement is within the range of reasonableness and should be preliminarily approved; (6) the proposed Notice program and proposed forms of Notice satisfy Florida Rule of Civil Procedure 1.220 and constitutional due process requirements, and are reasonably calculated under the circumstances to apprise the Settlement Class of the pendency of the Action, class certification, the terms of the Settlement, Class Counsel's application for an award of Attorneys' Fees and Expenses ("Fee Application") and request for Service Award for Plaintiff, and their rights to opt-out of the Settlement Class or object to the Settlement, Class Counsel's Fee Application, and/or the request for Service Award for Plaintiff; (7) good cause exists to schedule and conduct a Final Approval Hearing, to assist the Court in determining whether to grant Final Approval of the Settlement and enter the Final Approval Order, and whether to grant Class Counsel's Fee Application and request for Service Award for Plaintiff; and (8) the other related matters pertinent to the Preliminary Approval of the Settlement should also be approved.

Based on the foregoing, **IT IS HEREBY ORDERED AND ADJUDGED** as follows:

1. As used in this Preliminary Approval Order, unless otherwise noted, capitalized terms shall have the definitions and meanings accorded to them in the Settlement.
2. The Court has jurisdiction over the subject matter and Parties to this proceeding pursuant to Florida Rule of Civil Procedure 1.220 and Fla. Stat. § 26.012(2).
3. Venue is proper in this Court.

Provisional Class Certification and Appointment of Class Representative and Class Counsel

4. It is well established that “[a] class may be certified solely for purposes of settlement [if] a settlement is reached before a litigated determination of the class certification issue.” *Borcea v. Carnival Corp.*, 238 F.R.D. 664, 671 (S.D. Fla. 2006) (internal quotation marks omitted). In deciding whether to provisionally certify a settlement class, a court must consider the same factors it would consider in connection with a proposed litigation class—i.e., all Fla. R. Civ. P. 1.220(a) factors and at least one subsection of Rule 1.220(b)—except that the Court need not consider the manageability of a potential trial, since the settlement, if approved, would obviate the need for a trial. *Id.*; see also *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

5. The Court finds, for settlement purposes, that the Florida Rule of Civil Procedure 1.220 factors are present and that certification of the proposed Settlement Class is appropriate under Rule 1.220. The Court therefore provisionally certifies the following Settlement Class.

(i) All persons in Florida who (ii) were sent a text message regarding Defendant’s goods or services utilizing the same equipment used to send a text message to Plaintiff, (iii) between July 1, 2021 and the date of Preliminary Approval and (iv) whose telephone numbers are identified on the Class List provided to the Class Administrator.

The Settlement Class excludes the following: (1) the trial judge presiding over this case; (2) Defendant, as well as any parent, subsidiary, affiliate, or control person of Defendant, and the officers, directors, agents, servants, or employees of Defendant; (3) any of the Released Parties; (4) the immediate family of any such person(s); (5) any Settlement Class Member who has timely opted out of this proceeding; and (6) Plaintiff’s Counsel, their employees, and their immediate family.

6. Specifically, the Court finds, for settlement purposes and conditioned on final certification of the proposed class and on the entry of the Final Approval Order, that the Settlement

Class satisfies the following factors of Florida Rule of Civil Procedure 1.220:

(a) Numerosity: In the Action, approximately 21,000 individuals are members of the proposed Settlement Class. The proposed Settlement Class is thus so numerous that joinder of all members is impracticable.

(b) Commonality: “[C]ommonality requires the plaintiff to demonstrate that the class members ‘have suffered the same injury,’” and the plaintiff’s common contention “must be of such a nature that it is capable of classwide resolution, meaning that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (citation omitted); *see also Sosa v. Safeway Premium Fin. Co.*, 73 So. 3d 91, 107 (Fla. 2011) (“The primary concern in the consideration of commonality is whether the representative’s claim arises from the same practice or course of conduct that gave rise to the remaining claims and whether the claims are based on the same legal theory.”). Here, the commonality requirement is satisfied. Multiple questions of law and fact centering on Defendant’s class-wide practices are common to the Plaintiff and the Settlement Class, are alleged to have injured all members of the Settlement Class in the same way, and would generate common answers central to the viability of the claims were this case to proceed to trial.

(c) Typicality: The Plaintiff’s claims are typical of the Settlement Class because they concern the same alleged Defendant’s practices, arise from the same legal theories, and allege the same types of harm and entitlement to relief. Rule 1.220(a)(3) is therefore satisfied. *See Sosa*, 73 So. 3d at 114 (typicality satisfied where “the class representative possesses the same legal interest and has endured the same legal injury as the class members”).

(d) Adequacy: Adequacy under Rule 1.220 relates to: (1) whether class counsel possesses the necessary “qualifications, experience, and ability” to conduct the litigation; and (2) whether the class representative’s interests are antagonistic to the interests of the class members. *Id.* at 115. Here, adequacy is satisfied because there are no conflicts of interest between the Plaintiff and the Settlement Class, and Plaintiff has retained competent counsel to represent them and the Settlement Class. Class Counsel regularly engage in consumer class litigation, complex litigation, and other litigation similar to this Action, and have dedicated substantial resources to the prosecution of the Action. Moreover, the record appears to reflect that Plaintiff and Class Counsel have adequately and competently represented the Settlement Class in the Action. *See generally Lyons v. Georgia-Pacific Corp. Salaried Employees Rel. Plan*, 221 F.3d 1235, 1253 (11th Cir. 2000).

(e) Predominance and Superiority: Rule 1.220 is satisfied because the common legal and alleged factual issues here predominate over individualized issues, and resolution of the common issues for the members of the Settlement Class in a single, coordinated proceeding is superior to thousands of individual lawsuits addressing the same legal and factual issues. With respect to predominance, under Rule 1.220(b)(3), “a class representative establishes predominance if he or she demonstrates a reasonable methodology for generalized proof of class-wide impact[,]” meaning that “by proving his or her own individual case, necessarily proves the cases of the other class members.” *Sosa*, 73 So. 3d at 112. This does not mean that all issues or elements of a cause of action are subject to common proof, but merely that “some questions are common, and that they predominate over individual questions.” *Id.* Here, common questions present a significant aspect of the case and can be resolved for all members of the Settlement Class in a single adjudication. In a liability

determination, those common issues would predominate over any issues that are unique to individual members of the Settlement Class. Moreover, superiority of class treatment is clearly established because: (i) given the relatively small amount of per-claimant damages (\$500.00), class litigation is the only economically viable form of adjudication, (ii) individually litigating and incurring the expenses necessary to do so is not economically justifiable, (iii) class treatment of this litigation is manageable. *Id.* at 116 (explaining that the factors relevant to the superiority analysis are “(1) whether a class action would provide the class members with the only economically viable remedy; (2) whether there is a likelihood that the individual claims are large enough to justify the expense of separate litigation; and (3) whether a class action cause of action is manageable.”).

7. The Court appoints Plaintiff as the Class Representative.

8. The Court appoints the following attorneys and firms as Class Counsel: Scott A. Edelsberg of Edelsberg Law, P.A.; Andrew J. Shamis of Shamis & Gentile, P.A.; Manuel S. Hiraldo of Hiraldo, P.A.; and Jacob Phillips of Normand PLLC.

9. The Court recognizes that Defendant reserves all defenses and objections against and rights to oppose any request for class certification in the event that the proposed Settlement does not become Final for any reason. Defendant also reserves its defenses to the merits of the claims asserted in the event the Settlement does not become Final for any reason.

Preliminary Approval of the Settlement

10. At the preliminary approval stage, the Court’s task is to evaluate whether the Settlement is within the “range of reasonableness.” 4 *Newberg on Class Actions* § 11.26. “Preliminary approval is appropriate where the proposed settlement is the result of the parties’ good faith negotiations, there are no obvious deficiencies and the settlement falls within the

range of reason.” *Smith v. Wm. Wrigley Jr. Co.*, 2010 WL 2401149, at *2 (S.D. Fla. Jun. 15, 2010). Settlement negotiations that involve arm’s length, informed bargaining with the aid of experienced counsel support a preliminary finding of fairness. *See Manual for Complex Litigation*, Third, § 30.42 (West 1995) (“A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm’s-length negotiations between experienced, capable counsel after meaningful discovery”) (internal quotation marks omitted).

11. The Court preliminarily approves the Settlement as fair, reasonable, and adequate. There is no evidence in the record of collusion, and the Settlement appears to be the product of informed, good-faith, arm’s-length negotiations between the Parties with the benefit of capable and experienced counsel. The Court further finds that the Settlement, including the exhibits thereto, is within the range of reasonableness and possible judicial approval, such that: (a) a presumption of fairness is appropriate for the purposes of preliminary settlement approval; and (b) it is appropriate to effectuate notice to the Settlement Class, as set forth below and in the Settlement, and schedule a Final Approval Hearing to assist the Court in determining whether to grant Final Approval to the Settlement and enter a Final Approval Order.

Approval of Class Notice and the Claims Process

12. The Court approves the form and content of the Class Notice, substantially in the forms attached to the Settlement, as well as the Claim Form attached thereto. The Court further finds that the Class Notice program described in the Settlement is the best practicable under the circumstances. The Class Notice program is reasonably calculated under the circumstances to inform the Settlement Class of the pendency of the Action, certification of a Settlement Class, the terms of the Settlement, Class Counsel’s Fee Application and the request for Service Award for Plaintiff, and their rights to opt-out of the Settlement Class or object to the Settlement. The

Class Notice constitutes sufficient notice to all persons entitled to notice. The Class notices and Class Notice program satisfy all applicable requirements of law, including, but not limited to, Florida Rule of Civil Procedure 1.220 and constitutional due process requirements.

13. Kroll Settlement Administration shall serve as the Administrator.

14. The Administrator shall implement the Class Notice program, as set forth below and in the Settlement, using the Class notices substantially in the forms attached to the Settlement and approved by this Preliminary Approval Order. Notice shall be provided to the members of the Settlement Class pursuant to the Class Notice program, as specified in the Settlement and approved by this Preliminary Approval Order. The Class Notice program shall include the Notice, the Long-Form Notice, and Settlement Website, as set forth in the Settlement and below.

Notice

19. The Administrator shall administer Notice as set forth in the Settlement.

Settlement Website

24. The Administrator shall establish a Settlement Website as a means for Settlement Class members to obtain notice of, and information about, the Settlement. The Settlement Website shall be established as soon as practicable following Preliminary Approval, but no later than before commencement of the Class Notice program. The Settlement Website shall include the Settlement, the Long-Form Notice, the Preliminary Approval Order, and other such documents as Class Counsel and counsel for Defendant agrees to include. These documents shall remain on the Settlement Website until 14 days following the distribution of Claim Settlement Checks.

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

Final Approval Hearing, Opt-Outs, and Objections

26. A Final Approval Hearing shall be held before this Court via Webex videoconference on **June 20, 2023 at 9:30 a.m.** to determine whether to grant Final Approval to the Settlement and to enter a Final Approval Order, and whether Class Counsel's Fee Application and request for Service Awards for the Class Representative should be granted.

The following instructions shall be used to access the hearing:

Link for videoconference:

<https://ninthcircuit.webex.com/meet/ctjuvf1>

Join by phone

to be used only in the event of technical difficulties with videoconference

+1-904-900-2303 United States Toll (Jacksonville)

+1-408-418-9388 United States Toll

Access code: 179 341 6555

All parties should connect to the videoconference at least five (5) minutes before the scheduled hearing time. The Court will connect at the time of the hearing.

Witnesses wishing to testify must have with them government-issued identification so that an oath can be administered remotely.

Any exhibits to be offered at the hearing must be submitted in compliance with the Division 39 Procedures applicable to remote evidentiary hearings.

27. Any person within the Settlement Class who wishes to be excluded from the Settlement Class may exercise their right to opt-out of the Settlement Class by following the opt-out procedures set forth in the Settlement and in the Notices at any time during the Opt-Out Period. To be valid and timely, opt-out requests must be sent to Class Counsel or the Administrator and postmarked on or before the last day of the Opt-out Period, as set forth in the Agreement. No mass or class opt outs are permitted.

28. Any Settlement Class Member may object to the Settlement, Class Counsel's Fee Application, or the request for Service Award for Plaintiff. Any such objections must be mailed to

the Clerk of the Court, Class Counsel, and Defendant's Counsel, at the addresses indicated in the Long-Form Notice. For an objection to be considered by the Court, the objection must be postmarked no later than the deadline as set forth in the Agreement and which shall be identified in the Notice forms. No mass or class objections are permitted.

29. To be valid, an objection must include the following information:

- a. the name of the Action;
- b. the objector's full name, address, and telephone number;
- c. an explanation of the basis upon which the objector claims to be a Settlement Class Member, including the telephone number at which the message(s) at issue were received;
- d. all grounds for the objection, accompanied by any legal support for the objection known to the objector or his counsel;
- e. the number of times in which the objector has objected to a class action settlement within the five years preceding the date that the objector files the objection, the caption of each case in which the objector has made such an objection, and a copy of any orders related to or ruling upon the objector's prior such objections that were issued by the trial and appellate courts in each listed case;
- f. the identity of all counsel who represent the objector, including any former or current counsel who may be entitled to compensation for any reason related to the objection to the Settlement or Fee Application;
- g. a copy of any orders related to or ruling upon counsel's or the counsel's law firm's prior objections made by individuals or organizations represented by the counsel or the counsel's law firm(s) that were issued by the trial and appellate courts in each listed

- case in which the objector's counsel and/or counsel's law firm have objected to a class action settlement within the preceding five years;
- h. any and all agreements that relate to the objection or the process of objecting— whether written or oral—between objector or objector's counsel and any other person or entity;
 - i. the identity of all counsel (if any) representing the objector who will appear at the Final Approval Hearing;
 - j. a statement confirming whether the objector intends to personally appear and/or testify at the Final Approval Hearing;
 - k. a list of all persons who will be called to testify at the Final Approval Hearing in support of the objection; and
 - l. the objector's signature (an attorney's signature is not sufficient).

Further, any Settlement Class Member who files and serves a written objection in accordance with the Settlement and this Section may appear, in person or by counsel, at the Final Approval Hearing, to show cause why the Settlement should not be approved as fair, adequate, and reasonable, but only if the objecting Settlement Class Member: (a) files with the Court a Notice of Intention to Appear meeting the requirements set forth in the Settlement ; and (b) serves the Notice of Intention to Appear on Class Counsel and Counsel for Defendant by the deadline set forth in the Agreement and which shall be identified in the Notice forms.

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

30. Plaintiff and Class Counsel shall file their Motion for Final Approval of the Settlement, Fee Application and request for Service Awards for Plaintiff, no later than 15 days before the Final Approval Hearing.

31. Plaintiffs and Class Counsel shall file their responses to timely filed objections to

the Settlement, the Fee Application and/or request Service Awards for Plaintiff no later than 15 days before the Final Approval Hearing.

Effect of Failure to Approve Settlement

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

(a) All orders and findings entered in connection with the Settlement shall become null and void and have no further force and effect, shall not be used or referred to for any purpose whatsoever, and shall not be admissible or discoverable in any other proceeding;

(b) Nothing in this Preliminary Approval Order is, or may be construed as, any admission or concession by or against Defendant or Plaintiff on any point of fact or law; and

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

Stay/Bar of Other Proceedings

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

37. Based on the foregoing, the Court sets the following schedule for the Final Approval

Hearing and the related actions which must take place:

| <u>Event</u> | <u>Date</u> |
|------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------|
| Deadline for sending the First Email Notice | January 30, 2023 |
| Deadline for filing Motion for Final Approval of the Settlement and Class Counsel's Fee Application and expenses, and for Service Awards | June 5, 2023 |
| Deadline for opting-out of the Settlement and for submission of Objections | March 16, 2023 |
| Deadline for Responses to Objections | June 5, 2023 |
| Final Approval Hearing | June 20, 2023 at 9:30 a.m. |
| Last day Class Claimants may submit a Claim Form | May 10, 2023 |

DONE and ORDERED at Miami, Florida, this 30th day of December, 2022.



eSigned by Vincent Falcone III 12/30/2022 08:26:37 ysJstBx+

Vincent Falcone III
Circuit Judge

Copies furnished to: Counsel of Record