UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

RETINA ASSOCIATES MEDICAL GROUP, INC., on behalf of itself and all others similarly situated, **Plaintiff,** **v.** **KEELER INSTRUMENTS, INC.,** **Defendant.**	**Case No.: SACV 18-01358-CJC (DFMx)** **ORDER GRANTING MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT [Dkt. 33]**

I. INTRODUCTION & BACKGROUND

Plaintiff Retina Associates Medical Group, Inc. brings this putative class action against Defendant Keeler Instruments, Inc. ("Keeler") for violations of the Telephone Consumer Protection Act, 47 U.S.C. §§ 227 *et seq*. ("TCPA"). (Dkt. 17 [Operative First Amended Complaint, hereinafter "FAC"].) Keeler manufactures ophthalmic instruments and sells ophthalmic medication. (Dkt. 33-2 [Declaration of Seth Lehrman, hereinafter

"Lehrman Decl."] ¶ 25.) According to Plaintiff, Keeler sent unsolicited advertisements to telephone facsimile machines without proper opt-out notices in violation of the TCPA. (*See generally* FAC.) On behalf of itself and the other recipients of these unsolicited advertisements, Plaintiff seeks statutory damages under the TCPA.

On April 23, 2019, the parties attended a full-day mediation in Philadelphia before an experienced mediator, Bennett G. Picker. (Lehrman Decl. ¶ 24.) Following the mediation and several continued negotiations, they entered into the settlement agreement before the Court (the "Settlement Agreement"). (*Id.*; Dkt. 33-1 Ex. A [Settlement Agreement].) It creates a Settlement Fund of $310,000 to benefit all persons or entities who were sent an unsolicited fax message advertising Keeler's goods or services on or after August 3, 2014. The Settlement Fund, less settlement administration costs, attorneys' fees and expenses, and an incentive award for Plaintiff, will be distributed on a pro rata basis to class members who submit a valid claim. (Lehrman Decl. ¶ 34.)

Before the Court is Plaintiff's unopposed motion for preliminary approval of the Settlement Agreement. (Dkt. 33 [hereinafter "Mot."].) For the following reasons, the motion is **GRANTED**.[1]

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[1] Having read and considered the papers presented by the parties, the Court finds this matter appropriate for disposition without a hearing. *See* Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set for July 29, 2019, at 1:30 p.m. is hereby vacated and off calendar.

II. ANALYSIS

A. Class Certification Requirements

Pursuant to Federal Rule of Civil Procedure 23, Plaintiff seeks provisional certification of a class for settlement purposes only. The proposed settlement class is defined as

> all persons or business entities in the United States who from August 3, 2014, until the date of preliminary approval were sent an unsolicited telephone facsimile message of material advertising the commercial availability or quality of any property, goods, or services by or on behalf of [Keeler].

(Settlement Agreement § 10.7.) Based on Keeler's records of successful fax transmissions, the settlement class consists of approximately 5,581 individuals. (Lehrman Decl. ¶ 29.)

When a plaintiff seeks conditional class certification for purposes of settlement, the Court must ensure that the four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b) are met. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *Staton v. Boeing Co.*, 327 F.3d 938, 952–53 (9th Cir. 2003). Under Rule 23(a), the plaintiff must show the class is sufficiently numerous, that there are questions of law or fact common to the class, that the claims or defenses of the representative parties are typical of those of the class, and that the representative parties will fairly and adequately protect the class's interests. Under Rule 23(b), the plaintiff must show that the action falls within one of the three "types" of classes. Here, Plaintiff seeks certification pursuant to Rule 23(b)(3). Rule 23(b)(3) allows certification where (1) questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and (2) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

1. Rule 23(a) Requirements

i. Numerosity

Rule 23(a)(1) requires that "the class is so numerous that joinder of all members is impracticable." "No exact numerical cut-off is required; rather, the specific facts of each case must be considered." *In re Cooper Cos. Inc. Sec. Litig.*, 254 F.R.D. 628, 634 (C.D. Cal. 2009) (citing *Gen. Tel. Co. of Nw., Inc. v. E.E.O.C.*, 446 U.S. 318, 330 (1980)). "As a general matter, courts have found that numerosity is satisfied when class size exceeds 40 members." *Moore v. Ulta Salon, Cosmetics & Fragrance, Inc.*, 311 F.R.D. 590, 602–03 (C.D. Cal. 2015); *see Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466, 473–74 (C.D. Cal. 2012). According to Keeler's records, the settlement class consists of 5,581 members. Accordingly, numerosity is satisfied.

ii. Commonality

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." The plaintiff must "demonstrate that the class members 'have suffered the same injury,'" which "does not mean merely that they have all suffered a violation of the same provision of law." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). Rather, the plaintiff's claim must depend on a "common contention" that is capable of classwide resolution. *Id.* This 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." *Id.*

Plaintiff asserts that Keeler sent the class members unsolicited advertisements in violation of the TCPA. Under the TCPA, any unsolicited advertisement must include a notice advising its recipient of the right to opt-out from future unsolicited advertisements.

47 U.S.C. § 227(b)(2)(D). Plaintiff contends that Keeler faxed each of the class members unsolicited advertisements without proper opt-out notices. On behalf of the class, it seeks $500 for each non-willful violation of the TCPA and $1,500 for each knowing or willful violation. Resolution of the class's TCPA claims thus presents at least two common questions: (1) whether Keeler's fax advertisements contained the opt-out notice required under the TCPA, and (2) whether Keeler's violation of the TCPA, if any, was willful or knowing. Those questions are central to each class member's claims and their resolution will determine, "in one stroke," whether Keeler violated the TCPA and if so, the amount of damages the class may obtain.

iii. Typicality

Rule 23(a)(3) requires that the "claims or defenses of the representative parties are typical of the claims or defenses of the class." Representative claims are "typical" if they are "reasonably coextensive with those of the absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). Plaintiff's and the class members' claims arise from the same alleged course of conduct: that Keeler sent them unsolicited fax advertisements without proper opt-out notices. Accordingly, Plaintiff's claims are "reasonably coextensive" with those of the class.

iv. Adequacy

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." This factor requires (1) a lack of conflicts of interest between the proposed class and the proposed representative plaintiff, and (2) representation by qualified and competent counsel that will prosecute the action vigorously on behalf of the class. *Staton*, 327 F.3d at 957. The concern in the context of a class action settlement is that there is no collusion between the defendant, class counsel,

and class representatives to pursue their own interests at the expense of the interests of the class. *Id*. at 958 n.12.

There is no evidence of a conflict of interest between Plaintiff and the class. Plaintiff's claims are identical to those of the class. It has every incentive to vigorously pursue those claims. Nor is there any evidence that Plaintiff's counsel will not adequately represent or protect the interests of the class. Plaintiff's counsel, Seth Lehrman of Edwards Pottinger LLC and Ronald J. Eisenberg of Schultz & Associates LLP, have extensive experience litigating class actions, including actions for violations of the TCPA. (Lehrman Decl. ¶¶ 45–46; Dkt. 33-3 [Declaration of Ronald J. Eisenberg] ¶¶ 22–23, 27.) Counsel have vigorously prosecuted this matter, leading to the present Settlement Agreement. The record indicates that they have done so capably and adequately.

2. Rule 23(b)(3) Requirements

In addition to the requirements of Rule 23(a), Plaintiff must satisfy the requirements of Rule 23(b)(3). Under Rule 23(b)(3), a plaintiff must demonstrate that common questions "predominate over any questions affecting only individual members." The predominance requirement overlaps with Rule 23(a)(2)'s commonality requirement but is a more demanding inquiry. *Hanlon*, 150 F.3d at 1019. The "main concern in the predominance inquiry . . . [is] the balance between individual and common issues." *In re Wells Fargo Home Mortg. Overtime Pay Litig*., 571 F.3d 953, 959 (9th Cir. 2009). The plaintiff must show that "questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 459 (2013). In TCPA cases, predominance "primarily turns on whether a class-based trial on the merits could actually be

administered." *Connelly v. Hilton Grand Vacations Co.*, 294 F.R.D. 574, 577 (S.D. Cal. 2013).

Plaintiff has shown that questions common to the class predominate over any questions affecting only individual members. The central question is whether Keeler faxed unsolicited advertisements without opt-out notices in violation of the TCPA. That question can be resolved using the same evidence for the class members, as it is based on Keeler's own records and technology.

Class actions certified under Rule 23(b)(3) must also be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The Court must consider four nonexclusive factors in evaluating whether a class action is the superior method for adjudicating Plaintiff's claims: (1) the interest of each class member in individually controlling the prosecution or defense of separate actions, (2) the extent and nature of any litigation concerning the controversy already commenced by or against the class, (3) the desirability of concentrating the litigation of the claims in the particular forum, and (4) the difficulties likely to be encountered in the management of a class action. *Id.*

The vast majority of the class members are presumably unaware that their rights may have been violated. Although an individual alleging violation of the TCPA can seek up to $1,500 in damages for each willful violation, there is significant cost and effort required for the average individual to bring a suit. *See Amchem*, 521 U.S. at 617 ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."). Alternatives to a class action are either no recourse for the thousands of individual class members, or a multiplicity of suits resulting in an inefficient administration of justice. Plaintiff avers there is no competing litigation

regarding the claims at issue. Given the substantial overlap in evidence and the desirability of concentrating litigation of the class's claims in one forum, the Court finds that the superiority requirement is met. Plaintiff's proposed class is appropriate for provisional certification under Rules 23(a) and 23(b)(3).

B. Fairness of the Proposed Settlement

Plaintiff also seeks preliminary approval of the Settlement Agreement. Rule 23(e) "requires the district court to determine whether a proposed settlement is fundamentally fair, reasonable, and accurate." *Staton*, 327 F.3d at 959 (quoting *Hanlon*, 150 F.3d at 1026). To determine whether this standard is met, a district court must consider a number of factors, including "the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; . . . and the reaction of the class members to the proposed settlement." *Id.* (quoting *Molski v. Gleich*, 318 F.3d 937, 953 (9th Cir. 2003)). At the preliminary approval stage, a full "fairness hearing" is not required. *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007). Rather, the inquiry is whether the 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." *Id.*

1. Amount Offered in Settlement

The Settlement Agreement provides that class members who file a valid claim will receive a pro rata share of the Settlement Fund. After deducting settlement administration costs, attorneys' fees and costs, and the proposed class representative

award, there will be approximately $190,542 remaining for distribution to the class. If, on one extreme, all 5,581 class members filed a claim, they would each receive approximately $34. If, on the other end, ten percent of the class members filed a claim, they would receive approximately $341 each. This recovery is well within the range of other TCPA settlements. *See, e.g.*, *In re Jiffy Lube Int'l, Inc. Text Spam Litig.*, 2012 WL 4849617, at *2 (S.D. Cal. Oct. 10, 2012) (approving certificate for $20 in defendant's goods or $15 in cash); *Rose v. Bank of Am.*, 2014 WL 4273358, at *10 (N.D. Cal. Aug. 29, 2014) (approving award amount between $20 and $40 in cash). This factor weighs in favor of preliminary approval.

2. Remaining Factors

The remaining factors likewise weigh in favor of preliminary approval. The parties did not settle until after engaging in substantial discovery and negotiation. Keeler initially moved to strike the class allegations on the ground that the class was unascertainable and required individual determinations. (*See generally* Dkt. 13-1.) Before the motion was adjudicated on the merits, Plaintiff filed an amended complaint. (*See* FAC.) Keeler answered the amended pleading with seventeen affirmative defenses. (Dkt. 20 [Answer].) The parties then made their initial disclosures and propounded written discovery requests. The parties met and conferred over discovery issues, leading Keeler to supplement its production. They then attended a full-day mediation before an experienced mediator. The involvement of an experienced mediator following meaningful discovery indicates that the Settlement Agreement was noncollusive. *See Satchell v. Fed. Express Corp.*, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007) ("The assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive.").

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The Settlement Agreement also presents a fair compromise in light of the risks and expense of continued litigation. If Plaintiff succeeded in certifying a class and prevailed on the merits, potential damages could be higher than the Settlement Agreement here. However, continued litigation involved considerable obstacles. Class certification in TCPA cases often turns on the issue of whether the recipient gave consent. Determining consent, in turn, can involve individualized issues that defeat commonality and predominance. *See Connelly*, 294 F.R.D. at 577 (noting that class certification in TCPA cases "is warranted only when the 'unique facts' of a particular case indicate that individual adjudication of the pivotal element of prior express consent is unnecessary" (citation omitted)). Through the instant Settlement Agreement, Plaintiff bypasses these risks and guarantees a tangible and substantial result for the class members.

C. Attorneys' Fees and Incentive Award

The Settlement Agreement also provides for $77,500 in attorneys' fees and costs. This amount reflects 25% of the $310,000 Settlement Fund. The Ninth Circuit has held that 25% of the fund is the "benchmark" for a reasonable fee award, and courts must provide adequate explanation in the record of any "special circumstances" to justify a departure. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 942–43 (9th Cir. 2011) (citing *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990)); *Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989) ("We note with approval that one court has concluded that the 'bench mark' percentage for the fee award should be 25 percent. That percentage amount can then be adjusted upward or downward to account for any unusual circumstances involved in this case." (internal citation omitted)). Based on the evidence before the Court, it preliminarily approves Plaintiff's proposed attorneys' fees and costs. The Court will expect Plaintiff's counsel to provide detailed evidence to support their award prior to final approval.

Plaintiff also seeks a $5,000 incentive award to compensate its time and efforts on behalf of the class. It is true that district courts in this state consider a $5,000 incentive award presumptively reasonable. *See In re Toys R Us-Del., Inc.-Fair & Accurate Credit Transactions Act Litig.*, 295 F.R.D. 438, 470 (C.D. Cal. 2014) (explaining that California district courts typically approve incentive awards between $3,000 and $5,000). However, Plaintiff offers no evidence of its efforts and time spent on behalf of the class. (*See generally Mot.*) The Court will expect Plaintiff to provide such evidence before final approval of its proposed incentive award.

D. Settlement Administrator

Plaintiff asks the Court to appoint Kurtzman Carson Consultants, LLC ("KCC") as settlement administrator. KCC specializes in providing administrative services in class action litigation and has extensive experience administering TCPA class action settlements. (*See* Settlement Agreement § 10.34.) Federal courts in California routinely approve KCC as a class action settlement administrator. *See*, *e.g.*, *Tadepalli v. Uber Techs., Inc.*, 2015 WL 9196054, at *13 (N.D. Cal. Dec. 17, 2015). Accordingly, the Court appoints KCC as Settlement Administrator. Any award of administrator expenses will need to be substantiated with detailed evidence.

E. Notice of the Proposed Settlement

Finally, Plaintiff seeks approval of the proposed manner and form of the notice that will be sent to the class members. Rule 23(c)(2)(B) provides that for Rule 23(b)(3) classes, as here, the Court "must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."

The Court finds the proposed manner of notice is adequate. Plaintiff proposes a notice protocol that centers on direct mail. Following preliminary approval, Keeler will provide KCC a list of the fax numbers from its successful fax transmissions. (Settlement Agreement § 12.1.) KCC will identify the names and physical addresses associated with the fax numbers provided. (*Id.* § 12.3.) KCC will run those names and addresses through the National Change of Address database and update its information accordingly. (*Id.*) It will then send a class notice to the addresses it obtains. The class notice will direct the class members to a settlement website that contains the class notice, Settlement Agreement, and claim form.

The form of notice also meets the requirements of Rule 23(c)(2)(B). Notice to class members must "clearly and concisely state, in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues or defenses; (iv) that the class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion, and (vii) the binding effect of a class judgment on members under Rule 23(c)(3)." Fed. R. Civ. P. 23(c)(2)(B). Here, the proposed notice provides clear information about the definition of the class and nature of the action, a summary of the terms of the proposed settlement, the process for objecting to the settlement, and the consequences of inaction. (*See* Dkt. 33-1 Ex. A.) The notice will also provide specific details regarding the date, time, and place of the final approval hearing and inform class members that they may enter an appearance. (*See id.*)

III. CONCLUSION

For the foregoing reasons, the Court **GRANTS** both provisional certification of the class for settlement purposes and preliminary approval of the Settlement Agreement. The Court hereby **APPOINTS** Plaintiff Retina Associates Medical Group, Inc. as Class Representative, Seth Lehrman and Ronald J. Eisenberg as Class Counsel, and KCC as Settlement Administrator. The Court also **APPROVES** the proposed notice and orders that it be disseminated to the class as provided in the Settlement Agreement. The final approval hearing shall be held on **Monday, December 2, 2019, at 1:30 p.m.**

DATED: July 22, 2019

CORMAC J. CARNEY
UNITED STATES DISTRICT JUDGE