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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
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JONATHAN WEISBERG, individually and on behalf of all others similarly situated, Plaintiff, v. H.D. SUPPLY, INC., Defendant.	Case No. CV 15-8248 FMO (MRWx) **ORDER RE: MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT AND CERTIFICATION OF SETTLEMENT CLASS**

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18 Having reviewed and considered all the briefing filed with respect to Plaintiff's Amended
19 Motion for Preliminary Approval of Class Settlement and Certification of Settlement Class (Dkt.
20 64, "Motion") and the oral argument presented at the hearing on March 16, 2017 and July 6, 2017,
21 the court concludes as follows.

22 **INTRODUCTION**

23 On October 21, 2015, Jonathan Weisberg ("plaintiff" or Weisberg") filed this action on behalf
24 of himself and all others similarly situated, against HD Supply, Inc. ("HDS" or "defendant"),
25 asserting claims for violations of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. §
26 227. (See Dkt. 1, Complaint). Plaintiff's First Amended Complaint ("FAC"), the operative
27 complaint, alleges that defendant negligently and willfully violated the TCPA by sending text
28 messages to his cell phone. (See Dkt. 24, FAC at ¶¶ 14-26 & 50-57).

In his Motion, plaintiff seeks an order: (1) provisionally certifying a nationwide class for settlement purposes; (2) preliminarily approving the settlement; (3) directing dissemination of class notice; and (4) scheduling a final approval hearing. (See Dkt. 64, Motion at 7).

BACKGROUND

This case arises from allegations that HDS negligently and willfully violated the TCPA by sending plaintiff and the putative class text messages to their cell phones. (See Dkt. 24, FAC at ¶¶ 14-26 & 50-57). Plaintiff alleges that HDS used an "automatic telephone dialing system" ("ATDS") as defined by 47 U.S.C. § 227(a)(1) to send marketing texts to plaintiff.[1] (See id. at ¶ 33). Plaintiff, on his own behalf and on behalf of others similarly situated, seeks statutory damages, injunctive relief, and "[a]ny other relief the Court may deem just and proper." (Id. at pp. 23-24, Prayer for Relief).

During the litigation of this action, which included the filing of several motions to dismiss and a motion for sanctions (see Dkt. 64, Motion at 8-9; Dkt. Nos. 14, 19, 26, 31, 33, 35), and following "extensive discovery," the parties attended a mediation session on October 26, 2016, with the Honorable Louis M. Meisinger (Ret.) ("Judge Meisinger"). (See Dkt. 64-2, Declaration of Todd M. Friedman in Support of Plaintiff's Motion for Preliminary Approval of Class Settlement and Certification of Settlement Class ("Friedman Decl.") at ¶¶ 10-11). While the parties did not reach an immediate settlement during the mediation, they subsequently resolved the matter on approximately November 10, 2016, with the assistance of Judge Meisinger. (See id.. at ¶¶ 11, 13).

The parties have defined the settlement class as "[a]ll persons or entities within the United States who received texts from HDS using an alleged ATDS between October 21, 2011 and the date preliminary approval is granted." (Dkt. 64-2, Exh. A, Settlement Agreement and Release ("Settlement Agreement") at § 2.1; Dkt. 64, Motion at 9-10). The relief available to the class, which is estimated to consist of 13,298 members, will come from a $1,225,000 Settlement Fund (see

[1] Capitalization, emphasis, internal alteration marks, and internal quotation marks may be altered or omitted without notation in record citations.

Dkt. 64-2, Exh. A, Settlement Agreement at §§ 2.2, 4.1, 4.4, 15.5; Dkt. 64-2, Friedman Decl. at ¶¶ 31, 44), after all court-approved deductions for attorney's fees, costs, settlement administration fees and costs, and the class representative incentive payment.[2] (See Dkt. 64-2, Exh. A, Settlement Agreement at § 4.2; Dkt. 64-2, Friedman Decl. at ¶¶ 31, 33). Payment from the Settlement Fund will be paid on a pro rata basis to class members who submit timely claim forms. (See Dkt. 64-2, Exh. A, Settlement Agreement at §§ 5, 10.2). Plaintiff "estimate[s] there will be approximately $750,000 for the Settlement Class to be distributed pro rata[and i]f each and every 13,298 Class Member filed a Claims Form . . . then they would receive approximately $56.39." (Dkt. 64, Motion at 11). Moreover, the Settlement Fund is non-reversionary and any uncashed checks mailed to class members within 90 days will be delivered to a court-approved cy pres recipient. (See Dkt. 64-2, Exh. A, Settlement Agreement at §§ 4.4, 15.5).

LEGAL STANDARD

"[I]n the context of a case in which the parties reach a settlement agreement prior to class certification, courts must peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement." Staton v. Boeing Co., 327 F.3d 938, 952 (9th Cir. 2003).

I. CLASS CERTIFICATION.

At the preliminary approval stage, the court "may make either a preliminary determination that the proposed class action satisfies the criteria set out in Rule 23[3] or render a final decision as to the appropriateness of class certification." Smith v. Wm. Wrigley Jr. Co., 2010 WL 2401149, *3 (S.D. Fla. 2010) (internal citation omitted); see also Sandoval v. Roadlink USA Pac., Inc., 2011 WL 5443777, *2 (C.D. Cal. 2011) (citing Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620, 117 S.Ct. 2231, 2248 (1997)) ("Parties seeking class certification for settlement purposes must satisfy

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[2] The agreed-upon deductions include up to $306,250 in attorney's fees and $50,000 in litigation costs to class counsel, and an incentive payment of $5,000 to Weisberg. (See Dkt. 64, Motion at 10; Dkt. 56-1, Friedman Decl. at ¶¶ 33; Dkt 64-2, Exh. A, Settlement Agreement at §§ 6-8). Settlement administration costs are not to exceed $160,000. (See Dkt. 64-2, Exh. A, Settlement Agreement at § 8.4).

[3] All "Rule" references are to the Federal Rules of Civil Procedure.

1 the requirements of Federal Rule of Civil Procedure 23[.]"). "A court considering such a request
2 should give the Rule 23 certification factors 'undiluted, even heightened, attention in the settlement
3 context.'" Sandoval, 2011 WL 5443777, at *2 (quoting Amchem, 521 U.S. at 620, 117 S.Ct. at
4 2248). "Such attention is of vital importance, for a court asked to certify a settlement class will lack
5 the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings
6 as they unfold." Amchem, 521 U.S. at 620, 117 S.Ct. at 2248.

7 A party seeking class certification must first demonstrate that: "(1) the class is so numerous
8 that joinder of all members is impracticable; (2) there are questions of law or fact common to the
9 class; (3) the claims or defenses of the representative parties are typical of the claims or defenses
10 of the class; and (4) the representative parties will fairly and adequately protect the interests of the
11 class." Fed. R. Civ. P. 23(a).

12 "Second, the proposed class must satisfy at least one of the three requirements listed in
13 Rule 23(b)." Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 345, 131 S.Ct. 2541, 2548 (2011).
14 Rule 23(b) is satisfied if:

15 (1) prosecuting separate actions by or against individual class members
16 would create a risk of:

17 (A) inconsistent or varying adjudications with respect to individual
18 class members that would establish incompatible standards of
19 conduct for the party opposing the class; or

20 (B) adjudications with respect to individual class members that, as a
21 practical matter, would be dispositive of the interests of the other
22 members not parties to the individual adjudications or would
23 substantially impair or impede their ability to protect their interests;

24 (2) the party opposing the class has acted or refused to act on grounds that
25 apply generally to the class, so that final injunctive relief or corresponding
26 declaratory relief is appropriate respecting the class as a whole; or

27 (3) the court finds that the questions of law or fact common to class members
28 predominate over any questions affecting only individual members, and that

a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests 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)(1)-(3).

The party seeking class certification bears the burden of demonstrating that the proposed class meets the requirements of Rule 23. See Dukes, 564 U.S. at 350, 131 S.Ct. at 2551 ("A party seeking class certification must affirmatively demonstrate his compliance with the Rule – that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc."). However, courts need not consider the Rule 23(b)(3) considerations regarding manageability of the class action, as settlement obviates the need for a manageable trial. See Morey v. Louis Vuitton N. Am., Inc., 2014 WL 109194, *12 (S.D. Cal. 2014) ("[B]ecause this certification of the Class is in connection with the Settlement rather than litigation, the Court need not address any issues of manageability that may be presented by certification of the class proposed in the Settlement Agreement."); Rosenburg v. I.B.M., 2007 WL 128232, *3 (N.D. Cal. 2007) (discussing "the elimination of the need, on account of the Settlement, for the Court to consider any potential trial manageability issues that might otherwise bear on the propriety of class certification").

II. FAIRNESS OF CLASS ACTION SETTLEMENT.

Rule 23 provides that "the claims, issues, or defenses of a certified class may be settled . . . only with the court's approval." Fed. R. Civ. P. 23(e). "The primary concern of [Rule 23(e)] is the protection of th[e] class members, including the named plaintiffs, whose rights may not have been given due regard by the negotiating parties." In re Syncor ERISA Litig., 516 F.3d 1095,

1101-02 (9th Cir. 2008) (quoting Officers for Justice v. Civil Service Comm'n of the City & Cnty. of San Francisco, 688 F.2d 615, 624 (9th Cir. 1982), cert. denied 459 U.S. 1217 (1983)). Accordingly, a district court must determine whether a proposed class action settlement is "fundamentally fair, adequate, and reasonable." Staton, 327 F.3d at 959; see Fed. R. Civ. Proc. 23(e). Whether to approve a class action settlement is "committed to the sound discretion of the trial judge." Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1276 (9th Cir.), cert. denied, Hoffer v. City of Seattle, 506 U.S. 953 (1992) (internal quotation marks and citation omitted).

"If the [settlement] proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). "[S]ettlement approval that takes place prior to formal class certification requires a higher standard of fairness [given t]he dangers of collusion between class counsel and the defendant, as well as the need for additional protections when the settlement is not negotiated by a court designated class representative[.]" Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998). As the Ninth Circuit has observed, "[p]rior to formal class certification, there is an even greater potential for a breach of fiduciary duty owed the class during settlement. Accordingly, such agreements must withstand an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required under Rule 23(e) before securing the court's approval as fair." In re Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 946 (9th Cir. 2011).

Approval of a class action settlement requires a two-step process – a preliminary approval followed by a later final approval. See West v. Circle K Stores, Inc., 2006 WL 1652598, *2 (E.D. Cal. 2006) ("[A]pproval of a class action settlement takes place in two stages."); Tijero v. Aaron Bros., Inc., 2013 WL 60464, *6 (N.D. Cal. 2013) ("The decision of whether to approve a proposed class action settlement entails a two-step process."). At the preliminary approval stage, the court "evaluate[s] the terms of the settlement to determine whether they are within a range of possible judicial approval." Wright v. Linkus Enters., Inc., 259 F.R.D. 468, 472 (E.D. Cal. 2009). Although "[c]loser scrutiny is reserved for the final approval hearing[,]" Harris v. Vector Mktg. Corp., 2011 WL 1627973, *7 (N.D. Cal. 2011), "the showing at the preliminary approval stage – given the amount of time, money and resources involved in, for example, sending out new class notices –

should be good enough for final approval." Spann v. J.C. Penney Corp., 314 F.R.D. 312, 319 (C.D. Cal. 2016). "At this stage, the court may grant preliminary approval of a settlement and direct notice to the class if the settlement: (1) appears to be the product of serious, informed, non-collusive negotiations; (2) has no obvious deficiencies; (3) does not improperly grant preferential treatment to class representatives or segments of the class; and (4) falls within the range of possible approval." Id. (internal quotation marks omitted); Harris, 2011 WL 1627973, at *7 (same); Cordy v. USS-Posco Indus., 2013 WL 4028627, *3 (N.D. Cal. 2013) ("Preliminary approval of a settlement and notice to the proposed class is appropriate if the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval.") (internal quotation marks omitted).

DISCUSSION

I. CLASS CERTIFICATION.

A. Rule 23(a) Requirements.

1. **Numerosity**.

The first prerequisite of class certification requires that the class be "so numerous that joinder of all members is impractical[.]" Fed. R. Civ. P. 23(a)(1). Although impracticability does not hinge only on the number of members in the putative class, joinder is usually impracticable if a class is "large in numbers." See Jordan v. Cnty. of Los Angeles, 669 F.2d 1311, 1319 (9th Cir.), vacated on other grounds, 459 U.S. 810 (1982) (class sizes of 39, 64, and 71 are sufficient to satisfy the numerosity requirement); Jimenez v. Domino's Pizza, Inc., 238 F.R.D. 241, 247 (C.D. Cal. 2006) (same). "As a general matter, courts have found that numerosity is satisfied when class size exceeds 40 members, but not satisfied when membership dips below 21." Slaven v. BP Am., Inc., 190 F.R.D. 649, 654 (C.D. Cal. 2000); see Tait v. BSH Home Appliances Corp., 289 F.R.D. 466, 473 (C.D. Cal. 2012) ("A proposed class of at least forty members presumptively satisfies the numerosity requirement.").

Here, the members of the class are so numerous that joinder of all members is impracticable. According to the parties, there are approximately 13,298 class members, (see Dkt.

Dkt. 64, Motion at 22; Dkt. 64-2, Exh. A, Settlement Agreement at § 2.2), which easily exceeds the minimum threshold for numerosity under Rule 23(a)(1).

2. **Commonality**.

The commonality requirement is satisfied if "there are common questions of law or fact common to the class[.]" Fed. R. Civ. P. 23(a)(2). Commonality requires plaintiff to demonstrate that his claims "depend upon a common contention . . . [whose] truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Dukes, 564 U.S. at 350, 131 S.Ct. at 2551; see Wolin v. Jaguar Land Rover N. Am., LLC, 617 F.3d 1168, 1172 (9th Cir. 2010) (The commonality requirement demands that "class members' situations share a common issue of law or fact, and are sufficiently parallel to insure a vigorous and full presentation of all claims for relief.") (internal quotation marks omitted). "The plaintiff must demonstrate the capacity of classwide proceedings to generate common answers to common questions of law or fact that are apt to drive the resolution of the litigation." Mazza v. Am. Honda Motor Co., 666 F.3d 581, 588 (9th Cir. 2012) (internal quotation marks omitted). "This does not, however, mean that every question of law or fact must be common to the class; all that Rule 23(a)(2) requires is a single significant question of law or fact." Abdullah v. U.S. Sec. Assocs., Inc., 731 F.3d 952, 957 (9th Cir. 2013), cert. denied, 135 S.Ct. 53 (2014) (emphasis and internal quotation marks omitted); see Mazza, 666 F.3d at 589 (characterizing commonality as a "limited burden[,]" stating that it "only requires a single significant question of law or fact"). Proof of commonality under Rule 23(a) is "less rigorous" than the related preponderance standard under Rule 23(b)(3). See Mazza, 666 F.3d at 589. "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." Hanlon, 150 F.3d at 1019.

Here, the litigation involves common class-wide issues that are apt to drive the resolution of plaintiff's claims. The common questions include: whether HDS used an ATDS in sending text messages to class members; whether it had "prior express consent" for sending the text messages; whether HDS violated the TCPA; and whether it did so willfully or knowingly. (See Dkt. 24, FAC at ¶¶ 33, 44; Dkt. 64, Motion at 22-23); see, e.g., Robinson v. Paramount Equity

Mortgage, LLC, 2017 WL 117941, *4 (E.D. Cal. 2017) (common questions of fact or law included "whether Defendant used an auto-dialer" to make calls without "written consent;" "whether Defendant's conduct violated the TCPA;" and "whether Defendant acted willfully"); Stemple v. QC Holdings, Inc., 2016 WL 4059345, *5 (S.D. Cal. 2016) (finding common questions of fact or law including whether defendant used an ATDS and whether defendant made calls in violation of the TCPA); Malta v. Fed. Home Loan Mortgage Corp., 2013 WL 444619, *2 (S.D. Cal. 2013) ("There are . . . several common questions of law, including: (1) whether [defendant] negligently violated the TCPA; (2) whether [defendant] willfully or knowingly violated the TCPA; and (3) whether [defendant] had "prior express consent" for the calls).

3. **Typicality**.

"Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought." Ellis v. Costco Wholesale Corp., 657 F.3d 970, 984 (9th Cir. 2011) (internal quotation marks and citation omitted). To demonstrate typicality, plaintiff's claims must be "reasonably co-extensive with those of absent class members[,]" although "they need not be substantially identical." Hanlon, 150 F.3d at 1020; see Ellis, 657 F.3d at 984 ("Plaintiffs must show that the named parties' claims are typical of the class."). "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiff[], and whether other class members have been injured by the same course of conduct." Ellis, 657 F.3d at 984 (internal quotation marks and citation omitted).

Here, the claims of the representative plaintiff are typical of the claims of the class. Plaintiff's claims arise from the same nucleus of facts as the class – text messages were sent to his cell phone allegedly via an ATDS – and are based on the same legal theory, i.e., the text messages allegedly violated the TCPA. (See Dkt. 24, FAC at ¶¶ 11-37,41, 45, 50-57; Dkt. 64, Motion at 23); Malta, 2013 WL 444619, at *3 (finding plaintiffs' claims typical of the class in part because their claims were "based on the same legal theory as that applicable to the class: that the calls violated the TCPA"). Additionally, the court is not aware of any facts that would subject the class representative "to unique defenses which threaten to become the focus of the litigation."

Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992).

4. **Adequacy of Representation**.

"The named Plaintiff[] must fairly and adequately protect the interests of the class." Ellis, 657 F.3d at 985 (citing Fed. R. Civ. P. 23(a)(4)). "To determine whether [the] named plaintiff[] will adequately represent a class, courts must resolve two questions: (1) do[es] the named plaintiff[] and [his] counsel have any conflicts of interest with other class members and (2) will the named plaintiff[] and [his] counsel prosecute the action vigorously on behalf of the class?" Id. (internal quotation marks and citation omitted). "Adequate representation depends on, among other factors, an absence of antagonism between representative[] and absentees, and a sharing of interest between representative[] and absentees." Id.

Here, the proposed class representative does not appear to have any conflicts of interest with the absent class members, as he has no individual claims separate from the class claims. Plaintiff states that he has "no interest that is not in line with the class members[,] (see Dkt. 64-1, Declaration of Jonathan Weisberg in Support of Plaintiff's Motion for Preliminary Approval of Class Settlement and Certification of Settlement Class ("Weisberg Decl.") at ¶ 7), and despite defendant's efforts to "place a wedge between [his] personal interests and that of the class" by offering him $7,5000, plaintiff "rejected the overtures" because of his "responsibilities to the class[.]" (Id. at ¶ 3). Indeed, plaintiff understands his "responsibilities and [is] willing and prepared to put the interest of the class members before [his] own." (Id. at ¶ 2). Under the circumstances, "[t]he adequacy-of-representation requirement is met here because Plaintiff[has] the same interests as the absent Class Members[.] Further, there is no apparent conflict of interest between the named Plaintiff['s] claims and those of the other Class Members' – particularly because the named Plaintiff[has] no separate and individual claims apart from the Class." Barbosa v. Cargill Meat Solutions Corp, 297 F.R.D. 431, 442 (E.D. Cal. 2013).

Finally, the court is satisfied that plaintiff's counsel are competent and willing to prosecute this action vigorously. Plaintiff's counsel requests, and the Settlement Agreement provides, that the court appoint as class counsel Todd M. Friedman and Adrian Bacon of The Law Offices of Todd M. Friedman, P.C. (See Dkt. 64-2, Friedman Decl. at ¶ 56; Dkt. 64-2, Exh. A, Settlement

Agreement at § 1.5). Todd Friedman ("Friedman") states that he has "extensive experience prosecuting cases related to consumer issues" and that his firm "has litigated over 1000 individual based consumer cases and litigated over 60 consumer class actions." (Dkt. 64-2, Friedman Decl. at ¶ 58). According to Friedman, "[a]pproximately 100% percent [sic] of [his] practice concerns consumer and employment litigation in general, with approximately 90% of [his] class action experience involving consumer protection, and approximately 50% percent [sic] of [his] class action practice involves litigating claims under the TCPA." (Id.; see also id. at ¶¶ 60-61) (listing consumer cases). Based on Friedman's representations, and having observed counsel's diligence in litigating this case, the court finds that plaintiff's counsel are competent, and that the adequacy of representation requirement is satisfied. See Barbosa, 297 F.R.D. at 443 ("There is no challenge to the competency of the Class Counsel, and the Court finds that Plaintiffs are represented by experienced and competent counsel who have litigated numerous class action cases."); Avilez v. Pinkerton Gov't Servs., Inc., 286 F.R.D. 450, 457 (C.D. Cal. 2012) vacated and remanded on other grounds, 595 Fed. Appx. 579 (9th Cir. 2015) ("Defendants do not dispute and the evidence confirms that, as detailed in their declarations, Plaintiff's counsel are experienced class action litigators who have litigated many . . . class actions and have been certified as class counsel in numerous other class actions[.]").

B. Rule 23(b) Requirements.

Certification under Rule 23(b)(3) is proper "whenever the actual interests of the parties can be served best by settling their differences in a single action." Hanlon, 150 F.3d at 1022 (internal quotation marks omitted). The rule requires two different inquiries, specifically a determination as to whether (1) "questions of law or fact common to class members predominate over any questions affecting only individual members[;]" and (2) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3); see Spann, 314 F.R.D. at 321-22.

1. **Predominance**.

"The Rule 23(b)(3) predominance inquiry tests whether [the] proposed class[is] sufficiently cohesive to warrant adjudication by representation." Amchem, 521 U.S. at 623, 117 S.Ct. at 2249. "Rule 23(b)(3) focuses on the relationship between the common and individual issues. When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." Hanlon, 150 F.3d at 1022 (internal quotation marks and citations omitted); see In re Wells Fargo Home Mortg. Overtime Pay Litig., 571 F.3d 953, 959 (9th Cir. 2009) ("[T]he main concern in the predominance inquiry . . . [is] the balance between individual and common issues."). Additionally, the class damages must be sufficiently traceable to plaintiff's liability case. See Comcast Corp. v. Behrend, 133 S.Ct. 1426, 1433 (2013).

For the reasons discussed above, see supra at § I.A.2., the court is persuaded that common questions predominate over individual questions. See, e.g., Robinson, 2017 WL 117941, at *6 ("[T]he common questions discussed in conjunction with Rule 23(a)(2) also predominate over any individual issues."); Malta, 2013 WL 444619, at *4 ("The central inquiry is whether [defendant] violated the TCPA by making calls to the class members. Accordingly, the predominance requirement is met."). Additionally, the relief sought applies to all class members and is traceable to plaintiff's liability case. See Comcast, 133 S.Ct. at 1433. In short, common questions predominate over all others in this litigation.

2. **Superiority**.

"The superiority inquiry under Rule 23(b)(3) requires determination of whether the objectives of the particular class action procedure will be achieved in the particular case" and "necessarily involves a comparative evaluation of alternative mechanisms of dispute resolution." Hanlon, 150 F.3d at 1023. Rule 23(b)(3) provides a list of four non-exhaustive factors relevant to superiority. See Fed. R. Civ. P. 23(b)(3)(A)-(D).

The first factor considers "the class members' interests in individually controlling the prosecution or defense of separate actions." Fed. R. Civ. P. 23(b)(3)(A). "This factor weighs

1 against class certification where each class member has suffered sizeable damages or has an
2 emotional stake in the litigation." Barbosa, 297 F.R.D. at 444. Here, plaintiff does not assert
3 claims for emotional distress, nor is there any indication that the amount of damages any individual
4 class member could recover is significant or substantially greater than the potential recovery of
5 any other class member. (See, generally, Dkt. 24, FAC). The alternative method of resolution is
6 individual claims for a relatively modest amount of damages, and such claims would likely never
7 be brought, as "litigation costs would dwarf potential recovery." Hanlon, 150 F.3d at 1023; see
8 Leyva v. Medline Indus., Inc., 716 F.3d 510, 515 (9th Cir. 2013) ("In light of the small size of the
9 putative class members' potential individual monetary recovery, class certification may be the only
10 feasible means for them to adjudicate their claims. Thus, class certification is also the superior
11 method of adjudication."); Bruno v. Quten Research Inst., LLC, 280 F.R.D. 524, 537 (C.D. Cal.
12 2011) ("Given the small size of each class member's claim, class treatment is not merely the
13 superior, but the only manner in which to ensure fair and efficient adjudication of the present
14 action."). In short, "there is no evidence that Class members have any interest in controlling
15 prosecution of their claims separately nor would they likely have the resources to do so." Munoz
16 v. PHH Corp., 2013 WL 2146925, *26 (E.D. Cal. 2013).
17 The second factor to consider is "the extent and nature of any litigation concerning the
18 controversy already begun by or against class members." Fed. R. Civ. P. 23(b)(3)(B). There is
19 no indication that any class member is involved in any other litigation concerning the claims in this
20 case. (See Dkt. 64, Motion at 26) ("The Parties are unaware of any competing litigation regarding
21 claims at issue.").
22 The third factor is "the desirability or undesirability of concentrating the litigation of the
23 claims in the particular forum[,]" Fed. R. Civ. P. 23(b)(3)(C), and the fourth factor relates to "the
24 likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3)(D). As noted above, "[i]n
25 the context of settlement . . . the third and fourth factors are rendered moot and are irrelevant."
26 Barbosa, 297 F.R.D. at 444; see Amchem, 521 U.S. at 620, 117 S.Ct. at 2248 ("Confronted with
27 a request for settlement-only class certification, a district court need not inquire whether the case,
28 if tried, would present intractable management problems, for the proposal is that there be no trial.")

(internal citation omitted).

The only factor in play here weighs in favor of class treatment. Further, the filing of separate suits by several thousand class members "would create an unnecessary burden on judicial resources." Barbosa, 297 F.R.D. at 445. Under the circumstances, the court finds that the superiority requirement is satisfied.

II. FAIRNESS, REASONABLENESS, AND ADEQUACY OF THE PROPOSED SETTLEMENT.

A. The Settlement is the Product of Arm's-Length Negotiations.

"This circuit has long deferred to the private consensual decision of the parties." Rodriguez v. W. Publ'g Corp., 563 F.3d 948, 965 (9th Cir. 2009). The Ninth Circuit has "emphasized" that "the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." Id. (internal quotation marks omitted). When the settlement is "the product of an arms-length, non-collusive, negotiated resolution[,]" id., courts afford the parties the presumption that the settlement is fair and reasonable. See Spann, 314 F.R.D. at 324 ("A presumption of correctness is said to attach to a class settlement reached in arm's-length negotiations between experienced capable counsel after meaningful discovery.") (internal citation omitted); In re Netflix Privacy Litig., 2013 WL 1120801, *4 (N.D. Cal. 2013) ("Courts have afforded a presumption of fairness and reasonableness of a settlement agreement where that agreement was the product of non-collusive arms' length negotiations conducted by capable and experienced counsel.").

Here, there is no evidence of collusion or fraud leading to, or taking part in, the settlement negotiations between the parties. On the contrary, HDS vigorously defended against the claims made in this litigation, filing five motions to dismiss (see Dkt. 14, 19, 26, 31, 35), including one that prompted plaintiff to file a motion for sanctions. (See Dkt. 33-1, Motion for Sanctions at 1). With respect to discovery, plaintiff's counsel states that the parties "engaged in extensive discovery, including the exchange of thousands of documents, as well as third party subpoenas from the

companies hired by HDS to send SMS messages to Class Members." (Dkt. 64-2, Friedman Decl. at ¶ 10). Documents obtained in response to third party subpoenas confirmed the total number of cell phone numbers that were sent text messages. (See id. at ¶ 21).

Following written discovery, the parties participated in a mediation with Judge Meisinger. (See Dkt. 64-2, Friedman Decl. at ¶ 11). Plaintiff's counsel prepared a 20 page, single-spaced mediation brief that extensively reviewed the law and facts. (See id.). Although defendant "strongly contested the legal issues in this matter[,]" the parties, with Judge Meisinger's guidance, reached a settlement in November 2016. (See id. at ¶¶ 12-13).

Based on the evidence and record before the court, the court is persuaded that the parties thoroughly investigated and considered their own and the opposing parties' positions. The parties had a sound basis for measuring the terms of the settlement against the risks of continued litigation, and there is no evidence that the settlement is "the product of fraud or overreaching by, or collusion between, the negotiating parties[.]" Rodriguez, 563 F.3d at 965 (quoting Officers for Justice, 688 F.2d at 625).

B. The Amount Offered In Settlement Falls Within a Range of Possible Judicial Approval and is a Fair and Reasonable Outcome for Class Members.

1. **Recovery for Class Members.**

The settlement is fair, reasonable, and adequate, particularly when viewed in light of the litigation risks in this case. As described above, the settlement class members will share in a settlement fund of $1,225,000. See supra at Background. After deducting amounts for claims administration, and assuming the court awards the full amount requested for attorney's fees ($306,250), costs ($50,000),[4] and an incentive award to plaintiff ($5,000), plaintiff estimates there would be approximately $750,000 remaining in the Settlement Fund for distribution among the class members. (See Dkt. 64, Motion at 11). According to plaintiff, if each class member submits a claim form, each would received approximately $56.39. (See id.). If roughly half of the class

[4] Plaintiff's counsel states that as of the filing of the Motion, his firm had incurred only approximately $8,500 in expenses, and absent the need for depositions of potential objectors to the settlement, he did not expect costs to exceed $10,000. (Dkt. 64-2, Friedman Decl. at ¶ 34).

members submit claim forms, then each would receive approximately $125.600, (id.), and if 2,500 do so, then each would receive approximately $300. (Id. at 11-12).

The settlement here is reasonable given the substantial litigation risks in this case. Plaintiff and his counsel believe that "recent developments in case law under the TCPA show substantial risks regarding both merits and certification issues." (Dkt. 64-2, Friedman Decl. at ¶ 49). For instance, defendant asserted throughout the case that "the dialing systems used to transmit SMS messages to Class Members was not an ATDS under the TCPA" (see id.), and that plaintiff's claims were moot because defendant tendered payment to plaintiff as compensation for his individual statutory damages. (See id. at ¶ 52). Plaintiff's counsel states that the "significant risk to the claims at issue in the case" were "given due weight in settlement discussions." (Id. at ¶ 51). Moreover, plaintiff recognizes the costs and delays of continued litigation. (See Dkt. 64, Motion at 20; Dkt. 64-1, Weisberg Decl. at ¶¶ 5-6; Dkt. 64-2, Friedman Decl. at ¶¶ 47-48). In short, the risks of continued litigation are significant, and the court takes these real risks into account. Weighed against those risks, and coupled with the costs and delays associated with continued litigation, the settlement's benefits to the class fall within the range of reasonableness. See Malta, 2013 WL 444619, at *7; see, e.g., Robinson, 2017 WL 117941, at *10 ("In the instant case, potential recovery is fixed by the TCPA: $500 per violation, with treble damages for knowing and willful violations. The most a class member will receive under the settlement is $200. Although there is a disparity between the potential recovery and the value of the settlement . . . [a]t the preliminary approval sta[g]e, the Court finds that the proposed settlement falls within the range of potential approval.") (citations omitted); Bellows v. NCO Fin. Sys., Inc., 2008 WL 4155361, *3 (S.D. Cal. 2008) ("each Class Member who makes a timely and accepted claim shall be entitled to receive a $70 settlement check"); Sarabri v. Weltman, Weinberg & Reis Co., L.P.A., 2012 WL 3991734, *3 (S.D. Cal.), report and recommendation adopted, 2012 WL 3809123 (S.D. Cal. 2012) (same); Lo v. Oxnard European Motors, LLC, 2011 WL 6300050, *5 (S.D. Cal. 2011) ("The Settlement Agreement requires Defendant to place $49,100.00 into a settlement fund, from which class members will have the right to make a claim to receive, at a minimum, approximately $131.69.").

2. **Release of Claims.**

Beyond the value of the settlement, potential recovery at trial, and inherent risks in continued litigation, courts also consider whether a class action settlement contains an overly broad release of liability. See 4 Newberg on Class Actions § 13:15, at 326 (5th ed. 2014) ("Beyond the value of the settlement, courts have rejected preliminary approval when the proposed settlement contains obvious substantive defects such as . . . overly broad releases of liability."); see, e.g., Fraser v. Asus Computer Int'l, 2012 WL 6680142, *3 (N.D. Cal. 2012) (denying preliminary approval of proposed settlement that provided defendant a "nationwide blanket release" in exchange for payment "only on a claims-made basis," without the establishment of a settlement fund or any other benefit to the class).

Here, plaintiff and class members who do not exclude themselves from the settlement will release and discharge HDS (as defined in the Settlement Agreement) "from any and all actions, causes of action, obligations, costs, expenses, damages, losses, clams, liabilities, and demands, of whatever character, known or unknown, to the date hereof, arising out of, relating to, or in connection with the Texts, any other text messaging by HDS or any of its agents, or the administration of this settlement." (Dkt. 64-2, Exh. A, Settlement Agreement at § 16.1). The Settlement Agreement defines "Texts" to mean "any and all SMS messages sent by HDS and/or agents of HDS to the cellular telephones of any Settlement Class Members between October 21, 2011 until the date Preliminary Approval is granted." (Id. at § 1.34). The release also contains a waiver of rights under California Civil Code § 1542 ("§ 1542"), which preserves unknown claims, and similar statutes of any other state. (See id. at § 16.2). However, the § 1542 release is "expressly limited to claims relating to conduct alleged in the [FAC], i.e., those legal claims arising from the transmission of Texts by HDS." (Id.). With the understanding that, under the release, the settlement class members are not giving up claims unrelated to those asserted in this action, the court finds that the release adequately balances fairness to absent class members and recovery for plaintiffs with defendants' business interest in ending this litigation with finality. See, e.g., Fraser, 2012 WL 6680142, at *4 (recognizing defendant's "legitimate business interest in 'buying peace' and moving on to its next challenge" as well as the need to prioritize "[f]airness to

absent class member[s]").

C. The Settlement Agreement Does Not Improperly Grant Preferential Treatment to the Class Representative.

"Incentive awards are payments to class representatives for their service to the class in bringing the lawsuit." Radcliffe v. Experian Info. Solutions Inc., 715 F.3d 1157, 1163 (9th Cir. 2013). The Ninth Circuit has instructed "district courts to scrutinize carefully the awards so that they do not undermine the adequacy of the class representatives." Id. The court must examine whether there is a "significant disparity between the incentive awards and the payments to the rest of the class members" such that it creates a conflict of interest. See id. at 1165. "In deciding whether [an incentive] award is warranted, relevant factors include the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998).

The Settlement Agreement provides that class counsel shall petition the court for an incentive award for the class representative of up to $5,000 "for his service as class representative[.]" (Dkt. 64-2, Exh. A, Settlement Agreement at § 7). It further provides that "Court approval of any Service Award will not be a condition of the Settlement." (Id.).

Here, it is clear that the settlement does not improperly grant preferential treatment to the class representative. As an initial matter, the $5,000 incentive award is presumptively reasonable. See Dyer v. Wells Fargo Bank, N.A., 303 F.R.D. 326, 335 (N.D. Cal. 2014) (finding an incentive award of $5,000 presumptively reasonable). Moreover, because the parties agree that the Settlement Agreement shall remain in force regardless of any incentive award, the award here is unlikely to create a conflict of interest between the named plaintiff and absent class members. Further, the record reflects that plaintiff has taken on responsibility in litigating this case, and the class has benefitted from his efforts. (See Dkt. 56-2, Weisberg Decl. at ¶ 2). While a disparity may exist between the award plaintiff receives and the potential monetary awards to absent class members, the court does not believe, under the circumstances here, that such disparity rises to the level of unduly preferential treatment. On the contrary, the additional payment – with his

1 request amounting to less than one percent of the settlement fund – is warranted given that
2 plaintiff resisted defendant's efforts to settle with him by offering him $7,500, (see Dkt. 64-1,
3 Weisberg Decl. at ¶ 3), which according to HDS represented plaintiff's statutory damages and
4 would have left plaintiff without standing to pursue the class claims. (See Dkt.35, Motion to
5 Dismiss at 1, 4). In short, because the parties agree that the settlement shall remain in force
6 regardless of any incentive award and the amount of the award is presumptively reasonable, the
7 court is persuaded that there is no conflict of interest between the named plaintiff and absent class
8 members. See In re Online DVD-Rental, 779 F.3d at 947-48 (approving incentive awards that
9 were roughly 417 times larger than $12 individual awards because the awards were reasonable,
10 the number of representatives was relatively small, and the total amount of incentive awards
11 "ma[d]e up a mere .17% of the total settlement fund").

12 D. Class Notice and Notification Procedures.

13 Upon settlement of a certified class, "[t]he court must direct notice in a reasonable manner
14 to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). Federal
15 Rule of Civil Procedure 23(c)(2) requires the "best notice that is practicable under the
16 circumstances, including individual notice" of particular information. See Fed. R. Civ. P.
17 23(c)(2)(B) (enumerating notice requirements for classes certified under Rule 23(b)(3)).

18 A class action settlement notice "is satisfactory if it generally describes the terms of the
19 settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come
20 forward and be heard." Churchill Vill., LLC v. Gen. Elec., 361 F.3d 566, 575 (9th Cir.), cert.
21 denied, 543 U.S. 818 (2004) (internal quotation marks omitted). "The standard for the adequacy
22 of a settlement notice in a class action under either the Due Process Clause or the Federal Rules
23 is measured by reasonableness." Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 113 (2d
24 Cir.), cert. denied, 544 U.S. 1044 (2005). Settlement notices must "fairly apprise the prospective
25 members of the class of the terms of the proposed settlement and of the options that are open to
26 them in connection with the proceedings." Weinberger v. Kendrick, 698 F.2d 61, 70 (2d Cir. 1982),
27 cert. denied, 464 U.S. 818 (1983) (internal quotation marks and brackets omitted); see Trotsky v.
28 Los Angeles Fed. Sav. & Loan Ass'n., 48 Cal.App.3d 134, 151-52 (1975) (same); Wershba v.

Apple Computer, Inc., 91 Cal.App.4th 224, 252 (2001) ("As a general rule, class notice must strike a balance between thoroughness and the need to avoid unduly complicating the content of the notice and confusing class members."). The notice should provide sufficient information to allow class members to decide whether they should accept the benefits of the settlement, opt out and pursue their own remedies, or object to its terms. See Wershba, 91 Cal.App.4th at 251-52. "[N]otice is adequate if it may be understood by the average class member." 4 Newberg on Class Actions § 11:53, at 167 (4th ed. 2013).

Here, the parties have selected, subject to court approval, Epiq Systems, Inc. ("Epiq") as the Claims Administrator. (See Dkt. 64-2, Exh. A, Settlement Agreement at §§ 1.4, 8.2; Dkt. 64, Motion at 5-6). The notice program will consist of a combination of: (1) individual notice to known class members in the form of post-card notice ("Mail Notice") (see Dkt. 64, Motion at 27; Dkt. 64-2, Exh. A, Settlement Agreement at § 9.1; Dkt. 67, Declaration of Todd M. Friedman Providing Plaintiff's Notice of Filing of Revised Class Notice Documents ("Friedman Notice Decl.") at Exh. B (Mail Notice)); website notice (Dkt. 67, Friedman Notice Decl. at Exh. A ("Website Notice"); (2) a publication notice in USA Today (see Dkt. 64, Motion at 27-28; Dkt. 94-2, Exh. A, Settlement Agreement at § 9.3; Dkt. 64-2, Exh. D ("Publication Notice"); Dkt. 64-2, Friedman Decl. at ¶ 26); and (3) banner ads on the internet providing approximately 90 million total impressions. (See Dkt. 64, Motion at 28; Dkt. 64-2, Exh. A, Settlement Agreement at § 9.3; Dkt. 64-2, Friedman Decl. at ¶ 26). Additionally, Epiq will establish a settlement website that will enable class members to submit a claim form and access and download the class notice and claim form; and will provide access to relevant documents, including a downloadable Opt Out Form (see Dkt. 64-2, Exh. E ("Opt-Out Form")), the operative complaint, the Settlement Agreement, the preliminary approval order, and plaintiff's motion for attorney's fees and other documents. (See Dkt. 64, Motion at 28; Dkt. 64-2, Friedman Decl. at ¶ 29; Dkt. 64-2, Exh. A, Settlement Agreement at § 9.2). Finally, Epiq will establish and maintain a toll-free telephone line where class members can obtain information. (See Dkt. 64-2, Friedman Decl. at ¶ 30; Dkt. 64-2, Exh. A, Settlement Agreement at §§ 8.3, 9.4).

The Mail Notice, which will include the URL address of the settlement website, (Dkt. 64-2, Exh. A, Settlement Agreement at § 9.1.5; Dkt. 67, Friedman Notice Decl., Exh. B (Mail Notice);

Dkt. 64-2, Friedman Decl. at ¶ 29), will be sent via U.S. Mail to class members whose contact information is maintained by defendant or can be obtained by Epiq via "reverse telephone look-up procedures[.]" (See Dkt. 64, Motion at 27; Dkt. 64-2, Exh. A, Settlement Agreement at §§ 9.1.2-9.1.3). It describes the nature of the action, including the class claims. (See Dkt. 67, Friedman Notice Decl., Exh. B (Mail Notice)); see Fed. R. Civ. P. 23(c)(2)(B)(i). The Mail Notice advises class members that "records indicate that HDS contacted [them] by text message on [their] mobile phone" during the class period. (See id.); see also Fed. R. Civ. P. 23(c)(2)(B)(ii). The Mail Notice explains the benefits of the settlement, including the estimated deductions from the settlement amount. (See Dkt. 67, Friedman Notice Decl., Exh. B (Mail Notice)). It advises class members that they may submit the Mail Notice Claim Form to Epiq or submit one online at the settlement website. (See id.). It further informs class members: (1) how to obtain an Opt-Out Form by visiting the settlement website; (2) the deadlines for opting out of the class and submitting objections and claim forms; and (3) the date of the final fairness hearing. (See id.); see also Fed. R. Civ. P. 23(c)(2)(B)(iv)-(vi). Finally, it advises class members that they may appear on their own or through counsel at the final fairness hearing. (See Dkt. 67, Friedman Notice Decl., Exh. B (Mail Notice)); see also Fed. R. Civ. P. 23(c)(2)(B)(iv)-(vi).

The Website Notice, (see Dkt. 64-2, Exh. A, Settlement Agreement at § 9.2.1), describes the nature of the action, including the class claims. (See Dkt. 67, Friedman Notice Decl., Exh. A ("Website Notice") at 4); see also Fed. R. Civ. P. 23(c)(2)(B)(i) & (iii). The class definition is conspicuously included in a section entitled, "Who is in the Settlement?" (Sse Dkt. 67, Friedman Notice Decl., Exh. A, Website Notice at 5). The Website Notice also includes an explanation that lays out the class members' options under the settlement: they may submit a claim form, do nothing, exclude themselves, or object. (See id. at 1-2, 5-7); see also Fed. R. Civ. P. 23(c)(2)(B)(v)-(vi). It also provides that class members may elect to exclude themselves by completing and submitting online or mailing an Opt Out Form, which will be available on the settlement website. (See id. at 6-7). The Website Notice also states that if class members choose to object to the settlement, they may do so by submitting their written objections to the court, and

they may attend the final approval hearing.[5] (See id. at 7); see also Fed. R. Civ. P. 23(c)(2)(B)(iv). Finally, the Website Notice explains that all members of the class who do not exclude themselves will release the claims as more fully described in the Settlement Agreement. (See Dkt. 67, Friedman Notice Decl., Exh. A, Website Notice at 6).

Based on the foregoing, the court finds there is no alternative method of distribution that would be more practicable here, or any more reasonably likely to notify the class members. Under the circumstances, the court finds that the procedure for providing notice and the content of the class notice constitute the best practicable notice to class members and complies with the requirements of due process.

E. Summary.

The court's preliminary evaluation of the Settlement Agreement "does not disclose grounds to doubt its fairness[,] . . . such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys, and appears to fall within the range of possible approval[.]" In re Vitamins Antitrust Litig., 2001 WL 856292, *4 (D.D.C. 2001) (quoting Manual for Complex Litigation § 30.41 (3d ed. 1999)); see also Spann, 314 F.R.D. at 323 (same); In re NVIDIA Corp. Derivative Litig., 2008 WL 5382544, *2 (N.D. Cal. 2008) (same).

CONCLUSION

Based on the foregoing, IT IS ORDERED THAT:

1. Plaintiff's Amended Motion for Preliminary Approval of Class Settlement and Certification of Settlement Class **(Document No. 64)** is **granted** upon the terms and conditions set forth in this Order.

2. The court preliminarily certifies the class, as defined in § 2.1 of the Settlement Agreement and Release ("Settlement Agreement") (Document No. 64-2, Exhibit A) for the purposes of settlement.

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[5] The Website Notice explains that class members who object and wish to speak at the Final Fairness Hearing must file a notice of intent to appear. (See Dkt. 67, Friedman Notice Decl., Exh. A, Website Notice at 8). Also, it requires information from objecting class members regarding objections served in other class actions within the past five years. (See id. at 7).

3. The court preliminary appoints plaintiff Jonathan Weisberg as class representative for settlement purposes.

4. The court preliminarily appoints Todd M. Friedman and Adrian Bacon of The Law Offices of Todd M. Friedman, P.C. as class counsel for settlement purposes.

5. The court preliminarily finds that the terms of the Settlement are fair, reasonable and adequate, and comply with Rule 23(e) of the Federal Rules of Civil Procedure.

6. The proposed manner of the notice of settlement set forth in the Settlement Agreement constitutes the best notice practicable under the circumstances and complies with the requirements of due process.

7. The court approves the form, substance, and requirements of the Mail Notice (Dkt. 67, Exh. B); Website Notice (Dkt. 67, Exh. A); Publication Notice (Dkt. 64-2, Exh. D); and the Opt Out Form (Dkt. 64-2, Exh. E).

8. The parties shall carry out the settlement and claims process according to the terms of the Settlement Agreement.

9. Epiq Systems, Inc. shall complete dissemination of class notice, in accordance with the Settlement Agreement, no later than **August 28, 2017**.

10. Any class member who wishes to: (a) object to the settlement, including the requested attorney's fees, costs and incentive award; or (b) exclude him or herself from the settlement must file his or her objection to the settlement or request for exclusion (i.e., the Opt Out Form) no later than **December 5, 2017**, in accordance with the Settlement Agreement, Mail Notice, Website Notice, and/or Opt Out Form.

11. Any class member who wishes to appear at the final approval (fairness) hearing, either on his or her own behalf or through an attorney, to object to the settlement, including the requested attorney's fees, costs and incentive award, shall, no later than **December 19, 2017**, file with the court a Notice of Intent to Appear at Fairness Hearing.

12. A final approval (fairness) hearing is hereby set for **January 18, 2018,** at **10:00 a.m.** in Courtroom 6D of the First Street Courthouse, to consider the fairness, reasonableness, and adequacy of the Settlement as well as the award of attorney's fees and costs to class counsel, and

service award to the class representative.

13. Plaintiff shall file a motion for an award of class representative incentive payments and attorney's fees and costs no later than **October 5, 2017,** and notice it for hearing for the date set forth in paragraph 12 above. Any objection to the motion for an award of class representative incentive payment and attorney's fees and costs, by class members, shall be filed by the deadline set forth in paragraph 10 above. In the event any objections to the motion for an award of class representatives incentive payment and attorney's fees and costs are filed, class counsel shall, no later than **December 19, 2017,** file a reply addressing the objections.

14. Plaintiff shall, no later than **December 19, 2017,** file and serve a motion for final approval of the settlement and a response to any objections to the settlement. The motion shall be noticed for hearing for the date set forth in paragraph 12 above. Defendant may file and serve a memorandum in support of final approval of the Settlement Agreement or in response to objections no later than **December 27, 2017.**

15. All proceedings in the Action, other than proceedings necessary to carry out or enforce the Settlement Agreement or this Order, are stayed pending the final fairness hearing and the court's decision whether to grant final approval of the settlement.

Dated this 26th day of July, 2017.

/s/
Fernando M. Olguin
United States District Judge