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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA, FRESNO DIVISION

DAKOTA MEDICAL, INC., individually, and on behalf of all others similarly situated,

Plaintiff,

v.

REHABCARE GROUP, INC., *et al.*,

Defendants.

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

Hon. Dale A. Drozd

Plaintiff's Memorandum of Points and Authorities in Support of Plaintiff's Motion for Final Approval of Settlement and Certification of Settlement Class

[Fed. R. Civ. P. 23]

Date: Sept. 7, 2017
Time: 9:30 A.M.
Courtroom: 5

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Introduction

For several years, long-term care facilities across the country had been pummeled with junk faxes advertising products sold by "Polaris Group." Two prior lawsuits could not bring relief to the facilities for the resulting costs and disruption of their operations. This litigation did. If approved by the Court, over 12,000 skilled nursing facilities will share a $25 million recovery. Class members will be paid automatically by the settlement administrator without having to submit claims, and no settlement funds will revert to the Defendants.

In April 2017, the Court conditionally certified the class of "Polaris Group" junk fax recipients, preliminarily approved the proposed settlement, and directed that notice of the proposed settlement be delivered to the class. (Doc. No. 177.) The response has been overwhelmingly positive. Over 97 percent of the class received informative notices of the proposed settlement and have been able to access the settlement website, with links to key case documents. Hundreds of class members have updated their contact information to secure their payments. Only *one* out of 12,867 class members elected to opt out and, to date, none have expressed any objections. And numerous care facilities and health systems, many of whom have large stakes in this recovery, have stepped forward to offer strong support for the settlement.

Plaintiff/class representative Glenoaks Convalescent Hospital now asks the Court to confirm the settlement class and grant final approval to the settlement. Nothing has changed the certification analysis; the same considerations that supported the Court's conditional certification now warrant final certification of the settlement class.

The proposed class settlement meets and exceeds Rule 23(e)'s standard of fundamental fairness, adequacy, and reasonableness. It is the first of three legal initiatives

that will finally compensate thousands of care facilities for "Polaris Group" junk faxes. The settlement avoids further litigation that would expose the class to numerous legal and practical risks. The party that conducted the fax-blast operation, Defendant Cannon & Associates, is for all practical purposes judgment proof. The other Defendant, RehabCare Group, Inc., steadfastly denied responsibility for Cannon's fax-blast activities, and even if it were ultimately found liable, could not begin to satisfy the largest potential judgment.

The settlement was achieved only after more than two years of hard-fought litigation against formidable defense teams, several days of mediated settlement discussions, and often contentious negotiations over the final settlement terms. It apportions all settlement proceeds equitably among the entire class based on the number of fax ads they received. The strong class support for the settlement and final approval reflects the settlement's tangible benefits for class members and its fundamental fairness. The settlement merits final approval.

The Proposed Class Settlement

The Court recently examined the proposed Class Action Settlement Agreement in depth and, on April 19, 2017, granted Glenoaks' motion for preliminary approval. (*See* Doc. No. 177, *passim*.) The Court's order conditionally certified a settlement class consisting of:

> All persons that were subscribers of facsimile telephone numbers to which there was a successful transmission of one or more facsimiles by defendants (or either of them) between July 17, 2010 and February 4, 2014, in broadcasts by WestFax, Inc. Excluded from the class are officers, directors, and employees, accountants, and/or agents of defendants; any affiliated company; legal representatives, attorneys, heirs, successors, or assigns of defendants, defendants' officers and directors, or of any affiliated company; any entity in which any foregoing persons have or have had a controlling interest; any members of the immediate families of the foregoing persons; any federal, state and/or local governments, governmental agencies

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> (including the Federal Communications Commission), government entities, government body and any attorneys of record in this action; and any person or entity that has released defendants from all claims based on the transmission of faxes during the entire class period. (Doc. No. 177, p. 21.)

If finally approved, the settlement would establish a non-reversionary $25 million common fund for recipients of "Polaris Group" faxes between July 17, 2010, and February 4, 2014. (Doc. No. 171, p. 7.) On a gross basis, before expenses and fees, the settlement averages about $1,943 per class member. Costs of notice and settlement administration, attorneys' fees and expenses, and any incentive award to Glenoaks will be paid directly from the fund. (*Id.*, pp. 7-9.) After projected notice and settlement administration expenses, and assuming attorneys' fees and expenses and an incentive award are granted in the requested amounts, approximately $16,414,000, or an average of $1,339 per eligible class member, would be distributed to the class. (Jue Decl. ¶¶ 12-13.)[1] Some health systems with multiple facilities will receive in the range of $300,000. (*See* Pierce Decl. ¶ 7 (219 Golden Living facilities projected to recover $296,000).)

All net settlement proceeds will be distributed automatically to class members at addresses compiled from Defendants' records, without the need for class members to submit claims. (Doc. No. 171, pp. 10, 13.) If net settlement funds remain after the initial distribution, they will be redistributed in accordance with section 3.07 of the Restatement of the Law of Aggregate Litigation. (*Id.*, p. 14.)[2] This means there would be an additional

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[1] The settlement administrator estimates that $16,413,829 will be available for distribution to the class, after payment of notice and settlement administration expenses and assuming payment of the class representative incentive award and attorneys' fees and reimbursement of expenses in the requested amounts. (Jue Decl. ¶ 13.) KCC reports that as of today, 12,262 class members, or over 95 percent of the class, would be eligible for the distribution. (*Id.* ¶ 12.)

[2] Section 3.07(b) states that "[i]f the settlement involves individual distributions to class members and funds remain after distributions (because some class members could not be identified or chose not to participate), the settlement should presumptively provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such

(footnote continued)

distribution to all participating class members, if economically viable. (*Id.*) Only if a further distribution to the class is not economically viable, class representative Glenoaks will propose a *cy pres* recipient whose interests most closely approximate those of the class. (*Id.*) *See Nachshin v. AOL, LLC*, 663 F.3d 1034, 1040 (9th Cir. 2011).

Class members will grant a limited release to Defendants and their affiliated parties. (Doc. No. 171, p. 14.) The release is narrowly tailored to claims of the type made in this case—only those based on the *transmission* of "Faxes" or the "Action" (as both terms are defined in the settlement agreement). (*Id.*)

As discussed in the Court's preliminary approval decision, settlement was achieved only after two years of heavily-contested litigation against two highly-skilled legal defense teams (including a former judge in this Court), punctuated with numerous discovery battles, two intense mediations, and protracted negotiations over the terms of the Class Action Settlement Agreement. (*See* Doc. No. 177, pp. 6-7; Doc. No. 172-2 (Cordero Decl.) ¶¶ 15-22; Brown Decl. ¶¶ 4-8; Cordero Decl. ¶ 14(i).) At the time settlement in principle was reached, two significant motions were pending —Glenoaks' amended class certification motion, and Defendant RehabCare Group's motion for summary judgment. The settlement removes the risks associated with these and other defense challenges and provides substantial, certain recovery to class member facilities.

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further distributions impossible or unfair." The Restatement provides that if a redistribution cannot be made under these criteria, remaining funds should be distributed to a *cy pres* recipient "whose interests reasonably approximate those being pursued by the class." § 3.07(c).

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The Class Notice

In its preliminary approval order, the Court directed the settlement administrator to send a short-form class notice and a Class Member Information Form to all known class members. (Doc. No. 177, p. 22.) On May 10, 2017, KCC sent these documents via facsimile to all 12,867 telephone numbers to which "Polaris Group" faxes had been successfully transmitted. (Jue Decl. ¶ 3; Nemec Decl. ¶¶ 6-9.)[3] The administrator successfully transmitted fax notices and CMIFs to some 10,898 class members. (*Id.*) KCC then sent the notices and CMIFs by United States mail to the 1,855 class members that could not be reached by fax notice. (Jue Decl. ¶ 4.) Through this method, KCC was able to deliver notice to another 1,579 members. (*Id.* ¶¶ 4-5.) For the 276 mail notices that were returned, KCC re-mailed 12 to new addresses that had been located through additional searches. (*Id.*)

All told, KCC successfully reached 12,489 presumptive class members, representing over 97 percent of the class. (Jue Decl. ¶ 6.) Although the settlement does not require members to complete claim forms, to date 272 class members have completed and returned CMIFs to provide or update their contact information. (*Id.* ¶ 11.)[4] Only one

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[3] The Master Facsimile Transmission Database, a compendium of all 12,867 telephone numbers, was assembled cooperatively by the parties earlier this year. (*See* Doc. No. 172-12 (Nemec Decl.) ¶¶ 6-11; Doc. No. 172-13 (Campagne Decl.) ¶¶ 2-9.) The parties were able to match names and addresses to 12,075 telephone numbers, or 93 percent of the class. (Doc. No. 172-12 (Nemec Decl.) ¶ 10; Doc. No. 172-13 (Campagne Decl.) ¶ 8.)

[4] The CMIF enabled members to update or correct their names and addresses. (Jue Decl. ¶ 3.) A different version of the form was sent to class members with missing names or addresses; this form asked the member to provide a complete name and address. (*Id.*) Members in the latter category have until the date of the final approval hearing by which to complete and submit the form to KCC. (Doc. No. 177, p. 20.)

class member opted out of the class. (*Id.* ¶ 9.)[5]

Argument

I. The Class Should Be Finally Certified

In its preliminary approval order, the Court conditionally certified a settlement class consisting of "all persons that were subscribers of facsimile telephone numbers to which there was a successful transmission of one or more facsimiles by Defendants (or either of them) between July 17, 2010, and February 4, 2014, in broadcasts by WestFax, Inc. (the "Faxes")," subject to certain exclusions. (Doc. No. 177, pp. 3, 21.)[6] The Court determined that this class satisfied all requirements of Rule 23(a) and qualified for class treatment under Rule 23(b)(3). (*Id.*, pp. 13-18.)

Nothing has emerged since that order to revisit the certification question. To the contrary, the successful class notice program and highly-favorable class reaction demonstrate this is a cohesive class with a shared interest in the proposed recovery. There is "no need for the court to repeat the analysis here." *Taylor v. FedEx Freight, Inc.*, No. 1:13-cv-01137-DAD-BAM, 2016 WL 6038949, at *2 (E.D. Cal. Oct. 13, 2016) (Drozd, J.); *see also Aguilar v. Wawona Frozen Foods*, No. 1:15-cv-00093-DAD-EPG, at *2 (E.D. Cal. May 19, 2017) (Drozd, J.) (granting final certification in the absence of any new

[5] The one opt-out removes any potential for a $1 million holdback, which would have been triggered by opt outs from class members representing 2,000 or more transmissions. (*See* Doc. No. 177, p. 20 n.5.)

[6] The class excludes officers, directors and other agents of Defendants or their affiliated companies. This was not an inconsequential exclusion. Fully 107 fax recipients were removed from the class because they were affiliated with RehabCare. (Nemec Decl. ¶ 9.) The effect was to increase recoveries for non-affiliated facilities. Pines Nursing Home of Miami, Florida, also was excluded because it had settled its individual claims against Defendants. (*Id.*; *see* Doc. No. 172-2 (Cordero Decl.) ¶ 8.)

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certification issue since preliminary approval). The proposed settlement class should now be finally certified.

II. The Proposed Settlement Merits and Should Receive Final Approval

"At the final approval stage, the primary inquiry is whether the proposed settlement 'is fundamentally fair, adequate and reasonable.'" *Taylor v. FedEx Freight, Inc.*, No. 1:13-cv-01137-DAD-BAM, 2016 WL 6038949, at *2 (E.D. Cal. Oct. 13, 2016) (Drozd, J.) (quoting *Lane v. Facebook, Inc.*, 696 F.3d 811, 818 (9th Cir. 2012)); *see* Fed. R. Civ. P. 23(e)(2). But "the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable, and adequate to all concerned." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) (citing *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 628 (9th Cir. 1982)). The review should be undertaken with due regard for the strong legal policy favoring compromise and settlement of class actions. *See In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008); *Churchill Village, L.L.C. v. General Elec.*, 361 F.3d 566, 576 (9th Cir. 2004); *see also In re U.S. Oil & Gas Litig.*, 967 F.2d 489, 493 (11th Cir. 1992) (settlement is particularly favored in class actions).

In deciding whether to give final approval to a class settlement, courts in the Ninth Circuit balance several factors: (1) the strength of plaintiffs' case; (2) the risk, expense, complexity and likely duration of further litigation; (3) the risk of maintaining class action status throughout 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)

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the presence of a governmental participant;[7] and (8) the reaction of class members to the proposed settlement. *Churchill*, 361 F.3d at 575-76 (citing *Hanlon*, 150 F.3d at 1026); *see, e.g.*, *Mitchinson v. Love's Travel Stops & Country Stores, Inc*., No. 1:15-cv-01474-DAD-BAM, 2017 WL 2289342, at *4-6 (E.D. Cal. May 25, 2017) (Drozd, J.) (granting final approval based on these factors); *Aguilar*, 2017 WL 2214396, at *2-4 (same).

The proposed settlement measures well against these standards.

A. The Strength of Plaintiff's Case

This case presented serious issues concerning the legality of an organized fax-blasting program. For several years Glenoaks had received numerous junk faxes hawking products from "Polaris Group." (LeVine Decl. ¶ 5.) Because the hospital had never agreed to receive the ads (*id.*), the faxes prima facie violated the Telephone Consumer Protection Act, which prohibits "the use of a telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited facsimile advertisement." 47 U.S.C.A. § 227(b)(1)(C) (West 2017).

As the Court discussed in its preliminary approval order, the fax-blast operations were orchestrated by Defendant Cannon & Associates, the entity behind the "Polaris Group" name.[8] Cannon sells books, DVDs, manuals and consulting services to skilled nursing facilities. (*See* Doc. No. 157-4 (Cave Decl.) ¶ 4.) Cannon had purchased fax telephone numbers and other facility data from Billian Publishing, prepared ad copies at its

[7] Because there is no governmental participant in this case, "this factor…is irrelevant to the court's analysis." *Castillo v. ADT, LLC*, No. 2:15-383 WBS DB, 2017 WL 363108, at *6 (E.D. Cal. Jan. 25, 2017) (Shubb, J.).

[8] Until September 2014, Cannon was an indirect subsidiary of Defendant RehabCare Group, Inc. (Doc. No. 157-4 (Cave Decl.) ¶ 3.)

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Tampa office, then hired WestFax to broadcast the fax ads to thousands of long-term care facilities nationwide. (Doc. No. 177, p. 2.) Discovery confirmed that between 2010 and 2014, 2.4 million transmissions of 2,149 Polaris Group fax advertisements had been sent to almost 13,000 long-term care facilities. (Doc. No. 146 (Biggerstaff Decl.) ¶ 16.)

"When assessing the strength of plaintiff's case, the court does not reach 'any ultimate conclusions regarding the contested issues of fact and law that underlie the merits of [the] litigation.'" *Aguilar*, 2017 WL 2214936, at *3 (quoting *In re Wash. Pub. Power Supply Sys. Secs. Litig.*, 720 F. Supp. 1379, 1388 (D. Ariz. 1989)). "Instead, the court is to 'evaluate objectively the strengths and weaknesses inherent in the litigation and the impact of those considerations on the parties' decisions to reach these agreements.'" *Emmons v. Quest Diagnostics Clinical Labs., Inc.*, No. 1:13-cv-00474-DAD-BAM, 2017 WL 749018, at *4 (E.D.C.A. Feb. 27, 2017) (Drozd, J.) (quoting *Washington Public Power*, 720 F. Supp. at 1388)).

At the time of settlement, the case against Cannon appeared strong. Cannon asserted that had permission to fax ads to Glenoaks because the hospital had "provided its contact information, including its facsimile number," to the California Association of Health Facilities for publication in its membership directory. (Cordero Decl. Ex. A, p. 4 (Cannon Resp. Req. Admissions).) There were two problems with this contention—Glenoaks has never been a member of CAHF (LeVine Decl. ¶ 5 n.1), and CAHF hasn't published a membership directory in years (Doc. No. 149-10, p. 3 (Allen Decl.) ¶ 3). Nevertheless, Cannon also contended that it had received permission to fax its customers, trade show attendees, and members of numerous industry trade associations. (Doc. No. 148-3 (Brown Decl. Ex. E), pp. 4-6.)

As the Court observed at preliminary approval, "proving liability against [RehabCare] would also be substantially more difficult." (Doc. No. 177, p. 11.)

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RehabCare vigorously disputed its liability for the fax-blast operations and by the November mediation had moved for summary judgment on all claims. (Doc. No. 162.) RehabCare contended that it could not be liable as a "sender" of the "Polaris Group" faxes because the faxes did not advertise its products or services, nor were the faxes sent on its behalf. (*See id*., pp. 13-15.) Although a small subset of the faxes (78,240) promoted "manuals developed by RehabCare Group," RehabCare contended that these products were offered for sale solely by Cannon. (*Id*., p. 14.)

RehabCare also denied that it was vicariously liable for the fax transmissions. RehabCare offered testimony and other evidence that it had no involvement in the Cannon fax operation: It hadn't purchased the fax numbers from Billian; it had nothing to do with the ad copies; it hadn't retained Westfax; and it didn't instruct Westfax to broadcast the faxes. (Doc. No. 157-7, p. 3.)

Glenoaks believes the evidence could establish RehabCare's liability, particularly for the subset that promoted RehabCare manuals and seminars. (Doc. Nos. 149, ¶ 12, 172-2 (Cordero Decl.) ¶¶ 33-34.) In the present context, however, the Court need not reach any ultimate conclusions because the evidence has not been fully presented. *Mitchinson v. Love's Travel Stops & Country Stores, Inc*., No. 1:15-cv-01474-DAD-BAM, 2017 WL 2289342, at *4 (E.D.C.A. May 25, 2017) (Drozd, J.). The seriousness of the issues presented, and the fact that they were heavily contested, weighs in favor of approval. *See Mitchinson*, 2017 WL 2289342, at *4; *Aguilar*, 2017 WL 2214936, at *3.

B. The Risk, Expense, Complexity and Likely Duration of Further Litigation

Continued litigation would have exposed the class to considerable risks of non-recovery and, at best, delayed any recovery for years. To be blunt, Cannon is judgment

proof. As the Court discussed in its preliminary approval decision, Cannon is now owned by Charles Cave, and its liabilities exceed its assets. (*See* Doc. No. 177, pp. 10-11 (citing Doc. No. 157-4 (Cave Decl.) ¶¶ 1-6).) As a practical matter, Cannon could satisfy a potential judgment only from the $8 million Homeland insurance program, which it shares with RehabCare. (*See* Doc. No. 177, p. 11 (citing Doc. No. 172-11 (Cave Decl.) ¶ 7).)[9]

RehabCare also presented serious collection issues. Although RehabCare is considerably larger and more liquid than Cannon, it could not satisfy a $1.2 billion judgment that could issue if the company were found liable for 2.4 million TCPA violations. (Sherwin Decl. ¶ 16.)[10] A judgment of this magnitude would almost certainly have triggered a Chapter 11 proceeding and relegated class members to general unsecured creditor status. *See, e.g.*, *In re Bally Total Fitness of Greater N.Y., Inc.*, 402 B.R. 616, 624 (Bankr. S.D.N.Y.) (denying motion to lift stay because "Debtors' estates' limited resources" were "better spent stabilizing their operations and cash flows, rather than litigating a class action suit"), *aff'd*, 411 B.R. 142 (S.D.N.Y. 2009). Of course RehabCare might have sustained a $39.1 million liability for the 78,240 faxes that promoted manuals "developed by RehabCare" and other RehabCare services. (*See* Doc. No. 172-14, pp. 2-3.) But even a judgment in this amount would be at the top end of what RehabCare likely could pay outside a bankruptcy proceeding, and itself might trigger a bankruptcy. (Sherwin Decl. ¶ 16.)

It is well established that practical limitations on a class defendant's ability to

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[9] As noted at preliminary approval, however, Homeland took the position that its policies were unavailable to Cannon without RehabCare's consent, and RehabCare had objected to a bilateral Cannon settlement. (Doc. No. 172-2 (Cordero Decl.) ¶ 13.) Even apart from this problem, only half the policy limits, or $4 million, was practically available to Cannon. *See Shell Oil Co. v. National Union Fire Ins. Co.*, 44 Cal. App. 4th 1633, 1645-47 (1996).

[10] The statute sets a minimum damage of $500 per violation. *See* § 227(b)(1)(C).

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satisfy a judgment are highly relevant to the fairness question. *See Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993); *Johnson v. Quantum Learning Network, Inc.*, No. 15-cv-05013, 2017 WL 747462, at *1 (N.D. Cal. Feb. 27, 2017); *see also CE Design Ltd. v. King Supply Co.*, No. 09 C 2057, 2012 WL 2976909, at *3-4 (N.D. Ill. July 20, 2012) ($200,000 TCPA settlement justified, despite $335 million exposure, because the defendant's "ability to pay any judgment was extremely limited"). The $25 million recovery is outstanding in consideration of Defendants' inability to pay a significantly larger amount.

Absent this settlement, litigation would have continued for years. Defendants mounted a tenacious defense through two highly-skilled and experienced legal teams. If, as Glenoaks expects, the Court would have certified the class, there remained "a not insignificant chance the Ninth Circuit would grant interlocutory review." (Doc. No. 177, p. 12 (quoting Doc. No. 172-2 (Cordero Decl.) ¶ 29).) Any liability judgment would almost certainly be appealed. Defendants would have challenged the class certification order and any jury verdict on both merits and due process grounds. And a bankruptcy filing by one or both Defendants at any time in this process would have delayed recovery even longer. "All these proceedings could take years to fully resolve." *Emmons v. Quest Diagnostics Clinical Labs., Inc.*, No. 1:13-cv-00474-DAD-BAM, 2017 WL 749018, at *5 (E.D. Cal. Feb. 27, 2017) (Drozd, J.).

Even if the class ultimately obtained a judgment, the judgment were upheld on appeal, and Defendants could satisfy it, the present value of any such judgment would be significantly reduced. To put this in perspective, the present value of an ultimate $39.1 million recovery in two or three years is only marginally greater than the $25 million the class will recover today. (Sherwin Decl. ¶ 17.) The certain, immediate recovery afforded by the settlement is far preferable to exposing the class to a gauntlet of litigation risks and delays. *See Emmons*, 2017 WL 749018, at *5; *Taylor*, 2016 WL 6038949, at *3.

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C. The Risk of Maintaining Class Status

By the time of settlement, Glenoaks' amended class certification motion was pending.[11] (Doc. No. 145.) Glenoaks believes the case for certification is strong because the material facts concerning the fax-blast program or the asserted defenses did not vary by class member, and thus a strong case can be made that the predominance element of Rule 23(b)(3) was satisfied. (*See* Doc. No. 145-1, pp. 23-41.) Nevertheless, there was an inherent, irreducible risk that class certification could not be maintained throughout the case. Rule 23 requires the moving party to independently satisfy all four requirements of subsection a, and at least one alternative standard under subsection b. *See Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). "[T]here are no invariable rules regarding the suitability of a particular case filed under this subsection of the TCPA [prohibiting unsolicited facsimile advertisements] for class treatment; the unique facts of each case generally will determine whether certification is proper." *Gene and Gene, LLC v. BioPay, LLC*, 541 F.3d 318, 328 (5th Cir. 2008).

The strong majority of courts, particularly recently, have certified contested TCPA/junk fax classes. *See, e.g.*, *Ira Holtzman, CPA, & Assocs., Ltd. v. Turza*, 728 F.3d 682, 684 (7th Cir. 2013) ("class certification is normal in litigation under §227"), *cert. denied*, 134 S. Ct. 1310 (2014). In this case, however, Cannon contended that it had received permission in a variety of ways from a broad spectrum of fax recipients. (*See* Doc. No. 148-3 (Brown Decl. Ex. E), pp. 4-7.) Numerous courts have denied class certification of junk fax classes when the advertiser offers credible evidence that the

[11] In May 2015, Glenoaks had filed a protective class certification motion in response to the Supreme Court's grant of *certiorari* to review the Ninth Circuit's *Gomez* decision, holding that an unaccepted settlement offer to the named plaintiff does not moot a class action. *See Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 874-76 (9th Cir. 2014), *aff'd*, 136 S. Ct. 663 (2016). Glenoaks moved for class certification three days afterward to protect against the risk that the Ninth Circuit's decision would be reversed. (*See* Doc. No. 29; Cordero Decl. ¶ 14(c).)

permission issue would require a large number of individual inquiries. Last month, for example, the Sixth Circuit held that when the advertiser produces concrete evidence of "consent, evinced by hundreds of thousands of customer documents," the question whether the faxes were unsolicited "is sufficiently individualized to preclude class certification." *Sandusky Wellness Ctr. v. ASD Specialty Healthcare, Inc.*, No. 16-3741, __F.3d___, 2017 WL 2953039, at *6 (6th Cir. July 11, 2017).[12] Although Glenoaks believes this argument would have been unavailing on the facts of this case, class certification was certainly not "guaranteed," and "this favor weighs in favor of approving the settlement." *Castillo*, 2017 WL 363108, at *5.

D. The Amount Offered in Settlement

This factor weighs strongly in favor of approval. The $25 million recovery is exemplary, particularly in comparison with the numerous litigation and collection risks discussed above. The gross settlement recovery averages about $1,943 per class member. As discussed earlier (*see* p. 3, *supra*), the net settlement amount to be distributed to the class would be about $16,414,000, with the average class member receiving $1,339. (Jue Decl. ¶¶ 12-13.)

[12] Glenoaks also charged Cannon with violating FCC regulations that required opt-out disclosures on *all* faxes, solicited or unsolicited. (Doc. No. 1, ¶ 30.) Several courts have held that common issues predominated, and certified junk fax classes, when the faxes failed to include an opt-out notice required by the statute and FCC regulations. *See, e.g., Vandervort v. Balboa Capital Corp.*, 287 F.R.D. 554, 561 (C.D. Cal. 2012). In 2014, however, the FCC "waived" Cannon's compliance with its regulation requiring opt-out disclosures on solicited faxes. *See* In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket Nos. 02-278, 05-338, FCC 14-164, Order, ¶ 27 n.99 (Oct. 30, 2014). And earlier this year, the District of Columbia Circuit held that "the FCC's 2006 Solicited Fax Rule is unlawful to the extent that it requires opt-out notices on solicited faxes," and vacated the FCC's order that had promulgated the rule. *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078, 1083 (D.C. Cir. 2017). Taken together, these developments weakened the argument for predominance based on defective opt-out notices.

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This settlement compares favorably to other large Ninth Circuit TCPA class settlements. Table 1 abstracts Ninth Circuit TCPA settlements of $5 million or greater within this decade:

TABLE 1. – Large Ninth Circuit TCPA Class Recoveries[13]

Case	Year	Court	Recovery	Avg./Member	Structure[14]
AllianceOne	2012	SDCA	9,000,000	1.60	CM Rev.
Americredit	2016	SDCA	8,500,000	3.79	CM
AT&T Mobility (Hageman)	2015	D.MONT.	45,000,000	2,812.50	CM
Autobytel, Inc.	2012	NDCA	12,200,000	0.26	CM
Bank of America	2014	NDCA	32,083,905	4.42	CM
Barclays Group	2012	SDCA	8,262,500	125.00	CM
Clearwire	2013	WDWA	7,000,000	3.85	CM
Comenity Bank	2015	SDCA	8,475,000	1.93	CM
Discover Financial	2014	NDCA	8,700,000	0.93	CM
Google	2013	NDCA	6,000,000	32.31	CM
iYogi Inc.	2016	EDCA	7,555,480	40.00	CM
JPMorgan Chase	2015	SDCA	11,268,058	3.34	CM Rev.
Mortgage Investors Corp.	2016	EDOR	7,483,600	2.11	CM
Rain City Pizza	2013	WDWA	16,585,000	80.24	CM Rev.
RehabCare	**2017**	**EDCA**	**25,000,000**	**1,943.00**	**Auto Dist.**
Sallie Mae, Inc.	2012	WDWA	24,150,000	3.10	CM
Simon & Schuster	2010	NDCA	10,000,000	166.67	CM
Sprint	2011	WDWA	5,500,000	.30	CM
Steve Madden, Ltd.	2013	CDCA	10,000,000	49.20	CM Rev.
T-Mobile	2015	SDCA	5,000,000	47.17	CM
Tomy	2015	CDCA	10,000,000	750.08	CM
Wells Fargo Bank	2016	SDCA	13,859,104	3.40	CM
Wells Fargo Home Mtg.	2013	SDCA	17,078,324	3.94	CM

As reflected in the table, this settlement is the third largest among all recent Ninth Circuit TCPA class settlements. It is exceeded only by *AT&T Mobility* and *Bank of*

[13] Lem Decl. ¶¶ 2-5.

[14] "CM" indicates a claims-made settlement. "CM Rev." indicates a claims-made settlement with unclaimed funds reverting to the defendant. (Lem Decl. ¶ 4.)

America, cases with deep-pocketed defendants that presented no collectability concerns or difficult vicarious liability issues. This settlement ranks second on a "recovery per class member" basis, and exceeds by several orders of magnitude the typical class member recovery in this circuit.

The settlement also stands apart for its fair and equitable class distribution. Unlike the vast majority of TCPA and consumer class settlements (*see* table 1), proceeds will be distributed to all known class members without requiring them to submit claims. (Doc. No. 171, p. 13.) An automatic distribution is much more likely to result in meaningful compensation to the class than a reversionary, claims-made settlement. *See* Brian T. Fitzpatrick & Robert C. Gilbert, An Empirical Look at Compensation in Consumer Class Actions, 11 N.Y.U. J.L. & Bus. 767, 770 (2015); *see also In re:Checking Account Overdraft Litig.*, No. 1:09-MD-02036-JLK, 2013 WL 11319244, at *10 (S.D. Fla. Aug. 2, 2013). The settlement fairly apportions net proceeds among the class according to the number of faxes successfully sent to each member. (Doc. No. 171, p. 7.) In other words, class members will be paid according to the number of Polaris Group faxes they received, rather than by an arbitrary "pro rata" or other formula.[15] And under no circumstances will any settlement funds revert to Defendants. (Doc. No. 171, p. 14 ("Defendants shall have no reversionary or other interest in the Common Fund or excess funds not distributed to

[15] Several other approved TCPA settlements, by contrast, have imposed arbitrary ceilings on claimants' recoveries, *regardless* of how many violations impacted them. *See, e.g., Vandervort v. Balboa Capital Corp.*, SACV 11-1578-JLS (JPRx), Doc. No. 120-1 (C.D. Cal. Jan. 20, 2014); *Palmer v. Sprint*, 09-cv-01211, Dkt. 61-8 (W.D. Wash. April 26, 2011) (recovery capped at $2,000); *Pimental v. Google, Inc.*, 4:11-cv-02585, Dkt. 84-1 (N.D. Cal. Oct. 5, 2012) (recovery capped at $500); *Arthur v. Sallie Mae, Inc.*, 2:10-cv-00198, Dkt. 184-1 (W.D. Wash. Oct. 11, 2011) ($500 cap); *Saf-T-Gard Int'l, Inc. v. Seiko Corp. of Am.*, No. 1:09-cv-00776 (Dkt. 98-2) (N.D. Ill. Jan. 7, 2011) (recovery capped at $375 regardless of number of faxes received); *Satterfield v. Simon & Schuster, Inc.*, 4:06-cv-02893, Dkt. 112-1 (N.D. Cal. February 17, 2010) ($175 cap).

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Settlement Class Members...").)

E. The Extent of Discovery Completed and the Stage of the Proceedings

The stage of the proceedings at which settlement was reached also strongly favors final approval. This "settlement is the product of non-collusive negotiations after substantial discovery had been conducted, giving plaintiff and plaintiff's counsel a good grasp of the merits of the case before settlement talks began." *Taylor*, 2016 WL 6038949, at *4. As the Court noted in its prior order, "Plaintiff's counsel engaged in almost two years' worth of discovery, serving several sets of interrogatories, requests for admission, and Rule 34 requests for production of documents. [Citations omitted] This resulted in production of approximately 70,000 documents and 900 pages of written responses." (Doc. No. 177, p. 6.) To extract much of this discovery, Glenoaks had to convene several formal and informal discovery conferences and file multiple motions to compel. (*See* Brown Decl. ¶¶ 3-9.)[16] The parties took numerous depositions, including depositions of key Cannon and RehabCare personnel, and several experts. (*Id.*; *see also* Doc. No. 172-2 (Cordero Decl.), ¶¶ 5-6.) Even after the discovery, the proposed settlement was achieved only after two mediations and protracted negotiations over the final settlement agreement. (Doc. No. 177, pp. 6-7 (citing, *inter alia*, Doc. No. 172-7 (Fischbach Decl.) ¶¶ 9, 16).)

This settlement was secured only after years of intense litigation with highly-skilled and tenacious adversaries. It does not come close to overreaching or collusion among the parties. *See Aguilar*, 2017 WL 2214936, at *4 (citing *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1290 (9th Cir. 1985)).

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[16] The Court previously noted that the "docket reflects extensive litigation of this suit, including resolution by the court of numerous informal discovery disputes and motions to compel with respect to discovery." (Doc. No. 177, p. 2.)

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F. Experienced Class Counsel Favor Approval

Class counsel are veteran litigation attorneys with extensive experience representing clients in complex litigation. Among other things, they have considerable experience prosecuting class actions, and TCPA class actions in particular. (*See* Doc. No. 172-2 (Cordero Decl.) ¶¶ 36-37; Doc. No. 172-7 (Fischbach Decl.) ¶¶ 1-4; Doc. No. 172-8 (Magolnick Decl.) ¶¶ 1-6.) After reviewing their records, the Court opined "it is clear that all class counsel are well-qualified to represent the class." (Doc. No. 177, p. 17.) Class counsel uniformly believe the settlement is fair, reasonable, and adequate, and strongly recommend its approval. (Fischbach Decl. ¶ 8; Cordero Decl. ¶¶ 4-8; Magolnick Decl. ¶ 11.) The named plaintiff/class representative, which has actively participated in the case, agrees. (LeVine Decl. ¶¶ 11-12.)

G. The Highly Favorable Class Reaction to the Proposed Settlement

This factor weighs heavily in support of the proposed settlement. As discussed earlier, the settlement administrator successfully delivered notice to over 97 percent of the 12,867-member class. The notice gave class members meaningful information about the litigation and settlement. It informed members they could opt-out, object, or remain in the class and receive payment. (Doc. No. 177, p. 19.) The notice also informed members they could obtain additional information by visiting the settlement website, by contacting KCC at a toll-free number, and by accessing the Court file on PACER. (*Id.* at 2.)[17]

[17] The settlement website, www.rehabcaresettlement.com, offers copious information to interested class members. (Jue Decl. ¶ 7.) Since the website went live on May 10, members have been able to access and download, among other things, a more detailed notice of the settlement, the settlement agreement, the Complaint, and the Court's preliminary approval decision. The final approval, attorneys' fees, and incentive award motions and supporting documents will be available for download from the website immediately after this filing. To date (footnote continued)

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The class's reaction was extremely positive. Only *one* class member elected to opt-out—an infinitesimal percentage of the class. (Jue Decl. ¶ 9.) To date, no class members have objected to the settlement, and none have expressed dissatisfaction with the settlement. (*Id*. ¶ 10.) And numerous other class members, including many with the highest stakes in the recovery, have stepped forward to express strong support for the settlement. (*See* Anderson Decl. ¶¶ 5-7 (38 Plum Healthcare Group facilities); Cranwell Decl. ¶¶ 5-7 (12 American HealthCare facilities); Creagh Decl. ¶¶ 5-6 (6 Grane Healthcare); Grayson Decl. ¶ 5 (California Armenian Home); Hunter Decl. ¶¶ 5-7 (2 Brooke Grove Foundation); Lane Decl. ¶¶ 5-6 (50 Rockport-contracted facilities); Martinez Decl. ¶¶ 5-6 (20 Avante facilities); Nicoluzakis Decl. ¶ 5 (15 Autumn facilities); Pierce Decl. ¶¶ 5-8 (219 Golden Living facilities); Robinson Decl. ¶ 5 (36 Orianna Health System facilities); Sable Decl. ¶¶ 5-6 (20+ Windsor); Shelton Decl. ¶ 5 (8 Central Management facilities); Williams Decl. ¶ 5 (85 Evangelical Lutheran facilities).)

The class's overwhelming backing is powerful support in favor of the settlement. "The absence of objections to a proposed class action settlement supports that the settlement is fair, reasonable, and adequate." *Taylor*, 2016 WL 6038949, at *5 (citing *National Rural Telecomms. Coop. v. DIRECTV, Inc*., 221 F.R.D. 523, 529 (C.D. Cal. 2004)).

Conclusion

For the foregoing reasons, Plaintiff/Class Representative Glenoaks Convalescent Hospital respectfully requests that the Court confirm certification of the settlement class and grant final approval to the class settlement.

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there have been 2,190 visits to the website. (*Id*. ¶ 4.)

DATED: August 1, 2017

PAYNE & FEARS LLP

By: /s/ C. Darryl Cordero
C. DARRYL CORDERO
Attorneys for Dakota Medical, Inc., dba Glenoaks Convalescent Hospital, for itself and on behalf of all others similarly situated

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Proof of Service

R. Fellen, Inc., et al., vs. RehabCare Group, Inc., et al.
United States District Court, Eastern District of California (Sacramento Division)
Case No. 1:14-cv-02081-DAD-BAM

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 1100 Glendon Avenue, Suite 1250, Los Angeles, CA 90024.

On August 1, 2017, I served true copies of the following document(s) described as **Plaintiff's Memorandum of Points and Authorities in Support of Plaintiff's Motion for Final Approval of Settlement and Certification of Settlement Class** on the interested parties in this action as follows:

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BY CM/ECF NOTICE OF ELECTRONIC FILING: I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this

Court at whose direction the service was made.

Executed on August 1, 2017, at Los Angeles, California.

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