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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 **ERIK KNUTSON AND KEVIN**
12 **LEMIEUX, INDIVIDUALLY AND**
13 **ON BEHALF OF ALL OTHERS**
14 **SIMILARLY SITUATED,**

15 **PLAINTIFFS,**

16 **V.**

17 **SCHWAN'S HOME SERVICE,**
18 **INC.; AND CUSTOMER**
19 **ELATION, INC.,**

20 **DEFENDANTS.**
21

Case No.: 3:12-cv-00964-GPC-DHB

CLASS ACTION

ORDER GRANTING MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT

(ECF NO. 135)

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23 From April 18, 2008 through August 31, 2012, Defendants Schwan's Home
24 Service, Inc. ("Schwan's") and Customer Elation, Inc. ("Customer Elation")
25 (collectively, "Defendants") placed calls to past or present customers of
26 NutriSystem, Inc. ("NutriSystem"). Plaintiffs Erik Knutson ("Knutson") and Kevin
27 Lemieux ("Lemieux") (together, "Plaintiffs") allege Defendants violated the
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1 Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227 et seq., by placing
2 automated and/or prerecorded telephone calls to persons without their prior express
3 consent, using an automatic telephone dialing system (“ATDS”).

4 Knutson, initiated this lawsuit (the “Action”) on April 18, 2012. Knutson
5 later filed a First Amended Complaint adding Lemieux. (ECF No. 28.) On January
6 25, 2013, Plaintiffs filed a motion for leave to file a Second Amended Complaint
7 (“SAC”) to add defendant Customer Elation. (ECF No. 30.) The Court granted
8 that motion on February 20, 2013. (ECF No. 38.) In their SAC, Plaintiffs assert
9 causes of action for (1) negligent violation of the TCPA and (2) knowing and/or
10 willful violation of the TCPA. On May 8, 2013, Plaintiffs filed a motion for class
11 certification, which the Court granted in part on September 5, 2013. (ECF No. 99.)

12 The Court certified the following Rule 23(b)(3) class (“Class”):

13 All persons who are past or present customers of NutriSystem,
14 Inc., who had or have a number assigned to a cellular telephone
15 service, which number was called by Defendants using an
16 automatic telephone dialing system and/or an artificial or
17 prerecorded voice between April 18, 2008 and August 31,
18 2012. Excluded from the Class are persons who Defendants
19 called for emergency purposes and persons who gave express
20 consent to Defendants to call their cellular telephone number
21 prior to Defendants first placing a call using an automatic
22 telephone dialing system and/or artificial or prerecorded voice.
Also excluded from the Class are Defendants, their officers and
directors, families and legal representatives, heirs, successors or
assigns and any other entity in which Defendants have a
controlling interest, any judge assigned to this case and their
immediate families.

23 (ECF No. 119.) Plaintiffs seek, in their SAC, \$500 per negligent violation and
24 \$1,500 per willful violation as well as injunctive relief.

25 Presently before the Court is Plaintiffs’ Motion for Preliminary Approval of
26 Class Action Settlement. (ECF No. 135.) Pursuant to the Parties’ Settlement
27 Agreement, Defendants do not oppose this Motion.
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DISCUSSION

Prior to granting approval of a class action settlement, a court (1) assesses whether a class exists and (2) determines whether the proposed settlement is “fundamentally fair, adequate, and reasonable.” Stanton v. Boeing Co., 327 F.3d 938, 952 (9th Cir. 2003) (internal quotations omitted). Here, the Court has already granted class certification pursuant to Fed. R. Civ. P. 23(b)(3) and thus first turns to examining the fairness of the Settlement Agreement (“SA”) followed by the questions of a claims administrator and class notice.

I. THE SETTLEMENT

Rule 23(e) requires the Court to determine whether a proposed settlement is “fundamentally fair, adequate, and reasonable.” Stanton, 327 F.3d at 959 (internal quotations omitted). In making this determination, a court may consider: (1) the strength of the plaintiff’s case; (2) “the risk, expense, complexity, and likely duration of further litigation”; (3) “the risk of maintaining class action status throughout the trial”; (4) “the amount offered in settlement”; (5) “the extent of discovery completed and the stage of the proceedings”; (6) “the experience and views of counsel”; (7) “the presence of a governmental participant”; and (8) “the reaction of the class members to the proposed settlement.” Id. (internal quotations omitted). Moreover, the settlement may not be the product of collusion among the negotiating parties. In re Mego Fin Corp. Sec. Litig., 213 F.3d 454, 458 (9th Cir. 2000).

Because some of these factors cannot be fully assessed until the Court conducts a final fairness hearing, “a full fairness analysis is unnecessary at this stage.” See Alberto v. GMRI, Inc., 252 F.R.D. 652, 665 (E.D. Cal. 2008) (internal quotations omitted). At the preliminary approval stage, a court need only review the parties’ proposed settlement to determine whether it is within the permissible “range of possible approval” and thus, whether the notice to the class and the

1 scheduling of formal fairness hearing is appropriate. Id. at 666.

2 **A. THE STRENGTH OF PLAINTIFFS' CASE AND THE RISK, EXPENSE,**
3 **COMPLEXITY AND LIKELY DURATION OF FURTHER LITIGATION, AND THE**
4 **RISK OF MAINTAINING CLASS ACTION STATUS THROUGHOUT THE TRIAL**

5 Both sides recognize the risks of continuing to litigate this Action. Class
6 Counsel understands the uncertainties associated with complex, class-action
7 litigation. Defendants argued in their Motion for Summary Judgment that, due to
8 the circumstances surrounding the Class Members' relationships with NutriSystem
9 and Schwan's, all Class Members consented to receiving calls on their cell phones
10 The law interpreting the TCPA and its consent requirement has been in flux,
11 making it difficult for Class Members to prove lack of consent under the TCPA.
12 See, e.g., Baird v. Sabre Inc., 2014 WL 320205 (C.D. Cal. Jan. 28, 2014).

13 Moreover, Defendants filed a separate motion to decertify the Class or, in the
14 alternative, to amend the Class definition based on arbitration and forum selection
15 clauses in the Terms and Conditions agreed to by individuals purchasing products
16 from NutriSystem. Defendants argue the arbitration and forum selection clauses
17 fracture the Class and create individualized issues that defeat the requirements for
18 class certification or call for this Court to reconsider the Class definition. Although
19 now withdrawn, Defendants also filed an appeal of this Court's class certification
20 order. Both the motion to decertify and the appeal present risks regarding the
21 continued certification of the Class.

22 On the other hand, Defendants also understand the risks of litigation. Even if
23 only a small percentage of Class Members recover damages, a large demand award
24 could result. Further litigation would be very expensive. Defendants have already
25 expended considerable resources on discovery and motions practice, as well as to
26 ascertain the 16,691 unique cellular telephone numbers, which represent the
27 certified Class.

1 Taken together, the costs, the risks to both sides, and delays of continued
2 litigation weigh in favor of preliminary approval of the proposed settlement.

3 **B. THE EXTENT OF DISCOVERY AND THE STAGE OF THE PROCEEDINGS**

4 As to class-action settlements, “formal discovery is not a necessary ticket to
5 the bargaining table where the parties have sufficient information to make an
6 informed decision about settlement.” Linney v. Cellular Alaska P’ship, 151 F.3d
7 1234, 1239 (9th Cir. 1998) (internal quotations omitted).

8 Here, the Parties appear to have engaged in substantial discovery. In addition
9 to participating in formal discovery (including the exchange of requests for
10 admissions, interrogatories, and document requests), the Parties have taken
11 extensive depositions. Defendants have taken both named Plaintiffs’ depositions.
12 Plaintiffs have taken nine depositions, and there have been numerous discovery
13 disputes over call data. Plaintiffs also took the deposition of non-party NutriSystem
14 regarding telephone numbers provided by NutriSystem to Schwan’s. Moreover, the
15 Parties engaged in multiple lengthy direct negotiations, as well as two full days of
16 mediation before the Honorable Leo S. Papas (Ret.) and one full day of mediation
17 before the Honorable Leo Wagner (Ret.).

18 The Parties also engaged in formal discovery to determine the Class size.
19 Plaintiffs requested information on not only Class size, but how Defendants
20 identified the Class certified by the Court. To do this, Defendants obtained a list of
21 unique mobile numbers associated with NutriSystem customers that received calls
22 on their cellular telephones using an ATDS or prerecorded messages and compared
23 that list of numbers against its system of record, which stores profile information
24 for all of Defendants’ customers. That compiled list constitutes the Class list.

25 The Parties appear to have thoroughly investigated, litigated, and evaluated
26 the factual strengths and weaknesses of this case and engaged in sufficient
27 discovery to support the Settlement. Accordingly, the extent of discovery and stage
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1 of the proceedings weigh in favor of preliminary approval.

2 **C. EXPERIENCE OF CLASS COUNSEL**

3 Class Counsel have experience prosecuting class actions relating to privacy
4 and consumer rights, including TCPA actions. Class Counsel were recently
5 approved as class counsel in a TCPA action in Barani v. Wells Fargo Bank, N.A.,
6 2014 U.S. Dist. LEXIS 49838 (S.D. Cal. April 9, 2014). Counsel on both sides
7 believe this Settlement is fair and reasonable in light of the uncertainties of
8 continued certification and litigation. Accordingly, this factor weighs in favor of
9 preliminary approval. See Ellis v. Naval Air Rework Facility, 87 F.R.D. 18 (N.D.
10 Cal. 1980); In re Omnivision Techs., Inc., 559 F. Supp. 2d 1036, 1043 (N.D. Cal.
11 2008) (“The recommendations of plaintiffs’ counsel should be given a presumption
12 of reasonableness.” (internal quotations omitted)).

13 **D. THE AMOUNT OFFERED IN SETTLEMENT**

14 A settlement is not judged against only the amount that might have been
15 recovered had the plaintiff prevailed at trial, nor must the settlement provide 100%
16 of the damages sought to be fair and reasonable. Linney, 151 F.3d at 1242. There
17 is a “range of reasonableness” in determining whether to approve settlements,
18 “which recognizes the uncertainties of law and fact in any particular cause and the
19 concomitant risks and costs necessarily inherent in taking any litigation to
20 completion.” Frank v. Eastman Kodak Co., 228 F.R.D. 174, 186 (W.D.N.Y. 2005)
21 (quoting Newman v. Stein, 464 F.2d 689, 693 (2d. Cir. 1972)). The adequacy of
22 the amount recovered must be judged as “a yielding of absolutes Naturally,
23 the agreement reached normally embodies a compromise; in exchange for the
24 saving of cost and elimination of risk, the parties each give up something they
25 might have won had they proceeded with litigation.” Officers for Justice v. Civil
26 Serv. Comm’n, 688 F.2d 615, 624 (9th Cir. 1982) (internal quotations omitted). “It
27 is well-settled law that a cash settlement amounting to only a fraction of the
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1 potential recovery will not per se render the settlement inadequate or unfair.” Id. at
2 628.

3 Here, Plaintiffs assert causes of action for (1) negligent violation of the
4 TCPA; and (2) knowing and/or willful violation of the TCPA. The TCPA provides
5 statutory damages of \$500 for each negligent violation and \$1,500 for each willful
6 violation.

7 Defendants have agreed to establish a maximum benefit in the amount of:

8
9 (1) Up to \$1,200,000 in cash for the payment of:

10 (a) all valid claims for cash benefits in the amount of \$20 per
11 claiming Class Member;

12 (b) up to \$38,000 for Notice and other Administrative Expenses;
13 and

14 (c) the Fee and Expense Award; and

15 (2) Up to \$1,335,280 in Schwan’s merchandise vouchers, entitling each
16 claiming class member to a voucher in the amount of \$80

17 (SA § 4.1.)

18 The Settlement Agreement provides for a maximum recovery by each
19 claiming Class Member of a \$20 settlement check plus a merchandise voucher in
20 the amount of \$80 that may be used to purchase products from Schwan’s website.
21 This recovery amount will not be diluted based on the number of claims submitted,
22 as the settlement benefit is large enough to cover 100% participation without a pro
23 rata reduction. (SA § 4.) Each Settlement Class Member shall be entitled to make
24 only one claim per cellular telephone number, regardless of the number of calls
25 received by each cellular telephone number. (SA §§ 4 & 5.)

26 The award each Class Member will receive is fair, appropriate, and
27 reasonable given the purposes of the TCPA and in light of the anticipated risk,
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1 expense, and uncertainty of continued litigation, as discussed above.

2 A proposed settlement may be acceptable even though it amounts to only a
3 percentage of the potential recovery that might be available to Class Members at
4 trial. See Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc., 221 F.R.D. 523, 527
5 (C.D. Cal. 2004); Mego Fin. Corp., 213 F.3d 454, 459 (9th Cir. 2000). The Court
6 finds the amounts provided by the Settlement Agreement to be adequate, at least at
7 this stage of the proceedings. See, e.g., Arthur v. Sallie Mae, Inc., 2012 WL
8 4075238 (W.D. Wash. Sept. 17, 2012) (approving TCPA settlement where each
9 claiming class member was estimated to receive recovery between \$20 and \$40);
10 Gutierrez v. Barclays Grp., 3:10-cv-1012-DMS, ECF No. 58 (S.D. Cal. Mar. 12,
11 2012) (approving TCPA settlement where each of the approximate 66,000 class
12 members received approximately a \$100 credit or settlement check); Adams v.
13 AllianceOne, 3:08-cv-0248-JAH, ECF No. 137 (S.D. Cal. Sept. 28, 2012)
14 (approving TCPA class settlement where each claiming class member received
15 \$40); Bellows v. NCO Fin. Sys., Inc., 3:07-cv-1413-W, ECF Nos. 53 & 54 (S.D.
16 Cal. July 13, 2009) (approving TCPA class settlement where each claiming class
17 member received \$70)

18 The voucher component of this Settlement is similar to the preliminarily
19 approved class action settlement in Wojcik v. Buffalo Bills, Inc., 3:12-cv-2414-
20 SDM, ECF No. 73 (M.D. Fla. April 17, 2014). There, a maximum settlement fund
21 of \$2,487,745 was created for class members to make claims for debit cards
22 redeemable for merchandise purchases at the official online retail store or in person
23 at the retail store. The tiered claim amounts ranged from merchandise debit cards
24 in the amount of \$57.50 to \$75.00. The district court preliminarily approved the
25 settlement. In this case, Plaintiffs and the Class Members will recover not only \$80
26 in merchandise certificates, but also a \$20 settlement check for each Class Member.
27 Accordingly, the Court finds the amounts offered in the settlement to be adequate at
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1 this stage of the proceedings.

2 **II. APPOINTING THE CLAIMS ADMINISTRATOR**

3 The Parties propose that the Court appoint Kurtzman Carson Consultants
4 (“KCC”) as the claims administrator for this Action. (SA § 7.1.) KCC specializes
5 in providing administrative services for class-action litigation and has experience in
6 administering consumer-protection and privacy class-action settlements.
7 Accordingly, the Court **GRANTS** Plaintiffs’ motion to appoint KCC as the Claims
8 Administrator.

9 **III. APPROVING CLASS NOTICE**

10 Class notice must be “reasonably calculated, under all the circumstances, to
11 apprise interested parties of the pendency of the action and afford them an
12 opportunity to present their objections.” See Mullane v. Cent. Hanover Bank &
13 Trust Co., 339 U.S. 306, 314 (1950). Moreover, the class notice must satisfy the
14 content requirements of Rule 23(c)(2)(B), which provides that the notice must
15 clearly and concisely state in plain, easily understood language:

16 (i) the nature of the action; (ii) the definition of the class
17 certified; (iii) the class claims, issues, or defenses; (iv) that a
18 class member may enter an appearance through an attorney if
19 the member so desires; (v) that the court will exclude from the
20 class any member who requests exclusion; (v) the time and
21 manner for requesting exclusion; and (vii) the binding effect of
22 a class judgment on members under Rule 23(c)(3).

23 Here, the proposed notice provides: (1) information on the meaning and
24 nature of the class; (2) the terms and provisions of the proposed settlement; (3) the
25 costs and fees to be paid out of the settlement benefit; (4) the procedures and
26 deadlines for submitting claim forms, objections, and/or requests for exclusion; and
27 (5) the date, time and place of the Final Fairness Hearing.

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1 In addition, the methods of Notice, more fully set forth below are reasonable.

2 **CONCLUSION & ORDER**

3 Based on the foregoing, **IT IS HEREBY ORDERED** that:

4 1. JURISDICTION: The Court has jurisdiction over the subject matter of
5 the Action and over all settling parties hereto.

6 2. PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT: The
7 Court preliminarily finds the Settlement of the Action, on the terms and conditions
8 set forth in the Settlement Agreement, including all exhibits thereto, is in all
9 respects, fundamentally fair, reasonable, adequate, and in the best interests of the
10 Class Members, taking into consideration the benefits to Class Members; the
11 strengths and weaknesses of Plaintiffs' case; the complexity, expense, and probable
12 duration of further litigation; and the risk and delay inherent in possible appeals.
13 The Court finds that Notice of the settlement should be given to persons in the
14 Class and a full hearing should be held on approval of the settlement.

15 3. CAFA NOTICE: Defendants shall be responsible for serving the Class
16 Action Fairness Act ("CAFA") notice required by 28 U.S.C. § 1715(b) within ten
17 (10) days of entry of this Order. Defendants may delegate this responsibility to the
18 Claims Administrator. At least fourteen (14) days prior to the Final Fairness
19 Hearing, Defendants shall file a declaration confirming compliance with the CAFA
20 notice requirement.

21 4. CLASS MEMBERS: Pursuant to Federal Rule of Civil Procedure
22 23(b)(3), the Action remains certified as a class action on behalf of the following
23 Class Members:

24 All persons who are past or present customers of NutriSystem, Inc.,
25 who had or have a number assigned to a cellular telephone service,
26 which number was called by Defendants using an automatic telephone
27 dialing system and/or artificial or prerecorded voice between April 18,
28 2008 and August 31, 2012. Excluded from the Class are persons who
Defendants called for emergency purposes and persons who gave
express consent to Defendants to call their cellular telephone number

1 prior to Defendants first placing a call using an automatic telephone
2 dialing system and/or artificial or prerecorded voice. Also excluded
3 from the Class are Defendants, their officers and directors, families and
4 legal representatives, heirs, successors or assigns and any other entity
in which Defendants have a controlling interest, any judge assigned to
this case and their immediate families.

5 5. CLASS REPRESENTATIVES AND CLASS COUNSEL
6 APPOINTMENT: For purposes of the Court considering preliminary approval, the
7 Court continues the appointment of Knutson and Lemieux as Class Representatives
8 and Abbas Kazerounian of Kazerouni Law Group, APC and Joshua B. Swigart of
9 Hyde & Swigart as Class Counsel.

10 6. NOTICE AND CLAIMS PROCESS: The Court approves the form and
11 method of Notice as set forth in the Settlement Agreement. Defendants shall
12 provide the Class list for Class Members whose cellular telephone numbers were
13 identified from its databases to the Claims Administrator and Class Counsel.
14 Within twenty-one (21) days following entry of this Order, the Claims
15 Administrator shall mail a postcard-type Direct Mail Notice to each known Class
16 Member at the address provided by Defendants, based on the information contained
17 in Defendants' databases, and update those addresses for which a postcard is
18 returned with a forwarding address. The Direct Mail Notice shall reference a
19 website established for this settlement, and that website shall contain the full details
20 of the settlement and permit the filing of claims on the website. The mailed Notices
21 shall also contain the Claims Administrator's toll free telephone number so that
22 Class Members can inquire about the settlement and be directed on how to
23 download claim forms, fill them out, and submit them. At least fourteen (14) days
24 prior to the Final Fairness Hearing, the claims administrator shall file a declaration
25 of compliance with the Notice procedures set forth in the Agreement. The Court
26 finds that the form and methods of Notice set forth in the Agreement satisfy the
27 requirements of Federal Rule of Civil Procedure 23(c)(2)(B), due process, and
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1 constitute the best practicable procedure under the circumstances.

2 7. SETTLEMENT AND CLAIMS PROCESS: The Court preliminarily
3 approves the \$2,535,280 settlement as fair, reasonable, and adequate for members
4 of the Class. The Court preliminarily approves the process set forth in the
5 Agreement for reviewing, approving and paying claims after deducting Settlement
6 Costs.

7 8. EXCLUSIONS: Any Class Member who desires to opt-out of the Class
8 must send a written request for exclusion to the claims administrator, postmarked
9 no later than ninety (90) days after Notice is mailed to Class Members. The claims
10 administrator's address shall be provided in the Notice to the Class Members and
11 shall be posted on the website. The claims administrator shall provide a list of those
12 persons requesting exclusion to Class Counsel and Defendants' counsel after the
13 deadline for exclusions passes, but no later than twenty-one (21) days prior to the
14 Final Fairness Hearing. A copy of that list will be filed with the Motion for Final
15 Approval of the Class Action Settlement.

16 9. To be effective, a written request for exclusion must contain the Class
17 Member's full name, address, cellular telephone number, and be signed by the
18 Class Member. The request must also state generally that the person wishes to be
19 excluded from the Settlement.

20 10. Any Class Member who submits a valid and timely request for exclusion
21 shall not be a Settlement Class Member and shall not be bound by the Settlement
22 Agreement.

23 11. OBJECTIONS: Any Class Member who intends to object to the fairness
24 of the Settlement must file a written objection with the Court, at United States
25 District Court, Southern District of California, Office of the Clerk, 333 West
26 Broadway, Suite 420, San Diego, CA 92101, no later than ninety (90) days after
27 Notice is mailed to Class Member. Further, any such Class Member must within
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1 the same period, provide a copy of the written objection to Class Counsel and
2 Defense counsel, whose addresses shall be set forth in the website's Notice advising
3 the Class Members about objections.

4 12. To be considered, the written objection must be signed by the Class
5 Member and state: the Class Members full name, address, telephone number, the
6 reasons for objecting, and whether the objector intends to appear at the Final
7 Fairness Hearing on their own behalf or through counsel. Further, the Class
8 Member must attach to the written objection any documents supporting the
9 objection.

10 13. Any Class Member who does not file a valid and timely objection to the
11 settlement shall be barred from seeking review of the settlement by appeal or
12 otherwise.

13 14. FINAL FAIRNESS HEARING: The Court shall conduct a hearing
14 ("Final Fairness Hearing") on December 12, 2014, at 1:30 p.m. at 221 West
15 Broadway, Courtroom 2D, San Diego, CA 92101. The Final Fairness Hearing may
16 be rescheduled or continued by the Court without further notice to the Class
17 Members. At the hearing, the Court will consider the following issues:

18 a. Whether the proposed settlement is fundamentally fair, reasonable,
19 adequate, and in the best interest of the Settlement Class Members and should be
20 finally approved by the Court;

21 b. Whether the Final Judgment and Order of Dismissal With Prejudice, as
22 provided under the Agreement, should be entered, dismissing the Action with
23 prejudice and releasing the Released Parties;

24 c. Such other issues, as the Court deems appropriate.

25 15. Attendance at the Final Fairness Hearing is not necessary. Class
26 Members need not appear at the hearing or take any other action to indicate their
27 approval of the proposed class action settlement. As set forth above, however,
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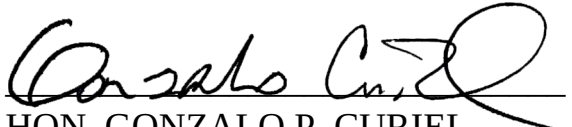
1 Class Members wishing to be heard are required to indicate in their written
2 objection whether they intend to appear at the Final Fairness Hearing.

3 16. If the Agreement is not finally approved for any reason, then this Order
4 shall be vacated without further order, the Agreement shall have no force and
5 effect, and the Parties' rights and defenses shall be restored, without prejudice, to
6 their respective positions as if the Agreement had never been executed and this
7 Order never entered.

8 17. The hearing currently set for July 18, 2014, is **VACATED**.

9 **IT IS SO ORDERED.**

10 DATED: July 14, 2014


HON. GONZALO P. CURIEL
U.S. District Judge