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

NEI CONTRACTING AND
ENGINEERING, INC.,

Plaintiff,

v.

HANSON AGGREGATES PACIFIC
SOUTHWEST, INC., *ET AL.*

Defendants.

Case No. 12-cv-01685-BAS(JLB)

**ORDER DENYING PLAINTIFF’S
MOTION FOR CLASS
CERTIFICATION,
APPOINTMENT OF CLASS
REPRESENTATIVE AND CLASS
COUNSEL**

(ECF No. 74)

Presently before the Court is Plaintiff NEI Contracting and Engineering, Inc.’s (“Plaintiff”) motion for class certification, appointment of class representative, and class counsel. Also before the Court are the opposition filed by Defendant Hanson Aggregates Pacific Southwest Inc. (“Hanson Pacific”) (ECF No. 82), and Plaintiff’s reply (ECF No. 86). Having reviewed the papers submitted and heard oral argument from both parties, for the reasons set forth below, the Court **DENIES** Plaintiff’s motion for class certification (ECF No. 74).

1 **I. FACTUAL BACKGROUND**

2 Hanson Pacific, Hanson Aggregates, Inc., and Lehigh Hanson Co.
3 (collectively, “Defendants”) “are related companies and are all engaged in the
4 business of providing construction concrete, aggregate, ready mix and related
5 materials to contractors engaged in the construction industry.” (SAC ¶ 4.) The “vast
6 majority of Hanson [Pacific]’s customers are commercial companies that place
7 numerous phone orders for Aggregate or Ready-Mix materials each year.” (ECF
8 No. 82-1 ¶ 2.) Many of the commercial customers have long-standing business
9 relationships with Hanson Pacific that span many years. (*Id.*)

10 Hanson Pacific receives all orders for construction materials through a
11 dedicated telephone line. (ECF No. 73-3 ¶ 5.) Prior to July 15, 2009, Hanson
12 Pacific utilized a “Voice Print International” (“VPI”) system, which created a
13 recording of every call made to or from the Ready Mix Dispatch or Aggregate
14 Dispatch lines. (*Id.* at ¶ 10; Mot at p. 4; ECF No. 82-6 (“Barajas Dep.”) at 33:12-
15 25.) While using the VPI system, Hanson Pacific used “beep tone generators” on all
16 of its telephones which received calls routed to its Ready Mix Dispatch or Aggregate
17 Dispatch lines, which produced an audible “beep tone” every fifteen seconds during
18 a call to provide notice to callers that the call was being recorded. (*Id.* at ¶ 11; ECF
19 No. 88 (Joint Statement of Undisputed Material Fact (“JSUF”)) ¶¶ 1, 2.) Plaintiff is
20 a contractor and placed numerous orders with Hanson Pacific for construction
21 materials. (SAC ¶ 4; JSUF ¶ 4; ECF No. 82-1 ¶ 4.) Hanson Pacific located forty-
22 eight recordings from five of the twenty-eight phone numbers provided by Plaintiff.
23 (ECF No. 82-1 ¶ 4.)

24 On July 15, 2009, Hanson Pacific replaced the VPI system and discontinued
25 its use of the “beep tone generators” and began using “a pre-recorded verbal
26 admonition,” which notified inbound callers that their calls “may be monitored for
27 quality assurance.” (JSUF ¶ 5; *see also* ECF No. 73-3 ¶¶ 13, 14; ECF No. 74-4 at 3-
28 4; ECF No. 74-3 at 6-7; ECF No. 82-1 ¶ 6.) On or about December 23, 2013,

1 Hanson Pacific updated the verbal admonition to state that calls may be “monitored
2 or recorded for quality assurance purposes.” (ECF No. 73-3 ¶ 17; ECF No. 74-4 at
3 4.)

4 Plaintiff contends that Defendants recorded 210,688 calls made by putative
5 class members from cellphones during the class period beginning on July 15, 2009
6 and ending on December 23, 2013. (Mot. at 3; ECF No. 74-9 (“Hansen Decl.”) ¶ 5.)
7 These calls were allegedly made from 12,551 unique cellphone numbers. (*Id.*;
8 Hansen Decl. ¶ 5) Therefore, Plaintiff seeks to certify a class of 12,551 members
9 with 210,688 claims. (*Id.*)

10 **II. LEGAL STANDARD**

11 The class action is “an exception to the usual rule that litigation is conducted
12 by and on behalf of the individual named parties only.” *Wal-Mart Stores, Inc. v.*
13 *Dukes*, 131 S.Ct. 2541, 2550 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682,
14 700-01 (1979)). In order to justify departing from that rule, “a class representative
15 must be part of the class and ‘possess the same interest and suffer the same injury’ as
16 the class members.” *Id.* (citing *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431
17 U.S. 395, 403 (1977)). In this regard, Rule 23 contains two sets of class-certification
18 requirements set forth in Rule 23(a) and (b). *United Steel, Paper & Forestry,*
19 *Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int’l Union, AFL-CIO, CLC v.*
20 *ConocoPhillips Co.*, 593 F.3d 802, 806 (9th Cir. 2010). “A court may certify a class
21 if a plaintiff demonstrates that all of the prerequisites of Rule 23(a) have been met,
22 and that at least one of the requirements of Rule 23(b) have been met.” *Otsuka v.*
23 *Polo Ralph Lauren Corp.*, 251 F.R.D. 439, 443 (N.D. Cal. 2008).

24 “Rule 23(a) provides four prerequisites that must be satisfied for class
25 certification: (1) the class must be so numerous that joinder of all members is
26 impracticable; (2) questions of law or fact exist that are common to the class; (3) the
27 claims or defenses of the representative parties are typical of the claims or defenses
28 of the class; and (4) the representative parties will fairly and adequately protect the

1 interests of the class.” *Id.* at 443 (citing Fed. R. Civ. P. 23(a)). “A plaintiff must
2 also establish that one or more of the grounds for maintaining the suit are met under
3 Rule 23(b), including: (1) that there is a risk of substantial prejudice from separate
4 actions; (2) that declaratory or injunctive relief benefitting the class as a whole
5 would be appropriate; or (3) that common questions of law or fact predominate and
6 the class action is superior to other available methods of adjudication.” *Id.* (citing
7 Fed. R. Civ. P. 23(b)). Plaintiff seeks class certification under Rule 23(b)(3).

8 “Rule 23 does not set forth a mere pleading standard.” *Wal-Mart Stores, Inc.*
9 *v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Rather, “[a] party seeking class certification
10 must affirmatively demonstrate his compliance with the Rule—that is, he must be
11 prepared to prove that there are *in fact* sufficiently numerous parties, common
12 questions of law or fact, etc.” *Id.* The Court must engage in a “rigorous analysis,”
13 often requiring some evaluation of the “merits of the plaintiff’s underlying claim,”
14 before finding that the prerequisites for certification have been satisfied. *Id.*
15 “Although some inquiry into the substance of a case may be necessary[,] . . . it is
16 improper to advance a decision on the merits to the class certification state.” *Staton*
17 *v. Boeing Co.*, 327 F.3d 938, 954 (9th Cir. 2003) (citations and internal quotation
18 marks omitted).

19 **III. DISCUSSION**

20 Plaintiff brings this putative class action under California Penal Code section
21 632.7 (“Section 632.7”), which prohibits the intentional recording of a telephone call
22 involving at least one cellular telephone without the consent of all parties to the call.¹
23

24 ¹ California Penal Code Section 632.7 states, in relevant part: “Every
25 person who, without the consent of all parties to a communication, intercepts or
26 receives and intentionally records, or assists in the interception or reception and
27 intentional recordation of, a communication transmitted between two cellular radio
28 telephones, a cellular radio telephone and a landline telephone, two cordless
telephones, a cordless telephone and a landline telephone, or a cordless telephone
and a cellular radio telephone, shall be punished[.]” Cal. Penal Code § 632.7(a).

1 A person injured under the statute may bring a civil action for damages and
2 injunctive relief against the person who committed the violation. *See* Cal. Penal
3 Code § 637.2. Plaintiff moves for certification of the following class:

4 All persons who called Defendant with a cellular telephone and
5 selected the Aggregate or Ready Mix Dispatch lines through
6 Defendant's telephone system, whose calls were recorded by
7 Defendant, during the time period beginning July 15, 2009, and
continuing through December 23, 2013.

8 (Mot. at 3.) Hanson Pacific opposes the motion for class certification on several
9 grounds, arguing that Plaintiff has failed to (1) satisfy the commonality and
10 heightened predominance requirements; (2) satisfy the numerosity, ascertainability,
11 and adequacy requirements; and (3) satisfy the superiority requirement. The Court
12 finds that Rule 23(b)(3)'s predominance requirement is dispositive of Plaintiff's
13 motion, and thus does not address Hanson Pacific's remaining arguments.

14 **A. Predominance**

15 "The predominance test of Rule 23(b)(3) is far more demanding than the
16 commonality test under Rule 23(a)(2)." *Villalpando v. Exel Direct Inc.*, 303 F.R.D.
17 588, 607 (N.D. Cal. 2014) (quoting *Amchem Prod.'s, Inc. v. Windsor*, 521 U.S. 591,
18 624 (1997)) (internal quotation marks omitted). "[It] tests whether proposed classes
19 are sufficiently cohesive to warrant adjudication by representation." *Id.* (quoting
20 *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998)) (internal quotation
21 marks omitted). "When common questions present a significant aspect of the case
22 and they can be resolved for all members of the class in a single adjudication, there
23 is clear justification for handling the dispute on a representative rather than an
24 individual basis." *Id.* (citation omitted).

25 In opposing class certification, Hanson Pacific argues that individual issues
26 would predominate because determining whether each caller consented to the
27 recording would require individualized inquiries into the particular circumstances
28

1 surrounding each caller.² (Opp. at 13.) In support of its argument, Hanson Pacific
2 cites *Torres v. Nutrisystem, Inc.*, 289 F.R.D. 587 (C.D. Cal. 2013), *Hataishi v. First*
3 *Am. Home Buyers Prot. Corp.*, 223 Cal. App. 4th 1454 (2014), and *Kight v.*
4 *CashCall, Inc.*, 231 Cal. App. 4th 112 (2014). In response, Plaintiff argues that this
5 Court should determine the adequacy of Defendants’ warning under a “reasonable
6 person” standard, and not by analyzing each putative class member’s subjective
7 belief about whether they were being recorded. (Mot. at 5.) Plaintiff urges the
8 Court to follow the reasoning in *Ades & Woolery v. Omni Hotels Mgmt. Corp.*, No.
9 2:13-cv-02468, 2014 WL 4627271, at *15 (C.D. Cal Sept. 8, 2014), in which the
10 district court granted class certification on a Section 632.7 claim.

11 In *Torres*, the district court denied class certification on the plaintiff’s Section
12 632³ and Section 632.7 claims because plaintiff failed to satisfy the commonality
13 and predominance requirements. *Torres*, 289 F.R.D. at 595. There, callers were
14 able to bypass the defendant’s warning that their calls “may be monitored or
15 recorded.” *Id.* at 590. The plaintiff argued that “commonality is ‘easily satisfied’
16 because ‘this case is based on Defendant’s identical conduct, which caused the same
17 injury to both Plaintiff and Class Members.’” *Id.* at 591. The district court
18 disagreed, stating that the answer to Section 632’s confidentiality and consent
19 questions would likely “vary significantly among class members given that the
20 confidentiality and consent issues require individualized factual inquiries into the
21

22 ² Hanson Pacific argues that resolving the consent question for each
23 caller requires an examination of the following: (1) the length and breadth of the
24 caller’s relationship with Hanson Pacific; (2) whether and how many times the caller
25 heard Hanson Pacific’s “beep tone” warning; (3) whether and how many times the
26 caller heard Hanson Pacific’s verbal admonition; (4) whether the caller understood
the verbal admonition to include recording; and (5) whether the caller had actual
knowledge that its calls were being recorded. (Opp. at 2.)

27 ³ California Penal Code section 632 (“Section 632”), a related statute,
28 prohibits the recording of confidential communications without the consent of all
parties to the call. Cal. Penal Code § 632.

1 circumstances of each class member.” *Id.* at 591-92.

2 In discussing the confidentiality element of Section 632, the district court
3 noted that the trier of fact would need to examine, among other things, the length of
4 each caller’s relationship with the defendant, the number of times each caller called
5 the defendant, and whether each caller heard the defendant’s warning. *Id.* at 592.
6 Noting that lack of consent is an element in both Section 632 and Section 632.7, the
7 district court concluded that the same type of inquiry would need to be done on the
8 issue of consent, which would similarly result in varying answers. *Id.* at 594
9 (“[W]hether a caller heard the Disclosure during the recorded call does not
10 conclusively answer the question of consent.”). Therefore, the district court found
11 that “individual inquiries required to resolve *the consent* and confidentiality issues
12 for each class member will dominant the litigation in this case.” *Id.* at 595
13 (emphasis added).

14 In *CashCall*, a California Court of Appeal upheld the decertification of a class
15 in a Section 632 case on similar grounds. *CashCall*, 231 Cal. App. 4th at 132-33. In
16 *CashCall*, employees of the defendant lending company would listen in on (but not
17 record) calls between other employees and the plaintiffs, who were people that
18 borrowed money from the defendant. *Id.* at 118-20. To complete a loan application,
19 all borrowers had to call the defendant. *Id.* at 120. The defendant’s telephone
20 system provided a warning that calls “may be monitored or recorded[,]” but callers
21 could bypass the warning in at least two ways and it was not played on outbound
22 calls. *Id.* at 120-21. The trial court granted defendant’s decertification motion,
23 finding that individual issues would predominate. *Id.* at 124. The appellate court
24 affirmed, stating the following:

25 Although each plaintiff declared that he or she did not believe anyone
26 was listening to their monitored calls with [defendant’s] employees,
27 the trier of fact would have to determine whether a person *under the*
28 *particular circumstances and given the background and experience of*
each plaintiff would have understood that the particular call was not

1 being monitored.

2 *Id.* at 130 (emphasis in original). Because the confidentiality element was an issue
3 for each putative class member, the appellate court refused to apply class action
4 principles to remove that substantive burden from plaintiffs. *Id.* at 130-31. Finally,
5 the appellate court found that “[u]nder section 632, the defendant has the right to
6 litigate the issue of each class member’s *consent* and each class member’s claimed
7 objectively reasonable expectation that the call was not being monitored [i.e.,
8 confidentiality][.]” and that the trial court did not abuse its discretion in holding that
9 common issues would not predominate. *Id.* at 132 (emphasis added).

10 Defendant also relies on *Hataishi*, in which another California Court of
11 Appeal affirmed the denial of class certification on the plaintiff’s Section 632 claim
12 due to her failure to satisfy the predominance requirement. *Hataishi*, 223 Cal. App.
13 4th at 1469. Defendant cites *Hataishi* for its holding that adding a section 632.7
14 claim would not have dispensed with the need for an individualized inquiry. (Opp at
15 p. 18.) However, in so holding, the appellate court did not address the issue of
16 consent. *See Hataishi*, 223 Cal. App. 4th at 1469 (“Even if a section 632.7 claim
17 were added, this would not eliminate the need to determine what type of telephone
18 was used[.]”). Therefore, Defendant’s reliance on this case is inapposite.

19 In *Ades*, on the other hand, a district court granted class certification on the
20 plaintiff’s Section 632.7 claim. *Ades*, 2014 WL 4627271, at *15. Prior to, and
21 during the class period, defendant provided no warning whatsoever to callers that
22 their calls would be recorded. *Id.* at *1-*2. The defendant opposed certification,
23 and, relying on *Torres*, argued that the issue of implied consent would require
24 individual inquiries, which would predominate the litigation. *Id.* at *11. In finding
25 that the plaintiff satisfied the predominance requirement, the district court declined
26 to follow *Torres*, and instead followed the reasoning of the California Supreme
27 Court in *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914 (Cal. 2006). *Ades*,
28 2014 WL 4627271, at *11-*12. The district court quoted the following passage

1 from *Kearney*:

2 As made clear by the terms of section 632 as a whole, this provision
3 does not absolutely preclude a party to a telephone conversation from
4 recording the conversation, but rather simply prohibits such a party
5 from secretly or surreptitiously recording the conversation, *that is,*
6 *from recording the conversation without first informing all parties to*
7 *the conversation that the conversation is being recorded.* If, after
8 being so advised, another party does not wish to participate in the
9 conversation, he or she may simply decline to continue the
communication. A business that *adequately advises all parties to a*
telephone call, at the outset of the conversation, of its intent to record
the call would not violate the provision.

10 *Ades*, 2014 WL 4627271, at *11 (quoting *Kearney*, 137 P.3d at 930) (emphasis in
11 original). *Kearney* involved a Section 632 claim, but, as noted by the district court
12 in *Ades*, Section 632 contains the same “without the consent of all parties” language
13 present in Section 632.7. *Id.* at *11.

14 The *Ades* court appears to place significance on the fact that the defendant had
15 *never* provided a warning to callers: “[T]he Court does not find that evidence that
16 some class members expected their calls to be recorded raises predominant issues of
17 consent in the absence of any evidence that [defendant]—or anyone else—ever
18 notified callers that [defendant] would record their calls before or at the outset of any
19 call.” *Id.* at *12 (emphasis removed). The *Ades* court also points out that “[d]espite
20 extensive discovery, [the defendant] has not produced evidence that a single person
21 meeting the class definition actually consented to a call being recorded during the
22 Class Period.” *Id.* Thus, the court in *Ades* found that foreseeability or an
23 expectation of recording is insufficient to infer consent. *Id.* But *Ades* does not
24 foreclose the possibility that there may be an inquiry as to actual knowledge of
25 recording. The district court distinguished *Torres* on these grounds. The court
26 found that individual consent issues in the plaintiffs’ case would not predominate,
27 unlike *Torres*, in which “many putative class members” had likely heard the
28 recorded warning before bypassing it on a subsequent call. *Id.*

1 The Court finds *Ades* to be distinguishable. The district court in that case
2 made its holding in a factually different context. At no point did the *Ades* defendant
3 provide its customers with a warning that their calls would be recorded. *Ades*, 2014
4 WL 4627271, at *1-*2. Indeed, the *Ades* court found it significant that the
5 defendant never gave notice. *See id.* at *12 (“[T]he Court does not find that
6 evidence that some class members expected their calls to be recorded raises
7 predominant issues of consent *in the absence of any evidence that [defendant]—or*
8 *anyone else—ever notified callers that [defendant] would record their calls before or*
9 *at the outset of any call.*” (emphasis added)). Under those circumstances, the district
10 court was certainly reasonable in holding that individual inquiries of some class
11 members’ expectations would not predominate.

12 Here, however, Defendants provided sufficient notice of recording for a
13 period of at least seven years before switching to the verbal warning. (Opp. at 4.)
14 And notably, the “vast majority of Hanson [Pacific]’s customers are commercial
15 companies that place numerous phone orders for Aggregate or Ready-Mix materials
16 each year,” with many of them having long-standing business relationships with
17 Hanson Pacific spanning many years. (ECF No. 82-1 ¶ 2.) Of significance, Hanson
18 Pacific cites two putative class members, Verdugo Concrete Construction, Inc.
19 (“Verdugo”) and ARB Construction (“ARB”), as examples of customers who had
20 actual knowledge their calls were being recorded *after* the switch to the verbal
21 warning, and continued placing orders, thereby evidencing consent. (*Id.* at 8; ECF
22 No. 82-8 (Verdugo), ECF No. 82-9 (ARB).) Verdugo has placed over 4,000 orders
23 with Hanson Pacific since 2001, with over 1,200 orders being placed during the
24 class period. (*Id.* at 10.) ARB has placed almost 300 orders with Hanson Pacific
25 since January 2009, with approximately 200 orders being placed during the class
26 period. (*Id.* at 19.) Thus, Verdugo heard the beep tones thousands of times, and
27 ARB heard the beep tones approximately 100 times before the switch to the verbal
28 admonition. According to Hanson Pacific, this factor, along with determining

1 whether a caller had actual knowledge of recording, is relevant to whether each
2 putative class member consented.


3 Given the specific factual circumstances in this case, the Court agrees that
4 individual inquiries into whether each putative class member provided consent will
5 be necessary. *See CashCall*, 231 Cal. App. 4th at 132; *Torres*, 289 F.R.D. at 591-92.
6 Defendants are entitled to litigate the issue of consent as to each person who has a
7 potential claim. Therefore, the Court finds that Plaintiff has failed to establish that
8 common questions of law or fact would predominate and, on that basis, Plaintiff's
9 motion for class certification is denied.

10 **IV. CONCLUSION & ORDER**

11 For the foregoing reasons, Plaintiff's motion for class certification is
12 **DENIED** (ECF No. 74).

13 **IT IS SO ORDERED.**

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15 **DATED: March 24, 2015**


Hon. Cynthia Bashant
United States District Judge

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