**UNITED STATES DISTRICT COURT**

**FOR THE CENTRAL DISTRICT OF CALIFORNIA**

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| JEFFREY KEARNS, individually and on behalf of all others similarly situated,<br><br>Plaintiff,<br><br>v.<br><br>LOANDEPOT.COM, LLC,<br><br>Defendant. | Case No. 8:22-cv-01217-JWH-JDE<br><br>**ORDER GRANTING CLASS CERTIFICATION [ECF Nos. 128 & 145]** |

Before the Court are two motions: (1) the motion of named Plaintiff Jeffrey Kearns for class certification;[1] and (2) the motion of Defendant loanDepot.com, LLC to strike both the proposed class and Kearns's request to change the named class representative.[2] Each Motion is opposed,[3] and the Class Certification Motion is fully briefed.[4] Kearns also filed various "Notices of Supplemental Authority" in support of his Class Certification Motion,[5] to which loanDepot objects.[6]

The Court concludes that these matters are appropriate for resolution without a hearing. *See* Fed. R. Civ. P. 78; L.R. 7-15. For the reasons detailed herein, the Court **GRANTS** Kearns's Class Certification Motion and **DENIES** loanDepot's Motion to Strike.

## I. BACKGROUND

Kearns filed this case, on behalf of himself and others similarly situated, in June 2022.[7] In his operative Amended Complaint, Kearns asserts a single claim

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1 Pl.'s Mot. to Certify Class (the "Class Certification Motion") [ECF No. 128].

2 Def.'s Mot. to Strike New Proposed Class and Pl.'s Req. to Change Named Class Representative (the "Strike Motion") [ECF No. 145].

3 *See* Def.'s Opp'n to the Class Certification Motion (the "Class Certification Opposition") [ECF No. 138]; Pl.'s Opp'n to the Strike Motion (the "Strike Motion Opposition") [ECF No. 147].

4 *See* Pl.'s Reply in Supp. of the Class Certification Motion (the "Class Certification Reply") [ECF No. 143]. loanDepot declined to reply with respect to its Motion to Strike. *See* Def.'s Statement of Supp. for the Strike Motion [ECF No. 151].

5 Pl.'s Notices of Suppl. Authority (the "Supplemental Notices") [ECF Nos. 153, 155, 156, & 161].

6 Def.'s Opp'ns re the Supplemental Notices (the "Supplemental Oppositions") [ECF No. 154 & 157].

7 *See* Compl. [ECF No. 1].

for relief for violation of the Telephone Consumer Protection Act (the "TCPA"), 47 U.S.C. § 227(b)(1)(A)(iii).[8] In that pleading, Kearns proposed the following class:

> All persons in the United States who, within four years prior to the filing of this action through the date of class certification, were sent a prerecorded voice call on their cellular telephone for the purpose of encouraging the purchase or rental of, or investment in, Defendant's property, goods and/or services, and whose cellular telephone number Defendant obtained solely from LendingTree.[9]

Kearns reserved the right to seek to modify the proposed Class definition.[10]

Kearns's pleading survived loanDepot's Summary Judgment Motion[11] and loanDepot's preemptive Motion to Deny Class Certification.[12] Now, Kearns moves to certify the following proposed class under Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure:

> All persons in the United States whose cellular telephone number appears in "Exhibit A" of Defendant's Court Ordered Supplemental Discovery Responses and who was called by Defendant utilizing a prerecorded message on the date reflected in "Exhibit A."[13]

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8 Second Am. Compl. (the "Amended Complaint") [ECF No. 93].

9 *Id.* at ¶ 32.

10 *Id.* at ¶ 33.

11 *See* Def.'s Mot. for Summ. J. (the "Summary Judgment Motion") [ECF No. 62]; Min. Order re Hr'g re the Summary Judgement Motion [ECF No. 91].

12 *See* Def.'s Mot. to Deny Certification (the "Motion to Deny Class Certification") [ECF No. 109]; Min. Order re Hr'g re the Motion to Deny Class Certification [ECF No. 126].

13 Class Certification Motion 17:2-6.

Kearns describes "Exhibit A" as "a spreadsheet reflecting 9,434,314 telephone calls and the dates of each call . . . made to leads exclusively obtained by [l]oanDepot from LendingTree during the four years prior to the filing of this case, and where a prerecorded message was played during the call."[14] Kearns—based upon discovery and representations from loanDepot, as ordered by the Court—notes that the calls reflected in "Exhibit A" were placed to "3,464,926 unique telephone numbers" and that "[a]ll of the messages played during the 9,434,314 calls similarly requested the recipient to call [l]oanDepot at which point they would have ultimately been connected with a Customer Lending Representative to discuss [l]oanDepot's loan products."[15] In its Class Certification Opposition, loanDepot rejects the representations that it made in discovery, asserting that the phone numbers in "Exhibit A" came from "at least nine (9) different websites."[16] In response, Kearns suggests narrowing the "Exhibit A" class to exclude numbers supplied to loanDepot through websites other than LendingTree, as follows:

> All persons in the United States (1) whose cellular telephone number appears in "Exhibit A" to Defendant's Court Ordered Supplemental Discovery Responses; (2) whose telephone number Defendant obtained solely via the www.lendingtree.com website; and (3) who were called by Defendant utilizing a prerecorded message on the date reflected in "Exhibit A."[17]

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[14] *Id.* at 14:12-16 (emphasis omitted).

[15] *Id.* at 14:17-22 (emphasis omitted).

[16] Class Certification Opposition 14:16-17.

[17] Class Certification Reply 8:13-9:2.

Kearns also argues that, if the Court concludes that he is an inadequate class representative under Rule 23(a), then he should be permitted to substitute Mary Szanyi-Coffey as named Plaintiff.[18]

In its Motion to Strike, loanDepot argues that Kearns's requests in his Reply—(a) to narrow the class definition; and (b) if needed, to substitute the named Plaintiff—should be stricken or, in the alternative, that the Court should grant additional discovery and a briefing schedule to allow the parties to address the changes.[19] Kearns opposes loanDepot's Motion to Strike as procedurally improper, but he does not oppose additional discovery.[20]

## II. LEGAL STANDARD

### A. Rule 23

Rule 23 governs class actions. A party seeking class certification must establish the following:

> (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). After satisfying those four prerequisites—usually referred to as "numerosity," "commonality," "typicality," and "adequacy"—a party must also demonstrate one of the following: (1) a risk that separate actions would create incompatible standards of conduct for the defendant or prejudice individual class members not parties to the action; (2) the defendant has treated

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[18] *Id.* at 20:15-23:15.

[19] *See generally* Strike Motion.

[20] *See generally* Strike Motion Opposition.

the members of the class as a class, making appropriate injunctive or declaratory relief with respect to the class as a whole; or (3) common questions of law or fact predominate over questions affecting individual members and that a class action is a superior method for fairly and efficiently adjudicating the action. *See* Fed. R. Civ. P. 23(b)(1)-(3). A plaintiff must establish the Rule 23 factors by a preponderance of the evidence. *See Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 664 (9th Cir.), *cert. denied sub nom. StarKist Co. v. Olean Wholesale Grocery Coop., Inc.*, 143 S. Ct. 424 (2022).

A trial court has broad discretion to grant or deny a motion for class certification. *See Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 712 (9th Cir. 2010). However, "[a] party seeking class certification must affirmatively demonstrate his compliance with [Rule 23]—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (emphasis in original). A district court must conduct a "rigorous analysis" that frequently "will entail some overlap with the merits of the plaintiff's underlying claim." *Id.* at 351.

Class certification "'is inherently tentative,'" so "the judge remains free to modify it in the light of subsequent developments in the litigation." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.11 (1978)). Additionally, the court may, within its discretion, amend the class definition, even *sua sponte*. *See, e.g.*, *Davis v. Lab'y Corp. of Am. Holdings*, 604 F. Supp. 3d 913, 934 n.16 (C.D. Cal. 2022), *aff'd*, 2024 WL 489288 (9th Cir. Feb. 8, 2024) (certifying a class with a definition different than what was proposed in the motion); *see also Davis*, 2024 WL 489288, at *1 (noting that, after awarding class certification, "the district court amended its class certification order to refine the class definitions"). "This flexibility enhances the usefulness of the class-action device." *Falcon*, 457 U.S. at 160.

### B. Rule 12(f)

A court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). A court has discretion in determining whether to strike matter from a pleading. *See Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1528 (9th Cir. 1993), *rev'd on other grounds*, 510 U.S. 517 (1994). In the class action context, "a motion to strike class allegations, . . . is the 'functional equivalent of'" a motion to deny class certification under Rule 23. *Bates v. Bankers Life & Cas. Co.*, 848 F.3d 1236, 1238 (9th Cir. 2017) (quoting *In re Bemis Co.*, 279 F.3d 419, 421 (7th Cir. 2002)).

## III. ANALYSIS

As an initial matter, in view of the "flexibility" afforded to class action plaintiffs and courts with respect to crafting the class definition, *see Falcon*, 457 U.S. at 160; *Davis*, 604 F. Supp. 3d at 934 n.16, the Court analyzes Kearns's Class Certification Motion with respect the narrowed class definition asserted in Kearns's Reply, which the Court has *sua sponte* narrowed further in the interest of judicial efficiency, *see* Fed. R. Civ. P. 1. For the same reasons, the Court **DENIES** loanDepot's Motion to Strike, which argues—unconvincingly—that Kearns should not be allowed to amend the class definition.[21]

Therefore, the applicable proposed class definition is as follows:

> All persons in the United States (1) whose cellular telephone number appears in "Exhibit A" to Defendant's Court Ordered Supplemental Discovery Responses; (2) whose telephone number Defendant obtained solely via the www.lendingtree.com website;

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[21] *See generally* Strike Motion.

> and (3) who ***received a call from*** Defendant utilizing a prerecorded message on the date reflected in "Exhibit A" ***and did not return that call.***[22]

And because the Court concludes that Kearns is an appropriate Class representative, it **DENIES** Kearns's alternative request to substitute another representative, as well as loanDepot's Motion to Strike that request, **as moot**.

**A. Rule 23(a) Requirements**

**1. Numerosity**

Rule 23(a)(1) requires the class to be so numerous that the joinder of all class members is impracticable. *See* Fed. R. Civ. P. 23(a)(1). To be impracticable, joinder must be difficult or inconvenient, but it need not be impossible. *See Keegan v. Am. Honda Motor Co.*, 284 F.R.D. 504, 522 (C.D. Cal. 2012). No magic number automatically satisfies the numerosity inquiry, although 40 or more members will generally satisfy the requirement. *See id.* A plaintiff has the burden to establish that this requirement is satisfied. *See United Steel, Paper & Forestry, Rubber, Mfg. Energy v. Conoco Phillips Co.*, 593 F.3d 802, 806 (9th Cir. 2010).

Here, the proposed class members total in the millions, and loanDepot has conceded numerosity.[23] Even in view of the narrowed class definition, the Court concludes that the proposed class is sufficiently numerous.

**2. Commonality**

Rule 23(a)(2) requires that there be "questions of law or fact common to the class[.]" Fed. R. Civ. P. 23(a)(2). Courts have construed Rule 23(a)(2)'s commonality requirement permissively. *See Staton v. Boeing Co.*, 327 F.3d 938,

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22 Class Certification Reply 8:13-9:2 (emphasis indicates the narrowing imposed by the Court *sua sponte*).

23 *See* Class Certification Motion 29:22-30:2; *see generally* Class Certification Opposition (no argument in opposition to numerosity).

953 (9th Cir. 2003). A plaintiff satisfies the commonality requirement when he asserts claims for relief that "depend upon a common contention . . . capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350 ("What matters to class certification . . . is not the raising of common questions . . . but rather, the capacity of a classwide proceeding to generate common ***answers*** apt to drive the resolution of the litigation.") (internal quotation marks and citations omitted) (emphasis added).

Kearns asserts that the following common questions predominate among proposed class members:

> (1) [W]hether Defendant made nonemergency prerecorded or artificial telemarketing calls to Plaintiff's and Class members' cellular telephones; (2) whether Defendant can meet its burden of showing that it obtained prior express written consent to make prerecorded telemarketing calls to Plaintiff and Class members; (3) whether Defendant's actions violated the TCPA; (4) whether Defendant's conduct was knowing and willful; (5) whether Defendant is liable for damages and the amount of such damages; and (6) whether Defendant should be enjoined from continuing to engage in such conduct.[24]

In its Opposition, loanDepot raises a number of arguments against commonality. loanDepot first asserts that Kearns has not proven that all proposed class members actually ***received*** a prerecorded voicemail that was successfully delivered, and, indeed, Exhibit A "include[s] individuals to whom a voicemail was merely attempted and not necessarily delivered."[25] loanDepot

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[24] Class Certification Motion 26:6-13.

[25] Class Certification Opposition 25:21-27:10.

argues that determining whether each class member actually received a prerecorded voicemail is an individual, case-by-case inquiry, and, in support of its argument, it cites to various non-binding, out-of-circuit authorities.[26] loanDepot further asserts that Kearns fails to prove "that class members received uniform telemarketing messages" and that the content of each message must be individually reviewed to determine whether it constitutes "telemarketing."[27] Additionally, loanDepot contends that "there is no dispute that class member cellular phones can be identified accurately," so "whether or not a class member was called on a cellular phone is not an issue that will drive resolution at trial," and, therefore, it is not a proper consideration with respect to commonality.[28] loanDepot also asserts that the third question—whether the calls in Exhibit A violated the TCPA—is not a "common question" for the purpose of the commonality inquiry, but, rather, it is the ultimate question of liability.[29] With respect to the leads that loanDepot obtained from LendingTree, loanDepot alleges that LendingTree obtained telephone numbers from different sources, and even different forms submitted to lendingtree.com directly: proposed class members utilized "different forms at different times," such that "assessing TCPA liability . . . is *not* doable on common evidence."[30] loanDepot argues that Kearns "has offered no evidence" on the issue of "whether loanDepot acted willfully or knowingly across the entire class," so Kearns "failed to make any showing of commonality respecting th[at] issue."[31] And

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[26] *See id.*

[27] *Id.* at 27:11-24.

[28] *Id.* at 27:25-28:16.

[29] *Id.* at 28:19-26.

[30] *Id.* at 28:27-29:28 (emphasis in original).

[31] *Id.* at 30:1-8.

finally, loanDepot maintains that questions regarding the remedies available to class members "are definitively *not* common issues likely to drive any resolution of merits issues in the case," but that they "only come into play *after* the merits have been determined."[32]

Importantly, "[e]ven a single common question of law or fact that resolves a central issue" satisfies the commonality requirement. *Castillo v. Bank of Am., NA*, 980 F.3d 723, 728 (9th Cir. 2020) (citing *Dukes*, 564 U.S. at 359). Here, the Court concludes that commonality exists based upon the first and fourth proposed common questions.

With respect to the first common question, the Court finds loanDepot's arguments unconvincing. In interpreting the provision of the TCPA at issue in this case, the Supreme Court noted that "[i]n plain English, the TCPA prohibit[s] almost all robocalls to cell phones." *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 615 (2020); *see also id.* at 618 ("Section 227(b)(1)(A)(iii) generally bars robocalls to cell phones."). Therefore, the Court notes that, although Kearns has proposed a common question focused upon "telemarketing" calls, the TCPA "does not prohibit making robocalls to cell phones only if the calls involve advertising or telemarketing," but, rather, the statute "prohibits in plain terms 'any call,' regardless of content, that is made to a cell phone using an automatic telephone dialing system or an artificial or pre-recorded voice, unless the call is made either for emergency purposes or with the prior express consent of the person being called." *Loyhayem v. Fraser Fin. & Ins. Servs., Inc.*, 7 F.4th 1232, 1234 (9th Cir. 2021) (quoting 47 U.S.C. § 227(b)(1)(A)(iii)). And while the completion of such

[32] *Id.* at 30:9-20 (emphasis in original).

a call may affect the extent of the injury suffered,[33] that is not at issue here with the operative class definition.

With respect to the fourth question—whether loanDepot's conduct was knowing and willful—loanDepot's argument that Kearns has not offered any evidence of loanDepot's scienter misconstrues Kearns's present burden. At the class certification stage, Kearns must prove only that the resolution of a key element of his claim depends upon common evidence across the class. The issue of scienter will be resolved with respect to all class members equally because it will examine the centralized decisions and intent behind loanDepot's alleged automated voicemail marketing scheme.

Therefore, the Court concludes that the commonality requirement is satisfied.

**3. Typicality**

Typicality is fulfilled "if the claims or defenses of the representative parties are typical of the claims or defenses of the class." *Castillo*, 980 F.3d at 729 (citation and quotations omitted). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Id.* (citation and quotations omitted). "The purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Wolin v. Jaguar Land Rover No. Am.*, 617 F.3d 1168, 1175 (9th Cir. 2010) (citation and quotations omitted).

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33 *See infra* Part III.B.1.

loanDepot argues that Kearns is not typical of the proposed class because he "claims to have suffered harm from loanDepot's calls," and, therefore, he is "not typical of class members that claimed to have suffered no harm or injury at all."[34] loanDepot asserts that "typicality turns on 'whether other class members have been injured by the same course of conduct.'"[35] In so doing, loanDepot misrepresents the *Hanon* case. The full quotation is as follows: "[t]he test of typicality 'is whether other members have ***the same or similar injury***, whether the action is based on conduct [by the defendant] which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct.'" *Hanon*, 976 F.2d at 508 (emphasis added). And the requirement is lenient: "'Under [Rule 23's] permissive standards, representative claims are "typical" if they are reasonably co-extensive with those of absent class members; they need not be substantially identical.'" *DZ Rsrv. v. Meta Platforms, Inc.*, 96 F.4th 1223, 1238 (9th Cir. 2024) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998), *overruled on other grounds by Wal-Mart*, 564 U.S. at 338). "A named plaintiff is not typical if 'there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it.'" *Id.* (quoting *Hanon*, 976 F.2d at 508).

Kearns brings this action on behalf of a proposed class of individuals whose cell phone numbers loanDepot obtained through LendingTree and who received calls on those cell phones from loanDepot using a pre-recorded voice message.[36] The Court is satisfied that Kearns is one such individual.[37] And

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[34] Class Certification Opposition 23:6-25:3.

[35] *Id.* at 23:10-12 (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (emphasis omitted)).

[36] *See generally* Class Certification Motion.

[37] *See id.*

Kearns represents that he "does not have any unique affirmative defenses" that render him atypical for the purpose of Rule 23(a).[38]

Rather than oppose Kearns's argument with respect to typicality, loanDepot appears to conflate the typicality and adequacy factors; loanDepot contends that Kearns's "uniquely weak" individual claim exposes him to "unique defenses"—which loanDepot does not specify—and renders Kearns "inadequate."[39] loanDepot attempts to attack Kearns's credibility with respect to the his experience with robocalls,[40] but Kearns's credibility, or lack thereof, does not alone render him inadequate when, as here, the factual premise of his experience is typical of the proposed class. Perhaps, as loanDepot asserts, loanDepot will have ***stronger*** defenses against Kearns than it might against a different class member, but the nature of those defenses will not be ***different***.

Finally, loanDepot maintains that Kearns has not proven that he is a member of the proposed class because he never received a voicemail from loanDepot,[41] but the class is not defined as individuals who received a voicemail from loanDepot, so loanDepot's argument is inapt. Therefore, the Court concludes that the typicality requirement is met.

**4. Adequacy**

To determine whether a proposed class representative will adequately protect the interests of the class, "we ask two questions: (1) Do[es] the

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38 *Id.* at 30:19-20.

39 Class Certification Opposition 21:14-23:5. With respect to the typicality factor, loanDepot's reliance upon an unpublished, out-of-circuit case—*Van Elzen v. Advisors Ignite USA LLC*, 2024 WL 195473 (E.D. Wis. Jan. 18, 2024)—is unavailing and further evinces loanDepot's misunderstanding of the concept of typicality as it has been interpreted applied in the Ninth Circuit.

40 *Id.*

41 *Id.* at 18:6-19:25.

representative plaintiff[] and [his] counsel have any conflicts of interest with other class members, and (2) will the representative plaintiff[] and [his] counsel prosecute the action vigorously on behalf of the class?" *Staton*, 327 F.3d at 957 (citations omitted).

In support of his contention that he is an adequate class representative, Kearns convincingly asserts that he has no conflicting interests with the members of the proposed class, but, rather, he has sought out and retained experienced class counsel, has actively participated in litigation, and has rejected a $25,000 individual settlement offer from loanDepot in favor of moving forward with litigating this case on behalf of the proposed class.[42] In its Opposition, loanDepot argues that Kearns faces unique defenses.[43] As discussed above, that argument pertains to typicality, not adequacy, and, in any event, it is unavailing.[44] The Court concludes that Kearns is an adequate class representative.

**B. Rule 23(b)(3) Requirement**

"In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3)." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Here, Kearns seeks to certify his proposed class under Rule 23(b)(3)—the so-called "predominance" standard—which requires that common questions of law or fact ***predominate*** over questions affecting only individual members and that a class action be ***superior*** to other potential methods of adjudication. *See* Fed. R. Civ. P. 23(b)(3) (emphasis added).

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[42] Class Certification Motion 31:3-32:8.

[43] Class Certification Opposition 20:1-23:5.

[44] *See supra* Part III.A.3.

Kearns argues that common questions—specifically, the same six questions that he raises with respect to the commonality prong[45]—predominate in this case and that a class action is a superior method of adjudicating the claims for relief.[46] Relatedly, Kearns asserts that loanDepot waived the right to enforce LendingTree's arbitration provision and that Kearns and the class members possess Article III standing.[47]

In opposition, loanDepot responds that (1) Kearns cannot prove predominance because Article III harm and whether class members consented to arbitration are individualized issues, and loanDepot has not waived its right to compel arbitration; and (2) Kearns cannot prove superiority because the "unusual circumstances of this case" make a class action an inferior method of resolving the claims.[48]

**1. Predominance**

"[T]he focus of the predominance inquiry is whether a proposed class is sufficiently cohesive to warrant adjudication by representation." *Castillo*, 980 F.3d at 730 (quotations omitted). "But the rule does not require a plaintiff seeking class certification to prove that each element of their claim is susceptible to classwide proof, ***so long as one or more common questions predominate***." *Id.* (quotations omitted; emphasis added). "Individual differences in calculating the amount of damages will not defeat class certification where common issues otherwise predominate." *Id.*

"To ensure that common questions predominate over individual ones, the court must ensure that the class is not defined so broadly as to include a great

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45 *See supra* Part III.A.2.

46 Class Certification Motion 25:1-29:20.

47 *Id.* at 20:1-24:26.

48 Class Certification Opposition 30:21-47:20.

number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct." *Id.* (quotations omitted). "If many class members have no claim whatsoever because they were never exposed to the challenged conduct to begin with, the class does not satisfy Rule 23(b)(3)." *Id.* (quotations omitted).

For example, in a discrimination case, the Ninth Circuit concluded that "[i]f there is no evidence that the entire class was subject to the same allegedly discriminatory practice, there is no question common to the class. In other words, the district court must determine whether there was 'significant proof that [the company] operated under a general [unlawful] policy . . . .'" *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 983 (9th Cir. 2011) (quoting *Dukes*, 564 U.S. at 353).

**a. Article III Standing**

loanDepot argues that Article III standing—*i.e.*, whether the class members were harmed by its calls—is an individualized issue because certain class members might never have received the calls, and some even welcomed the calls.[49] In view of the operative class definition, the Court does not address those arguments because they are no longer relevant.[50] And loanDepot's contention that a class member may have returned loanDepot's call from a different number is unavailing; either loanDepot will have a record of the returned call in its sales logs or, for those return calls that were not tracked, the number is most likely *de minimis*. *See Olean Wholesale Grocery Coop.*, 31 F.4th at 669. Therefore, for the class as now defined, Article III standing is not in question. *See Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017) ("the violation of the TCPA is a concrete, *de facto* injury").

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[49] *Id.* at 36:10-39:26.

[50] *See supra* Part III.

**b. Arbitration**

loanDepot also argues that Kearns has not proved predominance because loanDepot has a right to compel the class members to adjudicate their claims through arbitration, and arbitrability is an individualized issue.[51] Kearns replies that loanDepot has waived its right to seek to compel arbitration.[52]

"[T]he test for waiver of the right to compel arbitration consists of two elements: (1) knowledge of an existing right to compel arbitration; and (2) intentional acts inconsistent with that existing right." *Hill v. Xerox Bus. Servs., LLC*, 59 F.4th 457, 468 (9th Cir. 2023). "[W]aiver is a unilateral concept." *Id.* at 469. "'[T]o decide whether a waiver has occurred, the court focuses on the actions of the person who held the right; the court seldom considers the effects of those actions on the opposing party.'" *Id.* (quoting *Morgan v. Sundance, Inc.*, 596 U.S. 411, 417 (2022)). Therefore, "[a] finding of waiver by [loanDepot would] look[] only to the acts of [loanDepot], [would] bind[] only [loanDepot], [would] not reach out to affect the rights of []unnamed class members, and [would] not depend upon when the law requires or authorizes such a right to be asserted." *Id.* And, as the Ninth Circuit confirmed in 2023, a class action defendant, such as loanDepot here, ***can*** waive its right to arbitrate against putative class members by failing to seek to compel arbitration in a timely manner against the named plaintiff. *See id.* at 469-70. loanDepot's argument to the contrary, which cites older, out-of-circuit authorities, is unavailing.[53]

Kearns argues, and loanDepot does not dispute, that loanDepot noted its right to compel arbitration as an affirmative defense in the Answer that it filed in

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51 Class Certification Opposition 44:1-45:14.

52 Class Certification Motion 20:1-23:19.

53 *See* Class Certification Opposition 41:7-28.

November 2022, then it proceeded to litigate this case through multiple dispositive motions without ever asserting that right.[54] Indeed, loanDepot concedes that it made the "litigation choice" to decline to seek arbitration of Kearns's claims.[55] Such "'an intentional decision to refrain from filing a motion to compel arbitration' . . . [to] ke[ep] the arbitrable claims in federal court for two years while seeking merits determinations," including making Rule 12(b)(6) motions to dismiss, unmistakably constitutes a waiver of the right to compel arbitration. *Id.* at 471 (quoting *Newirth by & through Newirth v. Aegis Senior Communities, LLC*, 931 F.3d 935, 941 (9th Cir. 2019)).

Therefore, because the class members have standing and loanDepot has waived its right to compel arbitration, common questions with respect to whether loanDepot's robocalls violated the TCPA and, if so, whether loanDepot acted knowingly and willfully, predominate.

**2. Superiority**

The certification of a class under Rule 23(b)(3) also requires the party seeking certification to prove that "the class action format is superior to other methods of adjudication." *Van v. LLR, Inc.*, 61 F.4th 1053, 1062 n.4 (9th Cir. 2023) (emphasis omitted). The Federal Rules of Civil Procedure provide a non-exhaustive list of considerations with respect to superiority. *See* Fed. R. Civ. P. 23(b)(3)(A)-(D); *see also Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (noting that the list is non-exhaustive). Chief among those factors is "manageability," which "encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit." *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 164 (1974). When, for example, injury must be determined on an individualized basis, class treatment

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[54] Class Certification Motion 20:3-21:3.

[55] Class Certification Opposition 42:18-43:4.

may be unmanageable and individual actions superior. *See, e.g.*, *Lara v. First Nat'l Ins. Co. of Am.*, 25 F.4th 1134, 1140 (9th Cir. 2022). But, when "the [litigation] risks, small [individual] recovery, and relatively high costs of litigation make it unlikely that plaintiffs would individually pursue their claims," a class action may be superior. *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1123 (9th Cir. 2017) (internal quotations omitted). Indeed, "[t]h[o]se considerations are at the heart of why the Federal Rules of Civil Procedure allow class actions." *Id.*

When, as here, class members' individual damages are likely to be relatively small, and—as discussed above with respect to standing and arbitration[56]—individualized issues do not create barriers to class action case management, a class action is superior.

### C. Conclusion

Having found that all of the Rule 23(a) and 23(b)(3) requirements for class certification are met, the Court determines that class certification is appropriate.

## IV. DISPOSITION

For the foregoing reasons, the Court hereby **ORDERS** as follows:

1. loanDepot's Motion to Strike [ECF No. 145] is **DENIED**.

2. Kearns's Class Certification Motion [ECF No. 128] is **GRANTED**.

3. The parties are **DIRECTED** to meet and confer forthwith regarding the case schedule and to file no later than November 7, 2025, a Joint Status Report that provides their jointly proposed case schedule. If the parties cannot agree on a case schedule, then the parties are **DIRECTED** to provide the Court with the following:

   a. each party's respective proposed case schedule;

   b. each party's justification therefor; and

[56] *See supra* Part III.B.1.

c. each party's objections to the other party's proposed case schedule.

4. A Scheduling Conference is **SET** for November 21, 2025, at 11:00 a.m. in Courtroom 9D of the Ronald Reagan Federal Building and U.S. Courthouse, 411 W. 4th Street, Santa Ana, California. Counsel for the parties are **DIRECTED** to appear in person at that date and time.

**IT IS SO ORDERED.**

Dated: October 20, 2025

John W. Holcomb
UNITED STATES DISTRICT JUDGE