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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Joanne Knapper, *on behalf of herself and others similarly situated,*	Case No. 2:17-cv-00913-SPL
Plaintiff,	**PLAINTIFF'S MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL**
v.	
Cox Communications, Inc.,	
Defendant.	

Request for Relief

Joanne Knapper ("Plaintiff") respectfully requests that this Court certify the following class, and appoint Greenwald Davidson Radbil PLLC ("GDR") as class counsel:

> All persons and entities throughout the United States (1) to whom Cox Communications, Inc. placed a call, (2) directed to a number assigned to a cellular telephone service, but not assigned to a Cox Communications, Inc. subscriber, (3) in connection with its efforts to collect a past due residential account balance, (4) via its Avaya dialers or with an artificial or prerecorded voice, (5) from March 28, 2013 through the date of class certification.

The Telephone Consumer Protection Act

"The TCPA prohibits persons from (1) making 'any call,' (2) 'using any automatic telephone dialing system or an artificial or prerecorded voice,' (3) 'to any telephone number assigned to a . . . cellular telephone service. . . .'" *Grant v. Capital Mgmt. Servs., L.P.*, 449 F. App'x 598, 600 (9th Cir. 2011).[1]

"Express consent is not an element of a plaintiff's prima facie [TCPA] case." *Van Patten v. Vertical Fitness Grp., LLC,* 847 F.3d 1037, 1044 (9th Cir. 2017). Rather, it "is an affirmative defense for which the defendant bears the burden of proof." *Id.*

Express consent is also not available as a protection against wrong or reassigned number calls. *See McMillion v. Rash Curtis & Assocs.*, No. 16-CV-03396-YGR, 2018 WL 3023449, at *3-4 (N.D. Cal. June 18, 2018) (rejecting as a ground for reconsideration the defendant's argument that a previous owner of the plaintiff's cellular telephone number provided the defendant express consent to call the number); *Jordan v. Nationstar Mortg. LLC*, No. 14-cv-00787-WHO, 2014 WL 5359000, at *11 (N.D. Cal. Oct. 20, 2014) ("The reasoning in *Soppet* is particularly helpful. There, the Seventh Circuit held that the TCPA

[1] "Unwanted and illegal robocalls are the FTC's number-one complaint category, with more than 1.9 million complaints filed in the first five months of 2017 alone." *FTC Escalates the Fight against Illegal Robocalls Using Consumer Complaints to Aid Industry Call-Blocking Solutions*, FEDERAL TRADE COMMISSION (Aug. 1, 2017), *https://www.ftc.gov/news-events/press-releases/2017/08/ftc-escalates-fight-against-illegal-robocalls-using-consumer*.

requires consent from the person who was actually called, not the person the caller asserts it was attempting to call."); *Reid v. I.C. Sys., Inc.*, No. 12-02661-PHX-ROS, 2013 WL 11394251, at *2 n.3 (D. Ariz. Sept. 3, 2013) (Silver, J.) ("Defendant claims it had previously obtained consent from an individual named 'Vitek Kozlowski' to call Plaintiff's number. It is not entirely clear why Defendant believes the consent of a third-party is relevant. *See Soppet v. Enhanced Recovery Co.*, LLC, 679 F.3d 637, 640 ([7]th Cir. 2012) (consent must be the consent of the current subscriber, not the consent of some prior holder of the number)) (internal citation omitted).

Statement of Relevant Facts

I. Defendant places millions of automated telephone calls each year to collect past-due residential account balances.

Of Cox Communications, Inc.'s ("Defendant") approximately 6 million residential subscribers, 15-20 percent of them go into collections on a monthly basis. *See* Transcript of Deposition of Virginia Snedeker pursuant to Rule 30(b)(6) ("Snedeker Dep."), attached as Exhibit A, at 52:21-53:18. As a result, Defendant places between 2 and 4 million automated calls each year in an effort to contact subscribers with past-due accounts. *See id*. at 13:18-25, 14:1-19.

Defendant does not "ever manually dial phone numbers in connection with collection calls for residential accounts." *Id*. at 48:19-25. Rather, Defendant places its collection calls by using Avaya Proactive Contact dialers. *See id*. at 20:21-25, 21:14-18.

Defendant's Avaya Dialers operate as follows: A "Daily Call List . . . is created and . . . loaded into the dialer each morning," *see id.* at 56:8-17, and the Avaya dialers then automatically launch calls to telephone numbers on the Daily Call List without human intervention. *See id*. at 57:11-25, 58:1. The process of "compiling the Daily Dialer List" is "automated." *See id*. at 50:19-22. And there is no "human intervention at all in terms of having the Avaya Dialers launch calls for accounts in—for residential accounts in collections." *Id*. at 57:19-25, 58:1.

II. Defendant placed no less than 11 automated calls to Plaintiff's cellular telephone number.

From October 2015 through February 2016, Defendant placed at least 11 automated calls to Plaintiff's cellular telephone number—which she has been the user of, and subscriber to, continuously since 2006, *see* Transcript of Deposition of Joanne Knapper ("Knapper Dep."), attached as Exhibit B, at 13:20-23, 15:14-18—by using its Avaya dialers. Each of these 11 calls was accompanied by a prerecorded voice message. *See* Snedeker Dep. at 26:11-19, 34:6-15 (Q. So to put it all together then, by looking at Plaintiff's Exhibit 2, Cox was able to determine that it made 11 outbound calls to the 4074 telephone number and left a prerecorded voice message on that number on each of those 11 calls? A. That is correct. Q. Were all 11 of the outbound calls to the 4074 number reflected on Exhibit 2 made through the Avaya dialers? A. Correct.); Defendant's Answer, ECF No. 14 at 9, ¶ 15 ("Cox admits that it left at least five voice mail messages at 480-xxx-4074 attempting to reach its customer.").

III. Defendant did not have any business relationship with Plaintiff, and Plaintiff did not give Defendant express consent to call her cellular telephone number.

Plaintiff neither subscribed to Defendant's services, nor was she ever one of Defendant's customers. Knapper Dep. at 71:9-22; Defendant's Answer, ECF No. 14 at 9, ¶ 21 (admitting that "Plaintiff is not, nor was, one of Defendant's customers."); Snedeker Dep. at 58:2-4 (Q. Has Cox found any record of Joanne Knapper being a customer? A. No.). As such, in placing automated calls to Plaintiff's cellular telephone number, Defendant was not attempting to reach Plaintiff, but rather one of its customers whose account was in collections. *Id*. at 34:16-35:1.

IV. Defendant did nothing to independently confirm that Plaintiff's cellular telephone number belonged to the intended recipient of its calls before placing automated calls to it.

Defendant claims to have obtained Plaintiff's cellular telephone number from one of its customers in 2005—11 years prior to the calls at issue. *Id*. at 59:2-7. But it has no

paperwork substantiating how or when its customer provided the 4074 telephone number to it. *Id*. at 59:24-60:15. Nonetheless, prior to implementing a service through Neustar in 2016, *see* Section V, *infra*, Defendant did not take any steps to independently verify the accuracy of the telephone numbers to which it placed calls before autodialing them. *Id*. at 93:8-14, 104:3-15, 123:3-16. Had it done so, Defendant would have discovered that Plaintiff obtained the 4074 telephone number in 2006.

V. Defendant ultimately designated Plaintiff's cellular telephone number as a potential wrong number.

Sometime in 2016 Defendant contracted with a company called Neustar to analyze the telephone numbers in its database. *Id*. at 93:1-4; 94:2-12. Among other things, Neustar identifies whether a particular telephone number is assigned to a cellular line or land line. *Id*. at 95:22-25, 97:15-19; Transcript of Deposition of Orrin Gray ("Gray Dep."), attached as Exhibit C, at 78:8-12 (Q. Okay. So, in other words, you're confident that Neustar can properly distinguish between landlines and cell phones? A. Yeah. That's one reason why we went with them.).

In August 2016, Neustar began checking each of the 8-9 million telephone numbers in Defendant's system, on a nightly basis, to determine whether the numbers are valid, among other things. *See* Snedeker Dep. at 100:16-101:20, 122:14-17. With respect to telephone numbers it identifies as cellular telephone numbers, Neustar assigns a score of "01" to each number where the name on Defendant's account, and the name Neustar associates with the telephone number, are "negatively linked." *Id*. at 109:9-110:2; Gray Dep. at 73:10-16. Because these telephone numbers may be wrong numbers, as of August 2016 Defendant no longer calls them with its "automated dialer." Gray Dep. at 17:24-18:3, 74:9-12.

As a result of the initial Neustar effort in August 2016, Plaintiff's cellular telephone number was assigned a score of "01"—meaning the name associated with Plaintiff's number was "negatively linked" to the name associated with Defendant's account. Snedeker Dep. at 114:8-11.

VI. Defendant identified more than 600,000 cellular telephone numbers currently associated with its residential accounts as likely wrong numbers, including Plaintiff's.

Defendant maintains records showing all cellular telephone numbers on its residential accounts with a Neustar score of "01"—of which there are over 600,000. *Id*. at 117:18-20; Gray Dep. at 78:20-80:21. When Defendant performed its initial Neustar scrub in August 2016, it identified over 485,000 cellular telephone numbers associated with residential accounts with a Neustar score of "01." Gray Dep. at 91:18-92:25.[2]

Separately, Defendant uses a notation to indicate when a called party notifies Defendant—as a result of an outbound, live agent call made by Defendant—that it is calling a wrong number. Gray Dep. at 46:3-15-48:1. Defendant produced a listing of approximately 55,000 such telephone numbers in this case. *Id*. Of note, Defendant separately identified approximately 31,000 telephone numbers to which it placed approximately 750,000 automated calls *after* its own internal records designated them as wrong numbers. Snedeker Dep. at 145:8-20, 146:13-147:2, 149:17-150:7, 170:1-171:17.[3]

VII. Defendant has records of many of the outbound calls it placed by using its Avaya dialers during the proposed class period.

Cox maintains records of the telephone numbers it dialed on a given day. Gray Dep. at 24:19-25:16. Separately, Defendant can search its records by telephone number to determine whether a particular person is or was a subscriber, and if and when Defendant called a particular telephone number. *Id*. at 42:20-23, 94:10-95:2.

Argument

Under Rule 23 of the Federal Rules of Civil Procedure, the party seeking class certification must satisfy the four requirements of Rule 23(a) and, pertinent here, the requirements of Rule 23(b)(3). As set forth below, Plaintiff satisfies each of these elements.

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[2] Defendant produced lists of the cellular telephone numbers Neustar gave a score of 01 during discovery, and Plaintiff can provide them to the Court upon request.

[3] Likewise, Defendant produced these telephone numbers during discovery. Not all of these telephone numbers are valid numbers, and many are assigned to landlines.

I. Plaintiff's proposed class is well suited for class treatment.

As Judge Easterbrook wrote: "Class certification is normal in litigation under [the TCPA], because the main questions . . . are common to all recipients." *Ira Holtzman, C.P.A., & Assocs. v. Turza*, 728 F.3d 682, 684 (7th Cir. 2013). And this is especially true in non-debtor and wrong-number cases, like this matter, where courts do not have to inquire as to whether each putative class member may be subject to an independent consent defense. *See, e.g.*, *Reyes v. BCA Fin. Servs., Inc.*, No. 16-24077-CIV-Goodman, 2018 WL 3145807 (S.D. Fla. June 26, 2018) (certifying over the defendant's objection a "wrong number" TCPA class); *Lavigne v. First Community Bankshares, Inc.*, No. 1:15-cv-00934-WJ/LF, 2018 WL 2694457 (D.N.M. June 5, 2018) (same); *West v. Cal. Servs. Bureau, Inc.*, 323 F.R.D. 295 (N.D. Cal. 2017) (same); *see also Johnson v. Navient Solutions, Inc.*, 315 F.R.D. 501 (S.D. Ind. 2016) (same); *Abdeljalil v. Gen. Elec. Capital Corp.*, 306 F.R.D. 303, 306 (S.D. Cal. 2015) (same); *Johnson v. NPAS Solutionss, LLC*, No. 9:17-CV-80393, 2017 WL 6060778, at *1 (S.D. Fla. Dec. 4, 2017) (certifying for settlement purposes a "wrong number" TCPA class); *Reid v. I.C. Syst. Inc.*, No. 2:12-cv-02661-ROS, Doc. 230 (D. Ariz. Nov. 9, 2017) (same); *James v. JPMorgan Chase Bank, N.A.*, No. 8:15-CV-2424-T-23JSS, 2016 WL 6908118, at *1 (M.D. Fla. Nov. 22, 2016) (same); *Munday v. Navy Fed. Credit Union*, No. SACV151629JLSKESX, 2016 WL 7655807, at *12 (C.D. Cal. Sept. 15, 2016) (same); *Picchi v. World Fin. Network Nat'l Bank, N.A.*, No. 11-cv-61797, Doc. 131 (M.D. Fla. Jan. 30, 2015); *accord McMillion v. Rash Curtis & Assocs.*, No. 16-CV-03396-YGR, 2017 WL 3895764, at *10 (N.D. Cal. Sept. 6, 2017) (certifying, over the defendant's objection, two "non-debtor" TCPA classes).

II. Plaintiff satisfies the requirements of Rule 23(a).

A. The proposed class is so numerous that joinder of all members is impracticable.

"The first requirement of Rule 23(a) is that the class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "The requirement is met if, due to class size, it would be extremely difficult or inconvenient to join all class

members." *Brink v. First Credit Res.*, 185 F.R.D. 567, 569 (D. Ariz. 1999) (Silver, J.). "[I]n light of prevailing precedent, the difficulty inherent in joining as few as 40 class members should raise a presumption that joinder is impracticable, and the plaintiff whose class is that large or larger should meet the test of Rule 23(a)(1) on that fact alone." *Amone v. Aveiro*, 226 F.R.D. 677, 684 (D. Haw. 2005) (citing *Newberg & Conte, 1 Newberg on Class Actions* § 3.6 (4th ed. 2002)). Consequently, "courts [generally] find the numerosity requirement satisfied when a class includes at least 40 members." *Rannis v. Recchia*, 380 F. App'x 646, 651 (9th Cir. 2010).

Here, Defendant identified more than 600,000 cellular telephone numbers that it associates with its residential accounts, and that are likely wrong numbers. *See supra*, Statement of Facts, Sections V, VI. In other words, Defendant identified well over a half-million cellular telephone numbers, the subscribers to which Defendant likely had no relationship with whatsoever, as contact numbers for its customers. At the same time, Defendant made millions of autodialed calls per year to collect on residential accounts, of which 15-20 percent were delinquent during any given month. *See supra*, Statement of Facts, Section I. Moreover, Defendant identified thousands of cellular telephone numbers to which it placed automated calls *after* its own internal records designated them as wrong numbers. *See supra*, Statement of Facts, Section VI.

Thus, it stands to reason that the proposed class is sufficiently numerous such that joinder is impracticable. *See, e.g.*, *Drossin v. Nat'l Action Fin. Servs., Inc.*, 255 F.R.D. 608, 614-15 (S.D. Fla. 2009) (finding a proposed class to be sufficiently numerous where the number of class members was an unknown subset of 30,139 individuals, and noting that it was reasonable to assume that fifty of the "tens of thousands" of people the defendant called were class members).

B. Questions of law and fact are common to all members of the proposed class.

Rule 23(a)(2) requires the existence of common questions of law or fact. Fed. R. Civ. P. 23(a)(2). The showing required to meet the commonality requirement is "minimal"

and "not high." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998). As well, "Rule 23(a)(2) has been construed permissively. All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Id.* at 1019.

This case presents a host of common questions. First, whether Defendant placed the calls at issue by using an automatic telephone dialing system is a common question. To be sure, Defendant utilized its Avaya dialers to place calls to each proposed class member. *See supra*, Statement of Facts, Section I. Accordingly, whether Defendant's dialers, as it used them, are automatic telephone dialing systems as defined by the TCPA is a question that results in an answer common to all members of the proposed class. *See Lavigne*, 2018 WL 2694457, at *4 ("Plaintiff identifies a number of common questions of law or fact: • whether the Aspect Unified IP used to call all class member is an automatic telephone dialing system"); *Cabrera v. Gov't Emps. Ins. Co.*, No. 12-61390-CIV, 2014 WL 11894430, at *3 (S.D. Fla. Sept. 29, 2014) (finding that "common questions . . . apt to drive the resolution of the case, includ[e] (1) whether [the defendant] placed the calls at issue; [and] (2) whether it did so using an automated dialing system or prerecorded or artificial voice"); *Agne v. Papa John's Int'l, Inc.*, 286 F.R.D. 559, 567 (W.D. Wash. 2012) (finding as a common question of law "whether [the defendant's] system of transmission qualifies as an automatic telephone dialing system under the TCPA").

Second, that each class member suffered the same injury and is entitled to the same statutorily mandated relief gives rise to another common question. *See Lavigne*, 2018 WL 2694457, at *4 ("Plaintiff identifies a number of common questions of law or fact: . . . . • whether the class suffered the same injury, receipt of call in violation of the TCPA."); *Gehrich v. Chase Bank USA, N.A.*, No. 12 C 5510, 2016 WL 806549, at *4 (N.D. Ill. Mar. 2, 2016) ("Each class member suffered roughly the same alleged injury: receipt of at least one phone call or text message from Chase to her cell phone."); *Birchmeier v. Caribbean Cruise Line, Inc.*, 302 F.R.D. 240, 251 (N.D. Ill. 2014) ("Those who are members of one

of the proposed classes by definition received the same calls . . . made by or for one of the defendants, using the same artificial or prerecorded voice technology. This is a common alleged injury presenting a common question . . . . Here there is a common injury, resulting from receipt of the allegedly offending calls . . . . The Court likewise determines that there are questions of law or fact common to each class member.").

Finally, another question common to all class members is whether liability for calls placed to wrong or reassigned telephone numbers attaches under the TCPA. *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014) (explaining that only the current subscriber to a cellular telephone number can provide valid consent to receive calls made by an ATDS); *Soppet*, 679 F.3d at 641 (stating that "[c]onsent to call a given number must come from its current subscriber"); *see also, e.g.*, *McMillion*, 2018 WL 3023449, at *3-4 (rejecting as a ground for reconsideration the defendant's argument that a previous owner of the plaintiff's cellular telephone number provided the defendant express consent to call the number); *accord Reid*, 2013 WL 11394251, at *2.

C. Plaintiff's claims are typical of the claims of the members of the proposed class.

Rule 23(a)(3) requires that "the claims or defenses of the representative parties be typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). To that end, "the commonality and typicality requirements of Rule 23(a) tend to merge." *Bogner v. Masari Investments, LLC*, 257 F.R.D. 529, 532 (D. Ariz. 2009) (Campbell, J.) (citing *Hunt v. Check Recovery Sys., Inc.*, 241 F.R.D. 505, 510-11 (N.D. Cal. 2007)). Simply, a claim "is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of the other class members and his or her claims are based on the same legal theory." *Id*.

Here, Plaintiff and the members of the proposed class were each harmed in the same way by Defendant's common practice: the use of automated and prerecorded calls to cellular telephone numbers in an attempt to reach persons other than the intended recipients of its calls. Moreover, as Defendant indisputably placed multiple calls to Plaintiff's cellular telephone number (a non-customer) attempting to collect a debt from one of its customers,

see supra, Statement of Facts, Sections I-III, V, Plaintiff's claims are typical of those of the proposed class members. Indeed, Plaintiff's cellular telephone number appears on Defendant's list of numbers that do not match its customer records. *See id.*, Section V-VI.

Plaintiff's claims are therefore typical of the claims of the members of the proposed class. *See McMillion*, 2017 WL 3895764, at *7 ("Additionally, with respect to Perez, the analysis conducted by plaintiffs' expert demonstrates that he, like the members of the Non-Debtor classes, never had a debt collection account with Rash Curtis. Accordingly, the Court finds that Perez has satisfied Rule 23(a)(3)'s typicality requirement …."); *Palm Beach Golf Ctr.-Boca, Inc. v. Sarris*, 311 F.R.D. 688, 696 (S.D. Fla. 2015) ("The Court finds that the proposed class representative satisfies the typicality requirements because Plaintiff, like each of the class members, was purportedly sent the same fax and each class member's claim is based on the same legal theory and same set of facts as Plaintiff's claim."); *Cabrera*, 2014 WL 11894430, *4 ("The Court finds that Plaintiff's claims are typical of the proposed cellular-only class because his claims arise from the same practice—[the defendant's] use of LiveVox to place calls to cellular numbers—and are premised on the same TCPA violation."); *C-Mart, Inc. v. Metro. Life Ins. Co.*, 299 F.R.D. 679, 690 (S.D. Fla. 2014) (finding typicality in a TCPA matter where the named plaintiff received the same communication as did the members of the class).

D. Plaintiff, and her counsel, will fairly and adequately protect the interests of the members of the proposed class.

Rule 23(a)(4) requires that the named plaintiff fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4). This prerequisite is met by showing that: (1) the proposed representative does not have conflicts of interest with the proposed class; and (2) the representative plaintiff is represented by qualified counsel. *Hanlon*, 150 F.3d at 1020.

Here, Plaintiff is capable of, has, and will continue to protect the interests of the members of the proposed class. From the outset, Plaintiff has been, and remains to date, very involved in this matter. She communicates regularly with her counsel, responded to

Defendant's two sets of discovery requests, sat for deposition, and is prepared to make all necessary decisions involving this case with class members' best interests in mind. *See generally* Knapper Dep., Ex. B.

As well, Plaintiff retained counsel experienced and competent in class action litigation, including that under the TCPA. *See* Declaration of Michael L. Greenwald, ¶¶ 11-12, attached as Exhibit D. Indeed, courts have not only appointed GDR class counsel in dozens of consumer protection class actions in the past few years alone, but many have also taken care to highlight GDR's wealth of experience and skill. *See id*. at ¶¶ 13-17. Accordingly, Plaintiff and her counsel satisfy Rules 23(a)(4) and 23(g).

III. Plaintiff satisfies the requirements of Rule 23(b)(3).

A. The questions of law and fact common to the members of the proposed class predominate over any questions affecting only individual class members.

The predominance factor "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623, 117 S. Ct. 2231, 138 L.Ed.2d 689 (1997). The focus of the predominance inquiry is on "the relationship between the common and individual issues." *Hanlon*, 150 F.3d at 1022. "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Id*.

Here, to establish a TCPA violation, Plaintiff and the members of the proposed class must show that: "(1) the defendant called a cellular telephone; (2) using an automatic telephone dialing system [or an artificial or prerecorded voice]; (3) without the recipient's prior express consent." *Mendez v. C-Two Grp., Inc.*, No. 13-cv-05914-HSC, 2015 WL 8477487, at *7 (N.D. Cal. Dec. 10, 2015) (certifying TCPA class action) (quoting *Meyer v. Portfolio Recovery Assocs., LLC*, 707 F.3d 1036, 1043 (9th Cir. 2012)). As such, "whether [Defendant] used an automated telephonic dialing system to [place the subject calls] and caused injuries to the class members is an issue that predominates over those that

may be considered individualized." *Mohamed v. Am. Motor Co., LLC*, 320 F.R.D. 301, 316 (S.D. Fla. 2017); *see also Palm Beach Golf Ctr.-Boca, Inc.*, 311 F.R.D. at 699 (explaining that "[t]he facts necessary to establish liability [under the TCPA] relate to Defendant's common course of conduct and the transmissions of the [communications]," and finding that "common issues predominate over any individual issues that may arise"); *Gehrich*, 316 F.R.D. at 226 (noting that "[t]he common questions listed above [including whether the defendant placed prerecorded or automated calls and alerts to cellular telephone numbers] are the main questions in this case, they can be resolved on a class-wide basis without any individual variation, and they predominate over any individual issues"); *Malta v. Fed. Home Loan Mortg. Corp.*, No. 10-CV-1290 BEN NLS, 2013 WL 444619, at *4 (S.D. Cal. Feb. 5, 2013) ("The central inquiry is whether Wells Fargo violated the TCPA by making calls to the class members. Accordingly, the predominance requirement is met.").

Moreover, that the members of the proposed class are non-customers of Defendant, who necessarily did not provide Defendant with express consent to place calls to their cellular telephone numbers, means that express consent does not serve as an obstacle to predominance, as it might in other scenarios arising under the TCPA. *See Abdeljalil*, 306 F.R.D. at 311 (rejecting the defendant's argument that consent defeated predominance in connection with a TCPA "wrong-number" class, and finding that "plaintiff has met his burden of demonstrating that questions of fact and law predominate over individualized issues"); *accord C-Mart, Inc.*, 299 F.R.D. at 691 (explaining that "[w]ith consent and application of the [established business relationship] Safe Harbor being eliminated as criteria that serve to define (and defeat) the class . . . . predominance is satisfied").

No matter, even if issues regarding prior express consent existed—they do not—common issues would still predominate. *See Palm Beach Golf Ctr.-Boca, Inc.*, 311 F.R.D. at 699 ("The Court agrees with the Court in *Reliable Money Order, Inc. v. McKnight Sales Co.*, 281 F.R.D. 327, 338 (E.D. Wis. 2012), *aff'd,* 704 F.3d 489 (7th Cir. 2013), that any issues relating to whether any of the recipients gave permission to receive faxes prior to

transmission or whether any of the plaintiffs had an established business relationship with the defendant can be handled within the framework of a class action."); *accord James*, 2016 WL 6908118, at *1 ("Also, the class satisfies Rule 23(b)(3)'s predominance requirement. Class-wide proof can answer the predominant questions (whether Chase auto-dialed each person and whether each call violates the TCPA).").

Additionally, other potential issues—such as "difficult damage calculations, individual determinations of who the telephone user was, when the call was made and proof that [the defendant] actually made the calls . . . difficult[y] [in] determining the identity of users . . . [and] the distinct possibility that every record marked as a wrong number may not have actually been a wrong number," *Johnson*, 315 F.R.D. at 502—do not stand in the way of a finding of predominance. *See id.* (certifying, over the defendant's objection, a "wrong-number" TCPA class, and rejecting the defendant's contention that individual issues would "overwhelm the litigation and destroy the required commonality of facts"); *Reyes*, 2018 WL 3145807, at *14 (collecting cases); *West*, 323 F.R.D. at 301-02 ("Defendant does not persuade. As an initial matter, several district courts have deemed commonality and predominance satisfied in TCPA cases despite the possibility that a substantial proportion of the phone numbers marked as 'wrong number' in defendant's call log databases 'may not have actually been a wrong number.'").

B. A class action is superior to other available methods for the fair and efficient adjudication of this matter.

Rule 23(b)(3) also requires that a district court determine that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). In determining whether the superiority requirement is satisfied, a court may consider: (1) the interest of members of the class 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 members of the class; (3) the desirability or undesirability 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.*

In general, litigating TCPA claims as part of a class action is superior to litigating them in successive individual lawsuits. *See Reliable Money Order, Inc.*, 281 F.R.D. at 339 ("[M]any courts have found class actions to be an appropriate method of adjudication of TCPA violations."); *see also Palm Beach Golf Ctr.-Boca, Inc.*, 311 F.R.D. at 699 ("[T]he Court finds that a class action is superior to other methods for adjudicating the putative class members' TCPA claims."). This is especially true here, where the class likely has tens of thousands of members, if not more.

As well, here, no one class member has an interest in controlling the prosecution of this action. Simply, the claims of all members of the proposed class are identical, they arise from the same standardized conduct, and they result in uniform damages calculated on a per-violation basis. *See James*, 2016 WL 6908118, at *1 ("This class action, which resolves the controversy more fairly and efficiently than a series of individual actions, satisfies Rule 23(b)(3)'s superiority requirement. Because the TCPA permits a maximum award of $500 absent a willful violation, each class member lacks a strong financial interest in controlling the prosecution of his action."); *Lavigne*, 2018 WL 2694457, at *8 ("Here, Plaintiff has met the superiority requirement. It is unlikely that putative class members will file a case under TCPA for $500-1500, and will have little interesting in controlling the prosecution of the TCPA claims. Moreover, the complex nature of this TCPA action lends itself to the efficiencies of class certification. It would [be] inefficient to reinvent [the] wheel on approximately 30,000 separate cases. Moreover, the courts would be substantially burdened by 30,000 separate suits—or even a fraction of that. As explained above, Plaintiff has shown that the class action appears to be manageable. Any difficulties in managing this class action are outweighed by the desirability of concentrating this matter in one litigation.").

Moreover, absent a class action, thousands of claims like Plaintiff's—all of which stem from Defendant's identical conduct in autodialing wrong numbers—will likely go un-redressed. *See Siding & Insulation Co. v. Beachwood Hair Clinic, Inc.*, 279 F.R.D. 442,

446 (N.D. Ohio 2012) ("Under the TCPA, each individual plaintiff is unlikely to recover more than a small amount (the greater of actual monetary loss or $500). Individuals are therefore unlikely to bring suit against [the defendant], which makes a class action the superior mechanism for adjudicating this dispute."); *Green v. Serv. Master On Location Servs. Corp.*, No. 07 C 4705, 2009 WL 1810769, at *3 (N.D. Ill. June 22, 2009) ("[R]esolution of the issues [under the TCPA] on a classwide basis, rather than in thousands of individual lawsuits (which in fact may never be brought because of their relatively small individual value), would be an efficient use of both judicial and party resources."); *accord Abdeljalil*, 306 F.R.D. at 312.

Additionally, there are unlikely to be serious difficulties in the management of this case as a class action.[4] This is, in part, because Defendant has in its possession not only records of most of the calls it placed, but also lists of the telephone numbers its vendor (a) identified as cellular telephone numbers and (b) noted that the name associated with the cellular telephone number did not match the name Defendant attached to the number. And based on this information, the names and addresses of individuals associated with cellular telephone numbers at issue can be identified in a practical and efficient manner. *See* Expert Report of Cameron Azari, Esq., attached as Exhibit E. *See Reyes*, 2018 WL 3145807, at *11-*14 (discussing viability of reverse number lookup process to identify potential class members; *West*, 323 F.R.D. at 302 (same); *accord Birchmeier*, 302 F.R.D. at 254 (rejecting argument that class was not manageable because it would allegedly be either impossible, or costly and onerous, to obtain the identities of the subscribers for the phone numbers of

[4] Even if real manageability concerns did exist—they do not—failure to certify a class action under Rule 23(b)(3) solely on manageability grounds is disfavored. *See Mullins v. Direct Digital, LLC*, 795 F.3d 654, 663-64 (7th Cir. 2015) ("[B]efore refusing to certify a class that meets the requirements of Rule 23(a), the district court should consider the alternatives as Rule 23(b)(3) instructs rather than denying certification because it may be challenging to identify particular class members. District courts have considerable experience with and flexibility in engineering solutions to difficult problems of case management . . . . Under this comparative framework, refusing to certify on manageability grounds alone should be the last resort."), *cert. denied*, 136 S. Ct. 1161 (2016).

930,000 class members).

A class action is therefore the superior method to adjudicate this controversy. *See Manno v. Healthcare Revenue Recovery Grp., LLC*, 289 F.R.D. 674, 690 (S.D. Fla. 2013) ("In addition, the Court finds that the large number of claims, along with the relatively small statutory damages, the desirability of adjudicating these claims consistently, and the probability that individual members would not have a great interest in controlling the prosecution of these claims, all indicate that [a] class action would be the superior method of adjudicating the plaintiffs' claims under the . . . TCPA.").

IV. Plaintiff's proposed notice plan satisfies Rule 23(c)(2)(B).

Rule 23(c)(2)(B) requires delivery of the "best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Of course, "neither Rule 23 nor the Due Process Clause requires actual notice to each individual class member." *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1128 (9th Cir. 2017). In fact, Rule 23 "recognizes it might be *impossible* to identify some class members for purposes of actual notice." *Id*. at 1129. Consequently, "[c]ourts have routinely held that notice by publication in a periodical, on a website, or even at an appropriate physical location is sufficient to satisfy due process." *Id*.

Here, to properly provide notice to potential class members, Plaintiff will first perform reverse lookups for the telephone numbers Defendant has identified as potential wrong numbers.[5] *See* Ex. E. Plaintiff will then send Court-approved notice to each potential

[5] The existence of a list of telephone numbers to which a defendant may have placed calls makes membership in a TCPA class readily identifiable. *See Sandusky Wellness Ctr., LLC v. Medtox Sci., Inc.*, 821 F.3d 992, 997 (8th Cir. 2016) ("[F]ax logs showing the numbers that received each fax are objective criteria that make the recipient clearly ascertainable."); *Am. Copper & Brass, Inc. v. Lake City Indus. Prod., Inc.*, 757 F.3d 540, 545 (6th Cir. 2014) ("[T]he record in fact demonstrates that the fax numbers are objective data satisfying the ascertainability requirement."); *Mey v. Venture Data, LLC*, No. 14-123, Doc. 247 at 26 (N.D. W. Va. June 6, 2017) (certifying a TCPA class, and pointing out that "numerous reliable databases exist from which a class administrator can accurately identify names and addresses based on a list of telephone numbers").

class member by direct mail. In addition, Plaintiff will create a dedicated website, and a toll-free phone number. *See id.* And she will also issue notice by publication. *See id*.

Then, proposed class members who wish to participate in this lawsuit will be able to attest to receiving wrong-number calls from Defendant and, if necessary, submit supporting documentation such as telephone records. That is, if required to, the proposed class members will be able to identify themselves, by way of a sworn statement made in connection with a claim form sent to them as part of a notice program, as an unintended recipient of Defendant's calls. *See Briseno*, 844 F.3d at 1132 (explaining that the need for self-identification and related discovery from absent class members, if necessary, does not disturb a defendant's due process rights, and noting that "there is no due process right to a *cost-effective* procedure for challenging every individual claim to class membership"). And Defendant—which has records of the calls it made to the proposed class members—will have the ability to verify or contest their membership in the class.[6]

Conclusion

Plaintiff respectfully requests that this Court certify the proposed class, appoint Plaintiff as the class representative, and appoint GDR as class counsel.

Dated: June 28, 2018

Respectfully submitted,

/s/ Michael L. Greenwald
Michael L. Greenwald (*pro hac vice*)
Aaron D. Radbil (*pro hac vice*)
James L. Davidson (*pro hac vice*)
Greenwald Davidson Radbil PLLC

Counsel for Plaintiff and the proposed class

[6] Plaintiff need not "demonstrate that there is an 'administratively feasible' means of identifying absent class members." *Briseno*, 844 F.3d at 1123 ("We have never interpreted Rule 23 to require such a showing, and, like the Sixth, Seventh, and Eighth Circuits, we decline to do so now.").

CERTIFICATE OF SERVICE

I certify that on June 28, 2018, the foregoing document was filed with the Court using CM/ECF, which will send notification of such to all counsel of record.

/s/ Michael L. Greenwald
Michael L. Greenwald