

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  
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAKOTA MEDICAL, INC., a California corporation doing business as Glenoaks Convalescent Hospital,

Plaintiff,

v.

REHABCARE GROUP, INC., a Delaware corporation, and CANNON & ASSOCIATES, LLC, a Delaware limited liability corporation doing business as Polaris Group,

Defendants.

No. 1:14-cv-02081-DAD-BAM

ORDER GRANTING PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

(Doc. No. 172)

This matter is before the court on plaintiff's unopposed motion for preliminary approval of a class action settlement and certification of the settlement class. (Doc. No. 172.) Oral argument was heard on April 18, 2017. Attorneys Darryl Cordero, Donald Fischbach, Scott Luskin, and Joel Magolnick appeared at the hearing on behalf of plaintiffs. Attorney Oliver Wanger appeared on behalf of defendant RehabCare and attorneys Erin Kolmansberger, and David Jordan appeared on behalf of defendant Cannon. At the conclusion of the hearing, the matter was taken under submission. For the reasons set forth below, the court will grant plaintiff's motion.

////

1 **BACKGROUND**

2 The complaint in this action was filed on December 29, 2014, alleging violations of the  
3 Telephone Consumer Protection Act (“TCPA”). (Doc. No. 1.) This court has jurisdiction over  
4 the case because it arises under the laws of the United States. *See* 28 U.S.C. § 1331; *Mims v.*  
5 *Arrow Fin. Servs., LLC*, 565 U.S. 368, 375–76 (2012) (holding federal courts have jurisdiction  
6 over private TCPA suits).

7 Plaintiff<sup>1</sup> alleges defendants violated the TCPA and various regulations promulgated by  
8 the Federal Communications Commission (“FCC”) by sending more than 2.4 million  
9 transmissions of junk faxes to long-term care facilities throughout the country. (Doc. No. 1 at ¶  
10 3.) These junk faxes were advertisements for various seminars, manuals, DVDs, and programs  
11 on Medicare and Medicaid billing and other human resources management topics. (*Id.* at ¶ 13.)  
12 The faxes invited recipients to visit defendants’ website, [www.polaris-group.com](http://www.polaris-group.com), to purchase the  
13 advertised goods and services. (*Id.*) According to plaintiff, there were more than 2,100 different  
14 advertisements included in the 2.4 million fax transmissions. (*Id.* at ¶ 14.) The complaint alleges  
15 that defendants purchased lists of fax numbers for more than 12,000 long-term care facilities from  
16 a third party, Billian Publishing, Inc., and had no reason to believe these health care providers had  
17 given their permission to receive these advertisements. (*Id.* at ¶ 15.) Further, the advertisements  
18 allegedly failed to include opt-out notices mandated by federal law. (*Id.* at ¶ 16.) Defendants  
19 purportedly hired an outside company, WestFax, Inc., to carry out the fax advertising campaign  
20 *en masse*. (*Id.* at ¶ 17.) While defendant Cannon & Associates (doing business as Polaris Group)  
21 was directly responsible for the advertising campaign, plaintiff maintained RehabCare was  
22 vicariously liable for the TCPA violations, because its products and services were marketed and it  
23 benefited from the junk fax campaign. (*Id.*)

24 The court’s docket reflects extensive litigation of this suit, including resolution by the  
25 court of numerous informal discovery disputes and motions to compel with respect to discovery.  
26 Plaintiff filed a contested motion to certify the class on October 3, 2016. (*See* Doc. Nos. 145,

27 \_\_\_\_\_  
28 <sup>1</sup> There was previously more than one named plaintiff in this action, but plaintiff R. Fellen, Inc.  
was voluntarily dismissed in August 2016. (*See* Doc. Nos. 136, 137.)

1 164.) Shortly thereafter, defendant RehabCare Group, Inc. filed a motion for summary judgment,  
2 arguing in large part that the two defendants were separate entities and defendant RehabCare  
3 Group bore neither direct nor vicarious liability for Cannon’s actions. (*See* Doc. No. 162.)  
4 Approximately a month after the filing of the motion for summary judgment, the court received  
5 notice on November 22, 2016 that the class action had been settled, and the then-pending  
6 certification and summary judgment motions were terminated. (Doc. Nos. 169, 170.) Plaintiff  
7 filed this unopposed motion for preliminary approval of the settlement and certification of a  
8 settlement class on March 21, 2017. (Doc. No. 172.)

9 The proposed class for this settlement is defined as “all persons that were subscribers of  
10 facsimile telephone numbers to which there was a successful transmission of one or more  
11 facsimiles by Defendants (or either of them) between July 17, 2010, and February 4, 2014, in  
12 broadcasts by WestFax Inc.” (Doc. No. 171 at 6.) Officers, directors, and other agents of  
13 Defendants and/or their affiliated companies are expressly excluded from the class, as are  
14 governmental entities and attorneys of record in this action. (*Id.*) The settlement is structured as  
15 a common fund for \$25 million, and seeks appointment of plaintiff as class representative, and  
16 attorneys C. Darryl Cordero of Payne & Fears LLP, Donald R. Fischbach of Dowling Aaron Inc.,  
17 and Joel S. Magolnick of Marko & Magolnick, P.A. as class counsel. (*Id.* at 6–7.) The release  
18 states that the class members who do not opt out of the settlement will release defendants,  
19 affiliated companies, and their agents “for all claims, whether known or unknown based on the  
20 transmission of the Faxes and/or the Action.” (Doc. No. 171 at 14.) This release, by its terms,  
21 pertains only to claims brought in this action, and only to the faxes sent to the class as defined  
22 above. (*See id.* at 4, 6 (defining terms “Faxes” and “Action”).)

### 23 **LEGAL STANDARD**

24 Rule 23 mandates that, “[t]he claims, issues, or defenses of a certified class may be  
25 settled, voluntarily dismissed, or compromised only with the court’s approval.” Fed. R. Civ. P.  
26 23(e). The following procedures apply to the court’s review of such a proposed settlement:

- 27 (1) The court must direct notice in a reasonable manner to all class  
28 members who would be bound by the proposal.

1 (2) If the proposal would bind class members, the court may  
2 approve it only after a hearing and on finding that it is fair,  
reasonable, and adequate.

3 (3) The parties seeking approval must file a statement identifying  
4 any agreement made in connection with the proposal.

5 . . .

6 (5) Any class member may object to the proposal if it requires court  
7 approval under this subdivision (e); the objection may be  
withdrawn only with the court's approval.

8 *Id.*

9 “Courts have long recognized that settlement class actions present unique due process  
10 concerns for absent class members.” *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935,  
11 946 (9th Cir. 2011) (citation and internal quotations omitted). To protect the rights of absent  
12 class members, Rule 23(e) of the Federal Rules of Civil Procedure requires that the court approve  
13 all class action settlements “only after a hearing and on finding that it is fair, reasonable, and  
14 adequate.” Fed. R. Civ. P. 23(e)(2); *Bluetooth*, 654 F.3d at 946. However, when parties seek  
15 approval of a settlement agreement negotiated prior to formal class certification, “there is an even  
16 greater potential for a breach of fiduciary duty owed the class during settlement.” *Bluetooth*, 654  
17 F.3d at 946. Thus, the court must review such agreements with “a more probing inquiry” for  
18 evidence of collusion or other conflicts of interest than is normally required under the Federal  
19 Rules. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998); *see also Bluetooth*, 654  
20 F.3d at 946.

21 When parties seek class certification for settlement purposes only, Rule 23 “demand[s]  
22 undiluted, even heightened, attention” to the requirements for certification. *Amchem Prods., Inc.*  
23 *v. Windsor*, 521 U.S. 591, 620 (1997). Although here the parties do not dispute that the class  
24 exists for the purposes of settlement, the court must examine the propriety of certification under  
25 Rule 23 both at this preliminary stage and at a later fairness hearing. *See, e.g., Ogbuehi v.*  
26 *Comcast*, 303 F.R.D. 337, 344 (E.D. Cal. 2014); *West v. Circle K Stores, Inc.*, No. 04-cv-0438  
27 WBS GGH, 2006 WL 1652598, at \*2 (E.D. Cal. June 13, 2006).

28 //

1 Review of a proposed class action settlement ordinarily proceeds in three stages. *See*  
2 Manual for Complex Litigation (4th) § 21.632. First, the court conducts a preliminary fairness  
3 evaluation and, if applicable, considers preliminary class certification. *Id.* Second, if the court  
4 makes a preliminary determination of the fairness, reasonableness, and adequacy of the settlement  
5 terms, the parties are directed to prepare the notice of certification and proposed settlement to the  
6 class members. *Id.* Third, the court holds a final fairness hearing to determine whether to  
7 approve the settlement. *Id.*; *see also Narouz v. Charter Commc'ns, Inc.*, 591 F.3d 1261, 1266–67  
8 (9th Cir. 2010).

9 Prior to formal class certification, a preliminary fairness determination is appropriate “[i]f  
10 the proposed settlement appears to be the product of serious, informed, non-collusive  
11 negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to  
12 class representatives or segments of the class, and falls within the range of possible approval.”  
13 *Lounibos v. Keypoint Gov't Solutions Inc.*, No. 12-00636, 2014 WL 558675, at \*5 (N.D. Cal.  
14 Feb. 10, 2014) (quoting *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal.  
15 2007)); Newberg on Class Actions § 13:13 (5th ed. 2011); *see also Dearauju v. Regis Corp.*, Nos.  
16 2:14-cv-01408-KJM-AC, 2:14-cv-01411-KJM-AC, 2016 WL 3549473 (E.D. Cal. June 30, 2016)  
17 (“Rule 23 provides no guidance, and actually foresees no procedure, but federal courts have  
18 generally adopted [the process of preliminarily certifying a settlement class].”).

## 19 ANALYSIS

### 20 1. Preliminary Evaluation of Fairness of Proposed Class Action Settlement

21 First, the court must conduct a preliminary fairness evaluation of the proposed class action  
22 settlement, pursuant to Rule 23(e). While it is not a court’s province to “reach any ultimate  
23 conclusions on the contested issues of fact and law which underlie the merits of the dispute,” a  
24 court should weigh the strength of a plaintiff’s case; the risk, expense, complexity, and likely  
25 duration of further litigation; the stage of the proceedings; and the value of the settlement offer.  
26 *Chem. Bank v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992); *see also Officers for Justice*  
27 *v. Civil Serv. Comm'n of City & Cty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). The  
28 court should also watch for collusion between class counsel and defendant. *Id.* A preliminary

1 fairness determination is appropriate “[i]f the proposed settlement appears to be the product of  
2 serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly  
3 grant preferential treatment to class representatives or segments of the class, and falls within the  
4 range of possible approval.” *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d at 1079.

5 a. Negotiations

6 This settlement is clearly the product of serious, substantial, and arms-length negotiations.  
7 Early in the case, in June 2015, defense counsel proposed mediation, which was not agreed to by  
8 plaintiff’s counsel until after some discovery was completed. (Doc. No. 172-7 at ¶ 7) (Decl. of  
9 Fischbach). Plaintiff’s counsel engaged in almost two years’ worth of discovery, serving several  
10 sets of interrogatories, requests for admission, and Rule 34 requests for production of documents.  
11 (Doc. No. 172-2 at ¶ 5) (Decl. of Cordero). This resulted in production of approximately 70,000  
12 documents and 900 pages of written responses. (*Id.*) Several depositions—more than a dozen, all  
13 told—were taken by both plaintiff and defendants. (*Id.* at ¶¶ 5–6.) Both the evidence submitted  
14 by plaintiff as well as the court’s own docket show extensive litigation relating to discovery in  
15 this matter. (Doc. No. 172-9 at ¶¶ 6–12; *see also* Doc. Nos. 44, 65, 68, 72, 75 (informal  
16 discovery dispute conferences); Doc. Nos. 66, 83, 84, 96, 106, 121 (motions to compel)).

17 The first mediation in this case occurred on May 12, 2016 in Los Angeles. (Doc. No. 172-  
18 7 at ¶ 8) (Decl. of Fischbach). That full day session ended with the parties apparently far apart  
19 on many key terms, including both the settlement amount and the structure of any proposed  
20 settlement fund. (*Id.*) Subsequently, plaintiff’s counsel discussed with defense counsel for  
21 defendant Cannon the possibility of a settlement with that defendant only, for the combined \$8  
22 million limit of its two liability insurance policies. (Doc. No. 172-2 at ¶ 13) (Decl. of Cordero).  
23 That offer was rejected, but purportedly opened the door to further mediation. (*Id.*) Litigation  
24 continued for a number of months until a two-day mediation took place in Washington, D.C. in  
25 November 2016. (Doc. No. 172-7 at ¶ 9) (Decl. of Fischbach). At that negotiation, the two sides  
26 reached a settlement amount and a structure for the settlement on the first day, and spent the  
27 second day negotiating other terms of the settlement. (*Id.*; *see also* Doc. No. 172-2 at ¶ 16) (Decl.  
28 of Cordero). A sheet depicting the terms of the agreement was finalized and signed by all parties

1 a week later. (Doc. No. 172-7 at ¶ 9) (Decl. of Fischbach); Doc. No. 172-2 at ¶¶ 16, 18 (Decl. of  
2 Cordero)). Nevertheless, it took the parties several more months of negotiations to agree on a  
3 completed class action settlement agreement. (Doc. No. 172-2 at ¶¶ 19–22) (Decl. of Cordero).

4 Based upon this history, the court is convinced these negotiations were extensive,  
5 involved, and non-collusive, lending weight to the fairness of the settlement.

6 b. Deficiencies

7 A proposed settlement does not meet the test for preliminary fairness if there are any  
8 obvious deficiencies in the proposed agreement. *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d  
9 at 1079. This settlement calls for the establishment of a common fund of \$25 million. (Doc. No.  
10 171 at 7.) Distribution of the funds will be divided based on the number of successful fax  
11 transmissions included within the settlement class, with each class member entitled to a share  
12 based on the number of faxes involved in the settlement that they received. (*Id.*) Payments for  
13 attorneys' fees, expenses, and an incentive award for the class representative are to be paid from  
14 the common fund, and settlement is not conditioned on any particular award of those. (*Id.* at 9.)  
15 The settlement provides a means for class members to exclude themselves from the settlement.  
16 (*Id.* at 12.) Payments from the common fund that are not successfully delivered to class members  
17 will be divided among remaining class members, with no reversionary interest remaining with  
18 defendants. (*Id.* at 13–14.) The release of liability appears reasonably tailored to the claims  
19 presented in the action. (*Id.* at 14–15.) The settlement agreement provides for a settlement  
20 administrator to coordinate notice to the class, any requests for exclusion, and payments to class  
21 members upon final approval. (*Id.* at 8–9, 12.) The court is satisfied there are no obvious  
22 deficiencies with this settlement.

23 c. Preferential Treatment

24 For a proposed settlement to pass a preliminary fairness determination, the proposed  
25 settlement must not provide preferential treatment to certain members of the class or the named  
26 plaintiffs. *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d at 1079. As noted above, the  
27 settlement terms provide for the settlement fund to be divided among class members in proportion  
28 to the number of junk faxes received by that class member. This is, at least preliminarily, a fair

1 and reasonable way to distribute the settlement. The court therefore turns to the attorney’s fees  
2 provisions, the anticipated incentive fees, and the other administrative costs.

3 When a negotiated class action settlement includes an award of attorneys’ fees, the fee  
4 award must be evaluated in the overall context of the settlement. *Knisley v. Network Assocs.*, 312  
5 F.3d 1123, 1126 (9th Cir. 2002). Where, as here, fees are to be paid from a common fund, the  
6 relationship between the class members and class counsel “turns adversarial.” *In re Washington*  
7 *Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1302 (9th Cir. 1994). As a result, the district  
8 court must assume a fiduciary role for the class members in evaluating a request for an award of  
9 attorney fees from the common fund. *Id.*; *Rodriquez v. W. Publ’g Corp.*, 563 F.3d 948, 968 (9th  
10 Cir. 2009). Similarly, while “[i]ncentive awards are fairly typical in class action cases,”  
11 *Rodriquez*, 563 F.3d at 958–59, “district courts must be vigilant in scrutinizing all incentive  
12 awards to determine whether they destroy the adequacy of the class representatives . . .  
13 [C]oncerns over potential conflicts may be especially pressing where . . . the proposed service  
14 fees greatly exceed the payments to absent class members.” *Radcliffe v. Experian Info. Sols.,*  
15 *Inc.*, 715 F.3d 1157, 1165 (9th Cir. 2013) (internal quotation marks and citations omitted).

16 The settlement agreement provides for no specific award of either attorneys’ fees or class  
17 representative incentive awards. (Doc. No. 171 at 9.) Counsel represent in their briefs that they  
18 will ultimately seek an award of attorneys’ fees of no more than one-third of the fund. (*See* Doc.  
19 No. 172-1 at 24.) They will also eventually seek a \$15,000<sup>2</sup> incentive payment for the named  
20 plaintiff here. (*Id.* at 25.) Neither of these is outside the realm of what may be reasonable,  
21 contingent on a sufficient showing, and provides no cause for the court to hesitate in finding the  
22 settlement preliminarily fair. *See Morales v. Stevco, Inc.*, No. 1:09-cv-00704, 2011 WL 5511767  
23 AWI JLT, at \*12 (E.D. Cal. Nov. 10, 2011) (“The typical range of acceptable attorneys’ fees in  
24 the Ninth Circuit is 20% to 33 1/3% of the total settlement value, with 25% considered the

---

25 <sup>2</sup> The court notes the class notice indicates plaintiff will seek a \$25,000 payment. Plaintiff’s  
26 counsel also noted this at the hearing on the pending motion, explaining that plaintiff would be  
27 reducing the incentive payment sought to \$15,000. *See Taylor v. FedEx Freight, Inc.*, No. 1:13-  
28 cv-01137-DAD-BAM, 2016 WL 6038949, at \*8 (E.D. Cal. Oct. 13, 2016) (reducing incentive  
payment from \$25,000 to \$15,000). The notice to be sent to class members and posted on the  
website should reflect this change in the incentive payment sought prior to distribution.

1 benchmark.”) (quoting *Powers v. Eichen*, 229 F.3d 1249, 1256 (9th Cir. 2000)). *See also Taylor*  
2 *v. FedEx Freight, Inc.*, No. 1:13-cv-01137-DAD-BAM, 2016 WL 6038949, at \*8 (approving a  
3 \$10,000 incentive award); *Ontiveros v. Zamora*, 303 F.R.D. 356, 366 (E.D. Cal. 2014) (approving  
4 \$15,000 incentive payments).

5 The administrative costs sought—budgeted at approximately \$94,000—are somewhat  
6 higher than in other proposed settlements submitted to this court for review. *See Syed v. M-I,*  
7 *L.L.C.*, No. 1:12-cv-01718-DAD-MJS, 2017 WL 714367, at \*2 (E.D. Cal. Feb. 22, 2017)  
8 (administration costs up to \$11,500 for \$7 million settlement); *Aguilar v. Wawona Frozen Foods,*  
9 No. 1:15-cv-00093-DAD-EPG, 2017 WL 117789, at \*7 (E.D. Cal. Jan. 11, 2017) (administration  
10 costs of \$45,000 for \$4.5 million settlement); *Mitchinson v. Love’s Travel Stops & Country*  
11 *Stores, Inc.*, No. 1:15-cv-01474-DAD-BAM, 2016 WL 7426115, at \*1 (E.D. Cal. Dec. 22, 2016)  
12 (administration costs up to \$20,000 for \$290,000 settlement). That said, the settlement  
13 administrator proposes to host a case website throughout the remainder of the action until final  
14 settlement approval, as well as a toll-free telephone support hotline, which are more technically  
15 involved than in other settlements this court has had occasion to approve. (*See Doc. No. 172-18*  
16 *at 6.*) Additionally, a number of the costs are only estimated at this point, such as the  
17 approximately \$15,600 budgeted for postage. (*See Doc. No. 172-5*) (itemized estimated budget  
18 from settlement administrator). In short, the settlement is larger, and therefore will require more  
19 extensive involvement on the part of an administrator, than the other settlements referenced  
20 above. None of the proposed payments to class counsel, the class representative, or the  
21 settlement administrator make the court question the preliminary fairness of this settlement.

22 d. Range of Possible Approval

23 To evaluate the fairness of the settlement award, the court should “compare the terms of  
24 the compromise with the likely rewards of litigation.” *See Protective Comm. for Indep.*  
25 *Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424–25 (1968). “It is well-  
26 settled law that a cash settlement amounting to only a fraction of the potential recovery does not  
27 *per se* render the settlement inadequate or unfair.” *In re Mego Fin. Corp. Secs. Litig.*, 213 F.3d  
28 454, 459 (9th Cir. 2000). To determine whether a settlement “falls within the range of possible

1 approval” a court must focus on “substantive fairness and adequacy,” and “consider plaintiffs’  
2 expected recovery balanced against the value of the settlement offer.” *In re Tableware Antitrust*  
3 *Litig.*, 484 F. Supp. 2d at 1080.

4 The total proposed settlement is for \$25 million, which will be paid proportionally to class  
5 members based on the number of junk faxes received. Plaintiff represents the average recovery  
6 appears to be approximately \$1,950 per class member. (Doc. No. 172-1 at 27.) According to  
7 plaintiff, the statutory damages for the 2.4 million violations of the TCPA would be \$1.2 billion.  
8 (*Id.* at 29.) Thus, the settlement is for approximately two percent of the total liability, in  
9 plaintiff’s estimation.

10 In justifying what may appear to be at first glance a low settlement amount in light of the  
11 total potential liability, plaintiff provides several explanations. First, plaintiff notes that this is the  
12 minimum liability for defendant Cannon, against which plaintiff believes it has the strongest case.  
13 (*See* Doc. No. 172-1 at 28.) It is undisputed for purposes of this motion that defendant Cannon,  
14 and not defendant RehabCare, actually orchestrated the sending of the faxes and that there was no  
15 *express* permission given to Cannon by the recipients allowing Cannon to lawfully send these  
16 advertisements. (*See* Doc. No. 172-4 at 8 (Deposition of Charles Cave); Doc. No. 148-3 at 4–5  
17 (suggesting implicit permission was received either due to existing business relationships,  
18 attendance at trade shows, and/or membership in trade associations).) Further, plaintiffs maintain  
19 the FCC has rejected any argument that permission is given to fax ads simply because fax  
20 numbers are listed in the directory of a trade association. *See In re Rules & Regulations*  
21 *Implementing the Tel. Consumer Prot. Act of 1991*, 18 F.C.C. Rcd. 14014, 14129, ¶ 192 (2003).  
22 Plaintiff also asserts that defendant Cannon did not include appropriate opt-out disclosures  
23 mandated by federal law in its advertising faxes. (Doc. No. 172-2 at ¶ 31) (Decl. of Cordero).

24 However, any sizable judgment against defendant Cannon would likely have been in large  
25 part uncollectable. Cannon (dba Polaris) was apparently spun off from RehabCare in September  
26 2014, and is no longer an affiliate of RehabCare (Doc. No. 157-4 at ¶ 3) (Decl. of Charles  
27 Cave). Charles Cave, prior chief operating officer of Cannon/Polaris, acquired an ownership  
28 interest in September 2014 and is the sole member of the company. (Doc. No. 172-11 at ¶ 1)

1 (Decl. of Cave). Cannon/Polaris owes \$1.225 million on a bank loan, and has other debts of  
2 approximately \$870,000. (*Id.* at ¶¶ 2–6.) The company currently has assets worth approximately  
3 \$670,000. (*Id.* at ¶ 5.) The only significant asset the company has to pay a judgment is its  
4 liability insurance with policy limits of \$8 million. (*Id.* at ¶ 7.) Moreover, this insurance policy  
5 apparently also covered defendant RehabCare, and it is plaintiff’s understanding that only \$4  
6 million from the policy was available to indemnify Cannon/Polaris. (Doc. No. 172-1 at 29–30.)

7 Further, while RehabCare is a substantially larger company, proving liability against it  
8 would also be substantially more difficult. Direct liability under the TCPA is imposed on the  
9 “sender” of unsolicited advertisements. *See* 47 C.F.R. § 64.1200(a)(4). The term “sender” in the  
10 regulations means “the person or entity on whose behalf a facsimile unsolicited advertisement is  
11 sent or whose goods or services are advertised or promoted in the unsolicited advertisement.” *Id.*  
12 § 64.1200(f)(10). Because of this, some courts have limited liability where the plaintiff cannot  
13 prove that the advertising of defendant’s goods and services was authorized. *See Cin-Q Auto.,*  
14 *Inc. v. Buccaneers Ltd. P’ship*, No. 8:13-cv-01592-AEP, 2014 WL 7224943, at \*6–7 (M.D. Fla.  
15 Dec. 17, 2014). Defendant RehabCare has maintained that none of its goods or services were  
16 advertised in the faxes and that the faxes were not sent on its behalf. (*See* Doc. No. 162)  
17 (RehabCare’s Motion for Summary Judgment). Some of the faxes at issue mentioned that certain  
18 manuals for sale had been “[d]eveloped by RehabCare Group,” or otherwise include RehabCare’s  
19 name in a header along with other references. (*See* Doc. No. 172-15.) Nevertheless, according to  
20 defendant RehabCare, the manuals at issue were sold only by Cannon/Polaris, and none of its  
21 property, goods, or services were advertised or promoted and no faxes were sent on its behalf.  
22 (Doc. No. 162 at 13–18.) Similarly, while plaintiff believed defendant RehabCare was liable on a  
23 theory of vicarious liability because it retained the ability to control Cannon/Polaris and its junk  
24 fax sending, defendant Cannon’s owner, Charles Cave, testified that RehabCare had no  
25 involvement in the faxes. (*See* Doc. No. 157-4 at ¶¶ 11–14 - Decl. of Cave) (stating that  
26 RehabCare not involved in the creation of the faxes, was not asked for input, review, approval,  
27 and the faxes were sent by Cannon without consulting or informing RehabCare.)

28 ////

1           Only approximately 78,000 of the 2.4 million faxes specifically mentioned RehabCare as  
2 discussed above. (*See* 172-14 at ¶¶6–9) (Decl. of Courtney Porter). Plaintiff represents that these  
3 faxes could have warranted up to \$39.1 million in damages against defendant RehabCare directly.  
4 (Doc. No. 172-1 at 33–34.) Presumably, the rest of the \$1.2 billion would only be recoverable if  
5 RehabCare was held vicariously liable for Cannon/Polaris.<sup>3</sup> Plaintiff also notes defendant  
6 RehabCare has advanced a partial statute of limitations defense to some of these claims which, if  
7 successful, would remove liability for approximately 52,000 of the 78,000 faxes bearing  
8 RehabCare’s name. (Doc. No. 172-1 at 32.) While plaintiff disagrees with this asserted defense,  
9 and notes that tolling of the statute of limitations should apply here, it acknowledges “there was  
10 some risk RehabCare could successfully bar claims for two-thirds of the ‘RehabCare’ faxes.”  
11 (Doc. No. 172-1 at 32–33; *see also* Doc. No. 172-2 at ¶¶ 33–34 (Decl. of Cordero) (noting  
12 concerns regarding the merits of plaintiff’s liability case against defendant RehabCare).)

13           Aside from the merits-based defenses facing plaintiff, counsel notes that there was the risk  
14 of delay inherent even in a successful motion for class certification against RehabCare. Any  
15 successful class certification decision was likely to be subject to an interlocutory appeal, and  
16 counsel believed there was “a not insignificant chance the Ninth Circuit would grant interlocutory  
17 review.” (Doc. No. 172-2 at ¶ 29) (Decl. of Cordero).

18           Several of plaintiff’s attorneys state that they believe the terms are fair and reasonable,  
19 and the best that could have been achieved by way of settlement. (Doc. No. 172-2 at ¶ 23 (Decl.  
20 of Cordero); Doc. No. 172-7 at ¶ 11 (Decl. of Fischbach); Doc. No. 172-8 at ¶ 10 (Decl. of Joel  
21 Magolnick).) The concerns about the inability to recover a large judgment from Cannon, the  
22 higher risk of both certifying a class and proving liability against RehabCare, the risks of further  
23 delay in recovery through various procedural aspects of litigation, and the risks inherent in any  
24 continued litigation are sufficient to warrant settling this matter for significantly less than the total  
25 statutory penalties that may have been awarded under ideal circumstances. The court concludes  
26 that this settlement amount falls within the range of possible approval such that it passes, at the

---

27 <sup>3</sup> There is no evidence before the court about whether defendant RehabCare has sufficient assets  
28 to satisfy a judgment of that size.

1 very least, preliminary muster.

2 Accordingly, the court finds the settlement agreement in this case to be fair for the  
3 purposes of preliminary approval of the settlement.

4 2. *Preliminary Certification of the Settlement Class*

5 In order to preliminarily certify a class,<sup>4</sup> the court must find all of the requirements of  
6 Rule 23(a) are met. *See Hanlon*, 150 F.3d at 1019. As a threshold matter, in order to certify a  
7 class, a court must be satisfied that:

8 (1) the class is so numerous that joinder of all members is  
9 impracticable (the “numerosity” requirement); (2) there are  
10 questions of law or fact common to the class (the “commonality”  
11 requirement); (3) the claims or defenses of representative parties are  
12 typical of the claims or defenses of the class (the “typicality”  
13 requirement); and (4) the representative parties will fairly and  
14 adequately protect the interests of the class (the “adequacy of  
15 representation” requirement).

13 *In re Intel Securities Litigation*, 89 F.R.D. 104, 112 (N.D. Cal. 1981) (citing Fed. R. Civ. P. 23(a)).

14 Once each of these threshold requirements set out under Rule 23(a) is satisfied, a class  
15 may be certified if the class action satisfies the predominance and superiority requirements of  
16 Rule 23(b)(3). *See Amchem*, 521 U.S. at 615 (“To qualify for certification under Rule 23(b)(3), a  
17 class must meet two requirements beyond Rule 23(a) prerequisites: Common questions must

---

18 <sup>4</sup> The 2003 Amendments to Federal Rule of Civil Procedure 23 eliminated the provision stating  
19 that class certification orders “may be conditional,” and circuit courts have subsequently reached  
20 different conclusions about the continued viability of conditional or preliminary certification of  
21 settlement classes under the amended rule. *Compare Wachtel ex rel. Jesse v. Guardian Life Ins.*  
22 *Co. of America*, 453 F.3d 179, 186 n.8 (3d Cir. 2006) (“[T]he 2003 amendments to the Rule  
23 eliminated so-called “conditional” certifications—formerly available under Rule 23(c)(1)(C)”);  
24 *with Denney v. Deutsche Bank AG*, 443 F.3d 253, 270 (2d Cir. 2006) (concluding that  
25 “conditional certification survives the 2003 amendment to Rule 23(c)(1)”). In the absence of  
26 Ninth Circuit guidance on the issue, this court will not depart from the procedure commonly  
27 employed by district courts in this circuit of certifying settlement classes on a preliminary basis  
28 for settlement purposes, and deferring final class certification until after the fairness hearing. *See*  
*Denney*, 443 F.3d at 269 (noting that federal district courts “continue to employ this practice,”  
and that the process of “preliminary” certification is endorsed by the Manual for Complex  
Litigation and Moore’s Federal Practice). Before granting preliminary certification, the court  
nonetheless must carry out a searching, rather than a cursory, Rule 23 analysis. *See Amchem*  
*Prods., Inc.*, 521 U.S. at 622 (requiring “undiluted, even heightened attention [to Rule 23  
requirements] in the settlement context”); *cf. Pointer*, 2016 WL 696582, at \*5 (“[D]espite the  
Supreme Court’s cautions in *Amchem* . . . a cursory approach appears the norm”).

1 ‘predominate over any questions affecting only individual members,’ and class resolution must be  
2 ‘superior to other available methods for the fair and efficient adjudication of the controversy.’”  
3 First, the common questions must “predominate” over any individual questions. While this  
4 requirement is similar to the Rule 23(a)(2) commonality requirement, the standard is much higher  
5 at this stage of the analysis. *Dukes*, 564 U.S. at 359; *Amchem*, 521 U.S. at 624–25; *Hanlon*, 150  
6 F.3d at 1022. While Rule 23(a)(2) can be satisfied by even a single question, Rule 23(b)(3)  
7 requires convincing proof the common questions “predominate.” *Amchem*, 521 U.S. at 623–24;  
8 *Hanlon*, 150 F.3d at 1022. “When common questions present a significant aspect of the case and  
9 they can be resolved for all members of the class in a single adjudication, there is clear  
10 justification for handling the dispute on a representative rather than on an individual basis.”  
11 *Hanlon*, 150 F.3d at 1022. Rule 23(b)(3) also requires a court to find “a class action is superior to  
12 other available methods for the fair adjudication of the controversy.” Fed. R. Civ. P. 23(b)(3).

13 As one district court has summarized:

14 In resolving the Rule 23(b)(3) superiority inquiry, the court should  
15 consider class members’ interests in pursuing separate actions  
16 individually, any litigation already in progress involving the same  
17 controversy, the desirability of concentrating in one forum, and  
potential difficulties in managing the class action—although the last  
two considerations are not relevant in the settlement context.

18 *Palacios v. Penny Newman Grain, Inc.*, No. 1:14-cv-01804-KJM, 2015 WL 4078135, at \*6 (E.D.  
19 Cal. July 2, 2015) (citing *Schiller v. David’s Bridal Inc.*, No. 10-0616, 2012 WL 2117001, at \*10  
20 (E.D. Cal. June 11, 2012)).

21 a. Rule 23(a)

22 i. *Numerosity*

23 A proposed class must be “so numerous that joinder of all members is impracticable.”  
24 Fed. R. Civ. P. 23(a)(1). Here, the proposed class contains 12,976 unique fax numbers to which  
25 the junk faxes were allegedly sent. (Doc. No. 146 at ¶ 16.) This is easily sufficient to make  
26 joinder of all class members as plaintiffs impracticable. See *Monterrubio v. Best Buy Stores, L.P.*,  
27 291 F.R.D. 443, 449 (E.D. Cal. 2013) (numerosity met with approximately 3,500 class members);  
28 *Orvis v. Spokane Cty.*, 281 F.R.D. 469, 473 (E.D. Wash. 2012) (numerosity met with 260 class

1 members); *Campbell v. PricewaterhouseCoopers, LLP*, 253 F.R.D. 586, 594 (E.D. Cal. 2008)  
2 (approximately one thousand members).

3 *ii. Commonality*

4 Rule 23 requires there be “questions of law or fact common to the class.” Fed. R. Civ. P.  
5 23(a)(2). To satisfy Rule 23(a)’s commonality requirement, a class claim “must depend upon a  
6 common contention . . . of such a nature that it is capable of classwide resolution—which means  
7 that determination of its truth or falsity will resolve an issue that is central to the validity of each  
8 one of the claims in one stroke.” *Dukes*, 564 U.S. at 350. As the Supreme Court has further  
9 explained, this frequently necessitates an inquiry that “overlap[s] with the merits of plaintiff’s  
10 underlying claim.” *Id.* at 351. Thus, in *Dukes*, the question was whether Wal-Mart engaged in a  
11 pattern or practice of discrimination, which required looking at “a particular employment  
12 decision.” *Id.* at 352. The Supreme Court concluded that type of claim, under the facts  
13 presented, could not be common among the various class members, because there was no  
14 evidence of a “general policy of discrimination.” *Id.* at 352–53. Here, there are numerous  
15 common threads of both fact and law: whether defendants had permission to send the allegedly  
16 junk faxes; whether defendants’ opt-out notice on the allegedly junk faxes was sufficient; and  
17 whether RehabCare was vicariously liable for Cannon/Polaris’s campaign of faxed  
18 advertisements. Commonality is therefore satisfied.

19 *iii. Typicality*

20 Typicality is satisfied if the representative’s claims arise from the same course of conduct  
21 as the class claims and are based on the same legal theory. *See, e.g., Kayes v. Pac. Lumber Co.*,  
22 51 F.3d 1449, 1463 (9th Cir. 1995) (claims are typical where named plaintiffs have the same  
23 claims as other members of the class and are not subject to unique defenses). Under the rule’s  
24 “permissive standards,” representative claims are typical if they are “reasonably co-extensive  
25 with those of absent class members; they need not be substantially identical.” *Hanlon*, 150 F.3d  
26 at 1020. Plaintiff’s president and administrator, Henry LeVine, Jr., declares that he regularly  
27 reviewed the faxes sent to plaintiff, and they frequently included unwanted fax advertisements  
28 from parties with whom plaintiff did not do business. (Doc. No. 172-10 at ¶¶ 1, 3, 4) (Decl. of

1 LeVine). LeVine states plaintiff has “received numerous junk faxes over the years promoting  
2 products and services offered by ‘Polaris Group.’ A few faxes have also mentioned ‘RehabCare  
3 Group.’” (*Id.* at ¶ 5.) It is clear plaintiff’s claims are analogous to the claims alleged by the class  
4 as a whole. Therefore, the typicality requirement of Rule 23(a) is satisfied.

5 *iv. Adequacy of Representation*

6 Adequacy of representation is met if “the representative parties will fairly and  
7 adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). The Ninth Circuit  
8 has noted that two criteria for determining this have been recognized: “First, the named  
9 representatives must appear able to prosecute the action vigorously through qualified  
10 counsel, and second, the representatives must not have antagonistic or conflicting interests  
11 with the unnamed members of the class.” *Lerwill v. Inflight Motion Pictures, Inc.*, 582  
12 F.2d 507, 512 (9th Cir. 1978). The Ninth Circuit has cautioned that incentive awards for  
13 named plaintiffs may, in certain situations, impact the adequacy of those plaintiffs to serve  
14 as class representatives. *Radcliffe*, 715 F.3d at 1164–65. Particularly, where an incentive  
15 award is specifically conditioned on the named plaintiffs’ endorsement of the settlement  
16 or where there is a significant disparity between the incentive awards and the typical class  
17 member’s recovery, plaintiffs’ interests may be sufficiently unaligned with the class to  
18 find they are not adequate representatives. *Id.*

19 Plaintiff’s attorney Darryl Cordero states that he was chiefly responsible for organizing  
20 this litigation and preparing the complaint. (Doc. No. 172-2 at ¶ 2) (Decl. of Cordero). Attorney  
21 Cordero has spent almost 1,100 hours on this litigation, while other attorneys and paralegals from  
22 his firm have spent more than 3,700 hours on it. (*Id.* at ¶ 3.) According to attorney Cordero, he  
23 has thirty-three years of litigation experience in courts around the country, focusing on complex  
24 business litigation, including several class action TCPA matters. (*Id.* at ¶¶ 36–37.) These matters  
25 included three separate actions involving TCPA claims in recent years that were litigated to  
26 settlements of \$40 million, \$10 million, and \$15 million. (*Id.* at ¶ 37(a)–(c).) Attorney Cordero  
27 has served as lead counsel in several other complex cases, which include other, non-TCPA class  
28 actions. (*Id.* at ¶ 38(a)–(b).) Donald Fischbach, one of the other attorneys of record for plaintiff,

1 indicates he was admitted to practice law in 1972, and has been attorney of record in numerous  
2 class actions, including one litigated to a \$115 million verdict and judgment in 2011. (Doc. No.  
3 172-7 at ¶¶ 1–4) (Decl. of Fischbach). Attorney Fischbach participated in both mediations in this  
4 case. (*Id.* at ¶¶ 8, 9.) Counsel Joel Magolnick, also an attorney of record for plaintiff here,  
5 submitted a declaration noting his extensive experience in class action litigation since 1990. (*See*  
6 Doc. No. 172-8 at ¶¶ 1–6.) Attorney Magolnick also participated in both mediations in this  
7 action. (*Id.* at ¶¶ 8–9.) It is clear that all class counsel are well-qualified to represent the class.

8         Additionally, the aforementioned Mr. LeVine notes he has exercised independent  
9 judgment throughout his involvement in the litigation to represent the class. (Doc. No. 172-10 at  
10 ¶ 7.) He has kept abreast of case developments through his attorneys, coordinated the collection  
11 of various documents requested in discovery by defendants, assisted the attorneys in responding  
12 to interrogatories, and has appeared for deposition. (*Id.* at ¶ 8.) Mr. LeVine attended the first  
13 mediation, and was available by phone during the second mediation. (*Id.* at ¶¶ 9, 10.) According  
14 to Mr. LeVine, he has spent between forty-five and fifty-five hours on this case. (*Id.* at ¶ 12.)  
15 Further, Mr. LeVine states that he knows “of no conflicting interests between Glenoaks and class  
16 members” pertinent to this case. (*Id.* at ¶ 7.) The court finds plaintiff is an adequate class  
17 representative.

18                 b.         Rule 23(b)(3)

19         Aside from the four aforementioned prerequisites to class certification, certification must  
20 also meet one of the three requirements of Rule 23(b). *See Amchem*, 521 U.S. at 615.  
21 Certification is sought here under Rule 23(b)(3). (Doc. No. 70-1 at 25–26.) This provision  
22 requires the court to find that “the questions of law or fact common to class members  
23 predominate over any questions affecting only individual members, and that a class action is  
24 superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed.  
25 R. Civ. P. 23(b)(3). Again, while this requirement is similar to the Rule 23(a)(2) commonality  
26 requirement, the standard is much higher at this stage of the analysis. *Dukes*, 564 U.S. at 359;  
27 *Amchem*, 521 U.S. at 624–25; *Hanlon*, 150 F.3d at 1022. Predominance is essentially “an  
28 assessment of ‘whether proposed classes are sufficiently cohesive to warrant adjudication by

1 representation.” *Torres v. Mercer Canyons, Inc.*, 835 F.3d 1125, 1134 (9th Cir. 2016) (quoting  
2 *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 944 (9th Cir. 2009)).

3 Courts regularly certify TCPA cases based on allegedly junk faxes, because the cases  
4 frequently concern “‘transmission’ of the allegedly illegal fax, and in substantial part ‘do[ ] not  
5 relate to the individual recipients.’” *A&L Indus., Inc. v. P. Cipollini, Inc.*, No. 12-07598 (SRC),  
6 2013 WL 5503303, at \*3 (D.N.J. Oct. 2, 2013) (quoting *Reliable Money Order, Inc. v. McKnight  
7 Sales Co., Inc.*, 281 F.R.D. 327 (E.D. Wis. 2012)); *see also Bee, Denning, Inc. v. Capital Alliance  
8 Grp.*, 310 F.R.D. 614, 628 (S.D. Cal. 2015); *Vandervort v. Balboa Capital Grp.*, 287 F.R.D. 554,  
9 562 (C.D. Cal. 2012). Here, there are numerous disputes common to all the faxes at issue—  
10 whether the faxes were indeed advertisements, whether RehabCare was liable for faxes sent by  
11 Cannon/Polaris, whether the statute of limitations applies, and whether the care facilities’  
12 registration with a trade group constituted prior express permission to receive the advertising.  
13 (See Doc. No. 172-1 at 38–39.) By contrast, there are no apparent individual issues which would  
14 weigh against class certification, since the identity of the recipients of the faxes can be  
15 determined through defendants’ records. This is sufficient for the court to conclude that common  
16 issues would predominate over individual ones, thus warranting certification for settlement  
17 purposes.

18 Further, a class action here is superior to any other available method for adjudicating this  
19 controversy. *See* Fed. R. Civ. P. 23(b)(3). Joinder of the more than 12,000 anticipated class  
20 members would be virtually impossible, and the amount in controversy (an average recovery of  
21 slightly less than \$2,000) would likely be far too little to warrant bringing each of these similar  
22 claims as individual actions. Further, nothing is before the court suggesting that other individual  
23 suits are proceeding on this basis. Finally, class members will be afforded the opportunity to opt  
24 out if they wish to pursue an individual suit. Thus, this dispute appears ideally suited for class-  
25 wide resolution.

### 26 3. Proposed Class Notice and Administration

27 For proposed settlements under Rule 23, “the court must direct notice in a reasonable  
28 manner to all class members who would be bound by the proposal.” Fed. R. Civ. P. 23(e)(1); *see*

1 *also Hanlon*, 150 F.3d at 1025 (“Adequate notice is critical to court approval of a class settlement  
2 under Rule 23(e).”). For a class certified under Federal Rule of Civil Procedure 23(b)(3), the  
3 notice must contain, in plain and easily understood language, (1) the nature of the action; (2) the  
4 definition of the class certified; (3) the class claims, issues, or defenses; (4) that a class member  
5 may appear through an attorney if desired; (5) that the court will exclude members who seek  
6 exclusion; (6) the time and manner for requesting an exclusion; and (7) the binding effect of a  
7 class judgment on members of the class. Fed. R. Civ. P. 23(c)(2)(B). A class action settlement  
8 notice “is satisfactory if it generally describes the terms of the settlement in sufficient detail to  
9 alert those with adverse viewpoints to investigate and to come forward and be heard.” *Churchill*  
10 *Vill., LLC v. General Elec.*, 561 F.3d 566, 575 (9th Cir. 2004) (internal quotations and citations  
11 omitted).

12 Here, the proposed short-form class notice will be sent to putative class members via the  
13 fax number that was used to send the advertisements to them in the first place. (Doc. No. 172-1  
14 at 40.) If delivery by fax fails three times, the settlement administrator will send the notice via  
15 First Class mail to the addresses associated with the fax number in defendants’ records, utilizing  
16 address location services in the event the mail is returned as undeliverable. (*Id.* at 41.) This  
17 short-form notice describes the nature of the action, the prospective class, the claims and issues  
18 raised in the action, the terms of the settlement, the proposed attorneys’ fees and liability releases,  
19 and the time and place of the final fairness hearing. (Doc. No. 171 at 26–27.) The short-form  
20 notice sets out the means and deadlines for class members to object to the proposed settlement or  
21 to seek to be excluded from the settlement. (*Id.*) It advises class members they may, but are not  
22 required to, retain an attorney. (*Id.*) It also notifies prospective class members of the binding  
23 effect of the settlement upon them. (*Id.*) The long-form class notice, which plaintiff represents  
24 will be available online through the settlement administrator (*see* Doc. No. 172-1 at 41), contains  
25 more detailed information with respect to all of the subjects addressed above. (Doc. No. 171 at  
26 35–39.)

27 Additionally, the plaintiffs propose the following schedule:

28 ////

1 //

Event	Date
Deadline for parties to submit Master Facsimile Transmission Database to the Settlement Administrator	Within seven days of the order granting preliminary approval
Deadline for Settlement Administrator to send the notice, Class Member Information Form, and Form W9 (if applicable) to class members	Within twenty-one calendar days after order granting preliminary approval
Deadline for class members to deliver opt-out requests to the Settlement Administrator	July 14, 2017
Deadline for Settlement Administrator to file Exclusion Report	July 19, 2017
Deadline for Defendants to terminate settlement <sup>5</sup>	Within ten days after filing of Exclusion Report
Deadline for Plaintiff to file Motion for Final Approval of Settlement	August 1, 2017
Deadline for Plaintiff and Class Counsel to file Motion for Attorneys' Fees and Costs, and Motion for Incentive Award	August 1, 2017
Deadline for class members to file objections to Motion for Final Approval of Settlement, Motion for Attorneys' Fees and Costs, and Motion for Incentive Award	August 17, 2017 <sup>6</sup>
Deadline for parties to file replies in support of Final Approval, Motion for Attorneys' Fees, and Motion for Incentive Award	August 31, 2017 <sup>7</sup>
Deadline for class members to deliver Class Member Information Form and completed Form W-9 to the Settlement Administrator	September 7, 2017
Hearing on Final Settlement Approval, Motion for Attorneys' Fees and Costs, and	September 7, 2017, 9:30 A.M.

20 \_\_\_\_\_  
21 <sup>5</sup> The settlement provides defendants the right to terminate the settlement agreement if class  
22 members with shares equaling more than 4,000 fax transmission were to opt out of the class.  
23 (Doc. No. 171 at 12–13.) If class members representing between 2,000 and 4,000 fax  
24 transmission opt out of the class, up to \$1 million of the settlement amount will be put into  
escrow to indemnify the defendants from any individual class member's TCPA lawsuit filed  
within one year of the settlement, to the extent judgment in such a suit exceeds \$1 million. (*Id.* at  
13.) If the money in escrow is not used to indemnify defendants, it then reverts back to the class.

25 <sup>6</sup> Initially, plaintiff requested this deadline be set for August 15, 2017, but at hearing on the  
26 pending motion requested it be moved back by two days in light of the agreed upon hearing date  
27 and in order to provide the maximum amount of time for class members to file objections.

28 <sup>7</sup> Plaintiff initially sought to have this date scheduled as August 29, 2017, but suggested this date  
at the hearing on the pending motion.

2 The court finds that the notice and the manner of notice proposed by plaintiff meets the  
3 requirements of Federal Civil Procedure Rule 23(c)(2)(B) and that the proposed method of  
4 delivery is also appropriate in these circumstances. Further, the court finds the above schedule is  
5 appropriate and adopts it.

6 **CONCLUSION**

7 For the reasons stated above:

8 1. The court finds the settlement is preliminarily fair, reasonable, and in the best interests  
9 of the proposed settlement class;

10 2. The following settlement class is appropriate for preliminary certification:

11 All persons that were subscribers of facsimile telephone numbers to  
12 which there was a successful transmission of one or more  
13 facsimiles by defendants (or either of them) between July 17, 2010  
14 and February 4, 2014, in broadcasts by WestFax Inc. Excluded  
15 from the class are officers, directors, and employees, accountants,  
16 and/or agents of defendants; any affiliated company; legal  
17 representatives, attorneys, heirs, successors, or assigns of  
18 defendants, defendants' officers and directors, or of any affiliated  
19 company; any entity in which any foregoing persons have or have  
20 had a controlling interest; any members of the immediate families  
21 of the foregoing persons; any federal, state and/or local  
22 governments, governmental agencies (including the Federal  
23 Communications Commission), government entities, government  
24 body and any attorneys of record in this action; and any person or  
25 entity that has released defendants from all claims based on the  
26 transmission of faxes during the entire class period.

20 3. Plaintiff Dakota Medical, Inc. is designated and appointed representative of the  
21 settlement class;

22 4. C. Darryl Cordero of Payne & Fears LLP is designated and appointed as lead  
23 settlement class counsel in this matter, and Donald R. Fischbach of Dowling Aaron and Joel S.  
24 Magolnick of Marko & Magolnick P.A. are designated and appointed as settlement class counsel;

25 5. KCC LLC is designated and appointed as the settlement administrator in this matter;

26 6. The notices of class action and proposed settlement and class member information  
27 forms submitted by plaintiff are appropriate and approved for distribution to class members,  
28

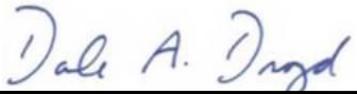
1 provided they are amended as discussed at the hearing on this motion and as otherwise indicated  
2 in this order;

3 7. The above schedule proposed by the parties is hereby incorporated in full, and all  
4 parties, class members, and the settlement administrator shall abide by it, absent good cause being  
5 shown or leave of the court being granted; and

6 8. The settlement administrator is directed to distribute class notice in accordance with  
7 the terms of the settlement agreement.

8 IT IS SO ORDERED.

9 Dated: April 19, 2017

  
UNITED STATES DISTRICT JUDGE

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