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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

AMY VIGGIANO, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,

Plaintiff,

v.

KOHL'S DEPARTMENT STORES,
INC.,

Defendant.

Civil Action No. 3:17-cv-00243-BRM-
TJB

Honorable Brian R. Martinotti, U.S.D.J.
Motion Return Date: May 1, 2017

NOTICE OF MOTION

PLEASE TAKE NOTICE that on May 1, 2017, at 9:00 a.m., or as soon thereafter as counsel may be heard, Defendant Kohl's Department Stores, Inc. ("Kohl's"), of N95W18000 Appleton Ave, Menomonee Falls, Wisconsin, 53051, shall move through its attorneys Kelley Drye & Warren LLP, before the Honorable Brian R. Martinotti, U.S.D.J. of the United States District Court for the District of New Jersey, Clarkson S. Fisher Building & U.S. Courthouse, 402 East State Street,

Trenton, New Jersey 08608, for an order dismissing the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), or in the alternative, striking the class allegations in the above-captioned action.

PLEASE TAKE FURTHER NOTICE that in support of this motion, Kohl's shall rely upon the accompanying Memorandum of Law and Declaration of Aaron Johnson, together with any papers that Kohl's may submit in reply to any opposition filed.

PLEASE TAKE FURTHER NOTICE that a proposed form of order is also submitted herewith.

PLEASE TAKE FURTHER NOTICE that if this motion is opposed, Kohl's requests oral argument.

Dated: March 29, 2017

Respectfully submitted,

/s/ Jeffrey S. Jacobson

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CERTIFICATE OF SERVICE

I, Jeffrey S. Jacobson, hereby certify that a true and correct copy of Defendant Kohl's Department Stores, Inc.'s Motion to Dismiss Plaintiff's Class Action Complaint Pursuant To Fed. R. Civ. P. 12(b)(6), Or, In The Alternative, To Strike The Class Allegations In The Complaint, Memorandum of Law and Declaration of Aaron Johnson in Support, and form order were filed on this 29th day of March 2017 using the Court's ECF system and is available for downloading and viewing by the following:

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KOHL'S DEPARTMENT STORES,
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Civil Action No. 3:17-cv-00243-BRM-
TJB

Oral Argument Requested

Electronically Filed

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT KOHL'S
DEPARTMENT STORES, INC.'S MOTION TO DISMISS PLAINTIFF'S
CLASS ACTION COMPLAINT PURSUANT TO FED. R. CIV. P. 12(B)(6)
OR, IN THE ALTERNATIVE, TO STRIKE THE
CLASS ALLEGATIONS IN THE COMPLAINT**

Kohl's Department Stores, Inc. ("Kohl's") respectfully submits this memorandum of law in support of its motion to dismiss the Class Action Complaint (the "Complaint") of plaintiff Amy Viggiano ("Plaintiff") pursuant to

Rule 12(b)(6) of the Federal Rules of Civil Procedure, or, in the alternative, to strike the class allegations contained in the Complaint pursuant to Rules 12(f) and/or 23(a) of the Federal Rules of Civil Procedure. In addition to this memorandum of law, Kohl's relies on the Declaration of Aaron Johnson, dated March 29, 2017, (the "Johnson Decl.") submitted herewith.

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PRELIMINARY STATEMENT

Plaintiff undisputedly requested to receive text messages from Kohl's with sale and discount information. Equally undisputedly, Kohl's told all those who requested and received these messages that they had a ready means to stop the messages if they no longer wished to receive them: All they had to do was text "STOP" in response to any message. Plaintiff never texted a "STOP" message and does not contend that she did. She texted other sentence-long messages that she contends should have sufficed as a revocation of consent, and she brings the novel claim that Kohl's supposedly violated the Telephone Consumer Protection Act (the "TCPA") by, as she artfully phrases it, sending "text messages to consumers after purporting to designate the exclusive means by which consumers may withdraw consent to receive such messages." This claim must be dismissed because, as the Federal Communications Commission ("FCC") has made clear, Kohl's was within its rights to set a straightforward revocation method for consumers like texting "STOP," and Plaintiff cannot complain about her continued receipt of messages because she refused to follow that simple instruction.

A law school exam writer could not fashion a more ridiculous hypothetical than Plaintiff's actual claim here. She admits in her Complaint that she consented to receive automated, commercial text messages from Kohl's providing her with discounts and other sale-related information. Following Kohl's instructions, she

sent two inbound messages to Kohl's, by texting in the command "SAVE02" and "SAVE" requesting to sign up for Kohl's text messaging program. Plaintiff was advised repeatedly in incoming messages that Plaintiff subsequently received from Kohl's that she could stop the messages if she no longer wished to receive them: All she had to do was respond with the single word "stop." (Kohl's automated system also would accept "cancel," "quit," "unsubscribe," and "end.") Rather than follow that simple instruction, however, Plaintiff sent longer, convoluted messages like "I've changed my mind and don't want to receive these anymore." Kohl's automated system repeatedly responded with a message saying "we don't understand" and repeating that Plaintiff could cancel messages at any time just by texting "stop."

A cynic might say that Plaintiff sent messages other than "stop" for the express purpose of ginning up a lawsuit. She contends in this case that Kohl's continued to send her messages after she "communicated" a desire that the messages cease, albeit not in the way that Kohl's instructed would be effective. Whether or not that was Plaintiff's intent, however, this lawsuit fails. By providing her express written consent to receive text messages from Kohl's, Plaintiff consented to receive those messages unless and until she communicated a "stop" request *in the manner set forth in the instructions to which Plaintiff consented*. The FCC has held it sufficient for a calling party to "give

consumers a direct opt-out mechanism such as [. . .] a reply of ‘STOP’ for text messages.” (30 FCC Rcd 7961, 7996.) In addition, the Mobile Marketing Association’s *U.S. Consumer Best Practices for Messaging* guidelines, which sets industry standards for messaging, endorses the exact mechanism presented to consumers by Kohl’s to cease receiving messages. Plaintiff cannot claim a violation of law or damages based on her failure to follow Kohl’s simple instruction.

Even if Plaintiff could proceed with her TCPA claim, her class claims fail on their face and should be stricken. Revocation cases under the TCPA are especially unsuited for class action treatment, and federal courts regularly strike class claims from revocation complaints at the pleading stage. Even were it the law — as it is not — that Kohl’s must accept other forms of texted-in revocation besides “STOP” (and its synonyms), the question of whether sentence-length texts like Plaintiff’s amounted to valid revocation would be inherently individualized. Because that fatal flaw in Plaintiff’s proposed class is clear from the face of the Complaint and cannot be cured through amendment or facts adduced in discovery, the Court can and should reject the class *now*, at the pleading stage. *See* Fed. R. Civ. P. 23(c)(1)(A) (requiring determination of class certification issues “[a]t an early practicable time”).

RELEVANT BACKGROUND

A. The Complaint

On January 12, 2017, Plaintiff filed a Complaint against Kohl's on behalf of herself and a putative class, asserting two causes of action: (1) Count I for Negligent Violations of the TCPA; and (2) Count II for Knowing and/or Willful Violation of the TCPA

The TCPA, as it relates to Plaintiff's allegations in the Complaint, prohibits sending a text message for commercial purposes to a cellular telephone using an automated telephone dialing system ("ATDS") without the prior express written consent of the person called. 47 U.S.C. § 227(b); 47 C.F.R. § 64.1200(a)(2).

Plaintiff admits that in 2016 she "consented to receive automated commercial text messages from" Kohl's. (Compl. ¶ 12.) Plaintiff claims that for some unspecified amount of time, she received text messages that she requested and for which she had given Kohl's express consent to receive. Plaintiff alleges, however, that she thereafter later withdrew consent to receive the text messages and notified Kohl's multiple times using a "reasonable method." (Compl. ¶ 13.) Specifically, Plaintiff contends that she attempted to revoke consent by sending the following text messages to Kohl's:

- (1) "I've changed my mind and don't want to receive these anymore."
- (2) "Please do not send any further messages."

(3) "...I don't want these messages anymore. This is your last warning!"

(Compl. ¶ 13.)

Kohl's automated system responded to each of these messages with the following reply message:

Sorry we don't understand the request! Text SAVE to join mobile alerts. Msg&DataRatesMayApply. Receive 5-7 msgs/mon. Reply HELP for help, STOP to cancel.

(Johnson Decl. ¶¶ 23, 25, 27.)

Plaintiff does not allege that she ever simply texted "STOP" (or a synonym of "stop"), even after Kohl's system reminded her that this was the means to cancel the text message subscription she voluntarily initiated. Plaintiff alleges, instead, that Kohl's violated the TCPA by allegedly designating an exclusive means by which customers could revoke consent to receiving text messages. *See* Compl. ¶¶ 1, 11.

Based on the text messages that Plaintiff claim to have received, Plaintiff seeks to represent the following nationwide class:

All persons in the United States to whom Defendant has sent any automated commercial text message during the applicable statute of limitations period after designating an exclusive means by which consumers may revoke consent to receive text messages from Defendant.

(Compl. ¶ 16.)

B. At All Times Relevant, Kohl's Has Only Sent Promotional Text Messages to Consumers Who Provided Prior Express Written Consent

Kohl's operates family-oriented department stores that sell moderately priced apparel, footwear and accessories for women, men and children; soft home products such as sheets and pillows; and housewares. Kohl's, like many other retailers and other businesses, offers its customers an opportunity to receive recurring sales alerts and/or mobile coupons by short message service (SMS) text messages. (Johnson Decl. ¶ 3.)

Kohl's customers are advised, by email, by social media, by the Kohl's website, in print media, and/or in a Kohl's retail location (the "Calls to Action"), that they may sign-up to receive Kohl's mobile sales alerts by texting a keyword (*i.e.*, "SAVE14") to the program's short code. (*Id.* ¶ 4.) Plaintiff does not contend (nor could she) that Kohl's sent these messages to anyone who did not specifically ask for them. While the Calls to Action have varied over time and vary based on the specific promotion, they all advise consumers that, among other things, by signing up, they will receive the text message sales alerts or coupons that they have requested. (*Id.* ¶ 5.) The Calls to Action in place since October 2013 contain a reference and/or an electronic link to the Terms & Conditions that apply to the specific program. (*Id.*)

Given the various means through which a customer may agree to a Call to Action and the fact that Calls to Action have varied, customer experiences also vary with respect to signing up for Kohl's mobile alerts and/or coupon. (*Id.* ¶ 6.)

For example, the following is an example of a Call to Action sent to customers by email:



SIGN UP FOR KOHL'S MOBILE SALE ALERTS!

Plus, take an extra 15% off your next online purchase!
We'll text you a Promo Code to save. Msg&Data Rates may apply.*

TEXT SAVE14 TO 56457 (KOHL'S)

*Messages sent via auto-dialed text message to your mobile number. Approx. 5-7 msgs/mo. Participation not required to make a purchase. Reply HELP for help, STOP to cancel. You must be 18 years or older to participate. See Kohls.com/sms for other program Terms & Conditions.

(*Id.* ¶ 7.)

The following is an example of a call to action on Kohl's homepage:



TEXT US, GET 15% OFF!

We'll send you a 15% off online promo code right away! Just text **SAVE02** to **56457 (KOHL'S)** to sign up.*

*Messages sent via auto-dialed text message to your mobile number. Approx. 7 msgs/mon. Msg&Data Rates May Apply. Participation not required to make a purchase. Reply HELP for help, STOP to cancel. You must be 18 years or older to participate. See Kohls.com/sms for other program Terms & Conditions. U.S. residents only.

(*Id.* ¶ 8.)

Under the Terms & Conditions, customers agree to certain terms, including that they:

[W]ill receive approx. 5-7 autodialed text messages per month to [their] mobile number. Msg&Data Rates May Apply. Reply **HELP** for help. Reply **STOP** to opt out. [They] must be 18 years old or older to participate or have parent/guardian permission. U.S. residents only.

(*Id.* ¶ 10, Ex A (emphasis in original).)

The Terms & Conditions further provide as follows:

How to Sign-Up.

- a. Sign-up for the Program by texting SAVE[] to 56457.
- b. You will receive approximately 5-7 Text Messages per month.

How to Opt-Out.

- a. To stop receiving future Text Messages from Kohl's pursuant to the Kohl's Mobile Sales Alerts Program, you can text any of the following commands to 56457:

- STOP
- CANCEL
- QUIT
- UNSUBSCRIBE
- END

- b. Once you have taken this step to opt-out of the Program, you will receive a final confirmation Text Message, and thereafter, no further Text Messages will be sent to your mobile number (unless you want to opt-in again by following the steps outlined above).

Acceptance by You.

a. By affirmatively signing-up for Kohl's Text Messages and/or otherwise using the Service provided by us, you have expressly agreed to be bound by the terms and conditions herein ("Agreement"), and you are consenting to receive Kohl's Text Message disclosures ("Disclosures") electronically. If you do not consent to the terms of this Agreement and do not agree to receive electronic Disclosures, you must immediately cease using the Services that you have received and contact us as provided below.

b. Your consent to this Agreement includes authorization for Kohl's to deliver advertising messages using an auto-dialer (and/or non-auto-dialer technology) to the mobile phone number you supply when you opt-in.

c. You acknowledge that your consent to this Agreement is not in any way required as a condition of making purchases at Kohl's stores or Kohls.com.

d. You should print or store a copy of this Agreement for your records, as well as any Disclosure that is important to you. In order to do so, you must have a SSL-enabled web browser and capability to print or store Disclosures.

(*Id.* ¶ 11, Ex. A (emphasis in original).)

After a customer sends a text to Kohl's containing the keyword set forth in the Call to Action, he or she will immediately receive:

(1) a welcome text, which contains the following statement (or a substantially similar statement): Welcome to Kohl's Mobile Alerts! Keep up w/ Kohl's savings. Msg&Data Rates May Apply. Get 5-7 msgs per month. Reply HELP for HELP. STOP to cancel;" and

(2) a text messaging containing a welcome SMS Code, which text message includes the following statement (or a substantially similar statement): "KohlsAlerts: Sign-up offer: Get 15% off at Kohls.com. Use code SMS[CODE] until [Date]. Terms: www.kohls.com/sms. Reply HELP for help, STOP to cancel."

(*Id.* ¶ 12.)

If a customer sends a text message to Kohl's that does not contain one of the key words, they will receive a message that says:

Sorry we don't understand the request! Text SAVE to join mobile alerts. Msg&DataRatesMayApply. Receive 5-7 msgs/mon. Reply HELP for help, STOP to cancel.

(*Id.* ¶ 13.)

C. Kohl's Records Show That Plaintiff Provided Prior Express Written Consent To Receive Promotional Text Messages

Kohl's maintains records for wireless telephone numbers that participate in its mobile sale alerts programs, including the date that on which a consumer sent a text to Kohl's requesting to participate in a program, whether such consumer requested that Kohl's stop sending text messages, and the text messages that were sent to such consumer. (*Id.* ¶ 14.)¹ According to Kohl's records, Kohl's received an inbound text message containing the keyword "SAVE02" from the Plaintiff's Number at 2:22 p.m. on November 18, 2016 in response to a Kohl's Call of

¹ The Court may consider the attached Declaration of Aaron Johnson because Plaintiff has relied on the exchange of text messages with Defendant in her Complaint. This Court can consider the full context of the exchanges relied upon by Plaintiff without converting the instant Motion to Dismiss into one for Summary Judgment. *See In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997)(allowing the Court to consider documents integral to or relied upon in the Complaint on a Motion to Dismiss because "[w]hat the rule seeks to prevent is the situation where a plaintiff is able to maintain a claim of fraud by extracting an isolated statement from a document and placing it in the complaint, even though if the statement were examined in the full context of the document, it would be clear that the statement was not fraudulent. [. . .] Plaintiffs cannot prevent a court from looking at the texts of the documents on which its claim is based by failing to attach or explicitly cite them.").

Action. (*Id.* ¶ 16; *see id.* Ex. A.) In response to the inbound text message from the Number, Kohl's sent two messages to the Number also at 2:22 p.m. on November 18, 2016. (Johnson Decl. ¶ 17.) The first said "Welcome to Kohl's Mobile Sales Alerts! Keep up w/ Kohl's savings. Msg&data rates may apply. Get 5-7 msgs/mo. Reply HELP for help, STOP to cancel." (*Id.*) The second said "KohlsAlerts: Sign-up offer: Get 15% off at Kohls.com. Use code SMS8695 until 11/26. Terms: www.kohls.com/sms. Reply HELP for help, STOP to cancel." (*Id.*)

Kohl's then received an inbound text message from Plaintiff's Number at 2:23 p.m. that said "Thanks." (*Id.* ¶ 18.) Kohl's then, at 2:23 p.m. sent the following text message in response: "KOHLS: Sorry we don't understand the request! Text SAVE to join mobile alerts. Msg&DataRatesMayApply. Receive 5-7 msgs/mon. Reply HELP for help, STOP to cancel." (*Id.* ¶ 19.) Kohl's then received an inbound text message from the Number, also at 2:23 p.m. that said "SAVE." (*Id.* ¶ 20.) Kohl's again sent the same welcome text messages to the Number, giving a link to the terms and conditions, informing her that she could unsubscribe from the text message program simply by texting "STOP" to Kohl's in a return message. (*Id.* ¶ 21.)

Kohl's thereafter sent the requested mobile text alerts to the Number. On multiple occasions, Kohl's messages advised Plaintiff that she could unsubscribe

from the text message program simply by texting “STOP” to Kohl’s in a return text message. (*Id.* ¶¶ 17, 19, 21, 23, 25, 27, 29.)

Two weeks after Plaintiff signed up to receive these messages, Kohl’s received an inbound text message from the Number on December 1, 2016 that said, “I’ve changed my mind and don’t want to receive these anymore.” (*Id.* ¶ 22.) Kohl’s automated system, which would have recognized “STOP” as a command, responded immediately with the message: “KOHLS: Sorry we don’t understand the request! Text SAVE to join mobile alerts. Msg&DataRatesMayApply. Receive 5-7 msgs/mon. Reply HELP for help, STOP to cancel.” (*Id.* ¶ 23.) Plaintiff did not text “STOP.”

On December 2, 2016, Kohl’s received an inbound text message from the Number that said, “Please don’t send these anymore.” (*Id.* ¶ 24.) Kohl’s system responded with the same “we don’t understand” message containing the instruction “Reply . . . STOP to cancel.” (*Id.* ¶ 25.) Plaintiff again did not text “STOP.”

On December 8, 2016, Kohl’s received a third inbound text message from the Number that said, “Please do not send any further messages.” (*Id.* ¶ 26.) Kohl’s system repeated the “we don’t understand” message, and Plaintiff still did not text “STOP.” (*Id.* ¶¶ 27-28.) Then, on December 13, 2016, Kohl’s received an inbound text message from the Number that said, “I’ve had enough! I have told you to stop multiple times that I don’t want these messages anymore. This is your

last warning!” (*Id.* ¶ 28). Kohl’s system generated the same “we don’t understand” message, and Plaintiff transmitted no further messages to Kohl’s before instituting this lawsuit. (*Id.* ¶¶ 29-30.)

The gist of Plaintiff’s Complaint seems to be that Kohl’s was required to have a human being monitor these inbound communications and manually cancel text message subscriptions in response to inbound messages other than “STOP” (or its synonyms). That requirement appears neither in the TCPA itself nor in FCC interpretations of the statute. Plaintiff received messages she requested to receive and never followed the easy method Kohl’s provided to stop those messages if she wished to stop them. Her claims, therefore, should be dismissed.

ARGUMENT

I. PLAINTIFF’S COMPLAINT SHOULD BE DISMISSED BECAUSE PLAINTIFF HAS FAILED TO STATE A CLAIM²

The FCC has spoken at length about how companies like Kohl’s must obtain consent before transmitting marketing text messages and about how consumers may revoke consent once given. Plaintiff cites a portion of the FCC’s ruling in her Complaint, stating that the “FCC ruled that ‘[c]onsumers have a right to revoke

² To survive a Rule 12(b)(6) motion to dismiss, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is “plausible” only when “the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). The plaintiff, therefore, must show “more than a sheer possibility that a defendant has acted unlawfully.” *Id.*

consent, using any reasonable method including orally or in writing.’” (Compl. ¶ 8 *citing* 30 FCC Rcd. 7961, 7996). The full quote, however, is as follows:

Consumers have a right to revoke consent, using any reasonable method including orally or in writing. Consumers generally may revoke, for example, by way of a consumer-initiated call, directly in response to a call initiated or made by a caller, or at an in-store bill payment location, among other possibilities. We find that in these situations, callers typically will not find it overly burdensome to implement mechanisms to record and effectuate a consumer’s request to revoke his or her consent. We conclude that callers may not abridge a consumer’s right to revoke consent using any reasonable method. The Commission has concluded as much for certain telemarketing calls, as our rules require that telemarketing calls using a prerecorded or artificial voice “provide an automated, interactive voice- and/or key press-activated opt-out mechanism for the called person to make a do-not-call request” and leave a “toll free number that enables the called person to call back at a later time” if the call is answered by voicemail. And when the Commission granted an exemption from the TCPA in the *Cargo Airline Order*, **it required that callers give consumers a direct opt-out mechanism such as a key-activated opt-out mechanism for live calls, a toll-free number for voicemails, and a reply of “STOP” for text messages.** The common thread linking these cases is that consumers must be able to respond to an unwanted call—using either a reasonable oral method or a reasonable method in writing—to prevent future calls.

30 FCC Rcd. at 7996 (internal citations omitted)(emphasis added).

In the *Cargo Airline Order* referenced in that paragraph, the FCC explicitly carved out an exception for text messages provided that “text notifications must include the ability for the recipient to opt out by replying ‘STOP.’” 29 FCC Rcd 3432, 3438. The FCC, in other words, differentiated between a consumer’s oral interactions with a live operator — in which case “magic words” may not necessarily be required to revoke consent — and an automated text message

subscription, in which the sending party may require a specific, reasonable means (*i.e.*, a “STOP” response to the automated system) to effect a revocation. The TCPA is guided by the FCC’s interpretation of the statute. *See Restrepo v. Atty Gen. of U.S.*, 617 F.3d 787, 793 (3d Cir. 2010).³ That Kohl’s utilized the exact language that the FCC found sufficient cannot be grounds for liability under the TCPA.

II. ALTERNATIVELY, THE CLASS ALLEGATIONS IN THE COMPLAINT SHOULD BE STRICKEN

Even in Plaintiff’s counter-factual world where Kohl’s supposedly must monitor inbound text messages and honor cancellation requests sent by text message phrased in terms other than “STOP” (or its synonyms), determining what is and is not a true revocation of consent would require individual inquiry. One can hypothesize any number of inbound messages that would not convey a desire for the messages to cease, and others that would not. Accordingly, if the Court declines to dismiss any aspect of Plaintiff’s personal claims, it should nevertheless

³ Texting “STOP” to opt out is also listed in the Mobile Marketing Association’s *U.S. Consumer Best Practices for Messaging* guidelines. These guidelines set industry best practices, including with respect to providing consumers a reasonable means by which to cancel recurring text message subscriptions. Specifically, section 1.5-2 states that “A subscriber must be able to stop participating and receiving message from any program by sending STOP to the short code used for that program. END, CANCEL, UNSUBSCRIBE, or QUIT should also be opt-out key words for all programs; however, content providers should feature the word STOP in their advertising and messaging.” *See Mobile Marketing Association U.S. Consumer Best Practices for Messaging*, at *10 (Oct. 16, 2012).

strike her class claims because she cannot, and will never be able to, satisfy the requirements of Rule 23.

At whatever litigation stage a putative class is scrutinized, “it is plaintiff’s burden to show that a class action is a proper vehicle for [the] lawsuit.” *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 354 (3d Cir. 2013) (citing *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013)). Courts need not and should not defer consideration of class certification issues until discovery has occurred, when discovery cannot affect the unsuitability of a case for class treatment. Here, no amount of discovery can rescue Plaintiff’s proposed class. The Court therefore can, and should, deny class certification now, at the pleading stage.

“The Court has the authority to strike class allegations at the pleading stage under Fed. R. Civ. P. 12(f) if the complaint demonstrates that a class action cannot be maintained.” *Mladenov v. Wegmans Food Mkts, Inc.*, 124 F. Supp. 3d 360, 368 (D.N.J. 2015) (citation omitted). *See also, e.g., John v. Nat’l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007) (“Where it is facially apparent from the pleadings that there is no ascertainable class, a district court may dismiss the class allegation on the pleadings” (citations omitted).); *Clark v. McDonald’s Corp.*, 213 F.R.D. 198, 204-05 (D.N.J. 2003) (same).⁴ As Judge Kugler stated in *Wilson v.*

⁴ *Mladenov* and other cases have applied the Rule 12 standard, taking plaintiff’s factual allegations as true and affording Plaintiff all reasonable inferences as to what she might be able to establish through discovery. *Royal Mile Co. v. UPMC*, 40 F. Supp. 3d 552, 578-79 (W.D. Pa. 2014), suggested that plaintiffs

Consol. Rail Corp., No. 13-cv-784-RBK-KMW, 2014 U.S. Dist. LEXIS 48209, at *14 (D.N.J. Apr. 8, 2014), “a court should grant a [pre-discovery] motion to strike class allegations only if the inappropriateness of class treatment is evident from the face of the complaint and from incontrovertible facts” (citing *Landsman & Funk PC*, 640 F.3d 72 at 93 n.30 (3d Cir. 2011)). See also, e.g., *Luppe v. Cheswick Generating Station*, No. 12-cv-929, 2015 U.S. Dist. LEXIS 9791 (W.D. Pa. Jan. 28, 2015) (granting motion to strike class allegations because the class failed on its face). As is true in this case, it was clear from the face of the complaint that the plaintiff could not establish class membership without individual inquiries. There, the inquiries would have been into whether other persons suffered “similar” damages and the individual causes of those damages.

District courts within this Circuit regularly strike class allegations from pleadings prior to discovery where it is clear from the complaint that class claims cannot be maintained. See e.g., *NBL Flooring, Inc. v. Trumbull Ins. Co.*, No. 10-cv-4398, 2011 U.S. Dist. LEXIS 110518, at *2-*3 (E.D. Pa. Sept. 26, 2011)

should have to meet a higher bar even at the pleading stage. Kohl’s brings this motion under Rule 23(d)(1)(D), which authorizes courts to issue orders that “require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly.” Pursuant to that Rule, the Court may consider any evidence relevant to the propriety of class certification. No matter how permissive a standard the Court may elect to apply to the burden Plaintiff must carry at this stage of the litigation, however, Plaintiff’s asserted class of persons who allegedly received text messages, without regard to having provided express written consent or revocation, cannot satisfy it.

(holding that a court may strike class allegations at the pleading stage “where it is clear from the complaint itself that the requirements for maintaining a class action cannot be met.”).⁵ For example, in *Zarichny v. Complete Payment Recovery Servs., Inc.*, 80 F. Supp. 3d 610, 623-626 (E.D. Pa. 2015), the court preemptively denied class certification in another TCPA case (there, involving allegedly unwanted debt collection calls) because determining whether a person had or had not given prior consent for those calls would require individual inquiry and involve no objective proof. In *Trunzo v. Citi Mortg.*, No. 2:11-cv-1124, 2014 U.S. Dist. LEXIS 43056, at *27-*28 (W.D. Pa. Mar. 31, 2014), the court preemptively denied class certification where it was clear from the face of the complaint that the defendant had causation defenses unique to the named plaintiffs’ claims and, therefore, “the legal theories controlling the potential class members’ claims are

⁵ *Berk v. JPMorgan Chase Bank, N.A.*, No. 11-cv-2715, 2011 U.S. Dist. LEXIS 109626, at *24-*25 (E.D. Pa. Sept. 23, 2011) (granting motion to strike class allegations at pleading stage where class allegations raise a matter of law); *Woodard v. FedEx Freight E., Inc.*, 250 F.R.D. 178, 182 (M.D. Pa. 2008) (noting that a “district court will strike class action allegations without permitting discovery or waiting for a certification where the complaint and any affidavits clearly demonstrate that the plaintiff cannot meet the requirements for a class action.”); *Advanced Acupuncture Clinic, Inc. v. Allstate Ins. Co.*, No. 07-cv-4925-JAP, 2008 U.S. Dist. LEXIS 65174 (D.N.J. Aug. 26, 2008) (granting motion to strike class allegations when it became clear injunctive relief under Rule 23(b)(2) was inappropriate); *see also Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 160 (1982) (“Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff’s claim...”).

not, and would not be, consistent class-wide.”⁶ Plaintiff here has both of those problems.

In this case, Plaintiff seeks to represent a class of, “[a]ll persons in the United States to whom Defendant has sent any automated commercial text message during the applicable statute of limitations period after designating an exclusive means by which consumers may revoke consent to receive text messages from Defendant.” Yet that class, by definition, would include people who explicitly requested these sale messages from Kohl’s and never attempted (or wanted) to stop them. It also would include people who explicitly requested to receive messages from Kohl’s and then stopped them using the FCC-approved means Kohl’s gave them to do so. Neither group has a valid TCPA claim.

⁶ Many other courts have struck class allegations when, as here, the plaintiff’s inability to satisfy Rule 23 is patent and cannot be fixed through discovery. In *Schilling v. Kenton County*, No. 10-cv-143-DLB, 2011 U.S. Dist. LEXIS 8050, at *3-*4, *21-*22 (E.D. Ky. Jan. 27, 2011), for example, the court granted a motion to deny class certification because it was facially plain that membership in the putative class of prison inmates who allegedly were “denied medical attention . . . as a result of Defendants’ neglect and deliberate indifference” could not be determined without individual inquiry. Other decisions that granted pre-discovery motions to deny class certification because the plaintiffs’ inability to satisfy Rule 23 was plain from the complaint and/or facts of which the courts could take judicial notice include *Ewing Indus. Corp. v. Bob Wines Nursery, Inc.*, 795 F.3d 1324 (11th Cir. 2015); *Schumacher v. State Auto. Mut. Ins. Co.*, No. 1:13-cv-232, 2015 U.S. Dist. LEXIS 11857 (S.D. Ohio Feb. 2, 2015); *Myart v. Glosson*, No. SA-14-cv-831-XR, 2014 U.S. Dist. LEXIS 162936, at *11-*16 (W.D. Tex. Nov. 20, 2014); *Labou v. Cellco P’ship*, No. 2:13-cv-844-MCE-EFB, 2014 U.S. Dist. LEXIS 26974 (E.D. Cal. Mar. 3, 2014); *Trazo v. Nestle USA, Inc.*, Case No. 5:12-cv-2272-PSG, 2013 U.S. Dist. LEXIS 113534, at *45-*48 (N.D. Cal. Aug. 9, 2013); *Zulewski v. Hershey Co.*, No. 11-cv-5117-KAW, 2013 U.S. Dist. LEXIS 58299 (N.D. Cal. Apr. 23, 2013); and *Mansfield v. Midland Funding, LLC*, No. 09-cv-358-WVG, 2011 U.S. Dist. LEXIS 34102 (S.D. Cal. Mar. 30, 2011).

Plaintiff's hypothetical class, assuming one can validly revoke consent by texting something other than "STOP," "CANCEL," "QUIT," "UNSUBSCRIBE," or "END," could include only those whose incoming messages sufficed under whatever extralegal standard Plaintiff ultimately may propose. But the only way to determine whether an inbound message sufficed as a revocation would be through individual inquiry into what each person who sent an atypical inbound message actually wrote and intended through that writing.

To the extent that Plaintiff attempted to rewrite her class definition to include only those who allegedly attempted to revoke consent, Plaintiff's class definition would still be unable to meet the requirements of Rule 23. The Court in *Pepka v. Kohl's Department Stores, Inc.*, Case No. 2:16-cv-04293-MWF-FFM (C.D. Cal. Dec. 21, 2016), granted Kohl's motion to strike the class in plaintiff's TCPA claim because the putative class allegations necessarily involved individualized inquiries regarding consent and revocation, and was an impermissible fail-safe class. The Court explained, "no matter what that discovery might show, the fact remains Plaintiff's allegations require an individualized inquiry into questions such as which of the class members granted consent in the first place, who among that group revoked consent, and whether such revocation was proper and put Defendant on notice." *Id.* at *7. *See also Gannon v. Network Tel. Servs., Inc.*, No. CV 12-9777-RGK (PJWx) 2013 WL 2450199, at *2 (C.D.

Cal. June 5, 2013) (denying a motion to certify a class of all persons who received text messages because it would create mini-trials and defeat ascertainability).

In sum, Plaintiff here lacks any ability to contend that discovery will solve any of the fatal problems with her class definition. This Court, therefore, should not put Defendant to the significant burden of class discovery before concluding, as it inevitably would have to do following discovery, that no class can be certified in this case.

CONCLUSION

For all of the reasons set forth above, Kohl's respectfully requests that the Court dismiss Plaintiff's Complaint pursuant to Fed. R. Civ. P. 12(b)(6) and, or in the alternative, strike all of Plaintiff's class allegations and require Plaintiff to file an amended complaint asserting only her individual claims.

Dated: March 29, 2017

/s/ Jeffrey S. Jacobson

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Attorneys for Defendant
Kohl's Department Stores, Inc.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

AMY VIGGIANO, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,

Plaintiff,

v.

KOHL'S DEPARTMENT STORES,
INC.,

Defendant.

Civil Action No. 3:17-cv-00243-BRM-
TJB

**DECLARATION OF AARON
JOHNSON IN SUPPORT OF
DEFENDANT'S MOTION TO
DISMISS COMPLAINT AND/OR
STRIKE PLAINTIFFS' CLASS
ALLEGATIONS**

I, Aaron Johnson, declare and state as follows:

1. I am currently employed by Kohl's Department Stores, Inc. ("Kohl's"), as the Director of Digital Marketing and have been a Kohl's employee for approximately 14 years. I have had responsibility for the SMS text message program for Kohl's since July 2014.

2. I submit this declaration in support of Kohl's Motion to Dismiss Plaintiffs' Complaint and/or to Strike Plaintiffs' Class Allegations.

3. Kohl's, like many other retailers and other businesses, offers its customers an opportunity to receive recurring sales alerts and/or mobile coupons by short message service (SMS) text messages.

4. Kohl's customers are advised, either by email, by social media, by the Kohl's website, in print media and/or in a Kohl's retail location (the "Calls to Action"), that they may sign-up to Kohl's mobile sales alerts by texting a keyword (*i.e.*, "SAVE14") to the program's short code. A customer will only receive Kohl's mobile sales alerts on the wireless phone number from which they text the keyword to the program's short code.

5. While the Calls to Action have varied over time and vary based on the specific promotion, they advise consumers that, among other things, by signing up, they will receive the text message sales alerts or coupons that they have requested. The Calls to Action in place since October 2013 contain a reference and/or an electronic link to the Terms & Conditions that apply to the specific program.

6. Given the various means through which a customer may agree to a Call to Action and the fact that Calls to Action have varied, customer experiences also vary with respect to signing up for Kohl's mobile alerts and/or coupon.

7. For example, the following is an example of a Call to Action sent to



SIGN UP FOR KOHL'S MOBILE SALE ALERTS!

Plus, take an extra 15% off your next online purchase!
We'll text you a Promo Code to save. Msg&Data Rates may apply.*

TEXT SAVE14 TO 56457 (KOHL'S)

*Messages sent via auto-dialed text message to your mobile number. Approx. 5-7 msgs/mo. Participation not required to make a purchase. Reply HELP for help. STOP to cancel. You must be 18 years or older to participate. See Kohls.com/sms for other program Terms & Conditions.

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8. T

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follow

ing is an example of a call to action on Kohl's homepage:

9. Attached hereto as Exhibit A is a true and correct copy of an example of Kohl's Terms and Conditions applicable to mobile sales alerts.

10. Under the Terms & Conditions, customers agree to certain terms, including that they:

TEXT US, GET 15% OFF!

We'll send you a 15% off online promo code right away! Just text **SAVE02** to **56457 (KOHL'S)** to sign up.*

*Messages sent via auto-dialed text message to your mobile number. Approx. 7 msgs/mon. Msg&Data Rates May Apply. Participation not required to make a purchase. Reply **HELP** for help. **STOP** to cancel. You must be 18 years or older to participate. See Kohls.com/sms for other program Terms & Conditions. U.S. residents only.

will receive approx. 5-7 autodialed text messages per month to [their] mobile number. Msg&Data Rates May Apply. Reply **HELP** for help. Reply **STOP** to opt out. [They] must be 18 years old or older to participate or have parent/guardian permission. U.S. residents only.

Exhibit A (emphasis in original).

11. The Terms & Conditions further provide as follows:

How to Sign-Up.

- a. Sign-up for the Program by texting SAVE[] to 56457.
- b. You will receive approximately 5-7 Text Messages per month.

How to Opt-Out.

- a. To stop receiving future Text Messages from Kohl's pursuant to the Kohl's Mobile Sales Alerts Program, you can text any of the following commands to 56457:

- STOP
- CANCEL
- QUIT
- UNSUBSCRIBE
- END

- b. Once you have taken this step to opt-out of the Program, you will receive a final confirmation Text Message, and thereafter, no further Text Messages will be sent to your mobile number

(unless you want to opt-in again by following the steps outlined above).

Acceptance by You

- a. By affirmatively signing-up for Kohl's Text Messages and/or otherwise using the Service provided by us, you have expressly agreed to be bound by the terms and conditions herein ("Agreement"), and you are consenting to receive Kohl's Text Message disclosures ("Disclosures") electronically. If you do not consent to the terms of this Agreement and do not agree to receive electronic Disclosures, you must immediately cease using the Services that you have received and contact us as provided below.
- b. Your consent to this Agreement includes authorization for Kohl's to deliver advertising messages using an auto-dialer (and/or non-auto-dialer technology) to the mobile phone number you supply when you opt-in.
- c. You acknowledge that your consent to this Agreement is not in any way required as a condition of making purchases at Kohl's stores or Kohls.com.

- d. You should print or store a copy of this Agreement for your records, as well as any Disclosure that is important to you. In order to do so, you must have a SSL-enabled web browser and capability to print or store Disclosures.

Exhibit A (emphasis in original).

12. After a customer sends a text to Kohl's containing the keyword set forth in the Call to Action, he or she will immediately receive:

- a. a welcome text, which contains the following statement (or a substantially similar statement): "Welcome to Kohl's Mobile Alerts! Keep up w/ Kohl's savings. Msg&Data Rates May Apply. Get 5-7 msgs per month. Reply HELP for HELP. STOP to cancel;" and
- b. a text message containing a welcome SMS Code, which text message includes the following statement (or a substantially similar statement): "KohlsAlerts: Sign-up offer: Get 15% off at Kohls.com. Use code SMS[CODE] until [Date]. Terms: www.kohls.com/sms. Reply HELP for help, STOP to cancel."

13. If a customer sends a text message to Kohl's that does not contain one of the key words, they will receive a message that says:

Sorry we don't understand the request! Text SAVE to join mobile alerts. Msg&DataRatesMayApply. Receive 5-7 msgs/mon. Reply HELP for help, STOP to cancel.

14. Kohl's maintains records for wireless telephone numbers that participate in its mobile sale alerts programs, including the date that on which a consumer sent a text to Kohl's requesting to participate in a program, whether such consumer requested that Kohl's stop sending text messages, and the text messages that were sent to such consumer.

15. I understand that plaintiff Amy Viggiano ("Plaintiff") has filed a Class Action Complaint, claiming that text messages allegedly sent by Kohl's to her cellular telephone number ("the Number") violated the Telephone Consumer Protection Act ("TCPA").

16. According to Kohl's records, Kohl's received an inbound text message containing the keyword "SAVE02" from Plaintiff's Number at 2:22 p.m. on November 18, 2016.

17. In response to the inbound text message from the Number, at 2:22 p.m. on November 18, 2016, Kohl's sent two welcome text messages stating as follows:

Welcome to Kohl's Mobile Sales Alerts! Keep up w/ Kohl's savings. Msg&data rates may apply. Get 5-7 msgs/mo. Reply HELP for help, STOP to cancel.

KohlsALERTS: Sign-up offer: Get 15% off at Kohls.com. Use code SMS8695 until 11/26. Terms: www.Kohls.com/sms. Reply HELP for help, STOP to cancel.

18. Within one minute of sending the Kohl's ALERTS text, Kohl's received the text "Thanks" from the Number.

19. Kohl's replied with the following messages at 2:23 p.m.:

KOHLs: Sorry we don't understand the request! Text SAVE to join mobile alerts. Msg&DataRatesMayApply. Receive 5-7 msgs/mon. Reply HELP for help, STOP to cancel.

20. Within one minute of sending the "We don't understand" text, Kohl's received the text "SAVE" from the Number.

21. As set forth in the Complaint, Plaintiff was advised numerous times by Kohl's that she could unsubscribe from the text message program simply by texting "Stop" to Kohl's in a return text message.

22. Kohl's records reflect that Kohl's received an inbound text message from the Number on December 1, 2016 that said, "I've changed my mind and don't want to receive these anymore."

23. Kohl's responded immediately with the message:

KOHLs: Sorry we don't understand the request! Text SAVE to join mobile alerts. Msg&DataRatesMayApply. Receive 5-7 msgs/mon. Reply HELP for help, STOP to cancel.

24. The next inbound text message Kohl's received from the Number occurred on December 2, 2016 that said, "Please don't send these anymore."

25. Kohl's responded immediately with the message:

KOHL'S: Sorry we don't understand the request! Text SAVE to join mobile alerts. Msg&DataRatesMayApply. Receive 5-7 msgs/mon. Reply HELP for help, STOP to cancel.

26. The next inbound text message Kohl's received from the Number occurred on December 8, 2016, that said, "Please do not send any further messages."

27. Kohl's responded immediately with the message:

KOHL'S: Sorry we don't understand the request! Text SAVE to join mobile alerts. Msg&DataRatesMayApply. Receive 5-7 msgs/mon. Reply HELP for help, STOP to cancel.

28. The next inbound message Kohl's received from the Number occurred on December 13, 2016, that said, "I've had enough! I have told you to stop multiple times that I don't want these messages anymore. This is your last warning!"

29. Kohl's responded immediately with the message:

KOHL'S: Sorry we don't understand the request! Text SAVE to join mobile alerts. Msg&DataRatesMayApply. Receive 5-7 msgs/mon. Reply HELP for help, STOP to cancel.

30. Kohl's received no other inbound messages from the Number other than those listed above.

31. At no time did Kohl's receive a text message from the Number saying "STOP," "CANCEL," "QUIT," "UNSUBSCRIBE," or "END," nor did Kohl's receive any such request from Plaintiff.

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on March 29, 2017, in Menomonee Falls, Wisconsin.



AARON JOHNSON

EXHIBIT A

TERMS & CONDITIONS

KOHL'S MOBILE SALES ALERTS

I. Sign-up Offer Terms & Conditions:

SIGN-UP FOR KOHL'S MOBILE SALE ALERTS & SAVE AN EXTRA 15%* AT KOHLS.COM!

Text **SAVE08** to **56457** (KOHLS) to sign up.

You will receive approx. 5-7 autodialed text messages per month to your mobile number. Msg&Data Rates May Apply. Reply **HELP** for help. Reply **STOP** to opt out. You must be 18 years old or older to participate or have parent/guardian permission. U.S. residents only.

WITHIN 1 DAY WE'LL TEXT YOU A CODE TO SAVE ON YOUR NEXT KOHLS.COM PURCHASE.

*OFFER VALID ONLINE ONLY. 15% offer is nontransferable and Promo Code must be entered at Kohls.com to receive discount. Dollar-off discounts, including Kohl's Cash® coupons, Yes2You Rewards™ and Promotional Gifts, applied prior to percent-off total purchase discounts. Offer cannot be used in conjunction with any other percent-off discounts, including age-specific discounts. Offer not valid on the following merchandise: Gift Card purchases; Kohl's Cares® cause merchandise or other charitable items; prestige brands of cosmetics, skincare and select prestige brands of fragrance; select electronics/electrics; consumables; Nike merchandise; select online-exclusive merchandise; and products sold by Wayfair on Kohls.com. For a complete list of these merchandise exclusions, go to Kohls.com/exclusions or look for signs in our stores. Offer also not valid on price adjustments on prior purchases; payment on a Kohl's Charge account; taxes, shipping and/or handling fees. See store for details.

II. Mobiles Sales Alerts Program Terms & Conditions:

1. Definitions.

- "**Applications**" and/or "**Content**" refer to any file, device or software that can be downloaded by you to either a computer or a wireless device such as a handset or a personal digital assistant.
- "**Kohl's Mobile Sales Alerts Program**" or "**Program**" is a recurring service where SMS or MMS messages (either referred to also as "Text Messages"), containing promotion alerts for select Kohl's events, are sent by Kohl's via an autodialer to your mobile device. Approximately 5-7 messages per month are sent to your mobile device.
- "**Service**" means the Kohl's Mobile Sale Alerts and any associated abbreviated dial code, Applications or Content.
- "**Text Message**" means SMS and/or MMS messages generated by an automated dialer to the mobile number You provided.

- "We," "our," "us" and "provider" refer to Kohl's Department Stores, Inc. and its subsidiaries and affiliates ("Kohl's"), as well as any other person or entity providing any service, applications or content to you from us or on our behalf.
- "You" or "you" means the person or entity signing-up to participate in, or use in any way, Kohl's Mobile Sale Alerts.

2. Eligibility.

- a. You must be 18 years or older in order to participate in the Program or have the express permission of a parent/guardian (but in any case, you must be at least 13 years old.)
- b. You must be a U.S. resident to participate in the Program.

3. How to Sign-Up.

- a. Sign-up for the Program by texting SAVE08 to 56457.
- b. You will receive approximately 5-7 Text Messages per month.

4. How to Opt-Out.

- a. To stop receiving future Text Messages from Kohl's pursuant to the Kohl's Mobile Sales Alerts Program, you can text any of the following commands to 56457:
 - STOP
 - CANCEL
 - QUIT
 - UNSUBSCRIBE
 - END
- b. Once you have taken this step to opt-out of the Program, you will receive a final confirmation Text Message, and thereafter, no further Text Messages will be sent to your mobile number (unless you want to opt-in again by following the steps outlined above).

5. Acceptance by You.

- a. By affirmatively signing-up for Kohl's Text Messages and/or otherwise using the Service provided by us, you have expressly agreed to be bound by the terms and conditions herein ("**Agreement**"), and you are consenting to receive Kohl's Text Message disclosures ("**Disclosures**") electronically. If you do not consent to the terms of this Agreement and do not agree to receive electronic Disclosures, you must immediately cease using the Services that you have received and contact us as provided below.
- b. Your consent to this Agreement includes authorization for Kohl's to deliver advertising messages using an auto-dialer (and/or non-auto-dialer technology) to the mobile phone number you supply when you opt-in.
- c. You acknowledge that your consent to this Agreement is not in any way required as a condition of making purchases at Kohl's stores or Kohls.com.
- d. You should print or store a copy of this Agreement for your records, as well as any Disclosure that is important to you. In order to do so, you must have a SSL-enabled web browser and capability to print or store Disclosures.

6. Participating Carriers & Fees.

- Content is not available on all carriers. The Service is currently available on AT&T, T-Mobile®, Verizon Wireless, Sprint, Boost, Alltel, U.S. Cellular, Cellular One, MetroPCS, InterOp, Cellular Com, C Spire Wireless, Cricket, Virgin Mobile, and

Cincinnati Bell and others. Product is not compatible with all cell phone models. The carriers and Kohl's are not liable for delayed or undelivered messages.

- Message and Data rates may apply. Your carrier's rates apply. All charges are billed by and payable to your mobile service provider. Kohl's does not charge you for sending or receiving Text Messages to or from 56457.

7. Help or Information.

- a. At any time, you can text HELP to 56457 which will return the following information:

Please visit www.kohls.com/sms or e-mail technical.help@kohls.com. 7 msgs/mo, Msg.&Data Rates May Apply. Text STOP to opt out.

8. Additional Terms & Conditions.

The following terms and conditions are applicable to the Program and made a part of this Agreement to which you agree:

- a. **Privacy Policy:** You can view Kohl's Privacy Policy by clicking [here](#). In particular, please be advised that data obtained from you in connection with this Service may include your mobile phone number; your carrier's name; the date, time and content of your messages and other information you provide to us in connection with this Program
- b. **Legal Notices:** You can view Kohl's Legal Notices by clicking [here](#).

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*Attorneys for Defendant
Kohl's Department Stores, Inc.*

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

AMY VIGGIANO, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,

Plaintiff,

v.

KOHL'S DEPARTMENT STORES,
INC.,

Defendant.

Civil Action No. 3:17-cv-00243-BRM-
TJB

ORDER

THIS MATTER having been brought before the Court by Kelley Drye & Warren LLP, attorneys for Defendant Kohl's Department Stores, Inc., ("Kohl's"), upon the Motion by Kohl's to Dismiss Plaintiff's Class Action Complaint Pursuant To Fed. R. Civ. P. 12(b)(6), Or, In The Alternative, To Strike The Class Allegations In The Complaint, and the Court having considered the papers submitted in support

of the within Motion and any Opposition thereto; and the Court having considered oral argument of the parties, if any; and for the reasons set forth in the record of the proceedings, and for other and good cause having been shown,

On this _____ day of _____ 2017:

IT IS ORDERED that the Complaint herein is **DISMISSED** with prejudice;

OR

IT IS ORDERED that the class allegations are deemed **STRICKEN** from the Complaint; and

IT IS FURTHER ORDERED that a copy of this Order shall be served on all counsel within _____ days of the date hereof.

Hon. Brian R. Martinotti

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**CERTIFICATION PURSUANT TO
LOCAL CIVIL RULE 11.2**

Jeffrey S. Jacobson, attorney of record for Defendant Kohl's Department Stores, Inc., pursuant to 28 U.S.C. § 1746, certifies that the matter in controversy is not the subject of any other action pending in any court, or of any pending arbitration or administrative proceeding.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on March 29, 2017.

/s/ Jeffrey S. Jacobson

Jeffrey S. Jacobson