

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

*PAUL STEMPLER, individually and
on behalf of all others similarly
situated,*

Plaintiff,

v.

QC HOLDINGS, INC.,

Defendant.

Case No. 12-cv-01997-BAS(WVG)

**ORDER GRANTING MOTION
FOR PRELIMINARY
APPROVAL OF NATIONWIDE
CLASS ACTION SETTLEMENT
AND CERTIFICATION OF
SETTLEMENT CLASS**

[ECF No. 102]

On August 13, 2012, Plaintiff Paul Stemple commenced this class action against Defendant QC Holdings, Inc. seeking relief for violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (“TCPA”). (ECF No. 1.) Plaintiff now moves unopposed for preliminary approval of a settlement reached between the parties and for certification of a settlement class. (ECF No. 102.)

The Court finds this motion suitable for determination on the papers submitted and without oral argument. *See* Civ. L.R. 7.1(d)(1). For the following reasons, the Court **GRANTS** Plaintiff’s Motion for Preliminary Approval of Nationwide Class Action Settlement and Certification of Settlement Class.

1 **I. PROPOSED SETTLEMENT**

2 **A. Settlement Class**

3 Following three years of litigation and attending multiple mediations, the
4 parties have reached a proposed settlement of this matter (“Settlement”). (Settlement
5 Agreement and Release (“Settlement Agreement”) Recitals C, D, ECF No. 102-3.)¹

6 The Settlement applies to a proposed Settlement Class that is defined as follows:

7 All persons or entities within the United States whose 10-digit cellular
8 telephone numbers were listed by an account holder in the Employment
9 and/or Contacts fields, but were not listed in the Personal fields, of a
10 customer loan application produced to Defendant, and who were called
11 by Defendant using an ATDS and/or an artificial or prerecorded voice
for the purpose of collecting or attempting to collect an alleged debt
from the account holder, between August 13, 2008 and August 13, 2012.

12 (*Id.* § 2.1.) The parties estimate this Settlement Class consists of 31,230 class
13 members. (*Id.* § 2.2.) A Settlement Class Member is a person or entity who is
14 encompassed by the Settlement Class and does not timely and properly opt out of the
15 Settlement. (*Id.* § 1.30.) To represent the Settlement Class, the parties agree to seek
16 appointment of Plaintiff as Class Representative and Plaintiff’s counsel—Joshua B.
17 Swigart of Hyde & Swigart, Abbas Kazerounian of Kazerouni Law Group, APC, and
18 Todd M. Friedman of The Law Offices of Todd M. Friedman, P.C—as Class
19 Counsel. (*Id.* § 3.2.)

20
21 **B. Settlement Fund**

22 Defendant denies that it has violated the TCPA or any other law, but it agrees
23 to establish a Settlement Fund in the amount of \$1,500,000 to pay for awards to
24 Settlement Class Members, settlement administration expenses, and any reasonable
25 attorneys’ fees and costs approved and awarded by the Court. (Settlement Agreement
26 Recital E, § 4.1.) After deducting class expenses, a pro rata share of the Settlement
27

28 ¹ Capitalized terms used in this Order but not defined herein have the meanings ascribed to them in
the Settlement Agreement.

1 Fund will be distributed by check to each Settlement Class Member who submits a
2 claim to the third-party claims administrator. (*Id.* § 4.2.) If an award is approved but
3 the resulting settlement check is not redeemed or is undeliverable, the award will be
4 delivered to a *cypres* recipient selected by the parties and approved by the Court. (*Id.*
5 § 15.5.)

6
7 **C. Notice to Settlement Class Members**

8 The Settlement requires the Claims Administrator to provide three forms of
9 notice to the Settlement Class Members. (Settlement Agreement § 9.) First, the
10 Claims Administrator will provide notice via First Class U.S. Mail to all class
11 members with known addresses. (*Id.* § 9.1.2, Ex. A.) The class members' addresses
12 will be either provided by Defendant from its records or obtained through a reverse
13 telephone number look-up. (*Id.* § 9.1.3.) The Mail Notice consists of an enlarged
14 postcard that contains, among other things, a summary of the terms of the Settlement,
15 instructions for submitting a claim, and directions for accessing the Settlement
16 Website. (*Id.* § 9.1.5, Ex. A.)

17 Second, the Claims Administrator will create a website to provide information
18 regarding the Settlement and to allow for online claim submission. (Settlement
19 Agreement § 9.2.1.) The Settlement Website will provide access to the Mail Notice
20 and also contain a notice in question and answer format that provides more detailed
21 information about the release of claims contained in the Settlement, contacting the
22 Court to object to the Settlement, and other matters. (*Id.* § 9.2, Ex. B.)

23 Third, notice will be provided by publication by (i) placing an advertisement
24 in an issue of *USA Today* and (ii) sponsoring link and banner advertising on the
25 internet for one month and for at least ninety million impressions—appearances of
26 the advertisement on a webpage. (Settlement Agreement § 9.3, Ex. C.) A toll-free
27 number will also be designated by the Claims Administrator on the various notices
28 to allow class members to contact the Claims Administrator to inquire about the

1 settlement process. (*Id.* § 9.4)

2
3 **D. Right to Opt Out or Object and Release of Claims**

4 Settlement Class Members will have 130 days from the date of preliminary
5 approval of the Settlement to opt out of the Settlement. (Settlement Agreement §
6 11.1) Class members may opt out by submitting an exclusion request by mail. (*Id.* §
7 11.2.) If 500 or more class members opt out of the Settlement, Defendant has the
8 right to terminate the Settlement. (*Id.* § 11.4.) Class members will have the same time
9 period to submit a written objection indicating their desire to object to the Settlement.
10 (*Id.* 12.1.)

11 Upon final approval of the Settlement, all Settlement Class Members shall be
12 deemed to have released and discharged Defendant from any and all claims that are
13 known or unknown to the class members and relate to the this action. (Settlement
14 Agreement § 16.)

15
16 **E. Attorneys' Fees and Settlement Costs**

17 As compensation for its services and to recover its expenses, Class Counsel
18 will seek from the Court an award of attorneys' fees and litigation costs not to exceed
19 \$450,000 in attorneys' fees and \$50,000 in litigation costs. (Settlement Agreement §
20 6.) Class Counsel will also seek from the Court a service award for Plaintiff in an
21 amount not to exceed \$5,000. (*Id.* § 7.) In addition to these expenses that are subject
22 to the Court's approval, the parties anticipate \$181,695 in claims administration
23 costs. (*Id.* § 8.1.)

24
25 **II. DISCUSSION**

26 The Ninth Circuit maintains a "strong judicial policy" that favors the
27 settlement of class actions. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276
28 (9th Cir. 1992). However, Federal Rule of Civil Procedure 23(e) first "require[s] the

1 district court to determine whether a proposed settlement is fundamentally fair,
2 adequate, and reasonable.” *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th
3 Cir. 2000) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)).
4 Where the “parties reach a settlement agreement prior to class certification, courts
5 must peruse the proposed compromise to ratify both the propriety of the certification
6 and the fairness of the settlement.” *Stanton v. Boeing Co.*, 327 F.3d 938, 952 (9th
7 Cir. 2003). In these situations, settlement approval “requires a higher standard of
8 fairness and a more probing inquiry than may normally be required under Rule
9 23(e).” *Dennis v. Kellogg Co.*, 697 F.3d 858, 864 (9th Cir. 2012) (internal quotation
10 marks omitted).

11 In this case, the Court previously certified a California-only class. (ECF No.
12 75 at 15:4–9.) The parties in reaching a settlement modified the certified class,
13 however, by expanding it to include all persons or entities within the United States
14 that satisfy the class criteria. (Settlement Agreement § 2.1.) The Court therefore
15 reviews the class certification requirements to determine whether it is also
16 appropriate to certify the Settlement Class.

17 18 **A. Class Certification**

19 Before granting preliminary approval of a class-action settlement, the Court
20 must first determine whether the proposed class can be certified. *Amchem Prods.,*
21 *Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (indicating that a district court must apply
22 “undiluted, even heightened, attention [to class certification] in the settlement
23 context” in order to protect absentees).

24 The class action is “an exception to the usual rule that litigation is conducted
25 by and on behalf of the individual named parties only.” *Wal-Mart Stores, Inc. v.*
26 *Dukes*, 564 U.S. 338, 131 S.Ct. 2541, 2550 (2011) (quoting *Califano v. Yamasaki*,
27 442 U.S. 682, 700-01 (1979)). In order to justify a departure from that rule, “a class
28 representative must be part of the class and ‘possess the same interest and suffer the

1 same injury’ as the class members.” *Id.* (citing *E. Tex. Motor Freight Sys., Inc. v.*
2 *Rodriguez*, 431 U.S. 395, 403 (1977)). In this regard, Rule 23 contains two sets of
3 class-certification requirements set forth in Rule 23(a) and (b). *United Steel, Paper*
4 *& Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int’l Union v.*
5 *ConocoPhillips Co.*, 593 F.3d 802, 806 (9th Cir. 2010). “A court may certify a class
6 if a plaintiff demonstrates that all of the prerequisites of Rule 23(a) have been met,
7 and that at least one of the requirements of Rule 23(b) have been met.” *Otsuka v.*
8 *Polo Ralph Lauren Corp.*, 251 F.R.D. 439, 443 (N.D. Cal. 2008).

9 “Rule 23(a) provides four prerequisites that must be satisfied for class
10 certification: (1) the class must be so numerous that joinder of all members is
11 impracticable; (2) questions of law or fact exist that are common to the class; (3) the
12 claims or defenses of the representative parties are typical of the claims or defenses
13 of the class; and (4) the representative parties will fairly and adequately protect the
14 interests of the class.” *Otsuka*, 251 F.R.D. at 443 (citing Fed. R. Civ. P. 23(a)). “A
15 plaintiff must also establish that one or more of the grounds for maintaining the suit
16 are met under Rule 23(b), including: (1) that there is a risk of substantial prejudice
17 from separate actions; (2) that declaratory or injunctive relief benefitting the class as
18 a whole would be appropriate; or (3) that common questions of law or fact
19 predominate and the class action is superior to other available methods of
20 adjudication.” *Id.* (citing Fed. R. Civ. P. 23(b)).

21 In the context of a proposed settlement class, questions regarding the
22 manageability of the case for trial are not considered. *E.g.*, *Wright v. Linkus Enters.,*
23 *Inc.*, 259 F.R.D. 468, 474 (E.D. Cal. 2009) (citing *Amchem Prods., Inc.*, 521 U.S. at
24 620 (“Confronted with a request for settlement-only class certification, a district
25 court need not inquire whether the case, if tried, would present intractable
26 management problems . . . for the proposal is that there be no trial.”)).

27 The Court considers the threshold issue of whether the Settlement Class is
28 ascertainable and each of prerequisites for certification in turn below.

1 1. Ascertainability

2 “As a threshold matter, and apart from the explicit requirements of Rule 23(a),
3 the party seeking class certification must demonstrate that an identifiable and
4 ascertainable class exists.” *Mazur v. eBay, Inc.*, 257 F.R.D. 563, 567 (N.D. Cal.
5 2009). Certification is improper if there is “no definable class.” *See Lozano v. AT &*
6 *T Wireless Servs., Inc.*, 504 F.3d 718, 730 (9th Cir. 2007).

7 “A class should be precise, objective, and presently ascertainable,” though “the
8 class need not be so ascertainable that every potential member can be identified at
9 the commencement of the action.” *O’Connor v. Boeing N. Am. Inc.*, 184 F.R.D. 311,
10 319 (C.D. Cal. 1998) (internal quotation marks omitted). “A class is ascertainable if
11 it is defined by ‘objective criteria’ and if it is ‘administratively feasible’ to determine
12 whether a particular individual is a member of the class.” *Bruton v. Gerber Prods.*
13 *Co.*, No. 12-CV-02412-LHK, 2014 WL 2860995, at *4 (N.D. Cal. June 23, 2014).
14 However, “[a] class definition is inadequate if a court must make a determination of
15 the merits of the individual claims to determine whether a person is a member of the
16 class.” *Hanni v. Am. Airlines, Inc.*, No. C 08-00732, 2010 WL 289297, at *9 (N.D.
17 Cal. Jan. 15, 2010). “It is not fatal for a class definition to require some inquiry into
18 individual records, as long as the inquiry is not so daunting as to make the class
19 definition insufficient.” *Herrera v. LCS Fin. Servs. Corp.*, 274 F.R.D. 666, 673 (N.D.
20 Cal. 2011) (internal quotation marks omitted).

21 Here, the Court finds the Settlement Class is ascertainable because class
22 members can be identified by reviewing records available to Defendant and
23 conducting a reverse telephone number look-up. Defendant’s agent who supplies
24 Defendant’s autodialing system provided a complete list of all calls made by
25 Defendant using the autodialing system during the proposed class period. (Evlin
26 Decl. ¶¶ 12–13, ECF No. 102-4) All of the unique cell phone numbers called by
27 Defendant were extracted from this list. (Hansen Decl. ¶¶ 3–4, ECF No. 102-10.)
28 Some of these numbers have address information associated with them from

1 Defendant's records, but almost all of them do not. (*Id.* ¶¶ 7–8.)

2 To solve this issue, the parties propose to have the Claims Administrator
3 perform a reverse telephone number look-up to determine the address information
4 for class members for whom address information is not available. (Settlement
5 Agreement § 9.1.3.) The Court finds this solution is acceptable, as the use of “reverse
6 look-up technology to identify” the class members “is an objective approach that
7 reinforces the ascertainability of the class.” *Bee, Denning, Inc. v. Capital All. Grp.*,
8 310 F.R.D. 614, 623 (S.D. Cal. 2015) (citing *Booth v. Appstack, Inc.*, No. C13–
9 1533JLR, 2015 WL 1466247, at *4 (W.D. Wash. Mar. 30, 2015)). Thus, the Court
10 concludes the Settlement Class is ascertainable.

11 12 **2. Numerosity – Rule 23(a)(1)**

13 Rule 23(a)(1) requires that the class be “so numerous that joinder of all
14 members is impracticable.” Fed. R. Civ. P. 23(a)(1). “[C]ourts generally find that the
15 numerosity factor is satisfied if the class comprises 40 or more members and will find
16 that it has not been satisfied when the class comprises 21 or fewer.” *Celano v.*
17 *Marriott Int’l, Inc.*, 242 F.R.D. 544, 549 (N.D. Cal. 2007).

18 Here, the proposed Settlement Class consists of approximately 31,230 class
19 members. (Elvin Decl. ¶ 19; Settlement Agreement § 2.2.) The Court therefore finds
20 joinder of all class members is impracticable for the purposes of Rule 23(a)(1) and
21 the numerosity requirement is satisfied. *See Celano*, 242 F.R.D. at 549.

22 23 **3. Commonality – Rule 23(a)(2)**

24 Under Rule 23(a)(2), the named plaintiff must demonstrate that there are
25 “questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2).
26 “Commonality requires the plaintiff to demonstrate that the class members ‘have
27 suffered the same injury[.]’” *Dukes*, 131 S. Ct. at 2551 (quoting *Gen. Tel. Co. of Sw.*
28 *v. Falcon*, 457 U.S. 147, 157 (1982)). However, “[a]ll questions of fact and law need

1 not be common to satisfy this rule.” *Hanlon*, 150 F.3d at 1019. “The existence of
2 shared legal issues with divergent factual predicates is sufficient, as is a common core
3 of salient facts coupled with disparate legal remedies within the class.” *Id.*

4 In this case, Plaintiff alleges he was harmed when Defendant placed twelve
5 calls to Plaintiff’s cell phone in an attempt to collect an alleged debt owed by a person
6 other than Plaintiff. (First Amended Complaint (“FAC”) ¶ 12, ECF No. 107.) These
7 calls were allegedly made via an “automatic telephone dialing system” (“ATDS”)
8 within the meaning of the TCPA and with the use of an “artificial or prerecorded
9 voice” as prohibited by the TCPA. (*Id.*) Plaintiff did not consent to these calls. (*Id.* ¶
10 18.) Plaintiff claims the proposed Settlement Class Members were similarly harmed
11 when they were called for debt collection purposes by Defendant without their
12 consent using an ATDS and artificial voice in violation of the TCPA. (*Id.* ¶¶ 20–22.)

13 Given this context, the Court finds there are questions of law and fact common
14 to the Settlement Class Members. A common core of salient facts exists with respect
15 to Defendant’s alleged use of an ATDS and artificial voice to make unsolicited calls
16 to persons or entities via their cell phone numbers for debt collection purposes. Class
17 members also share a common legal issue: whether Defendant made these calls in
18 violation of the TCPA. Accordingly, the commonality requirement is satisfied.

19 20 **4. Typicality – Rule 23(a)(3)**

21 To satisfy Rule 23(a)(3), the named plaintiff’s claims must be typical of the
22 claims of the class. Fed. R. Civ. P. 23(a)(3). The typicality requirement is
23 “permissive” and requires only that the named plaintiff’s claims “are reasonably co-
24 extensive with those of absent class members.” *Hanlon*, 150 F.3d at 1020. “The test
25 of typicality ‘is whether other members have the same or similar injury, whether the
26 action is based on conduct which is not unique to the named plaintiffs, and whether
27 other class members have been injured by the same course of conduct.’” *Hanon v.*
28 *Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (quoting *Schwartz v. Harp*,

1 108 F.R.D. 279, 282 (C.D. Cal. 1985)). “[C]lass certification should not be granted
2 if ‘there is a danger that absent class members will suffer if their representative is
3 preoccupied with defenses unique to it.’” *Id.* (quoting *Gary Plastic Packaging Corp.*
4 *v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir. 1990)).

5 Here, Plaintiff’s and the unnamed class members’ claims arise from the same
6 alleged conduct of Defendant—unsolicited phone calls for debt collection purposes
7 using an ATDS and artificial voice—and are based on the same legal theory—
8 violation of the TCPA. The typicality requirement is therefore satisfied. *See, e.g.*,
9 *Bee, Denning, Inc.*, 310 F.R.D. at 623 (concluding typicality requirement satisfied
10 where plaintiff alleged she received the same or similar unsolicited fax
11 advertisements as those sent to putative class members in violation of the TCPA);
12 *Knutson v. Schwan’s Home Serv., Inc.*, No. 3:12-cv-0964-GPC-DHB, 2013 WL
13 4774763, at *5 (S.D. Cal. Sep. 5, 2015) (finding typicality satisfied where plaintiffs
14 asserted they received autodialed and/or prerecorded calls from defendants, “and the
15 proposed class [was] defined to include individuals who received the same type of
16 calls”).

17

18 **5. Adequacy – Rule 23(a)(4)**

19 Rule 23(a)(4) requires that the representative plaintiff “will fairly and
20 adequately protect the interest of the class.” Fed. R. Civ. P. 23(a)(4). “To satisfy
21 constitutional due process concerns, absent class members must be afforded adequate
22 representation before entry of a judgment which binds them.” *Hanlon*, 150 F.3d at
23 1020 (citing *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940)). “Resolution of two
24 questions determines legal adequacy: (1) do the named plaintiffs and their counsel
25 have any conflicts of interest with other class members and (2) will the named
26 plaintiffs and their counsel prosecute the action vigorously on behalf of the class?”
27 *Id.* (citing *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir.
28 1978)).

1 Here, there is no indication that Plaintiff and his counsel have a conflict of
2 interest with the Settlement Class Members, and they appear to have vigorously
3 investigated and litigated this action. (*See* Kazerounian Decl. ¶¶ 4–8, 27, ECF No.
4 102-2.) Thus, the interests of Plaintiff and the Settlement Class Members are aligned.
5 In addition, Plaintiff’s counsel are qualified in class-action litigation. They have
6 handled numerous class actions focused on consumer protection, including matters
7 involving the TCPA. (*Id.* ¶¶ 13–26; Swigart Decl. ¶¶ 6–11, ECF No. 102-7; Friedman
8 Decl. ¶¶ 4–9, ECF No. 102-8.) Consequently, the Court finds Plaintiff and his counsel
9 adequately represent the unnamed class members.

11 6. Predominance and Superiority – Rule 23(b)(3)

12 (i) Predominance

13 “The predominance inquiry focuses on ‘the relationship between the common
14 and individual issues’ and ‘tests whether proposed classes are sufficiently cohesive
15 to warrant adjudication by representation.’” *Vinole v. Countrywide Home Loans, Inc.*,
16 571 F.3d 935, 944 (9th Cir. 2009) (citing *Hanlon*, 150 F.3d at 1022). The focus of
17 the inquiry is not the presence or absence of commonality as it is under Rule 23(a)(2).
18 Instead, the predominance requirement ensures that common questions “present a
19 significant aspect of the case” such that “there is clear justification”—in terms of
20 efficiency and judicial economy—for resolving those questions in a single
21 adjudication. *Hanlon*, 150 F.3d at 1022; *see also Vinole*, 571 F.3d at 944 (“[A] central
22 concern of the Rule 23(b)(3) predominance test is whether adjudication of common
23 issues will help achieve judicial economy.”)

24 Here, the Court finds a common issue predominates over any individual
25 issue—specifically, whether Defendant’s alleged practice of using an ATDS to call
26 the Settlement Class Members’ cell phone numbers without their consent violated
27 the TCPA. A potential pitfall for parties seeking to satisfy the predominance
28 requirement in a TCPA action is whether an individualized inquiry will be necessary

1 to determine if class members consented to the automated phone calls. *See, e.g.,*
2 *Connelly v. Hilton Grand Vacations Co., LLC*, 294 F.R.D. 574, 578 (S.D. Cal. 2013)
3 (holding predominance requirement not satisfied where the context of class
4 members’ interactions with the defendant was sufficiently varied to require
5 individual evaluation of whether express consent was provided). The Court
6 previously addressed this concern in certifying a California-only class by adopting
7 Plaintiff’s suggestion to exclude cell phone numbers that belonged to loan
8 applicants—i.e., customers of Defendant’s short-term loan business. (ECF No. 75 at
9 14:21–15:12.) Because the parties have also excluded cell phone numbers belonging
10 to loan applicants in the expanded Settlement Class, this concern is similarly
11 addressed here. Accordingly, the Court finds the predominance requirement is met.

12
13 **(ii) Superiority**

14 “Plaintiffs must also demonstrate that a class action is ‘superior to other
15 available methods for fairly and efficiently adjudicating the controversy.’” *Otsuka*,
16 251 F.R.D. at 448 (quoting Fed. R. Civ. P. 23(b)(3)). “Where classwide litigation of
17 common issues will reduce litigation costs and promote greater efficiency, a class
18 action may be superior to other methods of litigation,” and it is superior “if no
19 realistic alternative exists.” *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234–
20 35 (9th Cir. 1996). The following factors are pertinent to this analysis:

- 21 (A) the class members’ interest in individually controlling the prosecution or
22 defense of separate actions;
23 (B) the extent and nature of any litigation concerning the controversy already
24 begun by or against class members;
25 (C) the desirability or undesirability of concentrating the litigation of the
26 claims in the particular forum; and
27 (D) the likely difficulties in managing a class action.

27 Fed. R. Civ. P. 23(b)(3).

28 //

1 A class action is a superior method for adjudicating the claims presented in
2 this case because of the relatively low value of the average class member’s potential
3 action against Defendant. The TCPA provides for \$500 or the actual monetary loss
4 in damages for each violation and treble damages for each willful or knowing
5 violation. 47 U.S.C. § 227(b)(3). The cost a Settlement Class Member would have to
6 incur to bring an individual action against Defendant very likely outweighs the
7 prospective recovery of the class member. This disparity between litigation costs and
8 prospective recovery provides “the most compelling rationale for finding superiority
9 in a class action.” *Smith v. Microsoft Corp.*, 297 F.R.D. 464, 468–69 (S.D. Cal. 2014)
10 (quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 748 (5th Cir. 1996)). Moreover,
11 the Court is unaware of any other litigation regarding the claims at issue involving
12 Defendant and the parties agree it is desirable to resolve the class members’ claims
13 in this forum. Thus, the superiority requirement is satisfied.

14 For the foregoing reasons, the Court provisionally finds the prerequisites for a
15 class action under Rule 23 of the Federal Rules of Civil Procedure have been met for
16 the Settlement Class.

17
18 **B. Preliminary Fairness Determination**

19 Having certified the Settlement Class, the Court must next make a preliminary
20 determination of whether the class-action settlement is “fair, reasonable, and
21 adequate” pursuant to Rule 23(e)(2). “It is the settlement taken as a whole, rather than
22 the individual component parts, that must be examined for overall fairness.” *Hanlon*,
23 150 F.3d at 1026. A court may not “delete, modify or substitute certain provisions”
24 of the settlement; rather, “[t]he settlement must stand or fall in its entirety.” *Id.*
25 Relevant factors to this determination include, among others:

26 //
27 //
28 //

1 the strength of the plaintiffs' case; the risk, expense, complexity, and
2 likely duration of further litigation; the risk of maintaining class-action
3 status throughout the trial; the amount offered in settlement; the extent
4 of discovery completed and the stage of the proceedings; the experience
5 and views of counsel; the presence of a governmental participant; and
6 the reaction of the class members to the proposed settlement.

6 *Id.*; see also *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004).

7 Preliminary approval of a settlement and notice to the proposed class is
8 appropriate if “the proposed settlement appears to be the product of serious,
9 informed, non-collusive negotiations, has no obvious deficiencies, does not
10 improperly grant preferential treatment to class representatives or segments of the
11 class, and falls within the range of possible approval.” *In re Tableware Antitrust*
12 *Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007) (internal quotation marks and
13 citations omitted).

14 Here, the proposed Settlement complies with all of these requirements. The
15 Court addresses the relevant factors in further detail below.

17 **1. Strength of the Plaintiffs' Case and Risk of Further Litigation**

18 “[T]he very essence of a settlement is compromise, ‘a yielding of absolutes
19 and an abandoning of highest hopes.’” *Officers for Justice v. Civil Serv. Comm’n of*
20 *the City & Cnty. of San Francisco*, 688 F.2d 615, 624 (9th Cir. 1982) (quoting *Cotton*
21 *v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)). As explained by the Supreme Court,
22 “[n]aturally, the agreement reached normally embodies a compromise; in exchange
23 for the saving of cost and elimination of risk, the parties each give up something they
24 might have won had they proceeded with litigation.” *United States v. Armour & Co.*,
25 402 U.S. 673, 681 (1971).

26 Although each party here strongly believes in the merits of the party's side of
27 the case, the parties have agreed to settle the matter in light of the risks to both sides
28 in continuing this matter through trial. (See Settlement Agreement Recitals D–F;

1 Kazerounian Decl. ¶¶ 11–12.) Plaintiff and Class Counsel in particular recognize
2 prosecuting this matter “through trial would be protracted, burdensome, and
3 expensive.” (Kazerounian Decl. ¶ 11.) One court, in discussing a large proposed
4 settlement in a TCPA action at length, adopted a report concluding that “the average
5 TCPA case carries a 43% chance of success.” *In re Capital One Tel. Consumer Prot.*
6 *Act Litig.*, 80 F. Supp. 3d 781, 806 (N.D. Ill. 2015). Plaintiff and the class members
7 would similarly face a substantial risk of being unsuccessful at trial here. Moreover,
8 preparing this matter for trial would indeed be burdensome and expensive. Thus, the
9 Court agrees with the parties that the proposed Settlement eliminates litigation risks
10 and ensures that the Settlement Class Members receive some compensation for their
11 claims, and this factor weighs in favor of approving the Settlement.

12 13 **2. Amount of the Proposed Settlement**

14 The Settlement provides for a Settlement Fund of \$1,500,000. (Settlement
15 Agreement § 4.1.) Offsetting this amount are anticipated notice and claims
16 administration expenses in the amount of \$181,695; an incentive award up to \$5,000;
17 litigation costs up to \$50,000; and attorneys’ fees up to \$450,000. (*Id.* §§ 6–8.) The
18 parties estimate three percent of the Settlement Class Members will submit a valid
19 claim to the Claims Administrator. (ECF No. 102-1 at 12:22, fn. 4.) Assuming the
20 anticipated expenses are incurred and the claims participation rate is correct, each
21 Settlement Class Member who submits a claim will receive approximately \$868 from
22 the Settlement Fund. (*Id.*)

23 Although the TCPA provides for statutory damages of only \$500 for each
24 negligent violation and \$1,500 for each willful violation, 47 U.S.C. § 227(b)(3),
25 Defendant potentially contacted many of the 31,230 Settlement Class Members in
26 violation of the TCPA multiple times. Plaintiff, as an example, alleges he received
27 approximately twelve calls from Defendant. (FAC ¶ 16.) Thus, given the potential
28 for numerous violations per Settlement Class Member, the amount of the Settlement

1 Fund is only a small percentage of the potential recovery that might be available to
2 the class at trial. Yet, “[t]he fact that a proposed settlement may only amount to a
3 fraction of the potential recovery does not, in and of itself, mean that the proposed
4 settlement is grossly inadequate and should be disapproved.” *Linney v. Cellular*
5 *Alaska P’ship*, 151 F.3d 1234, 1242 (9th Cir. 1998) (internal quotation marks
6 omitted). Moreover, in comparing the Settlement to settlements approved in
7 comparable cases, the amount of the Settlement Fund appears appropriate in light of
8 the claims rate anticipated by the parties. (See ECF No. 102-6 (containing matrix of
9 TCPA class action cases with information regarding class size, settlement amount,
10 and claims rates)). Therefore, under the circumstances, the Court concludes that the
11 amount offered in the Settlement weighs in favor of preliminary approval.

13 3. Extent of Discovery Completed and Stage of the Proceedings

14 The Court assesses the stage of proceedings and the amount of discovery
15 completed to ensure the parties have an adequate appreciation of the merits of the
16 case before reaching a settlement. See *Ontiveros v. Zamora*, 303 F.R.D. 356, 371
17 (E.D. Cal. 2014) (“A settlement that occurs in an advanced stage of the proceedings
18 indicates that the parties carefully investigated the claims before reaching a
19 resolution.”). So long as the parties have “sufficient information to make an informed
20 decision about settlement,” this factor will weigh in favor of approval. *Linney v.*
21 *Cellular Alaska P’ship*, 151 F.3d 1234, 1239 (9th Cir. 1998); see also *In re Mego*
22 *Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (explaining that a
23 combination of investigation, discovery, and research conducted prior to settlement
24 can provide sufficient information for class counsel to make an informed decision
25 about settlement).

26 The advanced stage of the proceedings in this case also weighs significantly in
27 favor of approval of the Settlement. The parties engaged in pre-certification
28 discovery and litigated a number of discovery issues. (See Order on Discovery

1 Disputes, ECF No. 21.) Thereafter, the Court granted Plaintiff’s motion for class
2 certification of a California-only class. (ECF No. 75.) Defendant sought
3 reconsideration of the Court’s decision, but Defendant’s request was denied. (ECF
4 Nos. 78, 89.) Defendant also unsuccessfully sought leave to appeal the class
5 certification order. (ECF No. 92.)

6 Following certification of a California-only class, Plaintiff conducted
7 additional discovery. (Kazerounian Decl. ¶ 5.) The parties also attended an all-day
8 mediation presided over by the Honorable Leo S. Wagner (Ret.) and a part-day
9 mediation with the Honorable Leo S. Papas (Ret.). (*Id.* ¶ 6; *see also* Settlement
10 Agreement Recital D.) With the guidance of Judge Papas, the parties ultimately
11 reached the Settlement. (Kazerounian Decl. ¶ 6.) Given the discovery conducted, the
12 stage of the proceedings, and the evidence of significant arms-length negotiations
13 following certification of a California-only class, the Court concludes that this factor
14 weighs significantly in favor of preliminary approval of the Settlement.

15 16 **4. Experience and Views of Counsel**

17 As mentioned above, Class Counsel have significant experience in handling
18 class actions. (Kazerounian Decl. ¶¶ 13–26; Swigart Decl. ¶¶ 6–11; Friedman Decl.
19 ¶¶ 4–9.) For example, one of Class Counsel has been involved in at least twenty-two
20 TCPA class actions. (Swigart Decl. ¶ 8.) As for their opinions of the Settlement, Class
21 Counsel believe the Settlement is desirable, fair, and beneficial to the Settlement
22 Class. (Kazerounian Decl. ¶ 11.) “The recommendations of plaintiffs’ counsel should
23 be given a presumption of reasonableness.” *Boyd v. Bechtel Corp.*, 485 F. Supp. 610,
24 622 (N.D. Cal. 1979). Accordingly, giving the appropriate weight to Class Counsel’s
25 recommendation, the Court concludes that this factor also weighs in favor of
26 approval.

27 //

28 //

5. Reaction of the Class to the Settlement

Plaintiff, aside from his own view, provides no evidence regarding any putative Settlement Class Members' reactions to the proposed settlement—presumably because no other class members have been informed of the proposed Settlement. The proposed Mail Notice, Website Notice, and Publication Notice provide instructions as to how class members may object to the Settlement, contact the Court regarding the Settlement, and request to appear at the Fairness Hearing. (Settlement Agreement Exs. A–C.) Accordingly, the Court will further consider this factor at the Fairness Hearing before granting final approval of the Settlement.

On balance, the Court finds the Settlement falls within the range of reasonableness meriting possible final approval. The Court therefore preliminarily approves the Settlement and the terms and conditions set forth in the Settlement Agreement, subject to further consideration at the Fairness Hearing.

C. Proposed Class Notice

Under Rule 23(c)(2)(B), “the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B).

The notice must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that 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. 12(c)(2)(B). “[T]he mechanics of the notice process are left to the

1 discretion of the court subject only to the broad ‘reasonableness’ standards imposed
2 by due process.” *Grunin v. Int’l House of Pancakes*, 513 F.2d 114, 120 (8th Cir.
3 1975).

4 Here, the proposed notices describe the litigation, the terms of the Settlement,
5 and each class member’s rights and options under the Settlement. (Settlement
6 Agreement Exs. A–C.) As outlined above, the Claims Administrator will distribute
7 the Mail Notice and establish the Settlement Website containing the Website Notice.
8 (*Id.* §§ 9.1, 9.2.) A Publication Notice will also be disseminated. (*Id.* § 9.3.) All of
9 the notices state the deadlines for opting out or objecting to the Settlement, and the
10 Mail Notice and Publication Notice direct class members to the Settlement Website
11 for additional information. (*Id.*) The Settlement Administrator will also operate a toll-
12 free telephone number for Settlement Class Members to call for more information
13 about the Settlement. (*Id.* § 9.4.)

14 Having reviewed the proposed class notices, the Court finds that the methods
15 and contents of the notices comply with due process and Rule 23, are the best notice
16 practicable under the circumstances, and shall constitute due and sufficient notice to
17 all persons entitled to notice of the Settlement. Therefore, the Court approves the
18 form and content of the proposed notices to be provided to the Settlement Class
19 Members as set forth in Section 9 of the Settlement Agreement and Exhibits A
20 through C to the Settlement Agreement.

21 22 **II. CONCLUSION & ORDER**

23 In light of the foregoing, the Court **GRANTS** Plaintiff’s Motion for
24 Preliminary Approval of Nationwide Class Action Settlement and Certification of
25 Settlement Class (ECF No. 102). Accordingly, the Court hereby **ORDERS** the
26 following:

27 (1) Pursuant to Rule 23 of the Federal Rules of Civil Procedure, the Court
28 hereby conditionally certifies the following class for settlement purposes only:

1 All persons or entities within the United States whose 10-digit cellular
2 telephone numbers were listed by an account holder in the Employment
3 and/or Contacts fields, but were not listed in the Personal fields, of a
4 customer loan application produced to Defendant, and who were called
5 by Defendant using an ATDS and/or an artificial or prerecorded voice
6 for the purpose of collecting or attempting to collect an alleged debt
7 from the account holder, between August 13, 2008 and August 13, 2012.

8 (2) The Court hereby appoints Plaintiff as Class Representative of the
9 Settlement Class.

10 (3) The Court hereby appoints Joshua B. Swigart of Hyde & Swigart, Abbas
11 Kazerounian of Kazerouni Law Group, APC, and Todd M. Friedman of The Law
12 Offices of Todd M. Friedman, P.C as Class Counsel to represent the Settlement Class.

13 (4) The Court hereby preliminarily approves the Settlement Agreement and
14 the terms and conditions of the Settlement set forth therein, subject to further
15 consideration at the Fairness Hearing.

16 (5) The Court will hold a Fairness Hearing on **Monday, November 7, 2016,**
17 at **10:30 a.m.**, in the Courtroom of the Honorable Cynthia Bashant, United States
18 District Court for the Southern District of California, Courtroom 4B (4th Floor -
19 Schwartz), 221 West Broadway, San Diego, CA 92101, for the following purposes:

20 (a) finally determining whether the Settlement Class meets all
21 applicable requirements of Rule 23 of the Federal Rules of Civil Procedure, and thus,
22 whether the claims of the Settlement Class should be certified for purposes of
23 effectuating the Settlement; determining whether the proposed Settlement of the
24 action on the terms and conditions provided for in the Settlement Agreement is fair,
25 reasonable, and adequate and should be approved by the Court;

26 (b) considering any motion of Class Counsel for an award of
27 attorneys' fees and costs;

28 (c) considering the motion of the Plaintiff for a service award, if any;

(d) considering whether the Court should enter the [Proposed] Final
Judgment and Order of Dismissal with Prejudice;

1 (e) considering whether the releases by the Settlement Class
2 Members as set forth in the Settlement Agreement should be provided; and

3 (f) ruling upon such other matters as the Court may deem just and
4 appropriate.

5 (6) The Court may adjourn the Fairness Hearing and later reconvene such
6 hearing without further notice to the Settlement Class Members.

7 (7) Any motion in support of the Settlement and any motion for an award
8 of attorneys' fees and costs or Plaintiff's service award, if any, must be filed with the
9 Court no later than **August 15, 2016**. Any opposition must be filed no later than
10 fourteen days after the motion is filed, and any reply must be filed no later than
11 twenty-eight days after the motion is filed.

12 (8) The Court appoints Kurtzman Carlson Consultants ("KCC") to serve as
13 the Claims Administrator for the Settlement.

14 (9) The Claims Administrator shall carry out all duties set forth in the
15 Settlement Agreement in the manner provided in the Settlement Agreement.

16 (10) The costs and expenses related to claims administration shall be paid
17 from the Settlement Fund in accordance with the applicable provisions of the
18 Settlement Agreement.

19 (11) All Settlement Class Members shall be bound by all determinations and
20 judgments in this action concerning the Settlement, whether favorable or unfavorable
21 to the Settlement Class.

22 (12) Any Settlement Class Member may enter an appearance in this action,
23 at his or her own expense, individually or through counsel. All Settlement Class
24 Members who do not enter an appearance will be represented by Class Counsel.

25 (13) Any person—including any entity via its authorized representative
26 when applicable throughout this Order—falling within the definition of the
27 Settlement Class may, upon request, be excluded from the Settlement Class. This
28 procedure is also referred to as "opting out" of the Settlement Class. Any person

1 wishing to be excluded from the Settlement Class must submit a written “Exclusion
2 Request” to the Claims Administrator postmarked or delivered no later than 130
3 calendar days after the date of entry of this Order (“Exclusion Deadline”). The
4 Exclusion Request must include: (a) the name of this case and its number: *Stemple v.*
5 *QC Holdings, Inc.*, Case No. 3:12-cv-01997-BAS(WVG) (S.D. Cal.); (b) the
6 person’s name; (c) the person’s address; (d) the person’s telephone number; (e) the
7 person’s signature; and (f) a statement that the person is a class member and that he
8 or she wishes to be excluded from the Settlement. Exclusion Requests purportedly
9 filed on behalf of groups of persons are prohibited and will be deemed to be void. An
10 Exclusion Request must be written and may not be asked for telephonically or by
11 email.

12 (14) Any class member who does not send a completed, signed Exclusion
13 Request with the information listed in Paragraph 13 above to the Claims
14 Administrator postmarked or delivered on or before the Exclusion Deadline will be
15 deemed to be a Settlement Class Member for all purposes and will be bound by all
16 further orders of the Court in this Action and by the terms of the Settlement, if finally
17 approved by the Court. All persons who submit valid and timely Exclusion Requests
18 in the manner set forth in this Paragraph and Paragraph 13 above shall have no rights
19 under the Settlement and shall not be bound by the Settlement Agreement or the Final
20 Judgment and Order of Dismissal with Prejudice approving the Settlement, if issued.

21 (15) No later than fourteen calendar days after the Exclusion Deadline, the
22 Claims Administrator shall cause to be filed with the Court a list reflecting all
23 Exclusion Requests.

24 (16) Any Settlement Class Member who desires to object either to the
25 Settlement, the award of Class Counsel’s fees and costs, or Plaintiff’s service award,
26 if any, must timely file with the Clerk of this Court and timely serve on the parties’
27 counsel identified below by hand or first-class mail a notice of the objection(s) and
28 proof of membership in the Settlement Class and the grounds for such objections,

1 together with all papers that the Settlement Class Member desires to submit to the
2 Court no later than the deadline as set forth in the class notices, which is 130 calendar
3 days after the date of entry of this Order (“Objection Deadline”). Settlement Class
4 Members may not both object and request exclusion from the Settlement. If a
5 Settlement Class Member submits both an Exclusion Request and an objection, the
6 Exclusion Request will be controlling. To be considered by the Court, the objection
7 must also contain all of the information listed in Paragraph 17 below. The Court will
8 consider such objection(s) and papers only if such papers are received on or before
9 the Objection Deadline by the Clerk of the Court and by Class Counsel and
10 Defendant’s counsel. Such papers must be sent to each of the following persons:

11
12 U.S. District Court
13 Southern District of California
14 Office of the Clerk
15 333 West Broadway, Suite 420
16 San Diego, CA 92101

17
18 HYDE & SWIGART
19 Joshua B. Swigart, Esq.
20 2221 Camino Del Rio South
21 Suite 101
22 San Diego, CA 92108

23
24 SHOOK HARDY & BACON LLP
25 Rebecca J. Schwartz, Esq.
26 2555 Grand. Blvd.
27 Kansas City, MO 64108
28

1 (17) All objections must include: (a) the name of this case and its number:
2 *Stemple v. QC Holdings, Inc.*, Case No. 3:12-cv-01997-BAS(WVG) (S.D. Cal.); (b)
3 the objector’s full name, telephone number, and address; (c) if represented by
4 counsel, the full name, telephone number, and address of all counsel; (d) all of the
5 reasons for his or her objection; (e) whether the objector intends to appear at the
6 Fairness Hearing on his or her own behalf or through counsel; (f) a statement that the
7 objector is a class member; and (g) the objector’s signature. Any documents
8 supporting the objection must also be attached to the objection. If any testimony is to
9 be given in support of the objection, the names of all persons who will testify must
10 be set forth in the objection.

11 (18) All objections must be filed with the Clerk and served on the parties’
12 counsel no later than the Objection Deadline. Objections that do not contain all
13 required information or are received after the Objection Deadline will not be
14 considered at the Fairness Hearing.

15 (19) Attendance at the Fairness Hearing is not necessary; however, any
16 Settlement Class Member wishing to be heard orally with respect to approval of the
17 Settlement, the motion for an award of Class Counsel’s fees and costs, or the motion
18 for Plaintiff’s service award, if any, is required to provide written notice of his or her
19 intention to appear at the Fairness Hearing no later than the Objection Deadline by
20 filing a “Notice of Intention to Appear.” The Notice of Intention to Appear must
21 include the Settlement Class Member’s name, address, telephone number, and
22 signature and must be filed and served as described in Paragraph 16 of this Order.
23 Settlement Class Members who do not oppose the Settlement, the motion for an
24 award of Class Counsel’s fees and costs, or the motion for Plaintiff’s service award,
25 if any, need not take any action to indicate their approval. A person’s failure to submit
26 a written objection in accordance with the Objection Deadline and the procedure set
27 forth in the class notices waives any right the person may have to object to the
28 Settlement, the award of Class Counsel’s fees and costs, or Plaintiff’s service award,


1 if any, or to appeal or seek other review of, if issued, the Final Judgment and Order
2 of Dismissal with Prejudice approving the Settlement.

3 (20) The parties are ordered to carry out the Settlement Agreement in the
4 manner provided in the Settlement Agreement.

5 **IT IS SO ORDERED.**

6

7 **DATED: April 25, 2016**


Hon. Cynthia Bashant
United States District Judge

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28