UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JORDAN KISSEL, as an individual and on behalf of all others similarly situated,

Plaintiff,

vs.

CODE 42 SOFTWARE, INC., a Delaware corporation; and DOES 1 through 10, inclusive;

Defendants.

CASE NO. SACV 15-1936-JLS (KES)

ORDER GRANTING PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT (Doc. 43) AND SETTING A FINAL FAIRNESS HEARING DATE FOR FEBRUARY 9, 2018, AT 2:30 P.M.

Before the Court is an Unopposed Motion filed by Plaintiff Jordan Kissel seeking preliminary approval of a proposed class action settlement of claims that Defendant Code42 violated California Business & Professions Code Section 17600 *et seq*. (the "Automatic Renewal Law"). (Mot., Doc. 43.) Kissel asks the Court to (1) preliminarily approve the terms of the class action settlement; (2) certify the proposed class for settlement purposes only; (3) appoint Kissel as Class Representative; (4) appoint as Class Counsel Scott J. Ferrell, David W. Reid, and Victoria C. Knowles of Pacific Trial Attorneys, APC; (5) approve JND Class Action Administrator as the settlement administrator; (6) approve the form and manner of class notice; (7) approve the proposed monetary settlement benefit for the Settlement Class and the procedures for qualification, exclusion, and objection of class members; (8) stay all non-settlement related proceedings pending final approval of the agreement, and (9) schedule a final fairness hearing date. (*See* Notice of Mot. ¶¶ 1–9, Doc. 43.) Having read and considered the papers on file and taken the matter under submission, the Court GRANTS Kissel's Motion and sets a final fairness hearing date for February 9, 2018, at 2:30 p.m.

I. BACKGROUND

Plaintiff Jordan Kissel purchased a subscription for Code42's "CrashPlan" computer backup and related services. (FAC, ¶¶ 7, 17.) Kissel alleges that information required to be provided under the Automatic Renewal law was not provided with the requisite clarity and was not included in each of the requisite steps of the purchase. (FAC, ¶¶ 18-23). On November 19, 2015, Kissel filed a class lawsuit against Code42. (*See* Compl., Doc. 1) On February 10, 2016, she filed a first amended complaint. (FAC, Doc. 17.) In the FAC, Kissel alleges the following claims: (1) failure to present automatic renewal offer terms or continuous service offer terms clearly and conspicuously and in visual proximity to the request for consent offer in violation of Cal. Bus. & Prof. Code § 17602(a)(1); (2) failure to obtain affirmative consent before the subscription is fulfilled in

violation of Cal. Bus. & Prof. Code §§ 17602(a)(2) and 17603; (3) failure to provide acknowledgment with automatic renewal terms and information regarding cancellation policy in violation of Cal. Bus. & Prof. Code §§ 17602(a)(3) and 17602(b); and (4) violation of the Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq*.

On February 29, 2016, Code42 moved to dismiss the FAC. (MTD, Doc. 19.) The Court denied the motion on April 14, 2016. Code42 filed an Answer to the FAC on April 28, 2016. (Doc. 29.) The parties then engaged in informal discovery and settlement negotiations. Plaintiff filed a Joint Notice of Proposed Class Action Settlement on March 3, 2017. (Doc. 33.)

The Settlement Agreement defines the class as "[a]ll 'Consumers' . . . within the State of California who purchased any product or service from Code42 as part of an 'Automatic Renewal' or 'Continuous Service' plan or arrangement . . . between November 19, 2011 and November 19, 2015" and "were subsequently charged by and paid Code42 one or more fees for the renewal of the product or service beyond the original term prior to July 24, 2017." (Mot. for Prelim. Approval, Ex. 1, "Settlement Agreement" ¶ 2.01, Doc. 43-4.) The parties estimate that there are 32,200 class members. (Mot. for Prelim Approval, Doc. 43, at 6.)

The settlement provides for a full-distribution, non-reversionary settlement fund of $400,000. (*Id*.) After deducting attorneys' fees, litigation costs, Plaintiff's service payments, and the costs of administering the settlement fund, the net settlement amount, anticipated to be $247,500, will be used to provide settlement payments of approximately $7.00 to $7.50 to each class member. (*Id*.)

In return for net settlement fund payments, Kissel and settlement class members fully release and discharge Released Persons from the following:

> [A]ny claim, right, demand, charge, complaint, action, cause of action, obligation, or liability of any and every kind or nature whatsoever, whether currently known or unknown, asserted or unasserted, suspected or unsuspected, open or concealed, contingent or noncontingent, that any of the Releasing Persons have, may have had, or may have in the future against any

> of the Released Persons under any source of law (whether federal, state, or local, and whether based upon common law or a statute or ordinance) that were asserted in the Action, that could have been asserted in the Action, or that otherwise arise out or relate to disclosures or the alleged failure to make adequate disclosures during the Class Period regarding the terms and conditions of the sale of, or the offering for sale of, or the cancellation policy that applies to, an Automatically Renewing Service or of any other product or service that has a term that renews automatically from time to time or is in effect for a continuous period until cancelled (the "Released Claims").

(Settlement Agreement ¶ 6.01.) The "Released Persons" include (a) all of Code42's past, present and future parents, predecessors, successors, partners, assigns, joint venturers, subsidiaries, affiliates, and divisions; and (b) the owners, shareholders, officers, directors, vendors, employees, attorneys, insurers, and agents of these entities. (*Id.*)

The settlement provides that Class Counsel will request an award of attorneys' fees, costs, and expenses of up to 25% of the settlement fund. (*Id.* ¶¶ 4.21.) The settlement further provides that Kissel may apply for an incentive award not to exceed $2,500.00. (*Id.*) Code42 agrees to not oppose applications seeking the above attorneys' fees, costs, and incentive payments. (*Id.*) The settlement administrator will also be paid from the settlement fund for the reasonable costs of administering this settlement, which the Stipulation estimates will not exceed $40,000. (Mem. at 6.) Subject to the Court's approval, the parties agree to appoint JDN Class Action Administrator Consulting as the claims administrator in this settlement. (*Id.* at 2.)

The Motion also enumerates the process for Class Notice. Code42 will provide the claims administrator with the list of names and current email addresses of each class member. (Settlement Agreement ¶ 4.02.) Within thirty days following preliminary approval of the settlement, the claims administrator will email the class notice to each member at the email address provided by Code42. (*Id.* ¶ 4.03.) If the claims administrator receives notice that any email bounced back or was undeliverable, the claims administrator will notify Code42 and request that Code42 provide a physical mailing address for that member. (*Id.* ¶ 4.04.) Code42 will provide the most recent physical mailing address for each member, and the claims administrator will mail a Postcard Notice to each class

member within seven days of receiving the address. (*Id.*) If a notice is returned as undeliverable with a forwarding address, the claims administrator will mail the notice to the forwarding address. (*Id.*) If the returned notice does not include a forwarding address, the claims administrator will provide Class Counsel with the name and address of the member of the class for whom the Postcard Notice was returned and class counsel may thereafter conduct further research for the contact information of that class member. (*Id.*)

Additionally, within thirty days of the Preliminary Approval Date, the claims administrator will initiate a settlement website to provide information regarding (1) the lawsuit; (2) the settlement; (3) key deadlines in the settlement process; (4) how to submit a claim form, and (5) how to contact the claims administrator or Class counsel for more information. (*Id.* at ¶ 4.05.) The website will be available prior to the date of the emailing of the class notice and will remain available until at least ninety days after the settlement payments have been distributed to class members. (*Id.*) Also, within thirty days of the Preliminary Approval Date, and continuing until 180 days after final approval, the claims administrator will maintain an address and toll-free telephone number to receive inquiries with regard to the settlement.

Class members will not be required to submit a claim form to receive benefits under the Settlement Agreement. Instead, each class member will be paid their settlement benefit via their registered email address with Code42 and a Paypal link. (*Id.* ¶ 4.07.) Within the later of forty-five days after final approval or fifteen days after final court resolution of any objection, the claims administrator will send the benefit payment via PayPal directly to each class member. (*Id.* at ¶ 5.02.) Class members will have until the deadline set by this Court to exclude themselves from, or object to, the settlement. (*Id.* ¶ 4.10.)

Kissel now moves for preliminary approval of the proposed settlement. (Mot.) The parties contend that the proposed settlement is fair, reasonable, adequate, and in the best interest of the proposed class. (*Id.* at 17–18.) In her motion, Kissel failed to provide any

information explaining why the Court should approve the proposed claims administrator, JND; the motion also did not provide sufficient information for the Court to evaluate whether the settlement was fair and reasonable. (*See* Order re: supp'l briefing, Doc. 45.) On September 5, 2017, Kissel filed a supplemental brief addressing these issues. (Supp'l Brief, Doc. 46.)

II. CONDITIONAL CERTIFICATION OF THE CLASS

Kissel asks the Court to conditionally certify the settlement class for settlement purposes under Rule 23(a) and 23(b)(3). (Mem. at 12.)

"A party seeking class certification must satisfy the requirements of Federal Rule of Civil Procedure 23(a) and the requirements of at least one of the categories under Rule 23(b)." *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 542 (9th Cir. 2013). Rule 23(a) "requires a party seeking class certification to satisfy four requirements: numerosity, commonality, typicality, and adequacy of representation." *Id.* (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011)). Rule 23(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

"Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he

must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Dukes*, 564 U.S. at 350. This requires a district court to conduct a "rigorous analysis" that frequently "will entail some overlap with the merits of the plaintiff's underlying claim." *Id.* at 350–51.

"Second, the proposed class must satisfy at least one of the three requirements listed in Rule 23(b)." *Id*. at 345. Here, Kissel seeks certification of the class under Rule 23(b)(3), which permits maintenance of a class action if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

A. The Proposed Classes Meet All Rule 23(a) Requirements

1. Numerosity

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). The parties agree that there are a total of approximately 32,200 Class Members. (Mem. at 12.) Numerosity is plainly met for the proposed Class.

2. Commonality

Rule 23(a)(2) requires that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury." *Dukes*, 564 U.S. at 349–50 (citation and internal quotation marks omitted). The plaintiff must allege that the class' injuries "depend upon a common contention" that is "capable of classwide resolution." *Id.* at 350. In other words, the "determination of [the common contention's] truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* "What matters to class certification . . . is not the raising of common questions—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (internal quotation marks and citation omitted).

Here, the causes of action raise questions common to the settlement class. These questions include (i) whether Code42 failed to present the automatic renewal offer terms, or continuous service offer terms, in a clear and conspicuous manner before the subscription or purchasing agreement was fulfilled and in visual proximity to the request for consent to the offer in violation of Cal. Bus. & Prof. Code § 17602(a)(l); (ii) whether Code42 charged the Class Members' Payment Method for an automatic renewal or continuous service without first obtaining Class Members' affirmative consent in violation of Cal. Bus. & Prof. Code§ 17602(a)(2); (iii) whether Code42 failed to provide an acknowledgement that included the automatic renewal or continuous service offer terms, cancellation policy, and information on how to cancel in a manner that is capable of being retained by Class Members in violation of Cal. Bus. & Prof. Code § 17602(a)(3); and (iv) whether Code42's Terms and Conditions contained the automatic renewal offer terms and/or continuous service offer terms as defined by Cal. Bus. & Prof. Code § l760l. (FAC ¶ 28). Kissel has therefore satisfied the commonality requirement.

3. Typicality

Rule 23(a)(3) requires "the claims or defenses of the representative parties [to be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "[U]nder the rule's permissive standards, representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 613 (9th Cir. 2010) (en banc) (quoting *Hanlon v. Chrysler Corp*, 150 F.3d 1011, 1020 (9th Cir. 1998)), *rev'd on other grounds*, 564 U.S. 338 (2011). As to the representative, "[t]ypicality requires that the named plaintiffs be members of the class they represent." *Id.* (citing *Gen. Tech. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982)). The commonality, typicality, and adequacy-of-representation requirements "tend to merge" with each other. *Dukes*, 564 U.S. at 349 n.5 (citing *Falcon*, 457 U.S. at 157–58 n.13).

Here, Kissel asks that she be named class representative. (Mot. at 1.) Kissel's claims arise from the same common course of conduct as the claims of all class members. Kissel and all members of the settlement class were presented with the same auto-renewal disclosures and post-purchase acknowledgments via email. Thus, typicality is met.

4. Adequacy

Rule 23(a)(4) permits certification of a class action only if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon*, 150 F.3d at 1020.

Kissel's claims arise out of the same set of facts as the claims for the proposed Class, and her interest in obtaining the maximum recovery is coextensive with the interests of the Class Members. (Kissel Decl. ¶ 3-4, 16, Doc. 43-2.) The Court finds no sign of a potential conflict of interest between Kissel and the Class Members she seeks to represent. Accordingly, the Court concludes that Kissel is an adequate class representative.

B. <u>The Proposed Classes Meet the Rule 23(b) Requirements</u>

Kissel seeks certification under Rule 23(b)(3). (Mem. at 16.) For the reasons set forth below, the Court holds that certification of the proposed Class is appropriate under Rule 23(b)(3).

Under Rule 23(b)(3), a class action may be maintained if: "[1] the court finds that the questions of law or fact common to class members *predominate* over any questions affecting only individual members, and [2] that a class action is *superior* to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. R. 23(b)(3) (emphases added). When examining a class that seeks certification under Rule 23(b)(3), the Court may consider:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Id. The Court finds that Kissel's proposed Class satisfies both the predominance and superiority requirements.

1. Predominance

"[T]he predominance analysis under Rule 23(b)(3) focuses on the relationship between the common and individual issues in the case, and tests whether the proposed class is sufficiently cohesive to warrant adjudication by representation." *Abdullah v. U.S. Sec. Associates, Inc.*, 731 F.3d 952, 964 (9th Cir. 2013) (citations and internal quotation marks omitted). "Rule 23(b)(3) requires [only] a showing that questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Id*. (alterations in original).

Here, as discussed above, class members' claims turn on the common practices of Code42 in failing to comply with the Automatic Renewal Law. This common question and the common legal remedies will predominate in this action.

2. Superiority

The Court further finds that a class action would be a superior method of adjudicating Kissel's claims for the proposed Class. "The superiority inquiry under Rule 23(b)(3) requires determination of whether the objectives of the particular class action procedure will be achieved in the particular case." *Hanlon*, 150 F.3d at 1023. "This determination necessarily involves a comparative evaluation of alternative mechanisms of dispute resolution." *Id.* Here, each member of the proposed Class pursuing a claim

individually would burden the judicial system and run afoul of Rule 23's focus on efficiency and judicial economy. *See Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 946 (9th Cir. 2009) ("The overarching focus remains whether trial by class representation would further the goals of efficiency and judicial economy."). Further, litigation costs would likely exceed potential recovery if each Class Member litigated individually. "Where recovery on an individual basis would be dwarfed by the cost of litigating on an individual basis, this factor weighs in favor of class certification." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) (citations omitted).

Considering the non-exclusive factors under Rule 23(b)(3)(A)–(D), the Court finds that Class Members' potential interests in individually controlling the prosecution of separate actions and the potential difficulties in managing the class action do not outweigh the desirability of concentrating this matter in one litigation. *See* Fed. R. Civ. P. 23(b)(3)(A), (C), (D). Therefore, the Court finds that the proposed Class may be certified under Rule 23(b)(3).

C. Rule 23(g) – Appointment of Class Counsel

Under Rule 23(g), "a court that certifies a class must appoint class counsel." Fed. R. Civ. P. 23(g)(1). The Court must consider "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A). Here, Kissel asks that the Court appoint Scott J. Ferrell, David W. Reid, and Victoria C. Knowles as Class Counsel in this action. (*Id.*) Ferrell has provided a declaration describing his experience, and that of his colleagues, in litigating consumer class actions. (*See* Ferrell Decl. ¶¶ 7-13, Doc. 43-3.) From this experience, it would appear that counsel have knowledge of the applicable law in this area. Ferrell has also identified the work each performed in these actions, including taking cases to trial and negotiating proposed settlements. (*Id.* ¶ 9-13) Based on the

experience and work of Plaintiff's Counsel, the Court concludes that Plaintiff's Counsel have satisfied the adequacy requirement. The Court therefore appoints Scott J. Ferrell, David W. Reid, and Victoria C. Knowles as Class Counsel in this action.

Having found that the proposed Class satisfies the remaining elements of Rule 23(a), the Court conditionally certifies the Class for settlement purposes only.

III. PRELIMINARY APPROVAL OF CLASS SETTLEMENT

To preliminarily approve a proposed class-action settlement, Rule 23(e)(2) requires the Court to determine whether the proposed settlement is fair, reasonable, and adequate. Fed. R. Civ. P. 23(e)(2). In turn, review of a proposed settlement typically proceeds in two stages, with preliminary approval followed by a final fairness hearing. Federal Judicial Center, *Manual for Complex Litigation*, § 21.632 (4th ed. 2004).

"To determine whether a settlement agreement meets these standards, a district court must consider a number of factors, including: the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant;[1] and the reaction of the class members to the proposed settlement." *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003) (internal citation and quotation marks omitted). "The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case." *Officers for Justice v. Civil Serv. Comm'n of City & Cty. of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982). "'It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness,' and 'the

[1] This factor does not apply in this case.

settlement must stand or fall in its entirety.'" *Staton*, 327 F.3d at 960 (quoting *Hanlon*, 150 F.3d at 1026) (alterations omitted).

In addition to these factors, where "a settlement agreement is negotiated *prior* to formal class certification," the Court must also satisfy itself that "the settlement is not the product of collusion among the negotiating parties." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946-47 (9th Cir. 2011) (quotation marks and citation omitted). Accordingly, the Court must look for explicit collusion and "more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations." *Id.* at 947. Such signs include (1) "when counsel receive a disproportionate distribution of the settlement," (2) "when the parties negotiate a 'clear sailing' arrangement providing for the payment of attorneys' fees separate and apart from class funds," and (3) "when the parties arrange for fees not awarded to revert to defendants rather than be added to the class fund." *Id.* (quotation marks and citations omitted).

At this preliminary stage and because Class Members will receive an opportunity to be heard on the settlement, "a full fairness analysis is unnecessary . . . ." *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 665 (E.D. Cal. 2008). Instead, preliminary approval and notice of the settlement terms to the proposed class are appropriate where "[1] the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, [2] has no obvious deficiencies, [3] does not improperly grant preferential treatment to class representatives or segments of the class, and [4] falls within the range of *possible* approval . . . ." *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007) (internal quotation marks and citation omitted) (emphasis added); *see also Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 386 (C.D. Cal. 2007) ("To determine whether preliminary approval is appropriate, the settlement need only be *potentially* fair, as the Court will make a final determination of its adequacy at the hearing on the Final Approval, after such time as any party has had a chance to object and/or opt out.") (emphasis in original).

In evaluating all applicable factors below, the Court finds that the proposed settlement agreement should be preliminarily approved.

A. Strength of Plaintiff's Case

The principal claims at issue here involve Code42's alleged failure to provide adequate and requisite disclosures under the Automatic Renewal Law. While Plaintiff is confident she would prevail on the merits of her claims, Code42 has identified a number of defenses it could raise in the course of litigation. (*See* Mem. at 19.) Code42 filed a motion to dismiss and was poised to raise several legal and factual challenges. (Doc. 19.) For example, Code42 has indicated that it could argue that its disclosures were complete or at least in substantial compliance with the applicable law, or that Kissel does not have standing to pursue this action. (Mem. at 19.) Code42 contends that if the litigation were to continue, they would prevail on these issues. (*Id*.) The Court finds that given these potential obstacles, this factor weighs in favor of granting preliminary approval.

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

Kissel argues that continued litigation would become time consuming and uncertain. (Mem. at 20.) Although Kissel emphasizes the meritorious nature of the class claims, she observes that settlement allows class members "to avoid the risks of unfavorable, and in some cases dispositive, rulings" on key issues that may preclude relief, and a trial that "could add years to the resolution" of the suit. (*Id*.) Settlement eliminates the risks inherent in certifying a class, prevailing at trial, and withstanding any subsequent appeals, and it may provide the last opportunity for class members to obtain relief. This factor therefore weighs in favor of granting preliminary approval. *See Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc*., 221 F.R.D. 523, 526 (C.D. Cal. 2004) ("In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." (citation omitted)).

C. Risk of Maintaining Class Certification

The Court, in this Order, certifies the class for settlement purposes. The parties do not highlight any risks to obtaining or maintaining class certification throughout the course of litigation, and none are obvious to the Court. In any case, however, there remains a risk that a class may be decertified, and these risks have been held to be "not so minimal" as to preclude a Court granting preliminary approval to a settlement agreement. *See Rodriguez v. West Publishing Corp.*, 536 F.3d 948, 966 (9th Cir. 2009.)

D. Amount Offered in Settlement

The Court finds that the amount offered in settlement is reasonable. The proposed settlement provides for a settlement fund of $400,000, which is a substantial benefit to the class. (Mem. at 1.) No portion of the settlement fund will revert back to Code42. (*Id*.) The parties note that, given the potential disputes about the recoverability of renewal fees, "providing . . . a single 'maximum potential liability' figure is not as straightforward as in many class actions." (Supp. Brief at 4, Doc. 46.) Instead, the parties provide a range of potential maximum recoveries, from a high estimate of $6,581,663 (assuming recovery of all renewal fees paid by all class members during the class period) to a mid-range estimate of $2,396,162 (assuming recovery of all renewal fees paid by all class members for the first renewal period) to a low estimate of $265,578 (assuming recovery of all renewal fees paid by all class members only during the first month of the first renewal period). (*Id*.) Using the highest estimate, and net settlement amount of $247,500, the proposed settlement fund represents approximately 3.7% of Defendant's maximum potential liability. For the mid-range estimate, the settlement award represents approximately 10.3% of the potential liability of $2,396,162. And using the lowest estimate, the settlement represents 93% of the maximum liability. A "settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or

unfair," *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (internal quotation marks and citation omitted). These various percentages fall in the range of prior approved settlements in class actions. *See Noll v. eBay, Inc.*, 309 F.R.D. 593, 607 (approving settlement representing 50% of the first month renewal fees and nine percent of all renewal fees); *Custom LED, LLC v. eBay, Inc.*, No. 12-cv-350, 2013 WL 6114379 at *4 (November 20, 2013) (approving settlement recovery of 1.8% or 16% for breach of contract and unfair competition claims related to online fees). Accordingly, in considering the difficulties of potential recovery, the Court finds that the amount offered in settlement weighs in favor of preliminary approval.

The allocation of settlement funds also appears fair, adequate, and reasonable. Each Class Member will receive a payment of approximately $7.00 to $7.50. (Mem at . 18, Doc. 43-1.) Subscription costs range from $1.46 to $5.99 per month for individual plans, and $6.00 to $13.99 per month for family plans. (*Id.*) In light of the uncertainty about whether class members could recover damages per customer on a class-wide basis beyond a single autorenewal transaction, this settlement amount strikes a balance within the range of monthly subscription costs. This weighs in favor of preliminary approval.

Finally, the amount of the settlement also appears fair, adequate, and reasonable in light of the claims released by Kissel and Settlement Class Members. Each class member will release "any claim . . . aris[ing] out [of] or relate[d] to the disclosures or the alleged failure to make adequate disclosures during the Class Period." (Mot. Ex. A at 15, Doc. 43-4.) The scope of this release weighs in favor of preliminary approval. *See Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010) ("A settlement agreement may preclude a party from bringing a related claim in the future even though the claim was not presented and might not have been presentable in the class action, but only where the released claim is based on the identical factual predicate as that underlying the claims in the settled class action." (internal quotation marks and citation omitted)).

E. Stage of the Proceedings and Extent of Discovery Completed

This factor requires the Court to evaluate whether "the parties have sufficient information to make an informed decision about settlement." *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1239 (9th Cir. 1998). Discovery can be both formal and informal. *See Clesceri v. Beach City Investigations & Protective Servs., Inc.*, No. CV-10-3873-JST (RZx), 2011 WL 320998, at *9 (C.D. Cal. Jan. 27, 2011). Here, Plaintiff's Counsel received notice of revisions Code42 made to its autorenewal practices. (Mem. at 4.) Plaintiff's counsel also conducted extensive analysis of the claims and defenses, including factual and legal research. (Ferrell Decl. ¶¶ 4.) Given these facts, the Court concludes that the parties possess sufficient information to make an informed settlement decision. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d at 459 (finding plaintiffs had "sufficient information to make an informed decision about the [s]ettlement" where formal discovery had not been completed but class counsel had "conducted significant investigation, discovery and research, and presented the court with documentation supporting those services."). Accordingly, this factor weighs in favor of granting preliminary approval.

F. Experience and Views of Counsel

"The recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008) (citation omitted). As discussed above, Class Counsel have experience serving as plaintiffs' counsel in consumer actions, and they have endorsed the settlement as fair, reasonable, and adequate. (Ferrell Decl. ¶¶ 13-15.) Thus, this factor favors preliminary approval.

G. Reaction of Class Members to Proposed Settlement

Kissel has not provided evidence of the class members' reactions to the proposed settlement. However, the Court recognizes that the lack of such evidence is not

uncommon at the preliminary approval stage. Before the final fairness hearing, Class Counsel shall submit a sufficient number of declarations from class members discussing their reactions to the proposed settlement. In addition, a small number of objections at the time of the fairness hearing may raise a presumption that the settlement is favorable to the class. *See In re Omnivision Techs., Inc.*, 559 F. Supp. 2d at 1043.

H. Signs of Collusion

The Court notes that the parties have negotiated a "clear-sailing" agreement regarding attorneys' fees and class representative incentive award. However, this alone is not enough to find that the parties have colluded, as both payments will come from the capped settlement fund. *See Rodriguez,* 536 F.3d at 961 n.5 (noting that where payments are to be made from a capped settlement fund, clear sailing provisions do not signal collusion). Aside from this, the Court finds no sign, explicit or subtle, of collusion between the parties. Of course, before final approval, the court will "scrutinize closely the relationship between attorneys' fees and benefit to the class" and will not "award[] unreasonably high fees simply because they are uncontested." *In re Bluetooth*, 654 F.3d at 948 (internal quotation marks and citation omitted). The Court will also ultimately determine whether the requested amounts of service payments are justified by the circumstances of this case. Notably, unawarded amounts will remain in the gross settlement fund for the benefit of the settlement class.

Considering all of the factors together, the Court preliminarily concludes that the settlement is fair, reasonable, and adequate.

IV. APPROVAL OF THE PROPOSED CLAIMS ADMINISTRATOR

The parties agreed to appoint JND Legal Administration as the claims administrator in this action, subject to the Court's approval. (*See* Suppl. Brief at 1.) In Kissel's supplemental briefing, she provides sufficient documentation of JND's competence in

carrying out the duties of a claims administrator. (Suppl. Brief at 1-2; Keough Decl. ¶ 3-6, Doc. 56-1.) Moreover, courts in this circuit have approved JND as the claims administrator in other class action settlements. *See Allagas v. BP Solar International, Inc.*, No. 3:14-cv-560-SI (EDL), 2016 WL 9137636 at *3 (N.D. Cal. September 2, 2016) (appointing JND); *Gragg v. Orange CAB Company, Inc.*, No. CV 12-576 RSL, 2017 WL 785170, at *2 (N.D. Cal. Mar 1, 2017) (appointing JND). Accordingly, the Court approves JND as the claims administrator in this action.

V. PRELIMINARY APPROVAL OF CLASS NOTICE FORM AND METHOD

For a class certified under Rule 23(b)(3), "the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). However, actual notice is not required. *See Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994).

Pursuant to the settlement, Code42 will provide the claims administrator with the following information about each class member: his or her name and current email address based on Code42's current and most up to date business records. (Mem at 14, Doc. 43-1.) Within thirty days following preliminary approval of the settlement, the claims administrator will send the class notice by e-mail. (*Id.*) If the e-mail notice is undeliverable or otherwise "bounces back," the claims administrator will notify Code42 and request a physical mailing address for each class member for whom the notice was undeliverable. (*Id.*) If a notice is returned as undeliverable and without a forwarding address, the claims administrator will provide the name and address for each class member so that Class Counsel may conduct further research for the contact information of each class member for whom the notice was returned. (*Id.*) Class members will not have to submit a claims form to receive benefits under the settlement. (*Id.*) Further, the claims administrator will initiate a settlement website including information about the action, the

settlement, and all deadlines. The proposed settlement agreement does not provide for a deadline for class members to seek exclusion. The Court sets the deadlines as follows: class members will have forty-five days from the initial e-mailing of class notice to seek exclusion from the settlement or object to its terms. For those class members whose notices were re-mailed due to a bad address or forwarding, they must postmark an exclusion request within forty-five days of the re-mailing or by the above exclusion deadline, whichever is later.

The Supreme Court has found notice by mail to be sufficient if the notice is "reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *accord Sullivan v. Am. Express Publ'g Corp.*, No. SACV 09-142-JST ANx, 2011 WL 2600702 at *8 (C.D. Cal. June 30, 2011) (quoting *Mullane*). Under the circumstances of this case, where class members would have received much of their communication from Code42 via e-mail, e-mail is a "reasonably calculated" method by which to apprise them of the settlement. *See D.Light Design, Inc. v. Boxin Solar Co., Ltd.*, No. C-13-5988 EMC, 2015 WL 526835 at *3 (N.D. Cal. February 6, 2015) (holding that e-mail is a proper form of notice where parties have provided email addresses to facilitate their business dealings). The Court finds that the proposed procedure for class notice satisfies these standards.

Kissel has provided the Court with a copy of the proposed notice. (Class Notice, Mot. Ex. A, Doc. 43-3.) Under Rule 23, the notice must include, in a manner that is understandable to potential class members: "(i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members

under Rule 23(c)(3)." Fed. R. Civ. P. 23(c)(2)(B). The proposed notice includes this necessary information. (*See* Class Notice.)

The Court, however, requires the notice to be modified as follows:

- The second bullet on the first page should be updated to reflect that the calculated amount per consumer is $7.00-$7.50.
- Under Question 2 ("What is this lawsuit about?"), the notice must provide a more robust description of the claims and defenses.
- Under Question 18 ("How do I tell the Court that I don't like the settlement?"), the notice must eliminate any reference to filing a written objection with the Court. Plaintiff's Counsel are responsible for filing, in connection with Plaintiff's motion for final approval, any objections along with a brief responding to such objections. Accordingly, the notice should instruct class members to object by mailing a written objection to Plaintiff's Counsel, Counsel for Defendant, and the claims administrator at the indicated addresses.
- Under Question 17 ("How will the lawyers be paid?") and Question 24 ("How do I get more information about the settlement?"), the notice should also state that all papers filed in this action will also be available for review via the Public Access to Court Electronic Resources System (PACER), available online at http://www.pacer.gov.
- Under Question 9 ("How much will my payment be?"), the notice must mirror the language in Question 17 (with the addition identified above) setting forth that a copy of the application for fees and costs will be available for review. As explained earlier in this order, Kissel must adequately justify the requested service payments in the application for fees and costs. The notice must indicate that a copy of this application can be viewed at the Courthouse and through PACER by the filing deadline identified below.

- Under Question 24 ("How do I get more information about the settlement?"), the notice should also identify the claims administrator's contact information, *i.e.*, its phone number and address.

Subject to the changes discussed above, the Court approves the form and method of class notice. The Court ORDERS the parties to file a revised version of the Full Notice within **10 days** of this Order.

The Court requires that any motion for attorneys' fees, costs, *and service payments* be filed with the Court **no later than 15 days before** the exclusion deadline. Plaintiff shall file her motion for final approval no later than **December 22, 2017**, including a brief responding to any submitted objections and otherwise summarizing the class members' participation in the settlement and the settlement administration to date.

Finally, the Court notes that its jurisdiction over this matter arises in part from the Class Action Fairness Act. (*See* Compl. ¶ 4.) In their papers for final approval of the settlement, the parties must also include a declaration reflecting that they provided appropriate notice of the proposed settlement to relevant state and federal authorities per the terms of 28 U.S.C. § 1715(b) at least 90 days prior to the date for the final fairness hearing. 28 U.S.C. § 1715(d). *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1059 n.5 (C.D. Cal. 2010) (recognizing that the Class Action Fairness Act "requires that notice [of a proposed settlement] be sent to 'the appropriate State official of each State in which a class member resides and the appropriate Federal official.'" (quoting 28 U.S.C § 1715(b)).

VI. CONCLUSION

For the reasons discussed above, the Court (1) conditionally certifies the class for settlement purposes only, (2) preliminarily approves the settlement, (3) names Jordan Kissel as Class Representative, (4) names Scott J. Ferrell, David W. Reid, and Victoria C. Knowles as Class Counsel, (5) approves JND as the claims administrator, and (6) approves the form and method of class notice, subject to the changes discussed above. The Court

ORDERS the parties to file a revised version of the Full Notice within **10 days** of this Order.

The Court sets a final fairness hearing for **February 9, 2018, at 2:30 p.m.**, to determine whether the settlement should be finally approved as fair, reasonable, and adequate to Class Members. Plaintiff shall file her motion for final approval no later than **December 22, 2017**. Class Counsel shall file any supplemental brief in support of their application for fees and costs **no later than 15 days before** the exclusion deadline. The Court reserves the right to continue the date of the final fairness hearing without further notice to class members.

DATED: October 04, 2017

JOSEPHINE L. STATON

JOSEPHINE L. STATON
UNITED STATES DISTRICT JUDGE