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12 **UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

13 **SAYAN ABOUDI, ON BEHALF OF) Case No. 3:12-cv-02169-BTM-NLS**
14 **HIMSELF AND ALL OTHERS)**
15 **SIMILARLY SITUATED,) CLASS ACTION**

16 Plaintiff,)

17) **MEMORANDUM OF POINTS AND**
18) **AUTHORITIES IN SUPPORT OF**
19 vs.) **PLAINTIFF’S MOTION FOR**
20) **PRELIMINARY APPROVAL OF**
21) **CLASS ACTION SETTLEMENT**

22 **T-MOBILE USA, INC., et seq.,)**

23 Defendant.)

24) **Date: April 4, 2014**

25) **Time: 11:00am**

26) **Hon. Barry T. Moskowitz**

27) **[Oral Argument Not Requested]**

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1 **MEMORANDUM AND POINTS OF AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff, SAYAN ABOUDI (hereinafter referred to as “Plaintiff” or “Class
4 Representative”), individually and on behalf of the “Settlement Class” (as
5 defined below) hereby submits this application for preliminary approval of a
6 proposed settlement (the “Settlement”) of this action (the “Action”).¹ Defendant,
7 T-MOBILE USA, INC. (hereinafter referred to as “Defendant” or “TMUS”) does
8 not oppose Plaintiff’s Motion. The terms of the Settlement are set forth in the
9 Settlement Agreement and Release (hereinafter the “Agreement”) filed herewith
10 as Exhibit 1.²

11
12 The proposed Settlement resulted from the Parties’ participation in a two-
13 day mediation session before Judge Herbert B. Hoffman (Ret.) on May 16 and
14 17, 2013, in addition to extensive settlement discussions and negotiations in the
15 months following the May 16-17, 2013 mediation. The Parties participated in
16 substantial discovery prior to the mediation of this matter and also participated in
17 confirmatory discovery once an agreement in principle was reached to settle this
18 Action.

19
20 The Settlement provides for a substantial financial benefit to the Settlement
21 Class Members and makes available up to \$5 million dollars, minus Settlement
22 Costs, to the estimated 106,157 Settlement Class Members established through
23 confirmatory discovery. Under the proposed settlement, reached with the
24 guidance of Judge Hoffman, T-Mobile will contribute a minimum of \$2.5 million
25 to the Settlement Fund and a maximum of \$5 million, and each Qualified Class
26

27 ¹ Plaintiff and Defendants are collectively referred to as the “Parties.”

28 ² Unless otherwise specified, defined terms used in this Memorandum are intended to have the meaning ascribed to those terms in the Agreement.

1 Member who submits a claim will receive \$90. The payout for each Qualified
2 Class Member may be reduced on a pro rata basis depending on the total number
3 of Qualified Class Members and the amount of Settlement Costs.

4 The costs of notice and claims administration (estimated to be
5 approximately \$130,000) will be paid by Defendant out of the settlement fund.
6 In addition, Plaintiff's attorneys' fees not to exceed \$990,000 and legal costs not
7 to exceed \$100,000 will be paid by Defendant out of the settlement fund. Thus,
8 in addition to payments provided to Qualified Class Members, Defendant will be
9 responsible for approximately \$1.2 million in administration costs, Plaintiff's
10 attorneys' fees, and litigation costs incurred.

11 In consideration for the Settlement, Plaintiff, on behalf of the proposed
12 Settlement Class (the "Class"), will dismiss the Action and unconditionally
13 release and discharge Defendant and other Released Parties from all claims
14 relating to the Action. While Plaintiff is confident of a favorable determination
15 on the merits, he has determined that the proposed Settlement provides
16 significant benefits to the Class Members and is in the best interests of the Class.
17 Plaintiff also believes that the Settlement is appropriate because Plaintiff
18 recognizes the expense and amount of time required to continue to pursue the
19 Action, as well as the uncertainty, risk, and difficulties of proof inherent in
20 prosecuting such claims on a class-wide basis. Similarly, as evidenced by the
21 Agreement, Defendant believes it has substantial and meritorious defenses to
22 Plaintiff's claims, but has determined that it is desirable to settle the Action on
23 the terms set forth in the Agreement.

24 Accordingly, Plaintiff moves the Court for an order preliminarily
25 approving the proposed Settlement, provisionally certifying the Class pursuant to
26 Federal Rule of Civil Procedure 23(b)(3) ("Rule 23(b)(3)") for settlement
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1 purposes, directing dissemination of class notice, appointing Class Counsel and a
2 Class Representative, and scheduling a final approval hearing. A proposed
3 Preliminary Approval Order is attached as Exhibit F to the Agreement. The
4 proposed Settlement is fair, reasonable, and adequate and satisfies all of the
5 criteria for preliminary approval.

6 7 **II. STATEMENT OF FACTS**

8 9 **A. Factual Background**

10 In his class action complaint (“Complaint”), Plaintiff alleges that in the
11 relevant time period, September 4, 2008 to September 4, 2012,³ Defendant
12 violated the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.*,
13 (“TCPA”) by placing autodialed calls to the cellular telephones of persons
14 without “prior express consent,” using an “automatic telephone dialing system.”
15 Plaintiff contends he and the Class are entitled to statutory damages pursuant to
16 the TCPA. Defendant has denied and continues to deny that it violated the
17 TCPA, and denies any and all alleged wrongdoing or liability against it in the
18 Action.

19 20 **B. Proceedings to Date**

21 Plaintiff Sayan Aboudi filed the Complaint on September 4, 2012 asserting
22 claims under the TCPA. (Dkt. No. 1.) In the Complaint, Plaintiff asserts causes
23 of action for negligent and intentional violations⁴ of the TCPA, and based on
24 those allegations, seeks \$500 per negligent violation and \$1,500 for each
25 intentional violation. Plaintiff’s claims were brought on behalf of a class of

26
27 ³ The TCPA’s statute of limitations period runs for four years preceding the
filing of the original Complaint.

28 ⁴ Under the TCPA, a violation consists of a single call made that is prohibited
under the statute.

1 individuals in the United States who received collection calls on their cellular
2 phones from Defendant during the Class Period made through the use of an
3 automatic telephone dialing system or artificial or prerecorded voice and who did
4 not consent to such calls. (Dkt. No. 1).

5
6 On September 28, 2012, Defendant answered and denied all of the
7 allegations and liability. (Dkt. No. 4.). The parties engaged in an Early Neutral
8 Evaluation (ENE) with Hon. Magistrate Judge Stormes on November 5, 2012 and
9 appeared for a Case Management Conference on January 18, 2013.

10 Since that time, the Parties engaged in significant discovery. Defendant
11 provided extensive information and voluminous documents and data to Plaintiff,
12 including dialer records reflecting calls T-Mobile placed to Plaintiff and putative
13 class members. The dialer records produced by T-Mobile were analyzed by a
14 third-party expert engaged by Plaintiff. The Parties also participated in numerous
15 direct discussions about possible resolution of this litigation. After engaging in
16 initial discovery, the Parties participated in two-day mediation with the Hon.
17 Herbert Hoffman on May 16-17, 2013. With Judge Hoffman's guidance, this
18 Settlement was reached in principle on May 17, 2013. Atty Decls, ¶¶2-4. During
19 the time between May 17, 2013 and the present, the parties have remained active
20 in conducting confirmatory discovery, including the production of additional
21 documents and a deposition of T-Mobile's expert witness. The Parties have also
22 discussed and prepared all required documents necessary to submit the instant
23 application seeking preliminary approval, including but not limited to preparing
24 all attached documents. Atty Decls. ¶2-4, 6.

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1 **III. THE SETTLEMENT**

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3 **A. The Settlement Class.**

4 **1. Class Definition.**

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

7 All individuals in the United States who answered one
8 or more Collections Calls placed by T-Mobile to a
9 wireless telephone number using an automatic
10 telephone dialing system and not manually dialed, or an
11 artificial / prerecorded voice ("ATDS Calls"), either
12 directly, or indirectly through an outsourced vendor
13 placing calls on T-Mobile's behalf, between September
14 4, 2008 and September 4, 2012 and who:

- 14 (a) Are not current or former T-Mobile customers;
15 (b) Received Collections Calls from T-Mobile on a
16 non-T-Mobile US wireless telephone number that was
17 not provided to T-Mobile by the customer as a contact
18 number;
19 (c) Did not consent to receive those calls: and
20 (d) Did not indicate that the call had reached the
21 correct party.

22 Excluded from the Class are any employees of T-Mobile, its parent, affiliates, or
23 subsidiaries; the Judge or Magistrate Judge to whom the Action is assigned; and,
24 any member of those Judges' staffs or immediate families. For purposes of
25 clarification, the Class also does not include individuals who did not receive calls
26 placed by T-Mobile, either directly or indirectly, as set forth above, but did
27 receive calls from a third-party collections agency or business placing calls on its
28 own behalf in an attempt to collect debts owed on T-Mobile accounts.
Agreement §2.07.

1 **2. Class Membership Determination**

2 Based on data provided in discovery by Defendant and its counsel and
3 represented to be all available data reflecting the unique cell phone numbers
4 believed to fall in the Settlement Class, the Parties estimate that there are
5 approximately 106,157 unique cellular telephone numbers associated with
6 Settlement Class Members. Atty Decls. ¶¶2-6. Those numbers were confirmed by
7 confirmatory discovery responses provided by Defendant as well as through the
8 in-person deposition of Defendant’s expert witness, Carr Krueger, in December
9 of 2013 in Seattle, Washington. Atty Decls. ¶¶2-6.

10 **B. Settlement Benefits to the Class.**

11 The Settlement Agreement provides for up to \$5 million in cash benefits
12 (minus Settlement Costs) to Qualified Class Members. T-Mobile will contribute
13 a Minimum Payment of \$2.5 million to the Settlement Fund. Each Qualified
14 Class Member who submits a claim will receive a \$90 payout. The payout for
15 each Qualified Class Member may be reduced on a pro rata basis if the sum of the
16 amounts paid to Qualified Class Members and Settlement Costs exceeds the
17 Maximum Payment of \$5 million. *Agreement* §5.01-5.02

18 Defendant also agrees to pay, by way of the Settlement Fund, Settlement
19 Costs, which include: 1) all costs of administrating the proposed settlement to
20 conclusion; 2) an incentive fee to the Plaintiff (if awarded by the Court) in an
21 amount not to exceed \$1,500; 3) litigation costs to Plaintiff’s counsel (if awarded
22 by the Court) in an amount not to exceed \$100,000; and 4) attorneys’ fees to
23 Plaintiff’s counsel (if awarded by the Court) in an amount not to exceed
24 \$990,000. *Agreement* §2.29, 5.01-5.02, 6.01-6.02.

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1 **C. Claims Process.**

2 All of the approximately 106,157 persons in the Class are entitled to
3 make a claim to receive the benefits stated above. *Agreement*, §5.03. There is a
4 120-day Claims Period commencing after the entry of the Preliminary Approval
5 Order. *Agreement*, §7(H). To submit a claim, a Settlement Class Member can
6 timely: (1) call the Claims Administrator via the toll-free telephone number listed
7 in the settlement notices and provide the information required to make a claim;
8 (2) submit a Claim Form online on the Settlement website; or (3) submit a Claim
9 Form by mail. *Agreement*, §10.02. All the claimant needs to provide is: (1) a
10 name; (2) address; (3) telephone number; and 4) the cellular telephone number on
11 which the claimant answered a Collections Call from T-Mobile between
12 September 4, 2008 and September 4, 2012. The claimant also must attest that the
13 following information (required to establish membership in the Class) is true and
14 correct: (1) I am the person identified in this Claim Form; (2) I am not a T-
15 Mobile customer; (3) I have never been a T-Mobile customer; (4) I answered a
16 Collections Call placed by T-Mobile, either directly or indirectly through a
17 vendor placing calls on T-Mobile's behalf between September 4, 2008 and
18 September 4, 2012; (5) When I answered the call(s), I did not indicate to T-
19 Mobile that it had reached the correct party; and (6) I did not consent to receive
20 the call(s) from T-Mobile.
21

22 **D. Class Representative's Application for Incentive Awards.**

23 The proposed Settlement contemplates that Class Counsel will ask the
24 Court to award the Class Representative an incentive award in the amount of
25 \$1,500. *Agreement* §6.02. Defendant has agreed not to oppose a request for such
26 an incentive award in the agreed-upon amount. *Id.*
27

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1 **E. Class Counsel’s Application for Attorneys’ Fees, Costs, and**
2 **Expenses.**

3 The proposed Settlement contemplates that Class Counsel shall be
4 entitled to apply to the Court for an award of attorneys’ fees not to exceed
5 \$990,000 and litigation costs not to exceed \$100,000. *Agreement* §6.01.
6 Defendant has agreed not to oppose an application by Class Counsel for an
7 award of attorneys’ fees and costs not to exceed this amount. *Id.*

8 **IV. ARGUMENT**

9 **A. Preliminary Approval of The Proposed Settlement Is**
10 **Warranted.**

11 A class action may not be dismissed, compromised or settled without the
12 approval of the court. Fed. R. Civ. Proc. 23(e). Judicial proceedings under
13 Rule 23 have led to a defined procedure and specific criteria for settlement
14 approval in class action settlements, described in the *Manual for Complex*
15 *Litigation* (Fourth) (Fed. Judicial Center 2004) (“*Manual*”) § 21.63, *et seq.*,
16 including preliminary approval, dissemination of notice to class members, and a
17 fairness hearing. *Manual*, §§ 21.632, 21.633, 21.634.

18 At the preliminary approval stage, the Court must determine whether the
19 settlement is “within the range of reasonableness” to allow notice to the proposed
20 settlement class to be given and a hearing for final approval to be set. *See Ross v.*
21 *Trex Co., Inc.*, 2009 WL 2365865, *3 (N.D. Cal. 2009). *See also* 4 Herbert B.
22 Newberg, *Newberg on Class Actions* § 11.25 *et seq.*, and § 13.64 (4th ed. 2002
23 and Supp. 2004) (“*Newberg*”). The Court is not required to undertake an in-
24 depth consideration of the relevant factors for final approval. Instead, the “judge
25 must make a preliminary determination on the fairness, reasonableness, and
26 adequacy of the settlement terms and must direct the preparation of notice of the
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1 certification, proposed settlement, and date of the final fairness hearing.”
2 *Manual*, § 21.632 (4th ed. 2004).

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4 As a matter of public policy, settlement is a strongly favored method for
5 resolving disputes. *See Utility Reform Project v. Bonneville Power Admin.*, 869
6 F.2d 437, 443 (9th Cir. 1989). This is especially true in class actions such as this.
7 *See Officers for Justice v. Civil Service Comm’n*, 688 F.2d 615 (9th Cir. 1982).
8 As a result, courts should exercise their discretion to approve settlements “in
9 recognition of the policy encouraging settlement of disputed claims.” *In re*
10 *Prudential Sec. Inc. Ltd. Partnerships Litig.*, 163 F.R.D. 200, 209 (S.D.N.Y.
11 1995).

12 To make the preliminary fairness determination, courts may consider
13 several relevant factors, including “the strength of the plaintiff’s case; the risk,
14 expense, complexity, and likely duration of further litigation; the risk of
15 maintaining class action status through trial; the amount offered in settlement; the
16 extent of discovery completed and the stage of the proceedings; [and] the
17 experience and views of counsel.” *See Hanlon v. Chrysler Corp.*, 150 F.3d
18 1011, 1026 (9th Cir. 1998). Furthermore, courts must give “proper deference to
19 the private consensual decision of the parties,” since “the court’s intrusion upon
20 what is otherwise a private consensual agreement negotiated between the parties
21 to a lawsuit must be limited to the extent necessary to reach a reasoned judgment
22 that the agreement is not the product of fraud or overreaching by, or collusion
23 between, the negotiating parties, and that the settlement, taken as a whole, is fair,
24 reasonable and adequate to all concerned.” *Id.* at 1027.

25
26 Preliminary approval does not require the Court to make a final
27 determination that the settlement is fair, reasonable, and adequate. Rather, that
28 decision is made only at the final approval stage, after notice of the settlement

1 has been given to the class members and they have had an opportunity to voice
2 their views of the settlement or to exclude themselves from the settlement. *See* 5
3 James Wm. Moore, *Moore's Federal Practice – Civil* § 23.165[3] (3d ed.). Thus,
4 in considering a potential settlement, the Court need not reach any ultimate
5 conclusions on the issues of fact and law which underlie the merits of the dispute,
6 *West Va. v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1086 (2d Cir. 1971), and need not
7 engage in a trial on the merits, *Officers for Justice v. Civil Service Comm'n*, 688
8 F.2d at 625. Preliminary approval is merely the prerequisite to giving notice so
9 that “the proposed settlement . . . may be submitted to members of the
10 prospective class for their acceptance or rejection.” *Philadelphia Hous. Auth. v.*
11 *Am. Radiator & Standard Sanitary Corp.*, 323 F. Supp. 364, 372 (E.D. Pa. 1970).

13 Preliminary approval of the settlement should be granted if there are no
14 “reservations about the settlement, such as unduly preferential treatment of class
15 representatives or segments of the class, inadequate compensation or harms to the
16 classes, the need for subclasses, or excessive compensation for attorneys.”
17 *Manual for Complex Litigation* § 21.632, at 321 (4th ed. 2004). This proposed
18 settlement does not contain any of these potential impediments to preliminary
19 approval.

21 Furthermore, the opinion of experienced counsel supporting the settlement
22 is entitled to considerable weight. *See, e.g., Kirkorian v. Borelli*, 695 F.Supp.
23 446 (N.D. Cal.1988) (opinion of experienced counsel carries significant weight in
24 the court’s determination of the reasonableness of the settlement); *Boyd v.*
25 *Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal. 1979) (recommendations of
26 plaintiffs’ counsel should be given a presumption of reasonableness).

27 The decision to approve or reject a proposed settlement “is committed to
28 the sound discretion of the trial judge[.]” *See Hanlon*, 150 F.3d at 1026. This

1 discretion is to be exercised “in light of the strong judicial policy that favors
2 settlements, particularly where complex class action litigation is concerned,”
3 which minimizes substantial litigation expenses for both sides and conserves
4 judicial resources. *See Linney v. Cellular Alaska P’ship*, 151 F.3d 1234, 1238
5 (9th Cir. 1998) (quotations omitted).

6
7 Based on these standards, Plaintiff respectfully submits (and Defendant
8 does not oppose) that, for the reasons detailed below, the Court should
9 preliminarily approve the proposed Settlement.

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

12 Defendant has vigorously contested the claims asserted by Plaintiff in this
13 Action. Although Plaintiff feels strongly about the merits of his case, there are
14 risks to continuing the Action. Class Counsel understands, despite its confidence
15 in its positions, that there are uncertainties associated with complex class action
16 litigation and that no one can predict the outcome of the case. If the Action were
17 to continue, Defendant would oppose any class certification motion made by
18 Plaintiff, thereby placing in doubt whether a class could be certified in the
19 Action, and additional substantive challenges to the claims might be raised. In
20 considering the Settlement, Plaintiff and Class Counsel carefully balanced the
21 risks of continuing to engage in protracted and contentious litigation against the
22 benefits to the Class including the significant benefit and the deterrent effects it
23 would have. Attorney Decls., ¶12. As a result, Class Counsel supports the
24 Settlement and seeks its Preliminary Approval. *Id.* Similarly, Defendant
25 believes that it has strong and meritorious defenses to the action as a whole, as
26 well as to class certification and the amount of damages sought. The negotiated
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1 Settlement is a compromise avoiding the risk that the class might not recover and
2 presents a fair and reasonable alternative to continuing to pursue the Action as a
3 class action for alleged violations of the TCPA.
4

5 **2. The Settlement Results in a Fair and Substantial Benefit**
6 **to the Class.**

7 As set forth above, Defendant will make a minimum payment of
8 \$2,500,000 and up to a maximum payment of \$5,000,000 as part of the
9 Settlement. As a result, each Settlement Class Member who submits a timely and
10 valid Claim Form will receive payment of up to \$90.00. In the event that the sum
11 of the Settlement Costs and amounts to be paid to Qualified Class Members
12 exceed the \$5,000,000 maximum payment, then the amounts paid to each
13 Qualified Class Member will be reduced pro rata. To make a claim, Class
14 Members must simply: (a) call the Claims Administrator via the toll free
15 telephone number listed in the settlement notices and provide the information
16 required to make a claim; (b) submit a Claim Form online on the Settlement
17 website; or (c) submit a Claim Form by mail.
18

19 The settlement award that each Class Member will receive is fair,
20 appropriate, and reasonable given the purposes of the TCPA and in light of the
21 anticipated risk, expense, and uncertainty of continued litigation. Although the
22 TCPA provides for statutory damages of \$500 for each violation, it is well-settled
23 that a proposed settlement may be acceptable even though it amounts to only a
24 small percentage of the potential recovery that might be available to the class
25 members at trial. *See e.g., National Rural Tele. Coop. v. DIRECTV, Inc.*, 221
26 F.R.D. 523, 527 (C.D. Cal. 2004) (“well settled law that a proposed settlement
27 may be acceptable even though it amounts to only a fraction of the potential
28

1 recovery”); *In re Global Crossing Sec. and ERISA Litig.*, 225 F.R.D. 436, 460
2 (E.D. Pa. 2000) (“the fact that a proposed settlement constitutes a relatively small
3 percentage of the most optimistic estimate does not, in itself, weigh against the
4 settlement; rather, the percentage should be considered in light of strength of the
5 claims”); *In re Omnivision Tech., Inc.*, 559 F. Supp. 2d 1036 (N.D. Cal. Jan. 9,
6 2008) (court-approved settlement amount that was just over 9% of the maximum
7 potential recovery); *In re Mego Fin’l Corp. Sec. Litig.*, 213 F. 3d 454, 459 (9th
8 Cir. 2000). This is particularly so in a case like this one where real difficulties
9 exist with respect to ascertaining membership in the settlement class.
10
11

12 **3. The Settlement Was Reached As the Result of Arms-**
13 **Length Negotiation, Without Collusion, With the**
14 **Assistance of the Court.**

15 The proposed Settlement is the result of intensive arms-length negotiation,
16 including a two-day long mediation session before the Hon. Herbert B. Hoffman
17 (Ret.) and several months of intense negotiations following the mediation. The
18 Parties also negotiated through in-person meetings, by email and by telephone,
19 both before and after the mediation session. The Parties conducted formal and
20 informal discovery as well, including Defendant’s production of dialer records
21 from several different databases which were reviewed and analyzed by both
22 parties’ expert witnesses. With the guidance of Judge Hoffman, and working
23 independently of the Court, the Parties were able to reach a resolution of this
24 case. *Agreement* §1.01-1.04; *Atty Decls.*, ¶¶2-4, 6. Confirmatory discovery was
25 provided to Class Counsel which included the production of additional dialer
26 records and a declaration from Defendant’s expert witness. In addition, Class
27 Counsel took the deposition of Defendant’s expert witness in December of 2013
28

1 in Seattle, Washington. Class Counsel is satisfied with the information provided
2 about the estimated number of persons in the Settlement Class and the estimated
3 number of cell phones called is correct. Atty Decls., ¶6. Furthermore, after
4 reaching an agreement in principle to settle the case, the Parties' counsel engaged
5 in extensive discussions about the many details regarding the settlement, its terms
6 and how to implement its terms. That was required to work out the many details
7 surrounding data production, the claims procedure, and how to provide notice.
8 The time and effort spent on settlement negotiations, as well the time spent with
9 Judge Hoffman in the settlement process, militate in favor of preliminary
10 approval of the proposed Settlement, as they strongly indicate there was no
11 collusion. *See In re Wireless Facilities, Inc. Sec. Litig. II*, 253 F.R.D. 607, 610
12 (S.D. Cal. 2008) ("Settlements that follow sufficient discovery and genuine arms-
13 length negotiation are presumed fair.").

14
15
16 **4. Experienced Counsel Have Determined That the**
17 **Settlement Is Appropriate and Fair to the Class.**

18 The Parties are represented by counsel experienced in complex class action
19 litigation. Class Counsel has extensive experience in class actions, as well as
20 particular expertise in class actions relating to consumer protection and
21 specifically the TCPA. Atty Decls., ¶¶20-28. Class Counsel believe that under
22 the circumstances, the proposed Settlement is fair, reasonable and adequate and
23 in the best interests of the Class Members. Atty Decls., ¶12.

24
25 **B. The Court Should Preliminarily Certify the Class for Purposes**
26 **of Settlement.**

27 When parties settle a putative class action before a class is certified, a court
28 may conditionally certify the action for settlement purposes. *See In re Wireless*

1 *Facilities, Inc.*, 253 F.R.D. 630, 633 (“Parties may settle a class action before
2 class certification and stipulate that a defined class be conditionally certified for
3 settlement purposes”). Like any other class certification decision, certification of
4 a class for settlement purposes requires a determination that the requirements of
5 Rule 23 are met. *Id.*

7 Plaintiff seeks certification of the following class for settlement purposes
8 only:

10 All individuals in the United States who answered one
11 or more Collections Calls placed by T-Mobile to a
12 wireless telephone number using an automatic
13 telephone dialing system and not manually dialed, or an
14 artificial / prerecorded voice (“ATDS Calls”), either
15 directly, or indirectly through an outsourced vendor
16 placing calls on T-Mobile’s behalf, between September
17 4, 2008 and September 4, 2012 and who:

- 18 (a) Are not current or former T-Mobile customers;
- 19 (b) Received Collections Calls from T-Mobile on a
20 non-T-Mobile US wireless telephone number that was
21 not provided to T-Mobile by the customer as a contact
22 number;
- 23 (c) Did not consent to receive those calls: and did
24 not indicate that the call had reached the correct party.

25 As explained below, class certification is appropriate here because the
26 Action meets the requirements of Rule 23(a) and Rule 23(b)(3).

27 **1. The Proposed Class Is Numerous.**

28 Class certification under Rule 23(a)(1) is appropriate where a class
contains so many members that joinder of all would be impracticable.
“Impracticability does not mean ‘impossibility,’ but only the difficulty or
inconvenience of joining all members of the class.” *Harris v. Palm Springs*

1 *Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964) (citation omitted).
2 Here, the data that will be used to provide notice to the Class contains
3 information relating to approximately 106,157 unique cellular telephone numbers
4 associated with Settlement Class Members. *Agreement* §9.02; Atty Decl., ¶¶6-7.
5 Thus, the proposed Class is sufficiently numerous for purposes of certifying a
6 settlement class. *See Miletak v. Allstate Ins. Co.*, 2010 WL 809579, at *10 (N.D.
7 Cal. 2010) (“Generally if the named plaintiff demonstrates that the potential
8 number of plaintiffs exceeds 40, [numerosity] has been met”).
9

10
11 **2. The Commonality Requirement Is Satisfied Because**
12 **Common Questions of Law and Fact Exist.**

13 The commonality requirement is met if there are questions of law and fact
14 common to the class. *Hanlon*, 150 F.3d at 1019 (“The existence of shared legal
15 issues with divergent legal factual predicates is sufficient, as is a common core of
16 salient facts coupled with disparate legal remedies within the class.”). Here, the
17 proposed Class Members’ claims all stem from the same factual circumstances,
18 specifically that autodialed calls were placed by Defendant to Class Members
19 between September 4, 2008 and September 4, 2012 using autodialing equipment.
20 Plaintiff’s claims also present a number of questions of law that are common to
21 all members of the Class, including: (1) whether Defendant negligently violated
22 the TCPA; (2) whether Defendant willfully or knowingly violated the TCPA; and
23 (3) whether Defendant had “prior express consent” for making the calls at issue.
24 The Class Members all seek the same remedy. Under these circumstances, the
25 commonality requirement is satisfied for purposes of certifying a settlement
26 class. *See Hanlon*, 150 F. 3d at 1019-20.
27
28

1 **3. The Typicality Requirement Is Met.**

2 The typicality requirement is met if the claims of the named
3 representatives are typical of those of the class, though “they need not be
4 substantially identical.” *Hanlon*, 150 F.3d at 1020. For purposes of settlement,
5 Plaintiff’s claims are typical of the claims of the whole class because they arise
6 from the same factual basis – telephone calls placed to Plaintiff and the class
7 using autodialing equipment – and are based on the same legal theory as applies
8 to the Class as a whole – that the calls violated the TCPA. *See Wehner v. Syntex*
9 *Corp.*, 117 F.R.D. 641, 644 (N.D. Cal. 1987). The Class Representative claims
10 that he was contacted by Defendant on his cellular telephone via an automatic
11 telephone dialing system. Complaint, (Dkt. No. 1). Accordingly, the Class
12 Representative’s claims are typical of those of the Class Members. Thus, the
13 typicality requirement is satisfied for certifying a settlement class.
14
15

16 **4. The Adequacy Requirement Is Satisfied.**

17 Rule 23(a)(4) is satisfied if “the representative parties will fairly and
18 adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). The Court
19 must measure the adequacy of representation by two standards: “(1) Do the
20 representative plaintiffs and their counsel have any conflicts of interest with other
21 class members, and (2) will the representative plaintiffs and their counsel
22 prosecute the action vigorously on behalf of the class?” *In re Wireless Facilities*,
23 253 F.R.D. at 611 (quoting *Staton v. Boeing Co.*, 327 F.3d 938, 958 (9th Cir.
24 2003)).
25

26 Plaintiff and Class Counsel have no conflicts of interest with other Class
27 Members because, for purposes of the Settlement, Plaintiff’s claims are typical of
28 those of other Class Members. *See Declaration of Sayan Aboudi in Support of*

1 Preliminary Approval (“Plaintiff Decl.”) ¶3,6-7; Atty Decls. ¶29-32. In addition,
2 Plaintiff Sayan Aboudi and Class Counsel have been prosecuting this Action
3 vigorously on behalf of the Class. Atty Decls. ¶31. Plaintiff and Class Members
4 share the common goal of protecting and improving consumer and privacy rights
5 throughout the nation, and there is no conflict among them. Atty Decls. ¶29.
6 Class Counsel have extensive experience in consumer protection litigation,
7 including the prosecution of class actions seeking to protect privacy and
8 consumer rights, including TCPA actions. Atty Decls. ¶20-28. Class Counsel is
9 qualified and able to conduct this Litigation. Atty Decls. ¶20-28. Rule 23(a)(4)
10 is therefore satisfied.
11

12 **5. Common Questions Predominate, Sufficient to Certify a**
13 **Class for Settlement Purposes Only.**

14 Class certification under Rule 23(b)(3) is appropriate where “questions of
15 law or fact common to class members predominate over any questions affecting
16 only individual members.” Fed. R. Civ. P. 23(b)(3). The inquiry focuses on
17 whether the class is “sufficiently cohesive to warrant adjudication by
18 representation.” *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las*
19 *Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001). Central to this question
20 is “the notion that the adjudication of common issues will help achieve judicial
21 economy.” *Zincser v. Accufix Research Institute, Inc.*, 253 F.3d 1188, 1189 (9th
22 Cir. 2001) (citation omitted), *amended*, 273 F. 3d 1266 (9th Cir. 2001).
23

24 Here the central inquiry is whether Defendant violated the TCPA by
25 placing autodialed calls to Plaintiff’s and the Class Members’ cellular telephones.
26 Considerations of judicial economy favor litigating a predominant common issue
27 once in a class action instead of thousands of times in separate lawsuits. “When
28 common questions present a significant aspect of the case and they can be

1 resolved for all members of the class in a single adjudication, there is clear
2 justification for handling the dispute on a representative rather than on an
3 individual basis.” *Hanlon*, 150 F.3d at 1022.

4
5 **6. Class Treatment for Settlement Purposes is Superior to**
6 **Individual Resolutions.**

7 To determine whether the superiority requirements of Rule 23(b)(3) are
8 satisfied, a court must compare a class action with alternative methods for
9 adjudicating the parties’ claims. Lack of a viable alternative to a class action
10 necessarily means that a class action satisfies the superiority requirement. “[I]f a
11 comparable evaluation of other procedures reveals no other realistic possibilities,
12 [the] superiority portion of Rule 23(b)(3) has been satisfied.”
13 *Culinary/Bartenders Trust Fund*, 244 F.3d at 1163. *See also, Valentino v.*
14 *Carter-Wallace*, 97 F.3d 1227, 1235-36 (9th Cir. 1996) (“a class action is a
15 superior method for managing litigation if no realistic alternative exists”).

16 Consideration of the factors listed in Rule 23(b)(3) supports the conclusion
17 that, for purposes of a settlement class, certification is appropriate. Ordinarily,
18 these factors are: (A) the interest of members of the class in individually
19 controlling the prosecution or defense of separate actions; (B) the extent and
20 nature of any litigation concerning the controversy already commenced by or
21 against members of the class; (C) the desirability or undesirability of
22 concentrating the litigation of the claims in the particular forum; and (D) the
23 difficulties likely to be encountered in the management of a class action. Fed. R.
24 Civ. P. 23(b)(3).

25
26 However, when a court reviews a class action settlement, the fourth factor
27 does not apply. In deciding whether to certify a settlement class action, a district
28 court “need not inquire whether the case, if tried, would present intractable

1 management problems.” *Amchem Prods. Inc. v. Woodward*, 521 U.S. 591, 620
2 (1997). “With the settlement in hand, the desirability of concentrating the
3 litigation in one forum is obvious.” *Elkins v. Equitable Life Ins. of Iowa*, No.
4 Civ A96-296-Civ-T-17B, 1998 WL 133741, at *20 (M.D. Fla. Jan. 27, 1998);
5 *see also Strube v. Am. Equity Inv. Life Ins. Co.*, 226 F.R.D. 688, 697 (M.D. Fla.
6 2005) (Rule 23(b)(3)(C) and (D) factors are “conceptually irrelevant in the
7 context of settlement”) (citation omitted).

8
9 Here, the Rule 23(b)(3)(A), (B) and (C) factors all favor class certification:

- 10 ▪ Any class member who wishes to pursue a separate action can opt out
11 of the Settlement.
- 12 ▪ The Parties are unaware of any competing litigation regarding the
13 claims at issue.
- 14 ▪ The Parties agree that it would be desirable to resolve Plaintiff’s claims
15 in this forum.

16
17 **C. The Proposed Method of Class Notice Is Appropriate.**

18 Rule 23(c)(2)(B) provides that, in any case certified under Rule 23(b)(3),
19 the court must direct to class members the “best notice practicable” under the
20 circumstances. Rule 23(c)(2)(B) does not require “actual notice” or that a notice
21 be “actually received.” *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994).
22 Notice need only be given in a manner “reasonably calculated, under all the
23 circumstances, to apprise interested parties of the pendency of the action and
24 afford them an opportunity to present their objections.” *Mullane v. Central*
25 *Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). “Adequate notice is
26 critical to court approval of a class settlement under Rule 23(e).” *Hanlon*, 150
27
28

1 F.3d at 1025.⁵

2 Pursuant to Fed. R. Civ. P. 23(e)(1)(B), “[t]he court must direct notice in a
3 reasonable manner to all class members who would be bound by the proposal”.
4 Rule 23(c)(2)(B) also sets forth requirements as to the content of the notice. The
5 notice must concisely and clearly state in plain, easily understood language: (i)
6 the nature of the action; (ii) the definition of the class; (iii) the class claims,
7 issues, or defenses; (iv) that a class member may enter an appearance through
8 counsel if the member so desires; (v) that the court will exclude from the class
9 any member who requests exclusion, stating when and how members may elect
10 to be excluded; (vi) the time and manner for requesting exclusion; and (vii) the
11 binding effect of a class judgment on class members under Rule 23(c)(3). Fed.
12 R. Civ. P. 23(c)(2)(B).
13

14 Here, the direct mail notice, publication notice and the Question and
15 Answer Notice to be posted on the settlement website meet all the requirements.
16 See Agreement, Exhibits A, D, and E. The Claims Administrator will mail
17 individual Direct Mail Notices via first-class mail to individuals believed to be
18 associated with telephone numbers identified using the data produced by
19 Defendant in discovery. (Exhibit D to the Agreement). The Claims
20 Administrator will also publish notice in the form of internet banner
21 advertisements that will appear in approximately 80 million unique impressions.
22 (Exhibit E to the Agreement). The banners will be placed by a firm that has
23 substantial expertise in providing class notice, specifically targeted to adults who
24 are most likely to be Class Members, and will allow easy access to the Settlement
25 Website with a simple mouse click. The direct mail notice will be mailed within
26 30 days of the Court’s Preliminary Approval Order, and the publication notice
27

28

⁵ Defendant has agreed to bear the responsibility of preparing and serving the requisite Class Action Fairness Act (“CAFA”) Notices pursuant to 28 U.S.C. Section 1715(b). Agreement, §9.05.

1 shall be made during the 30-60 day period following entry of the Preliminary
2 Approval Order. *Agreement* §9.01-9.05.

3
4 In addition, the Parties have agreed to provide notice through the formal
5 and lengthy Q & A Notice posted on the Settlement Website which the Claims
6 Administrator will establish and maintain. *See* Agreement, Ex. B. The
7 Settlement Website will allow visitors to access (and print) a complete copy of
8 the Direct Mail Notice, the Settlement Agreement, and the Q&A Notice form.
9 Any Class member will be able to file claims by calling the toll free number,
10 submitting a claim online, or by mailing a claim form they have downloaded
11 from the Settlement Website or received via direct mail, all as set forth in the
12 Notice. *Agreement* §10.02.

13
14 Furthermore, the notices will be disseminated and also posted on the
15 website sufficiently prior to the Final Approval hearing to give Class members
16 the opportunity to comment on the settlement, or to opt out and preserve their
17 rights. *See Torrasi v. Tucson Electric Power Co.*, 8 F.3d 1370, 1374-1375 (9th
18 Cir. 1993) (31 days is more than sufficient, as Class as a whole had notice
19 adequate to flush out whatever objections might reasonably be related to the
20 settlement) citing *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir.
21 1977) (approving timing of a notice which was mailed 26 days before the
22 deadline for opting out of a settlement). Here there will be 75 days to opt out or
23 object from the date of preliminary approval. Accordingly, the Direct Mail
24 Notice, publication notice, and the Q & A Notice posted on the Settlement
25 Website fulfill all requirements of adequate notice and should be duly approved.
26 *Torrasi, supra*; Fed. R. Civ. P. 23(c)(2); *Manual, 3d*, 30.21.

27 Pursuant to the proposed Settlement, Defendant will provide the relevant
28 data containing the 106,157 unique cell numbers to the Claims Administrator.

1 The data will be used by the Claims Administrator to do a “reverse look up” and
2 obtain addresses for Direct Mail Notice. The information obtained from the
3 “reverse look up” process will also be used by the Claims Administrator as a part
4 of the claim verification process. The data was provided by Defendant and
5 provided to Plaintiff’s counsel in discovery and again during the course of
6 confirmatory discovery.

7
8 This multi-communication notice program was designed to meaningfully
9 reach the largest possible number of Class Members and is consistent with class
10 certification notice plans approved in this Circuit. *See, e.g. Simpao v. Gov’t of*
11 *Guam*, 369 Fed. Appx. 837, 838 (9th Circuit) (notice plan was “best notice
12 practicable” where direct notice was mailed to class members and supplemented
13 by published notice in multiple media outlets); *Vasquez v. Coast Valley Roofing,*
14 *Inc.*, 670 F.Supp.2d 1114, 1126-27 (E.D. Cal. 2009) (direct mailed notice
15 supplemented by published notice in newspapers of general circulation in areas
16 and languages designed to reach potential class members provided “best possible
17 notice” to class members of settlement); *Chavez v. Netflix, Inc.*, 162 Cal. App.
18 4th 43, 56-59 (2008) (emailed summary notice directing class members to
19 settlement website satisfied due process requirements). Here, the mailing of the
20 Direct Mail Notice combined with the publication notice and the posting of the
21 formal Notice in the Q&A form on the website satisfies the requirements of due
22 process, is the best notice practicable under the circumstances, and constitutes
23 due and sufficient notice.

24
25 **D. The Court Should Appoint the Class Representative and**
26 **Appoint Class Counsel.**

27 “[T]wo criteria for determining the adequacy of representation have been
28 recognized. First, the named representatives must appear able to prosecute the

1 action vigorously through qualified counsel, and second, the representatives must
2 not have antagonistic or conflicting interests with the unnamed members of the
3 class.” *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir.
4 1978). The adequacy of representation requirement is met here. For settlement
5 purposes, the parties have agreed that the Plaintiff Sayan Aboudi be appointed as
6 the Class Representative. *Agreement* §4.01. The Parties have agreed that Todd
7 M. Friedman, Esq. of Law Offices of Todd M. Friedman, P.C.; L. Paul Mankin,
8 IV of Law Offices of L. Paul Mankin; Abbas Kazerounian of Kazerouni Law
9 Group, APC; and Joshua B. Swigart of Hyde & Swigart should be appointed as
10 Class Counsel for all purposes of the Settlement. *Agreement* §4.01. Plaintiff’s
11 counsel all have extensive experience sufficient to be appointed as Class Counsel
12 here. Atty Decls., ¶¶20-28. Plaintiff Aboudi understands the obligations of
13 serving as a class representative, has adequately represented the interests of the
14 putative class, and has retained experienced counsel. Atty Decls. ¶29-32;
15 Plaintiff Decl. ¶ 3,6-7. Plaintiff has no antagonistic or conflicting interests with
16 the Class Members. Atty Decls. ¶29-32; Plaintiff Decl., ¶6-7. Plaintiff and the
17 Class Members seek the same relief, i.e., damages for Defendant’s alleged
18 unlawful actions. Considering the identity of claims, there is no potential for
19 conflicting interests in this action.
20

21 **E. The Court Should Appoint Kurtzman Carson Consultants**
22 **LLC as the Claims Administrator.**

23 The Parties have agreed upon and propose that the Court appoint the
24 Kurtzman Carson Consultants LLC (“KCC”) to serve as the Claims
25 Administrator. *Agreement*, §2.06. KCC specializes in providing administrative
26 services in class action litigation, and has extensive experience in administering
27 similar class action settlements. Atty Decl., ¶14.
28

1 **F. A Final Approval Hearing Should Be Scheduled.**

2 The last step in the settlement approval process is the formal fairness or
3 final approval hearing, at which time the Court may hear all evidence and
4 argument, for and against, to evaluate the proposed Settlement. The Parties
5 request that the hearing be held not before twenty-eight (28) days after the
6 deadline for all class members to opt-out or object to, the Settlement. The
7 proposed Final Approval Order is attached to the Agreement as Exhibit A.
8

9 **V. CONCLUSION**

10 For all the foregoing reasons, Plaintiff respectfully requests (and Defendant
11 does not oppose) that the Court enter an order preliminarily approving the
12 proposed Settlement.
13

14
15
16 Respectfully submitted this 7th day of March 2014.

17
18 LAW OFFICES OF TODD M. PLAINTIFF, P.C.

19
20 By: /s/ Todd M. Friedman

21 Todd M. Friedman
22 Attorney for Plaintiff

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

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