UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MICHAEL A. VANDERVORT and U.S. SAMPLE SERVICES, INC., on behalf of themselves and all others similarly situated, Plaintiff, vs. BALBOA CAPITAL CORPORATION Defendants.	CASE NO. SACV 11-1578-JLS JPRx) **ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY SETTLEMENT APPROVAL AND SETTING A FAIRNESS HEARING FOR MARCH 21, 2014, AT 2:30 P.M. (Doc. 102)**

I. INTRODUCTION

Before the Court is the unopposed Motion for Preliminary Approval of Class Settlement of Plaintiffs Michael A. Vandervort and U.S. Sample Services, Inc. (Docs. 102, 113.) The Motion asks the Court to preliminarily approve the proposed settlement and approve the form and method of class notice, including the setting of relevant dates. Having reviewed the papers and considered the arguments of counsel at hearing, the Court GRANTS Plaintiff's Motion, orders certain modifications to be made, particularly as to the notice form to class members, and sets a fairness hearing for Friday, March 14, 2014, at 2:30 p.m.

II. BACKGROUND

Plaintiffs in this class action allege that during the period from October 12, 2007 through November 23, 2011, Balboa Capital Corporation ("Balboa") sent them solicited and unsolicited fax advertisements in violation of state and federal law. On November 23, 2011, Plaintiffs filed a First Amended Complaint ("FAC") alleging causes of action for violation of the Telephone Consumer Protection Act ("TCPA") and California Business & Professions Code § 17538.43(b) and seeking damages and injunctive relief. (Doc. 18.)

On October 23, 2012, the Court granted in part Plaintiffs' motion for class certification. (("Class Certification Order"), Doc. 54.) It certified a Rule 23(b)(3) class ("Certified Class") under the TCPA, consisting of

> All persons in the United States from October 12, 2007 through November 23, 2011 to whom Defendant sent or caused to be sent a solicited or unsolicited facsimile advertisement that advertised the commercial availability or quality of any property, goods, or services, and contained an opt-out notice identical or substantially similar to that contained on the facsimile advertisement attached as Exhibit 1 to the First Amended Complaint.

(Class Certification Order at 17.)

1 On April 5, 2013, the Court heard oral argument on the parties' cross motions for
2 summary judgment. (Docs. 65, 66, 88.) At the hearing, the Court stated that it would
3 delay issuing its rulings on the motions until after the parties attended a settlement
4 conference before a magistrate judge. (Doc. 90 at 28.) On May 20, 2013, following a
5 day-long settlement conference before the Honorable Jay Gandhi, the parties settled the
6 case and signed a Memorandum of Understanding memorializing their agreement. (Bellin
7 Decl. Ex. A, Doc. 102-2.) On October 25, 2013, the parties signed a fully executed
8 settlement agreement ("Settlement"). (Motion Amendment Ex. B ("Settlement"), Doc.
9 112-1.) Plaintiffs filed the instant motion on August 16, 2013, seeking preliminary
10 approval of the Settlement and approval of the form and method of class notice.
11 The Settlement applies to a class consisting of "all persons in the United States
12 who, from October 12, 2007 through November 23, 2011, were sent or caused to be sent
13 one or more facsimile advertisements by Defendant Balboa Capital Corporation, its
14 employees, agents, vendors or contractors" ("Settlement Class"). (*Id.* ¶ 2(c).)
15 Under the Settlement, Balboa shall make a total settlement payment of no less than
16 $2.3 million and no more than $3.3 million. (Settlement ¶ 2(a)-(b).) That payment will
17 cover payments to class members, class representative incentive payments of $10,000 in
18 total, and attorney's fees and costs. (*Id.* ¶¶ 2(a)-(b), 10.)
19 If the sum of valid claims, incentive award, and attorney's fees and costs ("Total
20 Payment") is greater than or equal to $2.3 million but less than or equal to $3.3 million,
21 then the payments to class members will be distributed as follows: Claimants who submit
22 an affidavit or declaration under penalty of perjury stating that they received a fax or faxes
23 will be eligible for a cash payment of between $175 and $275, depending on the number of
24 faxes they declare they received. (*Id.* ¶¶ 6(a), 8.) Claimants who submit copies of the
25 faxes they received will be eligible for a cash payment of $500 per fax submitted. (*Id.*)
26 If the Total Payment is less than $2.3 million, then the balance shall be distributed
27 to claimants on a *pro rata* basis, based on the amount they would have received had the
28 Total Payment been greater than $2.3 million, up to a maximum of $1,500 per fax claimed

and five faxes per claimant. (*Id.* ¶¶2(b), 8.) If even after the increased payments, the Total Payment remains under $2.3 million, the balance will be distributed *cy pres* to a charity agreed upon by the parties and approved by the Court. (*Id.* ¶ 2(b).) If, on the other hand, the Total Payment is greater than $3.3 million, then each claimant's payment will be reduced on a *pro rata* basis. (*Id.* ¶¶2(a), 8.)

Class counsel will file a motion for attorney's fees no later than 30 days after the class administrator finishes sending out the Short-Form Notice or on an earlier date ordered by the Court. (*Id.* ¶ 9.) Balboa will not object to class counsel seeking approval for an award of attorney's fees not to exceed $1.1 million. (*Id.*)

A notice form ("Short-Form Notice) will be faxed to class members[1] within 21 days of this Court entering a preliminary approval order. (*Id.* ¶ 4(f); Bellin Decl. Ex. E ("Short-Form Notice").) The Short-Form Notice will briefly describe the litigation and explain the terms of the Settlement Agreement, as well as the class members' options to submit a claims form, opt-out of the settlement, and/or object to the settlement. (Short-Form Notice.) It will also direct class members to a website containing a more detailed notice form ("Long-Form Notice"), as well as the claim form. (Bellin Decl. Ex. F "Long-Form Notice").)

If the first attempt to send a Short-Notice Form to a class member by fax is unsuccessful, the class administrator will attempt a second time. (*Id.* ¶ 4(f).) If the second attempt is also unsuccessful, Balboa will make a reasonable effort to determine whether it has the mailing address associated with that fax number. (*Id.*) If so, it will provide that address to the class administrator, and the class administrator will send a Short-Form Notice via first-class mail. (*Id.*) Balboa will bear all reasonable costs of class notice and

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[1] The class administrator will do so by sending faxes to all persons who were "activated" in Balboa's marketing database during the class period of October 12, 2007 through November 23, 2011. (*Id.* ¶ 4(a).)

administration, with the exception that class counsel will bear the costs of first-class mailing of the Short-Form Notice. (¶ 4(e).)

Balboa also agrees to the entry of a permanent injunction prohibiting it from advertising by fax in violation of the TCPA. (*Id.* ¶ 3.)

Under the Settlement, class members will have 45 days from "the date on the Short-Form notice" ("Short-Form Notice Date") to exercise their rights under the Settlement ("Notice Response Deadline"). (*Id.* ¶¶ 6(b), 7(a)-(b).)[2] All class members who fail to opt out of the Settlement within that that time period will be bound by the Settlement's release. (*Id.* ¶ 11.)

III. APPROVAL OF SETTLEMENT CLASS DEFINITION

As a preliminary matter, the Court notes that the Settlement Class definition differs from the Certified Class definition. First, while the Certified Class definition referred to "solicited or unsolicited fax advertisement[s]," the Settlement Class definition refers simply to "facsimile advertisement[s]." (Class Certification Order at 17; Settlement ¶ 2(c).) The Court does not find this difference to be material, as in its Class Certification Order it noted that while the TCPA prohibits sending unsolicited fax advertisements without a requisite opt-out notice, "[t]he FCC's TCPA regulation now also prohibits sending *solicited* fax advertisements" without such notice. (Class Certification Order at 12.) Accordingly, the Court concluded that "the single determination as to whether the opt-out notice complied with the [TCPA] and regulations promulgated thereunder" would resolve the claims of *all* class members, whether the fax advertisements they received were solicited or unsolicited. (*Id.*)

The second difference between the Settlement Class and Certified Class definitions is that while the Certified Class included only those people who had received fax advertisements that contained "an opt-out notice identical or substantially similar to that

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[2] As is discussed further below, there is some ambiguity as to the exact deadline for class members to exercise their rights under the Settlement.

contained in the facsimile advertisement attached as Exhibit 1 to the First Amended Complaint," the Settlement Class includes all people who received fax advertisements. (Class Certification Order at 17; Settlement ¶ 2(c).) Plaintiffs argue that this difference is not material because "all of the fax advertisements Defendant caused to be sent [during the class period] contained identical or substantially similar opt-out notices." (Supplemental Brief at 1, Doc. 116.) In its Class Certification Order, the Court found that Plaintiffs had put forth common proof "that each of the opt-out notices on faxes sent during the class periods was the same as the opt-out notice found on Exhibit 1 to the Complaint." (Class Certification Order at 11.) As such, the Court finds that this difference as well to be immaterial, and approves the Settlement Class definition.

IV. PRELIMINARY APPROVAL OF THE PROPOSED SETTLEMENT

Rule 23(e)(2) requires the Court to determine whether the proposed settlement is fair, reasonable, and adequate. Fed. R. Civ. P. 23(e)(2). In turn, review of a proposed settlement typically proceeds in two stages, with preliminary approval followed by a final fairness hearing. Federal Judicial Center, *Manual for Complex Litigation*, § 21.632 (4th ed. 2004).

To determine whether a settlement agreement is fair, adequate, and reasonable, "a district court must [ultimately] consider a number of factors, including: the strength of 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; the presence of a governmental participant;[3] and the reaction of the class members to the proposed settlement." *Staton*, 327 F.3d at 959 (internal citation and quotation marks omitted). "The relative degree of importance to be

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[3] This factor does not apply in the case.

attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case." *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). "It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness, and the settlement must stand or fall in its entirety." *Staton*, 327 F.3d at 960 (quoting *Hanlon*, 150 F.3d at 1026).

Moreover, at this preliminary stage and because class members will receive an opportunity to be heard on the settlement, "a full fairness analysis is unnecessary . . . ." *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 665 (E.D. Cal. 2008). Instead, preliminary approval and notice of the settlement terms to the proposed class are appropriate where "[1] the proposed settlement appears to be the product of serious, informed, noncollusive negotiations, [2] has no obvious deficiencies, [3] does not improperly grant preferential treatment to class representatives or segments of the class, and [4] falls with the range of *possible* approval . . . ." *In re Tableware Antitrust Litig*., 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007) (internal quotation and citation omitted) (emphasis added); *see also Acosta v. Trans Union*, *LLC*, 243 F.R.D. 377, 386 (C.D. Cal. 2009) ("To determine whether preliminary approval is appropriate, the settlement need only be *potentially* fair, as the Court will make a final determination of its adequacy at the hearing on the Final Approval, after such time as any party has had a chance to object and/or opt out.") (emphasis in original).

In any event, the Court evaluates all applicable factors below and finds that the Settlement Agreement should be preliminarily approved.

A. Arms-length Negotiations

Having engaged in extensive discovery and having fully briefed motions for summary judgment, the parties participated in a day-long mediation session before the Honorable Jay Gandhi. (Bellin Decl. ¶¶ 5-6.) Given that, the Court is satisfied that the Settlement is the result of arms-length, noncollusive, and informed negotiations.

B. Strength of Plaintiff's Case and the Amount Offered in Settlement

Plaintiffs argue that although they believe their case to be strong, the case raises novel legal issues, making victory less certain and appeals likely. (Mot. at 10.) Specifically, Plaintiffs point out that the Ninth Circuit has yet to address the issue of whether an opt-out notice that substantially complies with the requirements of the TCPA is sufficient under the TCPA even where the notice does not comply with all the specific requirements of the law. (*Id.*) Noting Balboa's vigorous defense of this case, including its pending motion for summary judgment, and the fact that settlement was reached through good faith negotiations after almost two years of litigation, the Court concludes that the parties' decision to reach a settlement in this matter was reasonable.

Considering the strengths and weaknesses of Plaintiffs' position, the Court finds that the settlement amount is fair, adequate, and reasonable under the circumstances. If Plaintiffs were to prevail on their TCPA claim, class members would be entitled to recover the greater of $500 or actual monetary loss for each fax received. 47 U.S.C. § 227(3).[4] The exact amount each class member will receive under the Settlement will depend on the number of claims submitted, however it will most likely be substantially less than that amount, at least for those class members who cannot produce copies of the faxes they received. However, considering the present value of the settlement amount and the probability of lengthy litigation in the absence of settlement, the Court finds the settlement amount within the range of reasonableness.

Relatedly, the Court finds the plan of allocation of the settlement funds to be reasonable. *In re Citric Acid Antitrust Litig*., 145 F. Supp. 2d 1152, 1154 (N.D. Cal. 2001) ("Approval of a plan for the allocation of a class settlement fund is governed by the same legal standards that are applicable to approval of the settlement: the distribution plan must

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[4] If the Court were to find that Balboa willfully or knowingly violated the TCPA it could, at its discretion, award up to treble damages. *Id.*

be 'fair, reasonable and adequate.'") (citation omitted). Here, the division of funds is based on the number of faxes received by the individual class member and on the strength of the class member's evidence regarding those faxes. Moreover, the Court finds nothing unreasonable about having attorney's fees, costs, and certain of the expenses associated with this litigation included as part of the Total Payment, potentially reducing the amount available to be disbursed among participating class members.[5] *See Staton*, 387 F.3d at 969 ("Under regular common fund procedure, the parties settle for the total amount of the common fund and . . . . [class counsel] then apply . . . for a fee award from the fund.").

The amount of the settlement also appears fair, adequate, and reasonable in light of the claims released by the participating class members and those class members who fail to exclude themselves from the Settlement. The Settlement releases only those claims that "are or could be based on, arise from or relate in any way to the claims asserted in this Litigation or to Defendant's alleged sending or transmission of fax advertisements to Plaintiffs . . . from October 12, 2007 through November 23, 2011." (Settlement ¶ 11(a).)

The Court finds it premature to make any definitive ruling on the reasonableness of class counsel's fees and costs request at this stage. It will make that ruling if and when final approval occurs. The Court notes, however, that class counsel indicate that they intend to seek fees and costs in the amount of $1.1 million. (Mot. at 18.) Assuming a Total Payment of $2.3 million, the minimum amount for which Balboa has agreed to be liable, an award of $1.1 million would amount to almost half of the common fund. Even assuming a Total Payment of $3.3 million, the maximum amount for which Balboa has agreed to be liable, an award of $1.1 million would amount to one-third of the common fund. The benchmark for fees in the Ninth Circuit is 25% of the common fund. *See*, *e.g.*, *Hanlon*, 150 F.3d at 1029 ("This circuit has established 25% of the common fund as the

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[5] The payment of fees and costs will only reduce the amount available to be disbursed to class members only if Total Payment, including attorney's fees, would be greater than $3.3 million.

1 benchmark award for attorney fees."). Class counsel will have to justify an upward
2 departure from the Ninth Circuit's fees benchmark.
3 Despite the Court's misgivings as to the requested fees and expenses, the Court still
4 finds it appropriate to grant preliminary approval of the Settlement. As the Settlement is
5 structured, disallowed fees and expenses will revert to Balboa if the Total Payment
6 remains over $2.3 million. However, the Settlement is not conditioned on the Court's
7 approval of class counsel's fee request. (Settlement ¶ 9 (stating only that Balboa will not
8 object to class counsel seeking approval of an attorney's fees award not to exceed $1.1
9 million).) As such, the Court retains "supervisory discretion to determine the distribution
10 of the total settlement package between counsel and the class" and there is no risk that
11 class counsel "will be induced to forego a fair settlement for their clients in order to gain a
12 higher award of attorneys' fees." *Staton*, 327 F.3d at 970.
13 As part of the motion for attorneys' fees and costs, the parties must provide the
14 Court with updated documentation as to fees, actual litigation expenses, and settlement
15 administration costs incurred.
16 Finally, the Court preliminarily finds the $10,000 combined incentive award for
17 Plaintiffs to be reasonable. District courts have the discretion to award incentive payments
18 to named plaintiffs as compensation for their actions taken on behalf of the class. *Stanton*,
19 327 F.3d at 977; *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000). The
20 Ninth Circuit recently emphasized that district courts must "scrutinize[e] all incentive
21 awards to determine whether they destroy the adequacy of class representatives."
22 *Radcliffe v. Experian Info. Solutions Inc.*, No. 11-56376, --- F.3d ----, 2013 WL 1831760,
23 at *5 (9th Cir. May 2, 2013).
24 Here, the incentive award appears justified because Plaintiffs have expended
25 substantial time and effort prosecuting this action on behalf of the class, including: (1)
26 seeking out class counsel, (2) educating class counsel about the facts of the case and
27 providing them with documents; (3) responding to requests for documents, admissions,
28 and interrogatories; (4) appearing for their deposition; (5) participating in telephonic

mediations and reviewing numerous settlement offers; and (6) flying from Ohio to California to attend the in-person settlement conference before Judge Gandhi. (Bellin Decl. ¶ 13; *cf. Rausch v. Hartford Fin. Serv. Grp.*, No. 01-CV-1529-BR, 2007 WL 671334 at *3 (D. Oreg. Feb. 26, 2007) (granting $10,000 incentive fee award).)

C. Likely Expense and Duration of Further Litigation

Undoubtedly the expense incurred by the class will increase as the case progresses. Discovery in this case is complete, and there has already been extensive motion practice, including briefing on cross motions for summary judgment. Nonetheless, Balboa continues to actively defend this case, and if settlement were not reached, the class would likely incur additional costs in preparing for trial. The Court finds that this factor favors preliminary approval of the Settlement.

D. Extent of Discovery Completed

This factor requires the Court to evaluate whether "the parties have sufficient information to make an informed decision about settlement." *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir. 1998). The discovery cut-off in this case was October 29, 2012. (Doc. 25.) Class counsel represents that he, along with co-counsel, propounded written discovery, took multiple depositions, and responded to Balboa's written discovery requests. (Bellin Decl. ¶ 5.) Taking into consideration the representations regarding completed discovery and the Court's review of the parties' fully-briefed cross motions for summary judgment, the Court finds that the parties had sufficient information to make an informed decision about settlement. As such, the Court finds that this factor favors preliminarily approving the Settlement Agreement.

E. Risk of Maintaining Class Certification

Plaintiffs do not identify any specific risk involved in maintaining class certification throughout the litigation. (Mot. at 10-11.) Hence, the Court need not consider this factor

1 for settlement purposes. *See In re Veritas Software Corp. Sec. Litig.,* 2005 WL 3096079,
2 at *5 (N.D. Cal. Nov. 15, 2005) (favoring neither approval nor disapproval of settlement
3 where the court was "unaware of any risk involved in maintaining class action status"),
4 *aff'd in relevant part*, 496 F.3d 962 (9th Cir. 2007); *Murillo v. Pac. Gas & Elec. Co.*, 2010
5 WL 2889728, at *7 (E.D. Cal. July 21, 2010) (favoring neither approval nor disapproval of
6 settlement where the court was "unaware of any specific difficulty in maintaining class-
7 action status were [the] case to continue to trial").
8
9 F. Experience and Views of Counsel
10 Class counsel Aytan Bellin has served as class counsel on three other TCPA class
11 actions and co-class counsel Roger Furman and Joseph R. Compoli, Jr. both have
12 experience with TCPA litigation. (Bellin Decl. ¶ 4; Furman Decl. ¶ 3, Doc. 102-3;
13 Compoli Decl ¶ 3, Doc. 102-4.) They and Balboa's counsel have fully endorsed the
14 Settlement Agreement as fair, reasonable, and adequate. (Bellin Decl. ¶ 18, Furman Decl.
15 ¶ 7, Compoli Decl. ¶ 5.) Accordingly, this factor weighs in favor of preliminarily
16 approving the Settlement Agreement.
17
18 G. Reaction of Class Members to Proposed Settlement
19 As of yet, Plaintiffs provide no evidence regarding class members' reaction to the
20 proposed settlement. (Bellin Decl. ¶ 18 (noting only that "Plaintiffs . . . believe that the
21 settlement is fair, reasonable and adequate to . . . the Settlement Class.").) However, the
22 Court recognizes that the lack of such evidence is not uncommon at the preliminary
23 approval stage. Prior to the fairness hearing, class counsel shall submit a sufficient number
24 of declarations from class members discussing their reactions to the proposed settlement.
25
26 **V. PRELIMINARY APPROVAL OF CLASS NOTICE FORM AND METHOD**
27 For a class certified under Rule 23(b)(3), "the court must direct to class members
28 the best notice that is practicable under the circumstances, including individual notice to all

1 members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B).
2 However, actual notice is not required. *See Silber v. Mabon,* 18 F.3d 1449, 1454 (9th Cir.
3 1994).

4 Pursuant to the Settlement, the class administrator will fax the Short-Form Notice to
5 class members within 21 days of the entry of the preliminary approval order. (Settlement ¶
6 4(f).) If, after two attempts, fax transmission to a class member proves impossible, Balboa
7 will make a reasonable effort to locate within its records a mailing address for that class
8 member. (*Id.*) If Balboa determines it has a mailing address, it will provide that address to
9 the class administrator within seven days. (*Id.*) Within five days of receiving that address,
10 the class administrator will send the Short-Form Notice to that address via first-class mail.
11 (*Id.*) Notice by mail has been found by the Supreme Court to be sufficient if the notice is
12 "reasonably calculated . . . to apprise interested parties of the pendency of the action and
13 afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank &*
14 *Trust Co.,* 339 U.S. 306, 314 (1950). The class administrator used this notice method in
15 sending out its initial class notices, and succeeded in contacting 56,280 of 76,865
16 identified class members. (Bellin Decl. Ex. H.) As such, the Court finds the notice
17 method to be reasonable.

18 However, the Court notes two issues with the proposed deadline for class members
19 to submit a valid claim, opt out, or object. First, that deadline is ambiguous. The
20 Settlement states that valid claim forms must be "postmarked by the deadline set forth on
21 the Short-Term Notice," but that claim forms "shall also be deemed timely if received by
22 [the class administrator] no later than ten days after the deadline set forth in the Notice."
23 (Settlement 6(b)) (emphasis added). The proposed Short-Form Notice states that a valid
24 claim form is one that is "postmarked by [date] that is received no later than [date],"
25 indicating that a valid claim form must not only be postmarked by a certain date, it must
26 also be received by a certain date. The Long-Form Notice states only that a valid claim
27 form must be "postmarked no later than [date]." (Long-Form Notice at 5.) The Claim
28 Form states that it must be "postmarked on or before [date], *or* received no later than

[date].” (Settlement Ex. 3, Doc. 112-1 (emphasis added).) Finally, the Settlement requires that opt-out letters be “postmarked” within 45 days of the Short-Form Notice Date, but that objection letters be “sen[t] . . . within 45 days” of the Short-Form Notice Date. (Settlement ¶ 7(a)-(b).)

Second, the Court notes that class members to whom the Short-Notice Form must be mailed will receive the notice significantly later than class members who receive the notice by fax. Therefore, a deadline of only 45 days from the Short-Form Notice Date would likely prejudice those class members.

In order to address both concerns, the Court requires that class members be notified that claim forms, opt-out letters, and objection letters be *postmarked* within 60 days of the Short-Form Notice Date, and eliminate any reference to the date by which the relevant document must be received.

Plaintiff has provided the Court with a copy of a proposed Short-Form Notice, Long-Form Notice, and Claim Form. Under Rule 23, notice must include, in a manner that is understandable to potential class members, “(i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a 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). The proposed Long-Form Notice includes this necessary information. (*See* Settlement Agreement, Exh. 1.)

The Court requires that the Claim Form be modified as follows:

(1) The sentence that states “Important: This Claim Form must be postmarked on or before [date], or received not later than [date]” should be modified to read “Important: This Claim Form must be postmarked on or before [date].”

The Court also requires that the Short-Form Notice be modified as follows:

(1) The Short-Form Notice Date must be included on the face of the Short-Form Notice.

1 (2) The title sentence, which currently reads, "If you were sent or caused to be sent
2 a facsimile advertisement by Balboa Capital . . . . you could get a payment from
3 a class action settlement" should be modified to read, "If you received a
4 facsimile advertisement from Balboa Capital . . . . you could get a payment from
5 a class action settlement."
6 (3) The final sentence under the heading "How do you ask for a Payment" should be
7 deleted and replaced with a sentence stating, in bold, "Claim forms must be
8 postmarked by [date]."
9 Finally, the Court requires that the Long-Form Notice be modified as follows:
10 (1) The title sentence on page 1, which currently reads, "If you were sent or caused
11 to be sent a facsimile advertisement by Balboa Capital . . . . you could get a
12 payment from a class action settlement" should be modified to read, "If you
13 received a facsimile advertisement from Balboa Capital . . . . you could get a
14 payment from a class action settlement."
15 (2) A final sentence should be added at the end of the section titled "How will the
16 lawyers and class representatives be paid?," (Long-Form Notice at 7), stating,
17 "Class Counsel will file a Motion for Attorneys' Fees, Litigation Costs and
18 Expenses no later than [insert date], 15 days before the date by which you must
19 submit a claim form, opt out of the settlement, or object to the settlement's
20 terms. That motion will be available for review as part of the Court's files in
21 this matter at the Office of the Clerk of Court or via PACER." *See In re*
22 *Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994-95 (9th Cir. 2010)
23 (holding that district court must set a settlement schedule that provides the class
24 an adequate opportunity to review and prepare objections to class counsel's
25 *completed* fee motion).
26 (3) A final sentence should be added at the end of the section titled "How do I get
27 more information?," (Long-Form Notice at 9), stating, "Do not contact the
28 Court."

The parties must also provide the Court within 10 days of this order an updated copy of the Notice and related forms reflecting the changes identified above.

VI. CONCLUSION

Accordingly, the Court preliminarily approves the Settlement Agreement and approves the form and method of class notice with the modifications outlined in this order.

The Court sets a fairness hearing for March 21, 2014, at 2:30 p.m., to determine whether the Settlement should be finally approved as fair, reasonable, and adequate to class members. Plaintiffs' counsel shall file all additional supporting documentation noted by the Court and brief(s) supporting final approval of the Settlement Agreement, an award of reasonable attorney's fees and costs, and an award of a reasonable class representative service fee no later than **15 days** before the Notice Response Deadline. In addition, **15 days** after the Notice Response Deadline, Plaintiff's counsel shall file a brief responding to any submitted objections and otherwise summarizing the class members' participation in the Settlement and the settlement administration to date. This preliminary approval order is also conditioned upon the parties providing the Court within **10 days** of this order updated copies of the Short-Form and Long-Form Notices and Claim Form reflecting the changes identified above.

The Court reserves the right to continue the date of the fairness hearing without further notice to class members. The Court retains jurisdiction to consider all further applications arising out of or in connection with the Settlement.

DATED: November 20, 2013

JOSEPHINE L. STATON

JOSEPHINE L. STATON
UNITED STATES DISTRICT JUDGE