IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

JAMES BULL, on behalf of himself and others similarly situated,	)	
Plaintiff,	)	Case No. 1:14-cv-05789
v.	)	Judge Rebecca R. Pallmeyer
US COACHWAYS, INC.,	)	Magistrate Judge Daniel G. Martin
Defendant.	)	

PLAINTIFF'S MEMORANDUM IN SUPPORT OF HIS UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND FOR CONDITIONAL CERTIFICATION OF A SETTLEMENT CLASS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Regulations

Other Authorities

I. INTRODUCTION

After over a year of litigation, discovery, and numerous arm's-length negotiations between counsel, Plaintiff James Bull and Defendant US Coachways, Inc. ("US Coachways") have reached a proposed class action settlement of this matter, brought pursuant to the Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(3) and §227(c)(5). Discovery in the action, along with a report prepared by Plaintiff's expert witness Jeffrey Hansen, revealed that as part of its marketing of its charter bus services, US Coachways sent text messages without the prior express consent of the recipients promoting its services. Mr. Hansen's analysis identified 391,459 violative text messages, yielding potential exposure for US Coachways of $195,729,500.

Prior to its marketing efforts, US Coachways obtained an insurance policy from Illinois Union Insurance Company ("Illinois Union") which the parties believe provides insurance coverage for the claims set forth in this action. During this litigation, US Coachways twice tendered the claim to Illinois Union, and Plaintiff's counsel twice demanded that Illinois Union participate in this action, and also invited them to participate in settlement discussions. In spite of this massive exposure, and plain coverage for the claims at issue, Illinois Union declined coverage and refused to provide US Coachways with a defense, and even misstated the terms of its insurance policy in attempting to justify its denial.

Given Illinois Union's recalcitrance, Plaintiff's counsel engaged in settlement discussions with counsel for US Coachways without Illinois Union's participation. The negotiations resulted in the proposed Settlement under which US Coachways assigns its rights against Illinois Union to Plaintiff and the Class and agreeing to entry of a consent judgment for $49,932,375 enforceable only against Illinois Union, with US Coachways contributing $50,000 which shall be

applied toward the cost of notice.[1] As is set forth more fully below, Plaintiff and his counsel will then pursue an action against Illinois Union seeking to collect on that judgment. In the event of recovery, the funds from such an action will be deposited into a settlement fund, with distributions from the Settlement Fund to be approved by this Court. Plaintiff respectfully submits that given that US Coachways has limited financial resources, this settlement represents the best opportunity for the class to obtain a recovery, and meets all of the requirements for the Court's approval under Rule 23(b)(3).[2]

II. NATURE OF THE CASE

US Coachways is motor coach short term leasing company. In order to drive repeat business and secure new business, US Coachways began sending blast text messages in 2011 to individuals who had booked past trips as well as and individuals who had asked for quotes over the telephone, but decided to not book trips. In order to do this, US Coachways used a marketing platform, Gold Mobile. The Gold Mobile marketing platform allows customers to load lists of cellular telephone numbers and design the content of a text message that is then automatically sent to the entire list.

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1 All capitalized terms not defined herein have the meanings set forth in the Parties' Class Action Settlement Agreement ("Agr."), attached as Exhibit 1.

2 Although US Coachways does not oppose Plaintiff's Motion, its non-opposition is for purposes of settlement only. The Parties have agreed that the settlement is entered into for purposes for resolving any and all disputes between Defendant, Plaintiff and the Class. The Parties have agreed that if the Settlement is not finally approved, the settlement is null and void and may not be used by any party for any purpose, including any representations made in the settlement and the Affidavit of Edward Telmany provided in connection with this settlement. *See* Settlement Agreement at ¶ 2.

Plaintiff and his counsel thoroughly investigated the facts and law underlying the claims asserted in this action, and engaged in comprehensive discovery. (*See Broderick Decl.* at ¶10, attached as Exhibit 2.) Plaintiff requested and US Coachways produced data and documents regarding the claims of Plaintiff and the class. Plaintiff served a subpoena to Gold Mobile, and litigated a separate discovery action in the United States District Court for the District of New Jersey, *Gold Group Enterprises, Inc. d/b/a Gold Mobile v. James Bull*, Civil Action No. 2:14-cv-07410, over the enforcement of that subpoena. That discovery action yielded production of the business records of Gold Mobile, including the records of texting that Plaintiff used to identify the members of the proposed class. *Broderick Decl.* at ¶11.

The amount of text messages sent in this matter is staggering. An example of the privacy invasions caused by this marketing is indicated in the Plaintiff's own experience with US Coachways. Over the course of three years, the Plaintiff received more than 20 unsolicited text message advertisements. This type of marketing, along with e-mail solicitations, are the two largest forms of marketing engaged in by US Coachways. As their CEO commented in a June 2014 e-mail, "Every month we do an email blast to almost 300,000 customers and text blast to almost 90,000 customers." *Broderick Decl.* at ¶12.

The TCPA places restrictions on computer-generated telemarketing calls to cell phones. The general rule is that no person may make a call to a cellular telephone using an automatic telephone dialing system, period. 47 U.S.C. § 227(b)(1)(A)(iii). There is an affirmative defense available if the caller can show that it had the "prior express consent" of the call recipient to receive the call. *Id*. "Prior express consent" exists where a consumer has (a) clearly stated that

the telemarketer may call, and (b) clearly expressed an understanding that the telemarketer's subsequent call will be made for the purpose of encouraging the purchase of goods or services. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 F.C.C.R. 1830 ¶ 7 (FCC 2012).

Courts have explained that, "prior express consent" means that a caller is "not permitted to make an automated call to [an individual's] cell phone unless [that individual] had previously said to [the caller]…something like…: 'I give you permission to use an automatic telephone dialing system to call my cellular phone." *Edeh v. Midland Credit Mgmt., Inc.,* 748 F. Supp. 2d 1030, 1038 (D. Minn. 2010) aff'd, 413 F. App'x 925 (8th Cir. 2011); *Thrasher-Lyon v. CCS Commercial, LLC,* No. 11-cv-04473, 2012 WL 3835089, at *3 (N.D. Ill. 2012). Just last year, the FCC, at the request of the United States Courts of Appeals for the Second Circuit, provided further guidance regarding consent for entities to use an autodialer to call cellular telephones, as is alleged here. Courts in the district have interpreted this Order consistent with protecting the privacy rights of call recipients. In *Kolinek v. Walgreen Co.*, 2014 U.S. Dist. LEXIS 91554 (N.D. Ill. July 7, 2014), Judge Kennelly held:

> The FCC has established no general rule that if a consumer gives his cellular phone number to a business, she has in effect given permission to be called at that number for any reason at all, absent instructions to the contrary. Rather, to the extent the FCC's orders establish a rule, it is that the scope of a consumer's consent depends on its context and the purpose for which it is given. Consent for one purpose does not equate to consent for all purposes.
>
> This, in the Court's view, is a more natural reading of the TCPA's exception for a call "made with the prior consent of the called party."

Id. at *10-11. As another Court held, "the FCC's final orders are binding on this court under the Hobbs Act." *Griffith v. Consumer Portfolio Servs., Inc*., 838 F.Supp.2d 723, 726 (N.D. Ill. 2011). Here, US Coachways has failed to obtain the requisite consent to send these individuals the text messages. In fact, US Coachways, after being compelled in this case, confirmed that it did not have any evidence of consent to send the text messages at issue. *Broderick Decl.* at ¶ 12.

Grafting phone numbers from prior customers and sending them illegal text messages is a common tactic, but one which clearly violates the TCPA. In 2012, a Jiffy Lube franchisee agreed to pay $47,000,000 to resolve a text message marketing suit after it took cellular telephone numbers from old invoices and the customer database at a number of its Jiffy Lube locations. *See In re Jiffy Lube International, Inc. Text Spam Litigation*, United States District Court for the Southern District of California, Civil Action No. 11-md-02261, (final approval granted on February 20, 2013). Here, US Coachways violation of the law was not limited to interactions with prior customers, but also to individuals, such as the Plaintiff, who had never actually entered into a transaction with US Coachways, but merely obtained a quote.

The TCPA creates a private cause of "action to receive $500 in damages for each such violation." *See* 47 U.S.C. § 227. Here, Plaintiff's expert Jeffrey Hansen has provided the following analysis of ATDS generated text messages sent by US Coachways to members of the proposed class.

> Total messages sent between '2011-11-09' and '2012-11-08': 205,564
> Total messages sent between '2012-11-09' and '2013-11-08': 89,344
> Total messages sent between '2013-11-09' and '2014-11-08': 96,551

Mr. Hansen's analysis identified 391,459 violative text messages, as US Coachways has not provided any evidence of prior express consent to place the ATDS texts to cell phones, yielding exposure for US Coachways of $195,729,500. *Broderick Decl.* at ¶13. In the face of this level of exposure, given US Coachways inability to satisfy a judgment, Plaintiff and his counsel submit that a consent judgment leaving the class to pursue recovery against Illinois Union, the only economically rational choice for the proposed class. *Id.*

III. APPLICABLE INSURANCE

Effective November 9, 2013 to November 9, 2014, Illinois Union/ACE issued a miscellaneous Professional Liability Policy No. G24011999 007 ("the Policy"). The Policy covers TCPA claims under the "Personal Injury Offense" section of the policy, which states, *inter alia*:

> L. **Personal Injury Offense** means one or more of the following offenses:
> ….
> 4. publication or an utterance in violation of an individual's right to privacy

Courts across the United States, including a number of those litigated by Plaintiff's counsel, have repeatedly recognized that the privacy invasion coverage afforded by insurance policies extends to invasions of privacy prohibited by the TCPA, including in New York, where this policy was issued. *See Tower National Insurance Company v. National Business Capital, Inc. and 3081 Main Street, LLC /d/b New England Wine and Spirits*, 2014 N.Y. Misc. LEXIS 3414 ** 9-13 (NY Supreme Court July 28, 2014)(finding coverage under NY law); *Park University*

Enterprises, Inc. v. American Casualty Company of Reading, Pennsylvania, 442 F.3d 1239, 1243 (10th Cir. 2006) (Kansas law) *Valley Forge Insurance Co. v. Swiderski Electronics, Inc.*, 860 N.E.2d 307, 317 (Ill. 2006); *Pekin Insurance Co. v. XData Solutions, Inc*, 958 N.E.2d 397, 401-03 (Ill. App. 1 Dist. 2011) (same); *Owners Ins. Co. v. European Auto Works, Inc.*, 695 F.3d 814, 818-22 (8th Cir. 2012); *Hooters of Augusta, Inc. v. American Global Ins. Co.*, 157 F. App'x 201, 206-07 (11th Cir. 2005) (Georgia law); *Western Rim Inv. Advisors, Inc. v. Gulf Ins. Co.*, 96 F. App'x 960 (5th Cir. 2004), *affg*, 269 F. Supp. 2d 836 (N.D. Tex. 2003); *Sawyer v. West Bend Mut. Ins. Co.*, 821 N.W.2d 250, 257-58 (Wis. App. 2012); *Penzer v. Transportation Ins. Co.*, 29 So.3d 1000, 1006-07 (Fla. 2010); *Terra Nova Ins. Co. v. Fray-Witzer*, 869 N.E.2d 565, 572-74 (Mass. 2007).

After service of this lawsuit, US Coachways tendered the Action to Illinois Union seeking coverage under the Insurance Policy. Illinois Union denied the claim and refused to provide US Coachways with a defense in the action. On December 14, 2014, Plaintiff filed an Amended Complaint in the action. US Coachways again tendered the Action to Illinois Union seeking coverage and again Illinois Union denied either a defense or indemnity by letter dated January 13, 2015. There is no TCPA exclusion in the policy and Illinois Union's denial from its January 13, 2015 denial letter is based solely on its position that the Plaintiff's claim does not relate to the "performance of Insured's services as a bus charter broker "for a fee." (A copy of the January 13, 2015 denial letter as Exhibit A to the *Broderick Decl*.) Illinois Union's position would apparently convert the policy into an auto liability policy. As explained above, marketing

and customer retention are a vital part of the US Coachways business model, and is how US Coachways performs services as a bus charter broker for a fee.

In addition, the Illinois Union policy contains at page 21 a "Travel Agent's Endorsement" changing the definition of "Professional Services":

> 2. Section II, Definitions, is amended as follows:
>
> a. The following definition is added:
>
> • Travel Agency Operations shall mean services necessary or incidental to the conduct of travel agency business including the procurement or attempted procurement for a fee or commission of travel, lodging, or guided tour accommodations, or counseling or offering recommendations concerning such accommodations.
>
> b. Subsection P, the definition of Professional Services, is amended by adding the following:
>
> Professional Services also means Travel Agency Operations performed for others by an Insured or by any other person or entity for whom the Insured is legally liable.

This amendment broadens the scope of "Professional Services" from just "solely in performance of a bus charter" to "services necessary or incidental to the conduct of travel agency business…" which clearly encompasses the marketing at issue in this case.

On July 23, 2015, counsel for Plaintiff sent a demand letter to Illinois Union, setting forth the facts of the case, Plaintiff's basis for liability and the potential exposure to US Coachways. *See Broderick Decl.* at ¶15. In that demand, Plaintiff requested that Illinois Union engage in mediation, and asked for a response within 30 days. Plaintiff further cautioned that failing to engage in such mediation would constitute an unfair insurance settlement practice and that Plaintiff would pursue an assignment of rights under the Insurance Policy.

On August 24, 2015, through outside counsel, Illinois Union sent a letter denying coverage, failing to cite the amended definition of Professional Services which includes "Travel Agency Operations" and declining Plaintiff's invitation to engage in mediation over the case. The August 24, 2015 denial letter failed to cite the broadened definition of Professional Services. *See* Letter from Richard W. Boone, Jr. to Edward A. Broderick, attached to the *Broderick Decl.* *See Broderick Decl.* at ¶16.

Plaintiff's counsel and US Coachways believe that US Coachways is entitled to insurance coverage under the Illinois Union Insurance Policy. *See* Exhibit 3, *Declaration of Edward Telmany* at ¶20 and *Broderick Decl.* at ¶17. US Coachways shared two years of audited financial statements with counsel for Plaintiff which confirmed for Plaintiff's counsel that US Coachways was unable to financially satisfy a judgment in this action. *Telmany Decl*. at ¶19; *Broderick Decl.* ¶18.

IV. THE PROPOSED SETTLEMENT

A. The Settlement Class

The proposed Settlement would establish a "Settlement Class" for settlement purposes only, defined as:

> All persons within the United States who received one or more text message advertisements on behalf of US Coachways, Inc. at any time in the four years prior to the filing of the Complaint continuing through the date of this Settlement Agreement.

(Agr. ¶ 10).

B. Settlement Relief

1. Class Member Relief: Consent Judgment

The proposed Settlement establishes a Consent Judgment in the amount of $49,932,375, with US Coachways assigning its rights against Illinois Union to contributing $50,000 which will be used to pay for notice and administrative costs. The balance of the Judgment will be satisfied from a subsequent action to enforce against Illinois Union which will be brought by Plaintiff and his counsel on behalf of the class. In the event of recovery against Illinois Union, whether via a litigated resolution or settlement, any sums recovered will be deposited into the Settlement Fund, and only distributed after approval from this Court.

In the event of recovery from Illinois Union, Plaintiff's counsel anticipates seeking distribution of (1) cash settlement awards to Settlement Class Members; (2) Settlement Administration Expenses; (3) a court-approved incentive award of $15,000 to the Class Representative; and (4) court-approved attorney's fees of up to one-third of the total amount of the Settlement Fund, in addition to out of pocket expenses. (Agr. ¶¶ 4-7, 12.)

In the event of recovery from Illinois Union, each Settlement Class Member, *without* having to submit a claim, will receive a *pro rata* share of the Settlement Fund after the deduction of the amount for Settlement Administration Expenses, attorneys' fees and costs to Class Counsel, and any incentive award. The settlement represents $125 per alleged violation. (*Broderick Decl.* ¶19.) The Settlement provides for a further *pro rata* distribution of any amount remaining amount remaining in uncashed settlement distribution checks, to the extent administratively feasible. (Agr. ¶ 12.)

2. Class Representative Incentive Award

If approved by the Court, each Plaintiff will receive an incentive award of $15,000 from the Settlement Fund, in lieu of any payments on claims to which he might otherwise be entitled as a Settlement Class Member under the Settlement. (Agr. ¶ 12.) This award will compensate Plaintiff for his time and effort and for the risk he undertook in prosecuting this case.

3. Attorneys' Fees and Costs

Before the hearing on final approval of the settlement, Class Counsel will apply to the Court for an award of attorneys' fees in the amount of up to one-third of the total amount of the Settlement Fund, in addition to out of pocket expenses. (Agr. ¶ 10.) As Class Counsel will address in their fee application, an award of attorneys' fees and costs will compensate Class Counsel for the work already performed in relation to the settled claims, as well as the remaining work to be performed in documenting the Settlement, securing Court approval of the Settlement, making sure the Settlement is fairly implemented, and obtaining dismissal of the action.

C. Notice and Settlement Administration

All Settlement Administration Expenses will be paid from the Settlement Fund. (Agr. ¶ 4, 12.) The Parties have agreed upon, and propose that the Court approve, the nationally-recognized class action administration firm Kurtzman Carson Consultants LLC ("KCC") to be the Settlement Administrator (Agr. ¶ 4), and to implement the Notice Plan and administer the Settlement, subject to review by counsel. The Settlement Administrator's duties will include: (1) sending notice via email, with follow up notice via postcard to individuals on the Class List who are not reachable by e-mail, (2) responding to inquiries regarding the process from persons in the

Settlement Class; and (3) issuing settlement payments after any recovery from Illinois Union and approval of such distributions by this Court. (Agr. ¶¶ 3, 4, 14.)

The Settlement Administrator will send an email notice with the full notice, which will also be posted on a case-specific website, and will send direct postcard notice via the U.S. Postal Service, substantially in the form attached as Exhibit 2 to the Settlement Agreement, to a Settlement Class Member whose email address is undeliverable. (Agr. ¶ 3.). The Settlement Administrator also will administer a Settlement Website, substantially in the form of Exhibit 4 to the Settlement Agreement, through which Settlement Class Members will be obtain further details and information about the Settlement, including reviewing the Parties' Stipulation of Settlement.

Because this proposed settlement and payment process is simple and anticipates a non-reversionary Settlement Fund, it does not suffer from the infirmities identified in *Pearson v. NBTY, Inc.*, 772 F.3d 778, 782-83 (7th Cir. 2014), *Redman v. RadioShack Corp.*, 768 F.3d 622 (7th Cir. 2014) cert. denied sub nom. *Nicaj v. Shoe Carnival, Inc.*, 135 S. Ct. 1429 (2015), or *Eubank v. Pella Corp.*, 753 F.3d 718, 719 (7th Cir. 2014). Indeed, there is no claims process at all: each and every class member that does not opt out of the settlement will receive a settlement check from any recovery from Illinois Union.

After preliminary approval, the notice regime outlined here will be effectuated, providing class members the opportunity to exclude themselves. Participation requires no claim form; everyone who does not opt out will be sent a check. As is the normal course, the Court will consider any objections and review exclusions, as well as determine attorney's fees, costs and all

other necessary items at the final approval hearing. After the final approval hearing, each class member that did not opt out will be eligible to receive a check for the *pro rata* share of the any recovery from Illinois Union after court-approved fees, costs, service payment and administrative costs have been deducted.

D. Opt-Out and Objection Procedures

Persons in the Settlement Class will have the opportunity to exclude themselves from the Settlement or object to its approval. (Agr. ¶¶ 19, 20) The procedures and deadlines for filing opt-out requests and objections will be conspicuously listed in the Notices and on the Settlement Website. The Notice informs Settlement Class Members that they will have an opportunity to appear and have their objections heard by this Court at a Final Approval Hearing. The Notice also informs Settlement Class Members that they will be bound by the the Settlement Agreement unless they timely exercise their opt-out right.

V. ARGUMENT

A. The Settlement Approval Process

Federal courts strongly favor and encourage settlements, particularly in class actions and other complex matters, where the inherent costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *Armstrong v. Bd. of Sch. Dirs. of the City of Milwaukee*, 616 F.2d 305, 312–13 (7th Cir. 1980) (noting that "[i]n the class action context in particular there is an overriding public interest in favor of settlement") (citations, quotations, and internal marks omitted), *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998); *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996)

("Federal courts naturally favor the settlement of class action litigation."); *see also* 4 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* ("Newberg") § 11:41 (4th ed. 2002) (citing cases). The traditional means for handling claims like those at issue here — individual litigation — would unduly tax the court system, require a massive expenditure of public and private resources and, given the relatively small value of the claims of the individual Settlement Class Members, would be impracticable. Thus, the proposed Settlement is the best vehicle for Settlement Class Members to receive relief in a prompt and efficient manner.

A court may approve a class action settlement if it is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). A proposed class settlement is presumptively fair where it "is the product of arm's length negotiations, sufficient discovery has been taken to allow the parties and the court to act intelligently, and counsel involved are competent and experienced." Newberg § 11.41; *Am. Int'l Grp., Inc. v. ACE INA Holdings*, Nos. 07-2898, 09-2026, 2012 WL 651727, at *2 (N.D. Ill. Feb. 28, 2012) ("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.") (quotation and internal citation omitted).

Approval of a class action settlement is a two-step process. *Armstrong*, 816 F.2d at 314. At the preliminary approval stage, the question for this Court is whether the settlement falls "within a range of possible approval" and therefore warrants dissemination of notice apprising class members of the proposed settlement. *Id.* If the Court preliminarily approves the class action settlement, it then proceeds to the second step in the review process – the fairness hearing. *Id.*; *Manual for Complex Litig.* § 21.633 (4th ed. 2004).

In assessing the fairness, reasonableness and adequacy of a settlement, courts view the facts in the light most favorable to the settlement. *Isby*, 75 F.3d at 1199. The Court "should not substitute [its] own judgment as to the optimal settlement terms for the judgment of the litigants and their counsel." *Armstrong*, 616 F.2d at 315. To evaluate fairness at the preliminary approval stage, courts consider the following factors: (1) the strength of the case for plaintiff on the merits, balanced against the amount offered in settlement; (2) the complexity, length and expense of the litigation; (3) the presence of collusion in reaching a settlement; and (4) the stage of the proceedings and the amount of discovery completed. *Synfuel Techs., Inc.*, 463 F.3d at 653; *see also Armstrong*, 616 F.2d at 314; *Isby*, 75 F.3d at 1199.

As set forth in the following, the settlement here warrants preliminary approval so that persons in the Settlement Class can be notified of the settlement and provided an opportunity to voice approval or opposition.

B. The Settlement Merits Preliminary Approval

1. The Proposed Settlement Provides Substantial Relief to the Settlement Class Particularly in Light of the Uncertainty of Recovery Absent the Agreement

a. *Benefits to the Class*

"The most important factor relevant to the fairness of a class action settlement is the first one on the list: the strength of the plaintiffs' case on the merits balanced against the amount offered in the settlement." *Synfuel Techs., Inc.*, 463 F.3d at 653. Nevertheless, "[b]ecause the essence of settlement is compromise, courts should not reject a settlement solely because it does

not provide a complete victory to plaintiffs." *In re AT&T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 347 (N.D. Ill. 2010) (citations omitted).

The Settlement Agreement provides for a consent judgment in the amount of $49,932,375, which in light of US Coachways' inability to satisfy a judgment, offers the only practical avenue to recovery for the proposed class. Courts readily recognize the validity of an assignment against an insurer who has wholly refused to defend its insured, or to even participate in settlement negotiations:

> When an insurer breaches its duty to defend or indemnify its insured, it's not just any breach of contract. An insurer's breach abandons its insured and deprives it of the peace of mind it has bought. Moreover, most contract law assumes that the victim of a seller's breach can "cover" for the breach by buying a substitute product or service. That assumption does not apply to a liability insurer's breach. There is no market for insuring risks already realized. Once a claim for potential loss is known, no other insurer will step up to provide coverage at a reasonable premium. The abandoned insured is left truly on its own.

CE Design Ltd. v. King Supply Co., 791 F.3d 722, 727 (7th Cir. Ill. 2015) (Hamilton, J. concurring). Judge Hamilton continues in a footnote:

> For that reason, courts generally provide fairly light scrutiny to settlements like this one, in which the abandoned insured makes a deal with the injured plaintiffs for a modest payment from the insured with perhaps much more to come from the insurer, typically by means of a covenant not to execute or an assignment of available insurance proceeds to the plaintiffs, if coverage can be shown. See, e.g., Home Federal Savings Bank v. Ticor Title Ins. Co., 695 F.3d 725, 736 (7th Cir. 2012); Cincinnati Ins. Co. v. Young, 852 N.E.2d 8, 14 (Ind. App. 2006); Midwestern Indemnity Co. v. Laikin, 119 F. Supp. 2d 831, 838-42 (S.D. Ind. 2000); Frankenmuth Mutual Ins. Co. v. Williams, 690 N.E.2d 675, 679 (Ind. 1997); United Services Automobile Ass'n v. Morris, 154 Ariz. 113, 741 P.2d 246, 253-54 (Ariz. 1987); Miller v. Shugart, 316 N.W.2d 729, 733-35 (Minn. 1982); Restatement (Second) of Judgments § 57 (1982). For the Illinois standard regarding the reasonableness of such settlements, see Guillen ex rel. Guillen v. Potomac Ins. Co. of Illinois, 203 Ill. 2d 141, 785 N.E.2d 1, 14, 271 Ill. Dec. 350

(Ill. 2003).

Id. at 727, fn. 1.

Plaintiff acknowledges that the $49,932,375 Settlement Fund does not constitute the full measure of damages potentially available to Settlement Class Members, who theoretically could recover up to $500 in statutory damages for each violation of the TCPA if they were to prevail in litigation, less fees and costs. *See* 47 U.S.C. § 227(c)(5) (permitting up to $500 in statutory damages for each TCPA violation). This fact alone, however, should not weigh against preliminary approval. "Because settlement of a class action, like settlement of any litigation, is basically a bargained exchange between the litigants, the judiciary's role is properly limited to the minimum necessary to protect the interests of the class and the public. Judges should not substitute their own judgment as to optimal settlement terms for the judgment of the litigants and their counsel." *Armstrong*, 616 F.2d at 315. The proposed settlement merits approval as it represents an excellent recovery for the class, balanced against the uncertainties of continued litigation. *See Amadeck v. Capital One Fin. Corp. (In re Capital One Tel. Consumer Prot. Act Litig.)*, 80 F. Supp. 3d 781, 789-790 (N.D. Ill. 2015)(Holderman, CJ)(granting final approval to settlement yielding $2.72 per class member and $34.60 per class members that filed claims).

b. *The Strength of Plaintiff's Case*

Plaintiff continues to believe that his claims against US Coachways have merit, and that they could make a compelling case if tried. Nevertheless, Plaintiff's claims would face a number of difficult challenges if the litigation were to continue. Apart from the numerous affirmative

defenses asserted in its Amended Answer and Affirmative Defenses (Dkt. No. 42), US Coachways has vigorously litigated its defense of the action.

In addition, at least some courts view awards of aggregate, statutory damages with skepticism and reduce such awards — even after a plaintiff has prevailed on the merits — on due process grounds. *See, e.g., Aliano v. Joe Caputo & Sons – Algonquin, Inc.*, No. 09-910, 2011 WL 1706061, at *4 (N.D. Ill. May 5, 2011) ("[T]he Court cannot fathom how the minimum statutory damages award for willful FACTA violations in this case — between $100 and $1,000 per violation — would not violate Defendant's due process rights …. Such an award, although authorized by statute, would be shocking, grossly excessive, and punitive in nature."); *but see Phillips Randolph Enters., LLC v. Rice Fields*, No. 06-4968, 2007 WL 129052, at *3 (N.D. Ill. Jan. 11, 2007) ("Contrary to [defendant's] implicit position, the Due Process Clause of the 5th Amendment does not impose upon Congress an obligation to make illegal behavior affordable, particularly for multiple violations.").

The Settlement provides substantial relief to Settlement Class Members without delay and is within the range of reasonableness, particularly in light of the above risks that Settlement Class Members would face in litigation.

2. Continued Litigation Is Likely to Be Complex, Lengthy, and Expensive

Litigation would be lengthy and expensive if this action were to proceed. Although the Parties have conducted substantial discovery, extensive motion work, including finishing the briefing of motions for class certification and summary judgment, remain. Realistically, it could be a year before the case would proceed to trial. The appeals process may further delay any

judgment in favor of Settlement Class Members. The Settlement avoids these risks and provides a faster avenue to recovery for the Settlement Class Members. *See, e.g., Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 586 (N.D. Ill. 2011) (citation omitted) ("Settlement allows the class to avoid the inherent risk, complexity, time, and cost associated with continued litigation.").

3. The Settlement Resulted from Extensive, Arm's-Length Negotiations and Is Not the Result of Collusion

The requirement that a settlement be fair is designed to prevent collusion among the parties. *Mars Steel Corp. v. Cont'l Ill. Nat'l. Bank & Trust Co. of Chicago*, 834 F. 2d 677, 684 (7th Cir. 1987) (approving settlement upon a finding of no "hanky-panky" in negotiations). There is an initial presumption that a proposed settlement is fair and reasonable when it was the result of arm's-length negotiations. Newberg, *supra*, § 11:42; *see also Am. Int'l Grp.*, 2012 WL 651727, at *10.

Here, the proposed settlement was negotiated at arms-length between competent counsel for both parties. *Broderick Decl.* at ¶20. Plaintiff's counsel are particularly experienced in the litigation of nationwide class action cases, particularly under the TCPA. In negotiating this Settlement, putative Class Counsel had the benefit of years of experience with class actions in general and a familiarity with the facts of this case in particular. The fact that Plaintiffs achieved an excellent result for the Settlement Class despite facing significant procedural and substantive hurdles is a testament to the non-collusive nature of the Settlement.

4. The Stage of the Proceedings and the Amount of Discovery Completed Supports Preliminary Approval

The Parties have engaged in substantial, substantive discovery, permitting a thorough analysis of the factual and legal issues involved in this matter. *Id.* Settlement negotiations have been at arms-length based on a well-developed factual record.

C. Plaintiffs' Requested Fees Are Reasonable

Putative Class Counsel intend to seek an award not to exceed one third of the ultimate recovery from Illinois Union. Plaintiff and his counsel will pursue recovery from Illinois Union at their own expense. The anticipated fee request is reasonable under the circumstances of this case. In the Seventh Circuit, "courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time." *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 718 (7th Cir. 2001) (citing cases); s*ee also Pearson v. NBTY, Inc.*, 772 F.3d 778, 782 (7th Cir. 2014) ("[A]ttorneys' fees awarded to class counsel should not exceed a third or at most a half of the total amount of money going to class members and their counsel.").

Prior to any distribution out of recovered funds from Illinois Union putative Class Counsel will file a separate motion for approval of all distributions, including an award of attorneys' fees and costs, addressing in greater detail the facts and law supporting their fee request in light of all of the relevant facts.

D. The Requested Incentive Award Is Reasonable

Incentive awards for class representatives like the one requested here are appropriate. Such awards, which serve as premiums in addition to any claims-based recovery from the

settlement, promote the public policy of encouraging individuals to undertake the responsibility of representative lawsuits. *See Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (approving incentive award of $25,000); *see also* Manual for Complex Litig. Fourth Ed., Federal Judicial Center, § 21.62, n. 971 (2004) (incentive awards may be "merited for time spent meeting with class members, monitoring cases, or responding to discovery"). Such awards are generally proportional to the representative's losses or claims, and can range from several hundred dollars to many thousands of dollars.

Here, Plaintiff's requested incentive award of not more than $15,000 is appropriate. Unlike unnamed persons in the Settlement Class, who will enjoy the benefits of the Class Representative's efforts without taking any personal action, as well as Plaintiff's continued efforts to recover on behalf of the Class from Illinois Union.

E. The Proposed Class Notice Satisfies Due Process

Rule 23(e)(1) requires the Court to "direct notice in a reasonable manner to all class members who would be bound by" a proposed settlement. Fed. R. Civ. P. 23(e)(1); *see also* Manual for Complex Litig., *supra*, at § 21.312. The best practicable notice is that which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). According to the Manual for Complex Litigation, § 21.312, a settlement notice should do the following:

- Define the class;

- Describe clearly the options open to the class members and the deadlines for taking action;
- Describe the essential terms of the proposed settlement;
- Disclose any special benefits provided to the class representatives;
- Indicate the time and place of the hearing to consider approval of the settlement, and the method for objecting to or opting out of the settlement;
- Explain the procedures for allocating and distributing settlement funds, and, if the settlement provides different kinds of relief for different categories of class members, clearly set out those variations;
- Provide information that will enable class members to calculate or at least estimate their individual recoveries; and
- Prominently display the address and phone number of class counsel and the procedures for making inquiries.

The proposed Notice, attached as Exhibits 2-3 to the Settlement Agreement, satisfies all of the above criteria. The Notice is clear, straightforward, and provides persons in the Settlement Class with enough information to evaluate whether to participate in the Settlement. The Notice therefore satisfies the requirements of Rule 23. *See F.C.V., Inc. v. Sterling Nat'l. Bank*, 652 F. Supp. 2d 928, 944 (N.D. Ill. 2009) (Rule 23(b)(3) class) (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808 (1985)) (explaining that a settlement notice must provide settlement class members with an opportunity to present their objections to the settlement).

The Settlement Agreement provides for direct notice via email with supplemental notice via U.S. Mail to any non-deliverable email addresses. To supplement this notice, the Settlement Administrator will create a Settlement Website where Settlement Class Members may obtain additional relevant information about the Settlement.

This Notice Plan satisfies due process, especially because Rule 23 does not require that each potential class member receive actual notice of the class action. A court must simply make certain that class members receive "the best practicable notice that is: 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" *F.C.V., Inc.*, 652 F. Supp. 2d at 944 (Rule 23(b)(3) class) (quoting *Shutts*, 472 U.S. at 808). Plaintiffs respectfully submit that the notice plan proposed here website easily satisfies both Rule 23 and Due Process. *Amadeck v. Capital One Fin. Corp. (In re Capital One Tel. Consumer Prot. Act Litig.)*, 80 F. Supp. 3d 781, 789-790 (N.D. Ill. 2015)(Holderman, CJ)(granting final approval to settlement in which notice was disseminated via email with follow up postcards to class members without available email addresses—Settlement Agreement filed at under Civil Action No. 1:12-cv-10064, Docket No. 131-1); *see also Van Tassell v. United Marketing Group*, Northern District of Illinois, 1:10-cv-02675, Docket No. 109, (Castillo, J.) (approving notice via email with postcard supplementation—settlement at Docket No. 106-1)

The Notice Plan constitutes the best notice practicable under the circumstances, provides due and sufficient notice to the Settlement Class, and fully satisfies the requirements of due process and Federal Rule of Civil Procedure 23.

F. The Court Should Grant Class Certification for Settlement Purposes

For settlement purposes only, Plaintiff respectfully requests that the Court provisionally certify the Settlement Class defined as:

> All persons within the United States who received one or more text message advertisements on behalf of US Coachways, Inc. at any time in the four years prior to the filing of the Complaint continuing through the date of this Settlement Agreement.

(*See* Agr. ¶ 10.) As detailed below, the Settlement Class meets all of the requirement of Rule 23.

Class certification is proper if Plaintiffs satisfy the requirements of Rule 23(a) and one of the prongs of Rule 23(b). *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012). Rule 23(a) requires Plaintiffs to establish "'numerosity, commonality, typicality, and adequacy of representation.'" *Kleen Products LLC v. Int'l Paper*, 306 F.R.D. 585, 589 (N.D. Ill. 2015) (quoting *Messner*, 669 F.3d at 811). In this case, Plaintiff seeks certification under Rule 23(b)(3), which "requires the court to find[ ] that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy," *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 759 (7th Cir. 2014) (quoting the Rule) (internal quotation marks omitted).

The purpose of Rule 23 is to provide for the efficient administration of justice, as the class action mechanism allows large numbers of claims involving the same core issues to proceed in the aggregate, providing a path to relief where otherwise there would be none. "Class actions serve an important function in our system of civil justice." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981); Wright, *et al.*, 7A *Fed. Practice & Proc.* § 1751 (3d ed. 2010). In class actions such as this one, the alternative to certification is reaping the benefits of illegal calls with impunity. *See Mullins v. Direct Digital, LLC*, 795 F.3d 654, 658 (7th Cir. 2015).

1. The Rule 23(a) Factors Are Met

a. *The Class Is Sufficiently Numerous and Joinder Is Impracticable*

A plaintiff does not need to "specify the exact number of persons in the class, … but cannot rely on conclusory allegations that joinder is impractical or on speculation as to the size of the class in order to prove numerosity." *Marcial v. Coronet Ins. Co.*, 880 F.2d 954, 957 (7th Cir. 1989) (internal citations omitted). The Seventh Circuit has implied that even a class of forty may be sufficient to warrant class certification. *See Pruitt v. City of Chicago*, 472 F.3d 925, 926 (7th Cir. 2006) (noting that "[s]ometimes 'even' 40 plaintiffs would be unmanageable"). Numerosity is determined prior to any consideration of whether a particular class member has a valid claim. *See Parko v. Shell Oil Co.*, 739 F.3d 1083, 1084 (7th Cir. 2014) ("How many (if any) of the class members have a valid claim is the issue to be determined *after* the class is certified.") (emphasis in original).

In this case, there were 391,459 calls to 143,514 unique telephone numbers that comprise the Class List. This more than establishes that "joinder of all members is impractical." Fed. R. Civ. P. 23(a)(1). Numerosity is satisfied.

b. *The Settlement Class Shares Many Common Issues of Law and Fact*

"One of the requirements for a class action in federal court is the existence of 'questions of law or fact common to the class.'" *Suchanek*, 764 F.3d at 755 (quoting Fed. R. Civ. P. 23(a)(2)). "Where the same conduct or practice by the same defendant gives rise to the same kind of claims from all class members, there is a common question." *Id.* at 756 (citing *Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010)). "The Supreme Court has explained that

'for purposes of Rule 23(a)(2) even a single common question will do.'" *Id.* at 755 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556 (2011)). Here, every class member's claims arise from the same common nucleus of operative facts, *i.e.*, the defendant and its agent sent a text promoting US Coachways to market its services. Similarly, every class member has an interest in the same overarching question of law, *i.e.*, whether US Coachways violated the TCPA by allowing its agents and their vendors to make these calls, and accepting the benefits of such calls. On these issues alone, a class is appropriate. Additionally common questions of law and fact include:

- Is US Coachways vicariously or directly liable under the TCPA for texts messages sent by Gold Mobile?
- Did Gold Mobile send the texts under US Coachways' actual authority?
- Did Gold Mobile send the texts under US Coachways' apparent authority?
- Did US Coachways ratify Gold Mobile's illegal conduct by accepting the benefit of the illegally-generated business and failing to exercise its authority to end the violations?

These questions are dispositive, apply equally to all class members and, importantly, can be *answered* using common proof and uniform legal analysis. Further, the uniformity of the applicable law — the federal TCPA — distinguishes this case from putative nationwide class actions requiring application of multiple states' laws. The commonality requirement is therefore met. As the Seventh Circuit recently stated, "[c]lass certification is normal in litigation under § 227, because the main questions … are common to all recipients." *Holtzman v. Turza*, 728 F.3d 682, 684 (7th Cir. 2013). The class definition ensures that all class members have identical claims, both factually and legally. Fed. R. Civ. P. 23(b)(3); *Agne v. Papa John's Int'l, Inc.*, 286 F.R.D. 559, 570 (W.D. Wash. 2012).

c. *Plaintiffs' Claims Are Typical of the Settlement Class*

As with commonality, the threshold requirement for typicality is "not high." *See Brown v. Nucor Corp.*, 576 F.3d 149, 153 (4th Cir. 2009). Typicality means that the plaintiff's claims "arise[] from the same event or practice or course of conduct that gives rise to the claims of the other class members and ... [the] claims are based on the same legal theory." *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992) (citation omitted). This component is usually satisfied where "defendants have engaged in standardized conduct towards members of the proposed class." *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. Ill. 1998). However, typicality does not require that the representative's claims be identical to every other member of the class. *See Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. Ill. 2006) (noting that "factual variations may not defeat typicality").

Here, Plaintiff satisfies the typicality requirement because his interests are sufficiently aligned with those of the class. Like all class members, the Plaintiff received a text message promoting US Coachways services, and are members of the same database provided by Gold Mobilt who received such text messages as identified by Plaintiff's Expert Jeff Hansen. Plaintiff seeks the same relief as the class, and is not subject to unique defenses.

d. *Plaintiff and His Counsel Are Adequate Representatives*

"Rule 23(a)(4) requires that the named plaintiffs and class counsel 'will fairly and adequately protect the interests of the class.'" *Birchmeier v. Caribbean Cruise Line, Inc.*, 302 F.R.D. 240, 252 (N.D.Ill.2014) (quoting the Rule). In adequacy analysis, the Court considers "the adequacy of the named plaintiffs as representatives of the proposed class's myriad members,

with their differing and separate interests." *Gomez v. St. Vincent Health, Inc.*, 649 F.3d 583, 592 (7th Cir. 2011). While the Supreme Court has noted that adequacy and typicality analysis "tend[ ] to merge," *Windsor*, 521 U.S. at 626 n. 20, courts have rejected proposed class representatives due to "conflicts of interest" or "serious credibility problems," *Birchmeier*, 302 F.R.D. at 252 (internal quotation marks and citations omitted).

Plaintiff has no conflicting interests with class members. In fact, by investigating, documenting, filing, and prosecuting this action, the Plaintiff has demonstrated a desire and ability to protect class members' interests. There is nothing to suggest that Plaintiff has any interest antagonistic to the vigorous pursuit of the class claims against the defendant. Rather, his interests are perfectly aligned with those of class members. In addition, putative Class Counsel are practitioners with substantial experience in consumer and class action litigation, including cases under the TCPA similar to this one. (*See Broderick Decl.* ¶¶ 1-9; Exhibit 4, *Paronich Decl.* Exhibit 5, *Murphy Decl.*; Exhibit 6, *McCue Decl.*). The requirements of Rule 23(a), therefore, are satisfied.

2. The Rule 23(b)(3) Factors Are Satisfied

Rule 23(b)(3)'s predominance requirement tests whether proposed classes are "sufficiently cohesive to warrant adjudication by representation." *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013) (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997)). Predominance is satisfied so long as individual issues do not "overwhelm" common issues. *Id.* (quoting *Amgen Inc. v. Conn. Retirement Plans & Trust Funds*, 133 S. Ct. 1184, 1196 (2013)). Common issues predominate here because the central liability question—

i.e., whether US Coachways caused calls to be made in violation of the TCPA—can be established through generalized evidence. Predominance is "readily met" in certain consumer cases. *Windsor*, 521 U.S. at 625. The touchstone for predominance analysis in the Seventh Circuit is efficiency. *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 362 (7th Cir. 2012) ("*Butler I*"), *vac'd on other grounds* 133 S. Ct. 2768 (2013), *judgment reinstated*, 727 F.3d 796 (7th Cir. 2013) ("*Butler II*"), *cert. denied* 134 S. Ct. 1277 (2014). "[T]he requirement of predominance is not satisfied if 'individual questions ... overwhelm questions common to the class.'" *Butler II*, 727 F.3d at 801 (quoting *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1196 (2013)).

Because the claims are being certified for purposes of settlement, there are no issues with manageability. *Windsor*, 521 U.S. at 620 ("Confronted with a request for settlement-only certification, a district court need not inquire whether the case, if tried, would present intractable management problems … for the proposal is that there be no trial."). Additionally, resolution of hundreds of thousands of claims in one action is far superior to individual lawsuits and promotes consistency and efficiency of adjudication. *See Butler*, 727 F.3d at 801 (noting that "the more claimants there are, the more likely a class action is to yield substantial economies in litigation") (quoting *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004)). Thus, certification for purposes of settlement is appropriate.

G. Scheduling a Final Approval Hearing Is Appropriate

The last step in the settlement approval process is a final approval hearing at which the Court may hear all evidence and argument necessary to make its settlement evaluation.

Proponents of the Settlement may explain the terms and conditions of the Settlement Agreement, and offer argument in support of final approval. The Court will determine after the Final Approval Hearing whether the Settlement should be approved, and whether to enter a final order and judgment under Rule 23(e). Plaintiff requests that the Court set a date for a hearing on final approval at the Court's convenience, but no earlier than 100 days after the preliminary approval order is entered, and schedule further settlement proceedings pursuant to the schedule set forth below:

ACTION	DATE
Preliminary Approval Order Entered	At the Court's Discretion
Notice Deadline	Within 21 days following entry of Preliminary Approval Order
Class Counsel's Fee Motion Submitted	Within 14 days following entry of Preliminary Approval Order
Exclusion/Objection Deadline	35 days after Notice Deadline
Final Approval Brief and Response to Objections Due	At least 14 days prior to the Final Approval Hearing
Final Approval Hearing Date	No earlier than 100 days following entry of Preliminary Approval Order
Final Approval Order Entered	At the Court's Discretion

VI. CONCLUSION

The proposed class action Settlement is fair, reasonable, adequate, and well within the permissible range of possible judicial approval. It should, therefore, be approved in all respects. The Plaintiff has submitted a proposed Preliminary Approval Order, attached as Exhibit 7.

Respectfully submitted,

PLAINTIFF JAMES BULL individually and on behalf of a class of all persons and entities similarly situated,
By his attorneys,

Dated: March 9, 2016

/s/ *Anthony Paronich*

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CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2016, I electronically filed the foregoing with the Clerk of the Court, using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ *Anthony Paronich*
Anthony Paronich

CLASS ACTION SETTLEMENT AGREEMENT

This class action settlement agreement (the or this "Agreement" or the or this "Settlement Agreement") is entered into as of March 9, 2016, by and among James Bull ("Bull" or "Plaintiff"), individually and on behalf of the class of persons he seeks to represent (the Settlement Class (defined below)), and US Coachways, Inc. ("US Coachways") (Plaintiff and US Coachways are collectively referred to as the "Parties"). This Settlement Agreement is intended by the Parties to conclude this action, upon and subject to the terms and conditions of the Agreement, including but not limited to the agreement for entry of a judgment, and subject to the final approval of the Court.

RECITALS

A. On July 29, 2014, Bull filed a putative class action complaint against US Coachways in the United States District Court for the Northern District of Illinois, captioned *Bull v. US Coachways, Inc.*, No. 1:14-cv-05789 (N.D. Ill.) (the "Action"), alleging, among other things, that US Coachways and/or others acting on its behalf sent unsolicited text advertising messages, in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (the "TCPA"), and the regulations promulgated by the Federal Communications Commission (the "FCC") under that statute.

B. Illinois Union Insurance Company (Illinois Union") issued an insurance policy to US Coachways effective November 9, 2013 to November 9, 2014, identified as miscellaneous Professional Liability Policy No. G24011999 007 ("the Insurance Policy").

C. Thereafter, US Coachways tendered the Action to Illinois Union seeking coverage under the Insurance Policy. Illinois Union denied the claim and refused to provide US Coachways with a defense in the action.

D. On December 14, 2014, Plaintiff filed an Amended Complaint in the action. US Coachways again tendered the Action to Illinois Union seeking coverage and again Illinois Union denied either a defense or indemnity as more fully set forth in its letter dated January 13, 2015.

E. The TCPA creates a private cause of "action to receive $500 in damages for each such violation." *See* 47 U.S.C. § 227. In the Action, Plaintiff obtained discovery of the volume of text messages sent on behalf of US Coachways.

F. In discovery in the Action, Plaintiff obtained Gold Mobile's texting data, and provided the data to his expert, Jeffrey Hansen for analysis. Mr. Hansen's analysis identified 391,459 violative text messages, yielding potential exposure for US Coachways of $195,729,500, not accounting for additional exposure for multiple text messages to class members on the National Do Not Call Registry.

G. US Coachways is without the financial means to satisfy such a judgment, or indeed to fund a reasonable, approvable class-wide settlement.

H. On July 23, 2015, counsel for Plaintiff sent a demand letter to Illinois Union, setting forth the facts of the case, Plaintiff's basis for liability and the potential exposure to US Coachways. In that demand, Plaintiff requested that Illinois Union engage in mediation, and asked for a response within 30 days. Plaintiff further cautioned that failing to engage in such mediation would constitute an unfair insurance settlement practice and that Plaintiff would pursue an assignment of rights under the Insurance Policy.

I. On August 24, 2015, through outside counsel, Illinois Union sent a letter denying coverage, failing to cite the amended definition of Professional Services which includes "Travel Agency Operations" and declining Plaintiff's invitation to engage in mediation over the case.

J. US Coachways believes that it is entitled to insurance coverage under the terms of the Insurance Policy.

K. US Coachways lacks resources to resolve the Action.

L. Plaintiff's counsel has investigated the relevant facts and law relating to this Action, and believes that the claims asserted in the Action have merit. Nonetheless, Plaintiff and Plaintiff's counsel recognize and acknowledge the expense, time, and risk associated with continued prosecution of the Action against US Coachways through dispositive motions, class certification, trial, and any subsequent appeals. Plaintiff and Plaintiff's counsel also have taken into account the uncertainty, difficulties, and delays inherent in litigation, especially in complex actions.

M. After considering: (1) the benefits to the Class, (2) the inability of Defendants to satisfy a judgment if Plaintiff and the Class prevailed in the Action, (3) the attendant risks, costs, uncertainties, and delays of litigation, and (4) the Insurance Policy and the potential coverage claims, Plaintiff and its counsel have concluded the terms and conditions provided for in this Agreement are fair, reasonable and adequate, and in the best interest of the Class as a means of resolving the Action.

N. The Parties have each represented by counsel and agree that the Action should be resolved. This resolution was accomplished in good faith, following arms' length bargaining.

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and among the Parties, by and through their respective counsel, subject to final approval by the Court after a hearing or hearings as provided for in this Settlement Agreement, and in consideration of the benefits flowing from the Settlement Agreement set forth herein, that the Action shall be resolved upon and subject to the terms and conditions of this Agreement.

AGREEMENT

1. **Recitals**. The recitals set forth above are incorporated herein and are made part of this Agreement.

2. **For Settlement Only**. This Agreement is entered into for purposes for resolving any and all disputes between Defendant, Plaintiff and the Class. The Parties expressly agree that if this Agreement is not finally approved, this Agreement is null and void and may not be used by any party for any purpose, including any representations made in this Agreement and the Affidavit of Edward Telmany provided in connection with this Agreement.

3. **Preliminary Approval and Class Notice**. The Parties agree to jointly move the Court for the entry of an order preliminarily approving this Agreement. Plaintiff will request that the Court enter an "Order Certifying the Settlement Class, Preliminarily Approving the Class Action Settlement, and Approving the Class Notice," in substantially the form attached hereto as Exhibit 1. Additionally, Plaintiff will request that the Court approve a "Notice of Class Action and Proposed Settlement," in substantially the form attached hereto as Exhibit 2-A which will be sent via email, and by mail to class members whose email addresses register as undeliverable. The Long Form Notice attached as Exhibit 2-B will be available to class members on a settlement website maintained by the administrator.

4. **Payment for Initial Notice.** If the Court preliminarily approves the Agreement, US Coachways agrees to deposit $50,000, paid in five equal monthly payments commencing ten days following the Court's preliminary approval in escrow with Kurtzman Carson Consultants ("KCC"), the Class Administrator, as escrow agent This payment by US Coachways represents the full extent of its monetary contribution towards satisfying the Judgment. Initial notice to the Class shall be paid from this initial payment.

5. **Judgment.** US Coachways agrees to the entry of judgment against it in the amount of $49,932,375 on the First Amended Complaint in favor of the Class, *provided, however*, that the Judgment may not be satisfied from or executed on any assets or property of Defendants, and/or their past, present or future officers, directors, employees, members, shareholders, agents, executors, affiliates, divisions, subsidiaries, successors and assigns, other than Illinois Union. The Judgment will be effective as of the Effective Date of this Agreement (as defined below). If the Court does not grant final approval of the settlement contemplated under this Agreement or if the Court's Order granting final approval is reversed or substantially modified on appeal, then this Judgment shall be null and void. Furthermore, Defendant does not waive any defenses and Plaintiff agrees that nothing contained in this Agreement or revealed in negotiating the same can be used in prosecuting this action if the Judgment becomes null and void for any reason. The Judgment shall indicate on its face that it may only be satisfied from Illinois Union. The Judgment may not be satisfied by attaching, executing on, or otherwise acquiring any other asset or property of Defendant and/or past, present or future officers, directors, employees, members, shareholders, agents, executors, affiliates, divisions, subsidiaries, successors and assigns (apart from US Coachways' interest in the Illinois Union Insurance Policy and any bad faith rights against Illinois Union, which US Coachways hereby assigns to Plaintiff and the Class).

6. **Assignment of Claims and Rights Against Illinois Union**. As part of this Agreement, US Coachways assigns to the Class (as represented by Plaintiff and his attorneys) all of US Coachways' claims against and rights to payments from Illinois Union.

7. **Covenant Not to Execute and Not to Sue.** Plaintiff and the Class agree not to seek to execute on, attach or otherwise acquire any property or assets of Defendant and/or past, present and future officers, directors, employees, members, shareholders, agents, executors, subsidiaries,

divisions, affiliates, successors and assigns of any kind other than from the Insurance Policy and claims against Illinois Union to satisfy or recover on the Judgment and agree to seek recovery to satisfy the Judgment only against Illinois Union. After preliminary approval, Class Counsel will undertake to prosecute actions to permit recovery against Illinois Union. The Parties recognize and acknowledge that it is possible that no recovery may be obtained from Illinois Union.

8. **Condition Precedent.** It shall be a condition precedent for the validity and enforceability of this Agreement that the Court shall find that:

(a) This Agreement was made in reasonable anticipation of potential liability against Defendant would arise from a finding that Defendant sent 391,459 unsolicited text advertisements in violation of 47 U.S.C. § 227.

(b) The settlement amount is fair and reasonable because it is within the range of statutory damages that could be awarded for the claims made by the Class and potential damages that could be awarded if the Class prevailed on its claims;

(c) Defendant's decision to agree to entry of judgment is reasonable based on the risk of an adverse judgment, the cost of the defense, and the uncertainties of litigation;

(d) Defendant did not believe that it was violating any laws or regulations by sending the texts;

(e) Defendant tendered a claim for the Action to Illinois Union twice for defense and indemnity and Illinois Union denied coverage to Defendant under the Insurance Policy; and

(f) Defendant lacks financial resources to withstand the potential judgment in this case, or to fund a reasonable settlement from its own funds.

If the Court does not make the above findings, this Agreement shall be null and void.

9. **Effective Date**. This Agreement shall be effective upon the date on which the final order, judgment and decree become a final, non-appealable order, or if an appeal has been sought, after the disposition of any such appeal which approves the Court's final order, judgment and decree.

10. **Settlement Class**. The Settlement Class consists

> All persons within the United States who received one or more text message advertisements on behalf of US Coachways, Inc. at any time in the four years prior to the filing of the Complaint continuing through the date of this Settlement Agreement.

11. **Class Recovery Solely from Illinois Union**. Plaintiff and each Class Member, and their past, present and future officers, directors, employees, members, affiliates, divisions, subsidiaries, heirs, executors, administrators, representatives, agents, successors and assigns, have covenanted with Defendant and/or its officers, directors, employees, members, shareholders, agents, executors, successors and assigns not to execute on the Judgment against Defendant and/or its past, present and future officers, directors, employees, members, shareholders, agents, executors, subsidiaries, affiliates, divisions, successors and assigns, but rather have agreed to pursue collection of the Judgment (and any bad faith claims) against Illinois Union. This provision does not release the Judgment against Defendant to be entered herein, nor does it release the asserted claims that are the basis for the entry of the Judgment or the right to enforce the Judgment (which claims are merged into this Judgment) in favor of the Plaintiff and the Class against Illinois Union. In the event that the Class is unsuccessful in its pursuit of recovery from Illinois Union, then the Class's sole remedy is the monies paid by US Coachways.

12. **Relief to Plaintiff and the Class**. The Judgment, partially satisfied by the contribution by US Coachways, and any additional recovery for bad faith claims against Illinois Union, will

comprise the Class recovery. Plaintiff, the Class, and their counsel, at their sole expense will pursue and attempt to recover the Judgment against Illinois Union. Brian Murphy and Joseph Murray of Murray Murphy Moul + Basil LLP, Matthew P. McCue of The Law Office of Matthew P. McCue and Anthony Paronich and Edward Broderick of Broderick Law, P.C. ("Class Counsel") shall use their best efforts to recover on the Judgment from Illinois Union. Each class member that does not opt out or exclude himself, herself or itself from the Settlement will, after a second preliminary approval of proposed distributions, a second notice to the Class, and final approval by the Court, will receive a share of the amount recovered from Illinois Union by judgment or settlement, calculated by dividing the amount of the Settlement Fund net of an incentive award, attorneys' fees, attorney expenses and administration and notice costs by the total number of violative text messages sent, with each Class member to recover the per violation share times the number of text message that Class member received. In the event checks from an initial round of payments to Class members go uncashed, if economically feasible a second round of checks on the unredeemed funds will be issued to those class members who did cash checks, calculated in the same fashion as the first round of checks. The total recovery is subject to further litigation and compromise with Illinois Union, a deduction of attorneys' fees of one third of the amount recovered plus litigation expenses for Plaintiff's attorneys, and an incentive award not to exceed $15,000 to Plaintiff for representing the Class.

Plaintiff's attorneys have determined that this settlement is a fair, reasonable and adequate compromise for the Class.

13. **Cooperation.** Plaintiff and Defendant agree to cooperate fully with one another to effect the consummation of this Agreement, including but not limited to the provision of an Affidavit signed by Edward Telmany, Chief Executive Officer of US Coachways, attesting to the

underlying facts in this case, authenticating US Coachways business records, cooperating fully with Plaintiff and its experts and class administrator to readily identify class member addresses and emails in US Coachways' database, and responding to any lawfully document subpoena and/or lawfully deposition subpoena in connection with any proceedings by Plaintiff against Illinois Union.

14. **Attorneys' Fees, Notice Costs and Related Matters.** Plaintiff's counsel, through the Class Administrator KCC, will issue notice of the settlement described herein within 30 days of Preliminary Approval by email and by mail to any class members for whom email notice is unsuccessful. Plaintiff's counsel shall file with the Court an accounting of any funds received from Illinois Union. All disbursements from the settlement fund resulting from any recovery from Illinois Union shall be approved by the Court.

15. **Preliminary Approval.** As soon as possible after execution of this Agreement, the Plaintiff shall apply to the Court for an order that:

(a) Certifies the Class;

(b) Preliminarily approves this Agreement;

(c) Finds that the transmission of Class Notice by email and first class mail to those class members whose emails are returned as undeliverable is the best notice practicable and satisfies the requirements of due process and Rule 23 of the Federal Rules of Civil Procedure;

(d) Order that Notice shall be commenced within 30 days of Preliminary Approval;

(e) Sets the deadline for Class members to object to the proposed settlement or to exclude themselves 60 days after Preliminary Approval and setting a date for a Final Fairness hearing that is at least 100 days after the date or Preliminary Approval; and

(f) Makes all of the findings set forth in Paragraph 8 above

The Parties agree to propose the form of Preliminary Approval Order attached hereto as Exhibit 1, and to request the form of Notice attached hereto as Exhibit 2-A and 2-B, and to propose a Final Approval Order in the form attached hereto as Exhibit 3. The fact that the Court may require non-substantive changes in the Notice, the Preliminary Approval Order or the Final Approval Order does not invalidate this Agreement. However, this is expressly contingent upon the Court making the findings described herein, and entering the Preliminary Approval Order and Final Order containing the Judgment.

16. **Final Approval**. At the conclusion of, or as soon as practicable after the close of the hearing on fairness, reasonableness and adequacy of this Agreement, counsel for the Parties shall request that the Court enter a Final Order: (1) approving the terms of this Agreement; (2) making the findings set forth in paragraph 15 above; (3) providing for the implementation of the terms and provisions of this Agreement; (4) finding that the Notice given to the Class is the best notice practicable and satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure and due process.; (5) entering the Judgment; (6) finding that the Agreement prohibits Plaintiff and the Class from executing against any assets or property of any kind of Defendant and/or its past, present and future officers, directors, employees, members, shareholders, agents, executors, subsidiaries, divisions, affiliates, successors and assigns other than against the Insurance Policy and from bad faith claims against Illinois Union; and (7) retaining jurisdiction to enforce the provisions of this Agreement.

17. **Satisfaction**. Upon the later of 30 days after payment or satisfaction in full or settlement of the Judgment, or 30 days after the date of a final and non-appealable order entered by a Court

of competent jurisdiction in any litigation brought by Plaintiff and/or the Class against Illinois Union, Plaintiff and the Class shall file a satisfaction of that Judgment.

18. Mu**tual Non-Disparagement**. The Parties agree that each will not at any time, directly or indirectly, electronically or in writing, publicly or privately, post, publish, make or express any comment, view or opinion that criticizes, is adverse to, brings into disrepute in the eyes of the public, defames, derogates, impugns, or disparages another Party, nor shall any Party authorize any agent or representative to make or express any such comment, view, or opinion—although this provision shall not apply to such filings and statements by Plaintiff and Plaintiff's counsel in the course of pursuing recovery from Illinois Union as contemplated herein..

19. **Objections.** Any member of the Settlement Class who intends to object to this Agreement must file with the Court a written statement that includes: his or her full name; address; telephone number or numbers that he or she maintains were called; all grounds for the objection, with factual and legal support for each stated ground; the identity of any witnesses he or she may call to testify; copies of any exhibits that he or she intends to introduce into evidence at the Final Approval Hearing; and a statement of whether he or she intends to appear at the Final Approval Hearing with or without counsel. Any member of the Settlement Class who fails to timely file a written objection with the Court in accordance with the terms of this paragraph and as detailed in the Notice, and at the same time provide a copy of the filed objection to the Settlement Administrator, shall not be permitted to object to this Agreement at the Final Approval Hearing, and shall be foreclosed from seeking any review of this Agreement by appeal or other means and shall be deemed to have waived his or her objections and be forever barred from making any such objections in the Action or any other action or proceeding. To be timely,

the objection must be filed and sent to the Settlement Administrator on or before the Objection/Exclusion Deadline approved by the Court and specified in the Notice.

20. **Requests for Exclusion**. Any member of the Settlement Class may request to be excluded from the Settlement Class by sending a written request for exclusion to the Settlement Administrator postmarked on or before the Objection/Exclusion Deadline approved by the Court and specified in the Notice. In order to exercise the right to be excluded, a member of the Settlement Class must timely send a written request for exclusion to the Settlement Administrator providing his or her full name, address, and telephone numbers. Further, the written request for exclusion must include a statement that the member of the Settlement Class submitting the request wishes to be excluded from the Settlement, and the personal signature of the member of the Settlement Class submitting the request. A request to be excluded that does not include all of the foregoing information, or that is sent to an address other than that designated in the Notice, or that is not postmarked within the time specified, shall be invalid, and any Person serving such a request shall be a Settlement Class Member and shall be bound as a Settlement Class Member by the Agreement, if approved. Any member of the Settlement Class who elects to be excluded shall not: (i) be bound by the Final Approval Order and Judgment; (ii) be entitled to relief under this Settlement Agreement; (iii) gain any rights by virtue of this Agreement; or (iv) be entitled to object to any aspect of this Agreement. So-called "mass" or "class" opt-outs shall not be allowed.

21. **Continuing Court Jurisdiction.** Without affecting the finality of the Final Approval Order and Judgment for purposes of appeal, retain jurisdiction as to all matters relating to administration, consummation, enforcement, and interpretation of the Settlement Agreement and

the Final Approval Order and Judgment, and for any other necessary purpose; and to incorporate any other provisions, as the Court deems necessary and just.

22. **MISCELLANEOUS PROVISIONS**

22.1 The Parties (a) acknowledge that it is their intent to consummate this Settlement Agreement; and (b) agree, subject to their fiduciary and other legal obligations, to cooperate to the extent reasonably necessary to effectuate and implement all terms and conditions of this Agreement and to exercise their reasonable best efforts to accomplish the foregoing terms and conditions of this Agreement. Plaintiff's counsel and US Coachways agree to cooperate with one another in seeking Court approval of the Preliminary Approval Order, the Settlement Agreement, and the Final Approval Order and Judgment, and promptly to agree upon and execute all such other documentation as may be reasonably required to obtain final approval of the Agreement.

22.2 All of the Exhibits to this Settlement Agreement are material and integral parts thereof and are fully incorporated herein by this reference.

22.3 This Agreement and its Exhibits set forth the entire agreement and understanding of the Parties with respect to the matters set forth herein, and supersede all prior negotiations, agreements, arrangements and undertakings with respect to such matters. No representations, warranties or inducements have been made to any Party concerning this Settlement Agreement or its Exhibits other than the representations, warranties and covenants contained and memorialized in such documents. This Agreement may be amended or modified only by a written instrument signed by or on behalf of all Parties or their respective successors-in-interest.

22.4 Except as otherwise provided herein, each Party shall bear its own costs and attorneys' fees.

22.5 Plaintiffs represent and warrant that they have not assigned any claim or right or interest therein as against the Released Parties to any other Person and that they are fully entitled to release the same.

22.6 Each counsel or other Person executing this Settlement Agreement, any of its Exhibits, or any related settlement documents on behalf of any Party hereto hereby warrants and represents that such Person has the full authority to do so and has the authority to take appropriate action required or permitted to be taken pursuant to the Agreement to effectuate its terms.

22.7 This Agreement may be executed by the Parties in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument. Facsimile signatures or scanned and e-mailed signatures shall be treated as original signatures and shall be binding.

22.8 This Settlement Agreement shall be governed by and construed in accordance with the laws of the State of Illinois.

22.9 This Agreement is deemed to have been prepared by counsel for all Parties, as a result of arms' length negotiations among the Parties. Whereas all Parties have contributed substantially and materially to the preparation of this Agreement, it shall not be construed more strictly against one Party than another.

[THE REST OF THIS PAGE INTENTIONALLY LEFT BLANK. SIGNATURE PAGE FOLLOWS.]

IN WITNESS WHEREOF, the Parties hereto have caused this Settlement Agreement to be executed.

For Plaintiff and the Settlement Class:

James Bull
Plaintiff

Date: 3/9/16

Edward A. Broderick
Anthony Paronich
BRODERICK LAW, P.C.
99 High Street, Suite 304
Boston, MA 02110

Date: March 9, 2016

For US Coachways, Inc:

Authorized Representative
US Coachways, Inc.

Date: 3/9/16

Edward Telman CEO
Printed Name and Title

Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

JAMES BULL, on behalf of himself and others similarly situated,	)	
Plaintiff,	)	Case No. 1:14-cv-05789
v.	)	Judge Rebecca R. Pallmeyer
US COACHWAYS, INC.,	)	Magistrate Judge Daniel G. Martin
Defendant.	)	

PRELIMINARY APPROVAL ORDER

WHEREAS, this Action is a putative class action under the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.*,

WHEREAS, Plaintiff James Bull has filed an unopposed Motion for Preliminary Approval of a Class Settlement (the "Motion");

WHEREAS, the Motion attaches and incorporates a Settlement Agreement (the "Settlement Agreement") that, together with the exhibits thereto, sets forth the terms and conditions for the settlement of claims, on a class wide basis, against US Coachways, Inc. ("US Coachways") as more fully set forth below; and

WHEREAS, the Court having carefully considered the Motion and the Settlement Agreement, and all of the files, records, and proceedings herein, and the Court determining upon preliminary examination that the Settlement Agreement appears to be fair, reasonable and adequate, and that the proposed plan of notice to the Settlement Class is the best notice practicable under the circumstances and consistent with requirements of due process and Federal Rule of Civil Procedure 23, and that a hearing should and will be held after notice to the Settlement Class to confirm that the Settlement Agreement is fair, reasonable, and adequate, and

to determine whether this Court should enter a judgment approving the Settlement and an order of dismissal of this action based upon the Settlement Agreement;

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. For purposes of settlement only, the Court has jurisdiction over the subject matter of this action and personal jurisdiction over the parties and the members of the Settlement Class described below.

2. The Court finds that:

(a) This agreement was made in reasonable anticipation of potential liability against defendant would arise from a finding that defendant sent 391,459 unsolicited text advertisements in violation of 47 U.S.C. § 227.

(b) The settlement amount is fair and reasonable because it is within the range of statutory damages that could be awarded for the claims made by the class and potential damages that could be awarded if the class prevailed on its claims;

(c) Defendant's decision to agree to entry of judgment is reasonable based on the risk of an adverse judgment, the cost of the defense, and the uncertainties of litigation;

(d) The evidence adduced during discovery supports a finding that 391,459 text message advertisements were sent by US Coachways for which US Coachways had not received prior express permission to send;

(e) Defendant did not believe that it was violating any laws or regulations by sending the texts;

(f) Defendant tendered a claim for the action to its insurer Illinois Union Insurance Company ("Illinois Union") for defense and indemnity and Illinois Union denied coverage to defendant under the insurance policy.

(g) Defendant lacks financial resources to withstand the potential judgment in this case, or to fund a reasonable settlement from its own funds.

Certification of Settlement Classes

1. Under Rule 23(b)(3) of the Federal Rules of Civil Procedure, and for purposes of settlement only, the following "Settlement Classes" are preliminarily certified, consisting of the following classes:

Class One

> All persons within the United States who received one or more text message advertisements on behalf of US Coachways, Inc. at any time in the four years prior to the filing of the Complaint continuing through the date any class is certified;

Class Two

> All persons within the United States who received more than one text message advertisements on behalf of US Coachways, Inc. at any time in the four years prior to the filing of the Complaint continuing through the date any class is certified while the telephone number that the text message was sent to was on the National Do Not Call Registry;

2. All Persons who are members of the Settlement Class who have not submitted a timely request for exclusion are referred to collectively "Settlement Class Members" or individually as a "Settlement Class Member."

3. For purposes of settlement only, the Court finds that the prerequisites for a class action under Federal Rules of Civil Procedure 23(a) and (b)(3) have been preliminarily satisfied in that: (a) the number of Settlement Class Members is so numerous that joinder of all members thereof is impracticable; (b) there are questions of law and fact common to the Settlement Class Members; (c) the claims of the class representative are typical of the claims of the Settlement Class Members; (d) the class representative will fairly and adequately represent the interests of

the Settlement Class Members; (e) questions of law and fact common to the Settlement Class Members predominate over any questions affecting only individual Settlement Class Members; and (f) a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The Court further finds, for purposes of settlement only, that: (A) Settlement Class Members have a limited interest in individually prosecuting the claims at issue; (B) the Court is satisfied with Plaintiff's counsel's representation that they are unaware of any other litigation commenced regarding the claims at issue by members of the Settlement Class; (C) it is desirable to concentrate the claims in this forum; and (D) it is unlikely that there will be difficulties encountered in administering this Settlement.

4. Under Federal Rule of Civil Procedure 23, and for settlement purposes only, Plaintiff James Bull is hereby appointed Class Representative and the following are hereby appointed as Class Counsel:

Brian K. Murphy
Joseph F. Murray
Murray Murphy Moul + Basil LLP
114 Dublin Road
Columbus, OH 43204

Matthew McCue
THE LAW OFFICE OF MATTHEW P. MCCUE
1 South Avenue, Suite 3
Natick, Massachusetts 01760

Edward Broderick
Anthony Paronich
BRODERICK LAW, P.C.
99 High St., Suite 304
Boston, MA 02110

Notice and Administration

5. The Court hereby approves of Kurtzman Carson Consultants to perform the functions and duties of the Settlement Administrator set forth in the Settlement Agreement –

including effectuating the Notice Plan, providing Notice to the Settlement Class, and to provide such other administration services as are reasonably necessary to facilitate the completion of the Settlement.

6. The Court has carefully considered the Notice Plan set forth in the Settlement Agreement. The Court finds that the Notice Plan constitutes the best notice practicable under the circumstances, and satisfies fully the requirements of Rule 23 of the Federal Rules of Civil Procedure, the requirements of due process and any other applicable law, such that the terms of the Settlement Agreement, and this Court's final judgment will be binding on all Settlement Class Members.

7. The Court hereby approves the Notice Plan and the form, content, and requirements of the Notice described in and attached as exhibits to the Settlement Agreement. The Settlement Administrator shall cause the Notice Plan to be completed on or before **_____, 2016**. Class Counsel shall, prior to the Final Approval Hearing, file with the Court a declaration executed by the Settlement Administrator attesting to the timely completion of the Notice Plan.

8. All costs of providing Notice to the Settlement Class shall be paid out of the Settlement Fund from the initial payment by US Coachways, as provided by the Settlement Agreement.

9. In the event of recovery by Plaintiff and the Class from Illinois Union, further distributions from the Settlement Fund to Class members, an incentive award, will be made on additional approval by the Court, following a a second motion for preliminary approval of distributions from the Settlement Fund, including a request for an incentive award to the Class Representative, an award of attorneys' fees and costs, notice to the class and the entry of final

approval by the Court.

Exclusion and "Opt-Outs"

10. Each and every member of the Settlement Class shall be bound by all determinations and orders pertaining to the Settlement, unless such persons request exclusion from the Settlement in a timely and proper manner, as hereinafter provided.

11. A member of the Settlement Class wishing to request exclusion (or "opt-out") from the Settlement shall mail the request in written form, by first class mail, postage prepaid, and postmarked no later than **_____, 2016**, to the Settlement Administrator at the address specified in the Notice. In the written request for exclusion, the member of the Settlement Class must state his or her full name, address, and telephone numbers. Further, the written request for exclusion must include a statement that the member of the Settlement Class submitting the request wishes to be excluded from the Settlement, and the personal signature of the member of the Settlement Class submitting the request. The request for exclusion shall not be effective unless the request for exclusion provides the required information and is made within the time stated above, or the exclusion is otherwise accepted by the Court. No member of the Settlement Class, or any person acting on behalf of or in concert or in participation with a member of the Settlement Class, may request exclusion of any other member of the Settlement Class from the Settlement.

12. Members of the Settlement Class who timely request exclusion from the Settlement will relinquish their rights to benefits under the Settlement and will not release any claims against US Coachways.

13. All Settlement Class Members who do not timely and validly request exclusion shall be so bound by all terms of the Settlement Agreement and by the Final Approval Order and

Judgment even if they have previously initiated or subsequently initiate individual litigation or other proceedings against US Coachways.

14. The Settlement Administrator will promptly provide all Parties with copies of any exclusion requests, and Plaintiff shall file a list of all persons who have validly opted-out of the Settlement with the Court prior to the Final Approval Hearing.

Objections

15. Any Settlement Class Member who does not file a timely request for exclusion, but who wishes to object to approval of the proposed Settlement, to the potential award of attorneys' fees and expenses, or to the compensation award to the Class Representative must file with the Court a written statement that includes: his or her full name; address; telephone numbers that he or she maintains were called; all grounds for the objection, with factual and legal support for each stated ground; the identity of any witnesses he or she may call to testify; copies of any exhibits that he or she intends to introduce into evidence at the Final Approval Hearing; and a statement of whether he or she intends to appear at the Final Approval Hearing with or without counsel. Any objecting Settlement Class Member also must send a copy of the filing to the Settlement Administrator at the same time it is filed with the Court. The Court will consider objections to the Settlement, to the award of attorneys' fees and expenses, or to the compensation award to the Class Representative only if, on or before **_____, 2016**, such objections and any supporting papers are filed in writing with the Clerk of this Court and served on the Settlement Administrator.

16. A Settlement Class Member who has timely filed a written objection as set forth above may appear at the Final Approval Hearing in person or through counsel to be heard orally regarding their objection. It is not necessary, however, for a Settlement Class Member who has

filed a timely objection to appear at the Final Approval Hearing. No Settlement Class Member wishing to be heard orally in opposition to the approval of the Settlement and/or the request for attorneys' fees and expenses and/or the request for a compensation award to the Class Representative will be heard unless that person has filed a timely written objection as set forth above. No non-party, including members of the Settlement Class who have timely opted-out of the Settlement, will be heard at the Final Approval Hearing.

17. Any member of the Settlement Class who does not opt out or make an objection to the Settlement in the manner provided herein shall be deemed to have waived any such objection by appeal, collateral attack, or otherwise, and shall be bound by the Settlement Agreement, and all aspects of the Final Approval Order and Judgment. This includes the fact that US Coachways agrees to the entry of judgment against it in the amount of $49,932,375 in favor of the Class, *provided, however*, that the Judgment may not be satisfied from or executed on any assets or property of Defendants, and/or their past, present or future officers, directors, employees, members, shareholders, agents, executors, affiliates, divisions, subsidiaries, successors and assigns, other than Illinois Union.

Final Approval Hearing

18. The Federal Rule of Civil Procedure 23(e) Final Approval Hearing is hereby scheduled to be held before the Court on **_____, 2016 at _____ am** for the following purposes:

(a) to finally determine whether the applicable prerequisites for settlement class action treatment under Federal Rules of Civil Procedure 23(a) and (b) are met;

(b) to determine whether the Settlement is fair, reasonable and adequate, and should be approved by the Court;

(c) to determine whether the judgment as provided under the Settlement Agreement should be entered, including a bar order prohibiting Settlement Class Members from further collecting on claims directly against US Coachways and shall be limited to collecting against Illinois Union in the Settlement Agreement;

(d) to consider the application for an award of attorneys' fees and expenses of Class Counsel;

(e) to consider the application for an compensation award to the Class Representative;

(f) to consider the distribution of the Settlement Benefits under the terms of the Settlement Agreement; and

(g) to rule upon such other matters as the Court may deem appropriate.

19. On or before fourteen (14) days prior to the Final Approval Hearing, Class Counsel shall file and serve (i) a motion for final approval; and (ii) any application for a compensation award to the Class Representative. The Final Approval Hearing may be postponed, adjourned, transferred or continued by order of the Court without further notice to the Settlement Class. At, or following, the Final Approval Hearing, the Court may enter a Final Approval Order and Judgment in accordance with the Settlement Agreement that will adjudicate the rights of all class members.

20. For clarity, the deadlines the Parties shall adhere to are as follows:

Class Notice Mailed by: **_____, 2016**

Objection/Exclusion: **_____, 2016**

Motion for Final Approval: **_____, 2016**

Final Approval Hearing: **_____, 2016 at _____ am**

21. Settlement Class Members do not need to appear at the Final Approval Hearing or take any other action to indicate their approval.

Further Matters

22. All discovery and other pretrial proceedings in the Action as between the Plaintiff and US Coachways are stayed and suspended until further order of the Court except such actions as may be necessary to implement the Settlement Agreement and this Order.

23. In the event that the Settlement Agreement is terminated under the terms of the Settlement Agreement, or for any reason whatsoever the approval of it does not become final and no longer subject to appeal, then: (i) the Settlement Agreement shall be null and void, including any provisions related to the award of attorneys' fees and expenses, and shall have no further force and effect with respect to any party in this Action, and shall not be used in this Action or in any other proceeding for any purpose; (ii) all negotiations, proceedings, documents prepared, and statements made in connection therewith shall be without prejudice to any person or party hereto, shall not be deemed or construed to be an admission by any party of any act, matter, or proposition, and shall not be used in any manner of or any purpose in any subsequent proceeding in this Action or in any other action in any court or other proceeding, provided, however, that the termination of the Settlement Agreement shall not shield from subsequent discovery any factual information provided in connection with the negotiation of this Settlement Agreement that would ordinarily be discoverable but for the attempted settlement; (iii) this Order shall be vacated and of no further force or effect whatsoever, as if it had never been entered; and (iv) any party may elect to move the Court to implement the provisions of this paragraph, and none of the non-moving parties (or their counsel) shall oppose any such motion.

24. The Court retains jurisdiction to consider all further matters arising out of or connected with the Settlement.

DATED: _____, 2016

_____

Rebecca R. Pallmeyer
United States District Judge

Exhibit 2-A

NOTICE OF CLASS ACTION LAWSUIT AND PROPOSED SETTLEMENT

A COURT AUTHORIZED THIS NOTICE IT IS NOT A SOLICITATION FROM A LAWYER

If you received a text message advertisement from US Coachways, Inc. either (a) on a cellular telephone or (b) more than once within any twelve-month period to phone numbers registered on the Do Not Call Registry, you May Be Entitled to Receive a Payment From a Settlement Fund.

1-XXX-XXX-XXXX

www._____.com

ACH

Coachways Telemarketing Settlement Administrator
P.O. Box xxxx
City, ST xxxxx-xxxx

First Class Mail
US Postage Paid
Permit #__

Postal Service: Please do not mark barcode

«First1» «Last1»
«CO»
«Addr1» «Addr2»
«City», «ST» «Zip»
«Country»

A proposed settlement (the "Settlement") *Bull v. US Coachways, Inc.*, No. 1:14-cv-05789 (N.D. Ill.) (the "Action") would resolve a lawsuit brought on behalf of persons who received text messages promoting the goods and services of US Coachways, Inc. ("US Coachways") that were directed to (a) telephone numbers listed on the National Do Not Call Registry and/or (b) to cellular telephone numbers using an automated telephone dialing system, which are alleged to have violated the Telephone Consumer Protection Act, 47 U.S.C. § 227 (the "TCPA"). US Coachways denies that it violated any laws or it did anything wrong, and has agreed to the Settlement solely to avoid the burden, expense, risk and uncertainty of continuing the Lawsuit.

How much money can I get? If the Court approves the Settlement, every Settlement Class will be entitled to and receive an equal payment from the $49,932,375 Settlement Fund, if any proceeds can be recovered from US Coachways' insurance company. In addition to assigning its rights against its insurer Illinois Union Insurance Company ("Illinois Union") to the Class, US Coachways will contribute $50,000 towards the Settlement, which will be used on the cost of providing notice to the class and costs of pursuing an action against Illinois Union. The Settlement Fund will be divided and distributed equally–sometimes referred to as "pro rata"–to all Settlement Class Members, based on the amount of text messages records obtained in the lawsuit state they received, after attorneys' fees, costs and expenses, an award for the Class Representative, and notice and administration costs have been deducted. You do not need to do anything to receive a payment.

What are my options? If you are a Settlement Class Member and you do nothing, and the Court approves Settlement, you will receive a payment and be bound by all of the Settlement terms, including the releases of claims. If you do not want to receive a payment or release any claims, you must exclude yourself from the Settlement. To exclude yourself, you must mail a request for exclusion to the Settlement Administrator, Life Insurance Telemarketing Settlement Administrator, **P.O. Box xxxx, City ST xxxx-xxxx]** postmarked by **[INSERT DATE]** that includes your full name, address, telephone number or numbers, a statement that you wish to be excluded from the Settlement, and your personal signature. Unless you exclude yourself from this Settlement, you give up your right to sue or continue a lawsuit against US Coachways arising from telemarketing calls that violate state or federal law. You may object to the Settlement by submitting a written objection postmarked by **[INSERT DATE]** to: (1) Class Counsel, Edward A. Broderick, Broderick Law, P.C., 99 High St., Suite 304, Boston, MA 02110; and the (2) the Settlement Administrator (address provided above). Any objection must include the case name and number (*Bull v. US Coachways, Inc.*, No. 1:14-cv-05789 (N.D. Ill.)); your full name; address; telephone numbers that you maintain were called; all grounds for your objection, with factual and legal support for each; the identity of any witnesses you may call to testify; copies of any exhibits that you intend to introduce into evidence; and a statement of whether you intend to appear at the Final Approval Hearing with or without counsel.

The Court's Decision? The Court will hold a Final Approval Hearing on [DATE] at the U.S. District Court for the Western District of Wisconsin. At the Hearing, the Court will consider whether to approve: the proposed Settlement as fair, reasonable, and adequate; Class Counsel's request for attorney's fees of up to one-third of the amount recovered in addition to their costs and expenses; and a $15,000 payment to the Class Representative. The Court will also hear objections to the Settlement. If approval is denied, reversed on appeal, or does not become final, the case will continue and claims will not be paid.

Want more information? To determine whether you are class member, or view the Settlement Agreement and other relevant documents, please visit [website]. Pleadings and documents filed in Court may be reviewed or copied in the office of the Clerk. Please do not call the Judge or the Clerk of the Court. They cannot give you advice on your options.

Exhibit 2-B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

JAMES BULL, on behalf of himself and others similarly situated,	)	
Plaintiff,	)	Case No. 1:14-cv-05789
v.	)	Judge Rebecca R. Pallmeyer
US COACHWAYS, INC.,	)	Magistrate Judge Daniel G. Martin
Defendant.	)	

NOTICE OF PROPOSED SETTLEMENT OF CLASS ACTION

THIS NOTICE CONCERNS SETTLEMENT OF A LAWSUIT THAT MAY ENTITLE YOU TO RECEIVE A PAYMENT

This is a Notice of a proposed Settlement in a class action lawsuit captioned *Bull v. US Coachways, Inc.*, No. 1:14-cv-05789, pending in the U.S. District Court for the Northern District of Illinois ("the Lawsuit"). The Settlement would resolve a lawsuit brought on behalf of persons who received text messages allegedly made by US Coachways, Inc. ("US Coachways") that were directed to (a) telephone numbers listed on the National Do Not Call Registry and/or (b) cellular telephones.

WHAT IS THE LAWSUIT ABOUT?
The lawsuit alleges that telemarketing calls made by US Coachways violated the Telephone Consumer Protection Act, 47 U.S.C. § 227 (the "TCPA"). US Coachways denies that it violated any laws or that it did anything wrong, and has agreed to the settlement solely to avoid the burden, expense, risk and uncertainty of continuing the lawsuit. The Court has preliminarily certified this matter as a class action for settlement. The Settlement Class includes:

> All persons within the United States who received one or more text message advertisements on behalf of US Coachways, Inc. at any time in the four years prior to the filing of the Complaint continuing through the date of this Settlement Agreement.

Records in this action indicate the telephone numbers, and many of the addresses and e-mail addresses of members of the Settlement Class.

WHAT IS A CLASS ACTION?
In a class action, one or more people or entities, called "class representatives" (in this case, James Bull), sue on behalf of people who have similar claims. All of those people together are a "class" or "class members." The Settlement in this Lawsuit, if approved by the Court, resolves

the claims of all members of the Settlement Class, except for those who exclude themselves from the Settlement Class.

WHY IS THERE A SETTLEMENT?
The Court did not decide in favor of the Plaintiff or US Coachways. Instead, both sides have agreed to a Settlement. This avoids the cost, risk, and delay of trial. Under the Settlement, members of the Settlement Class will have the opportunity to obtain a payment from sums recovered in a separate, future action against the US Coachways insurer, Illinois Union Insurance Company, in exchange for giving up certain legal rights. The Class Representative and the lawyers who brought the Lawsuit ("Class Counsel") think the Settlement is best for all members of the Settlement Class.

WHAT DOES THE SETTLEMENT PROVIDE?
The Settlement provides for a consent judgment to be entered against the defendant, US Coachways in the amount of $49,932,375, with US Coachways paying $50,000 and assigning its rights against its insurer, Illinois Union Insurance Company to attempt to satisfy that judgment. Class Counsel believe that US Coachways has insurance coverage from Illinois Union Insurance Company, but Illinois Union has denied coverage, and further believe that US Coachways lacks sufficient resources to satisfy a judgment entered in this action. The initial payment by US Coachways will be used to fund notice to the class, and to cover costs in pursuing an action against Illinois Union. Separate proceeding will be pursued by Plaintiff and Class Counsel to recover from Illinois Union, which then be placed in Settlement Fund. Any distributions from the Settlement Fund will be made only with Court approval following a second motion for preliminary approval as to distributions. Class Counsel (listed below) will ask the Court to award them up to one third of that amount in attorneys' fees in addition to their expenses for the substantial time and effort they put into this case. The Class Representative also will apply to the Court for payment of $15,000 in recognition of his service to the Settlement Class. Any amounts awarded to Class Counsel and the Class Representative will be paid from the Settlement Fund. The Settlement Fund also will cover costs associated with notice and administration of the Settlement. These costs include the cost of mailing this Notice and publishing notice of the Settlement, as well as the costs of administering the Settlement Fund. Attorneys' fees, the Class Representative service payments, and the expenses of notice and administration will be deducted from the Settlement Fund before the balance is divided and distributed to Settlement Class Members.

HOW MUCH WILL I BE PAID?
If the Court approves the Settlement, every Settlement Class Member will be entitled to an equal payment from the Settlement Fund, if any proceeds can be recovered from US Coachways' insurance company. That is, the amount of the Settlement Fund available for distribution will be divided equally – sometimes referred to as "pro rata" – among all Settlement Class Members.

YOUR OPTIONS
Your choices are to:

1. **Do Nothing and Potentially Receive a Payment.** If you are a member of the Settlement Class whose number and address is within the records obtained in the case and you do nothing, and the Settlement is finally approved by the Court, you will be bound by all of the terms of the Settlement, including the releases of claims, and you will receive a payment

from the Settlement Fund if any proceeds can be recovered from US Coachways' insurance company.

2. **Exclude yourself**. You may "opt out" and exclude yourself from the Settlement. If you opt out, you will not be eligible to receive any payment, and you will not release any claims you may have – you will be free to pursue whatever legal rights you may have at your own risk and expense. To exclude yourself from the Settlement, you must mail a request for exclusion to the Settlement Administrator (address below) postmarked by **[INSERT DATE]** that includes your full name, address, telephone number or numbers, a statement that you wish to be excluded from the Settlement, and your personal signature.

3. **Object to the Settlement**. You may object to the Settlement by submitting a written objection in *Bull v. US Coachways, Inc.*, No. 1:14-cv-05789, to (1) the Clerk of Court, U.S. District Court, Northern District of Illinois, 219 South Dearborn Street Chicago, IL 60604 and (2) Class Counsel and (3) the Settlement Administrator, postmarked by **[INSERT DATE].** Any objection to the Settlement must include your full name; address; telephone numbers that you maintain were called; all grounds for your objection, with factual and legal support for each stated ground; the identity of any witnesses you may call to testify; copies of any exhibits that you intend to introduce into evidence at the Final Approval Hearing; and a statement of whether you intend to appear at the Final Approval Hearing with or without counsel. Attendance at the hearing is not necessary; however, persons wishing to be heard orally (either personally or through counsel) in opposition to the approval of the Settlement are required to file a timely objection as set forth above.

WHEN WILL I BE PAID?

If the Court approves the Settlement, proceeds can be recovered from US Coachways' insurance company, you will be paid as soon as possible after the court order becomes final and the funds from the insurance company are recovered. If there is an appeal of the Settlement, payment may be delayed. The Settlement Administrator will provide information about the timing of payment at **[WEBSITE].**

WHO REPRESENTS THE SETTLEMENT CLASS?

The attorneys who have been appointed by the Court to represent the Settlement Class are:

Edward A. Broderick
Anthony I. Paronich
Broderick Law, P.C.
99 High St., Suite 304
Boston, MA 02110

Matthew P. McCue
The Law Office of
Matthew P. McCue
1 South Ave, Third Floor
Natick, MA 01760

Brian K. Murphy
Joseph F. Murray
Murray Murphy Moul
+ Basil LLP
114 Dublin Road
Columbus, OH 43204

WHAT RIGHTS AM I GIVING UP IN THIS SETTLEMENT?

If the Court gives final approval to the Settlement, Members of the Settlement Class will be limited to recovering from any sums recovered against US Coachways insurer Illinois Union Insurance Company ("Illinois Union") in a subsequent action against Illinois Union or through a

subsequent settlement with Illinois Union, in addition to from the $50,000 contributed toward the Settlement by US Coachways. If you choose not to participate in this settlement and exclude yourself, and you file your own lawsuit for the violations alleged in this case you could recover up to $1500 per call plus an order prohibiting future calls. However, the lawyers in this case would not represent you in such a case, and US Coachways would vigorously assert all available defenses, and you could lose and receive nothing. This settlement permits class members the opportunity to obtain a smaller amount of money, risk-free.

WHEN AND WHERE WILL THE COURT DECIDE WHETHER TO APPROVE THE SETTLEMENT?

The Court will hold a Final Approval Hearing (the "Hearing") at [**TIME**] on [**DATE**]. The hearing will be held at the United States District Court for the Northern District of Illinois. At the Hearing, the Court will consider whether the proposed Settlement is fair, reasonable, and adequate. The Court will hear objections to the Settlement, if any. At the Hearing, the Court will also decide how much to pay Class Counsel. After the Hearing, the Court will decide whether to approve the Settlement. The Hearing may be continued at any time by the Court without further notice to you. If the Court does not approve the Settlement, or if it approves the Settlement and the approval is reversed on appeal, or if the Settlement does not become final for some other reason, you will not be paid at this time and the case will continue. The parties may negotiate a different settlement or the case may go to trial.

DO NOT ADDRESS QUESTIONS ABOUT THE SETTLEMENT OR THE LAWSUIT TO THE CLERK OF THE COURT OR TO THE JUDGE. PLEASE DIRECT QUESTIONS TO:

SETTLEMENT ADMINISTRATOR – [INSERT]

Toll-Free 1-_____

DATED: _____, 2016

Exhibit 3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

JAMES BULL, on behalf of himself and others similarly situated,	)	
Plaintiff,	)	Case No. 1:14-cv-05789
v.	)	Judge Rebecca R. Pallmeyer
US COACHWAYS, INC.,	)	Magistrate Judge Daniel G. Martin
Defendant.	)	

FINAL APPROVAL ORDER

This matter having come before the Court on Plaintiff's motion for final approval (the "Motion for Final Approval") of a proposed class action settlement (the "Settlement") of the above-captioned action (the "Action") between Plaintiff James Bull and Defendant US Coachways, Inc., pursuant to the parties' Class Action Settlement Agreement (the "Agreement" or the "Settlement Agreement"), and having duly considered all papers filed and arguments presented, the Court hereby finds and orders as follows:

1. For purposes of settlement only, the Court has jurisdiction over the subject matter of this action and personal jurisdiction over the parties and the members of the Settlement Class described below.

2. The Court preliminarily approved the Settlement Agreement and entered the Preliminary Approval Order dated _____, 2016, and notice was given to the Class as under the terms of the Preliminary Approval Order.

3. The Court has read and considered the papers filed in support of the Motion, including the Settlement Agreement and the exhibits thereto, memoranda and arguments submitted on behalf of the Plaintiff, Settlement Class Members, and the Defendant, and

supporting declarations. The Court has also read and considered any written objections filed by Settlement Class Members. [Alternatively: "The Court has not received any objections from any person regarding the Settlement."] The Court held a hearing on _____, 2016, at which time the parties [and objecting Settlement Class Members] were afforded the opportunity to be heard in support of or in opposition to the Settlement. Furthermore, the Court finds that notice under the Class Action Fairness Act was effectuated on _____, 2016, and that ninety (90) days has passed without comment or objection from any governmental entity

4. The Court finds that:

(a) This agreement was made in reasonable anticipation of potential liability against defendant would arise from a finding that defendant sent 391,459 unsolicited text advertisements in violation of 47 U.S.C. § 227.

(b) The settlement amount is fair and reasonable because it is within the range of statutory damages that could be awarded for the claims made by the class and potential damages that could be awarded if the class prevailed on its claims;

(c) Defendant's decision to agree to entry of judgment is reasonable based on the risk of an adverse judgment, the cost of the defense, and the uncertainties of litigation;

(d) The evidence adduced during discovery supports a finding that 391,459 text were sent by US Coachways for which US Coachways had not received prior express permission to send;

(e) Defendant did not believe that it was violating any laws or regulations by sending the texts;

(f) Defendant tendered a claim for the action to its insurer Illinois Union Insurance Company ("Illinois Union") for defense and indemnity and Illinois Union denied coverage to

defendant under the insurance policy.

(g) Defendant lacks financial resources to withstand the potential judgment in this case, or to fund a reasonable settlement from its own funds.

6. Based on the papers filed with the Court and the presentations made to the Court at the hearing, the Court now gives final approval to the Settlement and finds that the Settlement is fair, adequate, reasonable, and in the best interests of the Settlement Class. This finding is supported by, among other things, the complex legal and factual posture of the Action, the fact that the Settlement is the result of arms' length negotiations, and the settlement benefits being made available to Settlement Class Members.

Certification of Settlement Class

7. Under Rule 23(b)(3) of the Federal Rules of Civil Procedure, and for purposes of settlement only, the following "Settlement Class" is preliminarily certified:

> All persons within the United States who received one or more text message advertisements on behalf of US Coachways, Inc. at any time in the four years prior to the filing of the Complaint continuing through the date of the Settlement Agreement.

8. All Persons who are members of the Settlement Class who have not submitted a timely request for exclusion are referred to collectively "Settlement Class Members" or individually as a "Settlement Class Member."

9. For purposes of settlement only, the Court finds that the prerequisites for a class action under Federal Rules of Civil Procedure 23(a) and (b)(3) have been preliminarily satisfied in that: (a) the number of Settlement Class Members is so numerous that joinder of all members thereof is impracticable; (b) there are questions of law and fact common to the Settlement Class Members; (c) the claims of the class representative are typical of the claims of the Settlement Class Members; (d) the class representative will fairly and adequately represent the interests of

the Settlement Class Members; (e) questions of law and fact common to the Settlement Class Members predominate over any questions affecting only individual Settlement Class Members; and (f) a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The Court further finds, for purposes of settlement only, that: (A) Settlement Class Members have a limited interest in individually prosecuting the claims at issue; (B) the Court is satisfied with Plaintiff's counsel's representation that they are unaware of any other litigation commenced regarding the claims at issue by members of the Settlement Class; (C) it is desirable to concentrate the claims in this forum; and (D) it is unlikely that there will be difficulties encountered in administering this Settlement.

10. Under Federal Rule of Civil Procedure 23, Plaintiff James Bull is hereby appointed Class Representative and the following are hereby appointed as Class Counsel:

Brian K. Murphy
Joseph F. Murray
Murray Murphy Moul + Basil LLP
114 Dublin Road
Columbus, OH 43204

Matthew McCue
THE LAW OFFICE OF MATTHEW P. MCCUE
1 South Avenue, Suite 3
Natick, Massachusetts 01760

Edward Broderick
Anthony Paronich
BRODERICK LAW, P.C.
99 High St., Suite 304
Boston, MA 02110

Notice and Administration

11. The Court hereby approves of Kurtzman Carson Consultants to perform the functions and duties of the Settlement Administrator set forth in the Settlement Agreement – including effectuating the Notice Plan, providing Notice to the Settlement Class, and to provide

such other administration services as are reasonably necessary to facilitate the completion of the Settlement.

12. The Court has determined that the Notice given to the Settlement Class, in accordance with the Notice Plan in the Agreement and the Preliminary Approval Order, fully and accurately informed members of the Settlement Class of all material elements of the Settlement and constituted the best notice practicable under the circumstances, and fully satisfied the requirements of Rule 23 of the Federal Rules of Civil Procedure and the requirements of due process and any other applicable law.

13. The Court finds that the Class Administrator properly and timely notified the appropriate state and federal officials of the Settlement Agreement under the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1715.

14. All persons whose names were included on the list supplied by Plaintiff as having made timely and valid requests for exclusion are excluded from the Settlement Class and are not bound by this Final Approval Order and Judgment.

15. The Court orders the parties to the Settlement Agreement to perform their obligations thereunder. The Settlement Agreement shall be deemed incorporated herein as if explicitly set forth and shall have the full force of an order of this Court.

16. The Court adjudges that the Plaintiff and the Class are enjoined from seeking to execute on, attach or otherwise acquire any property or assets of Defendant and/or its officers, directors, employees, members, shareholders, agents, executors, successors and assigns of any kind other than from the Insurance Policy and claims against Illinois Union to satisfy or recover on the Judgment and agree to seek recovery to satisfy the Judgment only against Illinois Union.

17. The Court enters judgment against Defendant US Coachways, Inc. in the total

amount of $49,932,375 on the First Amended Complaint in favor of the Class, from which the partial payment of _____ by US Coachways, Inc. shall be deducted, *provided however,* that the Judgment may not be satisfied or executed on any assets or property of Defendant, officers, directors, employees, members, shareholders, agents, executors, successors and assigns, other than Illinois Union. The Judgment may not be satisfied by attaching, executing on, or otherwise acquiring any other asset or property of Defendant and/or its officers, directors, employees, members, shareholders, agents, executors, successors and assigns (apart from US Coachways interest in the Illinois Union Insurance Policy and any bad faith rights against Illinois Union, which US Coachways has assigned to Plaintiff and the Class). This provision does not release the Judgment against Defendant to be entered herein, nor does it release the asserted claims that are the basis for the entry of the Judgment or the right to enforce the Judgment (which claims are merged into this Judgment) in favor of the Plaintiff and the Class against Illinois Union.

18. In the event of recovery by Plaintiff and the Class from Illinois Union, further distributions from the Settlement Fund to Class members, an incentive award, and will be made on additional approval by the Court, in accordance with the distribution formula approved by the Court, or as modified by further Court order.

19. Without affecting the finality of this Final Approval Order and Judgment in any way, the Court retains jurisdiction over: (a) implementation and enforcement of the Settlement Agreement until the final judgment contemplated hereby has become effective and each and every act agreed to be performed by the parties hereto pursuant to the Settlement Agreement have been performed; (b) any other action necessary to conclude the Settlement and to administer, effectuate, interpret and monitor compliance with the provisions of the Settlement Agreement; and (c) all parties to this Action and Settlement Class Members for the purpose of

implementing and enforcing the Settlement Agreement, including authorizing distributions from the Settlement Fund of any proceeds recovered from Illinois Union.

20. Any objections to the Settlement Agreement are overruled and denied in all respects. The Court finds that no just reason exists for delay in entering this Final Approval Order and Judgment. Accordingly, the Clerk is hereby directed forthwith to enter this Final Approval Order and Judgment.

DATED: _____, 2016

_____

Rebecca R. Pallmeyer
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

JAMES BULL, on behalf of himself and others similarly situated,	)	
Plaintiff,	)	Case No. 1:14-cv-05789
v.	)	Judge Rebecca R. Pallmeyer
US COACHWAYS, INC.,	)	Magistrate Judge Daniel G. Martin
Defendant.	)	

DECLARATION OF EDWARD A. BRODERICK

1. I make this declaration in support of the Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement and for Conditional Certification of a Settlement Class, to set forth my qualifications to serve as class counsel, and to state that in my experience litigating claims under the Telephone Consumer Protection Act, the proposed settlement is reasonable and merits preliminary approval from the Court.

2. I am an attorney duly admitted to practice in the Commonwealth of Massachusetts, I am over 18 years of age, am competent to testify and make this affidavit on personal knowledge. I have been admitted to practice before the United States District Courts for the District of Massachusetts, the District of Michigan and the District of Colorado and the First Circuit Court of Appeals. From time to time, I have appeared in other Federal District Courts *pro hac vice*. I am in good standing in every court to which I am admitted to practice. Along with my co-counsel in this action, I will faithfully, effectively and zealously represent the interests of the class in this action.

Qualifications of Counsel

3. I have extensive experience in the prosecution of class actions on behalf of consumers, particularly claims under the Telephone Consumer Protection Act, 47 U.S.C. §227. ("TCPA") As a result of my extensive experience litigating TCPA class claims, I am well-aware of the significant time and resources needed to litigate such actions, and my firm possesses the resources necessary to prosecute these actions successfully. My firm keeps contemporaneous time records, and the rates for our attorneys and personnel are commensurate with my experience and are commensurate with market rates in Boston for attorneys with similar levels of experience. My hourly rate and that of my partner Anthony Paronich have been approved as reasonable by numerous state and federal courts in approving settlements.

4. I am a 1993 graduate of Harvard Law School. Following graduation from law school, I served as a law clerk to the Honorable Martin L.C. Feldman, United States District Judge in the Eastern District of Louisiana.

5. Following my clerkship, from 1994 to December 1996, I was an associate in the litigation department of Ropes & Gray in Boston, where I gained class action experience in the defense of a securities class action, Schaeffer v. Timberland, in the United States District Court in New Hampshire, and participated in many types of complex litigation.

6. From January 1997 to March 2000, I was an associate with Ellis & Rapacki, a three-lawyer Boston firm focused on the representation of consumers in class actions.

7. In March 2000, I co-founded the firm of Shlansky & Broderick, LLP, focusing my practice on complex litigation and the representation of consumers.

8. In 2003, I started my own law firm focusing exclusively on the litigation consumer class actions.

9. A sampling of other class actions in which I have represented classes of consumers follows:

i. In re General Electric Capital Corp. Bankruptcy Debtor Reaffirmation Agreements Litigation (MDL Docket No. 1192) (N.D. Ill) (nationwide class action challenging reaffirmation practices of General Electric Capital Corporation, settlement worth estimated $60,000,000.)

ii. LaMontagne, et al. v. Hurley State Bank, et al., USDC, D. Mass., C.A. No. 97-30093-MAP (nationwide class action challenging reaffirmation practices of the credit services of Radio Shack and other entities);

iii. Hurley v. Federated Department Stores, Inc., et al, USDC D. Mass. Civil Action No. 97-11479-NG (nationwide class action challenged bankruptcy reaffirmation practices of Federated Department Stores and others; $8,000,000 recovery for class.)

iv. Berry, et al. v. Stop & Shop Supermarket Company, Middlesex Superior Court, C.A. No. 97-4612 (successful statewide class action brought on behalf of consumers overcharged sales tax on their purchases—obtained full refund).

v. Valerie Ciardi v. F. Hoffman LaRoche, et al, Middlesex Superior Court Civil Action No. 99-3244D, (class action pursuant to Massachusetts Consumer Protection Act, M.G.L. c. 93A brought on behalf of Massachusetts consumers harmed by price-fixing conspiracy by manufactures of vitamins; settled for $19,600,000.)

vi. Shelah Feiss v. Mediaone Group, Inc, et al, USDC N. District Georgia, Civil Action No. 99-CV-1170, (multistate class action on behalf of consumers; estimated class recovery of $15,000,000--$20,000,000.)

vii. Mey v. Herbalife International, Inc., USDC, D. W. Va., Civil Action No. 01-C-263M. Co-lead counsel with Attorney McCue and additional co-counsel, prosecuting consumer class action pursuant to TCPA on behalf of nationwide class of junk fax and prerecorded telephone solicitation recipients. $7,000,000 class action settlement preliminarily approved on July 6, 2007 and granted final approval on February 5, 2008.

viii. Mulhern v. MacLeod d/b/a ABC Mortgage Company, Norfolk Superior Court, 2005-01619 (Donovan, J.). Representing class of Massachusetts consumers who received unsolicited facsimile advertisements in violation of the TCPA and G.L. c. 93A. Case certified as a class action, and I was appointed co-lead counsel with Attorney Matthew McCue by the Court on February 17, 2006, settlement for $475,000 granted final approval by the Court on July 25, 2007.

ix. I served as co-counsel on a Massachusetts consumer telemarketing class action entitled Evan Fray-Witzer, v. Metropolitan Antiques, LLC, NO. 02-5827 Business Session, Judge Van Gestel. In this case, the defendant filed two Motions to Dismiss challenging the plaintiff's right to pursue a private right of action and challenging the statute at issue as violative of the telemarketer's First Amendment rights. Both Motions to Dismiss were denied. Class certification was then granted and I was appointed co-lead class counsel. Companion to this litigation, my co-counsel and I successfully litigated the issue of whether commercial general liability insurance provided coverage for the alleged illegal telemarketing at issue. We ultimately appealed this issued to the Massachusetts Supreme Judicial Court which issued a decision reversing the contrary decision of the trial court and finding coverage. See

Terra Nova Insurance v. Fray-Witzer et al., 449 Mass. 206 (2007). This case resolved for $1.8 million.

x. I served as co-class counsel in the action captioned Shonk Land Company, LLC v. SG Sales Company, Circuit Court of Kanswaha County, West Virginia, Civil Action No. 07-C-1800 (multi-state class action on behalf of recipients of faxes in violation of TCPA, settlement for $2,450,000, final approval granted in September of 2009.

xi. I served as co-class counsel in Mann & Company, P.C. v. C-Tech Industries, Inc., USDC, D. Mass., C.A. 1:08CV11312-RGS, class action on behalf of recipients of faxes in violation of TCPA, settlement for $1,000,000, final approval granted in January of 2010.

xii. I served as co-class counsel in Evan Fray Witzer v. Olde Stone Land Survey Company, Inc., Massachusetts Superior Court, Civil Action No. 08-04165 (February 3, 2011) (final approval granted for TCPA class settlement). This matter settled for $1,300,000.

xiii. I served as co-class counsel in Milford & Ford Associates, Inc. and D. Michael Collins vs. Cell-Tek, LLC, USDC, D. Mass. C. A. 1:09-cv-11261-DPW, class action on behalf of recipients of faxes in violation of TCPA, settlement for $1,800,000, final approval granted August 17, 2011 (Woodlock, J.).

xiv. I served as co-class counsel in Collins v. Locks & Keys of Woburn, Inc.., Massachusetts Superior Court, Civil Action No. 07-4207-BLS2 (December 14, 2011) (final approval granted for TCPA class settlement). This matter settled for $2,000,000.

xv. I was appointed class counsel in Brey Corp t/a Hobby Works v. Life Time Pavers,

Inc., Circuit Court for Montgomery County, Maryland, Civil Action No. 349410-V (preliminary approval granted for TCPA class settlement). This matter settled for $1,575,000.

xvi. I was appointed class counsel in Collins, et al v. ACS, Inc. et al, USDC, District of Massachusetts, Civil Action No. 10-CV-11912 a TCPA case for illegal fax advertising, which settled for $1,875,000.

xvii. I was appointed class counsel in Desai and Charvat v. ADT Security Services, Inc., USDC, NDIL, Civil Action No. 11-CV-1925, settlement of $15,000,000 approved.

xviii. I was appointed class counsel in Kensington Physical Therapy, Inc. v. Jackson Therapy Partners, LLC, USDC, D. MD, Civil Action No. 11-CV-02467, settlement of $4,500,000 given final approval.

xix. I was appointed class counsel in Jay Clogg Realty Group, Inc. v. Burger King Corporation, Civil Action No. 13-cv-00662, USDC, D. MD, TCPA settlement of $8,500,000 approved on April 15, 2015.

xx. I was appointed as class counsel in a contested class certification in a Do Not Call case arising under the TCPA in Thomas Krakauer v. Dish Network, L.L.C., USDC MDNC, Civil Action No. 1:14-CV-333 on November 9, 2015.

xxi. I was appointed class counsel in Diana Mey v. Interstate National Dealer Services, Inc. et al, Civil Action No. 1:14-cv-0186-ELR, NDGA, Preliminary Approval Order entered January 28, 2016, Docket No. 163.

10. Plaintiff's counsel have thoroughly investigated the facts and law underlying the claims asserted in this action.

11. Plaintiff requested and US Coachways produced data and documents regarding the claims of Plaintiff and the class. Plaintiff served a subpoena to Gold Mobile, a third party utilized by US Coachways to send text messages, and litigated a separate discovery action in the United States District Court for the District of New Jersey, *Gold Group Enterprises, Inc. d/b/a Gold Mobile v. James Bull*, Civil Action No. 2:14-cv-07410, over the enforcement of that subpoena, which lead production of the business records of Gold Mobile, including the records of texting that Plaintiff used to identify the members of the proposed class.

12. Over the course of three years, the Plaintiff received more than 20 unsolicited text message advertisements. This type of marketing, along with e-mail solicitations, are the two largest forms of marketing engaged in by US Coachways. As their CEO commented in a June 2014 e-mail, "Every month we do an email blast to almost 300,000 customers and text blast to almost 90,000 customers." US Coachways has failed to obtain the requisite consent to send members of the proposed class the text messages. In fact, US Coachways, after being compelled in this case, confirmed that it did not have any evidence of consent to send the text messages at issue. *See* Doc. No. 54 (compelling US Coachways to provide all information of consent following the Plaintiff's motion to compel).

13. Plaintiff's expert Jeffrey Hansen has provided the following analysis of ATDS generated text messages sent by US Coachways to members of the proposed class.

> Total messages sent between '2011-11-09' and '2012-11-08': 205,564
> Total messages sent between '2012-11-09' and '2013-11-08': 89,344
> Total messages sent between '2013-11-09' and '2014-11-08': 96,551

Mr. Hansen's analysis identified 391,459 violative text messages, as US Coachways has not provided any evidence of prior express consent to place the ATDS texts to cell phones, yielding exposure for US Coachways of $195,729,500.

14. On December 14, 2014, Plaintiff filed an Amended Complaint in the action. US Coachways again tendered the Action to Illinois Union seeking coverage and again Illinois Union denied either a defense or indemnity by letter dated January 13, 2015. There is no TCPA exclusion in the policy and Illinois Union's denial from its January 13, 2015 denial letter is based solely on its position that the Plaintiff's claim does not relate to the "performance of Insured's services as a bus charter broker "for a fee." A copy of the January 13, 2015 denial letter is attached hereto as Exhibit A.

15. On July 23, 2015, counsel for Plaintiff sent a demand letter to Illinois Union, setting forth the facts of the case, Plaintiff's basis for liability and the potential exposure to US Coachways. A copy of the July 23, 2015 demand is attached hereto as Exhibit B.

16. On August 24, 2015, through outside counsel, Illinois Union sent a letter denying coverage, failing to cite the amended definition of Professional Services which includes "Travel Agency Operations" and declining Plaintiff's invitation to engage in mediation over the case. The August 24, 2015 denial letter failed to cite the broadened definition of Professional Services. *See* Letter from Richard W. Boone, Jr. to Edward A. Broderick, attached hereto as Exhibit C.

17. Along with my co-counsel in this action, I have significant experience in litigating claims for coverage under insurance policies for TCPA claims, including a successful appeal on a case of first impression before the Massachusetts Supreme Judicial Court establishing the availability of such coverage. See Terra Nova Insurance v. Fray-Witzer et al., 449 Mass. 206 (2007). I strongly believe that the Illinois Union policy at issue here provides coverage for the claims of Plaintiff and the proposed class.

18. US Coachways shared two years of audited financial statements with counsel for Plaintiff which confirmed for Plaintiff's counsel that US Coachways was unable to financially satisfy a judgment in this action.

19. The proposed settlement of $49,932,375 represents $125 per violation.

20. The settlement in this action was reached in arms-length negotiations with extremely competent counsel representing Defendant, and represents a fair and reasonable compromise.

SIGNED UNDER PAINS AND PENALTIES OF PERJURY THIS 9th DAY OF March, 2016.

/s/ *Edward A. Broderick*
Edward A. Broderick

EXHIBIT A

ACE North American Claims
Professional Risk
P.O. Box 5105
Scranton, PA 18505-0518
[redacted]
www.acegroup.com

Diane Fazzolari
Claims Director

January 13, 2015

By certified mail and email (USCoachways@gmail.com)
Edward Telmany
US Bus Charter & Limo Inc.
1000 St. Mary's Avenue, Suite 2B
Staten Island, NY 10305

RE: **Insured:** [redacted]
ACE Claim No: **JY14J0426052**
Claimant: **James Bull**
Policy No: **G24011999 007**

Dear Mr. Telmany:

ACE North American Claims ("ACE"), on behalf of Illinois Union Insurance Company (the "Company"), hereby acknowledges receipt of the amended complaint filed on December 11, 2014 in the above referenced matter. The purpose of this letter is to inform you that for the reasons detailed below, the amended complaint does not alter ACE's prior coverage determination **that there is no coverage for this matter.**

Background

We are in receipt of the amended class action complaint filed by the Plaintiff in which it is alleged that the Insured sent unlawful text messages in violation of the Telephone Consumer Protection Act. It is further alleged that the Insured used an automatic telephone dialing system to place text messages to the Plaintiff. The amended complaint alleges that the Plaintiff placed his telephone number on the Do Not Call Registry on July 17, 2005 and has not removed it at any time since then, and thus was on the registry during the alleged time the Insured sent the purported text messages. The following causes of action are pleaded in the amended complaint: (a) knowing and/or willful violation of the Telephone Consumer Protection Act; and (b) negligent violations of the Telephone Consumer Protection Act. The Plaintiff is seeking to recover statutory damages of $500 for every negligent violation of the Act and $1,500 for each knowing violation. The Plaintiff is also seeking to restrain the Insured from engaging in future telemarketing in violation of the Act.

The Policy

A Miscellaneous Professional Liability Policy was issued to the Insured for the policy period November 9, 2013 to November 9, 2014. The Policy provides for a Limit of Liability of $5,000,000 each Claim and in the Aggregate. The Policy also provides for a Retention of $25,000 each Claim.

With respect to the Claim, we direct your attention to the Insuring Agreement, which provides as follows:

I. Insuring Agreement and Defense

A. Insuring Agreement

The **Company** will pay on behalf of the **Insured** all sums in excess of the Retention that the **Insured** shall become legally obligated to pay as **Damages** and **Claims Expenses** because of a **Claim** first made against the **Insured** and reported to the **Company** during the **Policy Period** by reason of a **Wrongful Act** committed on or subsequent to the **Retroactive Date** and before the end of the **Policy Period**.

We also refer to the following definitions:

II. Definitions

P. **Professional Services** means only those services specified in Item 7 of the Declarations performed for others by an Insured or by any other person or entity for whom the **Insured** is legally liable.
Item 7 of the Declarations further provides "Solely in the performance of professional services as a bus charter broker for others for a fee".
T. **Wrongful Act** means any actual or alleged negligent act, error, omission, misstatement, misleading statement or **Personal Injury Offense** committed by the **Insured** or by any other person or entity for whom the **Insured** is legally liable in the performance of or failure to perform **Professional Services**.

Coverage Position

Please be advised that the amended complaint does not alter ACE's prior coverage determination that there is no coverage for this matter. The amended complaint, like the original complaint, does not arise by reason of a Wrongful Act and hence falls outside the scope of coverage provided by the Insuring Agreement. Specifically, the Claim does not arise from any actual or alleged act, error, omission, misstatement, misleading statement or Personal Injury Offense committed by the Insured in the performance of professional services as a bus charter broker for others for a fee. Rather, the Claim arises from the alleged use of automatic telephone dialing system to transmit text messages and it does not contain any allegations relating to the performance of the Insured's services as a bus charter broker. We also note the Insured did not provide any services to the Plaintiff "for a fee". Accordingly, for the reasons set forth herein, as well as in our letter dated August 18, 2014, which ACE incorporates herein, ACE hereby advises **that there is no coverage for this matter**.

As previously advised, we strongly recommend that you report this matter to any other insurance carrier that may afford coverage for this matter. Please note that you may request a re-evaluation of the coverage position. Any requests for re-evaluation should be accompanied by additional factual information, documentation, and/or legal precedent which you believe may apply. It should be directed to my attention. In the event of a re-evaluation, the Company reserves all rights under the Policy. Nothing herein shall be construed as a waiver of such rights.

ACE reserves the right to deny coverage based upon grounds other than those expressly set forth in this letter and to supplement and/or amend this letter to address additional coverage issues as they may arise, based upon all the provisions, terms, conditions, exclusions, endorsements and definitions found in the Policy and additional facts that may come to ACE's attention. By the same token, ACE will take into consideration any additional information that you provide. Nothing stated herein and no further action taken by ACE or on its behalf should be construed as a waiver of any of its rights under the Policy. On the contrary, by providing this or any prior correspondence to the Insured, engaging in any prior or future

discussions with the Insured, or paying or agreeing to pay any amount to or on or behalf of the Insured, ACE does not waive any rights that it has under the Policy at law or in equity and understands the Insured reserves its rights as well.

Sincerely,

[redacted]

Claims Director
ACE North American Claims

Via email only
cc: [redacted]

EXHIBIT B

BRODERICK LAW, P.C.

99 High St., Suite 304
Boston, Massachusetts 02110

Edward A. Broderick

Tel. (617) 738-7080
Fax (617) 830-0327
ted@broderick-law.com

July 23, 2015

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Ms. Susan Rivera
President
Illinois Union Insurance Company
525 West Monroe Street, Suite 400
Chicago, IL 60661

RECEIPT NUMBER 7010 0780 0000 3218 4704

Mr. Bruce Kessler
President
Mr. Joseph Casey
Division President, Professional Risk
ACE Westchester
11575 Great Oaks Way, Suite 200
Alpharetta, GA 30022

RECEIPT NUMBERS 7010 0780 0000 3218 4766, 7010 0780 0000 3218 4733

Re: *Bull v. US Coachways, Inc.* Civil Action No. 1:14-cv-05789 (Northern District of Illinois)

Dear Ms. Rivera and Messrs. Kessler and Casey:

Pursuant to the provisions of N.Y. Ins. Law § 2601, et seq., Georgia Unfair Settlement Practices Act and Unfair and Deceptive Practices Act, O,C.G.A. § 10-1-370 et seq. and O.C.G.A. § 33-6-1, *et seq*. and Illinois 215 ILCS 5/154, I along with my co-counsel, Brian Murphy, Matthew McCue and Anthony Paronich, write on behalf of the plaintiff, James Bull, ("Plaintiff") and the nationwide class of consumers he seeks to represent in the above-referenced underlying consumer class litigation ("Class Litigation"), to make a demand upon Illinois Union Insurance Company ("Illinois Union") to engage in settlement negotiations. I summarize the relevant law and facts in this case below.

BACKGROUND

This case arises under the remedial provisions of the Telephone Consumer Protection Act ("TCPA"), a statute enacted more than twenty years ago in response to consumer "outrage" over

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ACE Westchester

Re: *Bull v. US Coachways, Inc.* Civil Action No. 1:14-cv-05789 (Northern District of Illinois)

July 23, 2015

the proliferation of intrusive, nuisance telemarketing practices. *See Mims v. Arrow Fin. Servs., LLC,* 132 S. Ct. 740, 745 (2012). In so doing, Congress recognized that "[u]nrestricted telemarketing . . . can be an intrusive invasion of privacy[.]" Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(5) (1991), *codified at* 47 U.S.C. § 227.

US Coachways claims to be the largest logistic coach ways solutions company in the country. In order to drive repeat business and secure some new business, US Coachways began sending blast text messages in 2011 to individuals who had booked past trips as well as and individuals who had asked for quotes over the telephone, but decided to not book trips. In order to do this, US Coachways used a marketing platform, Gold Mobile. The Gold Mobile marketing platform allows customers to load lists of cellular telephone numbers and design the content of a text message that is then automatically sent to the entire list.

The amount of text messages sent in this matter, over 1,000,000 in the last three years, is staggering. An example of the privacy invasions caused by this marketing is indicated in the Plaintiff's own experience with US Coachways. Over the course of three years, the Plaintiff received more than 20 unsolicited text message advertisements. This type of marketing, along with e-mail solicitations, are the two largest forms of marketing engaged in by US Coachways. As their CEO commented in a June 2014 e-mail, "Every month we do an email blast to almost 300,000 customers and text blast to almost 90,000 customers."

However, The TCPA places restrictions on computer-generated telemarketing calls to cell phones. The general rule is that no person may make a call to a cellular telephone using an automatic telephone dialing system, period. 47 U.S.C. § 227(b)(1)(A)(iii). There is an affirmative defense available if the caller can show that it had the "prior express consent" of the call recipient to receive the call. *Id.* "Prior express consent" exists where a consumer has (a) clearly stated that the telemarketer may call, and (b) clearly expressed an understanding that the telemarketer's subsequent call will be made for the purpose of encouraging the purchase of goods or services. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 F.C.C.R. 1830 ¶ 7 (FCC 2012).

Courts have explained that, "prior express consent" means that a caller is "not permitted to make an automated call to [an individual's] cell phone unless [that individual] had previously said to [the caller]…something like…: 'I give you permission to use an automatic telephone dialing system to call my cellular phone." *Edeh v. Midland Credit Mgmt., Inc.,* 748 F. Supp. 2d 1030, 1038 (D. Minn. 2010) aff'd, 413 F. App'x 925 (8th Cir. 2011); *Thrasher-Lyon v. CCS*

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Re: *Bull v. US Coachways, Inc.* Civil Action No. 1:14-cv-05789 (Northern District of Illinois)

July 23, 2015

Commercial, LLC, No. 11-cv-04473, 2012 WL 3835089, at *3 (N.D. Ill. 2012). Just last year, the FCC, at the request of the United States Courts of Appeals for the Second Circuit, provided further guidance regarding consent for entities to use an autodialer to call cellular telephones, as is alleged here. Notably, the FCC clearly explained the scope of prior express consent stating:

> Consumers who provide a wireless phone number for a limited purpose—for service calls only, for example—'do not necessarily expect to receive telemarketing calls that go beyond the limited purpose,' and thus have not given their consent to receive telemarketing calls. *2012 Rulemaking Order*, 27 FCC Rcd. at 1840 (¶ 25).

See Exhibit 1, *FCC's Response to Request from the United States Courts of Appeals for the Second Circuit,* at 5. Courts in the district where this action is pending have interpreted this Order consistent with protecting the privacy rights of call recipients. In *Kolinek v. Walgreen Co.*, 2014 U.S. Dist. LEXIS 91554 (N.D. Ill. July 7, 2014), Judge Kennelly held:

> The FCC has established no general rule that if a consumer gives his cellular phone number to a business, she has in effect given permission to be called at that number for any reason at all, absent instructions to the contrary. Rather, to the extent the FCC's orders establish a rule, it is that the scope of a consumer's consent depends on its context and the purpose for which it is given. Consent for one purpose does not equate to consent for all purposes.
>
> This, in the Court's view, is a more natural reading of the TCPA's exception for a call "made with the prior consent of the called party."

Id. at *10-11. As another Court in the district where this matter is pending held, "the FCC's final orders are binding on this court under the Hobbs Act." *Griffith v. Consumer Portfolio Servs., Inc.*, 838 F.Supp.2d 723, 726 (N.D. Ill. 2011). Here, US Coachways has failed to obtain the requisite consent to send these individuals the text messages. In fact, US Coachways, after being compelled in this case, confirmed that it did not have any evidence of consent to send the text messages at issue.

Grafting phone numbers from prior customers and sending them illegal text messages is a common tactic, but one which clearly violates the TCPA. In 2012, a Jiffy Lube franchisee agreed to pay $47,000,000 to resolve a text message marketing suit after it took cellular telephone

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(Northern District of Illinois)

July 23, 2015

numbers from old invoices and the customer database at a number of its Jiffy Lube locations. *See In re Jiffy Lube International, Inc. Text Spam Litigation*, United States District Court for the Southern District of California, Civil Action No. 11-md-02261, (final approval granted on February 20, 2013). Here, US Coachways violation of the law was not limited to interactions with prior customers, but also to individuals, such as the Plaintiff, who had never actually entered into a transaction with US Coachways, but merely obtained a quote.

COURTS REGULARLY GRANT CLASS CERTIFICATION IN TCPA CASES

Not surprisingly, given the scope of illegal telemarketing previously recognized by Congress in implementing the TCPA, the relatively small monetary recovery under the TCPA for each claim, and the simple elements required to prove a TCPA violation, many consumers have sought to enforce their rights under the TCPA via class actions. In fact, in January of 2012, the U.S. Supreme Court issued its opinion in *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740 (2012), holding that federal courts have federal question jurisdiction under the TCPA, and recognizing that the class action vehicle is the most appropriate way to provide consumers with redress for violations covered by the TCPA, stating:

> Arrow's floodgates argument assumes "a shocking degree of noncompliance" with the Act . . . and seems to us more imaginary than real. The current federal district court civil filing fee is $350. 28 U.S.C. §1914(a). How likely is it that a party would bring a $500 claim in, or remove a $500 claim to, federal court? Lexis and Westlaw searches turned up 65 TCPA claims removed to federal district courts in Illinois, Indiana, and Wisconsin since . . . October 2005 . . . All 65 cases were class actions, not individual cases removed from small-claims court. There were also 26 private TCPA claims brought initially in federal district courts; of those, 24 were class actions.

Mims, 132 S. Ct. at 745. Thus, the Supreme Court points to the class action vehicle as an appropriate means by which TCPA claims may be pursued. Since the enactment of the TCPA, trial and appellate courts nationwide have scrutinized and approved consumers' use of the class action vehicle to combat illegal telemarketing. The Seventh Circuit Court of Appeals noted that class certification of TCPA claims is "normal" because the main questions that arise in TCPA class actions are "common to all recipients." *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 684 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1318 (2014).

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Re: *Bull v. US Coachways, Inc.* Civil Action No. 1:14-cv-05789 (Northern District of Illinois)

July 23, 2015

The Kansas Supreme Court, looking at the policy behind Rule 23, summarized why TCPA cases are appropriate for class certification:

> We do not agree with the defendant's contention that over 100,000 individual small claims actions would be superior to a single class action. While the defendant in such an action might benefit if only a small number of plaintiffs found it worth their while to bring suit or were aware of their rights under the TCPA, this small turnout would serve only to frustrate the intent of the TCPA and to protect junk fax advertisers from liability. It would, accordingly, not provide a "superior" method for individual plaintiffs.

Critchfield Physical Therapy v. Taranto Group, Inc., 263 P.3d 767, 780 (Kan. 2011) (certifying a TCPA illegal marketing class Kansas's equivalent of Rule 23(b)(3).

POTENTIAL EXPOSURE

The TCPA creates a private cause of "action to receive $500 in damages for each such violation,". *See* 47 U.S.C. § 227. Here, with over 1,000,000 text messages sent, US Coachways faces over **$500,000,000** in potential liability from the ATDS class alone. In the face of this level of exposure, we suggest that settlement, with the peace of mind that comes with a full release, is the only economically rational choice for US Coachways and its insurance carriers.

APPLICABLE INSURANCE LAW

Given these facts, and the massive exposure US Coachways faces for its illegal conduct, the failure of Illinois Union to resolve this claim under these circumstances would constitute an unfair and deceptive act or practice under the law of all of the states whose law might apply—Illinois, New York and Georgia. US Coachways is headquartered in Staten Island, NY, so typically NY insurance law should apply. However, Illinois Union is headquartered in Chicago, making Illinois law possibly applicable. ACE Westchester, Illinois Insurance's parent is headquartered in Alpharetta, Georgia, making Georgia law possibly applicable. Under the law of all three states, the outright denial of coverage by Illinois Union and ACE Westchester constitutes and unfair insurance settlement practice.

Ms. Susan Rivera
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Re: *Bull v. US Coachways, Inc.* Civil Action No. 1:14-cv-05789
(Northern District of Illinois)

July 23, 2015

Illinois Insurance Law

Illinois insurance law defining an unfair settlement practice as:

> Not attempting in good faith to effectuate prompt, fair, and equitable settlement of claims submitted in which liability has become reasonably clear.

Illinois 215 ILCS 5/154(d). In addition, Illinois 215 ILCS 5/154(e) prohibits an insurance company from:

> Compelling insureds or beneficiaries to institute suits to recover amounts due under its policies by offering substantially less than the amounts ultimately recovered in suits brought by them.

While there is no common-law bad-faith tort action under Illinois law, an insured may assert a common-law action against a liability insurer that has failed to act in good faith in responding to a settlement offer. *Cramer v. Insurance Exchange Agency*, 174 111.2d 513, 675 N.E.2d 897, 221 lll.Dec. 473 (1996). One of an insurer's obligations under a contract of liability insurance, arising out of its implied duty of good faith and fair dealing, is to settle a claim that has been brought against the insured when it is appropriate to do so. *Id.* Illinois courts have recognized that the insurer has a duty to act in good faith in responding to such settlement offers. *See Haddick v. Valor Insurance*, 198 I11.2d 409, 763 N.E.2d 299, 261 Ill.Dec. 329 (2001). As the court explained in *Cramer*:

> The "duty to settle" arises because the policyholder has relinquished defense of the suit to the insurer. The policyholder depends upon the insurer to conduct the defense properly. In these cases, the policyholder has no contractual remedy because the policy does not specifically define the liability insurer's duty when responding to settlement offers. The duty was imposed to deal with the specific problem of claim settlement abuses by liability insurers where the policyholder has no contractual remedy.

When an insurer breaches this duty, the insurer may be liable for the full amount of the judgment against the policyholder, regardless of policy limits. *Krutsinger v. Illinois Casualty Co.,* 10 Ill.2d 518, 141 N.E.2d 16 (1957); *Swedishamerican Hospital Association of Rockford v. Illinois State Medical Inter-Insurance Exchange*, 395 Ill.App.3d 80, 916 N.E.2d 80, 334 111.Dec.7 (2d Dist.

Ms. Susan Rivera
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(Northern District of Illinois)

July 23, 2015

2009).

New York Insurance Law

An insurer's conduct is regulated under New York Insurance Law §2601: Unfair Claims Settlement Practices, as well as the implied covenant of good faith and fair dealing in insurance contracts that traces its origin to the early part of the twentieth century. *See Brassil v. Maryland Cas. Co.*, 210 N.Y. 235 (1914) (finding that it was the obligation of the insurer to "deal fairly and in good faith" with its insured).

When making a determination regarding allegations of bad faith against an insurer in failing to settle, New York law has enumerated the following factors: (a) *Proper Investigation and/or Evaluation*: It is the obligation of the insurer to properly and thoroughly investigate the facts and circumstances of a claim in order to be able to ascertain the potential liability and the amount of the damages faced by the insured, which continues throughout the course of the litigation. *See Brown v. United States Fidelity & Guar Co.*, 314 F.2d 675 (2d Cir. 1963). (b) *Timely Negotiation of a Settlement or Failure to Negotiate*: New York courts will evaluate whether an insurer negotiated a settlement in a timely fashion, including assessment of whether, when a demand is within policy limits, the insurer made a fair and reasonable counter-proposal in a timely manner. *See State v. Merchants Ins. Co. of New Hampshire*, 109 A.D.2d 935 (3d Dep't 1985). (c) *Failure to Foresee a Verdict in Excess of the Policy Limits*: When an insurer has adequately and diligently investigated the circumstances surrounding a claim, and has assessed both liability and injury, the insurer may nevertheless be found to have acted in bad faith, if based on such knowledge, it should have recognized the danger of a substantial excess verdict being rendered against the insured. *See Knobloch v. Royal Globe Ins. Co.*, 38 N.Y.2d 471 (1976). (d) *Failure to Inform the Insured of Settlement Negotiations*: Although an insurer has the right to conduct settlement negotiations on behalf of its insured without consulting the insured where there is no "consent to settle" provision in the policy, the insurer is still obligated in most circumstances to respond accurately to requests from its insured as to the progress of negotiations and as to settlement developments, and a failure to do so may lead to a finding of bad faith against the insurer. *See Knobloch*, 38 N.Y.2d 471. (e) *Attempts to Obtain Contribution to Settlement From the Insured*: It is improper for an insurer to insist upon contribution from the insured to settle a claim, however, an insurer is permitted to discuss with its insured that contribution to settlement is possible, especially when the settlement amount is high compared to what the insurer is willing to pay. *See Brockstein v. Nationwide Mut. Ins. Co.*, 417 F.2d 703 (2d Cir. 1969) (f) *Belief in Non-Coverage*: An insurer will not be held liable for an excess judgment

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July 23, 2015

rendered against its insured where an insurer's refusal to settle is on the belief that there is no coverage under the applicable policy *only if* the inusrer's belief was reasonable. *See Dawn Frosted Meats, Inc. v. Ins. Co. of North American*, 99 A.D.2d 448 (1st Dep't 1984). (g) *Comparative Financial Risks*: Insurers should evaluate the potential magnitude of damages and the financial burden each party may be exposed to as a result of a refusal to settle. Bad faith may be found where an insurer takes a financial risk by not settling within policy limits, where that risk is considerably greater for the insured than for the insurer. *See Brown*, 314 F.2d at 678-79. (h) *The Insured's Conduct*: According to the *Pavia* Court, the insured's fault in delaying or ceasing settlement negotiations by misrepresenting the facts may also be taken into consideration. *See Pavia*, 82 N.Y.2d at 455. Here US Coachways promptly reported the claim and has not cooperated, all without securing coverage. Under this standard, Plaintiff submits that the denial of coverage by Illinois Union and ACE constitutes an act of bad faith.

Georgia Insurance Law

The Georgia Unfair Settlement Practices Act, § 33-6-34, defines an unfair settlement practice as:

> "Not attempting in good faith to effectuate prompt, fair, and equitable settlement of claims submitted in which liability has become reasonably clear"

O.C.G.A. § 33-6-34(4). In addition, O.C.G.A. § 33-6-34 prohibits an insurance company from:

> "Compelling insureds or beneficiaries to institute suits to recover amounts due under its policies by offering substantially less than the amounts ultimately recovered in suits brought by them."

O.C.G.A. § 33-6-34(5). In Georgia, in addition to policy proceeds recoverable under an insurance contract, an insured may have a claim for damages to its insured for failing to settle the claim of an injured person where the insurer is guilty of negligence, fraud, or bad faith in failing to compromise the claim. *McCall v. Allstate Ins. Co.*, 251 Ga. 869, 870 (310 S.E.2d 513) (1984). In deciding whether to settle a claim within the policy limits, the insurance company must give equal consideration to the interests of the insured. *See S. General Ins. Co. v. Holt*, 262 Ga. 267, 269 (Ga. 1992). "An insurance company may be liable for the excess judgment entered against its insured based on the insurer's bad faith or negligent refusal to settle a personal claim within

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July 23, 2015

the policy limits." *Cotton States Mut. Ins. Co. v. Brightman,* 276 Ga. 683, 684 (2003). Also under this standard, Plaintiff submits that the denial of coverage by Illinois Union and ACE constitutes an act of bad faith.

Applicable Insurance

There is at least one insurance policy at issue in this case. Effective November 9, 2013 to November 9, 2014, Illinois Union/ACE issued a miscellaneous Professional Liability Policy No. G24011999 007 ("the Policy"). The Policy covers TCPA claims under the "Personal Injury Offense" section of the policy, which states, *inter alia*:

> L. **Personal Injury Offense** means one or more of the following offenses:
>
> ....
>
> 4. publication or an utterance in violation of an individual's right to privacy

Courts across the United States, including a number of those litigated by Plaintiff's counsel, have repeatedly recognized that the privacy invasion coverage afforded by a commercial general liability policy extends to TCPA claims. *See Park University Enterprises, Inc. v. American Casualty Company of Reading, Pennsylvania*, 442 F.3d 1239, 1243 (10th Cir. 2006) (Kansas law) *Valley Forge Insurance Co. v. Swiderski Electronics, Inc.*, 860 N.E.2d 307, 317 (Ill. 2006); *Pekin Insurance Co. v. XData Solutions, Inc*, 958 N.E.2d 397, 401-03 (Ill. App. 1 Dist. 2011) (same); *Owners Ins. Co. v. European Auto Works, Inc.*, 695 F.3d 814, 818-22 (8th Cir. 2012); *Hooters of Augusta, Inc. v. American Global Ins. Co.*, 157 F. App'x 201, 206-07 (11th Cir. 2005) (Georgia law); *Western Rim Inv. Advisors, Inc. v. Gulf Ins. Co.*, 96 F. App'x 960 (5th Cir. 2004), *affg,* 269 F. Supp. 2d 836 (N.D. Tex. 2003); *Sawyer v. West Bend Mut. Ins. Co.*, 821 N.W.2d 250, 257-58 (Wis. App. 2012); *Penzer v. Transportation Ins. Co.,* 29 So.3d 1000, 1006-07 (Fla. 2010); *Terra Nova Ins. Co. v. Fray-Witzer,* 869 N.E.2d 565, 572-74 (Mass. 2007).

There is no TCPA exclusion in the policy and Illinois Union's denial from its January 13, 2015 denial letter is based solely on its position that the Plaintiff's claim does not relate to the "performance of Insured's services as a bus charter broker "for a fee." Illinois Union's position would apparently convert the policy into an auto liability policy. As explained above, marketing

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July 23, 2015

and customer retention are a vital part of the US Coachways business model, and is how US Coachways performs services as a bus charter broker for a fee.

COMPARABLE SETTLEMENTS

As discussed above, businesses taking telephone numbers from old invoices and using them to send text message advertisements without the prior express consent of the recipients is not unprecedented. *In re Jiffy Lube International, Inc. Text Spam Litigation*, United States District Court for the Southern District of California, Civil Action No. 11-md-02261, (final approval granted on February 20, 2013) resolved for a payment of $47,000,000 for approximately 2,000,000 text message advertisements that were sent.

Another comparison is *Desai v. ADT Sec. Servs., Inc.*, No. 11-1925 (N.D. Ill.), a case also handled by Plaintiff's counsel. On June 21, 2013, The Court in *Desai* granted final approval for a settlement for $15,000,000 for 1,000,000 telemarketing calls that had been sent by a third party agent, and an agreement from ADT to adopt changes to its telemarketing compliance policies going forward.

In the interest of settling this case without further expense, the Plaintiff is willing to mediate with Illinois Union to discuss resolution of this case. We expect a response to this demand letter within 30 days. At that point, the Plaintiff will begin settlement negotiations with the Defendant directly, including a potential assignment of rights under the applicable insurance policies.

Sincerely yours,

/s/

Edward A. Broderick

cc: Paul Gamboa, Esq. (pgamboa@gordonrees.com)
Brian Murphy, Esq. (murphy@mmblaw.com)
Matthew McCue, Esq. (mmccue@massattorneys.net)
Anthony Paronich, Esq. (anthony@broderick-law.com)

EXHIBIT 1

Federal Communications Commission
Washington, D.C. 20554
Office Of General Counsel
445 12th St. S.W.
Washington, D.C. 20554
Tel: (202) 418-1740 / Fax: (202) 418-2819

July 17, 2014

John Ley, Clerk of Court
United States Court of Appeals
for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Re: *Palm Beach Golf Center-Boca, Inc. v. Sarris*, No. 13-14013

Dear Mr. Ley:

The Federal Communications Commission respectfully submits this letter brief in response to the Court's request of July 7, 2014. In that request, the Court asked for the FCC's position "on whether the [Telephone Consumer Protection Act (TCPA)] and its accompanying regulations allow a plaintiff to recover damages from a defendant who sent no facsimile to the plaintiff, but whose independent contractor did." As we explain, the answer is yes.

In its letter, the Court adverted to the FCC's May 9, 2013 declaratory ruling in *DISH Network*, 28 FCC Rcd 6574 (2013), *pet. for review dismissed*, *DISH Network, LLC v. FCC*, 552 Fed. Appx. 1 (D.C. Cir. 2014), which addressed questions regarding the availability of direct and vicarious liability for unlawful telemarketing calls under the TCPA. As the Court observed, the TCPA and the FCC's implementing regulations "use[] different language in describing facsimile transmissions and telemarketing calls."

The *DISH Network* ruling did not address or alter the treatment of facsimile transmissions under the TCPA or the Commission's implementing regulations. Under the terms of the statute and regulations, the recipient of an unsolicited facsimile advertisement may recover damages from a defendant that does not itself transmit the offending facsimile, if the defendant has hired an independent contractor to transmit facsimiles advertising the defendant's goods or services. Such liability does not depend upon the application of federal common law vicarious liability principles.

BACKGROUND

1. Statutory and Regulatory Background. The Telephone Consumer Protection Act, Pub. L. No. 102-243, 105 Stat. 2394, codified at 47 U.S.C. § 227, contains an assortment of provisions designed to protect consumer privacy and prevent unwanted communications over telephone lines. Separate subsections of the statute address voice telephone calls and facsimile advertisements. Those subsections contain different language, and FCC rules implementing those provisions treat voice calls and faxes differently.

a. *Voice Telephone Calls*. The TCPA makes it unlawful, subject to certain exceptions, for any person within the United States to "initiate any telephone call to any residential telephone line using an artificial or prerecorded voice … without the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(B). Such artificial or prerecorded voice calls are commonly referred to as "robo-calls." The statute also authorizes the FCC to establish a national do-not-call registry that consumers can use to notify telemarketers that they object to receiving telephone solicitations. 47 U.S.C. § 227(c)(1)-(4). The FCC's implementing regulations provide – again, subject to exceptions – that no person or entity may "initiate any telephone solicitation … [to any] residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry." 47 C.F.R. § 64.1200(c)(2).

In identifying the party that "initiates" calls in violation of these robo-call and do-not-call-registry prohibitions, the Commission's rules distinguish between the "telemarketer" and the "seller." The Commission defines the "telemarketer" as "the person or entity that *initiates* a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person." 47 C.F.R. § 64.1200(f)(11) (emphasis added). By contrast, the "seller" is defined as "the person or entity *on whose behalf* a telephone call or message *is initiated* for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person." *Id.* § 64.1200(f)(9) (emphasis added). Thus, for example, in the *DISH Network* context, DISH was the seller and its third-party telemarketers were the parties that initiated calls promoting DISH's satellite television services.

The *DISH Network* ruling arose in the context of primary jurisdiction referrals from TCPA litigation involving alleged violations of the robo-call and do-not-call prohibitions contained in the TCPA and associated FCC rules. In it, the FCC relied upon these regulatory definitions of "seller" and "telemarketer" to hold that the party that is directly liable for unlawfully "initiat[ing]" a robo-call or a call to a number on the do-not-call registry is the telemarketer that "takes the steps necessary to physically place a telephone call" and not the seller whose goods or services the telemarketer promotes. *DISH Network* ¶ 26; *see also id.* ¶ 27. But the Commission also ruled that although a seller is not *directly* liable for robo-call and do-not-call violations committed by its third-party telemarketers, the seller may nevertheless be *vicariously* liable for such violations under federal common law agency principles.[1] *Id.* ¶¶ 28-47.

b. *Facsimile Advertisements*. The TCPA uses different language governing facsimile transmissions. Specifically, the TCPA prohibits the "use [of] any telephone facsimile machine … to *send*, to a telephone facsimile machine, an unsolicited advertisement." 47 U.S.C. § 227(b)(1)(C) (emphasis added). In contrast with the Commission's construction of "initiate" in the robo-call and do-not-call contexts – where FCC rules describe the directly-liable call "initiat[or]" as the "telemarketer" that physically makes the call – the FCC defines the directly-liable "sender," for purposes of the TCPA's unsolicited facsimile advertisement prohibition, as "the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement." 47 C.F.R. § 64.1200(f)(10). In other words, under the plain text of that definition – and unlike the robo-call and do-not-call contexts – direct liability for sending an unsolicited facsimile advertisement attaches to the entity (defined as the "sender") whose goods or services are being promoted, and *not* generally to the entity that physically transmits the facsimile.[2]

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[1] The *DISH Network* ruling addresses situations where a seller relies on third-party telemarketers; a seller could of course be directly liable if it acts as its own telemarketer.

[2] Under the FCC's rules, a party that transmits the unsolicited facsimile advertisement, but does not also meet the definition of "sender," may nevertheless be jointly and severally liable (along with the sender) "if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile transmissions." 47 C.F.R. § 64.1200(a)(4)(vii); *see Rules and Regulations Implementing the Telephone Consumer Protection Act of*

The FCC adopted the codified definition of "sender" in 2006. *Junk Fax Order*, 21 FCC Rcd at 3808 (¶ 39) ("We take this opportunity to emphasize that under the Commission's interpretation of the facsimile advertising rules, the sender is the person or entity on whose behalf the advertisement is sent."), 3822 (setting out codified definition of "sender"). That codification is consistent with the Commission's pre-existing uncodified interpretation that "the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements." *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 10 FCC Rcd 12391, 12407 (¶ 35) (1995).

2. The District Court Proceedings Below. In the proceedings below, the plaintiff golf center (Palm Beach Golf) brought a private TCPA lawsuit against the defendant dental office (Sarris), alleging that Sarris had sent the golf center an unsolicited facsimile advertisement in violation of 47 U.S.C. § 227(b)(1)(C). *See District Court Order* at 10-11. The district court described the alleged link between defendant Sarris and the facsimile transmitted to the plaintiff golf center as follows: Sarris had "engaged an independent contractor" named Roberts to provide marketing services to his dental practice, giving Roberts "'free rein' to legally advertise the practice." *Id.* at 2. Roberts, in turn, allegedly contracted with an entity called Business to Business Solutions ("B2B"), which sold facsimile advertising services in the United States on behalf of a Romanian company called Macaw. *See id.* at 2-3. B2B/Macaw allegedly then transmitted the offending fax to the golf center. *See id.* at 3-4, 7-9, 11.

The golf center alleged that this link between Sarris and the fax was sufficient to create direct (as opposed to vicarious) liability on Sarris's part,

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1991, 21 FCC Rcd 3787, 3808 (¶ 40) (2006) (*Junk Fax Order*). Such "high degree of involvement" by the party transmitting the facsimile may include "suppl[ying] the fax numbers used to transmit the advertisement," "mak[ing] representations about the legality of faxing to those numbers," or "advis[ing] a client about how to comply with the fax advertising rules." *Junk Fax Order*, 21 FCC Rcd at 3808 (¶ 40); *see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014, 14131 (¶ 196) & n.724 (2003) (noting that requisite high degree of involvement by the party transmitting the fax may also include a "role in reviewing and assessing the content of a facsimile message").

because Sarris met the definition of "sender" under the FCC's rules and the fax advertisement was unsolicited. *Id.* at 14.

The district court granted summary judgment in favor of the defendant dental office. *Id.* at 33. The court rejected the golf center's direct liability claim, ruling that it could establish liability, if at all, only on the basis of vicarious liability. *Id.* at 12-13. In doing so, the court relied on the FCC's ruling, in *DISH Network*, that the "seller" generally is not directly liable for unlawful telemarketing calls initiated by third-party telemarketers on the seller's behalf. *Id.* The court acknowledged that *DISH Network* "specifically examined the meaning of the word 'initiate' as used in the [statutory] telemarketing prohibition … instead of the word 'send' as used in the [statutory] unsolicited fax prohibition." *Id.* at 13 n.13. The court also conceded that *DISH Network* "specifically addressed the [FCC's rule defining the] term 'seller' in the telemarketing context, not [the definition of] 'sender' in the fax context." *Id.* at 13 n.13. The court nevertheless appeared to find that the Commission's analysis in *DISH Network* regarding the absence of direct seller liability in the telemarketing context also applied to foreclose direct sender liability in the fax advertising context, and hence foreclosed direct sender liability by the defendant dental office. *Id.* at 12-13.[3]

ARGUMENT

In holding "that a party is not directly liable" under the TCPA's prohibition against "send[ing]" unsolicited facsimile advertisements "unless it actually transmits a fax," the district court acknowledged the existence of, but did not cite or discuss, "pre-*DISH Network* decisions" to the contrary. *District Court Order* at 14; *see also Addison Automatics, Inc. v. The RTC Group, Inc.*, 2013 WL 3771423 at *4 (N.D. Ill. 2013) (direct TCPA liability available against party whose goods or services are advertised in fax transmitted by others); *Machesney v. Lar-Bev of Howell, Inc.*, 292 F.R.D. 412, 415 (E.D. Mich. 2013) (same). The court

[3] The district court went on to conclude that summary judgment for the defendant also was warranted because Palm Beach Golf had not established a case for vicarious liability under common law agency principles, *District Court Order* at 14-23, and because the plaintiff lacked Article III standing to present its TCPA claims, *id.* at 23-29. This Court's July 7 Letter did not ask the FCC to address these bases for the district court's decision and we express no view with respect to those issues (nor to the factual disputes addressed in the parties' briefs).

determined, however, that the *DISH Network* ruling supplanted any prior precedent on the subject and compelled the conclusion that a party whose goods or services were promoted in an unsolicited fax transmitted by a third party could be held liable, if at all, only "under federal common law principles of agency for the actions of a third-party." *Id.* That holding was in error.

First, the *DISH Network* ruling applies only to liability for telemarketing calls and neither addresses nor alters the Commission's pre-existing regulatory treatment of unsolicited facsimile advertisements. As noted above, the FCC issued the *DISH Network* ruling in response to primary jurisdiction referrals from TCPA litigation involving alleged violations of the robo-call and do-not-call prohibitions. *See DISH Network* ¶¶ 5-23. Those provisions prohibit the "initiat[ion]" of certain robo-calls and calls to telephone numbers listed on the national do-not-call registry. *See* 47 U.S.C. § 227(b)(1)(B) (robo-call prohibition); 47 C.F.R. § 64.1200(c)(2) (do-not-call prohibition); *see* pp. 2-3, above. In clarifying which party incurs direct liability for initiating a call in that context, the FCC found guidance in its rules defining "telemarketer" as the party that "initiates" a telephone call and "seller" as the party "on whose behalf a telephone call" is initiated. *DISH Network* ¶ 27 (citing 47 C.F.R. § 64.1200(f)(11) & (9)). The Commission determined on the basis of those definitions that the party that incurs direct liability for "initiat[ing]" an unlawful call is the telemarketer that physically makes the call and not the seller on whose behalf a call is made. *Id.* ¶¶ 26-27.

Because facsimile advertisements were not at issue in the *DISH Network* proceeding, the FCC had no occasion to opine on direct or vicarious liability in that context. Thus, nowhere in the *DISH Network* ruling does the FCC address the distinct prohibition against "send[ing]" unsolicited facsimile advertisements under 47 U.S.C. § 227(b)(1)(C), or the distinct definition of "sender" in the agency's rules (47 C.F.R. § 64.1200(f)(10)). The district court therefore improperly relied on the *DISH Network* ruling to hold that direct liability by the defendant dental office was foreclosed.

Second, as described above (at pp. 3-4), the FCC has defined the party that incurs direct liability for "send[ing]" an unsolicited facsimile advertisement under 47 U.S.C. § 227(b)(1)(C) very differently from the party that unlawfully "initiate[s]" a robo-call or do-not-call violation. By its plain terms, 47 C.F.R. § 64.1200(f)(10) defines the direct liability-incurring "sender" *not* as the party that physically transmits the fax, but as "the person or entity *on whose behalf* a

facsimile unsolicited advertisement is sent *or whose goods or services are advertised or promoted in the unsolicited advertisement.*" (Emphasis added.) Read in light of that binding regulatory definition,[4] the unsolicited fax prohibition in section 227(b)(1)(C) clearly "allow[s] a plaintiff to recover damages [under a theory of direct liability] from a defendant who [transmitted] no facsimile to the plaintiff, but whose independent contractor did," July 7 Letter at 1, so long as the transmitted fax constitutes an unsolicited facsimile advertisement promoting the defendant's goods or services.

CONCLUSION

For the foregoing reasons, the district court misapplied the TCPA, the *DISH Network* ruling, and FCC regulations regarding unsolicited facsimile advertisements to the extent that it ruled, as a matter of law, that the defendant dental practice may not be directly liable under the TCPA for any unsolicited facsimile advertisement sent to the plaintiff golf center unless the defendant actually transmitted the fax.

Respectfully submitted,

/s/ Laurence N. Bourne

Jonathan B. Sallet
General Counsel
David Gossett
Acting Deputy General Counsel
Richard K. Welch
Deputy Associate General Counsel
Laurence N. Bourne
Counsel

[4] As the district court otherwise acknowledges, courts in non-Hobbs Act proceedings such as this one "must apply" – and may not entertain collateral attacks on – a final order or regulation of the FCC in deciding an issue addressed by such order or regulation. *District Court Order* at 13 n.13 (citing 28 U.S.C. § 2342(1)). *Accord CE Design, Ltd. v. Prism Business Media, Inc.*, 606 F.3d 443, 446 (7th Cir. 2010); *Self v. BellSouth Mobility, Inc.*, 700 F.3d 453, 461-64 (11th Cir. 2012).

In the
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PALM BEACH GOLF CENTER-BOCA, INC.	)
APPELLANT,	)
V.	) **NO. 13-14013**
JOHN G. SARRIS, D.D.S., P.A.	)
APPELLEE.	)

CERTIFICATE OF SERVICE

I, Laurence N. Bourne, hereby certify that on July 17, 2014, I electronically filed the foregoing Letter Brief with the Clerk of the Court for the United States Courts of Appeals for the Eleventh Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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/s/ Laurence N. Bourne

EXHIBIT C

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August 24, 2015

VIA CERTIFIED MAIL & EMAIL
RETURN RECEIPT REQUESTED

Edward A. Broderick
Broderick Law, P.C.
99 High Street, Suite 304
Boston, MA 02110
(ted@broderick-law.com)

Re: ***Bull v. US Coachways, Inc.*, Civil Action No. 1:14-cv-05789 (N.D. Ill.)**

Insured	**:**	**US Bus Charter & Limo Inc. dba US Coachways ("US Bus")**
ACE Claim No:		**JY14J0426052**
Claimant	**:**	**James Bull**
Policy No.	**:**	**G24011999 007**
Our File:	**:**	**10928.00257**

Dear Mr. Broderick:

We represent Illinois Union Insurance Company ("Illinois Union") and ACE North American Claims ("ACE") with respect to the above-referenced matter (the "TCPA Litigation"), pending against the Insured, US Bus. Your July 23, 2015 letter to our clients regarding this matter, seeking to have Illinois Union engage in settlement negotiations, has been forwarded to us for a response.

Please note that going forward, although it is not our intent to engage in a letter writing campaign, all future submission should be directed to our attention.

For the reasons more fully detailed below, because there is no coverage obligation on the part of Illinois Union for US Bus in the TCPA Litigation, our clients must decline your request that Illinois Union participate in a settlement of this matter.

As you know, this putative class action under the federal Telephone Consumer Protection Act ("TCPA") was originally filed on July 29, 2014 in the United States District Court for the Northern District of Illinois. Essentially, it is alleged that the defendant violated the TCPA by using an automated dialing system to send unsolicited text message advertisements without the recipients' prior consent.

As you are also apparently aware, Illinois Union issued Miscellaneous Professional Liability Policy No. G24011999 007 (the "Policy") to US Bus for the Policy Period from

November 9, 2013 to November 9, 2014. As you further note, Illinois Union has advised US Bus that coverage is unavailable under the Policy for the TCPA Litigation.

There is, therefore, no fundamental basis for your contention that the purported violation of the TCPA alleged in the TPCA Litigation falls within the scope of coverage afforded by the subject professional liability policy. The Insuring Agreement of the policy specifically limits coverage to a Wrongful Act in the performance of Professional Services. The policy defines Professional Services to mean the performance of professional services as a bus charter broker for others for a fee. Advertising in violation of the TCPA, or otherwise, simply does not concern services unique to a bus charter broker. Further, the complaint does not allege that the wrongful conduct in dispute was in any way rendered to others for a fee, but rather includes allegations that US Bus was performing marketing services for itself. For this reason, Illinois Union must decline your invitation to participate in settlement discussions or mediation, as the allegations do not fall within the scope of the Insuring Agreement. We thus respectfully direct you to US Bus's defense counsel to discuss settlement.

Further, pursuant to both the Policy and applicable law, absent a settlement agreed to by Illinois Union or a final judgment against the Insured, matters relating to the Policy and to coverage thereunder are solely between Illinois Union and its Insured, as a plaintiff has no direct right of action against the insurer. *See Nick's Garage, Inc. v Liberty Mut. Fire Ins. Co.*, 120 A.D.3d 967, 968 (N.Y. App. Div. 4th Dep't 2014) (holding that to maintain an action against an insurer, a stranger to the underlying insurance policy must first obtain a judgment against the tortfeasor, serve the insurance company with a copy of the judgment and await payment for 30 days). Therefore, your letter to Illinois Union purporting to assert rights belonging to US Bus is inappropriate at this time.

Notwithstanding the foregoing, we are also compelled to briefly address a number of errors contained in your letter.

First, the Policy was issued to the Insured in the State of New York. Accordingly, any issues regarding the coverage provided thereunder would be governed by New York law. *See Certain Underwriters at Lloyd's, London v. Foster Wheeler Corp.*, 36 A.D.3d 17, 24, 822 N.Y.S.2d 30, 36 (N.Y. App. Div. 1st Dep't 2006) (where the insured risk is scattered throughout multiple states, courts deem the risk to be located in the state of the insured's domicile at the time the policy was issued). Any discussion of Illinois or Georgia law is therefore immaterial.

Second, your interpretation of the coverage available under the Policy is incorrect. You assert that "[t]he Policy covers TCPA claims under the 'Personal Injury Offense' section of the policy," citing the definition at Section II.L.4. of "Personal Injury Offense" as "publication or an utterance in violation of an individual's right to privacy."

This argument, however, overlooks that definitions contained in the Policy do not themselves confer insurance coverage. Rather, the scope of the coverage afforded under the Policy is set forth in the Insuring Agreement, which states:

> The **Company**[1] will pay on behalf of the **Insured** all sums in excess of the Retention that the **Insured** shall become legally obligated to pay as **Damages** and **Claims Expenses** because of a **Claim** first made against the **Insured** and reported to the **Company** during the **Policy Period** by reason of a **Wrongful Act** committed on or subsequent to the **Retroactive Date** and before the end of the **Policy Period**.

Policy, Section I.A.

"Wrongful Act," as used in the Policy, means "any actual or alleged negligent act, error, omission, misstatement, misleading statement or **Personal Injury Offense** committed by the **Insured** or by any other person or entity for whom the **Insured** is legally liable *in the performance of or failure to perform* ***Professional Services***." *Id.*, Section II.T. (emphasis added). "Professional Services" means "only those services specified in Item 7 of the Declarations performed for others by an Insured or by any other person or entity for whom the **Insured** is legally liable." *Id.*, Section II.P. Item 7 of the Declarations further provides "Solely in the performance of professional services as a bus charter broker for others for a fee."

Here, there are simply no Professional Services rendered to others for a fee that are at issue in the TCPA Litigation. Thus, any reliance of "Personal Injury Offense" standing alone is of no consequence and cannot serve to trigger coverage.

In accordance with the foregoing and subject to all other terms, conditions, limitations, and exclusions contained therein, coverage is only potentially available under the Policy for a Claim arising from an actual or alleged act, error, omission, misstatement, misleading statement or Personal Injury Offense committed by the Insured in the performance of professional services as a bus charter broker for others for a fee.[2] As Illinois Union has previously explained, the instant Claim arises from the alleged use of automatic telephone dialing system to transmit text messages and it does not contain any allegations relating to the performance of the Insured's services as a bus charter broker to others for a fee. Thus, Illinois Union denied coverage for this matter and maintains that denial by this letter.

We further note your statement that "[c]ourts across the United States … have repeatedly recognized that the privacy invasion coverage afforded by a ***commercial general liability policy*** extends to TCPA claims," and the cases cited in support of this proposition, have no bearing on the narrower coverage provided by this ***professional liability policy***. Additionally, your implication that CGL policies – or any policy – would necessarily extend coverage for TCPA claims is incorrect. As a matter of black-letter law, the coverage afforded under any insurance contract is governed by the specific terms set forth therein. Indeed, it is well settled that a professional liability policy only insures against acts unique to the insured. Advertising is, of course, a general business function and not unique to a charter bus broker.

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[1] Terms in bold are further defined in the Policy.

[2] In this respect, we note that, contrary to your assertion, the professional liability coverage provided under the Policy is unlike the coverage available under a typical automobile liability policy.

Finally, we note that your conclusory assertion that "the denial of coverage by Illinois Union and ACE constitutes an act of bad faith" is just plain wrong as a matter of law. Under New York law, "a claim of bad faith must be predicated on the existence of coverage of the loss in question." *Zurich Ins. Co. v. Texasgulf, Inc.*, 233 A.D.2d 180, 180, 649 N.Y.S.2d 153, 153 (N.Y. App. Div. 1st Dep't 1996). As explained, there is no coverage available under the Policy for the TCPA Litigation. Further, while Illinois Union's denial of coverage for the TCPA Litigation is plainly justified, under New York law "bad faith cannot be established when the insurer has an arguable basis for denying coverage." *Redcross v. Aetna Cas. & Sur. Co.*, 260 A.D.2d 908, 913, 688 N.Y.S.2d 817, 821 (N.Y. App. Div. 3d Dep't 1999).

For the foregoing reasons, we repeat that we are constrained to advise that Illinois Union must decline participating in settlement negotiations or mediation in connection with the TCPA Litigation. In so doing, we note that ACE confirms that no coverage is afforded for this matter, and continues to reserve all rights under the Policy, at law, or in equity with regard to this matter or otherwise.

Should you have any questions or comments with respect to the content of this letter or any other matter, please do not hesitate to contact me at your convenience.

Very truly yours,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

Richard W. Boone Jr.

cc: Diane Fazzolari
(via email: diane.fazzolari@acegroup.com)

Edward Telmany
(via e-mail: USCoachways@gmail.com)

David S. Sheiffer, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

JAMES BULL, on behalf of himself and others similarly situated, Plaintiff, v. US COACHWAYS, INC., Defendant.	Case No. 1:14-cv-05789 Judge Rebecca R. Pallmeyer Magistrate Judge Daniel G. Martin

AFFIDAVIT OF EDWARD TELMANY

1. I am over the age of 18 years old, am competent to testify to the matters set forth herein and make this affidavit on personal knowledge.

2. I am the Chief Executive Officer of US Coachways, Inc. ("US Coachways")

3. US Coachways is headquartered in Staten Island, NY.

4. US Coachways is a bus and limousine charter company, providing bus and limousine rentals.

5. As part of US Coachways' marketing, I am told that automated and computerized text messages to the cell phones of former and prospective customers were sent utilizing an Automatic Telephone Dialing System as that term is defined by the Telephone Consumer Protection Act. It is my understanding that the system can send the text messages in that the system has the capacity (A) to store or produce telephone numbers to be sent text messages to be called, using a random or sequential number generator; and (B) to dial such numbers.

6. In discovery in the action, US Coachways produced data purportedly reflecting the marketing text messages sent by US Coachways to the cell phone of Plaintiff and others, offering US Coachways' goods or services.

7. Although US Coachways did not believe it was violating the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"), as attested to in its discovery responses in the Action, US Coachways has no evidence of consent as to the text messages.

8. US Coachways did not scrub the list of telephone numbers to which it was purportedly sending text messages against the National Do Not Call list, US Coachways secured an insurance policy from Illinois Union Insurance Company (Illinois Union") effective November 9, 2013 to November 9, 2014, identified as miscellaneous Professional Liability Policy No. G24011999 007 ("the Insurance Policy"). A true and accurate copy of the Insurance Policy is attached hereto as Exhibit 1.

9. I am familiar and knowledgeable with all of the business records and activities of US Coachways and I am the custodian of those records such that I can certify the nature and authenticity of those records. The Insurance Policy is a record of regularly conducted activity of US Coachways within the meaning of Federal Rule of Evidence 803(6), in that it was made at or near the time of its issuance by Illinois Union and transmitted to US Coachways, was kept in the course of a regularly conducted activity of US Coachways, and making and keeping the record is a regular practice for both Illinois Union and US Coachways.

10. On July 29, 2014, Bull filed a putative class action complaint against US Coachways in the United States District Court for the Northern District of Illinois, captioned *Bull v. US Coachways, Inc.*, No. 1:14-cv-05789 (N.D. Ill.) (the "Action"), alleging, among other things, that US Coachways and/or others acting on its behalf sent unsolicited text advertising messages, in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (the "TCPA"), and the regulations promulgated by the Federal Communications Commission (the "FCC") under that statute.

11. On August 3, 2014, US Coachways received a summons in the Action together with the Complaint.

12. Thereafter, US Coachways submitted a claim to Illinois Union for coverage of the matter.

13. Illinois Union denied coverage under the policy, and refused to provide US Coachways with a defense in the Action or to provide indemnification.

14. US Coachways again submitted a claim to Illinois Union, and again was denied by Illinois Union by letter dated January 13, 2015. A copy of the letter that US Coachways received is attached hereto as Exhibit 2. The January 13, 2015 letter is a record of regularly conducted activity of US Coachways that was made at or near the time of its issuance by Illinois Union and transmitted to US Coachways, was kept in the course of a regularly conducted activity of US Coachways, and making and keeping the record is a regular practice for both Illinois Union and US Coachways.

15. In addition, in its January 13, 2015 letter, Illinois Union misstated the terms of its own Insurance Policy, failing to acknowledge that the definition of Professional Services was amended to include at page 21 a "Travel Agent's Endorsement" changing the definition of "Professional Services" to include "Travel Agency Operations, which shall mean services necessary or incidental to the conduct of travel agency business including the procurement or attempted procurement for a fee or commission of travel, lodging, or guided tour accommodations, or counseling or offering recommendations concerning such accommodations."

16. My attorney forwarded to me a demand letter dated July 23, 2015 from Plaintiff's counsel Edward Broderick to Illinois Union setting forth the facts of the case, summarizing US

Coachways' exposure and demanding that Illinois Union participate in settlement negotiations and mediation on the Action. A copy of that letter is attached hereto as Exhibit 3. The July 13, 2015 letter is a record of regularly conducted activity of US Coachways that was made at or near the time of its issuance by Edward Broderick and transmitted to US Coachways, was kept in the course of a regularly conducted activity of US Coachways, and keeping the record is a regular practice for US Coachways.

17. My attorney forwarded me a copy of Illinois Union's attorney's response letter dated August 24, 2015, denying that Illinois Union's policy afforded coverage and refusing to participate in any negotiation over the Action. A copy of the August 24, 2015 letter is attached as Exhibit 4. The August 24, 2015 letter is a record of regularly conducted activity of US Coachways that it was made at or near the time of its issuance and transmitted to US Coachways, was kept in the course of a regularly conducted activity of US Coachways, and keeping the record is a regular practice for US Coachways.

18. Having insurance coverage is a material necessity for my business, and in particular the inclusion of coverage for my marketing activities, which are part of US Coachways performance of services as a bus charter broker for a fee. The inclusion of the Travel Agent's Endorsement is also a material necessity for my business and formed a material basis for securing the Insurance Policy.

19. US Coachways exposure in the Action totals at least $195,729,500. US Coachways lacks the financial resources to satisfy such a judgment, and indeed would have to file for bankruptcy should a judgment approaching that amount be entered against it. In settlement discussions with Plaintiff's counsel, my attorney has provided US Coachways last two

years of tax returns evidencing that US Coachways lacks the means to properly defend this case, and certainly to satisfy any significant judgment against it.

20. Defending this Action without being provided a defense in the action by Illinois Union has been a significant drain on the resources of US Coachways, both in the form of time spent and attorneys' fees expended. In addition to US Coachways monetary payment to the settlement fund of $50,0000 in connection with the settlement, US Coachways assignment of its rights against Illinois Union means waiving its right to recover the significant attorneys' fees it has incurred which I believe should have been covered by Illinois Union. Making an assignment of US Coachways' insurance rights in connection with the settlement represents a significant financial hardship to its business.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJRUY THIS 9th DAY OF MARCH 2016

Edward Telmany
Chief Executive Officer
US Coachways, Inc.

EXHIBIT 1

Policy Declarations

Policy No. **G24011999 007**	Renewal of: **G24011999 006**

NAMED INSURED & MAILING ADDRESS
US Bus Charter & Limo Inc. dba US Coachways **100 St. Mary's Avenue,Suite 2B** **Staten Island NY 10305**

POLICY PERIOD		
When Coverage Begins:	**11/09/2013**	12:01 A. M. Local Time At Named Insured's Address
When Coverage Ends:	**11/09/2014**	12:01 A. M. Local Time At Named Insured's Address

INSURING COMPANY	Producer's Name & Address:
Illinois Union Insurance Company	**CRC INSURANCE SERVICES INC** **1120 AVENUE OF THE AMERICAS** **SUITE 4081** **NEW YORK NY 10036** Producer No: **72993W**

THE INSURER NAMED HEREIN IS NOT LICENSED BY THE STATE OF NEW YORK, NOT SUBJECT TO ITS SUPERVISION, AND IN THE EVENT OF THE INSOLVENCY OF THE INSURER, NOT PROTECTED BY THE NEW YORK SECURITY FUNDS. THE POLICY MAY NOT BE SUBJECT TO ALL OF THE REGULATIONS OF THE INSURANCE DEPARTMENT PERTAINING TO POLICY FORMS.

ATTACHED FORMS
This policy is completed by the following: **PF-18873 (11/05)** and forms and endorsements attached thereto.

Authorization Information
Dated: **11/25/2013** Authorized Representative

SLPD (03/08)

Illinois Union Insurance Company

ACE Advantage®
Miscellaneous Professional Liability Policy
Declarations

This Policy is issued by the stock insurance company listed above.

THIS POLICY IS A CLAIMS MADE AND REPORTED POLICY. EXCEPT AS OTHERWISE PROVIDED HEREIN, THIS POLICY COVERS ONLY CLAIMS FIRST MADE AGAINST THE INSUREDS AND REPORTED TO THE COMPANY DURING THE POLICY PERIOD. PLEASE READ THIS POLICY CAREFULLY.

THE LIMITS OF LIABILITY AVAILABLE TO PAY INSURED DAMAGES SHALL BE REDUCED BY AMOUNTS INCURRED FOR CLAIMS EXPENSES. FURTHER NOTE THAT AMOUNTS INCURRED FOR DAMAGES AND CLAIMS EXPENSES SHALL ALSO BE APPLIED AGAINST THE RETENTION AMOUNT.

TERMS THAT APPEAR IN BOLD FACE TYPE HAVE SPECIAL MEANING. PLEASE REFER TO SECTION II, DEFINITIONS.

Policy No. G24011999 007	Renewal of: G24011999 006
Item 1. **Named Insured**	US Bus Charter & Limo Inc. dba US Coachways
Principal Address:	100 St. Mary's Avenue,Suite 2B Staten Island, NY 10305
Item 2. **Policy Period**:	From 12:01 a.m. 11/09/2013 To 12:01 a.m. 11/09/2014 (Local time at the address shown in Item 1)
Item 3. Limit of Liability (including **Claims Expenses**)	
$ 5,000,000	Each **Claim**
$ 5,000,000	Aggregate Limit
$ 5,000.00	**Disciplinary Proceeding Claims Expenses** Aggregate Limit (in addition to the Each **Claim** and Aggregate Limits set forth above)
Item 4. Retention $ 25,000	Each **Claim**
Item 5. Premium	$45,959
Item 6. **Retroactive Date** (if applicable):	11/09/2005
Item 7. **Professional Services**: Solely in the performance of professional services as a bus charter broker for others for a fee.	

Item 8. Notice to **Company**:

A. Notice of **Claim** or **Wrongful Act**:

PO Box 5119
Scranton, PA 18505-0549
First Notices Fax:
215.640.5040 or 1.877.746.4671
General Correspondence Fax:
1.866.635.5688
First Notices Email:
WSGPROFRISKCLAIMS@ACEGROUP.COM

B. All other notices:

Chief Underwriting Officer
ACE Westchester Specialty Group - Professional Risk
11575 Great Oaks Way, Suite 200
Alpharetta, GA 30022

Item 9. Optional **Extended Reporting Period**:
Additional Premium: 100% of last annual premium
Additional Period: 12 Months

Item 10. Endorsements attached upon **Policy** effective date: See attached

IN WITNESS WHEREOF, the **Company** has caused this **Policy** to be countersigned by a duly authorized representative of the **Company**.

DATE: 11/25/2013

Authorized Representative

Illinois Union Insurance Company

ACE Advantage®
Miscellaneous Professional Liability Policy

In consideration of the payment of the premium, in reliance upon the **Application**, and subject to the Declarations and the terms and conditions of this **Policy**, the **Insureds** and the **Company** agree as follows:

I. INSURING AGREEMENT AND DEFENSE

A. Insuring Agreement

The **Company** will pay on behalf of the **Insured** all sums in excess of the Retention that the **Insured** shall become legally obligated to pay as **Damages** and **Claims Expenses** because of a **Claim** first made against the **Insured** and reported to the **Company** during the **Policy Period** by reason of a **Wrongful Act** committed on or subsequent to the **Retroactive Date** and before the end of the **Policy Period**.

B. Defense

1. The **Company** shall have the right and duty to defend any covered **Claim** brought against the **Insured** even if the **Claim** is groundless, false or fraudulent. The **Insured** shall not admit or assume liability or settle or negotiate to settle any **Claim** or incur any **Claims Expenses** without the prior written consent of the **Company** and the **Company** shall have the right to appoint counsel and to make such investigation and defense of a **Claim** as it deems necessary.

2. The **Company's** duty to defend ends if the **Insured** refuses to consent to a settlement acceptable to the claimant/plaintiff and the **Company**. In such event, the **Company** shall tender a check to the **Insured** for the recommended settlement amount, and shall be relieved of any further duty or obligation, other than for covered **Claims Expenses** incurred until the date of such refusal. The **Insured** thereafter has the duty to defend at its own expense. This paragraph shall not apply to a settlement in which the total incurred **Damages** and **Claims Expenses** do not exceed the Retention.

3. The **Company** shall not be obligated to commence or continue to investigate, defend, pay or settle any **Claim** after the applicable Limit of Liability specified in Item 3 of the Declarations has been exhausted, or after the **Company** has deposited the remaining available Limit of Liability with a court of competent jurisdiction. In such case, the **Company** shall withdraw from investigation, defense, payment or settlement of such **Claim** and shall tender control of such **Claim** to the **Insured**.

4. If the **Insureds** attend hearings, depositions or trials at the request of the **Company**, the **Company** shall reimburse the **Insureds** for actual loss of earnings and reasonable and necessary expenses due to such attendance, up to $250.00 per day and a maximum amount of $5,000 for all **Claims** covered by this **Policy**. Such reimbursement payments by the **Company** to the **Insured** are not subject to the Retention and shall not reduce the Limits of Liability.

II. DEFINITIONS

A. **Application** means all applications, including any attachments thereto, and all other information and materials submitted by or on behalf of the **Insureds** to the **Company** in connection with the **Company** underwriting this **Policy** or any policy of which this **Policy** is a direct or indirect renewal

or replacement or which it succeeds in time. All such applications, attachments, information, and materials are deemed attached to and incorporated into this **Policy**.

B. **Bodily Injury** means injury to the body, sickness, or disease, and death. **Bodily Injury** also means mental injury, mental anguish, mental tension, emotional distress, pain and suffering, or shock, whether or not resulting from injury to the body, sickness, disease or death of any person.

C. **Claim** means:
1. a written demand against any **Insured** for monetary or non-monetary damages;
2. a civil proceeding against any **Insured** for monetary damages, non-monetary damages or injunctive relief, commenced by the service of a complaint or similar pleading;
3. an arbitration proceeding against any **Insured** for monetary damages, non-monetary damages or injunctive relief;
4. a civil, administrative or regulatory investigation against any **Insured** commenced by the filing of a notice of charges, investigative order or similar document;
5. a **Disciplinary Proceeding**;

including any appeal therefrom.

D. **Claims Expenses** means:
1. reasonable and necessary attorneys' fees, expert witness fees and other fees and costs incurred by the **Company**, or by the **Insured** with the **Company's** prior written consent, in the investigation and defense of covered **Claims**; and
2. premiums for any appeal bond, attachment bond or similar bond, provided the **Company** shall have no obligation to apply for or furnish such bond.

Claims Expenses shall not include wages, salaries, fees or costs of directors, officers or employees of the **Company** or the **Insured**.

E. **Company** means the insurance company providing this insurance.

F. **Damages** means any compensatory amount which the **Insured** becomes legally obligated to pay on account of a covered **Claim**, including judgments, any award of prejudgment and post-judgment interest on that part of any judgment paid under this **Policy**, awards and settlements. **Damages** shall not include:
1. any amount for which the **Insured** is not financially liable or legally obligated to pay;
2. taxes, fines or penalties;
3. matters uninsurable under the law pursuant to which this **Policy** is construed;
4. disgorgement of profits by an **Insured**; cost of an **Insured's** correction; fees, commissions, expense or costs paid to or charged by an **Insured**;
5. the cost to comply with any injunctive or other non-monetary or declaratory relief, including specific performance, or any agreement to provide such relief; or
6. any amount relating to a **Disciplinary Proceeding**, other than **Claims Expenses**.

Damages includes punitive and exemplary damages and the multiplied portion of any multiple damage award, to the extent such damages are insurable under the internal laws of any jurisdiction which has a substantial relationship to the **Insured**, the **Company**, this **Policy** or such **Claim**.

G. **Disciplinary Proceeding** means any proceeding by a regulatory or disciplinary official, board or agency to investigate charges of professional misconduct by an **Insured** in the performance of **Professional Services**.

H. **Extended Reporting Period** means the period for the extension of coverage, if elected, described in Section IV, **Extended Reporting Period**.

I. **Insured** means:
1. the **Named Insured**;
2. any **Subsidiary**, but only with respect to **Wrongful Acts** which occur while it is a **Subsidiary**;
3. any past or present principal, partner, officer, director, trustee or employee of the **Named Insured** or **Subsidiary** thereof (and if the **Named Insured** is a partnership, limited liability

partnership or limited liability company, then any general or managing partner or principal thereof), but only with respect to **Professional Services** performed on behalf of the **Named Insured** or any **Subsidiary**;

4. the estate, heirs, executors, administrators or legal representatives of any **Insured** described in paragraph 3 above in the event of such **Insured's** death, incapacity, insolvency, or bankruptcy, but only to the extent that such **Insured** would otherwise be provided coverage under this **Policy**; and
5. independent contractors who are natural persons, but only with respect to **Professional Services** performed on behalf of the **Named Insured** or **Subsidiary** thereof.

J. **Interrelated Wrongful Acts** means all **Wrongful Acts** that have as a common nexus any fact, circumstance, situation, event, transaction, cause or series of related facts, circumstances, situations, events, transactions or causes.

K. **Named Insured** means the entity or person specified in Item 1 of the Declarations.

L. **Personal Injury Offense** means one or more of the following offenses:
1. false arrest, detention or imprisonment;
2. malicious prosecution;
3. defamation, including libel and slander, and disparagement;
4. publication or an utterance in violation of an individual's right to privacy; and
5. invasion of the right to private occupancy, including wrongful entry or eviction.

M. **Policy** means collectively, the Declarations, the **Application**, this policy form and any endorsements.

N. **Policy Period** means the period of time specified in Item 2 of the Declarations, subject to prior termination pursuant to Section VI.E, Termination of the Policy.

O. **Pollutants** means any substance exhibiting any hazardous characteristics as defined by, or identified on a list of hazardous substances issued by the United States Environmental Protection Agency or any federal, state, county or municipal or local counterpart thereof or any foreign equivalent. Such substances shall include, without limitation, solids, liquids, gaseous or thermal irritants, contaminants or smoke, vapor, soot, fumes, acids, alkalis, chemicals or waste materials. **Pollutants** shall also mean any other air emission, odor, waste water, oil or oil products, infectious or medical waste, asbestos or asbestos products, silica, or noise.

P. **Professional Services** means only those services specified in Item 7 of the Declarations performed for others by an **Insured** or by any other person or entity for whom the **Insured** is legally liable.

Q. **Property Damage** means:
1. physical injury to, or loss or destruction of, tangible property, including the loss of use thereof; and
2. loss of use of tangible property which has not been physically injured, lost, damaged or destroyed.

R. **Retroactive Date** means the date specified in Item 6 of the Declarations.

S. **Subsidiary** means any entity, other than a joint venture, in which the **Named Insured:**

1. owns interests representing more than 50% of the voting, appointment or designation power for the selection of a majority of the board of directors if such entity is a corporation, the management committee members if such entity is a partnership, the members of the management board if such entity is a limited liability company; or
2. has the right, pursuant to written contract or the by-laws, charter, operating agreement or similar documents of the **Named Insured** or any **Subsidiary**, to elect, appoint or designate a majority of the board of directors if such entity is a corporation, the management

committee members if such entity is a partnership, the members of the management board if such entity is a limited liability company,

on or before the inception date of the **Policy**, either directly or indirectly, in any combination, by one or more other **Subsidiaries**.

T. **Wrongful Act** means any actual or alleged negligent act, error, omission, misstatement, misleading statement or **Personal Injury Offense** committed by the **Insured** or by any other person or entity for whom the **Insured** is legally liable in the performance of or failure to perform **Professional Services**.

U. **Wrongful Employment Practices** means any actual or alleged:
1. wrongful dismissal or discharge or termination of employment, whether actual or constructive;
2. employment-related misrepresentation;
3. violation of any federal, state, or local laws (whether common or statutory) concerning employment or discrimination in employment;
4. sexual harassment or other unlawful workplace harassment;
5. wrongful deprivation of a career opportunity or failure to employ or promote;
6. wrongful discipline of employees;
7. retaliation against employees for the exercise of any legally protected right or for engaging in any legally protected activity;
8. negligent evaluation of employees;
9. failure to adopt adequate workplace or employment policies and procedures;
10. employment-related libel, slander, defamation, or invasion of privacy;
11. employment-related wrongful infliction of emotional distress;
12. any actual or alleged discrimination, sexual harassment, or violation of a natural person's civil rights relating to such discrimination or sexual harassment, whether direct, indirect, intentional or unintentional.

The foregoing definitions shall apply equally to the singular and plural forms of the respective words.

III. EXCLUSIONS

The **Company** shall not be liable for **Damages** or **Claims Expenses** on account of any **Claim**:

A. alleging, based upon, arising out of, or attributable to any dishonest, fraudulent, criminal or malicious act or omission, or any intentional or knowing violation of the law by an **Insured,** however, this exclusion shall not apply to **Claims Expenses** or the **Company's** duty to defend any such **Claim** unless and until there is an adverse admission by, finding of fact, or final adjudication against any **Insured** as to such conduct, at which time the **Insured** shall reimburse the **Company** for all **Claims Expenses** incurred;

B. alleging, based upon, arising out of, or attributable to any **Bodily Injury** or **Property Damage**;

C. alleging, based upon, arising out of, or attributable to any liability of others assumed by the **Insured** under any express, implied, actual or constructive contract or agreement, unless such liability would have attached to the **Insured** even in the absence of such contract or agreement;

D. alleging, based upon, arising out of, or attributable to **Professional Services** performed for any entity if at the time the **Professional Services** were performed:
1. any **Insured**, or any other natural person or entity for whom or which an **Insured** is legally liable, was a partner, director, officer or employee of such entity;
2. any **Insured**, or any other natural person or entity for whom or which an **Insured** is legally liable, owned, directly or indirectly, 10% or more of any such entity if it was a publicly held company, or 30% or more of any such entity if it was a privately held or not-for-profit company;

E. brought or maintained by, on behalf of, or in the right of any **Insured**;

F. alleging, based upon, arising out of or attributable to any **Wrongful Employment Practice**;

G. alleging, based upon, arising out of, or attributable to any discrimination on any basis, including, but not limited to, race, creed, color, religion, ethnic background, national origin, age, handicap, disability, gender, sexual orientation or pregnancy;

H. alleging, based upon, arising out of or attributable to any price fixing, restraint of trade, monopolization, unfair trade practices or other violation of the Federal Trade Commission Act, the Sherman Anti-Trust Act, the Clayton Act, or any other federal statutory provision involving antitrust, monopoly, price fixing, price discrimination, predatory pricing or restraint of trade activities, and any amendments thereto or any rules or regulations promulgated thereunder, or any similar provision of any federal, state, or local statutory law or common law anywhere in the world;

I. alleging, based upon, arising out or attributable to any violation of:
1. the Employee Retirement Income Security Act of 1974;
2. the Securities Act of 1933, the Securities Exchange Act of 1934;
3. the Racketeering Influenced and Corrupt Organizations Act of 1970;

and any rules or regulations promulgated thereunder, amendments thereof, or any similar federal, state or common law;

J. alleging, based upon, arising out of, or attributable to the gaining in fact of any profit or advantage to which the **Insured** is not legally entitled;

K. alleging, based upon, arising out of, or attributable to any **Wrongful Act** committed prior to the beginning of the **Policy Period**, if, on or before the earlier of the effective date of this **Policy** or the effective date of any **Policy** issued by the **Company** to which this **Policy** is a continuous renewal or replacement, the **Insured** knew or reasonably could have foreseen that such **Wrongful Act** would result in a **Claim**;

L. alleging, based upon, arising out of, or attributable to:
1. any **Wrongful Act,** fact, circumstance or situation which has been the subject of any written notice given under any other policy of which this **Policy** is a renewal or replacement or which it succeeds in time; or
2. any other **Wrongful Act** whenever occurring which, together with a **Wrongful Act** which has been the subject of such notice, would constitute **Interrelated Wrongful Acts**;

M. alleging, based upon, arising out of, or attributable to:
1. the actual, alleged or threatened discharge, dispersal, release, escape, seepage, migration or disposal of **Pollutants**; or
2. any direction or request that any **Insured** test for, monitor, clean up, remove, contain, treat, detoxify or neutralize **Pollutants**, or any voluntary decision to do so;

N. alleging, based upon, arising out of, or attributable to any validity, invalidity, infringement, violation or misappropriation of any patent, copyright, service mark, trademark, trade name, trade secret or any other intellectual property right;

IV. EXTENDED REPORTING PERIOD

If the **Company** terminates or does not renew this **Policy** (other than for failure to pay a premium when due), or if the **Named Insured** terminates or does not renew this **Policy** and does not obtain replacement coverage as of the effective date of such termination or nonrenewal, the **Named Insured** shall have the right, upon payment of the additional premium described below, to a continuation of the coverage granted by this **Policy** for at least one **Extended Reporting Period** as follows:

A. Automatic **Extended Reporting Period**

The **Named Insured** shall have continued coverage granted by this **Policy** for a period of 60 days following the effective date of such termination or nonrenewal, but only for **Claims** first made

during such 60 days and arising from **Wrongful Acts** taking place prior to the effective date of such termination or nonrenewal. This Automatic **Extended Reporting Period** shall immediately expire upon the purchase of replacement coverage by the **Named Insured**.

B. Optional **Extended Reporting Period**

1. The **Named Insured** shall have the right, upon payment of the additional premium set forth in Item 9 of the Declarations, to an Optional **Extended Reporting Period**, for the period set forth in Item 9 of the Declarations following the effective date of such termination or nonrenewal, but only for **Claims** first made during such Optional **Extended Reporting Period** and arising from **Wrongful Acts** taking place prior to the effective date of such termination or nonrenewal.

2. This right to continue coverage shall lapse unless written notice of such election is given by the **Named Insured** to the **Company**, and the **Company** receives payment of the additional premium, within 60 days following the effective date of termination or nonrenewal.

3. The 60 days of the Optional **Extended Reporting Period**, if it becomes effective, shall run concurrently with the Automatic **Extended Reporting Period**.

C. The **Company** shall give the **Named Insured** notice of the premium due for the Optional **Extended Reporting Period** as soon as practicable following the date the **Named Insured** gives such notice of such election, and such premium shall be paid by the **Named Insured** to the **Company** within 10 days following the date of such notice by the **Company** of the premium due. The Optional **Extended Reporting Period** is not cancelable and the entire premium for the Optional **Extended Reporting Period** shall be deemed fully earned and non-refundable upon payment.

D. The Automatic and Optional **Extended Reporting Periods** shall be part of and not in addition to the Limit of Liability for the immediately preceding **Policy Period**. The Automatic and Optional **Extended Reporting Periods** shall not increase or reinstate the Limit of Liability, which shall be the maximum liability of the **Company** for the **Policy Period** and the Automatic and Optional **Extended Reporting Period**, combined.

E. A change in **Policy** terms, conditions, exclusions and/or premiums shall not be considered a nonrenewal for purposes of triggering the rights to the Automatic or Optional **Extended Reporting Period**

V. LIMITS OF LIABILITY AND RETENTION

A. Limits

1. All **Claims** arising out of the same **Wrongful Act** and all **Interrelated Wrongful Acts** of the **Insureds** shall be deemed to be one **Claim**, and such **Claim** shall be deemed to be first made on the date the earliest of such **Claims** is first made, regardless of whether such date is before or during the **Policy Period.** All **Damages** and all **Claims Expenses** resulting from a single **Claim** shall be deemed a single **Damage** and **Claims Expense**.

2. The Each Claim Limit stated in Item 3 of the Declarations shall be the **Company's** maximum aggregate liability for the sum of all **Damages** and **Claims Expenses** because of each **Claim**, including each **Claim** alleging any **Interrelated Wrongful Acts**, first made and reported during the **Policy Period**.

3. The Aggregate Limit stated in Item 3 of the Declarations shall be the maximum aggregate liability of the **Company** for all **Damages** and **Claims Expenses** because of all **Claims**, including all **Claims** alleging any **Interrelated Wrongful Acts**, first made and reported during the **Policy Period**.

4. The **Disciplinary Proceeding Claims Expenses** Aggregate Limit stated in Item 3 of the Declarations shall be the maximum aggregate liability of the **Company** for **Claims Expenses** for **Disciplinary Proceedings** for each **Policy Period** regardless of the number of

Disciplinary Proceedings or **Insureds**. This limit is in addition to and is not part of the Each **Claim** Limit or the Aggregate Limit otherwise stated in Item 3 of the Declarations.

5. **Claims Expenses** shall be part of and not in addition to the Aggregate Limit of Liability shown in Item 3 of the Declarations, and shall reduce such Aggregate Limit of Liability.

6. If the Limit of Liability is exhausted by payment of **Damages** or **Claims Expenses**, the obligations of the **Company** under this **Policy** shall be completely fulfilled and extinguished.

B. Retention

1. The liability of the **Company** shall apply only to that part of **Damages** and **Claims Expenses** which are excess of the Retention amount shown in Item 4 of the Declarations. Such Retention shall be borne uninsured by the **Insureds** and at their own risk. However, the Retention shall not apply to **Claims Expenses** in a **Disciplinary Proceeding**.

2. A single Retention amount shall apply to **Damages** and **Claims Expenses** arising from all **Claims** alleging **Interrelated Wrongful Acts**.

VI. CONDITIONS

A. Notice:

1. The **Insured** shall, as a condition precedent to their rights under this **Policy**, give to the **Company** written notice of any **Claim** as soon as practicable, but in no event later than 30 days after: (i) the end of the **Policy Period**, or (ii) with respect to **Claims** first made during any applicable Automatic or Optional **Extended Reporting Period**, the end of such Automatic or Optional **Extended Reporting Period**.

2. If, during the **Policy Period**, any **Insured** becomes aware of any specific **Wrongful Act** which may reasonably give rise to a future **Claim** covered under this **Policy**, and if the **Insureds** give written notice to the **Company** during the **Policy Period**, the Automatic **Extended Reporting Period**, or, if elected, the Optional **Extended Reporting Period** of:

   a. the identity of the potential claimants;

   b. a description of the anticipated **Wrongful Act** allegations;

   c. the identity of the **Insureds** allegedly involved;

   d. the circumstances by which the **Insureds** first became aware of the **Wrongful Act**;

   e. the consequences which have resulted or may result; and

   f. the potential monetary damages;

   then any **Claim** which arises out of such **Wrongful Act** shall be deemed to have been first made at the time such written notice was received by the **Company**. No coverage is provided for fees, expenses and other costs incurred prior to the time such **Wrongful Act** results in a **Claim**.

3. All notices under any provision of this **Policy** shall be in writing and given by prepaid express courier, certified mail or facsimile transmission properly addressed to the appropriate party. Notice to the **Insureds** may be given to the **Named Insured** at the address shown in Item 1 of the Declarations. Notice to the **Company** of any **Claim** or **Wrongful Act** shall be given to the **Company** at the address set forth in Item 8A of the Declarations. All other notices to the **Company** under this **Policy** shall be given to the **Company** at the address set forth in Item 8B of the Declarations. Notice given as described above shall be deemed to be received and effective upon actual receipt thereof by the addressee, or one day following the date such notice is sent, whichever is earlier.

B. Assistance and Cooperation

The **Insured** shall cooperate with the **Company**, and provide to the **Company** all information and assistance which the **Company** reasonably requests including without limitation attending hearings, depositions and trials and assisting in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and conducting the defense of any **Claim** covered by this **Policy**. The **Insured** shall immediately forward to the **Company** at the address indicated in Item 8A of the Declarations every demand, notice, summons, or other process or pleadings received by the **Insured** or its representatives. The **Insured** shall do nothing that may prejudice the **Company's** position.

C. Other Insurance

If any **Damages** or **Claims Expenses** covered under this **Policy** are covered under any other valid and collectible insurance, then this **Policy** shall cover such **Damages** or **Claims Expenses**, subject to its terms and conditions, only to the extent that the amount of such **Damages** or **Claims Expenses** are in excess of the amount of such other insurance, whether such other insurance is stated to be primary, contributory, excess, contingent or otherwise, unless such other insurance is written only as specific excess insurance over the Limits of Liability provided by this **Policy**.

D. Representations

1. The **Insureds** represent and acknowledge that the statements and information contained in the **Application** are true and accurate and:
   a. are the basis of this **Policy** and are to be considered as incorporated into and constituting a part of this **Policy**; and
   b. shall be deemed material to the acceptance of this risk or the hazard assumed by the **Company** under this **Policy**.

   It is understood and agreed that this **Policy** is issued in reliance upon the truth and accuracy of such representations.

2. In the event the **Application,** including materials submitted or required to be submitted therewith, contains any misrepresentation or omission made with the intent to deceive or which materially affects either the acceptance of the risk or hazard assumed by the **Company** under this **Policy**, this **Policy** shall be void ab initio.

E. Termination

1. This **Policy** shall terminate at the earliest of the following times:
   a. the effective date of termination specified in a prior written notice by the **Named Insured** to the **Company**;
   b. 60 days after receipt by the **Named Insured** of a written notice of termination from the **Company**;
   c. 10 days after receipt by the **Named Insured** of a written notice of termination from the **Company** for failure to pay a premium when due, unless the premium is paid within such 10 day period;
   d. upon expiration of the **Policy Period** as set forth in Item 2 of the Declarations; or
   e. at such other time as may be agreed upon by the **Company** and the **Named Insured**.

2. If the **Policy** is terminated by the **Named Insured**, the **Company** shall refund the unearned premium computed at the customary short rate. If the **Policy** is terminated by the **Company**, the **Company** shall refund the unearned premium computed *pro rata*. Payment or tender of any unearned premium by the **Company** shall not be a condition precedent to the effectiveness of such termination, but such payment shall be made as soon as practicable.

F. Territory And Valuation

1. Coverage under this **Policy** shall extend to **Wrongful Acts** taking place anywhere in the world, provided that the **Claim** is made within the jurisdiction, and subject to the substantive laws of the United States of America, Canada, or their territories or possessions.

2. All premiums, limits, retentions, **Damages** and other amounts under this **Policy** are expressed and payable in the currency of the United States of America. If judgment is rendered, settlement is denominated, or another element of **Damages** under this **Policy** is stated in a currency other than United States of America dollars, payment under this **Policy** shall be made in United States dollars at the applicable rate of exchange as published in *The Wall Street Journal* as of the date the final judgment is reached, the amount of the settlement is agreed upon, or the other element of **Damages** is due, respectively or if not published on such date, the next date of publication of *The Wall Street Journal*.

G. Subrogation

In the event of any payment under this **Policy**, the **Company** shall be subrogated to the extent of such payment to all the rights of recovery of the **Insureds**. The **Insureds** shall execute all papers required and shall do everything necessary to secure and preserve such rights, including the execution of such documents necessary to enable the **Company** effectively to bring suit or otherwise pursue subrogation rights in the name of the **Insureds**.

H. Action Against the **Company** and Bankruptcy

No action shall lie against the **Company**. No person or organization shall have any right under this **Policy** to join the **Company** as a party to any action against any **Insured** to determine the liability of the **Insured** nor shall the **Company** be impleaded by any **Insured** or its legal representatives. Bankruptcy or insolvency of any **Insured** or of the estate of any **Insured** shall not relieve the **Company** of its obligations nor deprive the **Company** of its rights or defenses under this **Policy**.

I. Authorization

By acceptance of this **Policy**, the **Named Insured** agrees to act on behalf of all **Insureds** with respect to the giving of notice of **Claim**, the giving or receiving of notice of termination or non renewal, the payment of premiums, the receiving of any premiums that may become due under this **Policy**, the agreement to and acceptance of endorsements, consenting to any settlement, exercising the right to the **Extended Reporting Period**, and the giving or receiving of any other notice provided for in this **Policy**, and all **Insureds** agree that the **Named Insured** shall so act on their behalf.

J. Alteration, Assignment and Headings

1. Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this **Policy** nor prevent the **Company** from asserting any right under the terms of this **Policy**.

2. No change in, modification of, or assignment of interest under this **Policy** shall be effective except when made by a written endorsement to this **Policy** which is signed by an authorized representative of the **Company**.

3. The titles and headings to the various parts, sections, subsections and endorsements of the **Policy** are included solely for ease of reference and do not in any way limit, expand or otherwise affect the provisions of such parts, sections, subsections or endorsements.

K. Interpretation

The terms and conditions of this **Policy** shall be interpreted and construed in an evenhanded fashion as between the parties. If the language of this **Policy** is deemed to be ambiguous or otherwise unclear, the issue shall be resolved in the manner most consistent with the relevant terms and conditions of this **Policy,** without regard to the authorship of the language, without any presumption or arbitrary interpretation or construction in favor of either any **Insured** or the **Company** and without reference to the reasonable expectations of either the **Insured** or the **Company.**

VII. MATERIAL CHANGES IN CONDITIONS

A. Acquisition or Creation of Another Organization

If, during the **Policy Period**, the **Named Insured**:

1. acquires voting securities in another organization or creates another organization, which as a result of such acquisition or creation becomes a **Subsidiary**; or
2. acquires any organization by merger into or consolidation with the **Named Insured**;

then, subject to the terms and conditions of this **Policy**, such organization shall be covered under this **Policy** but only with respect to **Claims** for **Wrongful Acts** taking place after such acquisition or creation, unless the **Company** agrees to provide coverage by endorsement for **Wrongful Acts** taking place prior to such acquisition or creation.

If the total revenue of such acquired organization, as reflected in the then most recent consolidated financial statements of the organization, exceeds 10% of the total revenue of the **Named Insured** and the **Subsidiaries** as reflected in the then most recent consolidated financial statements of the **Named Insured**, the **Named Insured**, as a condition precedent to coverage with respect to such **Insureds**, shall, no later than 60 days after the effective date of such acquisition or creation:

a. give written notice of such acquisition or creation to the **Company**;
b. pay any additional premium required by the **Company**; and
c. agree to any additional terms and conditions of this **Policy** as required by the **Company**.

B. Acquisition of the **Named Insured**

If, during the **Policy Period**, any of the following events occurs:

1. the acquisition of the **Named Insured**, or of all or substantially all of its assets, by another entity, or the merger or consolidation of the **Named Insured** into or with another entity such that the **Named Insured** is not the surviving entity; or
2. the obtaining by any person, entity or affiliated group of persons or entities of the right to elect, appoint or designate at least 50% of i) the directors of the **Named Insured** if a Corporation; ii) the management committee members of the **Named Insured** if a partnership; iii) the management board of the **Named Insured** if a limited liability company;

then coverage under this **Policy** will continue in full force and effect until termination of this **Policy**, but only with respect to **Claims** for **Wrongful Acts** taking place before such event. Coverage under this **Policy** will cease as of the effective date of such event with respect to **Claims** for **Wrongful Acts** taking place after such event.

C. Termination of a **Subsidiary**

If before or during the **Policy Period** an organization ceases to be a **Subsidiary**, coverage with respect to the **Subsidiary** and its **Insureds** shall continue until termination of this **Policy**. Such coverage continuation shall apply only with respect to **Claims** for **Wrongful Acts** taking place prior to the date such organization ceased to be a **Subsidiary**.

Illinois Union
INSURANCE COMPANY

525 West Monroe Street, Suite 400
Chicago, IL 60661

NOTICE

POLICY NO. G24011999 007

NAME OF INSURED: US Bus Charter & Limo Inc. dba US Coachways

ADDRESS: 100 St. Mary's Avenue,Suite 2B
Staten Island NY 10305

We are pleased to enclose your policy for this account.

Please be advised that by binding this risk with the above referenced Surplus Lines Insurance Company, you agree that as the Surplus Lines Broker responsible for the placement of this insurance policy, it is your obligation to comply with all States Surplus Lines Laws including completion of any declarations/affidavits that must be filed as well as payment of any and all Surplus Lines taxes that must be the remitted to the State(s). We will look to you for indemnification if controlling Surplus Lines Laws are violated by you as the Surplus Lines broker responsible for the placement.

You further confirm that any applicable state requirement concerning a diligent search for coverage by admitted carriers has been fulfilled in accordance with state law.

Thank you for this placement and your regulatory compliance.

Date: 11/25/2013

WSG-084 (05/11)

ACE Producer Compensation
Practices & Policies

ACE believes that policyholders should have access to information about ACE's practices and policies related to the payment of compensation to brokers and independent agents. You can obtain that information by accessing our website at http://www.aceproducercompensation.com or by calling the following toll-free telephone number: 1-866-512-2862.

ALL-20887 (10/06)

U.S. TREASURY DEPARTMENT'S OFFICE OF FOREIGN ASSETS CONTROL ("OFAC") ADVISORY NOTICE TO POLICYHOLDERS

No coverage is provided by this Policyholder Notice nor can it be construed to replace any provisions of your policy. You should read your policy and review your Declarations page for complete information on the coverages you are provided.

This Notice provides information concerning possible impact on your insurance coverage due to directives issued by OFAC. **Please read this Notice carefully.**

The Office of Foreign Assets Control (OFAC) administers and enforces sanctions policy, based on Presidential declarations of "national emergency". OFAC has identified and listed numerous:

- Foreign agents;
- Front organizations;
- Terrorists;
- Terrorist organizations; and
- Narcotics traffickers;

as "Specially Designated Nationals and Blocked Persons". This list can be located on the United States Treasury's web site – http//www.treas.gov/ofac.

In accordance with OFAC regulations, if it is determined that you or any other insured, or any person or entity claiming the benefits of this insurance has violated U.S. sanctions law or is a Specially Designated National and Blocked Person, as identified by OFAC, this insurance will be considered a blocked or frozen contract and all provisions of this insurance are immediately subject to OFAC. When an insurance policy is considered to be such a blocked or frozen contract, no payments nor premium refunds may be made without authorization from OFAC. Other limitations on the premiums and payments also apply.

TRADE OR ECONOMIC SANCTIONS ENDORSEMENT

Named Insured **US Bus Charter & Limo Inc. dba US Coachways**			Endorsement Number
Policy Symbol **EON**	Policy Number **G24011999 007**	Policy Period **11/09/2013 to 11/09/2014**	Effective Date of Endorsement **11/09/2013**
Issued By (Name of Insurance Company) **Illinois Union Insurance Company**			

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

This insurance does not apply to the extent that trade or economic sanctions or other laws or regulations prohibit us from providing insurance, including, but not limited to, the payment of claims. All other terms and conditions of the policy remain unchanged.

Authorized Agent

SIGNATURE ENDORSEMENT

Named Insured			Endorsement Number
US Bus Charter & Limo Inc. dba US Coachways			
Policy Symbol	Policy Number	Policy Period	Effective Date of Endorsement
EON	**G24011999 007**	**11/09/2013 to 11/09/2014**	**11/09/2013**
Issued By (Name of Insurance Company)			
Illinois Union Insurance Company			

THE ONLY SIGNATURES APPLICABLE TO THIS POLICY ARE THOSE REPRESENTING THE COMPANY NAMED ON THE FIRST PAGE OF THE DECLARATIONS.

By signing and delivering the policy to you, we state that it is a valid contract when countersigned by our authorized representative.

ILLINOIS UNION INSURANCE COMPANY (A stock company)
525 W. Monroe Street, Suite 400, Chicago, Illinois 60661

WESTCHESTER SURPLUS LINES INSURANCE COMPANY (A stock company)
Royal Centre Two, 11575 Great Oaks Way, Suite 200, Alpharetta, GA 30022

CARMINE A. GIGANTI, Secretary

JOHN J. LUPICA, President

Authorized Representative

LD-5S23i (12/11)

SERVICE OF SUIT ENDORSEMENT

Named Insured **US Bus Charter & Limo Inc. dba US Coachways**			Endorsement Number
Policy Symbol **EON**	Policy Number **G24011999 007**	Policy Period **11/09/2013 to 11/09/2014**	Effective Date of Endorsement **11/09/2013**
Issued By (Name of Insurance Company) **Illinois Union Insurance Company**			

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

Information about service of suits upon the company is given below. Service of process of suits against the company may be made upon the following person, or another person the company may designate:

Saverio Rocca, Assistant General Counsel
ACE Group of Insurance Companies
436 Walnut Street
Philadelphia, PA 19106-3703

The person named above is authorized and directed to accept service of process on the company's behalf in any action, suit or proceeding instituted against the company. If the insured requests, the company will give the insured a written promise that a general appearance will be entered on the company's behalf if a suit is brought.

If the insured requests, the company will submit to the jurisdiction of any court of competent jurisdiction. The company will accept the final decision of that court or any Appellate Court in the event of an appeal. However, nothing in this endorsement constitutes a waiver of company's right to remove an action to a United States District Court, or to seek a transfer of a case to another court as permitted by the laws of the United States or of any state in the United States.

The law of some jurisdictions of the United States of America requires that the Superintendent, Commissioner or Director of Insurance (or their successor in office) be designated as the company's agent for service of process. In these jurisdictions, the company designates the Director of Insurance as the company's true and lawful attorney upon whom service of process on the company's behalf may be made. The company also authorizes the Director of Insurance to mail process received on the company's behalf to the company person named above.

If the insured is a resident of Canada, the insured may also serve suit upon the company by serving the government official designated by the law of the insured's province.

NOTHING HEREIN CONTAINED SHALL BE HELD TO VARY, ALTER, WAIVE OR EXTEND ANY OF THE TERMS, CONDITIONS, OR LIMITATIONS OF THE POLICY TO WHICH THIS ENDORSEMENT IS ATTACHED OTHER THAN AS ABOVE STATED.

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Authorized Representative

SL-34255 (09/11)

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

Named Insured			Endorsement Number
US Bus Charter & Limo Inc. dba US Coachways			
Policy Symbol	Policy Number	Policy Period	Effective Date of Endorsement
EON	**G24011999 007**	**11/09/2013 to 11/09/2014**	**11/09/2013**
Issued By (Name of Insurance Company)			
Illinois Union Insurance Company			

Fungi Exclusion

It is agreed that:

1. Section III, Exclusions, is amended by adding the following additional exclusion:
   - alleging, based upon, arising out of, or attributable to **Fungi**;
2. Section II, Definitions, is amended by adding the following additional definition:
   - **Fungi** means any type or form of fungus, including mold or mildew and any mycotoxins, spores, scents or byproducts produced or released by such fungus, including mold or mildew, but does not include any fungus intended by the **Insured** for consumption.

All other terms and conditions of this **Policy** remain unchanged.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

Named Insured **US Bus Charter & Limo Inc. dba US Coachways**			Endorsement Number
Policy Symbol **EON**	Policy Number **G24011999 007**	Policy Period **11/09/2013 to 11/09/2014**	Effective Date of Endorsement **11/09/2013**
Issued By (Name of Insurance Company) **Illinois Union Insurance Company**			

Terrorism Exclusion

It is agreed that the Policy is amended as follows:

1. Section II, Definitions, is amended by adding the following:
   - **Terrorism** means activities against persons, organizations or property of any nature:
     1. That involve the following or preparation for the following:
        a. Use or threat of force or violence; or
        b. Commission or threat of a dangerous act; or
        c. Commission or threat of an act that interferes with or disrupts an electronic, communication, information, or mechanical system; and
     2. When one or both of the following applies:
        a. The effect is to intimidate or coerce a government or the civilian population or any segment thereof, or to disrupt any segment of the economy; or
        b. It appears that the intent is to intimidate or coerce a government, or to further political, ideological, religious, social or economic objective or to express (or express opposition to) a philosophy or ideology.
2. Section III, Exclusions, is amended by adding the following:
   - alleging, based upon, arising out of, or attributable to, directly or indirectly, **Terrorism**, including action in hindering or defending against an actual or expected incident of **Terrorism**. **Damages** and **Claims Expenses** are excluded regardless of any other cause or event that contributes concurrently or in any sequence to such **Damages**.

All other terms and conditions of this **Policy** remain unchanged.

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Authorized Representative

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

Named Insured **US Bus Charter & Limo Inc. dba US Coachways**			Endorsement Number
Policy Symbol **EON**	Policy Number **G24011999 007**	Policy Period **11/09/2013 to 11/09/2014**	Effective Date of Endorsement **11/09/2013**
Issued By (Name of Insurance Company) **Illinois Union Insurance Company**			

Travel Agent's Endorsement

It is agreed that the **Policy** is amended as follows:

1. Section III, Exclusions, is amended by adding the following additional exclusions:
   - alleging, based upon, arising out of or attributable to the failure to effect or maintain any insurance or bond;
   - alleging, based upon, arising out of or attributable to commingling of funds;
   - alleging, based upon, arising out of or attributable to hotel security operations;
   - alleging, based upon, arising out of or attributable to invasion, act of foreign enemies, hostilities (whether war being declared or not), civil war, rebellion, revolution, insurrection, military or usurped power, confiscation or nationalization, or destruction of or damage to property by or under the order of any government or public or local authority;
   - alleging, based upon, arising out of or attributable to unauthorized or illegal credit card transactions;
   - alleging, based upon, arising out or attributable to:
     1. sexual molestation, abuse or harassment, including any alleged direct sexual activity and any allegation that the **Insured** negligently or recklessly employed, investigated, supervised or retained any person who committed such acts, or
     2. any practice, custom or policy, including any violation of a civil right, that gave rise to, caused, or resulted in such molestation, abuse or harassment**;**
   - alleging, based upon, arising out of or attributable to a governmental intervention, cease or desist order, insolvency, receivership, bankruptcy, licensing or liquidation of any organization;
2. Section II, Definitions, is amended as follows:
   a. The following definition is added:
      - **Travel Agency Operations** shall mean services necessary or incidental to the conduct of travel agency business including the procurement or attempted procurement for a fee or commission of travel, lodging, or guided tour accommodations, or counseling or offering recommendations concerning such accommodations.

   b. Subsection P, the definition of **Professional Services**, is amended by adding the following:

      Professional Services also means **Travel Agency Operations** performed for others by an **Insured** or by any other person or entity for whom the **Insured** is legally liable.

All other terms and conditions of this **Policy** remain unchanged.

_____
Authorized Representative

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

Named Insured **US Bus Charter & Limo Inc. dba US Coachways**			Endorsement Number
Policy Symbol **EON**	Policy Number **G24011999 007**	Policy Period **11/09/2013 to 11/09/2014**	Effective Date of Endorsement **11/09/2013**
Issued By (Name of Insurance Company) **Illinois Union Insurance Company**			

Insured Definition Amended-Leased, Part Time, Seasonal Employees

It is agreed that Section II, Definitions, Subsection I, the definition of **Insured** is amended by adding the following:

> **Insured** also means any leased, part time, or seasonal employees who are natural persons, but only with respect to **Professional Services** performed on behalf of the **Named Insured** or a **Subsidiary** thereof;

All other terms and conditions of this **Policy** remain unchanged.

Authorized Representative

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

Named Insured **US Bus Charter & Limo Inc. dba US Coachways**			Endorsement Number
Policy Symbol **EON**	Policy Number **G24011999 007**	Policy Period **11/09/2013 to 11/09/2014**	Effective Date of Endorsement **11/09/2013**
Issued By (Name of Insurance Company) **Illinois Union Insurance Company**			

Additional Insured (Automatic Pursuant to Contract)

It is agreed that:

1. Section II, Definitions, subsection I, the definition of **Insured**, is amended by adding the following:

   Insured also means any client or customer of the **Named Insured**, but only if a written contract entered into by the **Named Insured** specifically requires that such client or customer be added as an additional **Insured** for professional liability or errors and omissions insurance, and only for **Claims** (i) first made on or after the effective date of this endorsement and (ii) for vicarious or imputed liability of such client or customer which results from **Wrongful Acts** committed solely by the **Named Insured**.

   The **Policy** will not provide coverage for any **Wrongful Act** committed by such client or customer referenced above which is added to this **Policy** as an additional **Insured**.

2. Section III, Exclusions, is amended by deleting exclusion E, but solely with respect to **Claims** asserted by such client or customer referenced above for **Wrongful Acts** actually or allegedly committed by an **Insured** in the performance of or failure to perform **Professional Services**.

All other terms and conditions of this **Policy** remain unchanged.

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Authorized Representative

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

Named Insured **US Bus Charter & Limo Inc. dba US Coachways**			Endorsement Number
Policy Symbol **EON**	Policy Number **G24011999 007**	Policy Period **11/09/2013 to 11/09/2014**	Effective Date of Endorsement **11/09/2013**
Issued By (Name of Insurance Company) **Illinois Union Insurance Company**			

Defense and Settlement Endorsement

It is agreed that Section I, Insuring Agreement and Defense, subsection B, Defense is amended by deleting numbered paragraph 2 in its entirety and inserting the following:

2. If the **Insured** refuses to consent to a settlement or a compromise acceptable to the claimant/plaintiff and the **Company**, then the **Company's** liability to pay **Damages** and **Claims Expenses** under this **Policy** with respect to such **Claim** shall be reduced to (i) the amount of **Damages** for which the **Claim** could have been settled plus all **Claims Expenses** incurred until the date of such refusal, and (ii) 50% of all subsequent covered **Claims Expenses** in excess of such amount, which sum shall not exceed the unexhausted Limit of Liability specified in Item 3 of the Declarations. The remaining 50% of **Claims Expenses** and all subsequent **Damages** shall be borne by the **Insureds** uninsured and at their own risk. In such event, the **Company** shall tender a check to the **Insured** for the recommended settlement amount, and shall be relieved of any further duty or obligation, other than for covered **Claims Expenses** referenced above. This paragraph shall not apply to a settlement in which the total incurred **Damages** and **Claims Expenses** do not exceed the Retention.

All other terms and conditions of this **Policy** remain unchanged.

Authorized Representative

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

Named Insured			Endorsement Number
US Bus Charter & Limo Inc. dba US Coachways			
Policy Symbol	Policy Number	Policy Period	Effective Date of Endorsement
EON	**G24011999 007**	**11/09/2013 to 11/09/2014**	**11/09/2013**
Issued By (Name of Insurance Company)			
Illinois Union Insurance Company			

Spousal Coverage Extension

It is agreed that Section VI, Conditions, is amended by adding the following subsection:

- **Spouses**

  The spouses and legally recognized domestic partners of **Insureds** shall be considered **Insureds** under this **Policy**, but coverage is afforded only for a **Claim** arising solely out of their status as a spouse or domestic partner where the **Claim** seeks damages from marital community property, jointly held property or property transferred from a natural person **Insured** to such spouse or legally recognized domestic partner. No coverage is provided for any **Wrongful Act** actually or allegedly committed by such spouse or legally recognized domestic partner. All of the terms and conditions of this **Policy** including, without limitation, the Retention applicable to **Damages** and **Claims Expenses** incurred by **Insureds** shown in Item 4 of the Declarations shall also apply to **Damages** and **Claims Expenses** incurred by such spouses and legally recognized domestic partners.

All other terms and conditions of this Policy remain unchanged.

Authorized Representative

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

Named Insured **US Bus Charter & Limo Inc. dba US Coachways**			Endorsement Number
Policy Symbol **EON**	Policy Number **G24011999 007**	Policy Period **11/09/2013 to 11/09/2014**	Effective Date of Endorsement **11/09/2013**
Issued By (Name of Insurance Company) **Illinois Union Insurance Company**			

Contingent Bodily Injury, Property Damage

It is agreed that:

1. Section III, Exclusions, is amended as follows:

   a. Subsection B, is amended by adding the following:

   However, this exclusion does not apply if the **Bodily Injury** or **Property Damage** results from a **Wrongful Act** committed by the **Insured** in the performance of **Professional Services,** provided that:

   1) such **Wrongful Act** was not the proximate cause of such **Bodily Injury** or **Property Damage** and
   2) there is no other policy applicable to such **Claim**.

   b. The following exclusions are added, but solely with respect to coverage afforded by this endorsement:

   - alleging, based upon, arising out of, or attributable to the ownership, maintenance, operation, use, loading of any motor vehicle, aircraft or watercraft owned or operated by or loaned to any **Insured**;
   - for which the **Insured** or any carrier as his insurer may held liable under any workers' compensation, unemployed compensation or disability benefits law, or similar law;
   - to indemnify or contribute with another employer for **Bodily Injury** to any employee of the **Insured** arising out of his or her employment by the **Insured**.

2. Section VI, Conditions, is amended by adding the following to subsection C, Other Insurance:

   - It is a condition precedent to any coverage afforded by this endorsement that the **Named Insured** maintain in full force and effect during the **Policy Period** Comprehensive General Liability insurance, including Products/Completed Operations and Premises/Operations coverage, covering **Bodily Injury** and **Property Damage** in the amount of $1,000,000 aggregate and applying to the **Named Insured's** operations.

All other terms and conditions of this **Policy** remain unchanged.

_____
Authorized Representative

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

Named Insured **US Bus Charter & Limo Inc. dba US Coachways**			Endorsement Number
Policy Symbol **EON**	Policy Number **G24011999 007**	Policy Period **11/09/2013 to 11/09/2014**	Effective Date of Endorsement **11/09/2013**
Issued By (Name of Insurance Company) **Illinois Union Insurance Company**			

Network Security or Privacy Liability Exclusion

1. Section II, Definitions, is amended by adding the following:

   - **Network Security or Privacy Breach** means:

     1. the failure by the **Insured** to properly handle, manage, store, destroy or otherwise control confidential corporate or personally identifiable information;

     2. any violation of the **Insured's** privacy policy, or any violation by the **Insured** of:

        (a) the Health Insurance Portability and Accountability Act of 1996 (Public Law 104-191);
        (b) the Gramm-Leach-Bliley Act of 1999;
        (c) the California Security Breach Notification Act (CA SB 1386);
        (d) Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a), but solely for alleged violations of unfair or deceptive acts or practices in or affecting commerce; or
        (e) any violation of any other similar state, federal, and foreign identity theft and privacy protection legislation that requires commercial entities that collect personal information to post privacy policies, adopt specific privacy or security controls, or notify individuals in the event that personal information has potentially been compromised; or

     3. a failure in network security, including but not limited to activities performed by the **Insured** to protect against unauthorized access to, unauthorized use of, a denial of service attack directed against, or transmission of malicious code to the **Insured's** computer system.

2. Section III, Exclusions, is amended by adding the following:

   - alleging, based upon, arising out or attributable to a **Network Security or Privacy Breach**.

All other terms and conditions of this **Policy** remain unchanged.

Authorized Representative

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

Named Insured **US Bus Charter & Limo Inc. dba US Coachways**			Endorsement Number
Policy Symbol **EON**	Policy Number **G24011999 007**	Policy Period **11/09/2013 to 11/09/2014**	Effective Date of Endorsement **11/09/2013**
Issued By (Name of Insurance Company) **Illinois Union Insurance Company**			

Notice Amended (Variable Number of Days)

It is agreed that Section VI, Conditions, subsection A, Notice is amended by deleting the phrase "30 days" and inserting the phrase "60 days".

All other terms and conditions of this **Policy** remain unchanged.

Authorized Representative

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

Named Insured **US Bus Charter & Limo Inc. dba US Coachways**			Endorsement Number
Policy Symbol **EON**	Policy Number **G24011999 007**	Policy Period **11/09/2013 to 11/09/2014**	Effective Date of Endorsement **11/09/2013**
Issued By (Name of Insurance Company) **Illinois Union Insurance Company**			

Retroactive Date, Specified Layer

It is agreed that solely with respect to that portion of the Each **Claim** and Aggregate Limits of Liability set forth in Item 3 of the Declarations which is $2,000,000 excess of $3,000,000, Item 6 of the Declarations is deleted in its entirety and the following is inserted:

Item 6. **Retroactive Date** (if applicable): 11/09/2009

All other terms and conditions of this **Policy** remain unchanged

Authorized Representative

NEW YORK CHANGES - LEGAL ACTION AGAINST THE INSURER

Named Insured **US Bus Charter & Limo Inc. dba US Coachways**			Endorsement Number
Policy Symbol **EON**	Policy Number **G24011999 007**	Policy Period **11/09/2013 to 11/09/2014**	Effective Date of Endorsement **11/09/2013**
Issued By (Name of Insurance Company) **Illinois Union Insurance Company**			

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

The following provisions are added to the policy, and supercede any provisions to the contrary:

Legal Action Against the Insurer

a. No person or organization has a right under this policy:

(1) To join the insurer as a party or otherwise bring the insurer into an action asking for damages from an **Insured;** or

(2) To sue the insurer on this policy unless all of its terms have been fully complied with.

A person or organization may sue the insurer to recover on an agreed settlement or on a final judgment against an insured; but the insurer will not be liable for damages that are not payable under the terms of this policy or that are in excess of the applicable limit of liability. An agreed settlement means a settlement and release of liability signed by the insurer, the insured and the claimant or the claimant's legal representative.

Failure to Give Notice

Failure to give notice to the insurer as required under this policy shall not invalidate any Claim unless the failure to provide such timely notice has prejudiced the insurer. However, no Claim will be invalidated if it shall be shown not to have been reasonably possible to give such timely notice and that notice was given as soon as was reasonably possible thereafter.

All other terms and conditions of this Policy remain unchanged.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

Named Insured **US Bus Charter & Limo Inc. dba US Coachways**			Endorsement Number
Policy Symbol **EON**	Policy Number **G24011999 007**	Policy Period **11/09/2013 to 11/09/2014**	Effective Date of Endorsement **11/09/2013**
Issued By (Name of Insurance Company) **Illinois Union Insurance Company**			

Additional Insured Endorsement

It is agreed that Section II, Definitions, subsection I, the definition of **Insured**, is amended by adding the following:

The following entity or individual listed below shall be considered an **Insured**, but only with respect to **Damages** and **Claims Expenses** arising out of **Wrongful Acts** committed or allegedly committed by the **Named Insured** in the performance of or failure to perform **Professional Services**.

The policy will not provide any coverage for **Claims** and **Claims Expenses** arising out of any **Wrongful Act** committed by the entity or individual listed below.

East Islip School District

Additional **Insured**

All other terms and conditions of this **Policy** remain unchanged.

Authorized Representative

ACE North American Claims
P.O. Box 5105
Scranton, PA 18505-0518

[redacted]

www.acegroup.com

[redacted]
Senior Claims Specialist

August 18, 2014

By email and certified mail
Edward Telmany
US Bus Charter & Limo Inc.
1000 St. Mary's Avenue, Suite 2B
Staten Island, NY 10305
USCoachways@gmail.com

Insured: **US Bus Charter & Limo Inc.**
ACE Claim No: [redacted]
Claimant: **James Bull**
Policy No: **G24011999 007**

Dear Mr. Telmany:

This letter is to further acknowledge receipt of correspondence, whereby ACE North American Claims ("ACE"), on behalf of Illinois Union Insurance Company (the "Company"),was advised of the above referenced matter. This matter has been noticed by US Bus Charter & Limo Inc. (the "Insured") under its Miscellaneous Professional Liability Policy G24011999 007 (the "Policy"). If the Insured is seeking coverage under any other policies issued by the Company, please let us know as soon as possible.

A claim file has been established with the assigned claim number of [redacted]. Please refer to this claim number on all future correspondence regarding this matter. The purpose of this letter is to inform you that for the reasons detailed below, there is no coverage for this matter.

Background

A purported class action complaint has been filed by the Plaintiff in which it is alleged that the Insured sent unlawful text messages in violation of the Telephone Consumer Protection Act. It is further alleged that the Insured used an automatic telephone dialing system to place text messages to the Plaintiff. The following causes of action are pleaded in the Complaint: (a) knowing and/or willful violation of the Telephone Consumer Protection Act; and (b) negligent violations of the Telephone Consumer Protection Act. The Plaintiff is seeking to recover statutory damages of $500 for every negligent violation of the Act and $1,500 for each knowing violation. The Plaintiff is also seeking to restrain the Insured from engaging in future telemarketing in violation of the Act.

The Policy

A Miscellaneous Professional Liability Policy was issued to the Insured for the policy period November 9, 2013 to November 9, 2014. The Policy provides for a Limit of Liability of $5,000,000 each Claim and in the Aggregate. The Policy also provides for a Retention of $25,000 each Claim.

With respect to the Claim, we direct your attention to the Insuring Agreement, which provides as follows:

I. Insuring Agreement and Defense

A. Insuring Agreement

The **Company** will pay on behalf of the **Insured** all sums in excess of the Retention that the **Insured** shall become legally obligated to pay as **Damages** and **Claims Expenses** because of a **Claim** first made against the **Insured** and reported to the **Company** during the **Policy Period** by reason of a **Wrongful Act** committed on or subsequent to the **Retroactive Date** and before the end of the **Policy Period**.

We also refer to the following definitions:

II. Definitions

P. **Professional Services** means only those services specified in Item 7 of the Declarations performed for others by an Insured or by any other person or entity for whom the **Insured** is legally liable.

Item 7 of the Declarations further provides "Solely in the performance of professional services as a bus charter broker for others for a fee".

T. **Wrongful Act** means any actual or alleged negligent act, error, omission, misstatement, misleading statement or **Personal Injury Offense** committed by the **Insured** or by any other person or entity for whom the **Insured** is legally liable in the performance of or failure to perform **Professional Services**.

Coverage Position

Please be advised that **there is no coverage for this matter for the following reason**: This Claim does not arise by reason of a Wrongful Act and hence falls outside the scope of coverage provided by the Insuring Agreement. Specifically, the Claim does not arise from any actual or alleged act, error, omission, misstatement, misleading statement or Personal Injury Offense committed by the Insured in the performance of professional services as a bus charter broker for others for a fee. Rather, the Claim arises from the alleged use of automatic telephone dialing system to transmit text messages and it does not contain any allegations relating to the performance of the Insured's services as a bus charter broker. We also note the Insured did not provide any services to the Plaintiff "for a fee".

We strongly recommend that you report this matter to any other insurance carrier that may afford coverage for this matter. Please note that you may request a re-evaluation of the coverage position. Any requests for re-evaluation should be accompanied by additional factual information, documentation, and/or legal precedent which you believe may apply. It should be directed to my attention. In the event of a re-evaluation, the Company reserves all rights under the Policy. Nothing herein shall be construed as a waiver of such rights.

ACE reserves the right to deny coverage based upon grounds other than those expressly set forth in this letter and to supplement and/or amend this letter to address additional coverage issues as they may arise, based upon all the provisions, terms, conditions, exclusions, endorsements and definitions found in the

Policy and additional facts that may come to ACE's attention. By the same token, ACE will take into consideration any additional information that you provide. Nothing stated herein and no further action taken by ACE or on its behalf should be construed as a waiver of any of its rights under the Policy. On the contrary, by providing this or any prior correspondence to the Insured, engaging in any prior or future discussions with the Insured, or paying or agreeing to pay any amount to or on or behalf of the Insured, ACE does not waive any rights that it has under the Policy at law or in equity and understands the Insured reserves its rights as well.

Yours sincerely

[redacted]
Senior Claims Specialist
ACE North American Claims

c.c. Via email only
[redacted]

EXHIBIT 2

ACE North American Claims
Professional Risk
P.O. Box 5105
Scranton, PA 18505-0518
[redacted]
www.acegroup.com

Diane Fazzolari
Claims Director

January 13, 2015

By certified mail and email (USCoachways@gmail.com)
Edward Telmany
US Bus Charter & Limo Inc.
1000 St. Mary's Avenue, Suite 2B
Staten Island, NY 10305

RE: **Insured:** [redacted]
ACE Claim No: **JY14J0426052**
Claimant: **James Bull**
Policy No: **G24011999 007**

Dear Mr. Telmany:

ACE North American Claims ("ACE"), on behalf of Illinois Union Insurance Company (the "Company"), hereby acknowledges receipt of the amended complaint filed on December 11, 2014 in the above referenced matter. The purpose of this letter is to inform you that for the reasons detailed below, the amended complaint does not alter ACE's prior coverage determination **that there is no coverage for this matter.**

Background

We are in receipt of the amended class action complaint filed by the Plaintiff in which it is alleged that the Insured sent unlawful text messages in violation of the Telephone Consumer Protection Act. It is further alleged that the Insured used an automatic telephone dialing system to place text messages to the Plaintiff. The amended complaint alleges that the Plaintiff placed his telephone number on the Do Not Call Registry on July 17, 2005 and has not removed it at any time since then, and thus was on the registry during the alleged time the Insured sent the purported text messages. The following causes of action are pleaded in the amended complaint: (a) knowing and/or willful violation of the Telephone Consumer Protection Act; and (b) negligent violations of the Telephone Consumer Protection Act. The Plaintiff is seeking to recover statutory damages of $500 for every negligent violation of the Act and $1,500 for each knowing violation. The Plaintiff is also seeking to restrain the Insured from engaging in future telemarketing in violation of the Act.

The Policy

A Miscellaneous Professional Liability Policy was issued to the Insured for the policy period November 9, 2013 to November 9, 2014. The Policy provides for a Limit of Liability of $5,000,000 each Claim and in the Aggregate. The Policy also provides for a Retention of $25,000 each Claim.

With respect to the Claim, we direct your attention to the Insuring Agreement, which provides as follows:

I. Insuring Agreement and Defense

A. Insuring Agreement

The **Company** will pay on behalf of the **Insured** all sums in excess of the Retention that the **Insured** shall become legally obligated to pay as **Damages** and **Claims Expenses** because of a **Claim** first made against the **Insured** and reported to the **Company** during the **Policy Period** by reason of a **Wrongful Act** committed on or subsequent to the **Retroactive Date** and before the end of the **Policy Period**.

We also refer to the following definitions:

II. Definitions

P. **Professional Services** means only those services specified in Item 7 of the Declarations performed for others by an Insured or by any other person or entity for whom the **Insured** is legally liable.
Item 7 of the Declarations further provides "Solely in the performance of professional services as a bus charter broker for others for a fee".
T. **Wrongful Act** means any actual or alleged negligent act, error, omission, misstatement, misleading statement or **Personal Injury Offense** committed by the **Insured** or by any other person or entity for whom the **Insured** is legally liable in the performance of or failure to perform **Professional Services**.

Coverage Position

Please be advised that the amended complaint does not alter ACE's prior coverage determination that there is no coverage for this matter. The amended complaint, like the original complaint, does not arise by reason of a Wrongful Act and hence falls outside the scope of coverage provided by the Insuring Agreement. Specifically, the Claim does not arise from any actual or alleged act, error, omission, misstatement, misleading statement or Personal Injury Offense committed by the Insured in the performance of professional services as a bus charter broker for others for a fee. Rather, the Claim arises from the alleged use of automatic telephone dialing system to transmit text messages and it does not contain any allegations relating to the performance of the Insured's services as a bus charter broker. We also note the Insured did not provide any services to the Plaintiff "for a fee". Accordingly, for the reasons set forth herein, as well as in our letter dated August 18, 2014, which ACE incorporates herein, ACE hereby advises **that there is no coverage for this matter**.

As previously advised, we strongly recommend that you report this matter to any other insurance carrier that may afford coverage for this matter. Please note that you may request a re-evaluation of the coverage position. Any requests for re-evaluation should be accompanied by additional factual information, documentation, and/or legal precedent which you believe may apply. It should be directed to my attention. In the event of a re-evaluation, the Company reserves all rights under the Policy. Nothing herein shall be construed as a waiver of such rights.

ACE reserves the right to deny coverage based upon grounds other than those expressly set forth in this letter and to supplement and/or amend this letter to address additional coverage issues as they may arise, based upon all the provisions, terms, conditions, exclusions, endorsements and definitions found in the Policy and additional facts that may come to ACE's attention. By the same token, ACE will take into consideration any additional information that you provide. Nothing stated herein and no further action taken by ACE or on its behalf should be construed as a waiver of any of its rights under the Policy. On the contrary, by providing this or any prior correspondence to the Insured, engaging in any prior or future

discussions with the Insured, or paying or agreeing to pay any amount to or on or behalf of the Insured, ACE does not waive any rights that it has under the Policy at law or in equity and understands the Insured reserves its rights as well.

Sincerely,

[redacted]

Claims Director
ACE North American Claims

Via email only
cc: [redacted]

EXHIBIT 3

BRODERICK LAW, P.C.

99 High St., Suite 304
Boston, Massachusetts 02110

Edward A. Broderick

Tel. (617) 738-7080
Fax (617) 830-0327
ted@broderick-law.com

July 23, 2015

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Ms. Susan Rivera
President
Illinois Union Insurance Company
525 West Monroe Street, Suite 400
Chicago, IL 60661

RECEIPT NUMBER 7010 0780 0000 3218 4704

Mr. Bruce Kessler
President
Mr. Joseph Casey
Division President, Professional Risk
ACE Westchester
11575 Great Oaks Way, Suite 200
Alpharetta, GA 30022

RECEIPT NUMBERS 7010 0780 0000 3218 4766, 7010 0780 0000 3218 4733

Re: *Bull v. US Coachways, Inc.* Civil Action No. 1:14-cv-05789 (Northern District of Illinois)

Dear Ms. Rivera and Messrs. Kessler and Casey:

Pursuant to the provisions of N.Y. Ins. Law § 2601, et seq., Georgia Unfair Settlement Practices Act and Unfair and Deceptive Practices Act, O,C.G.A. § 10-1-370 et seq. and O.C.G.A. § 33-6-1, *et seq*. and Illinois 215 ILCS 5/154, I along with my co-counsel, Brian Murphy, Matthew McCue and Anthony Paronich, write on behalf of the plaintiff, James Bull, ("Plaintiff") and the nationwide class of consumers he seeks to represent in the above-referenced underlying consumer class litigation ("Class Litigation"), to make a demand upon Illinois Union Insurance Company ("Illinois Union") to engage in settlement negotiations. I summarize the relevant law and facts in this case below.

BACKGROUND

This case arises under the remedial provisions of the Telephone Consumer Protection Act ("TCPA"), a statute enacted more than twenty years ago in response to consumer "outrage" over

Ms. Susan Rivera
President
Illinois Union Insurance Company

Mr. Bruce Kessler
President
Mr. Joseph Casey
Division President, Professional Risk
ACE Westchester

Re: *Bull v. US Coachways, Inc.* Civil Action No. 1:14-cv-05789
(Northern District of Illinois)

July 23, 2015

the proliferation of intrusive, nuisance telemarketing practices. *See Mims v. Arrow Fin. Servs., LLC,* 132 S. Ct. 740, 745 (2012). In so doing, Congress recognized that "[u]nrestricted telemarketing . . . can be an intrusive invasion of privacy[.]" Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(5) (1991), *codified at* 47 U.S.C. § 227.

US Coachways claims to be the largest logistic coach ways solutions company in the country. In order to drive repeat business and secure some new business, US Coachways began sending blast text messages in 2011 to individuals who had booked past trips as well as and individuals who had asked for quotes over the telephone, but decided to not book trips. In order to do this, US Coachways used a marketing platform, Gold Mobile. The Gold Mobile marketing platform allows customers to load lists of cellular telephone numbers and design the content of a text message that is then automatically sent to the entire list.

The amount of text messages sent in this matter, over 1,000,000 in the last three years, is staggering. An example of the privacy invasions caused by this marketing is indicated in the Plaintiff's own experience with US Coachways. Over the course of three years, the Plaintiff received more than 20 unsolicited text message advertisements. This type of marketing, along with e-mail solicitations, are the two largest forms of marketing engaged in by US Coachways. As their CEO commented in a June 2014 e-mail, "Every month we do an email blast to almost 300,000 customers and text blast to almost 90,000 customers."

However, The TCPA places restrictions on computer-generated telemarketing calls to cell phones. The general rule is that no person may make a call to a cellular telephone using an automatic telephone dialing system, period. 47 U.S.C. § 227(b)(1)(A)(iii). There is an affirmative defense available if the caller can show that it had the "prior express consent" of the call recipient to receive the call. *Id.* "Prior express consent" exists where a consumer has (a) clearly stated that the telemarketer may call, and (b) clearly expressed an understanding that the telemarketer's subsequent call will be made for the purpose of encouraging the purchase of goods or services. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 F.C.C.R. 1830 ¶ 7 (FCC 2012).

Courts have explained that, "prior express consent" means that a caller is "not permitted to make an automated call to [an individual's] cell phone unless [that individual] had previously said to [the caller]…something like…: 'I give you permission to use an automatic telephone dialing system to call my cellular phone." *Edeh v. Midland Credit Mgmt., Inc.,* 748 F. Supp. 2d 1030, 1038 (D. Minn. 2010) aff'd, 413 F. App'x 925 (8th Cir. 2011); *Thrasher-Lyon v. CCS*

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Re: *Bull v. US Coachways, Inc.* Civil Action No. 1:14-cv-05789 (Northern District of Illinois)

July 23, 2015

Commercial, LLC, No. 11-cv-04473, 2012 WL 3835089, at *3 (N.D. Ill. 2012). Just last year, the FCC, at the request of the United States Courts of Appeals for the Second Circuit, provided further guidance regarding consent for entities to use an autodialer to call cellular telephones, as is alleged here. Notably, the FCC clearly explained the scope of prior express consent stating:

> Consumers who provide a wireless phone number for a limited purpose—for service calls only, for example—'do not necessarily expect to receive telemarketing calls that go beyond the limited purpose,' and thus have not given their consent to receive telemarketing calls. *2012 Rulemaking Order*, 27 FCC Rcd. at 1840 (¶ 25).

See Exhibit 1, *FCC's Response to Request from the United States Courts of Appeals for the Second Circuit,* at 5. Courts in the district where this action is pending have interpreted this Order consistent with protecting the privacy rights of call recipients. In *Kolinek v. Walgreen Co.*, 2014 U.S. Dist. LEXIS 91554 (N.D. Ill. July 7, 2014), Judge Kennelly held:

> The FCC has established no general rule that if a consumer gives his cellular phone number to a business, she has in effect given permission to be called at that number for any reason at all, absent instructions to the contrary. Rather, to the extent the FCC's orders establish a rule, it is that the scope of a consumer's consent depends on its context and the purpose for which it is given. Consent for one purpose does not equate to consent for all purposes.
>
> This, in the Court's view, is a more natural reading of the TCPA's exception for a call "made with the prior consent of the called party."

Id. at *10-11. As another Court in the district where this matter is pending held, "the FCC's final orders are binding on this court under the Hobbs Act." *Griffith v. Consumer Portfolio Servs., Inc.*, 838 F.Supp.2d 723, 726 (N.D. Ill. 2011). Here, US Coachways has failed to obtain the requisite consent to send these individuals the text messages. In fact, US Coachways, after being compelled in this case, confirmed that it did not have any evidence of consent to send the text messages at issue.

Grafting phone numbers from prior customers and sending them illegal text messages is a common tactic, but one which clearly violates the TCPA. In 2012, a Jiffy Lube franchisee agreed to pay $47,000,000 to resolve a text message marketing suit after it took cellular telephone

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(Northern District of Illinois)

July 23, 2015

numbers from old invoices and the customer database at a number of its Jiffy Lube locations. *See In re Jiffy Lube International, Inc. Text Spam Litigation*, United States District Court for the Southern District of California, Civil Action No. 11-md-02261, (final approval granted on February 20, 2013). Here, US Coachways violation of the law was not limited to interactions with prior customers, but also to individuals, such as the Plaintiff, who had never actually entered into a transaction with US Coachways, but merely obtained a quote.

COURTS REGULARLY GRANT CLASS CERTIFICATION IN TCPA CASES

Not surprisingly, given the scope of illegal telemarketing previously recognized by Congress in implementing the TCPA, the relatively small monetary recovery under the TCPA for each claim, and the simple elements required to prove a TCPA violation, many consumers have sought to enforce their rights under the TCPA via class actions. In fact, in January of 2012, the U.S. Supreme Court issued its opinion in *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740 (2012), holding that federal courts have federal question jurisdiction under the TCPA, and recognizing that the class action vehicle is the most appropriate way to provide consumers with redress for violations covered by the TCPA, stating:

> Arrow's floodgates argument assumes "a shocking degree of noncompliance" with the Act . . . and seems to us more imaginary than real. The current federal district court civil filing fee is $350. 28 U.S.C. §1914(a). How likely is it that a party would bring a $500 claim in, or remove a $500 claim to, federal court? Lexis and Westlaw searches turned up 65 TCPA claims removed to federal district courts in Illinois, Indiana, and Wisconsin since . . . October 2005 . . . All 65 cases were class actions, not individual cases removed from small-claims court. There were also 26 private TCPA claims brought initially in federal district courts; of those, 24 were class actions.

Mims, 132 S. Ct. at 745. Thus, the Supreme Court points to the class action vehicle as an appropriate means by which TCPA claims may be pursued. Since the enactment of the TCPA, trial and appellate courts nationwide have scrutinized and approved consumers' use of the class action vehicle to combat illegal telemarketing. The Seventh Circuit Court of Appeals noted that class certification of TCPA claims is "normal" because the main questions that arise in TCPA class actions are "common to all recipients." *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 684 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1318 (2014).

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Re: *Bull v. US Coachways, Inc.* Civil Action No. 1:14-cv-05789 (Northern District of Illinois)

July 23, 2015

The Kansas Supreme Court, looking at the policy behind Rule 23, summarized why TCPA cases are appropriate for class certification:

> We do not agree with the defendant's contention that over 100,000 individual small claims actions would be superior to a single class action. While the defendant in such an action might benefit if only a small number of plaintiffs found it worth their while to bring suit or were aware of their rights under the TCPA, this small turnout would serve only to frustrate the intent of the TCPA and to protect junk fax advertisers from liability. It would, accordingly, not provide a "superior" method for individual plaintiffs.

Critchfield Physical Therapy v. Taranto Group, Inc., 263 P.3d 767, 780 (Kan. 2011) (certifying a TCPA illegal marketing class Kansas's equivalent of Rule 23(b)(3).

POTENTIAL EXPOSURE

The TCPA creates a private cause of "action to receive $500 in damages for each such violation,". *See* 47 U.S.C. § 227. Here, with over 1,000,000 text messages sent, US Coachways faces over **$500,000,000** in potential liability from the ATDS class alone. In the face of this level of exposure, we suggest that settlement, with the peace of mind that comes with a full release, is the only economically rational choice for US Coachways and its insurance carriers.

APPLICABLE INSURANCE LAW

Given these facts, and the massive exposure US Coachways faces for its illegal conduct, the failure of Illinois Union to resolve this claim under these circumstances would constitute an unfair and deceptive act or practice under the law of all of the states whose law might apply—Illinois, New York and Georgia. US Coachways is headquartered in Staten Island, NY, so typically NY insurance law should apply. However, Illinois Union is headquartered in Chicago, making Illinois law possibly applicable. ACE Westchester, Illinois Insurance's parent is headquartered in Alpharetta, Georgia, making Georgia law possibly applicable. Under the law of all three states, the outright denial of coverage by Illinois Union and ACE Westchester constitutes and unfair insurance settlement practice.

Ms. Susan Rivera
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ACE Westchester

Re: *Bull v. US Coachways, Inc.* Civil Action No. 1:14-cv-05789
(Northern District of Illinois)

July 23, 2015

Illinois Insurance Law

Illinois insurance law defining an unfair settlement practice as:

> Not attempting in good faith to effectuate prompt, fair, and equitable settlement of claims submitted in which liability has become reasonably clear.

Illinois 215 ILCS 5/154(d). In addition, Illinois 215 ILCS 5/154(e) prohibits an insurance company from:

> Compelling insureds or beneficiaries to institute suits to recover amounts due under its policies by offering substantially less than the amounts ultimately recovered in suits brought by them.

While there is no common-law bad-faith tort action under Illinois law, an insured may assert a common-law action against a liability insurer that has failed to act in good faith in responding to a settlement offer. *Cramer v. Insurance Exchange Agency*, 174 111.2d 513, 675 N.E.2d 897, 221 lll.Dec. 473 (1996). One of an insurer's obligations under a contract of liability insurance, arising out of its implied duty of good faith and fair dealing, is to settle a claim that has been brought against the insured when it is appropriate to do so. *Id.* Illinois courts have recognized that the insurer has a duty to act in good faith in responding to such settlement offers. *See Haddick v. Valor Insurance*, 198 I11.2d 409, 763 N.E.2d 299, 261 Ill.Dec. 329 (2001). As the court explained in *Cramer*:

> The "duty to settle" arises because the policyholder has relinquished defense of the suit to the insurer. The policyholder depends upon the insurer to conduct the defense properly. In these cases, the policyholder has no contractual remedy because the policy does not specifically define the liability insurer's duty when responding to settlement offers. The duty was imposed to deal with the specific problem of claim settlement abuses by liability insurers where the policyholder has no contractual remedy.

When an insurer breaches this duty, the insurer may be liable for the full amount of the judgment against the policyholder, regardless of policy limits. *Krutsinger v. Illinois Casualty Co.,* 10 Ill.2d 518, 141 N.E.2d 16 (1957); *Swedishamerican Hospital Association of Rockford v. Illinois State Medical Inter-Insurance Exchange*, 395 Ill.App.3d 80, 916 N.E.2d 80, 334 111.Dec.7 (2d Dist.

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(Northern District of Illinois)

July 23, 2015

2009).

New York Insurance Law

An insurer's conduct is regulated under New York Insurance Law §2601: Unfair Claims Settlement Practices, as well as the implied covenant of good faith and fair dealing in insurance contracts that traces its origin to the early part of the twentieth century. *See Brassil v. Maryland Cas. Co.*, 210 N.Y. 235 (1914) (finding that it was the obligation of the insurer to "deal fairly and in good faith" with its insured).

When making a determination regarding allegations of bad faith against an insurer in failing to settle, New York law has enumerated the following factors: (a) *Proper Investigation and/or Evaluation*: It is the obligation of the insurer to properly and thoroughly investigate the facts and circumstances of a claim in order to be able to ascertain the potential liability and the amount of the damages faced by the insured, which continues throughout the course of the litigation. *See Brown v. United States Fidelity & Guar Co.*, 314 F.2d 675 (2d Cir. 1963). (b) *Timely Negotiation of a Settlement or Failure to Negotiate*: New York courts will evaluate whether an insurer negotiated a settlement in a timely fashion, including assessment of whether, when a demand is within policy limits, the insurer made a fair and reasonable counter-proposal in a timely manner. *See State v. Merchants Ins. Co. of New Hampshire*, 109 A.D.2d 935 (3d Dep't 1985). (c) *Failure to Foresee a Verdict in Excess of the Policy Limits*: When an insurer has adequately and diligently investigated the circumstances surrounding a claim, and has assessed both liability and injury, the insurer may nevertheless be found to have acted in bad faith, if based on such knowledge, it should have recognized the danger of a substantial excess verdict being rendered against the insured. *See Knobloch v. Royal Globe Ins. Co.*, 38 N.Y.2d 471 (1976). (d) *Failure to Inform the Insured of Settlement Negotiations*: Although an insurer has the right to conduct settlement negotiations on behalf of its insured without consulting the insured where there is no "consent to settle" provision in the policy, the insurer is still obligated in most circumstances to respond accurately to requests from its insured as to the progress of negotiations and as to settlement developments, and a failure to do so may lead to a finding of bad faith against the insurer. *See Knobloch*, 38 N.Y.2d 471. (e) *Attempts to Obtain Contribution to Settlement From the Insured*: It is improper for an insurer to insist upon contribution from the insured to settle a claim, however, an insurer is permitted to discuss with its insured that contribution to settlement is possible, especially when the settlement amount is high compared to what the insurer is willing to pay. *See Brockstein v. Nationwide Mut. Ins. Co.*, 417 F.2d 703 (2d Cir. 1969) (f) *Belief in Non-Coverage*: An insurer will not be held liable for an excess judgment

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July 23, 2015

rendered against its insured where an insurer's refusal to settle is on the belief that there is no coverage under the applicable policy *only if* the inusrer's belief was reasonable. *See Dawn Frosted Meats, Inc. v. Ins. Co. of North American*, 99 A.D.2d 448 (1st Dep't 1984). (g) *Comparative Financial Risks*: Insurers should evaluate the potential magnitude of damages and the financial burden each party may be exposed to as a result of a refusal to settle. Bad faith may be found where an insurer takes a financial risk by not settling within policy limits, where that risk is considerably greater for the insured than for the insurer. *See Brown*, 314 F.2d at 678-79. (h) *The Insured's Conduct*: According to the *Pavia* Court, the insured's fault in delaying or ceasing settlement negotiations by misrepresenting the facts may also be taken into consideration. *See Pavia*, 82 N.Y.2d at 455. Here US Coachways promptly reported the claim and has not cooperated, all without securing coverage. Under this standard, Plaintiff submits that the denial of coverage by Illinois Union and ACE constitutes an act of bad faith.

Georgia Insurance Law

The Georgia Unfair Settlement Practices Act, § 33-6-34, defines an unfair settlement practice as:

> "Not attempting in good faith to effectuate prompt, fair, and equitable settlement of claims submitted in which liability has become reasonably clear"

O.C.G.A. § 33-6-34(4). In addition, O.C.G.A. § 33-6-34 prohibits an insurance company from:

> "Compelling insureds or beneficiaries to institute suits to recover amounts due under its policies by offering substantially less than the amounts ultimately recovered in suits brought by them."

O.C.G.A. § 33-6-34(5). In Georgia, in addition to policy proceeds recoverable under an insurance contract, an insured may have a claim for damages to its insured for failing to settle the claim of an injured person where the insurer is guilty of negligence, fraud, or bad faith in failing to compromise the claim. *McCall v. Allstate Ins. Co.*, 251 Ga. 869, 870 (310 S.E.2d 513) (1984). In deciding whether to settle a claim within the policy limits, the insurance company must give equal consideration to the interests of the insured. *See S. General Ins. Co. v. Holt*, 262 Ga. 267, 269 (Ga. 1992). "An insurance company may be liable for the excess judgment entered against its insured based on the insurer's bad faith or negligent refusal to settle a personal claim within

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July 23, 2015

the policy limits." *Cotton States Mut. Ins. Co. v. Brightman,* 276 Ga. 683, 684 (2003). Also under this standard, Plaintiff submits that the denial of coverage by Illinois Union and ACE constitutes an act of bad faith.

Applicable Insurance

There is at least one insurance policy at issue in this case. Effective November 9, 2013 to November 9, 2014, Illinois Union/ACE issued a miscellaneous Professional Liability Policy No. G24011999 007 ("the Policy"). The Policy covers TCPA claims under the "Personal Injury Offense" section of the policy, which states, *inter alia*:

> L. **Personal Injury Offense** means one or more of the following offenses:
>
> ....
>
> 4. publication or an utterance in violation of an individual's right to privacy

Courts across the United States, including a number of those litigated by Plaintiff's counsel, have repeatedly recognized that the privacy invasion coverage afforded by a commercial general liability policy extends to TCPA claims. *See Park University Enterprises, Inc. v. American Casualty Company of Reading, Pennsylvania*, 442 F.3d 1239, 1243 (10th Cir. 2006) (Kansas law) *Valley Forge Insurance Co. v. Swiderski Electronics, Inc.*, 860 N.E.2d 307, 317 (Ill. 2006); *Pekin Insurance Co. v. XData Solutions, Inc*, 958 N.E.2d 397, 401-03 (Ill. App. 1 Dist. 2011) (same); *Owners Ins. Co. v. European Auto Works, Inc.*, 695 F.3d 814, 818-22 (8th Cir. 2012); *Hooters of Augusta, Inc. v. American Global Ins. Co.*, 157 F. App'x 201, 206-07 (11th Cir. 2005) (Georgia law); *Western Rim Inv. Advisors, Inc. v. Gulf Ins. Co.*, 96 F. App'x 960 (5th Cir. 2004), *affg,* 269 F. Supp. 2d 836 (N.D. Tex. 2003); *Sawyer v. West Bend Mut. Ins. Co.*, 821 N.W.2d 250, 257-58 (Wis. App. 2012); *Penzer v. Transportation Ins. Co.,* 29 So.3d 1000, 1006-07 (Fla. 2010); *Terra Nova Ins. Co. v. Fray-Witzer,* 869 N.E.2d 565, 572-74 (Mass. 2007).

There is no TCPA exclusion in the policy and Illinois Union's denial from its January 13, 2015 denial letter is based solely on its position that the Plaintiff's claim does not relate to the "performance of Insured's services as a bus charter broker "for a fee." Illinois Union's position would apparently convert the policy into an auto liability policy. As explained above, marketing

Ms. Susan Rivera
President
Illinois Union Insurance Company

Mr. Bruce Kessler
President
Mr. Joseph Casey
Division President, Professional Risk
ACE Westchester

Re: *Bull v. US Coachways, Inc.* Civil Action No. 1:14-cv-05789
(Northern District of Illinois)

July 23, 2015

and customer retention are a vital part of the US Coachways business model, and is how US Coachways performs services as a bus charter broker for a fee.

COMPARABLE SETTLEMENTS

As discussed above, businesses taking telephone numbers from old invoices and using them to send text message advertisements without the prior express consent of the recipients is not unprecedented. *In re Jiffy Lube International, Inc. Text Spam Litigation*, United States District Court for the Southern District of California, Civil Action No. 11-md-02261, (final approval granted on February 20, 2013) resolved for a payment of $47,000,000 for approximately 2,000,000 text message advertisements that were sent.

Another comparison is *Desai v. ADT Sec. Servs., Inc.*, No. 11-1925 (N.D. Ill.), a case also handled by Plaintiff's counsel. On June 21, 2013, The Court in *Desai* granted final approval for a settlement for $15,000,000 for 1,000,000 telemarketing calls that had been sent by a third party agent, and an agreement from ADT to adopt changes to its telemarketing compliance policies going forward.

In the interest of settling this case without further expense, the Plaintiff is willing to mediate with Illinois Union to discuss resolution of this case. We expect a response to this demand letter within 30 days. At that point, the Plaintiff will begin settlement negotiations with the Defendant directly, including a potential assignment of rights under the applicable insurance policies.

Sincerely yours,

/s/

Edward A. Broderick

cc: Paul Gamboa, Esq. (pgamboa@gordonrees.com)
Brian Murphy, Esq. (murphy@mmblaw.com)
Matthew McCue, Esq. (mmccue@massattorneys.net)
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EXHIBIT 1

Federal Communications Commission
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Office Of General Counsel
445 12th St. S.W.
Washington, D.C. 20554
Tel: (202) 418-1740 / Fax: (202) 418-2819

July 17, 2014

John Ley, Clerk of Court
United States Court of Appeals
for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Re: *Palm Beach Golf Center-Boca, Inc. v. Sarris*, No. 13-14013

Dear Mr. Ley:

The Federal Communications Commission respectfully submits this letter brief in response to the Court's request of July 7, 2014. In that request, the Court asked for the FCC's position "on whether the [Telephone Consumer Protection Act (TCPA)] and its accompanying regulations allow a plaintiff to recover damages from a defendant who sent no facsimile to the plaintiff, but whose independent contractor did." As we explain, the answer is yes.

In its letter, the Court adverted to the FCC's May 9, 2013 declaratory ruling in *DISH Network*, 28 FCC Rcd 6574 (2013), *pet. for review dismissed*, *DISH Network, LLC v. FCC*, 552 Fed. Appx. 1 (D.C. Cir. 2014), which addressed questions regarding the availability of direct and vicarious liability for unlawful telemarketing calls under the TCPA. As the Court observed, the TCPA and the FCC's implementing regulations "use[] different language in describing facsimile transmissions and telemarketing calls."

The *DISH Network* ruling did not address or alter the treatment of facsimile transmissions under the TCPA or the Commission's implementing regulations. Under the terms of the statute and regulations, the recipient of an unsolicited facsimile advertisement may recover damages from a defendant that does not itself transmit the offending facsimile, if the defendant has hired an independent contractor to transmit facsimiles advertising the defendant's goods or services. Such liability does not depend upon the application of federal common law vicarious liability principles.

BACKGROUND

1. Statutory and Regulatory Background. The Telephone Consumer Protection Act, Pub. L. No. 102-243, 105 Stat. 2394, codified at 47 U.S.C. § 227, contains an assortment of provisions designed to protect consumer privacy and prevent unwanted communications over telephone lines. Separate subsections of the statute address voice telephone calls and facsimile advertisements. Those subsections contain different language, and FCC rules implementing those provisions treat voice calls and faxes differently.

a. *Voice Telephone Calls*. The TCPA makes it unlawful, subject to certain exceptions, for any person within the United States to "initiate any telephone call to any residential telephone line using an artificial or prerecorded voice … without the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(B). Such artificial or prerecorded voice calls are commonly referred to as "robo-calls." The statute also authorizes the FCC to establish a national do-not-call registry that consumers can use to notify telemarketers that they object to receiving telephone solicitations. 47 U.S.C. § 227(c)(1)-(4). The FCC's implementing regulations provide – again, subject to exceptions – that no person or entity may "initiate any telephone solicitation … [to any] residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry." 47 C.F.R. § 64.1200(c)(2).

In identifying the party that "initiates" calls in violation of these robo-call and do-not-call-registry prohibitions, the Commission's rules distinguish between the "telemarketer" and the "seller." The Commission defines the "telemarketer" as "the person or entity that *initiates* a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person." 47 C.F.R. § 64.1200(f)(11) (emphasis added). By contrast, the "seller" is defined as "the person or entity *on whose behalf* a telephone call or message *is initiated* for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person." *Id.* § 64.1200(f)(9) (emphasis added). Thus, for example, in the *DISH Network* context, DISH was the seller and its third-party telemarketers were the parties that initiated calls promoting DISH's satellite television services.

The *DISH Network* ruling arose in the context of primary jurisdiction referrals from TCPA litigation involving alleged violations of the robo-call and do-not-call prohibitions contained in the TCPA and associated FCC rules. In it, the FCC relied upon these regulatory definitions of "seller" and "telemarketer" to hold that the party that is directly liable for unlawfully "initiat[ing]" a robo-call or a call to a number on the do-not-call registry is the telemarketer that "takes the steps necessary to physically place a telephone call" and not the seller whose goods or services the telemarketer promotes. *DISH Network* ¶ 26; *see also id.* ¶ 27. But the Commission also ruled that although a seller is not *directly* liable for robo-call and do-not-call violations committed by its third-party telemarketers, the seller may nevertheless be *vicariously* liable for such violations under federal common law agency principles.[1] *Id.* ¶¶ 28-47.

b. *Facsimile Advertisements*. The TCPA uses different language governing facsimile transmissions. Specifically, the TCPA prohibits the "use [of] any telephone facsimile machine … to *send*, to a telephone facsimile machine, an unsolicited advertisement." 47 U.S.C. § 227(b)(1)(C) (emphasis added). In contrast with the Commission's construction of "initiate" in the robo-call and do-not-call contexts – where FCC rules describe the directly-liable call "initiat[or]" as the "telemarketer" that physically makes the call – the FCC defines the directly-liable "sender," for purposes of the TCPA's unsolicited facsimile advertisement prohibition, as "the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement." 47 C.F.R. § 64.1200(f)(10). In other words, under the plain text of that definition – and unlike the robo-call and do-not-call contexts – direct liability for sending an unsolicited facsimile advertisement attaches to the entity (defined as the "sender") whose goods or services are being promoted, and *not* generally to the entity that physically transmits the facsimile.[2]

---

[1] The *DISH Network* ruling addresses situations where a seller relies on third-party telemarketers; a seller could of course be directly liable if it acts as its own telemarketer.

[2] Under the FCC's rules, a party that transmits the unsolicited facsimile advertisement, but does not also meet the definition of "sender," may nevertheless be jointly and severally liable (along with the sender) "if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile transmissions." 47 C.F.R. § 64.1200(a)(4)(vii); *see Rules and Regulations Implementing the Telephone Consumer Protection Act of*

The FCC adopted the codified definition of "sender" in 2006. *Junk Fax Order*, 21 FCC Rcd at 3808 (¶ 39) ("We take this opportunity to emphasize that under the Commission's interpretation of the facsimile advertising rules, the sender is the person or entity on whose behalf the advertisement is sent."), 3822 (setting out codified definition of "sender"). That codification is consistent with the Commission's pre-existing uncodified interpretation that "the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements." *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 10 FCC Rcd 12391, 12407 (¶ 35) (1995).

2. The District Court Proceedings Below. In the proceedings below, the plaintiff golf center (Palm Beach Golf) brought a private TCPA lawsuit against the defendant dental office (Sarris), alleging that Sarris had sent the golf center an unsolicited facsimile advertisement in violation of 47 U.S.C. § 227(b)(1)(C). *See District Court Order* at 10-11. The district court described the alleged link between defendant Sarris and the facsimile transmitted to the plaintiff golf center as follows: Sarris had "engaged an independent contractor" named Roberts to provide marketing services to his dental practice, giving Roberts "'free rein' to legally advertise the practice." *Id.* at 2. Roberts, in turn, allegedly contracted with an entity called Business to Business Solutions ("B2B"), which sold facsimile advertising services in the United States on behalf of a Romanian company called Macaw. *See id.* at 2-3. B2B/Macaw allegedly then transmitted the offending fax to the golf center. *See id.* at 3-4, 7-9, 11.

The golf center alleged that this link between Sarris and the fax was sufficient to create direct (as opposed to vicarious) liability on Sarris's part,

---

1991, 21 FCC Rcd 3787, 3808 (¶ 40) (2006) (*Junk Fax Order*). Such "high degree of involvement" by the party transmitting the facsimile may include "suppl[ying] the fax numbers used to transmit the advertisement," "mak[ing] representations about the legality of faxing to those numbers," or "advis[ing] a client about how to comply with the fax advertising rules." *Junk Fax Order*, 21 FCC Rcd at 3808 (¶ 40); *see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014, 14131 (¶ 196) & n.724 (2003) (noting that requisite high degree of involvement by the party transmitting the fax may also include a "role in reviewing and assessing the content of a facsimile message").

because Sarris met the definition of "sender" under the FCC's rules and the fax advertisement was unsolicited. *Id.* at 14.

The district court granted summary judgment in favor of the defendant dental office. *Id.* at 33. The court rejected the golf center's direct liability claim, ruling that it could establish liability, if at all, only on the basis of vicarious liability. *Id.* at 12-13. In doing so, the court relied on the FCC's ruling, in *DISH Network*, that the "seller" generally is not directly liable for unlawful telemarketing calls initiated by third-party telemarketers on the seller's behalf. *Id.* The court acknowledged that *DISH Network* "specifically examined the meaning of the word 'initiate' as used in the [statutory] telemarketing prohibition … instead of the word 'send' as used in the [statutory] unsolicited fax prohibition." *Id.* at 13 n.13. The court also conceded that *DISH Network* "specifically addressed the [FCC's rule defining the] term 'seller' in the telemarketing context, not [the definition of] 'sender' in the fax context." *Id.* at 13 n.13. The court nevertheless appeared to find that the Commission's analysis in *DISH Network* regarding the absence of direct seller liability in the telemarketing context also applied to foreclose direct sender liability in the fax advertising context, and hence foreclosed direct sender liability by the defendant dental office. *Id.* at 12-13.[3]

ARGUMENT

In holding "that a party is not directly liable" under the TCPA's prohibition against "send[ing]" unsolicited facsimile advertisements "unless it actually transmits a fax," the district court acknowledged the existence of, but did not cite or discuss, "pre-*DISH Network* decisions" to the contrary. *District Court Order* at 14; *see also Addison Automatics, Inc. v. The RTC Group, Inc.*, 2013 WL 3771423 at *4 (N.D. Ill. 2013) (direct TCPA liability available against party whose goods or services are advertised in fax transmitted by others); *Machesney v. Lar-Bev of Howell, Inc.*, 292 F.R.D. 412, 415 (E.D. Mich. 2013) (same). The court

[3] The district court went on to conclude that summary judgment for the defendant also was warranted because Palm Beach Golf had not established a case for vicarious liability under common law agency principles, *District Court Order* at 14-23, and because the plaintiff lacked Article III standing to present its TCPA claims, *id.* at 23-29. This Court's July 7 Letter did not ask the FCC to address these bases for the district court's decision and we express no view with respect to those issues (nor to the factual disputes addressed in the parties' briefs).

determined, however, that the *DISH Network* ruling supplanted any prior precedent on the subject and compelled the conclusion that a party whose goods or services were promoted in an unsolicited fax transmitted by a third party could be held liable, if at all, only "under federal common law principles of agency for the actions of a third-party." *Id.* That holding was in error.

First, the *DISH Network* ruling applies only to liability for telemarketing calls and neither addresses nor alters the Commission's pre-existing regulatory treatment of unsolicited facsimile advertisements. As noted above, the FCC issued the *DISH Network* ruling in response to primary jurisdiction referrals from TCPA litigation involving alleged violations of the robo-call and do-not-call prohibitions. *See DISH Network* ¶¶ 5-23. Those provisions prohibit the "initiat[ion]" of certain robo-calls and calls to telephone numbers listed on the national do-not-call registry. *See* 47 U.S.C. § 227(b)(1)(B) (robo-call prohibition); 47 C.F.R. § 64.1200(c)(2) (do-not-call prohibition); *see* pp. 2-3, above. In clarifying which party incurs direct liability for initiating a call in that context, the FCC found guidance in its rules defining "telemarketer" as the party that "initiates" a telephone call and "seller" as the party "on whose behalf a telephone call" is initiated. *DISH Network* ¶ 27 (citing 47 C.F.R. § 64.1200(f)(11) & (9)). The Commission determined on the basis of those definitions that the party that incurs direct liability for "initiat[ing]" an unlawful call is the telemarketer that physically makes the call and not the seller on whose behalf a call is made. *Id.* ¶¶ 26-27.

Because facsimile advertisements were not at issue in the *DISH Network* proceeding, the FCC had no occasion to opine on direct or vicarious liability in that context. Thus, nowhere in the *DISH Network* ruling does the FCC address the distinct prohibition against "send[ing]" unsolicited facsimile advertisements under 47 U.S.C. § 227(b)(1)(C), or the distinct definition of "sender" in the agency's rules (47 C.F.R. § 64.1200(f)(10)). The district court therefore improperly relied on the *DISH Network* ruling to hold that direct liability by the defendant dental office was foreclosed.

Second, as described above (at pp. 3-4), the FCC has defined the party that incurs direct liability for "send[ing]" an unsolicited facsimile advertisement under 47 U.S.C. § 227(b)(1)(C) very differently from the party that unlawfully "initiate[s]" a robo-call or do-not-call violation. By its plain terms, 47 C.F.R. § 64.1200(f)(10) defines the direct liability-incurring "sender" *not* as the party that physically transmits the fax, but as "the person or entity *on whose behalf* a

facsimile unsolicited advertisement is sent *or whose goods or services are advertised or promoted in the unsolicited advertisement.*" (Emphasis added.) Read in light of that binding regulatory definition,[4] the unsolicited fax prohibition in section 227(b)(1)(C) clearly "allow[s] a plaintiff to recover damages [under a theory of direct liability] from a defendant who [transmitted] no facsimile to the plaintiff, but whose independent contractor did," July 7 Letter at 1, so long as the transmitted fax constitutes an unsolicited facsimile advertisement promoting the defendant's goods or services.

CONCLUSION

For the foregoing reasons, the district court misapplied the TCPA, the *DISH Network* ruling, and FCC regulations regarding unsolicited facsimile advertisements to the extent that it ruled, as a matter of law, that the defendant dental practice may not be directly liable under the TCPA for any unsolicited facsimile advertisement sent to the plaintiff golf center unless the defendant actually transmitted the fax.

Respectfully submitted,

/s/ Laurence N. Bourne

Jonathan B. Sallet
General Counsel
David Gossett
Acting Deputy General Counsel
Richard K. Welch
Deputy Associate General Counsel
Laurence N. Bourne
Counsel

[4] As the district court otherwise acknowledges, courts in non-Hobbs Act proceedings such as this one "must apply" – and may not entertain collateral attacks on – a final order or regulation of the FCC in deciding an issue addressed by such order or regulation. *District Court Order* at 13 n.13 (citing 28 U.S.C. § 2342(1)). *Accord CE Design, Ltd. v. Prism Business Media, Inc.*, 606 F.3d 443, 446 (7th Cir. 2010); *Self v. BellSouth Mobility, Inc.*, 700 F.3d 453, 461-64 (11th Cir. 2012).

In the
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PALM BEACH GOLF CENTER-BOCA, INC.	)
APPELLANT,	)
V.	) **NO. 13-14013**
JOHN G. SARRIS, D.D.S., P.A.	)
APPELLEE.	)

CERTIFICATE OF SERVICE

I, Laurence N. Bourne, hereby certify that on July 17, 2014, I electronically filed the foregoing Letter Brief with the Clerk of the Court for the United States Courts of Appeals for the Eleventh Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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Counsel for: John G. Sarris

/s/ Laurence N. Bourne

EXHIBIT 4

WILSON ELSER
WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

Richard W. Boone Jr.
212.915.5972 (direct)
Richard.Boone@wilsonelser.com

August 24, 2015

VIA CERTIFIED MAIL & EMAIL
RETURN RECEIPT REQUESTED

Edward A. Broderick
Broderick Law, P.C.
99 High Street, Suite 304
Boston, MA 02110
(ted@broderick-law.com)

Re: ***Bull v. US Coachways, Inc.*, Civil Action No. 1:14-cv-05789 (N.D. Ill.)**

Insured	**:**	**US Bus Charter & Limo Inc. dba US Coachways ("US Bus")**
ACE Claim No:		**JY14J0426052**
Claimant	**:**	**James Bull**
Policy No.	**:**	**G24011999 007**
Our File:	**:**	**10928.00257**

Dear Mr. Broderick:

We represent Illinois Union Insurance Company ("Illinois Union") and ACE North American Claims ("ACE") with respect to the above-referenced matter (the "TCPA Litigation"), pending against the Insured, US Bus. Your July 23, 2015 letter to our clients regarding this matter, seeking to have Illinois Union engage in settlement negotiations, has been forwarded to us for a response.

Please note that going forward, although it is not our intent to engage in a letter writing campaign, all future submission should be directed to our attention.

For the reasons more fully detailed below, because there is no coverage obligation on the part of Illinois Union for US Bus in the TCPA Litigation, our clients must decline your request that Illinois Union participate in a settlement of this matter.

As you know, this putative class action under the federal Telephone Consumer Protection Act ("TCPA") was originally filed on July 29, 2014 in the United States District Court for the Northern District of Illinois. Essentially, it is alleged that the defendant violated the TCPA by using an automated dialing system to send unsolicited text message advertisements without the recipients' prior consent.

As you are also apparently aware, Illinois Union issued Miscellaneous Professional Liability Policy No. G24011999 007 (the "Policy") to US Bus for the Policy Period from

November 9, 2013 to November 9, 2014. As you further note, Illinois Union has advised US Bus that coverage is unavailable under the Policy for the TCPA Litigation.

There is, therefore, no fundamental basis for your contention that the purported violation of the TCPA alleged in the TPCA Litigation falls within the scope of coverage afforded by the subject professional liability policy. The Insuring Agreement of the policy specifically limits coverage to a Wrongful Act in the performance of Professional Services. The policy defines Professional Services to mean the performance of professional services as a bus charter broker for others for a fee. Advertising in violation of the TCPA, or otherwise, simply does not concern services unique to a bus charter broker. Further, the complaint does not allege that the wrongful conduct in dispute was in any way rendered to others for a fee, but rather includes allegations that US Bus was performing marketing services for itself. For this reason, Illinois Union must decline your invitation to participate in settlement discussions or mediation, as the allegations do not fall within the scope of the Insuring Agreement. We thus respectfully direct you to US Bus's defense counsel to discuss settlement.

Further, pursuant to both the Policy and applicable law, absent a settlement agreed to by Illinois Union or a final judgment against the Insured, matters relating to the Policy and to coverage thereunder are solely between Illinois Union and its Insured, as a plaintiff has no direct right of action against the insurer. *See Nick's Garage, Inc. v Liberty Mut. Fire Ins. Co.*, 120 A.D.3d 967, 968 (N.Y. App. Div. 4th Dep't 2014) (holding that to maintain an action against an insurer, a stranger to the underlying insurance policy must first obtain a judgment against the tortfeasor, serve the insurance company with a copy of the judgment and await payment for 30 days). Therefore, your letter to Illinois Union purporting to assert rights belonging to US Bus is inappropriate at this time.

Notwithstanding the foregoing, we are also compelled to briefly address a number of errors contained in your letter.

First, the Policy was issued to the Insured in the State of New York. Accordingly, any issues regarding the coverage provided thereunder would be governed by New York law. *See Certain Underwriters at Lloyd's, London v. Foster Wheeler Corp.*, 36 A.D.3d 17, 24, 822 N.Y.S.2d 30, 36 (N.Y. App. Div. 1st Dep't 2006) (where the insured risk is scattered throughout multiple states, courts deem the risk to be located in the state of the insured's domicile at the time the policy was issued). Any discussion of Illinois or Georgia law is therefore immaterial.

Second, your interpretation of the coverage available under the Policy is incorrect. You assert that "[t]he Policy covers TCPA claims under the 'Personal Injury Offense' section of the policy," citing the definition at Section II.L.4. of "Personal Injury Offense" as "publication or an utterance in violation of an individual's right to privacy."

This argument, however, overlooks that definitions contained in the Policy do not themselves confer insurance coverage. Rather, the scope of the coverage afforded under the Policy is set forth in the Insuring Agreement, which states:

> The **Company**[1] will pay on behalf of the **Insured** all sums in excess of the Retention that the **Insured** shall become legally obligated to pay as **Damages** and **Claims Expenses** because of a **Claim** first made against the **Insured** and reported to the **Company** during the **Policy Period** by reason of a **Wrongful Act** committed on or subsequent to the **Retroactive Date** and before the end of the **Policy Period**.

Policy, Section I.A.

"Wrongful Act," as used in the Policy, means "any actual or alleged negligent act, error, omission, misstatement, misleading statement or **Personal Injury Offense** committed by the **Insured** or by any other person or entity for whom the **Insured** is legally liable *in the performance of or failure to perform* ***Professional Services***." *Id.*, Section II.T. (emphasis added). "Professional Services" means "only those services specified in Item 7 of the Declarations performed for others by an Insured or by any other person or entity for whom the **Insured** is legally liable." *Id.*, Section II.P. Item 7 of the Declarations further provides "Solely in the performance of professional services as a bus charter broker for others for a fee."

Here, there are simply no Professional Services rendered to others for a fee that are at issue in the TCPA Litigation. Thus, any reliance of "Personal Injury Offense" standing alone is of no consequence and cannot serve to trigger coverage.

In accordance with the foregoing and subject to all other terms, conditions, limitations, and exclusions contained therein, coverage is only potentially available under the Policy for a Claim arising from an actual or alleged act, error, omission, misstatement, misleading statement or Personal Injury Offense committed by the Insured in the performance of professional services as a bus charter broker for others for a fee.[2] As Illinois Union has previously explained, the instant Claim arises from the alleged use of automatic telephone dialing system to transmit text messages and it does not contain any allegations relating to the performance of the Insured's services as a bus charter broker to others for a fee. Thus, Illinois Union denied coverage for this matter and maintains that denial by this letter.

We further note your statement that "[c]ourts across the United States … have repeatedly recognized that the privacy invasion coverage afforded by a ***commercial general liability policy*** extends to TCPA claims," and the cases cited in support of this proposition, have no bearing on the narrower coverage provided by this ***professional liability policy***. Additionally, your implication that CGL policies – or any policy – would necessarily extend coverage for TCPA claims is incorrect. As a matter of black-letter law, the coverage afforded under any insurance contract is governed by the specific terms set forth therein. Indeed, it is well settled that a professional liability policy only insures against acts unique to the insured. Advertising is, of course, a general business function and not unique to a charter bus broker.

---

[1] Terms in bold are further defined in the Policy.

[2] In this respect, we note that, contrary to your assertion, the professional liability coverage provided under the Policy is unlike the coverage available under a typical automobile liability policy.

Finally, we note that your conclusory assertion that "the denial of coverage by Illinois Union and ACE constitutes an act of bad faith" is just plain wrong as a matter of law. Under New York law, "a claim of bad faith must be predicated on the existence of coverage of the loss in question." *Zurich Ins. Co. v. Texasgulf, Inc.*, 233 A.D.2d 180, 180, 649 N.Y.S.2d 153, 153 (N.Y. App. Div. 1st Dep't 1996). As explained, there is no coverage available under the Policy for the TCPA Litigation. Further, while Illinois Union's denial of coverage for the TCPA Litigation is plainly justified, under New York law "bad faith cannot be established when the insurer has an arguable basis for denying coverage." *Redcross v. Aetna Cas. & Sur. Co.*, 260 A.D.2d 908, 913, 688 N.Y.S.2d 817, 821 (N.Y. App. Div. 3d Dep't 1999).

For the foregoing reasons, we repeat that we are constrained to advise that Illinois Union must decline participating in settlement negotiations or mediation in connection with the TCPA Litigation. In so doing, we note that ACE confirms that no coverage is afforded for this matter, and continues to reserve all rights under the Policy, at law, or in equity with regard to this matter or otherwise.

Should you have any questions or comments with respect to the content of this letter or any other matter, please do not hesitate to contact me at your convenience.

Very truly yours,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

Richard W. Boone Jr.

cc: Diane Fazzolari
(via email: diane.fazzolari@acegroup.com)

Edward Telmany
(via e-mail: USCoachways@gmail.com)

David S. Sheiffer, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

JAMES BULL, on behalf of himself and others similarly situated,	)	
	)	Case No. 1:14-cv-05789
Plaintiff,	)	
	)	Judge Rebecca R. Pallmeyer
v.	)	
	)	Magistrate Judge Daniel G. Martin
US COACHWAYS, INC.,	)	
Defendant.	)	

DECLARATION OF ANTHONY I. PARONICH

1. I make this declaration in support of the Plaintiff's Motion for Preliminary Approval of Class Settlement**,** to set forth my qualifications to serve as class counsel, and to state that in my experience litigating claims under the Telephone Consumer Protection Act, the proposed settlement is reasonable and merits preliminary approval from the Court.

2. I am an attorney duly admitted to practice in the Commonwealth of Massachusetts, I am over 18 years of age, am competent to testify and make this affidavit on personal knowledge. I have extensive experience in the prosecution of class actions on behalf of consumers.

Qualification of Counsel

3. I have extensive experience in the prosecution of class actions on behalf of consumers, particularly claims under the Telephone Consumer Protection Act, 47 U.S.C. §227.

4. I am a 2010 graduate of Suffolk Law School. In 2010, I was admitted to

the Bar in Massachusetts. Since then, I have been admitted to practice before the Federal District Court for the District of Massachusetts. From time to time, I have appeared in other State and Federal District Courts *pro hac vice*. I am in good standing in every court to which I am admitted to practice.

5. Since 2007, I have been an employee at Broderick Law, P.C., where I am currently an associate.

6. A sampling of other class actions in which I have participated regarding classes of consumers follows:

i. I assisted class counsel in an action captioned Shonk Land Company, LLC v. SG Sales Company, Circuit Court of Kanswaha County, West Virginia, Civil Action No. 07-C-1800 (multi-state class action on behalf of recipients of faxes in violation of TCPA, settlement for $2,450,000, final approval granted in September of 2009.

ii. I assisted class counsel in Mann & Company, P.C. v. C-Tech Industries, Inc., USDC, D. Mass., C.A. 1:08CV11312-RGS, class action on behalf of recipients of faxes in violation of TCPA, settlement for $1,000,000, final approval granted in January of 2010.

iii. I assisted class counsel in Evan Fray Witzer v. Olde Stone Land Survey Company, Inc., Massachusetts Superior Court, Civil Action No. 08-04165 (February 3, 2011) (final approval granted for TCPA class settlement). This matter settled for $1.3 million.

iv. I assisted class counsel in Milford & Ford Associates, Inc. and D. Michael Collins vs. Cell-Tek, LLC, USDC, D. Mass. C. A. 1:09-cv-11261-DPW, class

action on behalf of recipients of faxes in violation of TCPA, settlement for $1,800,000, final approval granted August 17, 2011 (Woodlock, J.).

v. I assisted class counsel in Collins v. Locks & Keys of Woburn, Inc.., Massachusetts Superior Court, Civil Action No. 07-4207-BLS2 (December 14, 2011) (final approval granted for TCPA class settlement). This matter settled for $2,000,000.

vi. I was appointed class counsel in Brey Corp t/a Hobby Works v. Life Time Pavers, Inc., Circuit Court for Montgomery County, Maryland, Civil Action No. 349410-V (preliminary approval granted for TCPA class settlement). This matter settled for $1,575,000.

vii. I was appointed class counsel in Collins, et al v. ACS, Inc. et al, USDC, District of Massachusetts, Civil Action No. 10-CV-11912 a TCPA case for illegal fax advertising, which settled for $1,875,000.

viii. I was appointed class counsel in Desai and Charvat v. ADT Security Services, Inc., USDC, NDIL, Civil Action No. 11-CV-1925, settlement of $15,000,000, approved, awarding fees of one third of common fund.

ix. I was appointed class counsel in Kensington Physical Therapy, Inc. v. Jackson Therapy Partners, LLC, 8:11-cv-02467 (D. MD. February 12, 2015) (Grimm, J.), TCPA class settlement of $4,500,000 approved, awarding $1,500,000 in fees plus expenses and approving from the bench my hourly rate of $425.

x. I was appointed class counsel in Jay Clogg Realty Group, Inc. v. Burger King Corporation, 13-cv-00662 (D. MD. April 15, 2015) (Hazel, J.), TCPA class settlement of $8,500,000 approved, awarding $2,833,333.00 in fees plus

expenses and approving from the bench my hourly rate of $425.

xi. I was appointed as class counsel in a contested class certification in a Do Not Call case arising under the TCPA in Thomas Krakauer v. Dish Network, L.L.C., USDC MDNC, Civil Action No. 1:14-CV-333 on November 9, 2015.

xii. I was appointed class counsel in Diana Mey v. Interstate National Dealer Services, Inc. et al, Civil Action No. 1:14-cv-0186-ELR, NDGA, Preliminary Approval Order entered January 28, 2016, Docket No. 163.

5. My law firm has collectively devoted time and resources to this litigation already.

6. My law firm is well-aware of the time and finances required to litigate a class action of this nature against, and are capable of expending the resources necessary to prosecute these actions effectively.

7. My law firm is monitoring resource levels to ensure that time and expenses are efficiently utilized to prevent waste and duplication of effort, and will continue to do so.

8. With respect to billing practices, my law firm requires their personnel (attorneys and staff) to keep contemporaneous time records, and bill their attorneys and staff at rates that are commensurate with their years of practice in the localities in which they practice.

9. My hourly rates of Proposed Counsel have been approved by numerous federal and state courts nationwide in class action fee petitions in similar litigation.

10. US Coachways shared two years of audited financial statements with counsel for Plaintiff which confirmed for Plaintiff's counsel that US Coachways was unable to financially satisfy a judgment in this action.

11. The settlement in this action was reached in arms-length negotiations with extremely competent counsel representing Defendant, and represents a fair and reasonable compromise.

SIGNED UNDER PAINS AND PENALTIES OF PERJURY THIS 9th DAY OF March, 2016.

/s/ Anthony I. Paronich
Anthony I. Paronich

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

JAMES BULL, on behalf of himself and others similarly situated, Plaintiff, v. US COACHWAYS, INC., Defendant.	)	Case No. 1:14-cv-05789 Judge Rebecca R. Pallmeyer Magistrate Judge Daniel G. Martin

DECLARATION OF BRIAN K. MURPHY

1. I make this declaration in support of the Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement and for Conditional Certification of a Settlement Class, to set forth my qualifications to serve as class counsel, and to state that in my experience litigating claims under the Telephone Consumer Protection Act, the proposed settlement is reasonable and merits preliminary approval from the Court.

2. I am an attorney duly admitted to practice in Ohio and Illinois, I am over 18 years of age, am competent to testify and make this affidavit on personal knowledge. I have extensive experience in the prosecution of class actions on behalf of consumers.

Qualification of Counsel

3. I have extensive experience in the prosecution of class actions on behalf of consumers, including claims under the Telephone Consumer Protection Act, 47 U.S.C. §227.

4. I am a 1994 graduate of The Ohio State University College of Law. In 1994, I was admitted to the Bar in Illinois. In 1999, I was admitted to the Bar of Ohio. Since then, I have been admitted to practice before numerous Federal District and

Appellate Courts and the United States Supreme Court. From time to time, I have appeared in other State and Federal District Courts *pro hac vice*. I am in good standing in every court to which I am admitted to practice.

5. Since 1999, I have been a partner with Murray Murphy Moul + Basil LLP in Columbus, Ohio.

6. A sampling of class actions in which I have participated are as follows:

Securities Litigation

Murray Murphy Moul + Basil has developed into one of the most experienced securities litigation firms in the State of Ohio. Since 2011 the firm has been a member of the Ohio Attorney General's Securities Panel, providing ongoing advice to the office related to potential securities claims affecting Ohio's public pension funds. The firm has represented numerous public pension funds for the State of Ohio under both Republic and Democratic administration since 2006. The firm has also prosecuted matters on behalf of other large pension funds. The following is short summary of a representative sampling of the securities cases the firm has been involved with over the years:

> In re Cardinal Health Securities Litigation
> (United States District Court for the Southern District of Ohio)
>
> Murray Murphy Moul + Basil was co-counsel in this matter, which resulted in a $600 million settlement for the class – the largest securities class action settlement in the history of the Sixth Circuit. The settlement was approved by the Judge Marbley on November 14, 2007. The Complaint alleged that Cardinal, and certain of its officers and directors, issued materially false statements concerning the Company's financial condition. The Complaint was on behalf of all persons who purchased the publicly traded securities of Cardinal Health, Inc. between October 24, 2000 and June 30, 2004 inclusive. After a review of in excess of 6 million documents and extensive depositions and interviews, and a lengthy and extensive mediation process, the parties entered into the settlement agreement pursuant to which the $600 million settlement fund was created.

In re Marsh & McLennan Cos., Inc. Securities Litigation
(United States District Court for the Southern District of New York)

Murray Murphy Moul + Basil was appointed by former Attorney General Jim Petro as co-counsel in this matter in which the Public Employees' Retirement System of Ohio, State Teachers' Retirement System of Ohio, and Ohio Bureau of Workers' Compensation were appointed as co-Lead Plaintiffs. The case was settled at the end of 2009 for $400 million.

In re Abercrombie & Fitch Securities Litigation
(United States District Court for the Southern District of Ohio)

Murray Murphy Moul + Basil was co-counsel in this PSLRA case which alleged that Abercrombie (a) carried out a scheme to deceive the investing public; (b) made untrue statements of material fact and/or omitted to state material facts necessary to make the statements not misleading; and (c) engaged in acts, practices, and a course of business which operated as a fraud and deceit upon the purchasers of the Company's securities in an effort to maintain artificially high market prices for Abercrombie securities. The Court certified the class and a settlement was eventually reached in the amount of $12 million in the middle of 2010.

Ohio Board of Deferred Compensation v. Pilgrim Baxter
(United States District Court for the District of Maryland)

Murray Murphy Moul + Basil assisted in the prosecution of this securities class action brought on behalf of purchasers and holders of Pilgrim Baxter mutual funds from Nov. 1, 1998 to Nov. 13, 2003 who were harmed by a pattern of market timing trading practices. The Ohio Board of Deferred Compensation was appointed as the lead Plaintiff in this litigation and Murray Murphy Moul + Basil served as co-counsel. The case was settled for $31,538,600 in 2010.

Other Class Litigation Experience

Murray Murphy Moul + Basil LLP has served as Lead Class Counsel in prosecuting other large class actions, including Violette, et al v. P.A. Days, Inc. (S.D. Ohio 2004) (Marbley, J.) and Adkins v. Ricart Properties, et al., (S. D. Ohio 2004) (Marbley, J.), two certified class actions that included over 100,000 class members. Similarly, this MMM+B served as Co-Lead Counsel in the certified class action of Mick

v. Level Propane Gases, Inc., 203 F.R.D. 324 (S.D. Ohio 2001) (Sargus, J.). The Firm has also appeared in the United States Supreme Court in a putative class action arising in the Southern District of Ohio. Household Credit Services, et al v. Pfennig, 124 S.Ct 1741 (2004).

Murray Murphy Moul + Basil LLP have also served as Defense Counsel in two putative class actions asserting claims against Ohio state agencies. Murray Murphy Moul + Basil LLP was trial counsel in the matter of S.H and all other similarly situated, et al v. Taft et al, Case Number: 2:04-cv-1206 (Smith, J.) and co-counsel in J.P. and all others similarly situated et al v. Taft et al, Case Number: 2:04-cv-692 (Marbley, J.).

Murray Murphy Moul + Basil LLP also served as Lead Counsel in class litigation that have been resolved in favor of the Classes: Downes v. Ameritech Corp., et al., Case No. 99 CH 11356 (Cook County, IL), Bellile v. Ameritech Corp., et al., Case No. 99-925403-CP (Wayne County, MI), Gary Phillips & Assoc. v. Ameritech Corp., 144 Ohio App. 3d 149, 759 N.E.2d 833 (Franklin County, OH) and Prestemon, et al v. Echostar Communication and WebTV Networks, Case No. 2002-053014 (Alameda Cty, California Sup. Court).

The firm was also successful in bringing about one of the largest class settlements ever for a class of consumers besieged by telemarketing robocalls in Desai v. ADT Security Systems, Case No. 11-cv-01925 (N.D. Illinois). The firm was Co-Lead Counsel on behalf of nationwide class that received $15,000,000 in 2013.

7. My law firm has collectively devoted substantial time and resources to this litigation already.

8. US Coachways shared two years of audited financial statements with counsel for

Plaintiff which confirmed for Plaintiff's counsel that US Coachways was unable to financially satisfy a judgment in this action.

9. The proposed settlement of $49,932,375 represents $125 per violation.

10. The settlement in this action was reached in arms-length negotiations with extremely competent counsel representing Defendant, and represents a fair and reasonable compromise.

SIGNED UNDER PAINS AND PENALTIES OF PERJURY
THIS 9th DAY OF MARCH 2014.

/s/ Brian K. Murphy
Brian K. Murphy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

JAMES BULL, on behalf of himself and others similarly situated, Plaintiff, v. US COACHWAYS, INC., Defendant.	)	Case No. 1:14-cv-05789 Judge Rebecca R. Pallmeyer Magistrate Judge Daniel G. Martin

DECLARATION OF MATTHEW P. MCCUE

1. I make this affidavit in support of the Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement and for Conditional Certification of a Settlement Class, to set forth my qualifications to serve as class counsel, and to state that in my experience litigating claims under the Telephone Consumer Protection Act, the proposed settlement is reasonable and merits preliminary approval from the Court.

Qualifications of Counsel

2. I have extensive experience in the prosecution of class actions on behalf of consumers, particularly claims under the Telephone Consumer Protection Act, 47 U.S.C. §227.

3. I am a 1993 honors graduate of Suffolk Law School. Following graduation from law school, I served as a law clerk to the Justices of the Massachusetts Superior Court. I then served a second year as a law clerk for the Hon. F. Owen Eagan, United States Magistrate Judge for the USDC District of Connecticut.

4. In 1994, I was admitted to the Bar in Massachusetts. Since then, I have been admitted to practice before the United States District Court for the District of Massachusetts, the First Circuit Court of Appeals, the United States District Court for the District of Colorado and the Sixth Circuit Court of Appeals. I frequently appear in federal courts around the United States *pro hac vice* litigating TCPA claims.

5. I am in good standing in every court to which I am admitted to practice.

6. Following my clerkships, I was employed as a litigation associate with the Boston law firm of Hanify & King. In 1997, I joined the law firm of Mirick O'Connell as a litigation associate where I focused my trial and appellate practice on plaintiff's personal injury and consumer protection law.

7. In the summer of 2002, I was recognized by the legal publication Massachusetts Lawyers Weekly as one of five "Up and Coming Attorneys" for my work on behalf of consumers and accident victims.

8. In November of 2004, I started my own law firm focusing exclusively on the litigation consumer class actions and serious personal injury cases.

9. Since 2004, I have worked extensively on consumer protection cases involving illegal telemarketing. I have handled these cases both on an individual basis, and as consumer class actions.

10. A sampling of other class actions in which I have represented classes of consumers follows:

i. Mey v. Herbalife International, Inc., USDC, D. W. Va., Civil Action No. 01-C-263M. Co-lead counsel with Attorney Broderick and additional co-counsel, prosecuting consumer class action pursuant to TCPA on behalf of nationwide class of junk fax and prerecorded telephone solicitation recipients. $7,000,000 class action

settlement preliminarily approved on July 6, 2007 and granted final approval on February 5, 2008.

ii. Mulhern v. MacLeod d/b/a ABC Mortgage Company, Norfolk Superior Court, 2005-01619 (Donovan, J.). Representing class of Massachusetts consumers who received unsolicited facsimile advertisements in violation of the TCPA and G.L. c. 93A. Case certified as a class action, and I was appointed co-lead counsel with Attorney Edward Broderick by the Court on February 17, 2006, settlement for $475,000 granted final approval by the Court on July 25, 2007.

iii. I served as co-counsel on a Massachusetts consumer telemarketing class action entitled Evan Fray-Witzer, v. Metropolitan Antiques, LLC, NO. 02-5827 Business Session, (Van Gestel, J.). In this case, the defendant filed two Motions to Dismiss challenging the plaintiff's right to pursue a private right of action and challenging the statute at issue as violative of the telemarketer's First Amendment rights. Both Motions to Dismiss were denied. Class certification was then granted and I was appointed co-lead class counsel. Companion to this litigation, my co-counsel and I successfully litigated the issue of whether commercial general liability insurance provided coverage for the alleged illegal telemarketing at issue. We ultimately appealed this issue to the Massachusetts Supreme Judicial Court which issued a decision reversing the contrary decision of the trial court and finding coverage. See Terra Nova Insurance v. Fray-Witzer et al., 449 Mass. 206 (2007). This case resolved for $1,800,000.

iv. I served as co-class counsel in the action captioned Shonk Land Company, LLC v. SG Sales Company, Circuit Court of Kanawha County, West Virginia, Civil Action No. 07-C-1800 (multi-state class action on behalf of recipients of faxes in violation of TCPA, settlement for $2,450,000, final approval granted in September of 2009.

v. I served as co-class counsel in Mann & Company, P.C. v. C-Tech Industries, Inc., USDC, D. Mass., C.A. 1:08CV11312-RGS, class action on behalf of recipients of faxes in violation of TCPA, settlement for $1,000,000, final approval granted in January of 2010.

vi. I served as co-class counsel in Evan Fray Witzer v. Olde Stone Land Survey Company, Inc., Massachusetts Superior Court, Civil Action No. 08-04165 (February 3, 2011) (final approval granted for TCPA class settlement). This matter settled for $1,300,000.

vii. I served as co-class counsel in Milford & Ford Associates, Inc. and D. Michael Collins vs. Cell-Tek, LLC, USDC, D. Mass. C. A. 1:09-cv- 11261-DPW, class action on behalf of recipients of faxes in violation of TCPA, settlement for $1,800,000, final approval granted August 17, 2011 (Woodlock, J.).

viii. I served as co-class counsel in Collins v. Locks & Keys of Woburn Inc.., Massachusetts Superior Court, Civil Action No. 07-4207-BLS2 (December 14, 2011) (final approval granted for TCPA class settlement). This matter settled for $2,000,000.

ix. I was appointed class counsel in Brey Corp t/a Hobby Works v. Life Time Pavers, Inc., Circuit Court for Montgomery County, Maryland, Civil Action No. 349410-V (preliminary approval granted for TCPA class settlement). This matter settled for $1,575,000.

x. I was appointed class counsel in Collins, et al v. ACS, Inc. et al, USDC, District of Massachusetts, Civil Action No. 10-CV-11912 a TCPA case for illegal fax advertising, which settled for $1,875,000. Fee of 33.33% approved, including time submitted at rate of $500 per hour for my work on the case.

xi. I was appointed class counsel in Desai and Charvat v. ADT Security Services, Inc., USDC, NDIL, Civil Action No. 11-CV-1925, settlement of $15,000,000, approved, awarding fees of one third of common fund.

xii. I was appointed class counsel in Benzion v. Vivint, 0:12cv61826, USDC S.D.Fla, settlement of $6,000,000 granted final approval.

xiii. I was appointed class counsel in Kensington Physical Therapy, Inc. v. Jackson Therapy Partners, LLC, 8:11-cv-02467 (D. MD. February 12, 2015) (Grimm, J.), class settlement of $4,500,000 under TCPA approved, awarding $1,500,000 in fees plus expenses and approving my hourly rate of $700.

xiv. I was appointed class counsel in Jay Clogg Realty Group, Inc. v. Burger King Corporation, 13-cv-00662 (D. MD. April 15, 2015) (Hazel, J.), TCPA class settlement of $8,500,000 approved, awarding $2,833,333.00 in fees plus expenses and approving from the bench my hourly rate of $425.

xv. I was appointed as class counsel in a contested class certification in a Do Not Call case arising under the TCPA in Thomas Krakauer v. Dish Network, L.L.C., USDC MDNC, Civil Action No. 1:14-CV-333 on November 9, 2015.

xvi. I was appointed class counsel in Diana Mey v. Interstate National Dealer Services, Inc. et al, Civil Action No. 1:14-cv-0186-ELR, NDGA, Preliminary Approval Order entered January 28, 2016, Docket No. 163.

12. My law firm has collectively devoted time and resources to this litigation already.

13. My law firm is well-aware of the time and finances required to litigate a class action of this nature against, and are capable of expending the resources necessary to prosecute these actions effectively.

14. My law firm is monitoring resource levels to ensure that time and expenses are efficiently utilized to prevent waste and duplication of effort, and will continue to do so.

15. With respect to billing practices, my law firm requires their personnel (attorneys and staff) to keep contemporaneous time records, and bill their attorneys and staff at rates that are commensurate with their years of practice in the localities in which they practice.

16. My hourly rates of Proposed Counsel have been approved by numerous federal and state courts nationwide in class action fee petitions in similar litigation.

17. Along with my co-counsel in this action, I have significant experience in litigating claims for coverage under insurance policies for TCPA claims, including a successful appeal on a case of first impression before the Massachusetts Supreme Judicial Court establishing the availability of such coverage. . See Terra Nova Insurance v. Fray-Witzer et al., 449 Mass. 206 (2007). I strongly believe that the Illinois Union policy at issue here provides coverage for the claims of Plaintiff and the proposed class.

18. US Coachways shared two years of audited financial statements with counsel for Plaintiff which confirmed for Plaintiff's counsel that US Coachways was unable to financially satisfy a judgment in this action.

19. The settlement in this action was reached in arms-length negotiations with extremely competent counsel representing Defendant, and represents a fair and reasonable compromise.

SIGNED UNDER PAINS AND PENALTIES OF PERJURY THIS 9th DAY OF March, 2016.

/s/ Matthew P. McCue
Matthew P. McCue

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

JAMES BULL, on behalf of himself and others similarly situated,	)	
Plaintiff,	)	Case No. 1:14-cv-05789
v.	)	Judge Rebecca R. Pallmeyer
US COACHWAYS, INC.,	)	Magistrate Judge Daniel G. Martin
Defendant.	)	

PRELIMINARY APPROVAL ORDER

WHEREAS, this Action is a putative class action under the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.*,

WHEREAS, Plaintiff James Bull has filed an unopposed Motion for Preliminary Approval of a Class Settlement (the "Motion");

WHEREAS, the Motion attaches and incorporates a Settlement Agreement (the "Settlement Agreement") that, together with the exhibits thereto, sets forth the terms and conditions for the settlement of claims, on a class wide basis, against US Coachways, Inc. ("US Coachways") as more fully set forth below; and

WHEREAS, the Court having carefully considered the Motion and the Settlement Agreement, and all of the files, records, and proceedings herein, and the Court determining upon preliminary examination that the Settlement Agreement appears to be fair, reasonable and adequate, and that the proposed plan of notice to the Settlement Class is the best notice practicable under the circumstances and consistent with requirements of due process and Federal Rule of Civil Procedure 23, and that a hearing should and will be held after notice to the Settlement Class to confirm that the Settlement Agreement is fair, reasonable, and adequate, and

to determine whether this Court should enter a judgment approving the Settlement and an order of dismissal of this action based upon the Settlement Agreement;

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. For purposes of settlement only, the Court has jurisdiction over the subject matter of this action and personal jurisdiction over the parties and the members of the Settlement Class described below.

2. The Court finds that:

(a) This agreement was made in reasonable anticipation of potential liability against defendant would arise from a finding that defendant sent 391,459 unsolicited text advertisements in violation of 47 U.S.C. § 227.

(b) The settlement amount is fair and reasonable because it is within the range of statutory damages that could be awarded for the claims made by the class and potential damages that could be awarded if the class prevailed on its claims;

(c) Defendant's decision to agree to entry of judgment is reasonable based on the risk of an adverse judgment, the cost of the defense, and the uncertainties of litigation;

(d) The evidence adduced during discovery supports a finding that 391,459 text message advertisements were sent by US Coachways for which US Coachways had not received prior express permission to send;

(e) Defendant did not believe that it was violating any laws or regulations by sending the texts;

(f) Defendant tendered a claim for the action to its insurer Illinois Union Insurance Company ("Illinois Union") for defense and indemnity and Illinois Union denied coverage to defendant under the insurance policy.

(g) Defendant lacks financial resources to withstand the potential judgment in this case, or to fund a reasonable settlement from its own funds.

Certification of Settlement Classes

1. Under Rule 23(b)(3) of the Federal Rules of Civil Procedure, and for purposes of settlement only, the following "Settlement Classes" are preliminarily certified, consisting of the following classes:

Class One

> All persons within the United States who received one or more text message advertisements on behalf of US Coachways, Inc. at any time in the four years prior to the filing of the Complaint continuing through the date any class is certified;

Class Two

> All persons within the United States who received more than one text message advertisements on behalf of US Coachways, Inc. at any time in the four years prior to the filing of the Complaint continuing through the date any class is certified while the telephone number that the text message was sent to was on the National Do Not Call Registry;

2. All Persons who are members of the Settlement Class who have not submitted a timely request for exclusion are referred to collectively "Settlement Class Members" or individually as a "Settlement Class Member."

3. For purposes of settlement only, the Court finds that the prerequisites for a class action under Federal Rules of Civil Procedure 23(a) and (b)(3) have been preliminarily satisfied in that: (a) the number of Settlement Class Members is so numerous that joinder of all members thereof is impracticable; (b) there are questions of law and fact common to the Settlement Class Members; (c) the claims of the class representative are typical of the claims of the Settlement Class Members; (d) the class representative will fairly and adequately represent the interests of

the Settlement Class Members; (e) questions of law and fact common to the Settlement Class Members predominate over any questions affecting only individual Settlement Class Members; and (f) a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The Court further finds, for purposes of settlement only, that: (A) Settlement Class Members have a limited interest in individually prosecuting the claims at issue; (B) the Court is satisfied with Plaintiff's counsel's representation that they are unaware of any other litigation commenced regarding the claims at issue by members of the Settlement Class; (C) it is desirable to concentrate the claims in this forum; and (D) it is unlikely that there will be difficulties encountered in administering this Settlement.

4. Under Federal Rule of Civil Procedure 23, and for settlement purposes only, Plaintiff James Bull is hereby appointed Class Representative and the following are hereby appointed as Class Counsel:

Brian K. Murphy
Joseph F. Murray
Murray Murphy Moul + Basil LLP
114 Dublin Road
Columbus, OH 43204

Matthew McCue
THE LAW OFFICE OF MATTHEW P. MCCUE
1 South Avenue, Suite 3
Natick, Massachusetts 01760

Edward Broderick
Anthony Paronich
BRODERICK LAW, P.C.
99 High St., Suite 304
Boston, MA 02110

Notice and Administration

5. The Court hereby approves of Kurtzman Carson Consultants to perform the functions and duties of the Settlement Administrator set forth in the Settlement Agreement –

including effectuating the Notice Plan, providing Notice to the Settlement Class, and to provide such other administration services as are reasonably necessary to facilitate the completion of the Settlement.

6. The Court has carefully considered the Notice Plan set forth in the Settlement Agreement. The Court finds that the Notice Plan constitutes the best notice practicable under the circumstances, and satisfies fully the requirements of Rule 23 of the Federal Rules of Civil Procedure, the requirements of due process and any other applicable law, such that the terms of the Settlement Agreement, and this Court's final judgment will be binding on all Settlement Class Members.

7. The Court hereby approves the Notice Plan and the form, content, and requirements of the Notice described in and attached as exhibits to the Settlement Agreement. The Settlement Administrator shall cause the Notice Plan to be completed on or before **_____, 2016**. Class Counsel shall, prior to the Final Approval Hearing, file with the Court a declaration executed by the Settlement Administrator attesting to the timely completion of the Notice Plan.

8. All costs of providing Notice to the Settlement Class shall be paid out of the Settlement Fund from the initial payment by US Coachways, as provided by the Settlement Agreement.

9. In the event of recovery by Plaintiff and the Class from Illinois Union, further distributions from the Settlement Fund to Class members, an incentive award, will be made on additional approval by the Court, following a a second motion for preliminary approval of distributions from the Settlement Fund, including a request for an incentive award to the Class Representative, an award of attorneys' fees and costs, notice to the class and the entry of final

approval by the Court.

Exclusion and "Opt-Outs"

10. Each and every member of the Settlement Class shall be bound by all determinations and orders pertaining to the Settlement, unless such persons request exclusion from the Settlement in a timely and proper manner, as hereinafter provided.

11. A member of the Settlement Class wishing to request exclusion (or "opt-out") from the Settlement shall mail the request in written form, by first class mail, postage prepaid, and postmarked no later than **_____, 2016**, to the Settlement Administrator at the address specified in the Notice. In the written request for exclusion, the member of the Settlement Class must state his or her full name, address, and telephone numbers. Further, the written request for exclusion must include a statement that the member of the Settlement Class submitting the request wishes to be excluded from the Settlement, and the personal signature of the member of the Settlement Class submitting the request. The request for exclusion shall not be effective unless the request for exclusion provides the required information and is made within the time stated above, or the exclusion is otherwise accepted by the Court. No member of the Settlement Class, or any person acting on behalf of or in concert or in participation with a member of the Settlement Class, may request exclusion of any other member of the Settlement Class from the Settlement.

12. Members of the Settlement Class who timely request exclusion from the Settlement will relinquish their rights to benefits under the Settlement and will not release any claims against US Coachways.

13. All Settlement Class Members who do not timely and validly request exclusion shall be so bound by all terms of the Settlement Agreement and by the Final Approval Order and

Judgment even if they have previously initiated or subsequently initiate individual litigation or other proceedings against US Coachways.

14. The Settlement Administrator will promptly provide all Parties with copies of any exclusion requests, and Plaintiff shall file a list of all persons who have validly opted-out of the Settlement with the Court prior to the Final Approval Hearing.

Objections

15. Any Settlement Class Member who does not file a timely request for exclusion, but who wishes to object to approval of the proposed Settlement, to the potential award of attorneys' fees and expenses, or to the compensation award to the Class Representative must file with the Court a written statement that includes: his or her full name; address; telephone numbers that he or she maintains were called; all grounds for the objection, with factual and legal support for each stated ground; the identity of any witnesses he or she may call to testify; copies of any exhibits that he or she intends to introduce into evidence at the Final Approval Hearing; and a statement of whether he or she intends to appear at the Final Approval Hearing with or without counsel. Any objecting Settlement Class Member also must send a copy of the filing to the Settlement Administrator at the same time it is filed with the Court. The Court will consider objections to the Settlement, to the award of attorneys' fees and expenses, or to the compensation award to the Class Representative only if, on or before **_____, 2016**, such objections and any supporting papers are filed in writing with the Clerk of this Court and served on the Settlement Administrator.

16. A Settlement Class Member who has timely filed a written objection as set forth above may appear at the Final Approval Hearing in person or through counsel to be heard orally regarding their objection. It is not necessary, however, for a Settlement Class Member who has

filed a timely objection to appear at the Final Approval Hearing. No Settlement Class Member wishing to be heard orally in opposition to the approval of the Settlement and/or the request for attorneys' fees and expenses and/or the request for a compensation award to the Class Representative will be heard unless that person has filed a timely written objection as set forth above. No non-party, including members of the Settlement Class who have timely opted-out of the Settlement, will be heard at the Final Approval Hearing.

17. Any member of the Settlement Class who does not opt out or make an objection to the Settlement in the manner provided herein shall be deemed to have waived any such objection by appeal, collateral attack, or otherwise, and shall be bound by the Settlement Agreement, and all aspects of the Final Approval Order and Judgment. This includes the fact that US Coachways agrees to the entry of judgment against it in the amount of $49,932,375 in favor of the Class, *provided, however*, that the Judgment may not be satisfied from or executed on any assets or property of Defendants, and/or their past, present or future officers, directors, employees, members, shareholders, agents, executors, affiliates, divisions, subsidiaries, successors and assigns, other than Illinois Union.

Final Approval Hearing

18. The Federal Rule of Civil Procedure 23(e) Final Approval Hearing is hereby scheduled to be held before the Court on **_____, 2016 at _____ am** for the following purposes:

(a) to finally determine whether the applicable prerequisites for settlement class action treatment under Federal Rules of Civil Procedure 23(a) and (b) are met;

(b) to determine whether the Settlement is fair, reasonable and adequate, and should be approved by the Court;

(c) to determine whether the judgment as provided under the Settlement Agreement should be entered, including a bar order prohibiting Settlement Class Members from further collecting on claims directly against US Coachways and shall be limited to collecting against Illinois Union in the Settlement Agreement;

(d) to consider the application for an award of attorneys' fees and expenses of Class Counsel;

(e) to consider the application for an compensation award to the Class Representative;

(f) to consider the distribution of the Settlement Benefits under the terms of the Settlement Agreement; and

(g) to rule upon such other matters as the Court may deem appropriate.

19. On or before fourteen (14) days prior to the Final Approval Hearing, Class Counsel shall file and serve (i) a motion for final approval; and (ii) any application for a compensation award to the Class Representative. The Final Approval Hearing may be postponed, adjourned, transferred or continued by order of the Court without further notice to the Settlement Class. At, or following, the Final Approval Hearing, the Court may enter a Final Approval Order and Judgment in accordance with the Settlement Agreement that will adjudicate the rights of all class members.

20. For clarity, the deadlines the Parties shall adhere to are as follows:

Class Notice Mailed by: **_____, 2016**

Objection/Exclusion: **_____, 2016**

Motion for Final Approval: **_____, 2016**

Final Approval Hearing: **_____, 2016 at _____ am**

21. Settlement Class Members do not need to appear at the Final Approval Hearing or take any other action to indicate their approval.

Further Matters

22. All discovery and other pretrial proceedings in the Action as between the Plaintiff and US Coachways are stayed and suspended until further order of the Court except such actions as may be necessary to implement the Settlement Agreement and this Order.

23. In the event that the Settlement Agreement is terminated under the terms of the Settlement Agreement, or for any reason whatsoever the approval of it does not become final and no longer subject to appeal, then: (i) the Settlement Agreement shall be null and void, including any provisions related to the award of attorneys' fees and expenses, and shall have no further force and effect with respect to any party in this Action, and shall not be used in this Action or in any other proceeding for any purpose; (ii) all negotiations, proceedings, documents prepared, and statements made in connection therewith shall be without prejudice to any person or party hereto, shall not be deemed or construed to be an admission by any party of any act, matter, or proposition, and shall not be used in any manner of or any purpose in any subsequent proceeding in this Action or in any other action in any court or other proceeding, provided, however, that the termination of the Settlement Agreement shall not shield from subsequent discovery any factual information provided in connection with the negotiation of this Settlement Agreement that would ordinarily be discoverable but for the attempted settlement; (iii) this Order shall be vacated and of no further force or effect whatsoever, as if it had never been entered; and (iv) any party may elect to move the Court to implement the provisions of this paragraph, and none of the non-moving parties (or their counsel) shall oppose any such motion.

24. The Court retains jurisdiction to consider all further matters arising out of or connected with the Settlement.

DATED: _____, 2016

_____

Rebecca R. Pallmeyer
United States District Judge