

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

JOHN MCCURLEY, DAN
DEFOREST, individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

ROYAL SEAS CRUISES, INC.,

Defendant.

Case No. 17-cv-00986-BAS-AGS

**ORDER GRANTING IN PART
AND DENYING IN PART
PLAINTIFFS' MOTION FOR
APPROVAL OF PROPOSED
CLASS NOTICE PLAN**

[ECF No. 100]

Plaintiffs John McCurley and Dan DeForest move for approval of their proposed class notice plan. (ECF Nos. 100, 103.) Plaintiffs' motion presents two separate and alternative notice plans—the proposed Direct Notice Plan and the proposed Publication Notice Plan—for which Plaintiffs seek court approval of only one, preferably publication notice. Defendant Royal Seas Cruises, Inc. (“Royal”) principally opposes the proposed Publication Notice Plan and argues that Plaintiffs' proposed notice is otherwise incomplete. (ECF No. 102.) For the reasons herein, the Court grants Plaintiffs' motion for approval of the Direct Notice Plan and denies Plaintiffs' motion for approval of the Publication Notice Plan. Having reviewed the proposed notices, the Court finds that they lack certain information that Rule 23 requires for notice in a Rule 23(b)(3) class action. Thus, the Court orders certain amendments to the notices.

RELEVANT BACKGROUND

1. Class Certification

Plaintiffs previously moved for certification of nationwide Rule 23(b)(2) and Rule 23(b)(3) TCPA classes. (ECF No. 49.) The Court granted in part and denied in part Plaintiffs' motion. *See McCurley v. Royal Seas Cruises, Inc.*, 331 F.R.D. 142 (S.D. Cal. 2019). As a result, the Court has certified nationwide Rule 23(b)(3) TCPA classes as follows:

Class:

All persons within the United States who received a telephone call (1) from Prospects, DM, Inc. on behalf of Royal Seas Cruises, Inc. (2) on said Class Member's cellular telephone (3) made through the use of any automatic telephone dialing system or an artificial or prerecorded voice, (4) between November 2016 and December 2017, (5) where such calls were placed for the purpose of marketing, (6) to non-customers of Royal Seas Cruises, Inc. at the time of the calls, and (7) whose cellular telephone number is associated in Prospects DM's records with either diabeteshealth.info or www.yourautohealthlifeinsurance.com.

Transfer Subclass:

All members of the Class whose call resulted in a Transfer to Royal Seas Cruises, Inc.

McCurley, 331 F.R.D. at 163.

2. Proposed Alternative Notice Plans

After receiving two extensions to propose a class notice plan, (ECF Nos. 92, 95), Plaintiffs timely filed the present motion. Class Counsel retained KCC Class Services ("KCC"), a class action administration firm, to design the proposed notice plans, and KCC will conduct whichever notice plan the Court approves. (ECF No.

1 101-1 Carla A. Peak (Vice President of Legal Notification Services for KCC) Decl.
 2 (“Peak Decl”) ¶¶ 2, 7; *see also* ECF No. 100-3 Matthew M. Loker (Class Counsel)
 3 Decl. (“Loker Decl.”) ¶ 20 Ex. 7 (KCC’s proposed Dissemination Plan).)

4
 5 As a general matter, KCC will establish a case website
 6 (www.RoyalSeasCruisesTCPAClassAction.com) to allow Class Members to obtain
 7 additional information and documents about the litigation, including the Complaints,
 8 Class Certification Order, and Detailed Notice. (Peak Decl. ¶ 22; Loker Decl. ¶ 12.)
 9 The website address will appear in any notice the Court approves. (Peak Decl. ¶ 22.)
 10 KCC will establish a toll-free telephone number to allow Class Members to learn
 11 more about the litigation and to request that notice be mailed to them directly. (*Id.* ¶
 12 23.) The number will appear on the website and any notice the Court approves. (*Id.*)
 13 Finally, KCC will establish and monitor a case mailbox where Class Members can
 14 submit exclusion requests and other case correspondence. (*Id.* ¶ 24.)

15
 16 **Proposed Direct Notice Plan.** Under this proposed plan, Class Counsel
 17 and/or Royal would provide KCC with all the telephone numbers available in
 18 Prospects DM’s (“Prospects”) records for diabeteshealth.info and
 19 www.yourautohealthlifeinsurance.com, which KCC would compile into a single
 20 Notice List. (*Id.* ¶ 13.) KCC would de-duplicate telephone numbers in the Notice
 21 List so that unique telephone numbers appear once and then KCC would perform a
 22 reverse directory search to determine viable postal addresses for each unique
 23 telephone number. (*Id.*) After the search, KCC would update the Notice List and de-
 24 duplicate to ensure that a single postcard notice is mailed for each unique phone
 25 number to the actual user of the phone number, as best as can be determined. (*Id.* ¶
 26 14.) If the reach of the Direct Notice Plan falls below 70%, then KCC would use
 27 digital media advertisements to ensure the Notice Plan reaches at least 70% of likely
 28 Class Members. (*Id.* ¶ 15.) KCC proposes to send a postcard notice by U.S. Postal

1 Service mail for identified physical addresses, with a follow-up address identification
 2 plan for any notice initially returned as undeliverable. (*Id.* ¶¶ 16–18.) Class Counsel
 3 has submitted a proposed postcard notice. (Loker Decl. ¶ 16 Ex. 5.) Class Counsel
 4 “believe[s]” that if direct mail notice is required “it should be accomplished first with
 5 the post card notice that directs consumers to the Website.” (*Id.* ¶ 17.) Class Counsel
 6 submits a separate proposed long form notice, which is presumably the Detailed
 7 Notice to which KCC refers in its declaration. (*Id.* ¶ 18 Ex. 6.) Royal believes the
 8 long form notice should be sent to consumers instead of the proposed postcard notice.
 9 (*Id.* ¶ 19; *see also* ECF No. 102.)

10
 11 **Proposed Publication Notice Plan.** Under this proposed plan, KCC would
 12 cause a “Summary Notice” to appear in *ESPN The Magazine*, which apparently
 13 “reaches 7.3% of likely Class Members” with “likely Class members [] 2.2% more
 14 likely to be readers of the magazine, as compared to the general adult population.”
 15 (Peak Decl. ¶ 19.) In addition, KCC would engage in digital media advertising by
 16 purchasing either 116 million or 242 million digital media advertising impressions to
 17 be distributed via the Google Display Network and Facebook over a period of 60
 18 days, with impressions “targeted to likely Class Members.” (*Id.* ¶ 21; Loker Decl.
 19 Ex. 7 at 6.)¹ The impressions would appear on desktop and mobile devices and would
 20 include an embedded link to the case website. (*Id.*) Class Counsel has submitted the
 21 proposed text for *ESPN The Magazine* and three proposed Facebook Ads. (Loker
 22 Decl. ¶¶ 11, 14, Ex. 1 (*ESPN The Magazine* and case website text), Ex. 2 (Facebook
 23 ads), Ex. 4 (*ESPN The Magazine* formatted text).)

24
 25
 26 ¹ Although Peak’s declaration proposes that KCC will purchase 242 million
 27 digital media advertising impressions, (Peak Decl. ¶ 21), the KCC Dissemination
 28 Plan refers only to 116 million impressions, (Loker Decl. Ex. 7 at 6). This
 discrepancy, while concerning, is ultimately unavailing because the Court rejects the
 proposed Publication Notice Plan.

LEGAL STANDARD

A court must approve the content and form of class notice. Fed. R. Civ. P. 23(d). District courts possess broad discretion to shape class notice to comply with Rule 23. *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 (1989) (holding that it is proper for district courts to “intervene in the notice process”). As is relevant here, class notice must satisfy Rule 23(c)(2), which “requires a higher standard of notice for a Rule 23(b)(3) class action.” *Frank v. United Airlines, Inc.*, 216 F.3d 845, 851 (9th Cir. 2000) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974)). For a Rule 23(b)(3) class, a 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). In addition, Rule 23(c)(2)(B) requires that class notice contain certain specified information. *Id.*

DISCUSSION

1. Direct Notice is the Best Practicable Notice Under the Circumstances

Although Plaintiffs propose two alternative plans, a key dispute between the parties concerns the propriety of the Publication Notice Plan. (*Contrast* ECF No. 102 at 3–9 *with* ECF No. 103 at 2–3.) The Court will approve only the Direct Notice Plan.

Class notice in a Rule 23(b)(3) class action must comport with the requirements of due process. “The plaintiff must receive notice plus an opportunity to be heard and participate in litigation, whether in person or through counsel.” *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 628 (1985). Rule 23(c)(2)(B) provides that notice must be “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). Direct individual notice “must be sent to all

1 class members whose names and addresses may be ascertained through reasonable
 2 effort.” *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173 (1974). Plaintiffs propose
 3 a Direct Notice Plan that uses the telephone numbers in Prospects’ records to perform
 4 a reverse directory lookup to ascertain a class member’s address, determine the actual
 5 user of the telephone number, and provide any approved notice to the class members
 6 at the identified address. (ECF No. 100-1 at 11; Peak Decl. ¶¶ 13–18.) Royal
 7 conspicuously does not challenge these aspects of the Direct Notice Plan and in fact
 8 points to it as a reason to deny approval of the Publication Notice Plan. (ECF No.
 9 102 at 1–3.) Thus, there is no dispute that Plaintiffs are able to identify the names
 10 and addresses of class members through reasonable effort, as reflected in the Direct
 11 Notice Plan.

12
 13 Plaintiffs, nevertheless, request that the Court approve the Publication Notice
 14 Plan instead of the Direct Notice Plan for two reasons. First, Plaintiffs believe that
 15 publication notice is the best form of notice under the circumstances “[g]iven the
 16 suspicious ‘consent’ data provided by Royal[.]” (ECF No. 100-1 at 9.) Plaintiffs
 17 draw from their class certification argument that Royal’s consent records “containing
 18 class members’ names and addresses ha[ve] been fabricated while the telephone
 19 numbers dialed appear[] to be associated with actual consumers” and thus “reliance
 20 upon the addresses therein . . . would be misplaced[.]” (*Id.*) Plaintiffs’ argument
 21 makes little sense at the class notice stage. The certified classes are defined by the
 22 telephone numbers in Prospects’ records for calls placed on Royal’s behalf and which
 23 are associated with two websites. *McCurley*, 331 F.R.D. at 163.² These numbers are
 24

25 ² Royal objects that notice should not be given until Plaintiffs have identified
 26 class members, characterizing Plaintiffs’ notice plan as “sending notice to everyone
 27 listed in any ‘metropolitan telephone book.’” (ECF No. 102 at 9–11 (quoting *In re*
 28 *Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1099 (5th Cir. 1977)).) Royal’s
 objection rings hollow. Plaintiffs’ Direct Notice Plan simply does not call for
 haphazard divinations about who is and isn’t a class member. Although the precise

1 the most crucial piece of data in this TCPA case. Plaintiffs do not and cannot soundly
 2 dispute the validity of the telephone numbers in Prospects' records. Critically,
 3 Plaintiffs' proposed Direct Notice Plan does not rely on any "suspicious" address
 4 information in the underlying records, but instead relies on KCC ascertaining class
 5 members' addresses through the telephone numbers in Prospects' records. Thus, the
 6 Court rejects this purported rationale for why the Publication Notice Plan is better
 7 than direct notice.

8
 9 Second, Plaintiffs argue that the Publication Notice Plan is preferable because
 10 it "is anticipated to provide notice to at least 70% of the class members in a more cost
 11 effective manner." (ECF No. 100-1 at 10.) Royal's counsel has provided the Court
 12 with a document Class Counsel sent Royal, in which KCC submitted cost estimates
 13 to Class Counsel, which estimates the cost of the proposed Publication Notice Plan
 14 to be \$222,212.00 and the cost of the proposed Direct Notice Plan to be \$776,013.00.
 15 (ECF No. 102-1 Brian R. Cummings Decl. ¶ 8 Ex. A at 4.)³ Plaintiffs do not dispute
 16 the veracity of the document, but instead argue that the cost of the Direct Notice Plan
 17 "appears to be inequitable" relative to the Publication Notice Plan, particularly when
 18 both plans are estimated to have the same 70% reach and Plaintiffs have agreed to
 19 cover notice costs. (ECF No. 103 at 4.) The Court is not persuaded by Plaintiffs'
 20 assertions.

21
 22 number of class members is not known yet, there is a defined universe of class
 23 members and the Direct Notice Plan entails generating a Notice List of class
 24 members in order to complete notice. Royal recognizes as much in its own
 25 opposition brief. (ECF No. 102 at 2 ("[T]he narrowed classes are specifically
 26 defined as a finite group of persons whose telephone numbers reside in [Prospects']
 records[.]").)

27 ³ For reasons unknown to the Court, Plaintiffs did not provide any information
 28 regarding the costs of the proposed notice plans with their opening motion. (See
 ECF No. 100.)

1 “Individual notice must be sent to all class members whose names and
 2 addresses may be ascertained through reasonable effort.” *Eisen v. Carlisle &*
 3 *Jacqueline*, 417 U.S. 156, 173 (1974). This means that the cost of notice is not the
 4 relevant focus of Rule 23 or this Court. *See id.* at 177 (“There is nothing in Rule 23
 5 to suggest that the notice requirements can be tailored to fit the pocketbooks of
 6 particular plaintiffs.”); *Cohorst v. BRE Properties, Inc.*, No. 3:10-CV-2666-JM-BGS,
 7 2011 WL 7061923, at *6 (S.D. Cal. Nov. 14, 2011) (noting that it is for the court “to
 8 determine what amounts to reasonable efforts under the circumstances of each case,
 9 the available information to the parties and possible methods of identification of
 10 potential class members,” and that “[t]he hallmark of the notice inquiry . . . is
 11 reasonableness”); *Kaufman v. Am. Express Travel Related Servs. Co.*, No. 07 C 1707,
 12 2010 WL 3365921, at *3 (N.D. Ill. Aug. 19, 2010) (“[T]he reasonableness
 13 requirement pertains to the effort expended to identify class members, not the cost
 14 incurred in providing such notification.”). It is only when individual notice is not
 15 feasible that a court should approve forms of notice that are in combination with or
 16 in place of direct individual notice. *See Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d
 17 781, 786 (7th Cir. 2004) (“When individual notice is infeasible, notice by publication
 18 . . . is an acceptable substitute.”). Here, the mere fact that Plaintiffs have proposed a
 19 Direct Notice Plan means that provision of direct individual notice is not infeasible.⁴
 20 Accordingly, the Court concludes that the best notice under the circumstances is
 21 direct notice to class members by U.S. mail. Accordingly, the Court will approve
 22 only the Direct Notice Plan.

23
 24 Plaintiffs’ motion is silent as to the timing of the Direct Notice Plan. Rule 23

26 ⁴ It is otherwise readily apparent to the Court that while the Publication Notice
 27 Plan may be a more cost-effective method for Class Counsel, the Publication Notice
 28 Plan would disseminate notice far beyond the narrow parameters of the class for
 which Plaintiffs requested class certification.

1 is similarly silent as to when notice should issue to class members in a certified Rule
 2 23(b)(3) class action. At a minimum, however, class notice “should issue swiftly
 3 after class certification[.]” *Pennington v. Fluor Corp.*, Nos. 0:17-cv-02094-JMC,
 4 0:17-cv-02201-JMC, 2019 WL 2537674, at *5 (D.S.C. June 20, 2019). Ultimately,
 5 class notice should be completed before dispositive motions are decided. *See*
 6 *Schwarzschild v. Tse*, 69 F.3d 293, 295 (9th Cir. 1995) (“The purpose of Rule 23(c)(2)
 7 is to ensure that the plaintiff class receives notice of the action well before the merits
 8 of the case are adjudicated.”); *Huynh v. Harasz*, No. 14-CV-02367-LHK, 2016 U.S.
 9 Dist. LEXIS 46753, at *2 (N.D. Cal. Apr. 5, 2016) (“Generally, dispositive motions
 10 in class actions, which include motions for summary judgment, should be decided
 11 after all potential Class Members receive notice.”); *see also Brown v. Colegio de*
 12 *Abogados de P.R.*, 613 F.3d 44, 51 (1st Cir. 2010); *Cohen v. Office Depot, Inc.*, 204
 13 F.3d 1069, 1078 (11th Cir. 2000); *Collins v. E.I. DuPont de Nemours & Co.*, 34 F.3d
 14 172, 180 (3d Cir. 1994). Here, the Court granted class certification in March 2019
 15 and the current deadline for filing dispositive motions is November 15, 2019. In the
 16 interests of the class receiving notice as swiftly as possible following the Court’s
 17 March 2019 class certification order and prior to adjudication of any motions for
 18 summary judgment, the Court will impose a deadline of November 1, 2019 for
 19 Plaintiffs to complete the Direct Notice Plan.

20 21 **2. The Contents of the Proposed Notices**

22 The Court must ensure that any proposed notice satisfies Rule 23’s notice
 23 requirements. In this action, notice must “concisely and clearly state in plain, easily
 24 understood language: (i) the nature of the action; (ii) the definition of the class
 25 certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter
 26 an appearance through an attorney if the member so desires; (v) that the court will
 27 exclude from the class any member who requests exclusion; (vi) the time and manner
 28 for requesting exclusion; and (vii) the binding effect of a class judgment on members

1 under Rule 23(c)(3).” Fed. R. Civ. P. 23(c)(2)(B).

2
3 Plaintiffs prefer to send a postcard notice to class members. (Loker Decl. ¶ 16
4 Ex. 5.) Royal objects to the postcard notice and instead requests that the Court require
5 Plaintiffs to send the proposed long form notice Plaintiffs have concurrently
6 submitted to the Court. (*Id.* ¶¶ 18–19 Ex. 6.) According to Royal, the postcard notice
7 “lacks sufficient information.” (ECF No. 102 at 13.) The only relevant issue under
8 Rule 23 is whether class notice contains the required information. Having reviewed
9 the proposed notices, Royal raises meritorious notice objections to the postcard
10 notice’s lack of required information regarding exclusion. These objections,
11 however, can be addressed through the Court’s amendment of the proposed notices,
12 as discussed herein. Royal’s remaining objections are otherwise misguided.

13
14 **a. Exclusion - Rule 23(c)(2)(B)(v) and (vi)**

15 First, Royal objects that the postcard notice does not clearly state that the Court
16 will exclude anyone who requests exclusion. (ECF No. 102 at 12–13.) The Court
17 agrees. Contrary to Plaintiffs’ argument in their approval motion, (ECF No. 100-1 at
18 8), both the postcard and long form notices do not contain this information. (Loker
19 Decl. ¶ 16 Ex. 5 (postcard notice); *id.* ¶ 18 Ex. 6 at 4 (long form notice).) Plaintiffs
20 will be required to add the following language to each proposed notice: “The Court
21 will exclude from the class any member who requests exclusion.”

22
23 Second, Royal objects that the postcard notice does not identify the time by
24 when class members must request exclusion. (ECF No. 102 at 12.) This objection is
25 accurate. The postcard notice simply states that a class member must request
26 exclusion “by Month XX, 2019.” (Loker Decl. ¶ 16 Ex. 5.) The long form notice
27 that Royal prefers similarly uses this placeholder. (*Id.* ¶ 18 Ex. 6 at 4.) The objection
28 is easily resolved because the Court will set the opt-out date as December 2, 2019.

1 This time period allows for class members to opt out during briefing on any motions
 2 for summary judgment under the current schedule and well before the current trial
 3 date. *See Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1997)
 4 (upholding district court’s decision to approve the mailing of class notice when there
 5 “were 26 days between the mailing of the notice and the deadline for opting out.”);
 6 *Huynh*, 2016 U.S. Dist. LEXIS 46753, at *2 (resetting opt-out deadline after the
 7 completion of briefing on cross-motions for summary judgment with the deadline set
 8 as five days before a hearing on the cross-motions).

9
 10 Second, Royal objects that the postcard notice does not identify how class
 11 members can exclude themselves. (ECF No. 102 at 12.) This objection is accurate.
 12 The postcard notice simply informs class members that, “[i]f you do not want to stay
 13 in the Class, you must submit a request for exclusion by Month XX, 2019.” (Loker
 14 Decl. ¶ 16 Ex. 5.) The proposed long form notice does not suffer from this defect
 15 because it directs class members to submit exclusion requests to the P.O. Box address
 16 that KCC will establish.⁵ The proposed postcard notice contemplates providing this
 17 P.O. Box address on the front of the postcard. (Loker Decl. ¶ 16 Ex. 5.) Based on
 18

19
 20 ⁵ The proposed long form notice states that:

21 To exclude yourself, you must send a letter that states “I want to be excluded from
 22 *McCurley v. Royal Seas Cruises, Inc.*, Case No. 3:17-cv-00986”. Include your name,
 23 address, the cell phone number or numbers that received the calls at issue in this
 24 lawsuit, and your signature. You must mail your exclusion request letter so that it is
 postmarked by Month XX, 2019 to:

25 McCurley v. Royal Seas TCPA Administrator
 26 P.O. Box XXXX
 27 Louisville, KY 40233-XXX”

28 (*Id.* ¶ 18 Ex. 6 at 4.) Of course, Plaintiffs will need to update the proposed notices to
 reflect the opt-out date and the true address.

1 this, the Court will require Plaintiffs to amend the postcard notices as follows:

2
3 If you do not want to stay in the Class, you must submit a request for
4 exclusion by December 2, 2019 by sending a letter to the P.O. Box
5 address on this postcard. The letter must state that “I want to be excluded
6 from *McCurley v. Royal Seas Cruises, Inc.*, Case No. 3:17-cv-00986.”
7 Include your name, address, the cell phone number or numbers that
8 received the calls at issue in this lawsuit, and your signature.

9
10 This proposed amendment incorporates the exclusion procedure identified in the
11 proposed long form notice. As such, the Court sustains Royal’s objections and has
12 addressed them through appropriate amendments.

13
14 **b. “The Class Claims, Issues, or Defenses” – Rule 23(c)(2)(B)(iii)**

15 Royal objects that the postcard notice “omit[s] disclosure of the primary class
16 issue in the case that was the primary focus of class certification briefing — Plaintiffs’
17 avoidance to Royal’s consent defense based on their contention of fabricated
18 consent.” (ECF No. 102 at 13.) The Court overrules this objection. Rule 23 does
19 not require class notice to identify all issues or defenses that have been or will be
20 presented in a certified class action. The plain language of the Rule instead
21 contemplates that identification of the claims at issue is itself sufficient for class
22 notice. *See* Fed. R. Civ. P. 23(c)(2)(B)(iii). The proposed postcard notice plainly
23 identifies that this case concerns TCPA claims against Royal, describes the nature of
24 the claims in clear and concise language, and indicates that Royal denies the claims.
25 (*See* Loker Decl. ¶ 16 Ex. 5.) Although the long form notice contains more
26 information, including a description of Royal’s affirmative consent defense, (*see id.*
27 ¶ 18 Ex. 6 at 2), Plaintiffs are not required to provide the same information in the
28 postcard notice. Thus, the Court overrules this objection.

1 The Court further **ORDERS** as follows:

2 1. Plaintiffs **SHALL AMEND** their notices in accordance with this Order.
3 Plaintiffs **SHALL FURTHER AMEND** the notices to reflect that any trial date is
4 subject to further change depending on the Court's schedule or the needs of the case.


5 2. Plaintiffs **SHALL FILE** copies of the amended notices with the Court
6 **no later than August 28, 2019.**

7 3. Plaintiffs **SHALL COMPLETE** the Direct Notice Plan **no later than**
8 **November 1, 2019.**

9 4 Class Members shall opt-out **no later than December 2, 2019.**

10 **IT IS SO ORDERED.**

11 **DATED: August 14, 2019**


Hon. Cynthia Bashant
United States District Judge