

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

**WO**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Joanne Knapper, on behalf of herself  
and others similarly situated,  
  
Plaintiff,  
  
vs.  
  
Cox Communications, Inc.,  
  
Defendant.

No. CV-17-00913-PHX-SPL

**ORDER**

**I. Background**

On March 28, 2017, Plaintiff filed a complaint against Defendant for violating the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227. (Doc. 1.) Plaintiff alleges, on behalf of a class, that Defendant “routinely violates [the TCPA] by using an automatic telephone dialing system [or an artificial or prerecorded voice] to place non-emergency calls to numbers assigned to a cellular telephone service, without prior express consent.” (Doc. 1 ¶¶ 3, 11.)

On June 28, 2018, Plaintiff filed a motion for class certification and appointment of class counsel. (Doc. 43.) On August 14, 2018, Defendant filed its response. (Doc. 58.) On August 30, 2018, Plaintiff filed her reply. (Doc. 61.) Both parties have filed supplemental authority notices. (Docs. 66, 67, 69, 72, 78, 79, 82, 86, 87.)

///

///

1     **II. Discussion**

2             Plaintiff argues for certification under Federal Rule of Civil Procedure (“Rule”)  
3 23(b)(3). She seeks to bring this action on her own behalf, as well as on the behalf of the  
4 following class: “[a]ll persons and entities throughout the United States (1) to whom Cox  
5 Communications, Inc. placed a call, (2) directed to a number assigned to a cellular  
6 telephone service, but not assigned to a Cox Communications, Inc. subscriber, (3) in  
7 connection with its efforts to collect a past due residential account balance, (4) via its Avaya  
8 dialers or with an artificial or prerecorded voice, (5) from March 28, 2013 through the date  
9 of class certification.” (Doc. 43 at 2.) Defendant responds that individual issues concerning  
10 consent predominate, that Plaintiff is neither an adequate nor a typical class representative,  
11 and that a class action is not a manageable or superior way to proceed. (Doc. 58.) It also  
12 argues that none of its relevant call logs reflect actual calls made by Defendant to wrong  
13 numbers or that the purported wrong numbers are actually “wrong.” (Doc. 58.) Defendant  
14 does not, however, challenge the class definition.

15     **III. Analysis**

16             Rule 23 of the Federal Rules of Civil Procedure governs class actions. A member  
17 of a class may sue as a representative party if the member satisfies four prerequisites:  
18 numerosity, commonality, typicality, and adequacy of representation. *Mazza v. Am. Honda*  
19 *Motor Co., Inc.*, 666 F.3d 581, 588 (9th Cir. 2012); Fed. R. Civ. P. 23(a). After satisfying  
20 the prerequisites, the plaintiff must then show that the class falls into one of three categories  
21 under Rule 23(b). Fed. R. Civ. P. 23(b). Here, Plaintiff seeks certification under Rule  
22 23(b)(3). Under Rule 23(b)(3), a plaintiff must show that questions of law or fact common  
23 to class members predominate over any questions affecting only individual members and  
24 that a class action is superior to other available methods for resolving the controversy. Fed.  
25 R. Civ. P. 23(b)(3).

26             “[P]laintiffs wishing to proceed through a class action must actually *prove*—not  
27 simply plead—that their proposed class satisfies each requirement of Rule 23[.]”  
28 *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014); *see Comcast*

1 *Corp. v. Behrend*, 569 U.S. 27, 33 (2013). The court must rigorously analyze the facts of a  
2 class action to ensure that it comports with Rule 23. *See Amgen Inc. v. Connecticut Ret.*  
3 *Plans & Tr. Funds*, 568 U.S. 455, 465 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S.  
4 338, 351 (2011). In doing so, however, the court will consider merits questions only to the  
5 extent relevant to determining whether the proposed class has met Rule 23’s requirements.  
6 *Amgen Inc.*, 568 U.S. at 465-66.

7 The TCPA prohibits “any person ... to make any call (other than a call made for  
8 emergency purposes or made with the prior express consent of the called party) using any  
9 automatic telephone dialing system or an artificial or prerecorded voice ... to any telephone  
10 number assigned to a ... cellular telephone service ....” 47 U.S.C. § 227(b). The TCPA  
11 creates a private right of action for statutory damages in the amount of \$500 per violation  
12 (or up to \$1,500 if the defendant violated this subsection willfully or knowingly). 47 U.S.C.  
13 § 227(b)(3).

14 **a. Rule 23(a)**

15 **1. Numerosity**

16 A proposed class satisfies the numerosity requirement if class members are so  
17 numerous that joinder would be impractical. Fed. R. Civ. P. 23(a)(1). While no absolute  
18 limit exists, numerosity is met when general knowledge and common sense indicate that  
19 joinder would be impracticable. *Horton v. USAA Cas. Ins. Co.*, 266 F.R.D. 360, 365 (D.  
20 Ariz. 2009) (citing *Garrison v. Asotin County*, 251 F.R.D. 566, 569 (E.D. Wash. 2008)).  
21 Generally, forty or more members will satisfy the numerosity requirement. *Id.*

22 Plaintiff argues that “Defendant identified more than 600,000 cellular telephone  
23 numbers that it associates with its residential accounts, and that are likely wrong numbers.”  
24 (Doc. 43 at 8.) She also argues that Defendant made millions of autodialed calls per year  
25 and thousands even after its own internal records designated those calls as wrong numbers.  
26 (Doc. 43 at 8.) Though Defendant argues that the putative class size is less than 600,000,  
27 it does not provide an exact estimate of the class size.

28 ///

1 Here, the Court is satisfied, based on Defendant’s call records, that the putative class  
2 members are sufficiently numerous to make joinder impracticable. Even assuming what  
3 the Court construes as Defendant’s lowest estimate of the putative class—30% of 11,920  
4 phone numbers (*see* doc. 58 at 8 n. 12)—that leaves 8,344 putative class members.  
5 Therefore, the Court finds that the putative class size here satisfies the numerosity  
6 requirement.

## 7 **2. Commonality**

8 A proposed class satisfies the commonality requirement if there is at least one  
9 question of fact or law common to the class. Fed. R. Civ. P. 23(a)(2). The claims must  
10 “depend upon a common contention such that determination of its truth or falsity will  
11 resolve an issue that is central to the validity of each claim in one stroke.” *Mazza v. Am.*  
12 *Honda Motor Co.*, 666 F.3d 581, 588 (9th Cir. 2012) (quoting *Wal-Mart*, 564 U.S. at 350)  
13 (internal quotations omitted). However, “even a single common question will do.” *Wal-*  
14 *Mart*, 564 U.S. at 359 (internal quotations omitted).

15 Plaintiff argues that there are a host of common questions. (Doc. 43 at 9.) She argues  
16 that (1) whether Defendant used an ATDS; (2) whether each class member suffered the  
17 same alleged injury; and (3) whether liability for calls placed to wrong or reassigned  
18 telephone numbers attaches under the TCPA are all common questions. Defendant argues  
19 that consent issues lead to the conclusion that only individualized trials are appropriate  
20 here. (Doc. 58 at 19-20.) Thus, it argues, “no common questions of fact predominate.”  
21 (Doc. 58 at 20.) It also argues that reassigned liability and what constitutes an ATDS have  
22 not yet been decided by the FCC, so there is no common question that could be answered.  
23 (Doc. 58 at 15-16.)

24 The Court finds that the commonality requirement is met. Whether Defendant used  
25 an ATDS or an artificial or prerecorded voice to allegedly call the putative class members  
26 would produce an answer that is “central to the validity of each claim in one stroke.” *Mazza*,  
27 666 F.3d at 588. As would whether liability attaches for wrong or reassigned numbers. This  
28 is so even if what triggers liability for wrong or reassigned numbers were to change.

1 Likewise, whether consent was or was not given is a common question applicable to the  
2 class. Lastly, all putative class members allegedly suffered the same injury—a receipt of  
3 at least one phone call by Defendant in violation of the TCPA. (Doc. 43 at 9.) Thus, whether  
4 each class member suffered the same injury is also a “common contention.” *Mazza*, 666  
5 F.3d at 588. Therefore, commonality is satisfied.

### 6 **3. Typicality**

7 A proposed class satisfies the typicality requirement if the claims of the  
8 representative party are typical of the claims of the class. Fed. R. Civ. P. 23(a)(3). As long  
9 as the representative’s claims are “reasonably coextensive with those of absent class  
10 members[,] they need not be substantially identical.” *Staton v. Boeing Co.*, 327 F.3d 938,  
11 957 (9th Cir. 2003) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir.  
12 1998)). In other words, “[t]ypicality refers to the nature of the claim or defense of the class  
13 representative, and not to the specific facts from which it arose or the relief sought.”  
14 *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014).

15 Plaintiff argues that her and the putative class members “were each harmed in the  
16 same way by Defendant’s common practice.” (Doc. 43 at 10.) She argues that because  
17 Defendant was attempting to reach someone else when it called her, just as with the putative  
18 class members, her claims are typical of the class. (Doc. 43 at 11.) Defendant argues that  
19 Plaintiff cannot represent the putative class of “wrong numbers” because she, unlike them,  
20 did not answer Defendant’s calls and did not speak to a live agent. (Doc. 58 at 8, 16.) Her  
21 phone number, therefore, was never designated as a wrong number. (Doc. 58 at 8, 16.)  
22 Plaintiff replies that her telephone number was designated as a potentially wrong number  
23 and that, in any event, her class status is not defined by Defendant’s internal codes. (Doc.  
24 61 at 10.)

25 The Court finds that the typicality requirement is met. Here, Plaintiff is a not a  
26 customer of Defendant and alleges that Defendant did not have consent to call her before  
27 it dialed her phone number. (Doc. 43 at 4, 5; Doc. 58 at 2, 7.) She alleges that the putative  
28 class members were also wrongly contacted by Defendant. (Doc. 43 at 6; *see* Doc. 58 at 6-

1 8.) Thus, the nature of Plaintiff’s claim is reasonably coextensive with the putative class  
2 members. In other words, the alleged injury, if found, would necessarily be a result of a  
3 course of conduct that is not unique to any of them, *i.e.*, a result of Defendant’s alleged  
4 unlawful calls. *See Parsons*, 754 F.3d at 685. This is so even if Plaintiff, perhaps unlike  
5 some of the other putative class members, did not talk with a call agent or otherwise inform  
6 Defendant about the wrong number. Plaintiff and those putative class members would still  
7 make similar legal arguments to prove Defendant’s liability.<sup>1</sup> The fact that some of the  
8 proposed members might have different degrees of injuries, or none at all, does not render  
9 the claim or the alleged injury atypical. *Id.* at 686 (citing *Ellis v. Costco Wholesale Corp.*,  
10 657 F.3d 970, 985 n.9 (9th Cir. 2011)) (noting that “[d]iffering factual scenarios resulting  
11 in a claim of the same nature as other class members does not defeat typicality.”).

#### 12 4. Adequacy

13 The adequacy requirement is satisfied if the representative parties will fairly and  
14 adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4). In determining this  
15 standard, the court asks: “(1) [d]o the representative plaintiffs and their counsel have any  
16 conflicts of interest with other class members, and (2) will the representative plaintiffs and  
17 their counsel prosecute the action vigorously on behalf of the class?” *Staton v. Boeing Co.*,  
18 327 F.3d 938, 957 (9th Cir. 2003) (citing *Hanlon*, 150 F.3d at 1020).

19 Plaintiff argues she has consistently communicated with her counsel, sat for  
20 deposition, responded to discovery requests, and is armed to “make all necessary decisions  
21 [in] this case with class members’ best interests in mind.” (Doc. 43 at 11-12.) She also  
22 states that her counsel is experienced and competent within the field of TCPA and has been  
23 appointed as class counsel in dozens of other consumer protection class actions. (Doc. 43  
24 at 12.) Defendant does not dispute that Plaintiff’s counsel is inadequate. It does argue,  
25 however, that Plaintiff and her counsel have concocted a plan to “catch” Defendant, so that

---

26  
27 <sup>1</sup> The Court is unaware of, and Defendant has not pointed to, any requirement  
28 that a potential plaintiff call and inform the defendant that it has an incorrect phone number.  
Nor does Defendant articulate why that would affect liability, assuming Defendant had  
already called that person without its consent.

1 Plaintiff could cash in on a payday. (Doc. 58 at 2-3.)

2 The Court finds that the adequacy requirement is met. Defendant does not contend  
3 that Plaintiff and her counsel have any conflicts of interest or that they have not prosecuted  
4 this action vigorously. Instead, Defendant argues that Plaintiff and her counsel have acted  
5 unethically by engaging in gamesmanship by, essentially, bringing this case in bad faith.  
6 The Court is not persuaded that Plaintiff, nor her counsel, have engaged in bad faith or  
7 have otherwise acted without integrity or candor. The Court is unaware of any conflicts of  
8 interest and finds that, to date, Plaintiff and her counsel have vigorously prosecuted this  
9 action. There is no reason to believe that will not continue. Further, Plaintiff's counsel's  
10 declaration provides the Court with satisfaction that it is competent to vigorously prosecute  
11 this case. (See Doc. 43-4.)

12 **b. Rule 23(b)(3)**

13 Finding that Plaintiff has met the four requirements of Rule 23(a), the Court turns  
14 to the Rule 23(b) analysis, which requires a finding that Plaintiff meet at least one of the  
15 three requirements under Rule 23(b). Here, Plaintiff argues that the class should be certified  
16 under Rule 23(b)(3). (Doc. 43 at 6.)

17 **1. Predominance**

18 A class may be maintained under Rule 23(b)(3) where questions of law or fact  
19 common to the class predominate over questions affecting only individual members. Fed.  
20 R. Civ. P. 23(b)(3). If proof of liability would involve transaction-by-transaction analysis,  
21 then individual issues will predominate. *See Torres v. Mercer Canyons Inc.*, 835 F.3d 1125,  
22 1134 (9th Cir. 2016); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998). If,  
23 however, liability can be established on a class-wide basis, common issues will  
24 predominate, and a class action will serve as the most efficient means of resolving the  
25 controversy. *Torres*, 835 F.3d at 1134; *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d  
26 1180, 1189 (9th Cir. 2001). This is so even if, at the damages stage, there are ultimately  
27 “non-injured” class members, and individualized damages’ calculations are required.  
28 *Torres*, 835 F.3d at 1136; *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362

1 (2011).

2 Plaintiff argues that Defendant’s use of its dialing system, to place calls to her and  
3 the putative class members, causing them injuries, predominates in this case. (Doc. 43 at  
4 12-13.) She argues that whether certain members gave consent does not defeat  
5 predominance because the putative class here is comprised of non-customers of Defendant  
6 “who necessarily did not provide Defendant with express consent to place calls” to their  
7 phones. (Doc. 43 at 13.) Plaintiff argues that even if there were individualized issues as to  
8 non-customers’ consent, common issues would still predominate. (Doc. 43 at 13.) Further,  
9 Plaintiff argues that other issues—damages calculations, determinations as to the identity  
10 of the telephone users, when each call was made, whether Defendant actually made each  
11 call, and whether each call marked as a wrong number was, in fact, a wrong number—have  
12 routinely been found to not defeat predominance. (Doc. 43 at 14, citing cases.)

13 Defendant argues that its evidence of consent obliterates predominance and would  
14 require individual mini-trials. (Doc. 58 at 12, 14.) It argues that its records do not  
15 necessarily represent true wrong numbers or individuals Defendant actually called. (Doc.  
16 58 at 7.) Further, Defendant’s expert notes that there are many reasons why “wrong  
17 number” dispositions, as reflected in Defendant’s records, are not accurate: (1) customers  
18 claim that their phone numbers are “wrong numbers” in order to avoid payment; (2) call  
19 agents mistakenly enter a “wrong number” disposition in their notes; (3) so-called “wrong  
20 numbers” can later place an incoming call to Defendant and “verify” the number; (4) no  
21 database is available to search for history of “subscribers”; and (5) there is no way to tell  
22 who the actual “user” of the phone was at the time Defendant allegedly called it. (Doc. 58,  
23 Ex. 6.) Defendant also argues that, even if Defendant made calls to a non-customer, an  
24 individualized inquiry would still be required because the Court would need to determine  
25 “whether that person was a former Cox customer who had previously consented to calls  
26 from Cox in connection with a past debt.” (Doc. 58 at 18 n. 20.)

27 The Court finds that the predominance requirement is met. The Court agrees that a  
28 “wrong number” designation—or any designation in Defendant’s call records that might



1 tip off the phone number’s veracity—does not necessarily mean that the phone number will  
2 lead to a “correct” wrong number. But, Plaintiff has explained that those phone numbers  
3 can be analyzed through a reverse lookup service and that other methods can be used to  
4 sanitize the phone numbers, on a class-wide basis, to address the consent issue. While there  
5 will undoubtedly be differences in the amount of damages claimed by class members,  
6 differences on users, and which numbers were actually called, these issues can also be  
7 resolved on a class-wide basis. Indeed, courts have certified TCPA cases despite the  
8 possibility that a substantial proportion of the phone numbers marked as “wrong number”  
9 in Defendant’s call records may not have actually been a wrong number. *See Johnson v.*  
10 *Navient Solutions, Inc.*, 315 F.R.D. 501, 503 (S.D. Ind. 2016); *Abdeljalil v. Gen. Elec.*  
11 *Capital Corp.*, 306 F.R.D. 303 (S.D. Cal. 2015); *West v. California Servs. Bureau, Inc.*, 323  
12 F.R.D. 295, 302 (N.D. Cal. 2017), leave to appeal denied sub nom. *Membreno v. California*  
13 *Serv. Bureau, Inc.*, No. 17-80258, 2018 WL 1604629 (9th Cir. Mar. 27, 2018).

14 Moreover, Defendant’s reliance on its evidence of consent is misplaced. The  
15 evidence is not indicative of consent, given by non-customers of Defendant, prior to being  
16 called on their cell phones. Instead, it shows that phone numbers in Defendant’s records  
17 dispositioned as “wrong number” or “unverified” were later dispositioned as “verified”  
18 phone numbers. Thus, the Court is not persuaded that its “unrefuted, demonstrative”  
19 evidence of consent in this case is detrimental to predominance. Even if Defendant’s  
20 evidence was helpful here, Plaintiff’s expert articulates how reverse lookups can be utilized  
21 to resolve consent or lack of consent on a class-wide basis. He explains how a reverse  
22 lookup service would be used to “determine if a name and associated physical address  
23 exists for each cell phone number [appearing in Defendant’s records] at the time the calls  
24 were made.” (Doc. 43, Ex. E at ¶ 17.) This process is done in conjunction with (1)  
25 subpoenaing wireless carriers to “obtain additional name and address information for the  
26 cellular telephone numbers at issue”; (2) checking the addresses against the National  
27 Change of Address database; (3) publicizing notice; (4) issuing a press release; (5) setting  
28 up a notice website; and (6) requiring claims forms, self-identifying affidavits, and

1 supporting documentation, which can include copies of telephone records from the  
2 claimants. (Doc. 43, Ex. E at ¶¶ 18-24.) Then, a reverse lookup service, Epiq for example,  
3 “can compare the names of claimants to [Defendant’s] records to establish that a claimant  
4 is, or is not, a [subscriber of Defendant].” (Doc. 43, Ex. E at ¶ 24.) Thus, it seems unlikely  
5 that the issue of consent beyond the notice stage in this litigation would be a predominate  
6 issue. Accordingly, the Court finds Plaintiff’s proposed methodology for resolving consent  
7 or lack thereof on a class-wide basis sufficient.

8 Defendant’s expert also argues that the call records here reveal a substantial amount  
9 of phone numbers leading to individuals who were customers of Defendant and, thus,  
10 necessarily gave consent. He also argues that Plaintiff’s proposed methods for analyzing  
11 Defendant’s records is unreliable because major data aggregators, like Intelius, do not  
12 provide accurate reverse lookup services. (Doc. 58, Ex. 6 at ¶ 41.) However, the Court is  
13 not concerned with whether the reverse lookup process will produce perfectly accurate  
14 results. Instead, the industry standard shows that the major data aggregators can be used,  
15 in connection with other methods like subpoenaing wireless carriers and cross-referencing  
16 addresses, to reasonably identify the most likely subscriber of the phone number on the  
17 relevant call date. Defendant’s expert does not challenge that the reverse lookup process is  
18 the industry standard and is commonly used in TCPA cases. Further, prior to August 2016  
19 (the month of the Neustar system installation), Defendant’s call agents manually kept  
20 records of a phone number’s changing disposition. (Doc. 58 at 7.) The Court is thus not  
21 persuaded that Defendant’s expert’s analysis, which included analyzing phone numbers  
22 prior to August 2016, was overly prohibited by referencing call agents’ notes.

23 Additionally, Defendant’s expert explains that the putative class members represent  
24 individuals “who were not [Defendant’s] customers [and] who allegedly received a  
25 telephone call in error.” (Doc. 58, Ex. 6 at ¶ 37.) He argues that “[Defendant] has no  
26 information about who these alleged ‘wrong parties’ are and the methodologies [Plaintiff’s  
27 expert] suggests he would use are completely unreliable.” (Doc. 58, Ex. 6 at ¶ 37.) This is  
28 not true though. Plaintiff is a proposed class member who allegedly received a telephone

1 call in error and who, undisputedly, was never a customer of Defendant. Yet, Plaintiff's  
2 phone number was found in Defendant's records. Plaintiff's expert was then able to return  
3 a name and address for that phone number and verified that Plaintiff and her husband were  
4 the subscribers of the phone number for the entirety of the class period. (Doc. 61, Ex. A at  
5 6.)

6 While Defendant's expert repeatedly argues that there is no way to guarantee that  
7 the subscriber of a phone number is also the "user" of the cellular phone, Plaintiff's expert  
8 states that reverse lookups provide reliable subscriber data indicating those individuals who  
9 may ultimately be in the class and, thus, who should be provided notice. (Doc. 61, Ex. A  
10 at 4.) As Plaintiff's expert explains, it would be "very odd" to not send subscribers of a  
11 phone number notice of this action simply because they might not end up being the "user"  
12 of the phone. (Doc. 61, Ex. A at 4.) As he explains, subscribers are typically in the best  
13 position possible to identify the phone's "user," if it is not the subscriber. (Doc. 61, Ex. A  
14 at 4.) For example, Defendant's expert explains that he has a family plan with AT&T. (Doc.  
15 58, Ex. 6 at 23.) He states that, though he is the "subscriber" of his family plan, AT&T  
16 assigns his wife's, daughter's, and son-in-law's phone numbers to his account and "does  
17 not even know their names." (Doc. 58, Ex. 6 at 23-24.) Though AT&T might not know the  
18 "users" associated with each phone number, this example tends to prove the point that  
19 subscribers of a group calling plan can, or easily could, generally identify the names and  
20 addresses of the users on their own group calling plan.<sup>2</sup> Moreover, Defendant's expert has  
21 not refuted that subpoenaing wireless carriers and running reverse lookups are atypical in  
22 TCPA cases. This negates an argument that those methods are so unreliable that the Court  
23 should not rely upon them—at least when a plaintiff has proffered how the methods will  
24 be employed on a class-wide basis. Thus, the Court is unconvinced that Plaintiff's methods

---

25  
26 <sup>2</sup> To this point, the Court notes that Defendant has not provided any evidence  
27 that agency issues are real and not simply skeptical. To the extent it is a real issue, self-  
28 identifying affidavits and notice to the subscriber (who likely has information and access  
to other "users" on its wireless account) can be used to identify the correct putative class  
member. If, however, agency issues start to predominate in this case, Defendant would be  
able to challenge it at the appropriate stage.

1 and Defendant’s records should not be relied upon to provide phone numbers that can be  
2 gathered and analyzed on a class-wide, efficient, and likely accurate basis.

3 Lastly, regardless of how this Court interprets a “called party,” the issue of consent  
4 is one that can be resolved on a class-wide basis. Even assuming Defendant is correct in  
5 arguing that the definition of “called party” is in flux while the Court waits for an FCC  
6 decision, it does not follow that class certification is defeated. This analysis also extends  
7 to the Court’s interpretation of what constitutes an ATDS. The liability of Defendant is still  
8 a common issue in this case, regardless of the definitions of the terms establishing that  
9 liability. Further, Defendant does not use third-party vendors to make calls. Thus, whether  
10 an ATDS was used or a prerecorded or artificial message was left is common to the class  
11 because the calls were only made by Defendant. In any event, this Court has found that  
12 *ACA International* did not overturn the FCC’s or the courts in this circuits’ prior  
13 interpretation of “called party,” which is the current subscriber of the phone and not the  
14 intended recipient. (Doc. 88 at 5.) This further negates any emphasis on the issue of consent  
15 given by Defendant’s customers.

16 In sum, to the extent the evidence provided by Defendant shows that those callers  
17 gave consent, the Court finds that (1) the information can be analyzed on a class-wide scale  
18 and (2) that the method of how a caller provides consent can be identified by class-wide  
19 methods, as evidenced by Plaintiff’s expert. This is further supported by the fact that  
20 Defendant argues that it “relies only on the phone numbers provided directly by its  
21 residential customers and does not—and never has—used third party-sources, such as skip  
22 tracing or caller identification services.” (Doc. 58 at 6.) Thus, it appears likely that  
23 determining whether someone gave consent, and how, should not result in individual mini-  
24 trials because the issue of consent would likely be of little concern and could be traced to  
25 one source—Defendant’s records. Should issues of consent arise that would lead  
26 Defendant to seek decertification, it may do so at that time. *See* Fed. R. Civ. P. 23(C)(1)(c),  
27 (C)(4), (C)(5) (stating that a certification order may be altered or amended before final  
28 judgment and that the class action may be maintained with respect to particular issues or

1 divided into subclasses). Defendant may also seek to challenge the class members' claims  
2 at any of the other appropriate stages of litigation. Thus, this Court finds that the issue of  
3 consent here is not so individualized, at this stage, that the Court cannot certify this class.

## 4 **2. Superior Method**

5 The superiority requirement tests whether "a class action is superior to other  
6 available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P.  
7 23(b)(3). In determining whether a class action is the superior method, a court considers:  
8 (1) the class members' interest in individually controlling the prosecution or defense; (2)  
9 the extent or nature of any litigation already begun by or against class members; (3) the  
10 desirability or undesirability of concentrating the litigation of the claims in this forum; and  
11 (4) the likely difficulties in managing a class action. *Id.* Where class wide litigation will  
12 reduce litigations costs and promote greater efficiency, a class action may be the superior  
13 method of litigation. *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996).

14 Plaintiff argues that a class action is a superior method because this case likely has  
15 over tens of thousands of class members. (Doc. 43 at 15.) She argues that each individual  
16 member has little incentive to control the litigation because all the claims are identical and  
17 result in a uniform damages calculation on a per-violation basis. (Doc. 43 at 15.) On that  
18 basis, she argues that, if this case were not certified, many claims will likely go  
19 unredressed. (Doc. 43 at 15-16.) Lastly, Plaintiff argues there would be little difficulty in  
20 managing this case because Defendant possesses the necessary and relevant records to  
21 efficiently and practically gather information regarding the telephone users. (Doc. 43 at  
22 16.) Defendant argues that, because its consent evidence negates any finding of  
23 predominance, a class action here would not be a superior nor manageable method of  
24 litigation. (Doc. 58 at 14, 19-20.) Defendant also argues that this case is not manageable  
25 because its records are inaccurate or non-existent during certain, relevant periods of time.  
26 (Doc. 58 at 20.)

27 The Court finds that a class action would be a superior method of adjudicating  
28 Plaintiff and the putative class members' claims under the TCPA. Defendant appears to

1 focus on the last factor under Rule 23(b)(3); however, difficulty in identifying all class  
2 members is not dispositive of manageability or feasibility at this stage. *Briseno v. ConAgra*  
3 *Foods, Inc.*, 844 f.3d 1121, 1126 (9th Cir. 2017). The Court is persuaded that putative class  
4 members who would ultimately become part of the class would have little incentive to  
5 prosecute their claims on their own. Should individual putative class members choose to  
6 file claims on their own, given the potential class size and the relatively small amount of  
7 statutory damages for each case, individual litigation would not promote efficiency or  
8 reduce litigation costs. This is particularly so for claims that all stem from the same cause  
9 of action and involve common issues. Therefore, the Court finds that a class action is a  
10 superior method to adjudicate this matter.

#### 11 **IV. Conclusion**

12 Having reviewed the parties' briefing (docs. 43, 58, 61), the Court finds that Plaintiff  
13 has met the four Rule 23(a) requirements and has shown that the class should be certified  
14 under Rule 23(b)(3) for the reasons stated above. Accordingly,

#### 15 **IT IS ORDERED:**

16 1. Plaintiff's Motion for Class Certification and Appointment of Class Counsel  
17 (Doc. 43) is **granted**.

18 2. Pursuant to Rules 23(a) and 23(b)(3), the Court certifies the class as: (1) all  
19 persons and entities throughout the United States, (2) to whom Cox Communications, Inc.  
20 placed a call (3) directed to a number assigned to a cellular telephone service, but not  
21 assigned to a Cox Communications, Inc. subscriber, (4) in connection with its efforts to  
22 collect a past due residential account balance, (5) via its Avaya dialers or with an artificial  
23 or prerecorded voice, (6) from March 28, 2013 through the date of class certification.

24 ///

25 ///

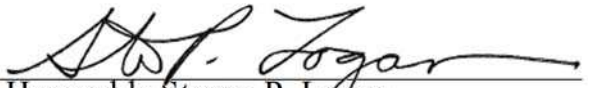
26 ///

27 ///

28 ///

1           3.       The Court appoints the law firm of Greenwald Davidson Radbil PLLC as  
2 class counsel pursuant to Rule 23(g).

3           Dated this 6th day of February, 2019.

4  
5   
6 Honorable Steven P. Logan  
United States District Judge

7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28