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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

KERRY O’SHEA, on behalf of himself  
and all others similarly situated.,

Plaintiff,

v.

AMERICAN SOLAR SOLUTION, INC.  
a California corporation,  
Defendant.

Case No. 3:14-cv-00894-L-RBB

**ORDER:**

**(1) DENYING WITHOUT  
PREJUDICE JOINT MOTION  
FOR PRELIMINARY  
APPROVAL OF SETTLEMENT  
[Doc. 158]**

**(2) GRANTING PLAINTIFF’S  
MOTION TO WITHDRAW  
ATTORNEY [Doc. 159]**

Pending before the Court in this class action alleging violations of the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227 *et seq.* is the joint motion for preliminarily approval of class action settlement. The motion is denied without prejudice for the following reasons:

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1           1.       The representation in the motion and the proposed class notice that class  
2 members will receive \$20 in damages is problematic. Twenty dollars (\$20) is the  
3 maximum class member payment provided under the settlement agreement. The  
4 actual amount depends on the number of claims. However, based on the  
5 representations in Plaintiff's motion, the class members will not receive \$20 unless  
6 the class participation rate is extremely low or the factual representations in support  
7 of the proposed settlement are inaccurate by a wide margin. Pursuant to the settlement  
8 agreement, Defendant is to set aside "a Settlement Fund for a total amount of  
9 \$1,250,000 to pay Approved Claims[.]" Doc. 158-3 at 8. From that amount, a  
10 potential \$170,000 is deducted attorney's fees an estimated \$125,000 for notice and  
11 settlement administration costs, and \$15,000 for requested class representative service  
12 compensation. After deductions, approximately \$940,000 is available to pay the class  
13 members. Defendant estimates that 220,007 members belong to the class called by  
14 Defendant during the class period. If the estimate is accurate, and that every class  
15 member submits one Approved Claim for a cellphone call, each will receive \$4.27.  
16 While the Court recognizes that it is very uncommon in consumer class actions for  
17 every class member to submit a claim, the class members could receive more of a  
18 benefit from proposed Settlement Fund even if the claim rate was low. "[I]t is not  
19 unusual for only 10 or 15% of the class members to bother filing claims." *Briseno v.*  
20 *ConAgra Foods, Inc.*, 844 F.3d 1121, 1131 (9th Cir. 2017) (internal quotation marks  
21 and citation omitted). Ten or 15% are "low participation rates." *Id.* If only 15% of  
22 the class submit Approved Claims as defined in the Settlement Agreement, their  
23 estimated recovery could exceed \$20 while accounting for other costs. As such, the  
24 Court questions why class members would only be afforded a maximum benefit of  
25 \$20 per Approved Claim per individual if the claims rate is less than three percent  
26 (3%). The joint motion does little to answer this question. A realistic estimate of  
27 individual class member recovery is relevant to the settlement fairness determination  
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1 under Federal Rule of Civil Procedure 23(e), see *In re Bluetooth Headset Prod.*  
2 *Liability Litig.*, 654 F.3d 935, 946 (9th Cir. 2011), and to the adequacy of the proposed  
3 notice to the class, see *In re Online DVD Rental Antitrust Litig.*, 779 F.3d 934, 946  
4 (9th Cir. 2015). The estimate of class member recovery provided in the motion and  
5 proposed notice appears inaccurate on its face and lacks a plausible explanation.

6 2. The joint motion wholly fails to identify a *cy pres* recipient in lieu of  
7 direct distribution of damages to silent class members. Federal courts frequently  
8 apply the *cy press* doctrine to allow for an “aggregate calculation of damages, the use  
9 of summary claim procedures, and distribution of unclaimed to indirectly benefit the  
10 entire class.” *Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012) (quoting *Six*  
11 *Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir. 1990)). A  
12 *cy pres* award must be “the next best distribution” to compensating the class members  
13 directly which ensures the settlement retains a logical connection to the plaintiff class  
14 and the underlying claims. *Six Mexican Workers*, 904 F.2d at 1308. A *cy pres* award  
15 must be “guided by (1) the objectives of the underlying statute(s) and (2) the interests  
16 of the silent class members, . . . and [(3)] must not benefit a group too remote from  
17 the plaintiff class.” *Id.* at 1308-09 (internal citations and quotation marks omitted).  
18 Accordingly, to determine “whether the class settlement, take as a whole, is fair,  
19 reasonable, and adequate to all concerned,” a court must determine “whether the  
20 distribution of the approved class settlement complies with [the Ninth Circuit’s]  
21 standards governing *cy pres* awards.” *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1040  
22 (9th Cir. 2011). Without designation of a *cy pres* award recipient and explanation of  
23 the nexus to the plaintiff class, the Court cannot complete its analysis of the  
24 settlement. Therefore, the settlement agreement and joint motion must be amended  
25 consistent with this order.

26 3. The proposed class long-form notice must be amended to indicate, on  
27 Page One, the number of the question that explains the class members rights and  
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1 options in this settlement. For example, to understand the steps necessary to “Attend  
2 A Hearing[,]” the class must see question 22, so reference to the corresponding  
3 question should be mentioned in addition to the current explanation on Page One.  
4 Also, the Court notes that, in the “Am I included?” section on Page Two of the long-  
5 form notice, the parties should modify the language beginning, “If you any question  
6 about *which class* you are a member of,” because the Court only certified one class in  
7 this case. The parties should also review the notices for typographical errors.  
8 Accordingly, the proposed notices must be amended consistent with this order.

9 4. Federal Rule of Civil Procedure 23(e)(5) provides that “[a]ny class  
10 member may object” to the proposed settlement. Although the parties may encourage  
11 class members to provide written objections by a date certain, the Court is not inclined  
12 to prohibit a class member from objecting, if he or she did not file written objections  
13 or did not do so in a timely manner. Accordingly, the proposed notice must be  
14 amended consistent with this order.

15 For the foregoing reasons, the parties’ motion for preliminary approval of class  
16 action settlement [Doc. 158] is denied without prejudice to re-filing after curing the  
17 foregoing defects.

18 Plaintiff seeks leave for attorney Tania Babaie’s (“Counsel”) withdrawal from  
19 this litigation because she is no longer employed by the firm representing Plaintiff.  
20 Defendants have not opposed Plaintiff’s request. Counsel has filed a proof of service  
21 declaring Defendant has been served in compliance with Civil Local Rule 83.3. For  
22 good cause shown, the Court **GRANTS** Plaintiff’s motion [Doc. 159].

23 **IT IS SO ORDERED.**

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25 Dated: June 12, 2019

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28 Hon. M. James Lorenz  
United States District Judge