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Attorneys for *Plaintiff John Blaha, Individually and on Behalf of Others Similarly Situated*

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

John Blaha,* individually and on behalf of others similarly situated,

Plaintiff,

v.

Rightscorp, Inc., a Nevada corporation, f/k/a Stevia Agritech Corp.; Rightscorp, Inc., a Delaware corporation; Christopher Sabec; Robert Steele; Craig Harmon; Dennis J. Hawk; BMG Rights Management (US) LLC; Warner Bros. Entertainment Inc.; and John Does 1 to 10,

Defendants.

Case No.: 2:14-cv-9032-DSF-(JCGx)

Assigned to: Hon. Dale S. Fischer
United States District Judge

PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Date: February 8, 2016
Time: 1:30 p.m.
Courtroom: 840

Complaint Filed: November 21, 2014
Trial Date: Not yet set

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Plaintiff John Blaha respectfully submits the following Memorandum in Support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement.

I. INTRODUCTION

Plaintiff John Blaha ("Plaintiff"), individually and on behalf of the "Settlement Class" (as defined below) hereby submits this application for preliminary approval of a proposed settlement (the "Settlement") of this action (the "Action"). Defendants Rightscorp, Inc. f/k/a Stevia Agritech Corp; Rightscorp, Inc. ("Rightscorp"), BMG Rights Management (US) LLC; and Warner Bros. Entertainment, Inc. (collectively "Defendants") support Plaintiff's Motion. The terms of the Settlement are set forth in the Settlement Agreement (hereinafter "Agreement") filed herewith as Exhibit A to the Declaration of Jesse B. Levin ("Levin Dec.").

The proposed Settlement resulted from the Parties' participation in a full day mediation session before Ralph A. Williams, Esq. of ADR on August 17, 2015, in addition to extensive settlement discussions and negotiations following the mediation.

The settlement provides for a substantial benefit to the Settlement Class Members and makes available $450,000.00, minus Settlement Costs, to the estimated 2,059 Settlement Class Members established through pre-mediation discovery, as well as a valuable release of alleged claims Defendants have of copyright infringement for each individual class member. Under the proposed settlement agreement, Defendants will contribute $450,000.00 to the Settlement Fund, and each Qualified Class Member who submits a claim and executes an Affidavit of Non-Infringement will receive approximately $100.00. The payout for each Qualified Class Member may be reduced on a pro rata basis depending on the total number of Qualified Class Members and the amount of Settlement Costs.

The costs of notice and claims administration (estimated to be approximately $25,000) will paid by Defendants from the Settlement Fund. In addition, Plaintiff's attorneys' fees and legal costs are not to exceed $330,000.00 and will be paid by Defendants out of the Settlement Fund.

In consideration for the Settlement, Plaintiff, on behalf of the proposed Settlement Class (the "Class"), will dismiss the Action and unconditionally release and discharge Defendants from all claims relating to the Action. While Plaintiff believes that he would have obtained a favorable determination on the merits if this matter had proceeded to trial, he has determined that the Proposed Settlement provides significant benefits to the Class Members and is in the best interests of the Class at this time, given the expense, time, difficulties, risk and uncertainty involved should the case proceed to trial. Likewise, Defendants believe the Settlement is appropriate based upon various factors, including the prospect of filing individual counterclaims against Plaintiff and other class-members for alleged copyright infringement.

Accordingly, Plaintiff moves the Court for an order preliminarily approving the proposed Settlement, provisionally certifying the Class pursuant to Federal Rule of Civil Procedure 23(b)(3) for settlement purposes, directing dissemination of the class notice, appointing Class Counsel and a Class Representative, and scheduling a final approval hearing. A proposed Preliminary Approval Order is attached as Exhibit D to the Agreement and filed concurrently herewith. (Exhibit "A" to Levin Dec.) As set forth below, the proposed Settlement is fair, reasonable, and adequate and satisfies all of the requirements for preliminary approval.

II. STATEMENT OF FACTS

A. Factual Background

In his class action complaint ("Complaint"), Plaintiff alleges that during the relevant time period, four years prior to the filing of this Action, Defendants violated the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.*, ("TCPA") by using an automatic telephone dialer and/or sending pre-recorded calls to the cellular phones of various individuals without their "prior express consent". Plaintiff contends that he and the Class are entitled to statutory damages under the TCPA, including treble damages. Defendants deny that they violated the TCPA, and deny any and all alleged wrongdoing or liability alleged in this Action.

B. Proceedings to Date

Plaintiff filed the Complaint on November 21, 2014 asserting TCPA and Abuse of Process claims, among others. (Dkt. No. 1). On March 9, 2015, Plaintiff filed a First Amended Complaint, which contained the TCPA and Abuse of Process claims, and omitted other debt collection related causes of action. (Dkt No. 22). In the First Amended Complaint, Plaintiff asserts a general cause of action for TCPA violations, and based on those allegations, seeks $500 per negligent violation and $1,500 for each intentional violation. Plaintiff's claims were brought on behalf of a class individuals who received pre-recorded calls ("robo-calls) on their cellular phones which Rightscorp, Inc. ("Rightscorp") allegedly caused to be issued on behalf of its entertainment industry clients, such as Defendants BMG Rights Management (US) LLC ("BMG") and Warner Brothers Entertainment, Inc. ("Warner Brothers"). Plaintiff alleges that the robo-calls were part of Rightscorp's efforts to obtain settlements from individuals it suspected to have infringed upon its clients' copyrights by illegally downloading music from the internet. In doing so, Plaintiff alleges that Defendants BMG and Warner Brothers are vicariously liable for Rightscorps' robo-calls issued on their behalf.

On March 30, 2015, Defendants filed a Motion to Strike Second Cause of Action pursuant to California Code of Civil Procedure § 425.16 and to Dismiss Second Cause of Action Pursuant to F.R.C.P. Rule 12(b)6. (Dkt No. 30). That same day, Defendant Harmon filed a Motion to Dismiss for Lack of Personal Jurisdiction Pursuant to 12(b)(2). (Dkt No. 29). After Plaintiff opposed both motions, Defendants filed replies, and the Parties filed surreplies based upon recent case law regarding the viability of anti-SLAPP motions against Abuse of Process claims. On May 8, 2015, the Court granted Defendants' motions. (Dkt. No. 71). On June 8, 2015, Defendants answered and denied many of the allegations and all liability. (Dkt. No. 79).

Around this time, Plaintiff propounded pre-certification discovery, including Requests for Production, Special Interrogatories, and Requests for Admission. Defendants responded to Plaintiff's discovery with objections and the Parties met and

conferred through both letters and telephonic conferences.

In late May, 2015, the Parties discussed the possibility of early mediation of the remaining TCPA cause of action. Declaration of Jesse B. Levin ("Levin Dec."), ¶ 2. Soon thereafter, the Parties agreed to mediate with Ralph A. Williams. Levin Dec., ¶ 2. On June 6, 2015, the Parties filed a Joint Ex Parte Application to Stay All Proceedings Pending Completion of Mediation. (Dkt. No. 78). On June 8, 2015, the Court granted the Ex Parte Application and ordered a stay of all proceedings pending completion of mediation. (Dkt. No. 80). During this time, the Parties also met and conferred regarding their proposed pre-mediation informal discovery requests in order to prepare for mediation. Levin Dec., ¶ 3. In order to participate in an effective mediation, Defendants provided Plaintiff with data regarding the estimated number of cellular telephones implicated in Plaintiff's claims, the estimated number of alleged robo-calls, and the range of alleged copyright infringement counterclaims involved. Levin Dec., ¶ 4.

On August 17, 2015, the Parties participated in a mediation with Ralph A. Williams, which lasted over nine hours during which Plaintiff made himself available. Levin Dec., ¶ 5. With Mr. Williams' guidance, a Settlement was reached in principle on August 19, 2015. Levin Dec., ¶ 6. As a result of the mediation, the parties reached the settlement that is reflected in the Settlement Agreement executed by the parties Levin Dec., ¶ 7, Exhibit ("Exh.") A. During the time between August 19, 2015 and the present, the parties have continued to participate in confirmatory discovery. Levin Dec., ¶ 8. The Parties have also discussed and prepared all required documents necessary to submit the instant application seeking preliminary approval, including but not limited to preparing all attached documents. *Id.*

III. THE SETTLEMENT

A. The Settlement Class

1. Class Definition

The terms "Settlement Class" or "Settlement Class Members" are defined in the Agreement as follows:

> All natural persons residing in the United States, who, during the period four years prior to the date of the filing of this action through the date the Court enters an order preliminarily approving this Agreement, Rightscorp called or caused to be called at their cellular telephone number(s) using: (i) an artificial or pre-recorded voice; and (ii) equipment with the capacity to dial numbers without human intervention.

Excluded from the class are Defendants and any of their subsidiaries, affiliates, officers, directors, agents, representatives, predecessors, successors, assigns, and family members; Plaintiff's counsel; the presiding judge, any of the judge's staff, and any member of the judge's immediate family; and all persons who timely elect to opt-out from the Settlement Class. Agreement § 2.1.

2. Class Membership Determination

Based on data Defendants provided in pre-mediation discovery that reflects the unique cellular telephone numbers believed to fall in the Settlement Class, the Parties estimate that there are approximately 2,059 unique cellular telephone numbers associated with Settlement Class members. Levin Dec., ¶ 9.

B. <u>Settlement Benefits to the Class</u>

The Settlement Agreement provides for up to $100.00 in benefits to qualified Class Members as well as a potential release regarding Defendants' purported copyright infringement claims. Defendants will contribute $450,000 to the Settlement Fund. Each Qualified Class member who timely submits a claim may receive a payment of up to $100.00 subject to the following condition. The Settlement Agreement provides that Defendants will release any and all alleged claims or counterclaims for copyright infringement against Settlement Class Members who timely execute an Affidavit of Non-Infringement. The value of the total infringement releases is estimated to fall between $94.8 million and $19 billion in total statutory damages. Levin Dec., ¶ 9. Further, in order to qualify for a settlement payment, Settlement Class Members are also required to execute the Affidavit of Non-Infringement in addition to submitting a timely claim form.

Defendant also agrees to pay, by way of the Settlement Fund, settlement costs, which include: 1) all costs of administering the proposed settlement to conclusion; 2) an incentive fee to the Plaintiff (if awarded by the Court) in an amount not to exceed $5,000.00; and 3) litigation costs and attorneys' fees to Plaintiff's counsel (if awarded by the Court) in an amount not to exceed $330,000.00. Agreement §§ 8.1, 8.3-85.

C. Claims Process

All of the approximately 2,059 persons in the Class are entitled to make a claim to receive the benefits stated above provided they timely execute a claim form and an Affidavit of Non-Infringement. Agreement § 3.4. There is a 45 day Claims Period commencing from the Class Notice Date. Agreement §§ 6.4-6.5. To submit a claim, a Settlement Class Member can timely: (1) submit a claim form online on the settlement website; or (2) submit a claim form by mail. Agreement § 6.2. All the claimant needs to provide is: (1) a full name; (2) mailing address; (3) telephone number; (4) and an email address. Agreement, Exhibit A. Additionally, Settlement Class Members are required to execute an Affidavit of Non-Infringement in exchange for the Defendants' release of any and all purported copyright infringement claims or counterclaims and in order to receive a settlement payment. Agreement §3.4.

D. Class Representative's Application for Incentive Awards

The proposed Settlement contemplates that Class Counsel will ask the Court to award the Class Representative an incentive award in the amount of $ 5,000.00. Agreement § 8.3. Defendants have agreed not to oppose a request for such an incentive award in the agreed-upon amount.

E. Class Counsel's Application for Attorneys' Fees, Costs and Expenses

The proposed Settlement contemplates that Class Counsel shall be entitled to apply to the Court for an award of attorneys' fees and costs not to exceed $330,000.00. Agreement §8.1. Defendants have agreed not to oppose an application by Class Counsel for an award of attorneys' fees and costs not to exceed this amount. *Id.*

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IV. ARGUMENT

A. Preliminary Approval of The Proposed Settlement is Warranted

A class action may not be settled, compromised or dismissed without the court's approval. Fed. R. Civ. Proc. 23(e). Judicial proceedings under Rule 23 have led to an agreed procedure and specific criteria for settlement approval in class action settlements. *See Manual for Complex Litigation* (Fourth 2004) § 21.63, *et seq.*, including preliminary approval, dissemination of notice to class members, and a fairness hearing. *Id.* at §§ 21.632-21.634.

Upon a motion for preliminary approval, the Court must determine whether the settlement is "within the range of reasonableness" to allow notice to the proposed settlement class to be given and hearing for final approval to be set. *Ross v. Trex. Co, Inc.*, 2009 WL 2365865 at *3 (N.D. Cal. July 30, 2009); 4 Herbert B. Newberg, *Newberg on Class Actions* § 11.25 *et seq.*, and §13.64 (4th ed. 2002). The Court "must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing." *Manual for Complex Litigation* (Fourth) § 21.632.

As a matter of public policy, settlement is strongly favored for resolving disputes, particularly class actions. *See Utility Reform Project v. Bonneville Power Admin.*, 869 F.2d 437, 443 (9th Cir. 1989); *Officers for Justice v. Civil Service Comn'n*, 688 F.2d 615 (9th Cir. 1982). As a result, courts thus approve settlements "in recognition of the policy encouraging settlement of disputed claims." *In re Prudential Sec. Inc. Ltd. Partnerships Litig.*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995).

In making a preliminary fairness determination, courts consider "the strength of the plaintiff's case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status through trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; [and] the experience and views of counsel." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th

Cir. 1998). Further, the courts must give "proper deference to the private consensual decision of the parties," since "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.* at 1027.

In evaluating the potential settlement, the court need not reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute. *West Va. v. Chas. Pfizer & Co.*, 440 F.3d 1079, 1086 (2d Cir. 1971). Preliminary approval is merely the prerequisite to providing notice so "the proposed settlement… may be submitted to members of the prospective class for their acceptance or rejection." *Philadelphia Hous. Auth. v. Am. Radiator & Standard Sanitary Corp.*, 323 F. Supp. 364, 372 (E.D. Pa. 1970).

Preliminary approval of the settlement should be granted if there are no "reservations about the settlement such as unduly preferential treatment of class representatives or segments of the class, inadequate compensation or harms to the classes, the need for subclasses, or excessive compensation for attorneys." *Manual for Complex Litigation* § 21.632. This proposed settlement does not contain any of these potential impediments to preliminary approval.

Additionally, the opinion of experienced counsel supporting the settlement is entitled to considerable weight. *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980); *Kirkorian v. Borelli*, 695 F.Supp. 446 (N.D. Cal. 1988); *Boyd v. Bechtel Corp.*, 485 F.Supp. 610, 622 (N.D. Cal. 1979). The presumption of reasonableness is fully warranted here because the settlement is the product of arms' length negotiations by capable and experienced counsel. *M. Berenson Co. Inc. . v. Faneuil Hall Marketplace, Inc.*, 671 F.Supp. 819, 822 (D. Mass. 1987) ("the fact that experienced counsel involved in the case approved the settlement after hard-fought

negotiations is entitled to considerable weight"); 2 Newberg on Class Actions § 11.24 (4th Ed. & Supp. 2002).

Based on these standards, Plaintiff respectfully submits (which Defendants support) that, for the reasons detailed below, the Court should preliminarily approve the proposed Settlement.

1. Liability is Highly Contested and Both Sides Face Significant Challenges in Litigating this Case

Defendants have vigorously contested the claims asserted by Plaintiff in this Action. Although Plaintiff feels strongly about the merits of his case, there are risks inherent in continuing to litigate the Action. Class Counsel understands, despite the strength of its case, that there are inherent uncertainties in class action litigation. As such, Defendants would oppose any motion for class certification, and the outcome of such a motion is by no means guaranteed or certain. Furthermore, Defendants have intended to pursue counterclaims for copyright infringement against many of the class members, and defending such counterclaims would necessarily entail additional and significant uncertainty, labor, time, expense and additional substantive challenges may arise from the proposed counterclaims. Before agreeing upon the Settlement, Plaintiff and Class Counsel carefully evaluated the balance of the risks of continuing contentious litigation against the benefits to the Class, including the significant benefits to the Class of obtaining full and complete releases from all claims by Defendants against them for copyright infringement. Levin Dec., ¶ 6. Thus, Class Counsel now seeks preliminary approval of the Settlement. Likewise, Defendants contend that they have meritorious defenses and counterclaims to the action, particularly defenses to class certification. The Settlement is thus a sound compromise and a well-reasoned alternative to continuing the prosecution of the Action and any related counterclaims.

2. The Settlement Provides Substantial Benefit to the Class

Pursuant to the Agreement, Defendants will fully fund the Settlement of $450,000.00. Each Settlement Class Member who timely submits a valid claim form

and an Affidavit of Non-Infringement will receive payment of up to $100.00. To make a claim, Class Members must: (a) submit a claim form and an Affidavit of Non-Infringement on the Settlement website; or (b) submit the claim form and the Affidavit of Non-Infringement by mail. In exchange for executing the Affidavit of Non-Infringement, Settlement Class Members will be released from any and all of Defendants' purported copyright infringement claims or counterclaims.

The settlement award to each Class Member is fair and reasonable, based upon the relevant statute, and in light of the anticipated uncertainty, expense, and risk of continued litigation. Although the TCPA provides for statutory damages of $500 for each violation, a proposed settlement may be acceptable even it amounts to a small percentage of the potential recovery to the class members at trial. *In re Global Crossing Sec.and ERISA Litig.*, 225 F.R.D. 436, 460 (E.D. Pa. 2000) ("the fact that a proposed settlement constitutes a relatively small percentage of the most optimistic estimate does not, in itself, weigh against the settlement"); *National Rural Tele. Coop. v. DIRECTTV, Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004) ("well settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery"); *In re Omnivision Tech., Inc.*, 559 F.Supp. 2d 1036 (N.D. Cal. Jan. 9, 2008) (court-approved settlement amounts was just over 9% of the maximum potential recovery).

Even if Settlement Class Members do not file a claim, they will still be entitled to a release from Warner Brothers and/or BMG with respect to the alleged copyright infringement claims. Based upon pre-mediation discovery, Rightscorp identified 126,409 separate acts of alleged infringement, which implicate a theoretical range of $94.8 million to $19 billion in statutory damages. Levin Dec., ¶ 9. Even assuming Rightscorp could only collect $20, the amount Rightscorp purportedly offered to settle with some of the Settlement Class in the alleged robo-calls, for each alleged infringement, that would equate to over $2.5 million from the class. Thus, the proposed infringement releases will provide an over $94 million dollar benefit to Settlement Class Members. Additionally, Settlement Class Members stand to benefit from the settlement

based upon the prospect practices Rightscorp has promised to adopt moving forward in order to prevent it from making similar calls in the future without the call recipient's prior express consent. For all of these reasons, the Settlement will provide enormous value to the Settlement Class in addition to the proposed settlement payments.

3. The Settlement Was the Result of Arms-Length Good Faith Negotiations

The proposed Settlement is the product of several rounds of arms-length negotiations, including a nine-hour long mediation before Ralph A. Williams, and several weeks following the mediation. The Parties negotiated through email and by telephone, following the mediation session. With the guidance of Ralph A. Williams, the Parties reached a settlement. Levin Dec., ¶ 6. Additionally, Class Counsel is satisfied with the data provided regarding the estimated number of persons in the Settlement Class and the estimated number of pre-recorded calls to the Settlement Class Members' cellular phones. Levin Dec., ¶ 9. Further, after reaching an agreement in principle to settle this case, the Parties' counsel engaged in several rounds of discussions regarding the details of the settlement, its terms, and implementation thereof. Counsel's discussions included details regarding the claims procedure, notice, and related data. The time and effort spent on the settlement discussions, the mediation, and the drafting of the Settlement Agreement, strongly support preliminary approval of the proposed Settlement, and confirm that there was no collusion. *In re Wireless Facilities, Inc. Sec. Litig. II*, 253 F.R.D. 607, 610 (S.D. Cal. 2008) (settlements based upon arms-length negotiations and sufficient discovery are presumed to be fair).

4. Experienced Counsel Have Determined That the Settlement is Reasonable and Fair to the Class

The Parties are represented by counsel experienced in complex class action litigation. Class Counsel has extensive experience in class actions, including consumer class actions such as this one. Levin Dec., ¶ 11, Declaration of Drew E. Pomerance ("Pomerance Dec."), ¶¶ 2-6; Declaration of Morgan E. Pietz ("Pietz Dec."), ¶¶ 1-9.

Class Counsel believe that based upon the circumstances, the proposed Settlement is fair and reasonable and in the best interests of the Class Members. Levin Dec., ¶ 10, Pomerance Dec., ¶ 7.

B. The Court Should Preliminarily Certify the Class for Settlement Purposes

A court may conditionally certify an action for settlement purposes upon the parties agreement to settle a putative class action. *In re Wireless*, 253 F.R.D. at 633. ("Parties may settle a class action before class certification and stipulate that a defined class be conditionally certified for settlement purposes"). Certification of a class for settlement purposes requires a determination that the requirements of Rule 23 are met.

Plaintiff seeks certification of the following Settlement Class:

> All natural persons residing in the United States, who, during the period four years prior to the date of the filing of this action though the date the Court enters an order preliminarily approving this Agreement, Rightscorp called or caused to be called at their cellular telephone number(s) using: (i) an artificial or pre-recorded voice; and (ii) equipment with the capacity to dial numbers without human intervention.

As set forth below, class certification is appropriate because the Action meets the requirements of Rule 23(a) and Rule 23(b)(3).

1. The Class Is Sufficiently Numerous

Rule 23(a)(1) requires a class to be "so numerous that joinder of all members is impracticable." " '[I]mpracticability does not mean impossibility', but simply that joinder of all class members must be difficult or inconvenient." *Stern v. Docircle, Inc. dba Trumpia.com*, 2014 U.S. Dist. LEXIS 17949 at * 9 (C.D.Cal. Jan. 29, 2014) citing *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913 (9th Cir. 1964). For example, in *Stern*, the court found that numerosity was satisfied based upon the fact that "the text messages at issue number in the hundreds of thousands which suggests that the number of class members will be far too large for joinder to be practicable." *Id.* citing *In*

re Alcoholic Beverages Litig., 95 F.R.D. 321, 324 (E.D.N.Y. 1983).

Here the data that will be used to provide notice to the Class contains information relating to approximately 2,059 unique cellular telephone numbers associated with the Settlement Class Members. Agreement p. 3, I, Levin Dec., ¶ 9. Numerosity is thus plainly met here. *Miletak v. Allstate Ins. Co.*, 2010 WL 809579, at *10 (N.D. Cal. 2010) ("Generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, [numerosity] has been met.").

2. The Settlement Class' Claims Present Common Questions of Fact and Law

"A class has sufficient commonality 'if there are questions of fact and law which are common to the class.'" *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998) quoting Fed. R. Civ. P. 23(a)(2). "All questions of fact and law need not be common to satisfy this rule." *Id.* Indeed, "[c]ommon questions may predominate despite the existence of individual differences, as long as 'a sufficient constellation of common issues binds class members together.'" *Sparkle Hill, Inc. v. Interstate Mat Corp.*, 2012 WL 6589258 at * 3 (D. Mass. Dec. 18, 2012) quoting *Waste Management Holdings v. Mowbray*, 208 F.3d 288, 296 (1st Cir. 2000). "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury." *Wal-Mart Stores, Inc,. v. Dukes*, 131 S.Ct. 2541, 2551 (2011) (citations omitted). "There must be a 'common contention' that is "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Stern*, 2014 U.S. Dist. LEXIS 17949 at * 10 quoting *Dukes*, 131 S.Ct. at 2551.

Here, the proposed Class Members' claims arise from the same factual circumstances, specifically that Rightscorp allegedly made pre-recorded calls to Class Members' cellular phones from November 21, 2010 up to this year. The Proposed Class presents common questions regarding (1) Rightscorp's practice of sending pre-recorded messages to the putative class members' cellular phones; (2) the steps, if any, Rightscorp

took to comply with the TCPA, and (3) whether Rightscorp willfully violated the TCPA. The litigation is driven by common issues because all class members received the same, or similar pre-recorded calls, made by the same Defendant, Rightscorp, using the same technology, resulting in the same injury. *See Hinman v. M & M Rental Center, Inc.*, 545 F.Supp.2d 803, 806 (N.D. Ill. 2008) (finding commonality satisfied where defendant maintained a standard course of conduct in transmitting mass facsimiles).

"[F]or purposes of *Rule 23(a)(2)*, 'even a single common question will do.'" *Stern* quoting *Wal-Mart*, 131 S.Ct. at 2556. Thus, the *Stern* court found that the case presented common questions of fact and law, namely: "What steps Defendant took to comply with the TCPA, and whether it can be held to have negligently or willfully violated the TCPA when it took those steps…" *Id.* at. *11. Under the circumstances, the commonality requirement is satisfied for purposes of certifying a settlement class.

3. The Settlement Class Is Ascertainable

"A threshold question is whether a class is ascertainable." *Stern v. Docircle, Inc. dba Trumpia.com*, 2014 U.S. Dist. LEXIS 17949 at * 6 (C.D.Cal. Jan. 29, 2014). In order to certify a class, the plaintiff must "establish an objective way to determine" who is a class member. *Williams v. Oberon Media, Inc.*, 468 F. App'x 768, 770 (9th Cir. 2012).

In this case, the Settlement Class is ascertainable because the class definition describes "a set of common characteristics sufficient to allow a prospective plaintiff to identify himself or herself as having a right to recover based on the description." *Parkinson v. Hyundai Motor Am.*, 258 F.R.D. 580, 593 (C.D. Cal. 2008) (citations omitted). Specifically, the commons set of characteristics are (1) whether the individual received a pre-recorded message from Rightscorp; and (2) whether the prerecorded messages were sent to class members' cellular phones. *See Knuton v. Schwan's Home Serv., Inc.*, 2013 WL 4774763 at *5 (S.D. Cal. Sept. 5, 2013) (holding that a TCPA class was ascertainable because "[w]hether a customer received an autodialed or artificial/prerecorded call may be determined objectively".) As such, the class definition

is based on Rightscorp's standardized procedures and conduct and the class can be easily ascertained from Rightscorp's call records.

4. Typicality: Plaintiff and the Class Share Injuries Arising from the Same Course of Conduct

"The typicality prerequisite of *Rule 23(a)* is fulfilled if 'the claims or defenses of the representative parties are typical of the claims or defenses of the class.'" *Hanlon*, 150 F.3d at 1020 quoting Fed. R. Civ. P. 23(a)(3). "The typicality requirement looks to whether the claims of the class representatives [are] typical of those of the class, and [is] satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1019 (9th Cir. 2011) (citations omitted). In the Ninth Circuit, typicality may be established if "the unnamed class members have injuries similar to those of the named plaintiffs and the injuries result from the same, injurious course of conduct." *Stern*, 2014 U.S. Dist. LEXIS 17949 at * 12 (citation omitted). It is sufficient for the plaintiff's claims to "arise from the same remedial and legal theories" as the class claims. *Arnold v. United Artists Theatre Cir., Inc.*, 158 F.R.D. 439, 449 (N.D. Cal. 1994).

In *Stern*, the court found that typicality was satisfied because "[t]he unnamed class members received text messages identical or similar to those received by Plaintiff. And these text messages were caused by the same course of conduct." *Stern*, 2014 U.S. Dist. LEXIS 17949 at *12. Likewise, here Plaintiff and the Settlement Class received the same or similar pre-recorded messages Rightscorp sent to their cellular telephones. Further, Plaintiff's claims are typical of the claims of the Settlement Class as a whole because the claims arise from the same factual basis – pre-recorded messages Rightscorp sent to the class members' cellular phones – and are based on the same legal theory as applies to the class as a whole – that the calls violated the TCPA.

5. Plaintiff and Class Counsel are Adequate Representatives

Rule 23(a)(4) permits certification of the class action provided "the representative

parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon*, 150 F.3d at 1020 quoting Fed. R. Civ. P. 23(a)(4)

Plaintiff's TCPA claim is virtually coextensive with the class members. Plaintiff, like every other member of the class, received pre-recorded calls from Rightscorp. Plaintiff thus shares the same interest in recovering statutory damages for Rightscorp's robo-calls. Plaintiff has no conflict of interest with Other Class Members because, for purposes of Settlement, Plaintiff's claims are typical of those of other Class Members. Plaintiff has provided key evidence, including several documents regarding Rightscorp's practices. Thus, Plaintiff has a full understanding of the case and is committed to acting in the proposed class' best interest. Plaintiff will thus fairly and adequately protect the interest of the class.

As to the adequacy of class counsel, the court is required to consider "(i) the work counsel has done in identifying or investigating potential claims in this action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A). Here, Roxborough, Pomerance, Nye & Adreani, LLP has ample class-action experience as well as a documented history of successfully serving as class counsel. Levin Dec., ¶ 11, Pomerance Dec., ¶¶ 2-6; Pietz Dec., ¶ 2. And both firms have already committed significant resources and time in investigating the class claims. Levin Dec., ¶¶ 2-13, Pietz Dec., ¶5-6. Thus, Plaintiff's counsel is adequate.

6. Common Issues Predominate

"The predominance inquiry of Rule 23(b)(3) asks 'whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *In re Wells Fargo Home Mortgage Overtime Pay Litig.*, 571 F.3d 953, 957 (9th Cir. 2009) (citation

omitted). The central question is whether issues "subject to generalized proof predominate over those issues that are subject only to individualized proof." *Dilts v. Penske Logistics, LLC*, 267 F.R.D. 625, 634 (S.D. Cal. 2010) (citations omitted). "When common questions present a significant aspect of the case and they can be resolved for all class 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 quoting Charles Alan Wright et al., *Federal Practice & Procedure* § 1778 (2d ed. 1986).

Here the central inquiry is whether Defendants violated the TCPA by sending pre-recorded calls to Plaintiff's and the Class Members' cellular telephones. This issue can be resolved for all members of the class in a single adjudication, thus making class treatment appropriate.

7. Class Treatment for Settlement Purposes is Superior

Rule 23(b)(3) certification requires that class adjudication is "superior to other available methods for the fair and efficient adjudication of the controversy." *Achem Prods. Inc. v. Windsor*, 521 U.S. 597, 651 (1997) quoting Fed. R. Civ. P. 23(b)(3). A class action is considered superior if "classwide litigation of common issues will reduce litigation costs and promote greater efficiency." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). "This determination necessarily involves a comparative evaluation of alternative mechanisms of dispute resolution." *Hanlon*, 150 F.3d at 1023. "[I]f a comparable evaluation of other procedures reveals no other realistic possibilities, [the] superiority portion of Rule 23(b)(3) has been satisfied." *Local Joint Executive Bd. of Culinary/Bartenders Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1150, 1163 (9th Cir. 2000) ("a class action is a superior method for managing litigation if no realistic alternative exists.")

Consideration of the factors listed in Rule 23(b)(3) supports the conclusion that certification of the Settlement Class is appropriate. These factors are: (A) the interests of the members of the class in individually controlling the prosecution or defense of

separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desireability or undesireability of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of the class action. Fed. R. Civ. P. 2(b)(3).

When a court reviews a class action settlement, the fourth factor does not apply. In deciding whether to certify a settlement class, a district court "need not inquire whether the case, if tried, would present intractable management problems." *Achem Prods. Inc. v. Woodwood,* 521 U.S. 591, 620 (1997). "With the settlement in hand, the desirability of concentrating the litigation in one forum is obvious." *Elkins v. Equitable Life Ins. of Iowa*, 1998 WL 133741 at *20 (M.D. Fla. Jan. 27, 1998).

Here, Rule 23(b)(3)(A),(B), and (C) factors all favor certification:

- Any class member who wishes to pursue a separate action can opt out of the Settlement.
- The Parties are unaware of any competing litigation regarding the claims at issue.
- The Parties agree that it would be desireable to resolve Plaintiff's in this forum.

C. <u>The Proposed Method of Class Notice Is Appropriate</u>

Pursuant to Rule 23(c)(2)(B), if the court certifies the settlement class it must direct to class members the "best notice practicable" under the circumstances. Rule 23(c)(2)(B) does not require actual notice. *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994). Notice need only be given in a manner "reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action and afford them the opportunity to present their objections." *Mullan v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). "Adequate notice is critical to court approval of a class settlement under Rule 23(e)." *Hanlon*, 150 F.3d at 1025.

Pursuant to Fed. R. Civ. P. 23(e)(1)(b), "[t]he court must direct notice in a reasonable manner to all class members who would be bound by the proposal." Rule 23(c)(2)(b) also sets forth requirements as to the content of the notice. The notice must

clearly and concisely state in plain language: (i) the nature of the action; (ii) the definition of the class; (iii) the class claims, issues or defenses; (iv) that a class member may enter an appearance through counsel if the member so desires; (v) that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on class members under Rule 23(c)(3). Fed. R. Civ. P. 23(c)(2)(B).

Here, the Class Notice (mail notice), and the Long Form notice meet all the requirements. See Agreement, Ex. A-B. (Exhibit "A" to Levin Dec.) The Claims Administrator will mail individual mail notices by first-class mail to individuals associated with the telephone numbers included in the data produced by Defendants. The Claims Administrator will also publish the Long Form Notice online on the Settlement Administration Website. Agreement § 4.1. The direct mail notice will be mailed within 25 days of the Court's Preliminary Approval Order, and the Long Form Notice shall be posted on the Settlement Website within 5 business days from the entry of the Preliminary Approval Order. Agreement §§ 5.2, 4.1.

As set forth above, the notices will be disseminated and also posted on the website prior to the Final Approval hearing to give Class members the opportunity to comment on the settlement, or to opt out and preserve their rights. *Torrisi v. Tuscon Electric Power Co.*, 8 F.3d 1370, 1374-75 (9th Cir. 1993) (31 days notice more than sufficient to provide an opportunity for notice, opt-outs and any objections related to the settlement). Here, there will be 70 days to opt out or object from the entry of the order of preliminary approval. (The Class Notice will be distributed 25 business days from the entry of the preliminary approval order, and the Class Members will then have 45 days from the Class Notice Date to opt out (25 days + 45 days = 70 days). Accordingly, the direct mail notice and Long Form Notice fulfill the requirements of adequate notice and should be duly approved.

As set forth in the proposed Settlement, Defendants will provide the relevant data,

including the 2,059 unique telephone numbers to the Claims Administrator. Based upon the data provided, the Claims Administrator will do a "reverse look up" and obtain addresses for the direct mail notice. The information obtained from this process will also be used as part of the claim verification process.

This two-tiered notice plan is consistent with class certification plans regularly approved in this Circuit, and is designed to reach the largest number of Class Members. *Vazquez v. Coast Valley Roofing, Inc.*, 670 F.Supp.2d 1114, 1126-27 (E.D. Cal. 2009) (direct mail notice and supplemental publication notice "best possible notice" to class members); *Simpao v. Gov't of Guam*, 369 Fed. Appx. 837, 838 (9th Cir. 2010) (notice plan of direct notice and supplemental publication notice the "best notice practicable"). Here the mailing of the direct mail notice, along with the online long form notice satisfies due process requirements and is the best practicable notice under the circumstances.

D. The Court Should Appoint the Class Representative and Appoint Class Counsel

"[T]wo criteria for determining the adequacy of representation have been recognized. First, the named representatives must appear to be able to prosecute the action vigorously through qualified counsel, and second, the representatives must not have antagonistic or conflicting interests with the unnamed members of the class." *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978). The adequacy of representation requirement is met here. For settlement purposes, the Parties have agreed that Plaintiff John Blaha be appointed as the Class Representative. Agreement §§ 1.21, 8.4. 9.1(e). The Parties have agreed that Drew E. Pomerance, Jesse B. Levin of Roxborough, Pomerance, Nye & Adreani, LLP; and Morgan E. Pietz of the Pietz Law Firm should be appointed as Class Counsel for all Settlement purposes. Agreement. Agreement §9.1(f). Plaintiff's counsel have extensive experience sufficient to be appointed as Class Counsel here. Levin Dec., ¶ 12, Pomerance Dec., ¶¶ 2-6, Pietz Dec., ¶¶ 2-9. Plaintiff Blaha understands the obligations of serving as a class

representative, has adequately represented the interests of the putative class, and has retained experience counsel. Levin Dec., ¶ 11, Pomerance Dec., ¶¶ 2-6; Pietz Dec., ¶¶2-9. Plaintiff has no conflicting interests with the Class Members. Levin Dec., ¶ 13. Plaintiff and the Class Members seek the same relief, including damages for Defendants' alleged violations of the TCPA.

E. The Court Should Appoint Simpluris Inc. as the Claims Administrator

The Parties have agreed upon and propose that the Court appoint Simpluris Inc.to serve as the Claims Administrator. Agreement § 2.3. Simpluris specializes in providing administrative services in class action litigation, and has substantial experience in administering class action settlements, such as this one . Levin Dec., ¶ 13, Exh. B.

F. A Final Approval Hearing Should be Scheduled

The next step in the settlement approval process is a final approval hearing, at which time the Court may hear all evidence and arguments, for and against, settlement in order to evaluate the proposed Settlement. The Parties request that the hearing be held 105 days after the Class Notice Date and 50 days after the deadline for all class members to opt-out or object to the Settlement. The proposed Final Approval Order is attached to the Agreement as Exhibit D. (Levin Dec., Exhibit "A").

V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court enter an order preliminarily approving the proposed Settlement.

DATED: January 11, 2015

ROXBOROUGH, POMERANCE, NYE & ADREANI, LLP

/S/ JESSE B. LEVIN
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