AYTAN Y. BELLIN
(admitted *pro hac vice*)
AYTAN.BELLIN@BELLINLAW.COM
BELLIN & ASSOCIATES LLC
85 Miles Avenue
White Plains, New York 10606
Telephone: (914) 358-5345
Facsimile: (212) 571-0284

JOSEPH R. COMPOLI, JR.
(admitted *pro hac vice*)
josephcompoli@sbcglobal.net
612 East 185th Street
Cleveland, Ohio 44119
Telephone: (216) 481-6700
Facsimile: (216) 481-1047

ROGER FURMAN (STATE BAR NO. 149570)
roger.furman@yahoo.com
7485 Henefer Avenue
Los Angeles, California 90045
Telephone: (310) 568-0640
Facsimile: (310) 694-9083

Attorneys for Plaintiffs Michael Vandervort and U.S. Sample Services, Inc.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

MICHAEL A. VANDERVORT and U.S. SAMPLE SERVICES, INC., on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

BALBOA CAPITAL CORPORATION,

Defendant.

Case No.: SACV 11-1578-JST(JPRx)
Hon. Josephine Staton Tucker

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR (1) PRELIMINARY APPROVAL AND ENFORCEMENT OF CLASS SETTLEMENT, (2) APPROVAL OF FORM AND MANNER OF PROVIDING NOTICE TO THE CLASS, AND (3) SETTING A HEARING DATE FOR FINAL APPROVAL OF SETTLEMENT, INCENTIVE AWARD TO NAMED PLAINTIFFS, AND CLASS COUNSELS' FEES AND COSTS

Date: October 18, 2013
Time: 2:30 P.M.
Judge: Hon. Josephine Staton Tucker

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Pursuant to Fed. R. Civ. P. 23(e), Plaintiffs Michael A. Vandervort and U.S. Sample Services, Inc. request that the Court preliminarily approve and enforce the parties' settlement of this litigation. That settlement requires Defendant Balboa Capital Corporation to pay a "Floor" amount of $2.3 million and a "Ceiling" amount of $3.3 million to class members, each of whom will receive either $500 or $175 per fax received, depending on whether the class member submits, respectively, the actual fax advertisement(s) he or she received, or simply a declaration averring to the receipt of the fax advertisements. The per fax amounts may be increased, if necessary, to reach the $2.3 million Floor, but are subject to a maximum recovery per class member; the per fax amounts also may be decreased, if necessary, if all the valid claims submitted exceed the $3.3 million Ceiling. In addition, the two named Plaintiff class representatives will receive one combined incentive award of $10,000, and Balboa will not object to Plaintiffs' counsels' seeking an attorneys' fee award of up to one-third of the $3.3 million ceiling amount. As demonstrated below, this settlement is fair, reasonable and adequate, as required by Fed. R. Civ. P. 23(e).

The parties' settlement also includes an agreed-upon "Short-Form Notice" to be sent to class members, in the first instance, by fax. The Short-Form Notice directs Settlement Class members to a website that contains an additional agreed-upon "Long-Form Notice" explaining to Settlement Class members the procedures and timing for filing a notice of intent to appear, to object to the settlement, and to opt out of the settlement. The website also will inform Settlement Class members how to submit an agreed-upon "Claim Form" to the claims administrator for the purpose of recovering compensation from the

settlement fund. As demonstrated below, this set of settlement procedures and notices also complies with Rule 23(e).

The parties' settlement is summarized in a Memorandum of Understanding that Magistrate Gandhi helped negotiate and both sides signed. The settlement is fleshed out in greater detail in a Settlement Agreement that the parties have since extensively negotiated. As of the date of this motion, Balboa has refused to sign the current iteration of the Settlement Agreement solely because it will not agree to a notice provision requiring that the class administrator send out first class mail notice of the settlement to the roughly 19,000 (out of 76,000) class members for which Balboa does not have a valid fax number but has a valid mailing address. Because of Balboa's recalcitrance on this single issue, Plaintiffs request that the Court compel Balboa to provide the mail notice as required in the Settlement Agreement, consistent with the requirements of Rule 23, this Court's prior order regarding notice of certification of the class, and the parties' Memorandum of Understanding.

Finally, Plaintiffs request that the Court preliminarily approve the attorneys' fees and costs requested by class counsel in this case, and schedule a hearing for the purpose of considering whether to (1) grant final approval of the Settlement Agreement; (2) enter final judgment in this action; and (3) approve the application of class counsel for attorneys' fees, costs and an incentive award to Vandervort and Sample.

II. SUMMARY OF RELEVANT PROCEEDINGS

Plaintiffs commenced this action against Balboa in October 2011, contending that, from October 12, 2007 through November 23, 2011, Balboa violated the Telephone Consumer Protection Act (the "TCPA"), 47 U.S.C. § 227, by sending out 1,582,707 fax advertisements, of which 973,879 were received, containing opt-out notices that do not comply with the TCPA.

Plaintiffs filed their Amended Class Action Complaint against Balboa on November 23, 2011, and Balboa filed its Answer to that pleading on December 8, 2011. Subsequently, the parties engaged in extensive written discovery, including discovery from Profax, Inc., Balboa's non-party fax broadcaster. Plaintiffs then conducted seven depositions, including the depositions of senior employees of Balboa and one representative of Profax. Balboa took the deposition of Plaintiff Michael Vandervort in his individual capacity and as a representative of Plaintiff U.S. Sample Services, Inc., and also obtained written discovery from Plaintiffs. (Bellin Decl., ¶ 5).

On October 23, 2012, this Court partially granted Plaintiffs' motion for class certification, ruling, among other things, that Balboa can be held liable for violating the TCPA if its unsolicited as well as solicited fax advertisements contain opt-out notices that are defective under the TCPA and the regulations promulgated thereunder. *Vandervort v. Balboa Capital Corp.*, 287 F.R.D. 554, 560-61 (C.D. Cal. 2012). Having found common proof that Balboa caused to be sent tens of thousands of facsimile advertisements, and that all of the fax advertisements that Balboa caused to be sent contained the same opt-out notice, this Court certified the following class:

> 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.

Id. at 563. Thereafter, notice was successfully served on 56,280 out of a possible 76,865 members of the certified class (the others could not be

reached by fax or mail), and only 10 class members opted out. Bellin Decl., ¶ 9 & Exh. H.

Shortly thereafter, the parties filed lengthy cross-motions for summary judgment, on which the Court heard oral argument on April 5, 2013. At Plaintiffs' counsel's request, the Court held its decision on those motions in abeyance while the matter was referred to a magistrate for a settlement conference. Prior to that date, Plaintiffs and Balboa had spent months unsuccessfully attempting to negotiate a settlement, including attending a mediation in November 2012 with a court-appointed mediator. Bellin Decl., ¶ 7.

After a day-long settlement conference on May 20, 2013 before U.S. Magistrate Jay Gandhi, the parties were finally able to settle this case, and signed their Memorandum of Understanding (the "MOU") memorializing that settlement. Bellin Decl., Exh. A. The parties thereafter agreed to all of the terms of a detailed Settlement Agreement, except the manner in which notice of the settlement is to be sent to the class, which issue is discussed in detail in section VI of this memorandum. Bellin Decl. ¶ 8, Exh. B.

III. TERMS OF THE PARTIES' SETTLEMENT

The principal terms of the parties' settlement are:

(A) Settlement Class. The Settlement Class is defined as all persons in the United States to whom from October 12, 2007 through November 23, 2011 Balboa sent or caused to be sent facsimile advertisements. (the "Settlement Class").[1] Bellin Decl., Exh. A, ¶ 7, Exh. B, ¶ 2(c).

[1] The Settlement Class, as defined in the MOU and Settlement Agreement, consists of "all persons in the United States who, from October 12, 2007 through November 23, 2011 were sent or caused to be sent one or more facsimile advertisements by Defendant Balboa Capital Corporation, its employees, agents, vendors or contractors." This definition, demanded by Balboa and agreed to by Plaintiffs, appears to be almost

(B) Monetary and Injunctive Relief to Plaintiffs and the Settlement Class. Depending on the number of claims made, Balboa will pay from a minimum "Floor" of $2.3 million to a maximum "Ceiling" of $3.3 million into a settlement fund, a portion of which will be distributed to the Settlement Class upon timely submission of proper claim forms to the claims administrator. Bellin Decl., Exh. A, ¶¶ 13, 15, Exh. B, ¶ 2(a)-(b). Claimants who submit actual copies of fax advertisements they received from Balboa will be eligible for a cash award of $500 per fax that is submitted. Claimants who submit only a sworn declaration stating that they received fax ads from Balboa will be eligible of a maximum cash payment of $275, depending on the number of faxes the claimant avers having received. Bellin Decl., Exh. A, ¶ 11, Exh. B, ¶ 8. The payment schedule is as follows:

Number of Faxes Pursuant to Declaration	Total Cash Payment to Claimant
1	$175
2	$200
3	$225
4	$250
5 or more	$275

Id. In addition, the two named Plaintiffs will receive a combined incentive award of $10,000. Bellin Decl., Exh. A, ¶ 18, Exh. B, ¶ 10.

If the amount required to pay valid claims, the incentive award and class counsels' attorneys' fees (as described below), amount to greater than the $3.3 million Ceiling, then after class counsels' attorneys' fees and the named Plaintiffs' $10,000 incentive award are subtracted, the remainder of the $3.3 million will be distributed on a reduced *pro rata* basis based on the amount of

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identical with the definition of the class certified by this Court; "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."

payment the claimant would have received pursuant to the schedule set forth above. If the total payments are less than the $2.3 million Floor, then the amounts will be increased on a *pro rata* basis, up to a maximum award of $1,500 per fax claimed and with a limit of a maximum of five faxes per claimant, to reach the $2.3 million amount. If the $2.3 million Floor is still not met, then the remaining balance will be distributed in *cy pres* to a charity agreed to by the parties and approved by the Court. Bellin Decl., Exh. A, ¶¶ 13, 15, 16, Exh. B, ¶ 2(a)-(b).

In addition to making its settlement fund payment, Balboa will pay all costs associated with providing notice to the Settlement Class members, administering the settlement claims process, and providing CAFA notice. Bellin Decl., Exh. A, ¶ 2, Exh. B, ¶ 4(e).

Balboa has further agreed to entry of a permanent injunction prohibiting it from advertising by fax in violation of the TCPA. Bellin Decl., Exh. A, ¶ 3, Exh. B, ¶ 3.

(C) Class Notice and Procedure for Administering Settlement. Within 21 days after a preliminarily approval order is issued, Balboa will cause Tilghman & Co., Inc. ("Tilghman"), the class action administration firm being used in this case, to disseminate the agreed-upon Short-Form Notice (Bellin Decl., Exh. E) by fax to the Settlement Class members using the fax numbers it previously used to send notice of this class action after this Court certified it. If the first attempt to fax the Short-Form Notice is not successful, then Tilghman will make another attempt to re-send it via fax. Bellin Decl., Exh. A, ¶ 1, Exh. B, ¶ 4(f). Although not explicitly addressed in the parties' MOU, the Settlement Agreement further provides that if that second attempt fails, and if Balboa has a mailing address for the recipient, Tilghman will send the Short-Form Notice via first class mail to that mailing address. *Id.* As addressed in more detail in section VI below, Balboa has refused to sign the Settlement Agreement solely because Balboa objects to having

to send the Short-Form Notice by mail to persons to whom it cannot send notice by fax but for whom it does have a mailing addresses. Bellin Decl., ¶ 7.

The Short-Form Notice directs Settlement Class members to a website, which will make available the agreed-upon Long-Form Notice (Bellin Decl., Exh. F), inform them of the litigation, the Settlement Agreement, their right to receive compensation by submitting an agreed-upon claim form available on the website (Bellin Decl., Exh. G) within 45 days, the right to object to the Settlement Agreement within 45 days, the right to opt out of the Settlement Agreement within 45 days, the consequences of opting out of the Settlement Agreement, and the right to make a claim for payment from the settlement fund. Bellin Decl., Exh. A, ¶¶ 6, 8, 10, Exh. B, ¶¶ 4(f), 6(a)-(b), 7.

(D) Releases. The parties have agreed a mutual release of all claims relating to the sending of any fax advertisements by Balboa from October 12, 2007 to November 23, 2011. Balboa has reserved the right to assert any other types of claims against its customers arising from the financing or other services provided by Balboa to its customers. Bellin Decl., Exh. A, ¶ 19, Exh. B, ¶ 11.

(E) Attorneys' Fees and Costs. Balboa has agreed that it will not contest class counsels' request to receive an amount of attorneys' fees and costs of up to one-third of the $3.3 million Ceiling, or $1.1 million. Class counsel will file their final motion for Attorneys' Fees and Costs within 30 days after Tilghman sends the Short-Form Notice to Settlement Class members. Bellin Decl., Exh. A, ¶ 21, Exh. B, ¶ 9.

IV. THE PARTIES' SETTLEMENT SATISFIES THE CRITERIA FOR PRELIMINARY APPROVAL PURSUANT TO FED. R. CIV. P. 23(E)

To determine whether a settlement agreement is fair, reasonable and adequate as required by Fed. R. Civ. P. 23(e)(2) and thus can be given preliminary approval, the court must find that "[A] the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, [B] has

no obvious deficiencies, [C] does not improperly grant preferential treatment to class representatives or segments of the class, and [D] falls with the range of *possible* approval." *Eddings v. Health Net, Inc.*, No. 10 CV 1744, 2013 WL 169895, *2 (C.D. Cal. Jan. 16, 2013) (emphasis in original, and internal citations and quotation marks omitted). These factors, as well as the more specific factors required to grant final approval to a class settlement,[2] all support preliminary approval of the parties' settlement.

(A) Serious, Informed and Non-Collusive Negotiations

There can be no question that the settlement in this case was the result of serious, difficult, contentious and protracted negotiations. In addition to exchanging extensive correspondence and telephone calls, the parties submitted briefs for and attended a mediation in November 2012 with a court-appointed mediator, which was unsuccessful. Bellin Decl. ¶ 6. It was only after Plaintiffs had obtained class certification, the parties had filed and orally argued cross-motions for summary judgment, and the parties had submitted briefs for, and attended, a day-long settlement conference on May 20, 2013, that, with the active involvement and approval of Magistrate Gandhi, the parties were able to settle this matter.

(B) No Obvious Deficiencies in Settlement

The parties' settlement has no obvious deficiencies. To the contrary, it allocates a substantial sum of between $2.3 million and $3.3 million to the 76,000 potential class members and class counsel. Each class member will likely receive $500 – the statutorily specified damages for a violation of the TCPA – for each

[2] Those additional factors are (1) the strength of the plaintiff's case; (2) the risk, expense complexity and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed, and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a government participant; and (8) the reaction of the class members to the proposed settlement. *Eddings v. Health Net, Inc., supra*, 2013 WL 169895, *2; *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003).

Balboa fax ad received that he or she can produce, and between $175 and $275 for fax ads that the claimant simply avers he or she received. The only situations in which such recoveries would be modified would be (a) if too few claimants came forward, in which case those amounts would be equitably increased on a pro rata basis until the $2.3 million Floor is reached; or (b) if too many claimants came forward, in which case the amounts would be equitably decreased on a pro rata basis until the $3.3 million Ceiling is reached.[3]

(C) No Preferential Treatment to Segments of the Class or to Class Representatives

As described above, the amounts recoverable in the settlement, as well as the procedures for obtaining those amounts, are identical for all class members. Moreover, the two class representatives in this case, in addition to being treated in the same manner as all other class members for fax ads they received, are receiving an eminently reasonable combined incentive award of $10,000 total for their substantial efforts in this case. That effort included providing class counsel with necessary documentation and information to draft the Complaint, and reviewing the Complaint; responding to Balboa's detailed requests for documents, admissions and interrogatories; appearing for their deposition; attending a mediation by telephone with a Court-appointed mediator and counsel in November, 2012; and traveling from Ohio to California to attend a day-long settlement conference with Magistrate Gandhi in May 2013. Bellin Decl., ¶ 13.

(D) The Settlement Falls within the Range of Possible Approval

As discussed above, the $2.3-$3.3 million settlement range is fair and reasonable to all concerned, and hence well within the range of possible approval

[3] As summarized earlier, if Balboa's payments to the class, to the named class representatives, and to class counsel remain insufficient to use up the $2.3 million Floor, the remainder of the settlement fund will be distributed in *cy pres* to a fund approved by the court. *Cy pres* awards of this sort are common in the Ninth Circuit, and have been approved by this and other courts. *Eddings, supra,* 2013 WL 169895, *3.

required to grant conditional approval of the settlement on this motion. As also discussed above, the class members' ability to recover $500 for each fax ad they can produce is more than fair, as is their ability to recover from $175 to $275 for faxes they simply aver they received (up to certain maximums).

Moreover, the amounts to be paid in settlement are particularly fair given the complexities and uncertainties of TCPA law. For example, the question of whether a class can be certified on the basis certified in this case and one other district court decision has yet to be decided by any federal appellate court, and would likely have been subject to lengthy appeals. Similarly, the question of whether an opt-out notice that allegedly "substantially complies" with the opt-out notice requirements of the TCPA, i.e., contains some but not all of the required information required by the statue and regulations, is sufficient under the TCPA is a question of first impression in this Circuit, although at least one other federal court has specifically determined that there is no such "substantial compliance" defense under the TCPA. *Bais Yaakov of Spring Valley v. Alloy, Inc.*, -- F. Supp.2d --, 2013 WL 1285408, **12-13 (S.D.N.Y. 2013).

Further, Balboa has been dogged in its defense of this case, as evidenced by its voluminous opposition to Plaintiffs' motion for class certification, its petition for leave to file an interlocutory appeal to the Ninth Circuit of this Court's class certification order, and its extensive opposition to Plaintiffs' motion for summary judgment as well as its own counter-motion for summary judgment. Balboa would likely continue to devote substantial time and expense to this litigation this action and through appeal if this settlement were not consummated. As this Court put it in another class action decision, "Defendant[] ha[s] shown that [it] is committed to thoroughly litigating this case. Thus, at this point, the proposed settlement strikes a balance between Plaintiffs['] claims and Defendant's defenses." *Eddings, supra*, 2013 WL 169895, *6.

Finally, Plaintiffs have taken and responded to extensive written discovery and participated in eight depositions in this case. Bellin Decl., ¶ 5. After using that discovery to analyze the legal and factual issues presented in this action, the risks and expense involved in pursuing the litigation to conclusion, and the likelihood of recovering damages in excess of those obtained through this settlement, Plaintiffs and their counsel – who have significant experience representing parties in TCPA actions and in class actions (Bellin Decl., ¶ 18, Furman Decl., ¶ 7, Compoli Decl., ¶ 5) – have determined that this settlement is fair, reasonable and adequate. Bellin Decl., ¶ 10; Furman Decl., ¶ 7; Compoli Decl., ¶ 5. For all these reasons, this Court should come to the same conclusion.

V. THE COURT SHOULD APPROVE THE PARTIES' AGREED-UPON SETTLEMENT NOTICES AND CLAIM FORM

As detailed in the prior section of this Memorandum addressing the key terms of the parties' settlement, the parties have agreed to use of a specific Short-Form Notice (Bellin Decl., Exh. E) to be used to notify class members of this settlement. The Short-Form Notice directs Settlement Class members to a website, which will contain a Long-Form Notice (Bellin Decl., Exh. F) informing them of the litigation, the Settlement Agreement, the right to object to the Settlement Agreement, the right to opt out of the Settlement Agreement, the consequences of opting out of the Settlement Agreement, the right to make a claim for payment from the settlement fund, and how to contact the claims administrator.

The Short-Form Notice is modeled on a publication notice found on the Class Action Notice page of the Federal Judicial Center's website. Bellin Decl., ¶ 14. In addition, Balboa's counsel has agreed to the use of this Short-Form Notice. *Id.* Further, this Court, in this case, has approved the use of a similar short-form notice to notify the class this Court certified of the pendency of this class action.

Minute Order dated January 2, 2013, Docket No. 79; Minute Order dated January 29, 2013, Docket No. 84.

Similarly, the parties' agreed-upon Long-Form Notice is modeled on a full notice found on the Class Action Notice page of the Federal Judicial Center's website. Bellin Decl., ¶ 15. The Long-Form Notice contains, in an understandable format, all of the information required for such a notice, to wit: "(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)." *Eddings, supra*, 2013 WL 169895, *6 (quoting Fed. R. Civ. P. 23(c)(2)(B)).

Further, the parties have agreed to the use of a Claim Form (Bellin Decl., ¶ 16, Exh. G) that is simple and easy to follow. Finally, with the exception of the one disputed issue regarding the method of disseminating the Short-Form Notice addressed immediately below, the parties have agreed to the remainder of the procedure for providing notice of, implementing, filing objections to, and opting out of, the settlement – all of which are fair and reasonable. Accordingly, this Court should approve all these undisputed aspects of the parties' settlement.

VI. THE COURT SHOULD RULE IN FAVOR OF PLAINTIFFS REGARDING THE ONE DISPUTED NOTICE ISSUE BECAUSE BALBOA'S PROPOSAL FOR SUCH NOTICE WOULD DEPRIVE 19,000 CLASS MEMBERS OF NOTICE AND VIOLATE RULE 23

The sole disputed item in the parties' settlement is whether, after the class administrator, Tilghman, has made two attempts to fax the Short-Form Notice to a class member at the fax number Balboa has provided for that class member, the class administrator should then send that notice by first class mail to that class

member. That is essentially the same procedure that the parties had proposed and this Court endorsed in its January 2, 2013 Minute Order, in which the Court specifically directed that the initial notice to the class it had certified be sent by fax to class members for whom Balboa who had working fax numbers, and by mail to class members for whom Balboa did not have working fax numbers but had mailing addresses. Docket No. 79, pp. 1-2.

Requiring that a copy of the notice be mailed to class members who do not have working fax numbers turned out to be extremely important. Tilghman's summary of the initial class notice results reports that, of the 76,865 members of the class identified, only 36,789 received notice by fax, while more than 50 percent, or 40,076, could not be reached by fax. Bellin Decl., Exh. H. Of those 40,076 persons who could not be reached by fax, Tilghman was able to send 19,491 of those persons notices by mail that were not returned as undeliverable. *Id.* Accordingly, if Tilghman had not sent any notices by mail, 19,491 class members who did apparently receive notice would not have received any notice of the pendency of this litigation.

Consistent with this prior practice for providing notice and the actual results showing that it was effective, Plaintiffs' Settlement Agreement requires the same type of procedure: "The Short-Form Notice shall be sent by way of facsimile . . . . If a facsimile transmission is not successful, then Tilghman shall make another attempt to resend via facsimile. In the event that the Class Notice cannot be transmitted to a given facsimile number, [and] if Defendant determines that it possesses such mailing address, it will cause Tilghman to send the Short-Form Notice via first class mail to that mailing address." Bellin Decl., Exh. B, ¶ 4(f).

Balboa, however, has refused to sign the Settlement Agreement based solely on this mail-notice provision, contending that it should be required only to send the Short-Form Notice twice by fax. Not only does Balboa's proposed

method for giving notice run directly afoul of Rule 23, but it is not even required by the parties' summary MOU, as Balboa urges.

(A) Balboa's Notice Proposal Violates Rule 23(e)

First, and most importantly, it is well settled that under Fed. R. Civ. P. 23(c)(2), "[i]ndividual notice must be sent to all class members whose names and *addresses* may be ascertained *with reasonable effort*." *Eisen v. Carlisle and Jaquelin*, 417 U.S. 156, 173 (1974) (emphases added). More specifically, Fed. R. Civ. P. 23(e)(1) requires that, with respect to notice of a class settlement, "[t]he court must direct notice in *a reasonable manner* to all class members who would be bound by the proposal." (emphasis added). Similarly, the Manual for Complex litigation, to which the Ninth Circuit has turned time and time again for guidance, states: "In general, settlement notices should be delivered or communicated to class members in the same manner as certification notices (section 21.311). As with certification notices, individual notice is required, where practicable, in Rule 23(b)(3) actions." *Manual for Complex Litigation (4th ed.)*, § 21.312; *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) (citing Manual on interpretation of Rule 23(e)). So too does the Advisory Committee Note to Rule 23(e), which is persuasive authority as to Rule 23(e)(1)'s interpretation,[4] provide that "[i]ndividual notice is appropriate, for example, if class members are required to take action--such as filing claims--to participate in the judgment, or if the court orders a settlement opt-out opportunity under Rule 23(e)(3)."

"Reasonable notice" in this case plainly requires that the 19,491 class members in this case who were unreachable by fax and reachable only by first class mail in connection with the Court's class certification order must also be

[4] *E.g.*, *Walters v. Young*, 100 F.3d 1437, 1441 (9th Cir. 1996) ("The advisory committee note guides our interpretation of Rule 50."); Wright & Miller, *4 Fed. Prac. & Proc., Civ. (3rd Ed.)*, § 1029 ("In interpreting the federal rules, the Advisory Committee Notes are a very important source of information and direction and should be given considerable weight.").

given first class mail notice of the class settlement at this time. Put simply, that is the only "reasonable manner" in which to give those class members notice, and it would be manifestly unreasonable to follow Balboa's proposal not to give them notice at all, and thereby effectively exclude them entirely from the settlement in this case. Indeed, there can be no doubt that this is the disturbing purpose behind Balboa's notice ploy. That is because Plaintiffs' counsel just tried to resolve this one remaining dispute by offering to pay the full costs of mailing notice to class members whom the Balboa cannot reach by fax but for whom Balboa has mailing addresses. Bellin Decl., ¶ 9. Balboa rejected this offer (*id.*), leaving one inescapable inference: that the real reason why Balboa is objecting to providing mail notice to class members who cannot be reached by fax is not the cost of such notice, but its desire to keep its liability under the settlement to the minimum Floor payable by improperly hiding the settlement from 19,491 class members.

(B) The MOU should be Construed to Require Mail Notice where Fax Notice Fails

Second, while turning a blind eye to the reasonable notice requirements of Rule 23, Balboa has tried to justify its intransigent position by contending that paragraph 1 of the summary MOU provides that mail notice need never be given. That contention is unavailing because all that paragraph 1 outlines is that "[w]ithin 21 days after the entry of the preliminary order of approval, notice of the settlement will be provided to the Activated Records via facsimile. If transmission by facsimile fails, there will be one more attempt by facsimile." Bellin Decl., Exh. A, ¶ 1. Accordingly, nothing in paragraph 1 of the MOU specifies what is to be done if the second attempt at fax notice fails, nor does paragraph 1 specify that fax notice is the *only* type of notice that should be given. The reason for that is apparent to anyone who practices in the class action arena: if fax notice of a proposed class settlement is not successful, then another form of reasonable individual notice, i.e., mail notice, is required under Rule 23(e)(1) – as

this Court required for the initial class notice in this case. Moreover, the MOU signed at the conference before Magistrate Gandhi plainly was not intended to be a comprehensive description of the entire Settlement Agreement, as many of its provisions clearly leave issues open for further elaboration. Bellin Decl., Exh. A, ¶¶ 3, 4, 5, 8, 9, 10, 19. The same is true for paragraph 1 of the MOU.

Even more importantly, for Balboa to contend that the parties intended that the method for disseminating notice of the settlement be limited to fax transmission suggests that the parties made an agreement in plain violation of Rule 23(e)(1). However, interpreting a contract as illegal is prohibited under California law if a legal construction of the contract is possible. *E.g.*, *People v. Parmar*, 86 Cal. App. 4th 781, 802 (2001) ("[W]e will not construe a contract in a manner that will render it unlawful if it reasonably can be construed in a manner that will uphold its validity."); Civ. Code § 1643 ("A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect, if it can be done without violating the intention of the parties."); *Navarro v. Mukasey*, 518 F.3d 729, 733 (9th Cir. 2008) (California law must be used to interpret settlement agreement negotiated in California.).

Because the MOU does not explicitly address what is to be done if fax notice fails, this Court has the authority to fill in this gap by requiring that notice be sent by mail to class members who cannot be reached by fax. *E.g.*, *Ersa Grae Corp. v. Fluor Corp.*, 1 Cal. App. 4th 613, 623 (1991) ("[a] contract will be enforced if it is possible to reach a fair and just result even if, in the process, the court is required to fill in some gaps."); *Armed Forces Communications, Inc. v. Cass Communications*, 60 F.3d 832, *5 (9th Cir. 1995) ("California case law grants a court equitable authority to modify an existing contract in order to satisfy [Cal. Civ. Code § 1643]."). Accordingly, this Court should exercise that authority and enforce the MOU and Settlement Agreement with the mail notice provision

that Plaintiffs have proposed (and this Court previously ordered), not the illegal fax-only notice provision that Balboa contends the MOU requires.

VII. PLAINTIFFS' REQUEST FOR ATTORNEYS' FEES OF ONE-THIRD OF THE MAXIMUM AMOUNT OF THE SETTLEMENT IS A FAIR AND REASONABLE COMPONENT OF THE SETTLEMENT

For more than a century, the U.S. Supreme Court has held that where an attorney succeeds in creating a common fund from which members of a class are compensated for a common injury, the attorney is entitled to a reasonable fee. *E.g.*, *Trustees v. Greenough*, 105 U.S. 527 (1881); *Boeing* Co. *v. Van Gemert*, 444 U.S. 472 (1980); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 392 (1970) (recognizing counsel's right to compensation for obtaining a common benefit on behalf of the class). It is well settled in the Ninth Circuit that, "[i]n a common fund case, the district court has discretion to apply either the lodestar method or the percentage-of-the-fund method in calculating a fee award." *Fischel v. Equitable Life Assurance Soc'y of the U.S.*, 307 F.3d 997, 1006 (9th Cir. 2002). As to those two possible methods, "the primary basis of the fee award remains the percentage method." *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002); *Lopez v. Youngblood*, No. 07 CV 0474, 2011 WL 10483569, * 3 (E.D. Cal. Sept. 2, 2011).

Specifically with respect to the percentage method, in the Ninth Circuit "[t]he benchmark for a fee award in a common fund case is 25% of the recovery obtained." *Eddings v. Health Net, Inc., supra*, 2013 WL 30133867, * 5. However, as the Ninth Circuit has repeatedly recognized, "[t]he district court may adjust the percentage 'upward or downward for any unusual circumstances involved' in the case." *Morris v. Lifescan, Inc.*, 54 Fed. Appx. 663, 664 (9th Cir. 2003) (*quoting Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 272 (9th Cir. 1989)). Among the factors that justify an upward adjustment of a percentage

award are (A) complexity of the issues, (B) exceptional results, and (C) the risk assumed by class counsel. *Morris*, *supra*, 54 Fed. Appx. at 664 (upholding fee award of 33% based on these factors); *Vizcaino, supra*, 290 F.3d at 1048 (stating that exceptional results, complexity of the issues, and risk are relevant circumstances and upholding percentage fee award of 28%); *In re Pacific Enterprises Securities Litigation*, 47 F.3d 373, 379 (9th Cir. 1995) (same, upholding 33% fee award). Other specific factors that courts in the Ninth Circuit look to in determining the appropriate percentage of legal fees to award class counsel are (D) the effort expended by counsel; (E) counsel's experience; (F) counsel's skill; and (G) comparison of the lodestar to the amount of fees sought. *Lopez, supra*, 2011 WL 10483569, *4.[5]

Class counsel are requesting fees of one-third of the maximum payment ($3,300,000) that Balboa could make to the common fund under the parties' settlement, plus expenses incurred to date of $40,687.48, for the following reasons:

(A) Complexity of the Case

This case has involved numerous difficult legal issues of first impression in this Circuit concerning the TCPA, including (1) whether the TCPA applies to solicited as well as unsolicited fax advertisements; (2) the interpretation of the opt-out notice requirements in 47 C.F.R. § 64.1200(a)(3)(iii) and 47 C.F.R. § 64.1200(a)(3)(iv); (3) whether these regulations are subject to challenge in the district court despite the Hobbs Act; (4) whether there is a cause of action for violation of the TCPA's opt-out notice requirements regardless of whether the fax advertisement is solicited or unsolicited, and regardless of whether the defendant has an established business relationship with the fax recipient; (5) whether

[5] *Lopez* also cites the reaction of class members to the settlement as a factor to be considered, but that concern is not applicable at this preliminary approval stage, before the class has even been notified of the settlement.

partial/substantial compliance with the opt-out notice requirements of the TCPA is a defense to liability; (6) whether awarding statutory damages in a TCPA class action may violate the due process clause of the United States Constitution; and (7) whether a class can be certified under the TCPA for the violation of the opt-out notice requirements on fax advertisements alone. On virtually every one of these issues either some conflicting precedent from other jurisdictions exists, or no precedent exists. *E.g.*, *Lopez, supra*, 2011 WL 10483569, * 12 (case was considered complex because, among other things, it involved complicated and unsettled legal issues).

In addition to its legal complexities, this case has been factually complex, involving extensive discovery concerning the transmission of more than one million fax advertisements throughout the United States. Bellin Decl., ¶ 5. Further evidencing these complexities, the parties have engaged in protracted and contentious settlement negotiations for almost one full year. *E.g.*, *Lopez*, 2011 WL 10483569, *7 (complexity of a case is reflected by difficult settlement negotiations).

(B) Exceptional Results

Class counsel have achieved exceptional results in this case, obtaining the first contested federal TCPA class certification order based on the lack of an opt-out notice on fax advertisements, regardless of whether the fax advertisements were solicited or unsolicited, and regardless of whether the defendant had an established business relationship with the persons to whom it sent the fax advertisements.

Class counsel also obtained significant monetary benefits for the class, namely a common fund holding a minimum of $2.3 million and a maximum of $3.3 million, depending on the number and type of claims made by Settlement Class members. This result is particularly impressive because the entire net worth of Balboa, according to Balboa's latest available financial estimates at the time of

settlement, was $12,028,291. Accordingly, this action caused Balboa to agree to pay to a common fund a minimum of 19.1% to a maximum of 27.4% of its stated net worth.

These monetary benefits also are significant in relation to the type of proof the Settlement Class members must submit to participate in the settlement. As detailed earlier, even if the Settlement Class members have not retained copies of the fax advertisements they received, they still may obtain compensation from $175 for one fax to $275 for five or more faxes simply by signing sworn declarations as to how many faxes they received during the class period. And those Settlement Class members who do come forward with copies of the fax advertisements they received from Balboa will receive $500 per fax, without a limit as to the number of fax advertisements they can produce. Finally, depending on the number of claims made, Settlement Class members may receive up to $1,500 per claimed fax, without having to provide actual fax advertisements, for up to five fax advertisements – the very maximum a plaintiff could recover under the TCPA per fax if the court awarded treble damages against a defendant for willful or knowing violations of the TCPA. 47 U.S.C. § 227(b)(3)).

(C) Risk Assumed by Class Counsel

The risk of non-payment facing class counsel in bringing this case has been substantial. Any number of the complex issues of first impression in this case could have been decided against Plaintiffs, torpedoing the entire litigation for Plaintiffs and the class.

(D) Effort Expended by Class Counsel

From inception until almost the eve of trial, class counsel have performed extensive work on this case, including (1) preparing Plaintiffs' original and amended complaints; (2) preparing a Rule 26 conference report; (3) propounding written discovery, including requests for documents, requests for admissions and

interrogatories, and meeting and conferring regarding Balboa's responses to that discovery; (4) subpoenaing a non-party faxing company and reviewing its document production; (5) taking seven depositions; (6) defending Plaintiffs' deposition; (7) responding to Balboa's written discovery; (8) preparing a mediation statement for a court-appointed mediator; (9) participating in a mediation with the court-appointed mediator; (10) drafting and arguing a class certification motion; (11) drafting a response to Balboa's petition to the Ninth Circuit for leave to file an interlocutory appeal of the Court's class certification order pursuant to Fed. R. Civ. P. 23(f); (12) drafting the initial class notice plan as well as model notices; (13) drafting and arguing voluminous cross-motions for summary judgment; (14) working with Tilghman to get notice to all class members before summary judgment motions were to be decided; (15) preparing a lengthy case statement for the settlement proceedings before Magistrate Gandhi; (16) participating in the settlement conference before Magistrate Gandhi; and (17) preparing this motion, the Settlement Agreement, the Long- and Short-Form Notices and Claim Form, and other accompanying papers for this motion. Bellin Decl., ¶ 5. Tasks left for class counsel are (i) working with Tilghman and Balboa's counsel to provide notice to the class of the settlement and resolving any questions about claims made by Settlement Class members; and (ii) preparing the motion and accompanying papers for final approval of the class settlement. Bellin Decl., ¶ 9.

(E) Experience of Class Counsel

Class counsel have extensive experience in complex class action litigation. Mr. Bellin has been an attorney for more than 22 years, and during that time has had significant experience in all stages of the litigation process, from inception of a case through trial and appeal. Bellin Decl., ¶ 3. He has handled numerous TCPA class actions throughout the country and has had four TCPA classes

certified (three settlement and one contested), including the class in this case. Bellin Decl., ¶ 4. Mr. Bellin has also handled individual TCPA actions. *Id.*

Mr. Furman has been an attorney for more than 30 years, has extensive experience in complex litigation, as well as working on both the plaintiff's and defendant's side of class action cases. Furman Decl., ¶ 3. Mr. Furman has worked and is working as co-counsel with Mr. Bellin on a number of TCPA class actions. Mr. Compoli has also been an attorney for over 30 years. He has experience in all stages of litigation and concentrates on representing plaintiffs in TCPA cases. Compoli Decl., ¶ 3.

(F) Class Counsels' Skill

Class counsel's skill is evident from the results obtained in this complex case and from counsel's credentials and experience.

(G) Comparison with the Lodestar

Through July 31, 2013 date Mr. Bellin has devoted 342.9 hours to this litigation, Mr. Furman has devoted 519.3 hours and Mr. Compoli devoted 73.7 hours. Bellin Decl. ¶ 10; Furman Decl. ¶ 8; Compoli Decl. ¶ 6. In all, the amount of time Class counsel devoted to this case was 935.9 hours as of July 31, 2013. Based on the modest hourly rates of Class counsel between $300 and $400 described in their declarations, the lodestar through July 31, 2013 amounts to $341,025, which is the starting point for the lodestar analysis.

(1) Class Counsels' Hourly Rates are Reasonable

Under a lodestar analysis, reasonable hourly rates are determined by "prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984). "The relevant community is the forum in which the district court sits." *Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973, 979 (9th Cir.2008). The lodestar may be adjusted up or down to account for other factors which are not subsumed within it. *Ferland v. Conrad Credit Corp.*, 244 F.3d 1145, 1149 n.4 (9th Cir. 2001).

The Court may consider evidence of counsel's customary hourly rate. *People Who Care v. Rockford Bd. of Educ., School Dist. No. 205*, 90 F.3d 1307, 1310 (7th Cir. 1996) (holding that an attorney's actual billing rate for similar work is presumptively appropriate). In addition, affidavits of the plaintiffs' attorneys regarding prevailing fees in the community and rate determinations in other cases "are satisfactory evidence of the prevailing market rate." *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990).

In this case, the hourly rates submitted by class counsel reflect their actual and customary billing rates in the areas where they practice. Bellin Decl., ¶ 11; Furman Decl., ¶ 8; Compoli Decl., ¶ 6. As detailed above, class counsel have extensive experience prosecuting TCPA class actions, TCPA individual actions and complex litigation. Class counsels' rates of from $300 to $400 per hour are modest and reasonable for complex, nationwide litigation. Bellin Decl, ¶ 11; Furman Decl., ¶ 8; Compoli Decl., ¶6.

Moreover, class counsels' hourly rates are low compared to those approved in this District, which range from $450-$1,000. *E.g., Kearney v. Hyundai Motor America*, No. 09 CV 1298, 2013 WL 3287996, *8 (C.D. Cal. 2013) (Tucker, J.); *Pierce v. County of Orange*, No. SACV 01-981, 2012 WL 5906663, at *13-14 (C.D. Cal. Mar. 2, 2012); *Housing Rights Ctr. v. Sterling*, No. CV 03-859, 2005 WL 3320738, at *2 (C.D. Cal. Nov. 1, 2005).

(2) Class Counsels' Hours are Reasonable

As stated above, class counsel have worked a total of 935.9 hours on this case through July 31, 2013.[6] Class counsel estimate they will need to perform

[6] Mr. Bellin worked for 342.9 hours on this case through July 31, 2013, and his hourly rate is $400 per hour, yielding a lodestar for his work through July 31 as $137,160. Bellin Decl. ¶ 10. Mr. Furman worked for 519.3 hours on this case through July 31, 2013, and his hourly rate is $350 per hour, yielding a lodestar for his work through July 31 as $181,755. Furman Decl. ¶ 8. Mr. Compoli worked for 73.7 hours on this case through July 31, 2013, and his hourly rate is $300 per hour, yielding a lodestar for his

approximately 50 to 100 hours more work to respond to the Settlement Class members' inquiries and objections, and to file a brief in response to any objections by Settlement Class members that also summarizes the administration of the settlement for final approval by the Court. (*Id*. ¶ 6.) This total of approximately 1,000 hours of work done and the work to be done by class counsel to litigate this complex nationwide class action is eminently reasonable.

(3) Class Counsels' Fees are Reasonable Pursuant to the *Kerr* Factors Subsumed in the Lodestar Analysis

Once the court determines that the rates and hours used to calculate the lodestar are reasonable, the courts must consider the novelty and complexity of the litigation, counsels' skill and experience, the quality of representation, the results obtained, and the contingent nature of the fee agreement to determine whether to make an upward adjustment to the lodestar. *E.g., Morales, supra*, 96 F.3d at 364. As demonstrated above, all of these factors support class counsels' attorneys' fees request, as does the contingent fee arrangement between the named Plaintiffs and counsel. Bellin Decl., ¶ 12.

(4) The Resulting Multiplier of 3.2 is Reasonable

Based on all of these factors, the multiplier of 3.2 ($1.1 million divided by the $341,025 lodestar) reflected in Plaintiffs' attorneys' fee request is a reasonable numerical multiplier, as numerous courts have ruled. *E.g., Vizcaino, supra*, 290 F.3d 1043, 1051 & n.6 (approving multiplier of 3.5); *Steiner v. Am. Broad Co.*, 248 Fed. Appx. 780, 783 (9th Cir. 2007) (affirming award with multiplier of 6.85); *Buccellato v. AT & T Operations, Inc.*, No. 10 CV 00463, 2011 WL 3348055, *2 (N.D. Cal. June 30, 2011) (approving multiplier of 4.3); *see also* Newberg, *Attorney Fee Awards*, § 14.03 at 14–5 (1987) ("multiples

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work through July 31 as $22,110. Compoli Decl. ¶ 6. Adding all of these figures together, class counsel worked on this case for 935.9 hours through July 31, 2013, yielding a lodestar of $341,025.

ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied.").

(5) Class Counsels' Fee Award is Warranted Irrespective of whether the Maximum $3.3 Million Amount is Paid Out

Finally, even if the total amount of the claims made by the class on the common fund does not require Balboa to pay the maximum $3.3 million amount into the common fund, that would not affect the amount of the fee award that should be given in this case. It is well settled that in class actions that result in a common fund, the attorneys' fee award should be based on the entire amount of money made available to the class by counsel's efforts, not based on the amount of compensation actually claimed by class members. *E.g.*, *Boeing Co. v. Van Gemert*, 444 U.S. 472, 479-80 (1980) (attorney's fee in common fund case should be calculated based on the entire common fund, including the portion of that fund unclaimed by class members); *Williams v. MGM-Pathe Commun. Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (reversing district court's award of attorney's fees that had been based on the compensation that class members actually claimed rather than the based on the benefits available to them as a result of the settlement).

VIII. CONCLUSION

For all the foregoing reasons, Plaintiffs and class counsel request that the Court preliminarily approve the parties' settlement, enforce the Settlement Agreement against Balboa, and grant the other relief requested on this motion.

Dated: August 16, 2013

/s/ Aytan Y. Bellin
AYTAN Y. BELLIN, ESQ.
BELLIN & ASSOCIATES

ROGER FURMAN, ESQ.

JOSEPH R. COMPOLI, JR., ESQ.

Attorneys for plaintiffs Michael A. Vandervort and U.S. Sample Services, Inc., on behalf of themselves and all others similarly situated