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11
12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**
14 **SAN FRANCISCO DIVISION**

15 JESSICA LEE, individually and on behalf of a
16 Class of similarly situated individuals,

17 Plaintiff,

18 v.

19 STONEBRIDGE LIFE INSURANCE
COMPANY, a Vermont corporation, and
20 TRIFECTA MARKETING GROUP LLC, a
Florida limited liability company,

21 Defendants.
22

No. CV 11-0043-RS

**PLAINTIFF’S NOTICE OF MOTION
AND MOTION FOR PRELIMINARY
APPROVAL OF PARTIAL CLASS
ACTION SETTLEMENT AGREEMENT**

Date: December 12, 2013
Time: 1:30 p.m.

Judge: Hon. Richard Seeborg
Magistrate: Hon. Jacqueline Corley

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NOTICE OF MOTION

NOTICE IS HEREBY GIVEN that on December 12, 2013 at 1:30 p.m., or at such other time as may be set by the Court, Plaintiff will move the Court, pursuant to Federal Rule of Civil Procedure 23(e), to grant preliminary approval of the class action settlement reached by Plaintiff and Defendant Trifecta Marketing Group LLC, and attached hereto as Exhibit 1, in Courtroom 3, 17th Floor, 50 Golden Gate Avenue, San Francisco, CA 94102, before the Honorable Richard Seeborg.

The Motion is based on this Notice of Motion, the Memorandum of Points and Authorities, oral argument of counsel, all documents in the record, and any other matter that may be submitted at the hearing.

Dated: October 23, 2013

Respectfully Submitted,

JESSICA LEE, individually and on behalf of the
Class of similarly situated individuals,

/s/ Ryan D. Andrews

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1 **I. INTRODUCTION**

2 Plaintiff has agreed to settle the Class Action with Trifecta—who is unable to contribute to
3 a monetary settlement or withstand a judgment—in exchange for the entry of a comprehensive
4 injunction and its assistance in continuing to prosecute this case against its co-defendant
5 Stonebridge Life Insurance Company—the ultimate beneficiary of the text message transmissions
6 sent to the Class.

7 This proposed class action settlement arises after more than two-and-a-half years of
8 contentious and hard fought litigation between Jessica Lee (“Plaintiff”) and Defendants
9 Stonebridge Life Insurance Company (“Stonebridge”) and Trifecta Marketing Group LLC
10 (“Trifecta”) (collectively, “Defendants”) over the transmission of nearly 60,000 unsolicited text
11 messages sent to Plaintiff and a Class of individuals like her that Defendants hoped would
12 generate “leads” for the sale of Stonebridge’s life insurance products.

13 Plaintiff brought this Action alleging that Stonebridge contracted with Trifecta to send
14 unsolicited text messages *en masse* with the use of an automated telephone dialing system
15 (“ATDS”) to cell phones nationwide—including Plaintiff’s own—promising illusory “\$100 Wal-
16 Mart gift card[s]” as bait to lure recipients into calling a toll-free telephone number used to market
17 Stonebridge’s products and services. Plaintiff is one of many persons who received such a text
18 message¹ and on February 12, 2013, the Court certified a Class consisting of “all individuals that
19 received a text message from telephone number ‘650-283-0793’ from November 28, 2010 through
20 December 2, 2010.” (Dkt. 97.) The Court also appointed Plaintiff Jessica Lee Class
21 Representative, and appointed the undersigned counsel as Class Counsel.

22 After a failed attempt at reaching a global resolution at mediation and with multiple
23 motions to compel discovery from Trifecta set to be filed, Trifecta approached Plaintiff to pursue
24 settlement talks, independent of Stonebridge. Based on Trifecta’s limited financial resources to

25

26 ¹ The text message Plaintiff received read: “Thanks 4 visiting our website please call 877-
27 711-5429 to claim your \$100 walmart gift card voucher! reply stop 2 unsub” (Dkt. 69-1, Ex. 16.)

28

1 satisfy a judgment against it or to fund a class settlement, and after extensive negotiations, the
2 parties reached the Class Action Settlement Agreement, a copy of which is attached to this motion
3 as Exhibit 1.

4 As detailed below, in exchange for a release from the Class's claims in this Action,
5 Trifecta has agreed to consent to the entry of an injunction against it and to cooperate fully with
6 Plaintiff in the continued prosecution of the Action against Stonebridge. In particular, it has
7 agreed to produce documents and provide the testimony of its officers indicating that Stonebridge
8 authorized the text messaging activities in which Trifecta was involved and that text messages
9 were being used to bring Stonebridge leads for their insurance products. This testimony will
10 corroborate the documents Stonebridge itself has produced showing it had the ability to stop
11 Trifecta's use of text message marketing to generate these leads for Stonebridge's life insurance
12 products at any time, but never did. Trifecta's cooperation is of ever-increasing value to Plaintiff
13 and the Class, as Stonebridge has repeatedly taken the position with Class Counsel and with the
14 Court that it was completely unaware of Trifecta's use of text message marketing, and could not
15 control Trifecta's actions. Trifecta has also agreed to the entry of an injunction preventing it from
16 transmitting text messages for the next four years, unless it first obtains express written consent
17 from the recipients to do so by following rigorous standards that ensure its compliance.

18 Given Trifecta's financial insolvency (neither Plaintiff nor Class Counsel are receiving
19 any payments under the Settlement) and the extreme importance of the information in Trifecta's
20 control to Plaintiff's case, Trifecta's complete cooperation in providing documents and testimony
21 to Plaintiff is perhaps the most valuable benefit it could offer the Class. The information that
22 Trifecta is providing to Plaintiff will maximize the chances that Plaintiff and the Class members
23 are awarded the monetary compensation under the TCPA from Stonebridge to which they are
24 entitled. The results achieved by this partial Settlement far exceed what is required for
25 preliminary approval and exceed the relief offered in similar settlements that have been approved
26 by Courts nationwide. Accordingly, Plaintiff moves the Court to preliminarily approve the instant
27 Settlement. For the convenience of the Court, proposed dates and deadlines leading to a final
28 approval hearing are provided in the Proposed Order separately submitted to the Court.

1 **II. NATURE OF THE LITIGATION**

2 **A. The TCPA**

3 In enacting the TCPA, Congress sought to prevent “intrusive nuisance calls” to consumers’
4 telephones that it determined were “invasive of privacy.” *Mims v. Arrow Fin. Servs. LLC*, 132 S.
5 Ct. 740, 744 (2012);² *see also Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir.
6 2009). The TCPA applies with equal force to text message calls as it does to voice calls.
7 *Satterfield*, 569 F.3d at 954. The TCPA prohibits calls made with certain equipment termed an
8 “automatic telephone dialing system” (“ATDS”), which Congress defines as “equipment which
9 has the capacity (A) to store or produce telephone numbers to be called, using a random or
10 sequential number generator; and (B) to dial such numbers.” 47 U.S.C. § 227(a)(1). The FCC has
11 clarified that equipment that dials a list of numbers is still an ATDS, because “the basic function
12 of such dialing equipment” is the same—“the capacity to dial numbers without human
13 intervention.” *Gragg v. Orange Cab Co., Inc.*, C-12-0576, 2013 WL 1788479, at *2 (W.D. Wash.
14 Apr. 26, 2013) (citing *Rules and Regulations Implementing the Telephone Consumer Protection*
15 *Act of 1991*, 73 Fed.Reg. 6041, 6042 (Feb. 1, 2008)).

16 The FCC, the agency authorized by Congress to interpret the terms of the TCPA, recently
17 pronounced that “a seller may be liable for violations by its representatives under a broad range of
18 agency principles, including not only formal agency, but also principles of apparent authority and
19 ratification.” *In the Matter of the Joint Petition Filed by Dish Network, LLC, the United States of*
20 *Am., & the States of California, Illinois, N. Carolina, & Ohio for Declaratory Ruling Concerning*
21 *the Tel. Consumer Prot. Act (TCPA) Rules*, 2013 WL 1934349, at *9, 28 F.C.C.R. 6574, 6584
22 (May 9, 2013). The FCC explained that incorporating broad agency principals into the TCPA is

23 _____
24 ² The Supreme Court has discussed Congress’s findings when it enacted the TCPA,
25 including that “unrestricted marketing can be an intrusive invasion of privacy,” that “many
26 consumers are outraged over the proliferation of intrusive, nuisance [telemarketing] calls to their
27 homes” and that “automated or prerecorded telephone calls made to private residences [] were
28 rightly regarded by recipients as an invasion of privacy.” *Mims*, 123 S. Ct at 745 (internal
quotations and citations omitted). The text messages at issue here are precisely the type of activity
Congress sought to restrict through the TCPA.

1 important because “allowing the seller to avoid potential liability by outsourcing its telemarketing
 2 activities to unsupervised third-parties would leave consumers in many cases without an effective
 3 remedy for telemarketing intrusions. This would be so if the telemarketers were judgment proof . .
 4 . as is often the case.” *Id.* at *12. *Mey v. Monitronics Int’l, Inc.*, 5:11-CV-90, 2013 WL 4105430,
 5 at *5 (N.D. W. Va. Aug. 14, 2013) (holding that the FCC’s interpretation of the scope of liability
 6 under the TCPA to be reasonable and denying defendants’ motion for summary judgment);
 7 *Savanna Grp., Inc. v. Trynex, Inc.*, 10 C 7995, 2013 WL 4734004, at *5 (N.D. Ill. Sept. 3, 2013)
 8 (finding that the FCC *Dish Network* ruling to be the controlling standard of liability under the
 9 TCPA and denying in part defendant’s motion for summary judgment).

10 The TCPA sets statutory damages in the amount of \$500 per violation, and provides for
 11 injunctive relief prohibiting the further transmission of such messages. *See* 47 U.S.C. §
 12 227(b)(3)(A-B).

13 **B. The Facts**

14 1. Stonebridge and its Marketing Partner Trifecta

15 The relationship between Stonebridge and Trifecta extends well beyond the two months
 16 that Stonebridge was being provided with new potential customers from Trifecta’s text messaging
 17 activities. In April 2010, Stonebridge began discussing possible marketing opportunities with
 18 Trifecta. These discussions led to the formation of two contracts, the Call-Back Agreement
 19 entered into on August 18, 2010, as well as a May 27, 2010, “Upsell Agreement” entered into
 20 between Trifecta and a Stonebridge affiliate called Stonebridge Benefit Services, Inc. Both the
 21 Stonebridge Life and Stonebridge Benefits marketing programs were discussed at the outset and
 22 the negotiations and performance of both contracts involved the same primary group of
 23 Stonebridge employees.³

24 Because generating in-bound calls through the transmission of incentivized text messages
 25 was what Trifecta did, in the course of performance of these contracts the use of text messaging as

26
 27 ³ These employees included Brad Skoda, Brad Terry, Marci Evans, Mary Polvika, Erin
 28 Zajkowski, William Neubauer, and Teresa Smeback.

1 part of the campaigns arose frequently between Stonebridge and Trifecta. These discussions about
 2 text messaging between Stonebridge and Trifecta, which occurred in person, through email, and
 3 over the phone covered:

- 4 • The use of text messages to drive in-bound calls to Trifecta’s call centers where
 Stonebridge’s products would be offered;
- 5 • Potential text message content (or “creative”);
- 6 • Potential sources of SMS text messaging traffic from third-parties that could be
 used to drive additional in-bound calls for Stonebridge products;
- 7 • The use of Wal-Mart gift card vouchers as the incentive in the text messages being
 used to drive in-bound traffic to promote Stonebridge Benefits products.

8 Despite all the emails, meetings, and phone calls, no one at Stonebridge ever told Trifecta that
 9 using text messages to generate in-bound calls to promote its products was forbidden or that
 10 different methods such as email or Internet banner ads should be used instead. As Trifecta has
 11 confirmed through the settlement, Stonebridge’s position in this case that they had “no idea” text
 12 messages were being used to generate leads for its products is not grounded in fact.⁴ Instead,
 13 Stonebridge continued to accept leads generated from Trifecta with the full knowledge that
 14 Trifecta was using outbound text messaging to generate these leads.

15 While Stonebridge discussed with Trifecta how text messaging was used in the
 16 performance of their contracts, its insertion into the telemarketing activities of Trifecta extended
 17 into other areas as well. For instance, Stonebridge made Trifecta meet demanding specifications
 18 about the file format in which lead information was transmitted and how often that information
 19 was transmitted. Stonebridge also aided in the drafting of all scripts read by Trifecta, approved the
 20 use of its trademarked name in those scripts, was given access to recordings of all calls, and
 21

22 _____
 23 ⁴ For example, Stonebridge made the following statements during Plaintiff’s presentment of
 her Class Certification motion:

24 **Court:** “And they [Stonebridge] know that the process is going to involve the – the
 25 transmission of text messages,”

26 **Stonebridge’s Counsel:** “No, they don’t. They do not.” (Tr. Pg. 6:8-10.)

* * *

27 **Court:** “Your suggestion to me was that Stonebridge had no idea that there would be the
 transmission of a text message inviting a call back to Trifecta”

28 **Stonebridge’s Counsel:** “That’s right.” (Tr. Pg. 9:2-5.)

1 controlled when its offer would be presented to those who called Trifecta after receiving a text
2 message.

3 Starting October 16, 2010, in furtherance of the Call-Back Agreement, Trifecta sent text
4 messages to millions of individuals encouraging them to call a toll-free telephone number
5 purportedly to receive a “\$100 Wal-mart gift card.” Upon calling the number they were connected
6 to Trifecta telemarketers who offered the caller the opportunity to enter into a \$5,000 sweepstakes
7 being sponsored by Stonebridge if they agreed to receive a call-back from Stonebridge to learn
8 about Stonebridge’s insurance products. Recordings of these calls sometimes began with Trifecta
9 asking the caller “what is the cell phone that you received our text message on . . . ?” Trifecta
10 provided Stonebridge with prospective customers via this contract through December 2010.

11 2. Trifecta creates an in-house SMS Platform to transmit text messages to
12 drive inbound calls to its call centers to Promote Stonebridge Products

13 Although Trifecta used incentive text messages to drive consumers to its call centers, these
14 text messages were initially sent by third-parties (such as ModernAd Media, Txtwire, and
15 OpenMarket) and also included Trifecta-licensed toll-free numbers. Use of these third-party text
16 message providers, however, was expensive and did not offer Trifecta the ability to control the
17 volume of in-bound calls that it desired, so it decided to move its text messaging operation in-
18 house.

19 During the first few weeks of October 2010, approximately the same time performance of
20 the Call-Back Agreement began, Trifecta began constructing its own SMS Platform. Trifecta
21 ordered the hardware components on-line—mainly cellular telephone modems and antennas—and
22 connected them to several PCs and a SQL server database containing lists of cell phone numbers it
23 had purchased. Trifecta simultaneously developed a proprietary software program that would pull
24 consumers’ cellular telephone numbers out of the database, pair those phone numbers with the
25 content of text messages that included a toll-free number it licensed, and transmit those messages
26 in rapid succession without any human intervention to lists of cell phone numbers stored in the
27 database. The text messages sent by this SMS Platform may have included one of 300 toll-free
28

1 numbers licensed to Trifecta during the Class period and may have offered different values of gift
2 cards.

3 In order for the cellular modems to transmit text messages across various cellular
4 networks, they required Subscriber Identity Modules, more commonly known as “SIM” cards. A
5 SIM card is associated with a unique, 10-digit cellular telephone number. A Trifecta employee
6 purchased these SIM cards for use in the SMS Platform from T-Mobile.

7 Trifecta proceeded to run its SMS Platform in November and December of 2010 to drive
8 inbound calls to its call center by sending text messages to the lists of consumer cellular telephone
9 numbers it purchased. But unlike the third-party text message providers, who transmitted text
10 messages using 5-digit “shortcodes,” Trifecta’s internal SMS Platform transmitted text messages
11 using 10-digit telephone numbers, or “longcodes.” These text messages also all contained toll-free
12 telephone numbers that would be answered at Trifecta’s call center.

13 C. The Litigation History

14 On November 30, 2010, Plaintiff Lee received a text message from longcode number 650-
15 283-0793 that read as follows:

16 Thanks 4 visiting our website please call 877-711-5429 to claim your \$100
17 walmart gift card voucher! reply stop 2 unsub

18 The toll-free telephone number in this text message was licensed exclusively by Trifecta. During
19 the class period, Trifecta also had 299 other active toll-free numbers licensed. Ms. Lee did not
20 desire nor consent to receive the above-referenced text message in any way. (*Id.* ¶ 17; Dkt. 69-1,
21 Ex. 14, at 12:24 – 13:7.)⁵ As a result, on January 4, 2011, Plaintiff filed this Action against
22 Stonebridge, on behalf of herself and the Class, in order to stop its ongoing practice of marketing
23 through unsolicited text messages in violation of the TCPA. (Dkt. 1.)

24 On March 28, 2011, Stonebridge filed its answer to Plaintiff’s original class action
25 complaint. (Dkt. 15.) Thereafter, the Parties engaged in an initial exchange of information, and
26 on July 28, 2011, Plaintiff filed a first amended class action complaint (the instant Action), adding

27 ⁵ After nearly three years of litigation no evidence that she (or any member of the Class) gave
28 prior express consent to either Trifecta or Stonebridge has surfaced.

1 Trifecta as a party-defendant. (Dkt. 34.) Both Defendants filed their answers to the amended
2 complaint, and the Parties began the discovery process. (Dkts. 40, 44.) Plaintiff's discovery on
3 Trifecta resulted in the production of virtually no documents—as Trifecta indicated that all its
4 records had been destroyed. Plaintiff's discovery on Stonebridge was met with denials of any
5 knowledge of Trifecta's text-messaging and refusals to produce anything but a trickle of
6 documents.

7 On August 29, 2012, Plaintiff moved for class certification. (Dkt. 69.) This motion was
8 ultimately granted on February 12, 2013. (Dkts. 78-79, 81, 85-86, 88-91, 97.) The certified Class
9 is defined as follows:

10 All individuals that received a text message from telephone number "650-283-0793" from
11 November 28, 2010 through December 2, 2010.

12 Plaintiff thereafter moved the Court to approve her plan to serve the required notice of
13 certification on Class Members, and after briefing and some minor alterations, the Court approved
14 the Notice Plan. (Dkts. 101, 104, 106, 110.)⁶

15 After the Court's ruling on Class Certification and the March 7, 2013 Case Management
16 Conference, Plaintiff propounded substantial merits-based discovery. Plaintiff issued numerous
17 third-party subpoenas for documents and depositions, and also issued several additional sets of
18 interrogatories, requests to admit, and document requests on both Stonebridge and Trifecta.

19 Due to both Stonebridge and Trifecta's incomplete responses (in those handful of cases
20 where they responded at all), Plaintiff has held multiple telephonic conferences with each
21 Defendant to discuss discovery. Stonebridge ignored the scope of the document requests by
22 making nebulous objections to avoid providing documents relating to its dealings with Trifecta
23 that related to SMS text messaging. After Plaintiff received several thousand documents from a
24 former Trifecta employee, Plaintiff discovered the extent that both Trifecta and Stonebridge had

25 _____
26 ⁶ The proposed notice attached as exhibits to the Settlement Agreement mirrors the language
27 approved by the Court with only slight modifications to inform the Class of the settlement with
28 Trifecta, and to conform to information revealed through fact discovery. These change are
covered in more detail in Section V, *infra*.

1 been misleading Plaintiff about the facts in this case and the scope of discoverable documents in
2 their possession. Plaintiff was eventually forced to request that the Court formally compel further
3 responses. (Dkt. 114.) Magistrate Judge Corley granted Plaintiff's motion to compel on July 19,
4 2013. (Dkt. 126.) This subsequent document production, which took Stonebridge until September
5 6, 2013 to complete, consisted of thousands of documents many of which contradicted
6 Stonebridge's prior versions of what occurred factually here.

7 Plaintiff encountered significant resistance to discovery from Trifecta as well; however,
8 most of its lack of responsiveness was based on claims that it no longer had any relevant
9 documents in its possession. On May 16, 2013, Plaintiff served Trifecta with its portion of a Joint
10 Statement on a Motion to Compel further responses to her First Set of discovery, and on May 21,
11 2013, served its portion of a Joint Statement on a Motion to Compel responses to her Second Set of
12 Discovery.

13 Before receiving a response from Trifecta or filing these motions with the Court, Plaintiff,
14 Stonebridge and Trifecta attempted to reach a global resolution to the Action through mediation at
15 JAMS in San Francisco, on June 21, 2013, but were ultimately unable to reach an agreement.
16 (Dkt. 128-1.) However, immediately following the mediation, Trifecta and Class Counsel began
17 discussing the possibility of a settlement between Trifecta and the Class in exchange for
18 information about what Stonebridge had been hiding. (*Id.*) During the conversations that
19 followed, Plaintiff discovered that Stonebridge was and had been—despite its repeated denials—
20 aware of Trifecta's text messaging efforts on its behalf, both in general and in relation to the Call-
21 Back Agreement. Moreover, counsel indicated that Trifecta would be willing to provide
22 documents and testimony from its officers demonstrating this fact.

23 On July 12, 2013, Class Counsel and counsel for Trifecta entered into a Memorandum of
24 Understanding⁷ contemplating a settlement arrangement providing for the production of
25 documents and testimony to Plaintiff for use in the continuing Action against Stonebridge. (Dkt.
26

27 ⁷ A true and accurate copy of the MOU has since been filed with this Court. *See* Dkt. 118-1.
28

1 118.) After the execution of the MOU, Parties negotiated at arm's length the instant Settlement
2 Agreement.

3 **D. Trifecta's Position**

4 Trifecta denies any wrongdoing whatsoever, and believes that it has at all times denied and
5 continues to deny that it committed, threatened, or attempted to commit, any of the wrongful acts
6 or violations of law or duty that are alleged in the Action, and instead contends that it has acted
7 properly. Nonetheless, taking into account the uncertainty and risks inherent in any litigation,
8 Trifecta has concluded that defense of the Action would be burdensome and expensive, and that it
9 is desirable and beneficial to fully and finally settle and terminate the Action against it in the
10 manner and upon the terms and conditions set forth in the Stipulated Settlement Agreement.

11 **III. TERMS OF THE SETTLEMENT AGREEMENT**

12 The key terms of the Stipulated Settlement Agreement are briefly summarized as follows:⁸

13 **A. Class Definition:** Plaintiff and Defendant Trifecta (the "Settling Parties") entered
14 into the Settlement Agreement with respect to the following Class definition, as certified by the
15 Court (dkt. 97): All individuals that received a text message from telephone number "650-283-
16 0793" from November 28, 2010 through December 2, 2010.

17 **B. Settlement Benefits**

18 1. Injunctive Relief:

19 Trifecta agrees to consent to the entry of an injunction against it, designed to prevent
20 Trifecta—as well as those parties with which it contracts—from transmitting any unauthorized
21 text messages for no fewer than four (4) years. (Settlement Agreement, § 2.1.) Specifically, this
22 injunction will require:

23 (1) That Trifecta shall not make, or cooperate with others to make, SMS text calls
24 to cellular phones unless each text-message recipient has given explicit prior express consent to
25 receive such text messages;

26
27 ⁸ All capitalized terms not defined herein shall have the meanings ascribed to them in the
28 Settlement Agreement.

1 (2) That any contract Trifecta enters into regarding the transmission of text
2 messages must expressly require parties to the contract who obtain consumer cell phone numbers
3 to keep documented proof of all such prior express consent received for no less than four years;
4 and

5 (3) That any such contract Trifecta enters into require that said “prior express
6 consent” be obtained in writing, and that if any cell phone numbers are obtained on a website, it
7 must require the clear and affirmative authorization on the part of the consumer before such
8 telephone number may be sent any text messages from Trifecta or parties with which it contracts.

9 (*Id.*)

10 Moreover, any costs associated with this injunction will be paid in full by Trifecta. (*Id.* §
11 2.2.)

12 2. Full Cooperation and Provision of Evidence:

13 Trifecta agrees to provide Plaintiff and Class Counsel with its complete and full
14 cooperation in the continued prosecution of the Action against Stonebridge, including appearing at
15 any trial and through any appeals. In furtherance of its agreement to cooperate, Trifecta has
16 specifically agreed to provide, without objection:

17 (1) Declarations, testimony and all others documents, truthfully attesting that
18 Stonebridge had knowledge of and authorized the text messaging that was performed for the Call-
19 Back Agreement, including the message sent to Plaintiff and the Class;

20 (2) Declarations, testimony and all others documents, truthfully attesting to
21 Trifecta’s causing to be sent the text messages to the Class for the Call-Back Agreement with
22 Stonebridge;

23 (3) Declarations, testimony and all others documents, truthfully attesting to
24 Stonebridge’s involvement in the Call-Back Agreement, including all text messaging conducted
25 pursuant to that agreement;

26 (4) Declarations or other testimony confirming the authenticity of certain
27 documents produced in discovery for purposes of the continued prosecution of Stonebridge;

28

1 (5) Declarations and all other documents related to Stonebridge, related to text
2 messaging campaigns (including the Call-Back Agreement) or that could be used to demonstrate
3 Stonebridge's potential liability or its failure to produce documents to Plaintiff in discovery;

4 (6) Declarations and financial documents supporting Trifecta's representation that
5 it is financially unable to sustain a judgment or to significantly contribute to any monetary
6 settlement with the Class; and

7 (7) Truthful sworn answers to Plaintiff's First Request to Admit Facts and certain
8 other discovery identified by Class Counsel. (*Id.*)

9 The Settlement provides that should Trifecta fail to fulfill its obligations to provide the
10 promised documents and testimony identified above, Plaintiff may terminate the Agreement. (*Id.*
11 § 6.2.) Further, Trifecta has agreed to provide confirmatory discovery, including third-party
12 discovery, to confirm their material representations concerning its lack of applicable insurance
13 coverage and financial condition that form the basis of this Agreement. (*Id.* §§ 9.1; 10.1.)

14 C. Release

15 The obligations incurred pursuant to this Settlement Agreement shall be, upon the entry of
16 a final order approving this Settlement, a full and final disposition of the Action and its claims
17 against Trifecta and each of its related affiliates and entities. (*Id.* § 3.1.) Upon the date the
18 Agreement is finally approved by the Court, the Plaintiff and Members of the Class, each of them,
19 shall be deemed to have fully, finally, and forever released, relinquished, and discharged all claims
20 arising out of this Action, against Trifecta and each of its related affiliates and entities. (*Id.* § 3.2.)
21 The Agreement does not release Stonebridge, any of its affiliates, or any other of Trifecta's
22 marketing partners.

23 IV. THE PROPOSED SETTLEMENT FALLS WITHIN THE RANGE OF POSSIBLE 24 APPROVAL AND THUS WARRANTS PRELIMINARY APPROVAL

25 The Court must approve any settlement of this certified class action, and the procedure for
26 review of the proposed settlement is a well-established two-step process. Fed. R. Civ. P. 23(e); *see*
27 *also* ALBA & CONTE, *Newberg on Class Actions* §11.25 at 3839 (4th ed. 2002). The first step is a
28 preliminary, pre-notification hearing to determine whether the proposed settlement is "within the

1 range of possible approval.” *Newberg*, §11.25 at 3839 (quoting *Manual for Complex Litigation* §
 2 30.41 (3d ed. 1995)); *see also In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D.
 3 Cal. 2007); *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1110 (9th Cir. 2008). This hearing is not a
 4 fairness hearing. *Id.* Its purpose, rather, is to ascertain whether there is any reason to notify the
 5 class members of the proposed settlement and to proceed with a fairness hearing. *Id.* Preliminary
 6 approval should be given and notice of a settlement should be sent where “the proposed settlement
 7 appears to be the product of serious, informed, non-collusive negotiations, has no obvious
 8 deficiencies, does not improperly grant preferential treatment to class representatives or segments
 9 of the class, and falls within the range of possible approval.” *In re Tableware*, 484 F. Supp. 2d at
 10 1079.

11 A strong judicial policy exists that favors the voluntary conciliation and settlement of
 12 complex class action litigation. *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008)
 13 (citing *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615 (9th Cir. 1982)). While the
 14 district court has discretion regarding the approval of a proposed settlement, it should give “proper
 15 deference to the private consensual decision of the parties.” *Hanlon v. Chrysler Corp.*, 150 F.3d
 16 1011, 1027 (9th Cir. 1998); *see also Garner v. State Farm Mut. Auto. Ins. Co.*, No. CV 08 1365
 17 CW EMC, 2010 WL 1687832, at *8 (N.D. Cal. Apr. 22, 2010). Further, when a settlement is
 18 negotiated at arm’s length by experienced counsel, there is a presumption that it is fair and
 19 reasonable. *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995).⁹ Ultimately, the
 20 Court’s role is to ensure that the settlement is fundamentally fair, reasonable, and adequate. Fed.

21
 22 ⁹ Plaintiff’s settlement with Trifecta is entitled to such a presumption here as it was negotiated
 23 by Class Counsel who have extensive experience in TCPA text messaging class action and
 24 consumer privacy class actions generally (*See* Declaration of Ryan D. Andrews ¶¶ 2-5; attached
 25 hereto as Exhibit 2); negotiations were at all times conducted at arm’s length (*id.* ¶ 6); and
 26 settlement was reached at the end of merits discovery. (*Id.*) *See In re Immune Response Sec.*
 27 *Litig.*, 497 F. Supp. 2d 1166, 1171 (S.D. Cal. 2007). Further, none of the “indicia of collusion”
 28 identified in *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011) are
 present here as neither Class Counsel or the Class Representative are receiving any monetary
 benefits from the Settlement: the Settlement provides an injunction for the benefit of the Class
 (and the public at large) and provides the best chance at recovering statutory monetary damages
 for the Class from Stonebridge through Trifecta’s cooperation.

1 R. Civ. P. 23(e)(2); *In re Syncor*, 516 F.3d at 1100.

2 **A. The Settlement Is Fair, Reasonable, and Adequate Under the Circumstances**

3 In light of Trifecta’s financial situation, the Settlement is demonstrably fair, reasonable and
4 adequate and is of considerable value to the Class. “Basic to [analyzing a proposed settlement] in
5 every instance, of course, is the need to compare the terms of the compromise with the likely
6 rewards of the litigation.”) *Protective Comm. for Indep. Stockholders v. Anderson*, 390 U.S. 414,
7 424–25 (1968). If Trifecta and Stonebridge are found to have violated the TCPA—either directly
8 or vicariously—they are jointly and severally liable for a statutory penalty of \$500 per violation,
9 as well as an injunction prohibiting any future transmission of such messages. 47 U.S.C. §
10 227(b)(3)(A-B); *In re Dish Network*, 2013 WL 1934349, ¶ 28; see *Manfred v. Bennett Law, PLLC*,
11 12-CV-61548, 2012 WL 6102071 (S.D. Fla. Dec. 7, 2012). Plaintiff’s Settlement with Trifecta
12 includes the statutory injunction provided for under the TCPA and provides for cooperation and
13 testimony that gives Plaintiff the means to obtain full monetary statutory damages for the Class
14 from Stonebridge.

15 **1. The Settlement Provides Strong Injunctive Relief**

16 Through the Settlement with Trifecta, the Class has obtained one of the primary benefits
17 sought by the Complaint: a comprehensive injunction designed to halt the transmission of unsolicited
18 text messages. This injunction thus creates a substantial benefit for Class Members, as well as for
19 consumers nationwide. See, e.g., *Wehlage v. Evergreen at Arvin LLC*, No. 4:10-cv-05839-CW, 2012
20 WL 2568151, at *1 (N.D. Cal. June 25, 2012) (holding that a stipulated injunction against a defendant
21 with a poor “financial condition” requiring that its practices comply with the law carried “a substantial
22 value and obtains fair and adequate relief for the [c]lass”); *Schwarm v. Craighead*, 814 F. Supp. 2d
23 1025, 1029 (E.D. Cal. 2011) (explaining that even though “[c]lass members may never benefit
24 financially” from a settlement agreement, “they do benefit from the attorneys’ success in stopping
25 defendants’ illegal practices and protecting class members from further harassment”); *Bruno v. Quten*
26 *Research Inst., LLC*, No. SACV 11-00173 DOC (Ex), 2013 WL 990495, at *4 (C.D. Cal. Mar. 13,
27 2013) (deciding that there was “a high value to the injunctive relief obtained” in a settlement, as it
28 would “bring a benefit to class consumers” as well as to “the marketplace” as a whole); *In re Netflix*

1 *Privacy Litig.*, No. 5:11–CV–00379 EJD, 2013 WL 1120801, at *5 (N.D. Cal. March 18, 2013)
 2 (holding that “the value of the injunctive relief” in a settlement “weigh[ed] strongly in favor of
 3 approval”). Here, the injunction consented to by Trifecta not only bars it from transmitting any text
 4 message advertisements without first ensuring that prior express consent from the potential recipients
 5 is obtained, it creates detailed requirements for obtaining consent, and maintaining records, of the
 6 express consent of those persons who gave it. (Settlement Agreement, § 2.1.) Moreover, these
 7 requirements extend to any party with which Trifecta contracts, a restriction that may not have been
 8 obtained if Plaintiff received a favorable judgment against Trifecta. (*Id.*) As such, the injunctive relief
 9 afforded by the Settlement supports finding Plaintiff’s agreement with Trifecta to be well within the
 10 range of possible approval.

11 2. The Settlement Requires Trifecta to Aid Plaintiffs In Seeking Full Monetary
Recovery From Stonebridge

12 The other component to Plaintiff’s Settlement with Trifecta is designed to provide Class
 13 Counsel with the evidence it needs to secure a full monetary statutory judgment against
 14 Stonebridge. Although Plaintiff and the Class would be entitled to recover monetary statutory
 15 damages directly from Trifecta should they prevail at summary judgment or trial, Plaintiff cannot
 16 obtain funds that do not exist. (Settlement Agreement, at Recitals, Part C.) The collectability of a
 17 judgment or settlement is a valid consideration in the negotiation and evaluation of any settlement
 18 agreement. *See Wehlage*, 2012 WL 2568151, at *1 (“the [c]ollectability of a judgment . . . bear[s] on
 19 the reasonableness of a settlement in relation to the defendants’ ability to withstand a greater one”)
 20 (internal quotations omitted) (brackets in original); *Aramburu v. Healthcare Fin. Servs., Inc.*, No. 02–
 21 CV–6535 (MDG), 2009 WL 1086938, at *4 (E.D.N.Y. Apr. 22, 2009) (“[a] related consideration
 22 weighing in favor of settlement is defendant’s dire financial condition, which makes obtaining a
 23 greater recovery than provided by the [s]ettlement . . . difficult”) (internal quotations omitted);
 24 *Newberg*, § 11.44 (same); *cf. Manual for Complex Litig.*, § 21.651 (“[t]he adequacy of a [partial]
 25 settlement depends in part on the relative . . . resources of other parties”).

26 So while Plaintiff and the Class cannot realistically obtain direct financial recovery from
 27 Trifecta, its agreement to cooperate completely with the continuing litigation against Stonebridge is of
 28

1 substantial benefit to the Class because the efficient provision of relevant information to Class Counsel
2 facilitates obtaining their monetary recovery from Stonebridge. (*See* Settlement Agreement, § 2.3.)
3 Federal courts nationwide have recognized the value of similar covenants to cooperate in their
4 approval of past settlements. *See, e.g., In re Processed Egg Prods. Antitrust Litig.*, 284 F.R.D. 278,
5 285 (E.D. Pa. 2012) (approving a settlement in which the only benefit to the class was defendant’s
6 agreement “to cooperate with the [p]laintiffs’ preparation for and prosecution of their class action”
7 against remaining defendants by providing relevant documents and witnesses); *Buckley v. Engle*, No.
8 07CV254, 2010 WL 4064985, at *2 (D. Neb. Oct. 14, 2010) (approving a “proposed settlement
9 [which] provides the important benefit of [defendant]’s cooperation in pursuing recovery from the
10 nonsettling parties” by “providing testimony, documents and information regarding the plaintiffs’
11 claims,” given the “prospect that [defendant]’s financial condition would make any judgment against
12 him difficult to collect”); *cf. In re Investors Fund Corp. of New York Sec. Litig.*, 9 B.R. 962, 964 n.2
13 (S.D.N.Y. 1981) (approving defendants’ stipulations in a partial settlement agreement “to cooperate
14 with plaintiffs in the prosecution of . . . actions against non-settling defendants” as valuable class
15 relief); *Waller v. Fin. Corp. of America*, 828 F.2d 579, 580 (9th Cir. 1987) (same); *In re PNC Fin.*
16 *Servs. Group, Inc.*, 440 F. Supp. 2d 421, 436 (W.D. Pa. 2006) (same); *In re Packaged Ice Antitrust*
17 *Litig.*, No. 08–MD–01952, 2011 WL 717519, at *3-4 (E.D. Mich. Feb. 22, 2011) (same).

18 Through the Settlement, Trifecta is correcting several of its shortcomings in discovery and
19 coming forward with testimony and evidence that Stonebridge has gone to great lengths to hide.
20 Namely, Trifecta has provided evidence and will provide testimony that the Stonebridge employees
21 responsible for overseeing the Call-Back Agreement were fully aware of and condoned Trifecta’s use
22 of text messaging to generate in-bound calls where Stonebridge would be promoted. Stonebridge and
23 Trifecta both made numerous statements to Class Counsel, in response to inquiries from the Court, in
24 their initial disclosures, and in briefing on Class Certification and other issues, that directly
25 contradicted the facts shown by documents in their possession that they, until recently, failed to
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27
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1 produce.¹⁰ Trifecta's agreement to provide information relevant to this case without objection, is thus
2 extremely valuable to the Class. Moreover, given the unflinching contentious discovery disputes that
3 have arisen out of Plaintiff's revelation that Defendants' were concealing evidence, it is likely that
4 absent this Agreement, Trifecta would continue to resist Plaintiff's requests, leaving no certainty that
5 the information at issue would ultimately be produced at all. *See In re Corrugated Antitrust Litig.*, 556
6 F. Supp. 1117, 1147-1148 (S.D. Tex. 1982) (holding that a partial settlement providing for a stipulated
7 injunction and defendant's cooperation with discovery was "fair, reasonable and adequate," as it
8 allowed "plaintiffs to secure, on a prompt basis, answers to questions and documents which may have
9 been otherwise unobtainable"). If not produced, Plaintiff would have needed to successfully win a
10 motion for spoliation of evidence against Trifecta¹¹ and obtain an adverse inference about what certain
11 destroyed evidence said. Instead, Trifecta has agreed to testify about several of the items that were
12 discarded after this litigation arose. Therefore, Trifecta's agreement to cooperate with Plaintiff's
13 continued prosecution of this case against Stonebridge is a valuable concession to the Class, which
14 supports the preliminary adequacy of the instant Settlement such that notice of the Settlement can
15 proceed.

16 **V. THE PROPOSED PLAN TO NOTIFY THE CLASS OF THE SETTLEMENT**

17 On May 22, 2013, this Court approved, with minor modifications, Plaintiff's plan to
18 provide notice to the Class of the certification of this case under Rule 23. (Dkt. 110.) Plaintiff has
19 agreed to pay for notice and proposes to incorporate the requisite information about the instant
20 Settlement with Trifecta into the already approved certification notice and distribute the notice to
21
22

23
24 ¹⁰ For example, documents subsequently produced by Stonebridge show that Stonebridge
25 employees who worked on the Call-Back Agreement had a much more extensive relationship with
26 Trifecta than originally thought, which included multiple discussions about Trifecta's text
27 message marketing activities.

28 ¹¹ Trifecta apparently discarded all of its servers that stored information concerning the text
message transmissions at issue after this lawsuit was filed, and likewise discarded its email servers
with hundreds, if not thousands, of emails concerning its business practices and its relationship
with Stonebridge.

1 the class in an identical manner.¹² Such combined notice is commonly approved. *See In re*
 2 *Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007). To satisfy the
 3 requirements of both Rule 23 and Due Process—be it for purposes of settlement or for notice of
 4 class certification—Rule 23(c)(2)(B) provides that, “[f]or any class certified under Rule 23(b)(3),
 5 the court must direct to class members the best notice practicable under the circumstances,
 6 including individual notice to all members who can be identified through reasonable effort.” Fed.
 7 R. Civ. P. 23(c)(2)(B); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). Rule 23(e)(1)
 8 similarly advises that “[t]he court must direct notice in a reasonable manner to all class members
 9 who would be bound by a proposed settlement, voluntary dismissal, or compromise.” Fed. R. Civ.
 10 P. 23(e)(1). As it pertains to the settlement with Trifecta, the parties have included in the
 11 previously approved notice (that describes the nature of the action, the definition of the class to be
 12 certified, and the class claims and defenses at issue) explanations about their rights under the
 13 settlement such as that class members may enter an appearance through counsel if so desired, how
 14 they request to be excluded from the settlement, how they can object to the terms of the
 15 settlement, and that the effect of a class judgment shall be binding on all class members. *See* Fed.
 16 R. Civ. P. 23(c)(2)(B).

17 With the assistance of Kurtzman Carson Consultants (“KCC”), the parties have included in
 18 the Settlement Agreement a modified version of the comprehensive notice plan already approved
 19 by the Court, which was designed to reach as many potential Class Members as possible.
 20 (Settlement Agreement, § 4.)¹³ As explained below, it is the best notice practicable under the
 21 circumstances and fully comports with Due Process. (*See* Declaration of Carla A. Peak ¶¶ 4, 13,
 22 26, 29, attached hereto as Exhibit 3.)

23

24

25 ¹² The Settlement was reached as the Notice Administrator was preparing to provide the Court
 26 approved notice to the Class. Plaintiff decided that in order to minimize the costs of litigation and
 27 to lessen the possibility of confusion to the Class resulting from the transmission of separate
 28 notices, that notice of certification and the Settlement should be combined.

¹³ Notice will proceed in the form approved by the Court for notice of class certification, and
 will occur concurrently therewith.

28

1 **A. Direct Notice**

2 KCC will perform a “reverse look-up” on the list of 59,568 unique cell phone numbers of
3 the Class members obtained through discovery from cellular telephone carrier T-Mobile U.S.A to
4 obtain valid email addresses and U.S. mail addresses of Class Members directly. KCC will send
5 direct notice through First Class U.S. Mail and email to those addresses obtained in the form
6 attached to the Settlement as Exhibit A. (Agreement, § 4.1(a); Ex. A; Peak Decl. ¶¶ 18-20.)

7 **B. Internet Banner Notice**

8 As in the original certification notice plan, KCC is going to supplement the direct notice
9 with internet banner ads. The Notice Administrator will cause to be posted a series of internet
10 banner ads on the 24/7 Real Media Internet Network, which allows the advertisements to appear
11 on over 4,000 premium websites. Depending on the percentage of Class member addresses
12 obtained through the reverse look-up, KCC will implement banner ads that will generate between
13 25 and 95 million unique impressions and run for a one-month period. (*Id* at § 4.1(b), ex. B; Peak
14 Decl. ¶¶ 21-23.)

15 **C. Website Publication**

16 Within 10 days of entry of the Order granting preliminary approval of the Settlement
17 Agreement, traditional “long form” notice will be provided on the Settlement website,
18 www.LeeTextMsgCase.net, which shall be administered and maintained by the Notice
19 Administrator. The long form notice describes the terms of the Settlement and provides a
20 mechanism for the Class Members to download and review both the Settlement Agreement and
21 several Court documents. (*Id.* at 4.1(c), ex. C; Peak Decl. ¶ 24.)

22 **D. Press Release**

23 KCC will distribute a press release to local, national, and syndicated news organizations
24 discussing the terms of the Settlement. (*Id.* at 4.1(d); Peak Decl. ¶ 23.)

25 **E. CAFA Notice**

26 The Settlement Agreement further requires, in accordance with 28 U.S.C. § 1715, that not
27 later than ten (10) days after the Agreement is filed with the Court, the Notice Administrator shall
28 serve upon the Attorneys General of each U.S. State, the Attorney General of the United States,

1 and other required government officials, notice of the proposed settlement, which shall include:
2 (1) a copy of the most recent complaint and all materials filed with the complaint or notice of how
3 to electronically access such materials; (2) notice of scheduled judicial hearings in the Action; (3)
4 all proposed forms of Notice; and (4) a copy of the Settlement Agreement. The Settlement
5 Administrator shall serve upon the above-referenced government officials the names of Class
6 Members who reside in each respective state, or if not feasible, a reasonable estimate of the
7 number of Class Members residing in each state. (Agreement, § 4.1(e).)

8 The format and language of each form of notice has been drafted so that it is in plain
9 language, is easy to read, and will be readily understood by the Class Members. (Peak Decl. ¶ 27.)
10 Accordingly, the proposed notice plan comports with Rule 23 and the requirements of Due
11 Process and should be approved by this Court. (*Id.* ¶ 29.)

12 **VI. CONCLUSION**

13 For the foregoing reasons, Plaintiff Jessica Lee respectfully requests that the Court grant
14 preliminary approval of the proposed Settlement Agreement, approve the form and manner of
15 notice described above, and grant such further relief the Court deems reasonable and just.

16 Dated: October 23, 2013

Respectfully Submitted,

18 JESSICA LEE, individually and on behalf of the
19 Class of similarly situated individuals,

20 /s/ Ryan D. Andrews
21 One of Plaintiff's Attorneys

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2 *Attorneys for Plaintiff and the Class*

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The undersigned certifies that on October 23, 2013, he caused this document to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of filing to counsel of record for each party.

Dated: October 23, 2013

EDELSON LLC

By: /s/ Ryan D. Andrews
Ryan D. Andrews

Exhibit 1

CLASS ACTION SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (“Agreement” or “Settlement” or “Settlement Agreement”) is entered into by and among plaintiff Jessica Lee (“Plaintiff”), on behalf of the Class certified in the Court’s February 12, 2013 Order (dkt. 97) and Trifecta Marketing Group, Inc. (“Trifecta”) (together, the “Parties” or singularly “Party”). (Except as otherwise specified, defined terms shall have the meanings set forth in the Definitions Section of this Settlement.) This Settlement is intended by the Parties to fully, finally, and forever resolve, discharge and settle all the claims specified below, subject to the terms and conditions herein.

RECITALS

A. WHEREAS, on January 4, 2011, Plaintiff brought a putative class action against Stonebridge Life Insurance Company in the United States District Court for the Northern District of California (“Court”), which was designated case number 11-cv-00043 RS. On July 28, 2011, Plaintiff filed her Amended Complaint adding Trifecta as a Defendant. Both the initial complaint and Amended Complaint (the “Action”) alleged that Stonebridge and its marketing partner Trifecta violated the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.* (“TCPA”) by transmitting unsolicited text messages to consumers. In the Action, Plaintiff sought statutory monetary damages and an injunction, amongst other relief.

B. WHEREAS, Trifecta answered the Amended Complaint on December 12, 2011, denying the material allegations of the Amended Complaint and setting forth seven affirmative defenses.

C. WHEREAS, Trifecta lacks the financial resources to satisfy any judgment entered against it in the Action or to meaningfully fund any class settlement.

D. WHEREAS, on February 12, 2013, the Court granted Plaintiff’s Motion for Class Certification, certifying a class pursuant to Fed. R. Civ. P 23(b)(3) of “All individuals that received a text message from telephone number “650-283-0793” from November 28, 2010 through December 2, 2010.”

E. WHEREAS, on April 18, 2012 Plaintiff served Trifecta with her First Set of Document Requests and First Set of Interrogatories on Trifecta. On June 5, 2012, Trifecta provided its responses and objections to this discovery.

F. WHEREAS, on March 14, 2013, Plaintiff served her Second Set of Document Requests and Second Set of Interrogatories on Trifecta.

G. WHEREAS, on May 21, 2013, Plaintiff served Trifecta with her First Set of Requests to Admit Facts and Third Set of Requests to Produce Documents.

H. WHEREAS, Plaintiff believed Trifecta’s responses to her First Set of Discovery were inadequate, and the Parties exchanged correspondence and met-and-conferred pursuant to Judge Corley’s Standing Order. Further, Trifecta did not answer Plaintiff’s Second Set of discovery and the Parties met-and-conferred on the production of responses to those requests as well. Ultimately, the Parties were unable to resolve their dispute. As a result, on May 16, 2013,

Plaintiff served Trifecta with its portion of a Joint Statement on a Motion to Compel further responses to her First Set of discovery and on May 21, 2013, served its portion of a Joint Statement on a Motion to Compel responses to her Second Set of Discovery.

I. WHEREAS, as Plaintiff was preparing to file the first of the Motions To Compel, the Parties, along with Stonebridge, agreed to a stay of discovery so that they could attempt to resolve their dispute through mediation with a respected neutral at JAMS in San Francisco on June 21, 2013. The Action did not settle at mediation and the stay of discovery ended.

J. WHEREAS, when litigation resumed after the stay, the Parties began discussing the possible resolution of this Action between themselves.

K. WHEREAS, after further arms-length negotiations, including frank discussions of evidence in possession of Trifecta and information about which Trifecta was willing to provide testimony, the Parties agreed to resolve the case, and on July 10, 2013, executed a Memorandum of Understanding outlining the principle terms of their agreement.

L. WHEREAS, Trifecta denies any wrongdoing whatsoever, and it has denied and continues to deny that it committed, threatened, or attempted to commit, any of the wrongful acts or violations of law or duty that are alleged in the Action, and instead contends that it has acted properly. In addition, Trifecta maintains that it believed that any text messages sent by it or for it at all times went to Persons who had provided their consent to receive text messages. Nonetheless, taking into account the uncertainty and risks inherent in any litigation, Trifecta has concluded that defense of the Action would be burdensome and expensive, and that it is desirable and beneficial to fully and finally settle and terminate the Action in the manner and upon the terms and conditions set forth in this Settlement.

M. WHEREAS, Plaintiff believes that the claims asserted in the Action have merit and believes the continued prosecution of this Action against Stonebridge with the benefits obtained through this agreement is of significant value to the Class. Further, Plaintiff and Class Counsel recognize and acknowledge the risk, expense and length of continued prosecution of the Action against Trifecta through discovery disputes, dispositive motion practice, trial and any subsequent appeals. Plaintiff and Class Counsel have also taken into account the uncertain outcome and risks of any litigation, especially in complex actions, as well as the difficulties and delays inherent in such litigation.

N. WHEREAS, therefore, Plaintiff and Class Counsel believe that it is desirable that the Released Claims be fully and finally compromised, settled, and resolved with prejudice, and barred pursuant to this Settlement. Based on their evaluation, Class Counsel have concluded that the terms and conditions of this Settlement are fair, reasonable, and adequate to the Settlement Class, and that it is in the best interests of the Settlement Class to settle the claims raised in the Action pursuant to the terms and provisions of this Settlement.

WHEREFORE, IT IS HEREBY STIPULATED AND AGREED by the Parties that the Action and the claims released below as against the parties identified below shall be

finally and fully compromised, settled, and resolved on the terms and conditions set forth in this Settlement, as a good faith, fair, reasonable, and adequate settlement.

AGREEMENT

1. DEFINITIONS

The following section defines terms that are not defined above. Some definitions use terms that are defined later in this section:

1.1 “Action” means *Lee v. Stonebridge Life Insurance Company and Trifecta Marketing Group, LLC*, Case No. 11-cv-00043 RS, pending in the United States District Court for the Northern District of California.

1.2 “Call Back Agreement” means the August 18, 2010, contract entered into between Trifecta, Stonebridge, and Transamerica Life Insurance Company.

1.3 “Class” means “All individuals that received a text message from the telephone number “650-283-0793” from November 28, 2010 through December 2, 2010,” as certified in the Court’s February 12, 2013 Order. (Dkt. 97.)

1.4 “Class Counsel” means Edelson LLC, including any successor entity.

1.5 “Class Member” means a Person who falls within the definition of the Class as set forth above and who has not submitted a valid request for exclusion.

1.6 “Complaint” means the putative class action complaint filed by Plaintiff on January 4, 2011, the Amended Complaint filed on July 28, 2011, and any subsequent amendment thereto.

1.7 “Court” means the United States District Court for the Northern District of California, the Honorable Richard Seeborg presiding, or any judge who shall succeed him as judge in this Action.

1.8 “Defendant” and “Trifecta” mean Trifecta Marketing Group, LLC, a Florida limited liability company.

1.9 “Final” means one business day following the latest of the following events: (i) the date upon which the time expires for filing or noticing any appeal of the Court’s Final Judgment approving the Settlement Agreement; (ii) if there is an appeal or appeals, the date of completion, in a manner that finally affirms and leaves in place the Final Judgment without any material modification, of all proceedings arising out of the appeal or appeals (including, but not limited to, the expiration of all deadlines for motions for reconsideration or petitions for review and/or *certiorari*, all proceedings ordered on remand, and all proceedings arising out of any subsequent appeal or appeals following decisions on remand); or (iii) the date of final dismissal of any appeal or the final dismissal of any proceeding on *certiorari*.

1.10 “Final Approval Hearing” means the hearing before the Court where the Parties will request the Final Judgment to be entered by the Court approving the Settlement Agreement.

1.11 “Final Judgment” means the Final Judgment and Order to be entered by the Court approving the Agreement after the Final Approval Hearing.

1.12 “Plaintiff” means Jessica Lee, individually, and as representative of the certified class.

1.13 “Plaintiffs” means Jessica Lee and the Class Members, collectively.

1.14 “Preliminary Approval” means preliminary approval of the Settlement Agreement, and approval of the form and manner of the Notice.

1.15 “Memorandum of Understanding” means the agreement of the Parties outlining the general terms of this Agreement and providing for the immediate exchange of documentary evidence to Class Counsel and the agreement to provide additional testimony, documents, and evidence.

1.16 “Notice” means the notice of this proposed Settlement Agreement and Final Approval Hearing, which is to be sent to the Class substantially in the form and manner approved by the Court in its May 22, 2013 Order (Dkt. 110), but that includes the terms of the Parties’ settlement substantially in the manner set forth in this Agreement, is consistent with the requirements of Due Process, Rule 23, and is substantially in the form of Exhibits A, B, and C hereto.

1.17 “Notice Administrator” means Kurtzman Carson Consultants LLC (“KCC”), selected by the Plaintiff and approved by the Court to implement the distribution of Notice, including the CAFA notice, as set forth in this Agreement.

1.18 “Notice Date” means the date by which the Notice is complete, which shall be a date no later than twenty-one (21) days after entry of the Preliminary Approval Order.

1.19 “Objection/Exclusion Deadline” means the date by which a written objection to this Settlement Agreement or a request for exclusion submitted by a Person within the Class must be postmarked, which shall be designated as a date thirty-five (35) days after the Notice Date or such other date as ordered by the Court.

1.20 “Person” means any individual, corporation, trust, partnership, limited liability company or other legal entity and their respective predecessors, successors or assigns.

1.21 “Released Claims” means any and all actual, potential, filed, known or unknown, fixed or contingent, claimed or unclaimed, suspected or unsuspected, claims, demands, liabilities, rights, causes of action, contracts or agreements, extracontractual claims, damages, punitive, exemplary or multiplied damages, expenses, costs, attorneys’ fees and or obligations (including “Unknown Claims” as defined below), whether in law or in equity, accrued or unaccrued, direct, individual or representative, of every nature and description

whatsoever, whether based on the TCPA or other federal, state, local, statutory or common law or any other law, rule or regulation, including the law of any jurisdiction outside the United States, against the Released Parties, or any of them, arising out of the facts, transactions, events, matters, occurrences, acts, disclosures, statements, misrepresentations, omissions or failures to act regarding the sending of any text message from 650-283-0793 that was transmitted by or at the direction of Trifecta and received by the Plaintiffs, including all claims that were brought or could have been brought in the Action relating to such text messages, belonging to any and all Plaintiffs or their respective present or past heirs, executors, estates, administrators, predecessors, successors, assigns, parents, subsidiaries, associates, affiliates, employers, employees, agents, consultants, independent contractors, insurers, directors, managing directors, officers, partners, principals, members, attorneys, accountants, financial and other advisors, investment bankers, underwriters, lenders, and any other representatives of any of these Persons and entities.

1.22 “Released Parties” means Defendant Trifecta, as well as any and all of its respective present or past heirs, executors, estates, administrators, predecessors, successors, assigns, parents, subsidiaries, associates, affiliates, employers, employees, consultants, independent contractors, insurers, directors, managing directors, officers, partners, principals, members, attorneys, accountants, financial and other advisors, investment bankers, underwriters, shareholders, lenders, auditors, investment advisors, legal representatives, successors in interest, assigns and companies, firms, trusts, corporations, officers, or directors. This definition specifically excludes: (1) Stonebridge Life Insurance Company and all of its respective present or past heirs, executors, estates, administrators, predecessors, successors, assigns, parents, subsidiaries, associates, affiliates, employers, employees, consultants, independent contractors, insurers, directors, managing directors, officers, partners, principals, members, attorneys, accountants, financial and other advisors, investment bankers, underwriters, shareholders, lenders, auditors, investment advisors, legal representatives, successors in interest, assigns and companies, firms, trusts, corporations, officers, or directors (2) Persons from whom Trifecta obtained cellular phone numbers; (3) Entities on whose behalf any text message was transmitted by or for Trifecta; and (4) Persons who received leads that were driven from a text message that paid or otherwise compensated Trifecta or its agents to drive such traffic.

1.23 “Stonebridge” means defendant Stonebridge Life Insurance Company, a Vermont Corporation.

1.24 “Trifecta’s Counsel” or “Defendant’s Counsel” means the Law Offices of Alexander E. Sklavos, PC.

1.25 “Unknown Claims” means claims that could have been raised in the Action and that the Plaintiffs, or any or all other Persons and entities whose claims are being released, or any of them, do not know or suspect to exist, which, if known by him, her or it, might affect his, her or its agreement to release the Released Parties or the Released Claims or might affect his, her or its decision to agree, object or not to object to the Settlement. Upon the Settlement becoming Final, Plaintiffs and all other Persons and entities whose claims are being released shall be deemed to have, and shall have, expressly waived and

relinquished, to the fullest extent permitted by law, the provisions, rights and benefits of § 1542 of the California Civil Code, which provides as follows:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

Upon the Effective Date, Plaintiffs and all other Persons and entities whose claims are being released, also shall be deemed to have, and shall have, waived any and all provisions, rights and benefits conferred by any law of any state or territory of the United States, or principle of common law, or the law of any jurisdiction outside of the United States, which is similar, comparable or equivalent to § 1542 of the California Civil Code. Plaintiffs acknowledge that they may discover facts in addition to or different from those that they now know or believe to be true with respect to the subject matter of this release, but that it is their intention to finally and forever to settle and release the Released Claims, notwithstanding any Unknown Claims they may have, as that term is defined in this Paragraph.

2. SETTLEMENT RELIEF

2.1 Injunctive Relief. Trifecta agrees that it shall consent to the entry of an injunction, to be included as part of the Final Judgment, requiring that the following be instituted on or before the Effective Date and to remain in effect for a period of four (4) years:

(a) Trifecta shall not make, or cooperate with others to make, SMS text calls to cellular phones unless each text-message recipient has given explicit prior express consent to receive such text messages (in a manner explained below);

(b) Trifecta shall require any contract it enters into for the purpose of obtaining consumer cell phone numbers to transmit text messages, to provide that Trifecta and each entity with whom it contracts to obtain consumer cell phone numbers shall keep documented proof of all prior express consent received from the owners of said cell phone numbers for a period of four (4) years after said consent is obtained;

(c) Trifecta shall require any contract it enters into for the purpose of obtaining consumer cell phone numbers to transmit text messages, to state that the requisite "prior express consent" must be obtained by written means, including electronic methods, and require that if a cellular phone number is obtained on a website, that any authorization must include an affirmative action on the part of the consumer, such as checking a box or clicking on an "I Accept," "Submit," "Proceed," or similar button with disclosures informing that the affirmative action will result in receiving text messages, which are presented on the same page as the required affirmative action indicating consent, with the text of such disclosers placed within a reasonable distance (for example

200 pixels on a 100 PPI screen) from the telephone number field or submit button, and in text of sufficient size and contrast to be clearly legible.

2.2 Injunction Costs. Trifecta will pay all costs associated with the implementation of the injunction.

2.3 Complete Cooperation. Upon Preliminary Approval, Trifecta agrees to provide Plaintiff and Class Counsel with its complete and full cooperation in the continued prosecution of the Action against Stonebridge, including appearing at any trial and through any appeals. In furtherance of its agreement to cooperate, Trifecta has specifically agreed to provide without objection or raising of privilege:

(a) Declarations or other testimony, along with all others documents, truthfully attesting that Stonebridge (and/or its related entities) had knowledge of and authorized the text messaging that was performed for the Call Back Agreement;

(b) Declarations or other testimony, along with all others documents, truthfully attesting to Trifecta's causing to be sent the text messages to the Class for the Call Back Agreement with Stonebridge;

(c) Declarations or other testimony, along with all others documents, truthfully attesting to Stonebridge's involvement in the Call Back Agreement, including all text messaging conducted pursuant to the that agreement;

(d) Declarations or other testimony confirming the authenticity of certain documents produced in discovery for purposes of continued motion practice or trial of the Action against Stonebridge;

(e) Declarations and all other documents involving Stonebridge (and/or its related entities) related to text messaging campaigns, the Call Back Agreement, or that could be used to demonstrate Stonebridge's potential liability or its failure to produce documents to Plaintiff in discovery (including, if necessary, waiver of discovery objections);

(f) Declarations and/or financial documents supporting Trifecta's representation that it is financial inability to sustain a judgment or to financially contribute to any monetary settlement to the class; and

(g) Truthful sworn answers to Plaintiff's First Request to Admit Facts and certain other discovery identified by Class Counsel.

3. RELEASE

3.1 The obligations incurred pursuant to this Settlement Agreement shall be a full and final disposition of the Action and any and all Released Claims, as against all Released Parties.

3.2 Upon the date the Agreement becomes Final, the Releasing Parties, and each

of them, shall be deemed to have, and by operation of the Final Judgment shall have, fully, finally, and forever released, relinquished, and discharged all Released Claims against the Released Parties, and each of them.

4. NOTICE TO THE CLASS

4.1 Plaintiff has agreed to pay for the costs of notice, to occur concurrently with notice of class certification, substantially in the form and manner approved by the Court in its May 22, 2013 Order (Dkt. 110), but including the terms of the Parties' settlement and the rights of the Class regarding this Settlement. Notice will be disseminated to the Class as follows:

(a) *Direct Notice.* KCC will use the list of 59,568 unique cell phone numbers of the Class members obtained through discovery from cellular telephone carrier T-Mobile U.S.A. to perform a "reverse look-up" to determine U.S. mailing and email addresses associated with those cell phone numbers. KCC estimates that the reverse look-up will obtain valid U.S. Mail and/or email addresses for 55.7% and 70.7% of the Class. KCC will then send direct notice, substantially in the form attached hereto as Exhibit A, through First Class U.S. Mail and email to the addresses obtained.

(b) *Internet Banner Notice.* KCC will supplement the direct mail and email notice via Internet banner ads, substantially in the form attached hereto as Exhibit B, on the 24/7 Real Media Internet Network, which allows access to over 4,000 premium websites. These ads will run for a one-month period. Depending on the percentage of Class member addresses obtained through the reverse look-up, KCC will implement an Internet media campaign that will generate between 25 and 95 million unique impressions, which it has determined that, in combination with the other notice contemplated by this section, will be sufficient to achieve notice reach to over 70% of the Class.

(c) *Website Notice.* Within ten (10) days following the entry of the Preliminary Approval Order, Notice shall be provided on a website at www.LeeTextMsgCase.net, which shall be administered by the Notice Administrator. The Notice on the Website shall be substantially in the form of Exhibit C hereto.

(d) *Press Release.* Within fourteen (14) days of the entry of the Preliminary Approval Order, the Notice Administrator shall distribute a press release prepared by Class Counsel to local, national, and syndicated news organizations discussing the terms of the Agreement in a manner that in no way disparages Trifecta.

(e) *CAFA Notice.* Pursuant to 28 U.S.C. § 1715, not later than ten (10) days after the Agreement is filed with the Court, the Notice Administrator shall serve upon the Attorneys General of each U.S. State, the Attorney General of the United States, and other required government officials, notice of the proposed settlement, which shall include (1) a copy of the most recent complaint and all materials filed with the complaint or notice of how to electronically access such materials; (2) notice of scheduled judicial hearings in the Action; (3) all proposed forms of Notice; and (4) a copy of this Agreement. The Settlement Administrator shall serve upon the above-referenced government officials the

names of Class members who reside in each respective state, or if not feasible, a reasonable estimate of the number of Class members residing in each state.

4.2 The Notice shall be conducted jointly with the notice of class certification and advise the Class of their rights, including the right to be excluded from, comment upon, and/or object to the Settlement Agreement or its terms. The Notice shall specify that any objection to the Settlement Agreement, and any papers submitted in support of said objection, shall be considered by the Court at the Final Approval Hearing only if, on or before the Objection/Exclusion Deadline approved by the Court and specified in the Notice, the Person making an objection files notice of his or her intention to do so and at the same time (a) files copies of such papers he or she proposes to submit at the Final Approval Hearing with the Clerk of the Court, (b) that any objection made by a Class Member represented by counsel must be filed through the Court's CM/ECF system, and (c) sends copies of such papers mail, hand, or overnight delivery service to Class Counsel and Trifecta's Counsel.

4.3 Any member of the Class who intends to object to this Agreement must include in the objection his/her name and address, include all arguments, citations, and evidence supporting the objection (including copies of any documents relied on), state that he or she is a Class Member, provide the cellular phone number that received the text message from 650-283-0793 and provide a statement indicating whether the objector intends to appear at the Final Approval Hearing with or without counsel. Any Class Member who fails to timely file a written objection with the Court and notice of his or her intent to appear at the Final Approval Hearing in accordance with the terms of this paragraph and as detailed in this Notice, and at the same time provide copies to designated counsel for the Parties, 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, her or its objections and be forever barred from making any such objections in the Action or any other action or proceeding. To be valid, the objection must be filed with the Court and sent to Class Counsel and Trifecta's Counsel on or before the Objection/Exclusion Deadline approved by the Court and specified in the Notice.

4.4 A member of the Class may request to be excluded from the Class for purposes of this Settlement, or the Class for purposes of certification and continued prosecution of the Action against Stonebridge, or both, by sending a written request postmarked on or before the Objection/Exclusion Deadline approved by the Court and specified on the Notice. In order to exercise the right to be excluded, a member of the Class must timely send a written request for exclusion to the Notice Administrator providing his/her name and address, the cellular phone number that received the text message from 650-283-0793, a signature, the name and number of the case, and a statement that he/she wishes to be excluded from the Class for purposes of this Settlement, or the Class for purposes of certification and continued prosecution of the Action against Stonebridge, or both. A request to be excluded that does not include all of this 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 the Person(s) serving such a request shall be a member(s) of the Class and shall be bound as Class Member by the Court's Order granting class certification and by this Agreement, if approved. Any member of the Class who elects to be

excluded from this Agreement shall not: (i) be bound by any orders of the Final Order; (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. The request for exclusion must be personally signed by the Person requesting exclusion. So-called "mass" or "class" opt-outs shall not be allowed.

5. NOTICE AND SETTLEMENT ADMINISTRATION

5.1 The Notice Administrator shall, under the supervision of the Court, administer the Notice in a rational, responsive, cost effective, and timely manner. The Notice Administrator shall maintain reasonably detailed records of its activities under this Agreement. The Notice Administrator shall maintain all such records as are required by applicable law in accordance with its normal business practices, and such records will be made available to Class Counsel and Trifecta's Counsel upon request. The Notice Administrator shall also provide reports and other information to the Court as the Court may require. The Notice Administrator shall provide Class Counsel and Trifecta's Counsel with information concerning Notice, administration and implementation of the Settlement Agreement, including testimony regarding the sufficiency of the Notice.

5.2 The Notice Administrator shall receive exclusion forms and other requests from the Class members for purposes of this Settlement, or the Class for purposes of certification and continued prosecution of the Action against Stonebridge, or both, and promptly provide to Class Counsel and Trifecta's Counsel copies thereof upon receipt. If the Notice Administrator receives any exclusion forms or other requests from the Class after the deadline for the submission of such forms and requests, the Notice Administrator shall promptly provide copies thereof to Class Counsel and Trifecta's Counsel.

6. TERMINATION OF SETTLEMENT

6.1 Subject to Paragraph 8 below, Plaintiff, on behalf of the Class, or Trifecta shall have the right to terminate this Agreement by providing written notice of the election to do so ("Termination Notice") to all other Parties to this Agreement within twenty-one (21) days, of any of the following events: (i) the Court's refusal to grant Preliminary Approval of this Agreement in any material respect; (ii) the Court's refusal to grant final approval of this Agreement in any material respect; (iii) the Court's refusal to enter the Final Judgment in this Action in any material respect; (iv) the date upon which the Final Judgment (as defined in Section 1.11) is modified or reversed in any material respect by the Court of Appeals or the Supreme Court; or (v) the date upon which an Alternative Judgment, as defined in Paragraph 8.1 of this Agreement is modified or reversed in any material respect by the Court of Appeals or the Supreme Court.

6.2 If Defendant fails in any material respect to provide the cooperation in Paragraph 2.3 above, Plaintiff, on behalf of the Class, shall have the option to terminate this Agreement. Plaintiff, through Class Counsel, may terminate the Agreement and reinstate the Action against Defendant by filing a notice of termination with the Court and serving written notice on Trifecta's Counsel by hand delivery or overnight courier within fourteen (14) days of learning of any material breach of Defendant's obligations set forth in Paragraph 2.3.

7. PRELIMINARY APPROVAL ORDER AND FINAL APPROVAL ORDER

7.1 Promptly after the execution of this Settlement Agreement, Class Counsel shall submit this Agreement together with its Exhibits to the Court and shall move the Court for Preliminary Approval of the settlement set forth in this Agreement and for entry of a Preliminary Approval Order, which order shall set a Final Approval Hearing date and approve the Notice substantially in the form Exhibits A, B, and C hereto. Such Preliminary Approval Order shall also authorize the Parties, without further approval from the Court, to agree to and adopt such amendments, modifications and expansions of the Settlement Agreement and its implementing documents (including all exhibits to this Agreement) so long as they are consistent in all material respects with the Final Judgment and do not limit the rights of the Class.

7.2 At the time of the submission of this Agreement to the Court as described above, Class Counsel shall request that, after Notice is given, the Court hold a Final Approval Hearing and approve the settlement of the Action as set forth herein.

7.3 After Notice is given, the Parties shall request and obtain from the Court a Final Judgment. The Final Judgment will (among other things):

(a) find that the Court has personal jurisdiction over all Class Members and that the Court has subject matter jurisdiction to approve the Agreement, including all exhibits thereto;

(b) approve the Settlement Agreement and the proposed settlement as fair, reasonable and adequate as to, and in the best interests of, the Class Members; direct the Parties and their counsel to implement and consummate the Agreement according to its terms and provisions; and declare the Agreement to be binding on, and have *res judicata* and preclusive effect in all pending and future lawsuits or other proceedings maintained by or on behalf of Plaintiff and Releasing Parties;

(c) find that the Notice implemented pursuant to the Agreement (1) constitute the best practicable notice under the circumstances, (2) constitute notice that is reasonably calculated, under the circumstances, to apprise the Class Members of the pendency of the Action, their right to object to or exclude themselves from the proposed Agreement, and to appear at the Final Approval Hearing, (3) are reasonable and constitute due, adequate, and sufficient notice to all persons entitled to receive notice, and (4) meet all applicable requirements of the Federal Rules of Civil Procedure, the Due Process Clause of the United States Constitution, and the rules of the Court;

(d) find that the Class Representative and Class Counsel adequately represented the Class for purposes of entering into and implementing the Agreement;

(e) dismiss the Action on the merits and with prejudice as to the Released Parties, without fees or costs to any Party except as provided in the Settlement Agreement;

(f) incorporate the Release set forth above, make the Release effective as of the date of the Final Judgment, and forever discharge the Released Parties as set forth

herein;

(g) permanently bar and enjoin all Class Members who have not been properly excluded from the Class from filing, commencing, prosecuting, intervening in, or participating (as class members or otherwise) in, any lawsuit or other action in any jurisdiction based on the Released Claims;

(h) without affecting the finality of the Final 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 Judgment, and for any other necessary purpose; and

(i) incorporate any other provisions, as the Court deems necessary and just.

8. CONDITIONS OF SETTLEMENT, EFFECT OF DISAPPROVAL, CANCELLATION OR TERMINATION.

8.1 If the Agreement does not become Final, or in the event that this Agreement is not approved by the Court, or, in the event that the Court enters an order and final judgment in a form other than that provided above (“Alternative Judgment”), or the settlement set forth in this Agreement is terminated or fails to become effective in accordance with its terms, then this Settlement Agreement shall be canceled and terminated subject to Paragraph 8.2 unless Class Counsel and Trifecta’s Counsel mutually agree in writing to proceed with this Agreement. If any Party is in willful material breach of the terms hereof, any other Party, provided that it is in substantial compliance with the terms of this Agreement, may terminate this Agreement on notice to the other party.

9. CONFIRMATORY DISCOVERY

9.1 In addition to the information and documents received as part of the Action and to be provided pursuant to the Memorandum of Understanding and Paragraph 2.3, Trifecta shall, to the extent available, provide to Class Counsel reasonable additional discovery and information as is necessary to confirm the material representations concerning their lack of applicable insurance coverage and financial condition that form the basis of this Agreement. Should the occasion arise, the Parties shall cooperate in seeking any third-party, that the Parties acknowledge are not under the control of Trifecta, discovery as may be necessary and appropriate, and said additional discovery is to be completed prior to the Final Approval Hearing.

10. MISCELLANEOUS PROVISIONS

10.1 Trifecta represents and warrants that it is financially unable to provide the monetary relief sought by Plaintiff in the Action on behalf of the Class, which is why Trifecta has agreed to provide and Plaintiff has agreed, in part, to accept the relief contemplated above.

10.2 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. Class Counsel and Trifecta's Counsel agree to cooperate with one another in seeking Court approval of the Preliminary Approval Order, the Settlement Agreement, and the Final Judgment, and promptly to agree upon and execute all such other documentation as may be reasonably required to obtain final approval of the Agreement.

10.3 The Parties intend this Settlement Agreement to be a final and complete resolution of all disputes between them with respect to the Released Claims by Plaintiff and the Class on the one hand, against the Released Parties on the other hand. Accordingly, the Parties agree not to assert in any forum that the Action was brought by Plaintiff or defended by Trifecta in bad faith or without a reasonable basis.

10.4 The Parties have relied upon the advice and representation of counsel, selected by them, concerning their respective legal liability for the claims hereby released. The Parties have read and understand fully the above and foregoing agreement and have been fully advised as to the legal effect thereof by counsel of their own selection and intend to be legally bound by the same.

10.5 Whether or not the Agreement becomes Final or the Settlement Agreement is terminated, neither this Agreement nor the settlement contained herein, nor any act performed or document executed pursuant to or in furtherance of this Agreement or the settlement:

(a) is, may be deemed, or shall be used, offered or received against the Released Parties, or each or any of them, as an admission, concession or evidence of, the validity of any Released Claims, the truth of any fact alleged by the Plaintiff, the deficiency of any defense that has been or could have been asserted in the Action, the violation of any law or statute, the reasonableness of the settlement amount or the fee award, or of any alleged wrongdoing, liability, negligence, or fault of the Released Parties, or any of them;

(b) is, may be deemed, or shall be used, offered or received against Trifecta as an admission, concession or evidence of any fault, misrepresentation or omission with respect to any statement or written document approved or made by the Released Parties, or any of them;

(c) is, may be deemed, or shall be used, offered or received against the Released Parties, or each or any of them, as an admission or concession with respect to any liability, negligence, fault or wrongdoing as against any Released Parties, in any civil, criminal or administrative proceeding in any court, administrative agency or other tribunal. However, the settlement, this Agreement, and any acts performed and/or documents executed in furtherance of or pursuant to this Agreement and/or Settlement may be used in any proceedings as may be necessary to effectuate the provisions of this Agreement. However, if this Settlement Agreement is approved by the Court, any Party or any of the Released Parties may file this Agreement and/or the Final Judgment in any action that may be brought against

such Party or Parties in order to support a defense or counterclaim based on principles of *res judicata*, collateral estoppel, release, good faith settlement, judgment bar or reduction, or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim;

(d) is, may be deemed, or shall be construed against Plaintiff, the Class or each or any of them, or against the Released Parties, or each or any of them, as an admission or concession that the consideration to be given hereunder represents an amount equal to, less than or greater than that amount that could have or would have been recovered after trial; and

(e) is, may be deemed, or shall be construed as or received in evidence as an admission or concession against Plaintiff, the Class, or each and any of them, or against the Released Parties, or each or any of them, that any of Plaintiff's claims are with or without merit or that damages recoverable in the Action would have exceeded or would have been less than any particular amount.

10.6 The headings used herein are used for the purpose of convenience only and are not meant to have legal effect.

10.7 The waiver by one Party of any breach of this Agreement by any other Party shall not be deemed as a waiver of any other prior or subsequent breaches of this Agreement.

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

10.9 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 the matters set forth herein. 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.

10.10 Except as otherwise provided herein, each Party shall bear its own costs.

10.11 Plaintiff represents and warrants that she has not assigned any claim or right or interest therein as against the Released Parties to any other Person or Party and that she is fully entitled to release the same.

10.12 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.

10.13 This Agreement may be executed in one or more counterparts. All executed counterparts and each of them shall be deemed to be one and the same instrument provided that counsel for the Parties to this Agreement all exchange original signed counterparts. A

complete set of original executed counterparts shall be filed with the Court if the Court so requests.

10.14 This Settlement Agreement shall be binding upon, and inure to the benefit of, the successors and assigns of the Parties hereto and the Released Parties.

10.15 The Court shall retain jurisdiction with respect to implementation and enforcement of the terms of this Agreement, and all Parties hereto submit to the jurisdiction of the Court for purposes of implementing and enforcing the settlement embodied in this Agreement.

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

10.17 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.

10.18 Where this Agreement requires notice to the Parties, such notice shall be sent to the undersigned counsel: Ryan D. Andrews, Edelson LLC, 350 North LaSalle Street, Suite 1300, Chicago, Illinois 60654; Alexander E. Sklavos, Law Offices of Alexander E. Sklavos, P.C., 375 North Broadway, Ste. 208, Jericho, NY 11753.

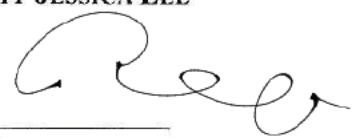
[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK. SIGNATURE PAGE FOLLOWS]

IT IS SO AGREED TO BY THE PARTIES.

Dated: October __, 2013

PLAINTIFF JESSICA LEE

By: _____



Jessica Lee

Individually and as representative of the Class

Dated: October __, 2013

TRIFECTA MARKETING GROUP, LLC.

By: _____

Trifecta Marketing Group LLC's:

(title): _____

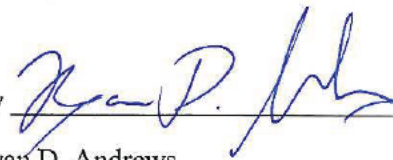
IT IS SO STIPULATED BY COUNSEL:

Dated: October 21, 2013

EDELSON LLC

Attorneys for Plaintiff and the Class

By _____



Ryan D. Andrews

IT IS SO AGREED TO BY THE PARTIES.

Dated: October __, 2013

PLAINTIFF JESSICA LEE

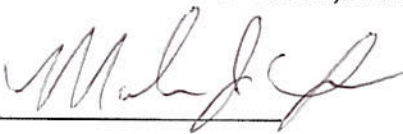
By: _____

Jessica Lee

Individually and as representative of the Class

Dated: October __, 2013

TRIFECTA MARKETING GROUP, LLC.

By: 

Mark J. Lyow

Trifecta Marketing Group LLC's:

(title): President

IT IS SO STIPULATED BY COUNSEL:

Dated: October 21, 2013

EDELSON LLC

Attorneys for Plaintiff and the Class

By  _____

Ryan D. Andrews

Dated: October 23 2013

LAW OFFICES OF ALEXANDER E.
SKLAVOS, PC

Attorneys for Trifecta Marketing Group, LLC

By _____



Alexander E. Sklavos