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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 LINDA SANDERS, individually and
11 on behalf of all others similarly
12 situated,

Plaintiff,

13 v.

14 RBS CITIZENS, N.A.,

15 Defendant.
16
17

Case No. 13-cv-03136-BAS(RBB)

**ORDER GRANTING MOTION
FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT AND
CERTIFICATION OF
SETTLEMENT CLASS**

[ECF No. 104]

18 On December 20, 2013, Plaintiff Linda Sanders (“Plaintiff”) commenced this
19 class action against Defendant RBS Citizens, N.A. (“Defendant” or “Citizens”)
20 seeking relief for violations of the Telephone Consumer Protection Act, 47 U.S.C. §
21 227 (“TCPA”). (ECF No. 1.) Plaintiff now moves unopposed for preliminary
22 approval of a settlement reached between the parties and for certification of a
23 settlement class. (ECF No. 104.)

24 The Court finds this motion suitable for determination on the papers submitted
25 and without oral argument. *See* Civ. L.R. 7.1(d)(1). For the following reasons, the
26 Court **GRANTS** Plaintiff’s Motion for Preliminary Approval of Class Action
27 Settlement and Certification of Settlement Class.

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I. PROPOSED SETTLEMENT

A. Settlement Class

The two parties have reached a proposed settlement that will apply to all class members (“Class” or “Class Members”) of this matter. (Class Action Settlement Agreement and Release (“Settlement Agreement” or “Settlement”) §§ 1.01, 1.03, 2.28, ECF No. 104-3.) The Settlement applies to a proposed Settlement Class that is defined as follows:

All persons in the United States who received a call on their cellular telephones from Citizens, or any third parties calling on a Citizens account, made with an alleged automatic telephone dialing system (“ATDS”) and/or an artificial or pre-recorded voice from December 20, 2009 through July 13, 2015, whose telephone numbers are identified in the Class List.

(*Id.* § 2.28.) The parties estimate this Settlement Class consists of 1,013,615 class members. (*Id.*) A Settlement Class Member (“Class Member”) is a person who is included in the Settlement Class but does not timely and properly submit a valid request for exclusion. (*Id.* § 2.29.) To represent the Settlement Class, the parties agree to seek appointment of Plaintiff as Class Representative and Class Counsel, Douglass J. Champion of The Law Offices of Douglas J. Champion, APC and Ronald A. Marron, Alexis M. Wood and Kas L. Gallucci of The Law Offices of Ronald A. Marron (“Class Counsel”). (*Id.* § 4.01.) Kurtzman Carlson Consultants (“Claims Administrator” or “KCC”) will serve as the claim administrator for the Settlement Class and Fund. (*Id.* § 2.07.)

B. Settlement Fund

Defendant has denied and continues to deny calling Plaintiff or other putative class members in violation of the TCPA, and without their consent, but it agrees to establish a Settlement Fund in the amount of \$4,551,267.50 to pay for awards to Settlement Class Members, settlement administration expenses, and any reasonable

attorneys' fees and costs approved and awarded by the Court. (Settlement Agreement, §§ 1.03, 2.31.) After deducting all Settlement Costs, a pro rata share of the Settlement Fund will be distributed by check to each Settlement Class Member who submits a claim to the Claims Administrator, no later than thirty days after the Funding Date. (*Id.* §§ 5.02, 8.05(e).) If a settlement check is awarded to a Class Member but the check is returned, the Claims Administrator will take reasonable steps to locate a correct address, and accept updated addresses from the United States Postal Service and Class Members themselves. (*Id.* § 9.01.) On the final distribution date, or 210 days after the date which the last check for an award was issued, the Claims Administrator will pay the remaining amount in the Settlement Fund to one or more *cy pres* recipients. (*Id.* § 8.05(f).)

C. Notice to Settlement Class Members

The Claims Administrator will provide three forms of notice to the Settlement Class Members. (Settlement Agreement § 9.) First, the Claims Administrator will provide a Postcard Notice via first class mail to all available addresses from the Class List, where each address will be checked against the United States Post Office National Change of Address Database before mailing. (*Id.* §§ 2.10, 9.01.) The Postcard Notice will summarize the terms of the settlement and inform the Class Members on submitting a claim, objecting, or opting out. (*Id.* § 2.23.) If any Postcard Notices are returned with a new forwarding address, the Claims Administrator will promptly re-mail a Postcard Notice to the new address. (*Id.* § 9.02.)

Second, notice will be provided by publication in at least two national publications. (*Id.* § 9.03) The Claims Administrator has currently selected *People* and *National Geographic* as the publication to notice Class Members. (Burke Decl. ¶ 20.) Additional publications may be provided if the Claims Administrator determines that the reach of both the Postcard Notice and the publications are not sufficiently reaching the Class Members. (Settlement Agreement § 9.03.)

1 Third, the Claims Administrator will establish and maintain a Settlement
2 Website. (*Id.* §§ 2.32, 9.05.) The website will include a long form of the Notice and
3 a question and answer section. (*Id.* § 9.05.) Additionally, the website will include
4 class information including the Settlement Agreement and Exhibits, the publication
5 notice, the Preliminary Approval Order, a downloadable print and electronic Claim
6 Form, the Complaint, the application for attorneys' fees and costs, and the Final
7 Approval Order. (*Id.*) The Claims Administrator will designate a toll-free number
8 within thirty days after the Preliminary Approval Order for submitting claims and
9 responding to Class Member's inquires. Once the Final Approval Order has been
10 entered a recording will inform callers that the Claims Deadline has passed.
11 (*Id.* § 9.06.)
12

13 **D. Right to Opt Out or Object and Release of Claims**

14 Settlement Class Members will have the option to send a written request to the
15 Claims Administrator to opt out of the Settlement, as long as it is postmarked on or
16 before the Opt-Out Deadline, which is 100 days after Notice Date on the Postcard
17 Notice. (Settlement Agreement §§ 2.20, 12.01.) The written request must include the
18 Class Member's name, statement of desire to be excluded from the Settlement Class,
19 and either the Claim Identification Number given on the Postcard Notice, or the
20 cellular telephone number Defendant's call was received on. (*Id.*) If 500 or more
21 class members opt out of the Settlement, Defendant has the right to terminate the
22 Settlement Agreement within ten calendar days after the Out-Out Deadline.
23 (*Id.* § 17.04.)

24 Any Class Member who would like to object to the fairness of the settlement
25 must file a written objection with the Court, and give a copy of the objection to the
26 Claims Administrator, Class Counsel, and Defendant's counsel before the Objection
27 Deadline. (*Id.* § 12.02.)
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1 Upon final approval of the Settlement, all Settlement Class Members shall be
 2 deemed to have released and discharged Defendant from any and all claims relating
 3 to the TCPA. (*Id.* § 16.01(A).)

4 5 **E. Attorneys' Fees and Settlement Costs**

6 As compensation for its services and to recover its expenses, Class Counsel
 7 will seek from the Court an award of attorneys' fees of no more than 25% of the
 8 Settlement Fund (Settlement Agreement § 6.01.) The attorneys' fees will be paid by
 9 the Claims Administrator from the Settlement Fund no later than five business days
 10 after the Funding Date. (*Id.* §§ 2.17, 6.01.) Class Counsel estimates that the attorneys'
 11 fees will be up to \$1,137,816.87. (Pl.'s Mot. Prelim. Approv. ("Pl.'s Mot.") 13:8–9,
 12 ECF No.104.) Also, Class Counsel is seeking actual litigation costs of no more than
 13 \$25,000. (*Id.* at 13:10-11.)

14 Plaintiff, as the class representative, will be paid up to \$5,000 from the
 15 Settlement Fund as an incentive payment. (Settlement Agreement § 6.02.) In addition
 16 to these expenses, the parties anticipate \$553,027 in claims administration costs if
 17 1% of the Class submit claims, and \$628,461 if 5% of the Class submit claims. (Pl.'s
 18 Mot. 8:5–6.)

19 20 **II. DISCUSSION**

21 The Ninth Circuit maintains a "strong judicial policy" that favors the
 22 settlement of class actions. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276
 23 (9th Cir. 1992). However, Federal Rule of Civil Procedure 23(e) first "require[s] the
 24 district court to determine whether a proposed settlement is fundamentally fair,
 25 adequate, and reasonable." *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th
 26 Cir. 2000) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)).
 27 Where the "parties reach a settlement agreement prior to class certification, courts
 28 must peruse the proposed compromise to ratify both the propriety of the certification

1 and the fairness of the settlement.” *Stanton v. Boeing Co.*, 327 F.3d 938, 952 (9th
2 Cir. 2003). In these situations, settlement approval “requires a higher standard of
3 fairness and a more probing inquiry than may normally be required under Rule
4 23(e).” *Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012) (internal quotation
5 marks omitted).

6 7 **A. Class Certification**

8 Before granting preliminary approval of a class-action settlement, the Court
9 must first determine whether the proposed class can be certified. *Amchem Prods.,*
10 *Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (indicating that a district court must apply
11 “undiluted, even heightened, attention [to class certification] in the settlement
12 context” in order to protect absentees).

13 The class action is “an exception to the usual rule that litigation is conducted
14 by and on behalf of the individual named parties only.” *Wal-Mart Stores, Inc. v.*
15 *Dukes*, 564 U.S. 338, 131 S.Ct. 2541, 2550 (2011) (quoting *Califano v. Yamasaki*,
16 442 U.S. 682, 700-01 (1979)). To justify a departure from that rule, “a class
17 representative must be part of the class and ‘possess the same interest and suffer the
18 same injury’ as the class members.” *Id.* (citing *E. Tex. Motor Freight Sys., Inc. v.*
19 *Rodriguez*, 431 U.S. 395, 403 (1977)). In this regard, Rule 23 contains two sets of
20 class-certification requirements set forth in Rule 23(a) and (b). *United Steel, Paper*
21 *& Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int’l Union v.*
22 *ConocoPhillips Co.*, 593 F.3d 802, 806 (9th Cir. 2010). “A court may certify a class
23 if a plaintiff demonstrates that all of the prerequisites of Rule 23(a) have been met,
24 and that at least one of the requirements of Rule 23(b) have been met.” *Otsuka v.*
25 *Polo Ralph Lauren Corp.*, 251 F.R.D. 439, 443 (N.D. Cal. 2008).

26 “Rule 23(a) provides four prerequisites that must be satisfied for class
27 certification: (1) the class must be so numerous that joinder of all members is
28 impracticable; (2) questions of law or fact exist that are common to the class; (3) the

claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.” *Otsuka*, 251 F.R.D. at 443 (citing Fed. R. Civ. P. 23(a)). “A plaintiff must also establish that one or more of the grounds for maintaining the suit are met under Rule 23(b), including: (1) that there is a risk of substantial prejudice from separate actions; (2) that declaratory or injunctive relief benefitting the class as a whole would be appropriate; or (3) that common questions of law or fact predominate and the class action is superior to other available methods of adjudication.” *Id.* (citing Fed. R. Civ. P. 23(b)).

In the context of a proposed settlement class, questions regarding the manageability of the case for trial are not considered. *E.g.*, *Wright v. Linkus Enters., Inc.*, 259 F.R.D. 468, 474 (E.D. Cal. 2009) (citing *Amchem Prods., Inc.*, 521 U.S. at 620 (“Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial.”))).

The Court considers the threshold issue of whether the Settlement Class is ascertainable and each of prerequisites for certification in turn below.

1. Ascertainability

“As a threshold matter, and apart from the explicit requirements of Rule 23(a), the party seeking class certification must demonstrate that an identifiable and ascertainable class exists.” *Mazur v. eBay, Inc.*, 257 F.R.D. 563, 567 (N.D. Cal. 2009). Certification is improper if there is “no definable class.” *See Lozano v. AT & T Wireless Servs., Inc.*, 504 F.3d 718, 730 (9th Cir. 2007). “A class should be precise, objective, and presently ascertainable,” though “the class need not be so ascertainable that every potential member can be identified at the commencement of the action.” *O’Connor v. Boeing N. Am. Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998) (internal quotation marks omitted). “A class is ascertainable if it is defined by ‘objective

criteria’ and if it is ‘administratively feasible’ to determine whether a particular individual is a member of the class.” *Bruton v. Gerber Prods. Co.*, No. 12-CV-02412-LHK, 2014 WL 2860995, at *4 (N.D. Cal. June 23, 2014). However, “[a] class definition is inadequate if a court must make a determination of the merits of the individual claims to determine whether a person is a member of the class.” *Hanni v. Am. Airlines, Inc.*, No. C 08-00732, 2010 WL 289297, at *9 (N.D. Cal. Jan. 15, 2010). “It is not fatal for a class definition to require some inquiry into individual records, as long as the inquiry is not so daunting as to make the class definition insufficient.” *Herrera v. LCS Fin. Servs. Corp.*, 274 F.R.D. 666, 673 (N.D. Cal. 2011) (internal quotation marks omitted).

Here, the Court finds the Settlement Class is ascertainable because the Claims Administrator has located a vast majority of Class Member addresses from Defendant’s records. The Claims Administrator found a total of 971,000 Class Members’ addresses, which is 95.7% of the Class, however, some of the Postcard Notices will likely be undeliverable because of address changes. (Burke Decl. ¶ 19.) The Claims Administrator projects to reach 90.5% the Class through mailings alone. (*Id.*) To notice the remaining percentage of the class, whose addresses are unknown, the Settlement has proposed to provide notice in two national publications, *People* and *National Geographic*. (*Id.*) Between both the mailed post cards and the publication, the Class Administrator projects that over 93% of the class will receive sufficient notice. (*Id.* ¶ 28.) Thus, the Court concludes the Settlement Class is ascertainable.

2. Numerosity – Rule 23(a)(1)

Rule 23(a)(1) requires that the class be “so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). “[C]ourts generally find that the numerosity factor is satisfied if the class comprises 40 or more members and will find that it has not been satisfied when the class comprises 21 or fewer.” *Celano v.*

1 *Marriott Int'l, Inc.*, 242 F.R.D. 544, 549 (N.D. Cal. 2007).

2 In this case, the proposed Settlement Class consists of approximately
3 1,013,615 Class Members that were called by Defendant. (Settlement Agreement
4 § 2.28.) Thus, the Court finds the joinder of all Class Members is impracticable for
5 the purposes of Rule 23(a)(1), satisfying the numerosity requirement. *See Celano*,
6 242 F.R.D. at 549.

7 8 **3. Commonality – Rule 23(a)(2)**

9 Under Rule 23(a)(2), the named plaintiff must demonstrate that there are
10 “questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2).
11 “Commonality requires the plaintiff to demonstrate that the class members ‘have
12 suffered the same injury[.]’” *Dukes*, 131 S. Ct. at 2551 (quoting *Gen. Tel. Co. of Sw.*
13 *v. Falcon*, 457 U.S. 147, 157 (1982)). However, “[a]ll questions of fact and law need
14 not be common to satisfy this rule.” *Hanlon*, 150 F.3d at 1019. “The existence of
15 shared legal issues with divergent factual predicates is sufficient, as is a common core
16 of salient facts coupled with disparate legal remedies within the class.” *Id.*

17 In this case, Plaintiff alleges she was harmed when she received a number of
18 unsolicited phone calls to her cellular telephone made by Defendant. (Compl. ¶ 12,
19 ECF No. 1.) Defendant’s telephone calls were allegedly placed using an “automatic
20 telephone dialing system” (“ATDS”), as defined by the TCPA, and using an
21 “artificial or prerecorded voice” system in further violation of TCPA. (*Id.* ¶ 14.)
22 Plaintiff states she did not consent to these calls. (*Id.* ¶ 12.) Plaintiff represents the
23 Class Members, claiming they were similarly harmed by receiving unsolicited phone
24 calls from Defendant through the use of an ATDS and artificial or prerecorded voice
25 in violation of the TCPA. (*Id.* ¶ 29.)

26 Given this context, the Court finds there are questions of law and fact common
27 to the Class Members. A common core of salient facts exists with respect to
28 Defendant’s alleged use of an ATDS and artificial voice to make unsolicited calls to

1 Class Members' cellular telephone numbers. Class members also share a common
2 legal issue: whether Defendant made these calls in violation of the TCPA.
3 Accordingly, the commonality requirement is satisfied.

4 5 **4. Typicality – Rule 23(a)(3)**

6 To satisfy Rule 23(a)(3), the named plaintiff's claims must be typical of the
7 claims of the class. Fed. R. Civ. P. 23(a)(3). The typicality requirement is
8 "permissive" and requires only that the named plaintiff's claims "are reasonably co-
9 extensive with those of absent class members." *Hanlon*, 150 F.3d at 1020. "The test
10 of typicality 'is whether other members have the same or similar injury, whether the
11 action is based on conduct which is not unique to the named plaintiffs, and whether
12 other class members have been injured by the same course of conduct.'" *Hanon v.*
13 *Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (quoting *Schwartz v. Harp*,
14 108 F.R.D. 279, 282 (C.D. Cal. 1985)). "[C]lass certification should not be granted
15 if 'there is a danger that absent class members will suffer if their representative is
16 preoccupied with defenses unique to it.'" *Id.* (quoting *Gary Plastic Packaging Corp.*
17 *v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir. 1990)).

18 Here, Plaintiff's and the unnamed Class Members' claims arise from the same
19 alleged conduct of Defendant—unsolicited phone calls for debt collection purposes
20 using an ATDS and artificial voice—and are based on the same legal theory—
21 violation of the TCPA. The typicality requirement is therefore satisfied. *See, e.g.,*
22 *Bee, Denning, Inc.*, 310 F.R.D. at 623 (concluding typicality requirement satisfied
23 where plaintiff alleged she received the same or similar unsolicited fax
24 advertisements as those sent to putative class members in violation of the TCPA);
25 *Knutson v. Schwan's Home Serv., Inc.*, No. 3:12-cv-0964-GPC-DHB, 2013 WL
26 4774763, at *5 (S.D. Cal. Sep. 5, 2015) (finding typicality satisfied where plaintiffs
27 asserted they received autodialed and/or prerecorded calls from defendants, "and the

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1 proposed class [was] defined to include individuals who received the same type
2 of calls”).

3 4 **5. Adequacy – Rule 23(a)(4)**

5 Rule 23(a)(4) requires that the representative plaintiff “will fairly and
6 adequately protect the interest of the class.” Fed. R. Civ. P. 23(a)(4). “To satisfy
7 constitutional due process concerns, absent class members must be afforded adequate
8 representation before entry of a judgment which binds them.” *Hanlon*, 150 F.3d at
9 1020 (citing *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940)). “Resolution of two
10 questions determines legal adequacy: (1) do the named plaintiffs and their counsel
11 have any conflicts of interest with other class members and (2) will the named
12 plaintiffs and their counsel prosecute the action vigorously on behalf of the class?”
13 *Id.* (citing *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th
14 Cir. 1978)).

15 Here, there is no indication that Plaintiff, or Class Counsel, have a conflict of
16 interest with the Class Members, and they appear to have vigorously investigated and
17 litigated this action. (*See* Campion Decl. ¶¶ 24, 33, ECF No. 104-2.) Thus, the
18 interests of Plaintiff and the Settlement Class Members are aligned. In addition, Class
19 Counsel is qualified in class-action litigation, having handled numerous class actions
20 focused on consumer protection, including many cases involving the TCPA. (*Id.* ¶¶
21 28–31.) Consequently, the Court finds that Plaintiff and Class Counsel adequately
22 represent the unnamed class members.

23 24 **6. Predominance and Superiority – Rule 23(b)(3)**

25 **(i) Predominance**

26 “The predominance inquiry focuses on ‘the relationship between the common
27 and individual issues’ and ‘tests whether proposed classes are sufficiently cohesive
28 to warrant adjudication by representation.’” *Vinole v. Countrywide Home Loans, Inc.*,

571 F.3d 935, 944 (9th Cir. 2009) (citing *Hanlon*, 150 F.3d at 1022). The focus of the inquiry is not the presence or absence of commonality as it is under Rule 23(a)(2). Instead, the predominance requirement ensures that common questions “present a significant aspect of the case” such that “there is clear justification”—in terms of efficiency and judicial economy—for resolving those questions in a single adjudication. *Hanlon*, 150 F.3d at 1022; *see also Vinole*, 571 F.3d at 944 (“[A] central concern of the Rule 23(b)(3) predominance test is whether adjudication of common issues will help achieve judicial economy.”)

Here, the Court finds a common issue predominates over any individual issue—specifically, whether Defendant’s alleged practice of using an ATDS to call the Settlement Class Members’ cell phone numbers without their consent violated the TCPA. A potential pitfall for parties seeking to satisfy the predominance requirement in a TCPA action is whether an individualized inquiry will be necessary to determine if class members consented to the automated phone calls. *See, e.g., Connelly v. Hilton Grand Vacations Co., LLC*, 294 F.R.D. 574, 578 (S.D. Cal. 2013) (holding predominance requirement not satisfied where the context of class members’ interactions with the defendant was sufficiently varied to require individual evaluation of whether express consent was provided). Defendant has agreed as part of the Settlement to take Class Members at their word and accept that individuals who submit a claim did not provide consent to Defendant for the calls made to their cellular telephones. (Pl.s Mot. 13:5–7, ECF No. 104.) Additionally, if consent was obtained from the consumer it likely would have been at the same, or similar, time for all class members at the signing of the credit card agreement. (*Id.* at 15:28–16:3.) Accordingly, the Court finds the predominance requirement is met.

(ii) Superiority

“Plaintiffs must also demonstrate that a class action is ‘superior to other available methods for fairly and efficiently adjudicating the controversy.’” *Otsuka*,

251 F.R.D. at 448 (quoting Fed. R. Civ. P. 23(b)(3)). “Where classwide litigation of common issues will reduce litigation costs and promote greater efficiency, a class action may be superior to other methods of litigation,” and it is superior “if no realistic alternative exists.” *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234–35 (9th Cir. 1996). The following factors are pertinent to this analysis:

- (A) the class members’ interest in individually controlling the prosecution or defense of separate actions;
- (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
- (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
- (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3).

A class action is a superior method for adjudicating the claims presented in this case because of the high number of potential plaintiffs and relatively low amount of compensation required for each successful claim. The TCPA provides for \$500, or the actual monetary loss in damages for each violation, and treble damages for each willful or knowing violation. 47 U.S.C. § 227(b)(3). The cost a Settlement Class Member would incur to bring an individual action against Defendant likely outweighs the prospective recovery for that Class Member. This disparity between litigation costs and prospective recovery provides “the most compelling rationale for finding superiority in a class action.” *Smith v. Microsoft Corp.*, 297 F.R.D. 464, 468–69 (S.D. Cal. 2014) (quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 748 (5th Cir. 1996)). The Settlement provides the most efficient way for Defendant to deal with the numerous lawsuits that could potentially be brought by the 1,013,615 Class Members. (Pl.’s Mot. 16:28–17:2.) Further, for those Class Members whose individual litigation would not be economically feasible, the Settlement provides a forum for relief. In sum, the Settlement provides the most efficient method to deal

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1 with TCPA claims for all parties involved and for the conservation of
2 judicial resources.

3 For the foregoing reasons, the Court provisionally finds the prerequisites for a
4 class action under Rule 23 of the Federal Rules of Civil Procedure have been met for
5 the Settlement Class.

6
7 **B. Preliminary Fairness Determination**

8 Having certified the Settlement Class, the Court must next make a preliminary
9 determination of whether the class-action settlement is “fair, reasonable, and
10 adequate” pursuant to Rule 23(e)(2). “It is the settlement taken as a whole, rather than
11 the individual component parts, that must be examined for overall fairness.” *Hanlon*,
12 150 F.3d at 1026. A court may not “delete, modify or substitute certain provisions”
13 of the settlement; rather, “[t]he settlement must stand or fall in its entirety.” *Id.*
14 Relevant factors to this determination include, among others:

15 the strength of the plaintiffs’ case; the risk, expense, complexity, and
16 likely duration of further litigation; the risk of maintaining class-action
17 status throughout the trial; the amount offered in settlement; the extent
18 of discovery completed and the stage of the proceedings; the experience
19 and views of counsel; the presence of a governmental participant; and
the reaction of the class members to the proposed settlement.

20 *Id.*; see also *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004).

21 Preliminary approval of a settlement and notice to the proposed class is
22 appropriate if “the proposed settlement appears to be the product of serious,
23 informed, non-collusive negotiations, has no obvious deficiencies, does not
24 improperly grant preferential treatment to class representatives or segments of the
25 class, and falls within the range of possible approval.” *In re Tableware Antitrust*
26 *Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007) (internal quotation marks and
27 citations omitted).

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1 Here, the proposed Settlement complies with all of these requirements. The
2 Court addresses the relevant factors in further detail below.

3
4 **1. Strength of the Plaintiffs' Case and Risk of Further Litigation**

5 "[T]he very essence of a settlement is compromise, 'a yielding of absolutes
6 and an abandoning of highest hopes.'" *Officers for Justice v. Civil Serv. Comm'n of*
7 *the City & Cnty. of San Francisco*, 688 F.2d 615, 624 (9th Cir. 1982) (quoting *Cotton*
8 *v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)). As explained by the Supreme Court,
9 "[n]aturally, the agreement reached normally embodies a compromise; in exchange
10 for the saving of cost and elimination of risk, the parties each give up something they
11 might have won had they proceeded with litigation." *United States v. Armour & Co.*,
12 402 U.S. 673, 681 (1971).

13 Although both Plaintiff and Defendant strongly believe in the merits of their
14 respective sides of the case, the parties have agreed that the benefits of settling
15 outweighs risks and uncertainties if the case were to continue to trial. (Campion Decl.
16 ¶¶ 8–9; Marron Decl. ¶ 12.) "Plaintiff and Class Counsel have carefully balanced the
17 risks of continued protracted and contentious litigation." (Marron Decl. ¶ 12.) One
18 court, in discussing a large proposed settlement in a TCPA action at length, adopted
19 a report concluding that "the average TCPA case carries a 43% chance of success."
20 *In re Capital One Tel. Consumer Prot. Act Litig.*, 80 F. Supp. 3d 781, 806 (N.D. Ill.
21 2015). Plaintiff and the Class Members would similarly face a substantial risk of
22 being unsuccessful at trial here. Moreover, preparing this matter for trial would
23 indeed be burdensome and expensive. Thus, the Court agrees with the parties that the
24 proposed Settlement eliminates litigation risks and ensures that Class Members
25 receive some compensation for their claims, this weighs in favor of approving the
26 proposed Settlement.

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2. Amount of the Proposed Settlement

The Settlement provides for a Settlement Fund of \$4,551,267.50. (Settlement Agreement § 5.01.) Offsetting this amount are anticipated notice and claims administration expenses in the amount of \$553,037 if 1% of Class Members submit a claim and \$628,461 if 5% of the Class submit a claim; an incentive award for Plaintiff up to \$5,000; litigation costs not to exceed \$25,000; and attorneys' fees up to 25% of the Settlement Fund, \$1,137,816.88. (*Id.* §§ 5.01, 6.01, 6.02; Pl.'s Mot. 8:5–6.) Assuming the anticipated expenses are incurred and the claims participation rate is correct, a 1% claim rate would result in each Class Member receiving approximately \$283.72, and a 5% claim rate would result in each Class Member receiving approximately \$56.75. (Pl.'s Mot. 18:8–10.)

Although the TCPA provides for statutory damages of only \$500 for each negligent violation and \$1,500 for each willful violation, 47 U.S.C. § 227(b)(3), Defendant potentially contacted many of the Class Members in violation of the TCPA multiple times. Plaintiff, as an example, alleges she received a number of calls from Defendant, several times per week commencing in 2010. (Compl. ¶ 12.) Thus, given the potential for numerous violations per Class Member, the amount of the Settlement Fund is only a small percentage of the potential recovery that may be available to Class Members at trial. Yet, “[t]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved.” *Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) (internal quotation marks omitted). Under the circumstances, the Court concludes that the amount offered in this Settlement weighs in favor of preliminary approval.

3. Extent of Discovery Completed and Stage of the Proceedings

The Court assesses the stage of proceedings and the amount of discovery completed to ensure the parties have an adequate appreciation of the merits of the

case before reaching a settlement. *See Ontiveros v. Zamora*, 303 F.R.D. 356, 371 (E.D. Cal. 2014) (“A settlement that occurs in an advanced stage of the proceedings indicates that the parties carefully investigated the claims before reaching a resolution.”). So long as the parties have “sufficient information to make an informed decision about settlement,” this factor will weigh in favor of approval. *Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1239 (9th Cir. 1998); *see also In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (explaining that a combination of investigation, discovery, and research conducted prior to settlement can provide sufficient information for class counsel to make an informed decision about settlement).

Prior to the settlement negotiations and mediation, the parties engaged in discovery requests and exchanges, litigating several discovery disputes. Plaintiff made a motion to compel discovery, seeking a dial list of calls made by Defendant, or third-party vendors on Defendant’s behalf, and all documents relating to express consent. (ECF No. 39.) Class Counsel served Defendant with 133 document requests, issued twenty-one non-party subpoenas, and took a 30(b)(6) deposition of Defendant’s witness to confirm the class size. (Decl. Hon. Infante ¶ 5, ECF No. 104-7.) The advanced stage of the proceedings in this case weighs in favor of approving the Settlement.

4. Experience and Views of Counsel

As mentioned above, Class Counsel has significant experience in handling class actions. (Campion Decl. ¶ 25.) Class Counsel has had extensive experience with TCPA claims, specifically, Douglas Campion has been either lead counsel or co-counsel on forty-one TCPA cases. (*Id.* ¶ 28.) Furthermore, Class Counsel believes the Settlement is both reasonable and fair to the Settlement Class. (Campion Decl. ¶ 9.) “The recommendations of plaintiffs’ counsel should be given a presumption of reasonableness.” *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979).

1 Accordingly, giving the appropriate weight to Class Counsel’s recommendation, the
2 Court concludes that this factor also weighs in favor of approval.

3 **5. Reaction of the Class to the Settlement**

4 Plaintiff, aside from his own view, provides no evidence regarding any
5 putative Class Members’ reactions to the proposed settlement—presumably because
6 no other class members have been informed of the proposed Settlement. The
7 proposed Postcard Notice, Website Notice, and Publication Notice provide
8 instructions as to how class members may object to the Settlement, contact the Court
9 regarding the Settlement, and request to appear at the Fairness Hearing. (Settlement
10 Agreement §§ 12.01, 12.02.) Accordingly, the Court will further consider this factor
11 at the Fairness Hearing before granting final approval of the Settlement.

12 Balancing all relevant factors, the Court finds the Settlement falls within the
13 range of reasonableness meriting possible final approval. The Court therefore
14 preliminarily approves the Settlement and the terms and conditions set forth in the
15 Settlement Agreement, subject to further consideration at the Fairness Hearing.

16 17 **C. Proposed Class Notice**

18 Under Rule 23(c)(2)(B), “the court must direct to class members the best notice
19 that is practicable under the circumstances, including individual notice to all
20 members who can be identified through reasonable effort.” Fed. R. Civ. P.
21 23(c)(2)(B).

22
23 The notice must clearly and concisely state in plain, easily understood
24 language: (i) the nature of the action; (ii) the definition of the class
25 certified; (iii) the class claims, issues, or defenses; (iv) that a class
26 member may enter an appearance through an attorney if the member so
27 desires; (v) that the court will exclude from the class any member who
28 requests exclusion; (vi) the time and manner for requesting exclusion;
and (vii) the binding effect of a class judgment on members under Rule
23(c)(3).

Fed. R. Civ. P. 12(c)(2)(B). “[T]he mechanics of the notice process are left to the

1 discretion of the court subject only to the broad ‘reasonableness’ standards imposed
 2 by due process.” *Grunin v. Int’l House of Pancakes*, 513 F.2d 114, 120 (8th
 3 Cir. 1975).

4 Here, the proposed notices describe the terms of the Settlement and inform the
 5 Class Members on submitting a claim, objecting, or opting out. (Settlement
 6 Agreement § 2.23.) As outlined above, the Claims Administrator will distribute the
 7 Postcard Notice and establish the Settlement Website containing the Website Notice.
 8 (*Id.* §§ 9.1, 9.2.) A Publication Notice will also be disseminated. (*Id.* § 9.03.) Within
 9 thirty days of entry of the Court’s Order for Preliminary approval, the Claims
 10 Administrator will operate and maintain a Settlement Website and toll-free telephone
 11 number for the Class Members to receive additional information. (*Id.* §§ 9.05, 9.06.)

12 Having reviewed the proposed class notices, the Court finds that the methods
 13 and contents of the notices comply with due process and Rule 23, are the best notice
 14 practicable under the circumstances, and shall constitute sufficient notice to all
 15 persons entitled to notice of the Settlement. Therefore, the Court approves the form
 16 and content of the proposed notices to be provided to the Settlement Class Members
 17 as set forth in Section 9 of the Settlement Agreement.

18 19 **III. CONCLUSION & ORDER**

20 In light of the foregoing, the Court **GRANTS** Plaintiff’s Motion for
 21 Preliminary Approval of Nationwide Class Action Settlement and Certification of
 22 Settlement Class (ECF No. 104). Accordingly, the Court hereby **ORDERS**
 23 the following:

24 (1) Pursuant to Rule 23 of the Federal Rules of Civil Procedure, the Court
 25 hereby conditionally certifies the following class for settlement purposes only:

26 All persons in the United States who received a call on their cellular
 27 telephones from Citizens, or any third parties calling on a Citizens
 28 account, made with an alleged automatic telephone dialing system
 (“ATDS”) and/or an artificial or pre-recorded voice from December 20,

1 2009 through July 13, 2015, whose telephone numbers are identified in
2 the Class List.

3 (2) The Court hereby appoints Plaintiff as Class Representative of the
4 Settlement Class.

5 (3) The Court hereby appoints Douglas J. Champion of The Law Offices of
6 Douglas J. Champion, APC and Ronald A. Marron, Alexis M. Wood and Kas L.
7 Gallucci of The Law Offices of Ronald A. Marron as Class Counsel to represent the
8 Settlement Class.

9 (4) The Court hereby preliminarily approves the Settlement Agreement and
10 the terms and conditions of the Settlement set forth therein, subject to further
11 consideration at the Fairness Hearing.

12 (5) The Court will hold a Fairness Hearing on **Monday, January 23, 2017,**
13 at **10:30 a.m.,** in the Courtroom of the Honorable Cynthia Bashant, United States
14 District Court for the Southern District of California, Courtroom 4B (4th Floor -
15 Schwartz), 221 West Broadway, San Diego, CA 92101, for the following purposes:

16 (a) finally determining whether the Settlement Class meets all
17 applicable requirements of Rule 23 of the Federal Rules of Civil Procedure, and thus,
18 whether the claims of the Settlement Class should be certified for purposes of
19 effectuating the Settlement; determining whether the proposed Settlement of the
20 action on the terms and conditions provided for in the Settlement Agreement is fair,
21 reasonable, and adequate and should be approved by the Court;

22 (b) considering any motion of Class Counsel for an award of
23 attorneys' fees and costs;

24 (c) considering the motion of the Plaintiff for a service award, if any;

25 (d) considering whether the Court should enter the [Proposed] Final
26 Judgment and Order of Dismissal with Prejudice;

27 (e) considering whether the releases by the Settlement Class
28 Members as set forth in the Settlement Agreement should be provided; and

1 (f) ruling upon such other matters as the Court may deem just
2 and appropriate.

3 (6) The Court may adjourn the Fairness Hearing and later reconvene such
4 hearing without further notice to the Settlement Class Members.

5 (7) Any motion in support of the Settlement and any motion for an award
6 of attorneys' fees and costs or Plaintiff's service award, if any, must be filed with the
7 Court no later than **November 21, 2016**. Any opposition must be filed no later than
8 fourteen days after the motion is filed, and any reply must be filed no later than
9 twenty-eight days after the motion is filed.

10 (8) The Court appoints Kurtzman Carlson Consultants to serve as the
11 Claims Administrator for the Settlement.

12 (9) The Claims Administrator shall carry out all duties set forth in the
13 Settlement Agreement in the manner provided in the Settlement Agreement.

14 (10) The costs and expenses related to claims administration shall be paid
15 from the Settlement Fund in accordance with the applicable provisions of the
16 Settlement Agreement.

17 (11) All Settlement Class Members shall be bound by all determinations and
18 judgments in this action concerning the Settlement, whether favorable or unfavorable
19 to the Settlement Class.

20 (12) Any Settlement Class Member may enter an appearance in this action,
21 at his or her own expense, individually or through counsel. All Settlement Class
22 Members who do not enter an appearance will be represented by Class Counsel.

23 (13) Any person—including any entity via its authorized representative
24 when applicable throughout this Order—falling within the definition of the
25 Settlement Class may, upon request, be excluded from the Settlement Class. This
26 procedure is also referred to as "opting out" of the Settlement Class. Any person
27 wishing to be excluded from the Settlement Class must submit a written "Opt-Out
28 Request" to the Claims Administrator postmarked on or before 100 days after the

1 Notice Date (“Opt-Out Deadline”). The Notice Date will be within thirty days of the
2 Preliminary Approval Order and is the date the Postcard Notice is mailed. The Opt-
3 Out Request must include the Class Member’s: (a) name; (b) address; (c) the name
4 of the Action (i.e., *Sanders v. RBS Citizens, N.A.*); (d) a statement that he or she
5 wishes to be excluded from the Settlement Class; and (e) the Claims Identification
6 Number on the Postcard Notice or the cellular number on which he or she received a
7 the call from Defendant. Opt-Out Requests purportedly filed on behalf of groups of
8 persons are prohibited and will be deemed to be void. An Opt-Out Request must be
9 written and may not be requested telephonically or by email.

10 (14) Any class member who does not send a completed, signed Opt-Out
11 Request with the information listed in Paragraph 13 above to the Claims
12 Administrator postmarked or delivered on or before the Opt-Out Deadline will be
13 deemed to be a Settlement Class Member for all purposes and will be bound by all
14 further orders of the Court in this Action and by the terms of the Settlement, if finally
15 approved by the Court. All persons who submit valid and timely Opt-Out Requests
16 in the manner set forth in this Paragraph and Paragraph 13 above shall not: (a) be
17 bound by any orders or the Final Judgement; (b) gain any rights by virtue of this
18 Settlement Agreement; (c) be entitled to relief under the Settlement Agreement; nor
19 (d) be entitled to object to any aspect of this Settlement Agreement.

20 (15) No later than fourteen calendar days after the Opt-Out Deadline, the
21 Claims Administrator shall cause to be filed with the Court a list reflecting all Opt-
22 Out Requests.

23 (16) Any Settlement Class Member who desires to object either to the
24 Settlement, the award of Class Counsel’s fees and costs, or Plaintiff’s service award,
25 if any, must timely file with the Clerk of this Court and timely serve on the parties’
26 counsel identified below by hand or first-class mail a notice of the objection(s) and
27 proof of membership in the Settlement Class and the grounds for such objections,
28 together with all papers that the Settlement Class Member desires to submit to the

1 Court no later than the deadline as set forth in the class notices, which is 100 days
2 after the Notice Date (“Objection Deadline”). Settlement Class Members may not
3 both object and request exclusion from the Settlement. If a Settlement Class Member
4 submits both an Opt-Out Request and an objection, the Opt-Out Request will be
5 controlling. To be considered by the Court, the objection must also contain all of the
6 information listed in Paragraph 17 below. The Court will consider such objection(s)
7 and papers only if such papers are received on or before the Objection Deadline by
8 the Clerk of the Court and by Class Counsel and Defendant’s counsel. Such papers
9 must be sent to each of the following persons:

10
11 U.S. District Court
12 Southern District of California
13 Office of the Clerk
14 333 West Broadway, Suite 420
15 San Diego, CA 92101
16

17 Law Offices of Douglas J. Campion, APC
18 Douglas J. Campion, Esq.
19 17150 Via Del Campo
20 Suite 100
21 San Diego, CA 92127
22

23 Law Offices of Ronald A. Marron
24 Ronald A. Marron, Esq.
25 651 Arroyo Drive
26 San Diego, CA 92103
27

28 Reed Smith LLP

Raymond Kim, Esq.
355 South Grand Avenue
Suite 2900
Los Angeles, CA 90071

(17) All objections must include the Class Member's: (a) full name; (b) address; (d) reasons for his or her objection; and (e) the Claims Identification Number on the Postcard Notice or the cellular number on which he or she received a call from Defendant. Any documents, evidence, or citations supporting the objection must also be attached to the objection.

(18) All objections must be filed with the Clerk and served on the parties' counsel no later than the Objection Deadline. Objections that do not contain all required information or are received after the Objection Deadline will not be considered at the Fairness Hearing.


(19) Attendance at the Fairness Hearing is not necessary; however, any Settlement Class Member wishing to be heard orally with respect to approval of the Settlement, the motion for an award of Class Counsel's fees and costs, or the motion for Plaintiff's service award, if any, is required to provide written notice of his or her intention to appear at the Fairness Hearing no later than ten days prior to the Fairness Hearing by filing a "Notice of Intention to Appear." The Notice of Intention to Appear must include the Settlement Class Member's name, address, telephone number, and signature and must be filed and served as described in Paragraph 16 of this Order. Settlement Class Members who do not oppose the Settlement, the motion for an award of Class Counsel's fees and costs, or the motion for Plaintiff's incentive award, need not take any action to indicate their approval. A person's failure to submit a written objection in accordance with the Objection Deadline and the procedure set forth in the class notices waives any right the person may have to object to the Settlement, the award of Class Counsel's fees and costs, or Plaintiff's service

1 award, if any, or to appeal or seek other review of, if issued, the Final Judgment and
2 Order of Dismissal with Prejudice approving the Settlement.

3 (20) The parties are ordered to carry out the Settlement Agreement in the
4 manner provided in the Settlement Agreement.

5
6 **IT IS SO ORDERED.**

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8 **DATED: July 1, 2016**


9 **Hon. Cynthia Bashant**
10 **United States District Judge**
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