UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 18-24407-CIV-UNGARO/O'SULLIVAN

MARCELO PENA, et al.,

Plaintiffs,

v.

JOHN C. HEATH, ATTORNEY AT LAW,
PLLC d/b/a LEXINGTON LAW FIRM,

Defendant.
_____/

REPORT AND RECOMMENDATION

THIS MATTER came before the Court on the Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement and Incorporated Memorandum of Law (DE# 24, 5/3/19). This matter was referred to the undersigned pursuant to 28 U.S.C. § 636(b) for a report and recommendation. See Order (DE# 35, 5/13/19). Having reviewed the applicable filings and the law, the undersigned respectfully RECOMMENDS that the Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement and Incorporated Memorandum of Law (DE# 24, 5/3/19) be **GRANTED** for the reasons stated herein.

BACKGROUND

The plaintiffs filed the instant action on October 23, 2018. See Class Action Complaint (DE# 1, 10/23/19). In the operative complaint, the plaintiffs assert claims against John C. Heath, Attorney at Law, PLLC d/b/a Lexington Law Firm (hereinafter "Lexington" or "defendant") for violating the Telephone Consumer Protection Act

(hereinafter "TCPA"), 47 U.S.C. § 227(b) (Count I) and knowingly and/or willfully violating the TCPA, 47 U.S.C. § 227(b) (Count II). See First Amended Class Action Complaint (DE# 22, 4/8/19). The plaintiffs' claims arise from "Defendant's unauthorized text messages" and "automated and prerecorded telemarketing calls" to consumers. Id. at ¶ 3.

The parties have negotiated a settlement. On May 3, 2019, the plaintiffs filed the instant motion seeking class certification and preliminary approval of the settlement. See Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement and Incorporated Memorandum of Law (DE# 24, 5/3/19) (hereinafter "Motion"). On May 3, 2019, the plaintiffs filed the declaration of Scott Edelsberg which had inadvertently been omitted from the Motion. See Notice of Filing Corrected Exhibit to Motion for Preliminary Approval of Class Action Settlement (DE# 26, 5/3/19). No response has been filed.[1]

This matter is ripe for adjudication.

ANALYSIS

The plaintiffs seek class certification and preliminary approval of a class settlement. See Motion. The plaintiffs seek to establish two settlement classes:

> **CLASS 1**: All persons in the United States: (1) who received a telephone call and/or text message from July 12, 2013 to the date of preliminary approval based on the information gathered by one or more of the following third-party lead generators- RTK Media, Inc., Capital Leads LLC, Fluent, LLC and Credit Sesame, and (2) the telephone call or text message in (1) resulted in a telephone conversation with a representative of Lexington or a text message that referenced "Lexington Law."

[1] On April 23, 2019, Eugene Rosales, the plaintiff in a related putative class action involving text messages filed a motion to intervene. See Eugene Rosales's Motion to Intervene and to Stay and Incorporated Memorandum of Law (DE# 23, 4/23/19). Mr. Rosales' motion is addressed in a separate Report and Recommendation.

> **CLASS 2**: All persons in the United States: (1) who had a telephone conversation with a representative of Lexington, from July 12, 2013 to the date of preliminary approval, wherein the Lexington Representative obtained a copy of such person's credit report, (2) who did not sign up for Lexington's credit repair services on that phone call, and (3) who did not opt-out of receiving text messages from Lexington.

Id. at 4.

"A class may be certified 'solely for purposes of settlement where a settlement is reached before a litigated determination of the class certification issue.'" Lipuma v. American Express Co., 406 F.Supp.2d 1298, 1314 (S.D. Fla. 2005) (quoting Woodward v. NOR–AMChem. Co., 1996 WL 1063670, *14 (S.D. Ala. 1996)). "[T]he purpose of the preliminary approval is for the court to determine that the proposed settlement agreement is sufficiently within the range of reasonableness." In re Outer Banks Power Outage Litig., No. 4:17-CV-141, 2018 WL 2050141, at *3 (E.D.N.C. May 2, 2018) (citation and internal quotation marks omitted).

The undersigned will address the request for class certification and the request for preliminary approval of the class settlement separately.

1. Class Certification

Rule 23 provides the requirements for a court to determine whether class certification is appropriate. Fed. R. Civ. P. 23. District courts must conduct a "rigorous analysis" of Rule 23 class certification requirements. General Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 161 (1982). In doing so, the Court must accept as true the factual allegations of the complaint and determine only whether those allegations meet the requirements of Rule 23. Hammett v. Am. Bankers Ins. Co., 203 F.R.D. 690, 693 (S.D. Fla. 2001). While the Court is not to conduct a preliminary inquiry into the merits of a case at this stage, the Court "may look beyond the allegations of the complaint in

assessing whether a motion for class certification should be granted." Id. (citing Gen. Tel. Co. of Sw., 457 U.S. at 160 (1982)).

Under Rule 23(a), a class may be certified only if: (1) the class is so numerous that joinder of all members would be impracticable; (2) there are questions of fact and law common to the class; (3) the claims or defenses of the representatives are typical of the unnamed members and (4) the named representatives will be able to represent the interests of the class adequately and fairly. Fed. R. Civ. P. 23(a). "These four prerequisites of Rule 23(a) are commonly referred to as 'numerosity, commonality, typicality, and adequacy of representation, and they are designed to limit class claims to those fairly encompassed by the named plaintiffs' individual claims.'" Valley Drug Co. v. Geneva Pharm., Inc., 350 F.3d 1181, 1188 (11th Cir. 2003) (quoting Prado-Stieman v. Bush, 221 F.3d 1266, 1278 (11th Cir. 2000)).

In addition to the four Rule 23(a) factors, at least one of the alternative requirements of Rule 23(b) must be present. Piazza v. Ebsco Indus., Inc., 273 F.3d 1341, 1351-52 (11th Cir. 2001). Here, the plaintiffs seek certification based on Rule 23(b)(3). Motion at 18. Rule 23(b)(3) requires the court to find "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. Civ. P. R. 23(b)(3).

"Failure to establish any one of the four Rule 23(a) factors and at least one of the alternative requirements of Rule 23(b) precludes class certification." Id. at 1188 (citing Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 615-18 (1997)). The burden of establishing these prerequisites is on the party seeking class certification. Valley Drug

Co., 350 F.3d at 1187.

The undersigned will address Rule 23(a) and (b) below.

a. Rule 23(a)

i. Numerosity

Under Rule 23(a)(1), the class must be so numerous that joinder is impracticable. In order for joinder to be impracticable, it need not be impossible but simply difficult or inconvenient. Pecere v. Empire Blue Cross and Blue Shield, 194 F.R.D. 66, 70 (S.D.N.Y. 2000) (citing 7A Charles Alan Wirght, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1762 (2d ed. 1986)). Practicability of joinder depends on many factors, such as the size of the class, the ease of identifying its numbers and determining their addresses, facility of making service on them if joined and their geographic dispersion. Hammett, 203 F.R.D. at 694; see also Kilgo v. Bowman Transp., Inc., 789 F.2d 859, 878 (11th Cir. 1986).

The plaintiffs argue that this factor is met "because the Settlement Class consists of approximately 1,861,929 individuals, and joinder of all such persons is impracticable." Motion at 18. Additionally, the plaintiffs define the two proposed classes as including persons across the United States. Id. at 4.

The numerosity requirement is met here where the plaintiffs have identified a class in excess of one million individuals who reside across the United States.

ii. Commonality

Commonality refers to the group characteristics of the class as a whole, while typicality refers to the individual characteristics of the representative plaintiff in relation to the class. Prado-Steinman v. Bush, 221 F.3d 1266, 1279 (11th Cir. 2000). The

commonality requirement demands that a class action involve issues susceptible to class-wide proof. Cooper v. Southern Co., 390 F.3d 695, (11th Cir. 2004).

The plaintiffs argue that this factor is met because "[t]here are multiple questions of law and fact – centering on Lexington's marketing telephone calls and text messages – that are common to the Settlement Class, that are alleged to have injured all Settlement Class members in the same way, and that would generate common answers." Motion at 18-19.

The commonality requirement is met here where common issues of fact and law exist as to the defendant's automated telephone calls and text messages to consumers. Generally, commonality is satisfied when "[d]efendants have engaged in a standardized course of conduct that affects all class members." In re Terazosin Hydrochloride, 220 F.R.D. 672, 685 (S.D. Fla. 2004).

iii. Typicality

Rule 23(a) requires that the representative plaintiff's claims or defenses be typical of the claims or defenses of the class. "In other words, typicality requires a nexus between the class representative's claims or defenses and the common questions of fact or law which unite the class." Hammett v. American Bankers Ins. Co., 203 F.R.D. 690, 694 (S.D. Fla. 2001). However, a factual variation in claims will not render a representative's claims atypical unless such variation results in markedly differentiating the representative's factual position from that of the proposed class members. Id.

The plaintiffs argue that this factor is met because "Plaintiff[s'] claims are reasonably coextensive with those of the absent class members." Motion at 19.

The typicality requirement is met here where the class representatives were

subject to the same automated telephone calls and/or text messages as the class members and seek relief based upon the same legal theory as the class members. A representative's claims are typical if they arise from the same pattern,or practice and are based on the same legal theory as those of the proposed class members. Hammett, 203 F.R.D. at 694.

iv. Adequacy of Representation

Rule 23(a)(4) requires that the class representative have no interests antagonistic to the class and that class counsel possess the competence to undertake the litigation. Kirkpatrick v. J.C Bradford & Co., 827 F.2d 718, 726-28 (11th Cir. 1987). "The 'adequacy of representation' analysis [under Rule 23(a)(4)] 'encompasses two separate inquiries: (1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representatives will adequately prosecute the action.'" Valley Drug Co., 350 F.3d at 1189 (quoting In re HealthSouth Corp. Securities Litigation, 213 F.R.D. 447, 460-61 (N.D. Ala. 2003)).

The plaintiffs argue that this factor is met here because:

> Plaintiffs' interests are coextensive with, not antagonistic to, the interests of the Settlement Class, because Plaintiffs and the absent Settlement Class members have the same interest in the relief afforded by the Settlement, and the absent Settlement Class members have no diverging interests. Further, Plaintiffs and the Settlement Class are represented by qualified and competent Class Counsel who have extensive experience and expertise prosecuting complex class actions. Class Counsel devoted substantial time and resources to vigorous litigation of the Action.

Motion at 19.

The adequacy of representation requirement is met here where the class representatives share the same interests and legal claims as the proposed class members in that the each received at least one automated telephone call and/or text

message from the defendant. Moreover, class counsel has experience handling complex class action and are well-suited to conduct this litigation.

b. Rule 23(b)

If all of the prerequisites of Rule 23(a) are met, then the Court must evaluate whether at least one of the three provisions of Rule 23(b) apply. As noted above, the plaintiffs seek certification based on Rule 23(b)(3), Motion at 18, which requires the court to find "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. Civ. P. R. 23(b)(3).

The plaintiffs argue that the requirements of Rule 23(b)(3) are met here "because liability questions common to all Settlement Class members substantially outweigh any possible issues that are individual to each Settlement Class member. Further, resolution of thousands of claims in one action is far superior to individual lawsuits, because it promotes consistency and efficiency of adjudication." Motion at 19.

The requirements of Rule 23(b)(3) are met here where common issues of fact and law predominate over any individual issues in that each potential class member received at least one automated telephone call and/or text message from the defendant and each seeks relief under the same legal theory. Moreover, requiring individual lawsuits by each plaintiff would be costly and inefficient.

In sum, the Court should find that the plaintiffs have met the requirements of Rule 23(a) and (b) and conditionally certify the class for settlement purposes only.[2] In

[2] The defendant does not oppose the conditional certification of the class provided that it is for

the event the parties fail to obtain final court approval of the settlement, the Court should revoke the conditional certification.

2. Preliminary Approval of Class Settlement

The plaintiffs also seek preliminary approval of a class settlement. Motion at 1. The plaintiffs argue that the Court should preliminarily approve the class settlement because:

> First, it provides relief for Settlement Class Members where their recovery, if any, would otherwise be uncertain, especially given Defendant's ability and willingness to continue its vigorous defense of the case. Second, the Settlement was reached only after first engaging in discovery and extensive arm's length negotiations cut across a multitude of lawsuits filed in different jurisdictions, before they were ultimately consolidated in this this Action. Third, the Settlement was not conditioned on any amount of attorneys' fees for Class Counsel or Service Award for Plaintiff, which speaks to the fundamental fairness of the process.

Motion at 2.

"Judicial review of a proposed class action settlement is a two-step process: preliminary approval and a subsequent fairness hearing." Smith v. Wm. Wrigley Jr. Co., No. 09-60646-CIV, 2010 WL 2401149, at *2 (S.D. Fla. June 15, 2010). Preliminary approval of a class settlement essentially allows notice to issue to the class and for the class members to either object to or opt out of the settlement. Coles v. Stateserv Med. of Fla., LLC, No. 8:17-CV-829-T-17AEP, 2018 WL 3860263, at *2 (M.D. Fla. June 19, 2018), report and recommendation adopted, No. 8:17-CV-829-EAK-AEP, 2018 WL 4381186 (M.D. Fla. July 19, 2018).

"Although class action settlements should be reviewed with deference to the

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settlement purposes only. See Settlement Agreement (DE# 24-1 at 11) ("Solely for purposes of avoiding the expense and inconvenience of further litigation, Defendant does not oppose the certification for settlement purposes only of the Settlement Classes") (emphasis in original).

strong judicial policy favoring settlement, the court must not approve a settlement merely because the parties agree to its terms." Palmer, 2016 WL 2348704, at *3 "This maxim particularly holds true in the context of precertification settlement, where the parties' speedy and seamless resolution of their dispute should prompt the court to consider whether the proposed settlement represents a bona fide end to the adversarial process or the collusive exploitation of the class action mechanism to the detriment of absent class members." Id. Nonetheless, preliminary approval is nonbinding and should be granted "where the proposed settlement is the result of the parties' good faith negotiations, there are no obvious deficiencies and the settlement falls within the range of reason." Smith, 2010 WL 2401149, at *2.

In determining whether to preliminarily approve a class settlement, district courts consider the following factors: "(1) the likelihood of success at trial; (2) the range of possible recovery; (3) the range of possible recovery at which a settlement is fair, adequate, and reasonable; (4) the anticipated complexity, expense, and duration of litigation; (5) the opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved." Faught v. Am. Home Shield Corp., 668 F.3d 1233, 1240 (11th Cir. 2011). The burden is on the party seeking approval of the class settlement to establish that the class settlement is fair, adequate and reasonable. Palmer v. Dynamic Recovery Sols., LLC, No. 6:15-CV-59-ORL-40KRS, 2016 WL 2348704, at *3 (M.D. Fla. May 4, 2016).

i. Likelihood of Success at Trial

With respect to the factor, the likelihood of success at trial, the plaintiffs state that "Class Counsel are confident in the strength of Plaintiffs' case, but they are also

pragmatic in their awareness of the various defenses available to Lexington, and the risks inherent in trial and post-judgment appeal." Motion at 16. Moreover, the plaintiffs note that even if they prevail at trial, they would be subject to a likely appeal which would result in a delay of any recovery. Id.

The parties have agreed to a settlement. However, the defendant maintains that it is not liable. As such and under the circumstances of this case, it is uncertain whether the plaintiffs would prevail at trial. Moreover, even if the plaintiffs were to prevail at trial, any recovery would be delayed pending an appeal. Under this factor, the settlement appears to be a reasonable compromise to avoid the uncertainty of trial and the delay of an appeal.

The likelihood of success at trial favors settlement.

ii. Range of Possible Recovery at which a Settlement Is Fair, Adequate, and Reasonable

As to this factor, the range of possible recovery, the plaintiffs argue that:

> The $11,450,863 made available to the class here is more than reasonable, given the complexity of the litigation and the significant risks and barriers that loomed in the absence of settlement including, but not limited to various Motions to Stay filed by Defendant, Lexington's assertion of individualized issues, including the raising of dispute-resolution procedures, such as arbitration and class-action waivers, a potential motion for summary judgment, Daubert motions, trial as well as appellate review following a final judgment.

Motion at 17. Individually, "[e]ach Settlement Class member who timely files with the Settlement Administrator a valid Claim Form" will "receive a cash distribution payable by check of $6.15." Id. at 8.

"The range of possible recovery spans from a finding of non-liability to a varying range of monetary and injunctive relief. In considering the question of a possible

recovery, the focus is on the possible recovery at trial." Saccoccio v. JP Morgan Chase Bank, N.A., 297 F.R.D. 683, 693 (S.D. Fla. 2014) (citation and internal quotation marks omitted). "The TCPA creates a private right of action for statutory damages in the amount of $500 per violation (or up to $1,500 if the defendant violated this subsection willfully or knowingly)." Wilson v. Badcock Home Furniture, 329 F.R.D. 454, 456 (M.D. Fla. 2018) (citing 47 U.S.C. § 227(b)(3)). Thus, the range of possible recovery is zero dollars through $1,500, per violation.

The $6.15 cash payment is a small fraction of the possible recovery at trial. Nonetheless, the Court should find that this factor favors settlement. A settlement agreement may compensate the plaintiff for substantially less than the full amount and still be reasonable. "A settlement can be satisfying even if it amounts to a hundredth or even a thousandth of a single percent of the potential recovery." Behrens v. Wometco Enterprises, Inc., 118 F.R.D. 534, 542 (S.D. Fla. 1988), aff'd sub nom. Behrens v. Wometco Enterprises, 899 F.2d 21 (11th Cir. 1990). Here, the $6.15 cash payment is the product of arms-length negotiations after multiple, lengthy mediations in related cases. If the instant case proceeds to trial, it is possible that the plaintiffs may not recover any money or that the defendant may not have sufficient funds to pay every class member their statutory damages.

Moreover, although the settlement agreement does not provide for injunctive relief against the defendant, it does state that the defendant must comply with the TCPA:

> **2. Compliance with the TCPA**
>
> The Parties recognize that Lexington will institute policies and procedures to ensure that it complies with the TCPA, including, but not limited to,

> policies and procedures to ensure that Lexington obtains adequate and proper consent from individuals before placing calls or text messages to those individuals using an automatic telephone dialing system.

Settlement Agreement (DE# 24-1 at 14). Additionally, the Settlement Agreement provides for an enforcement mechanism:

> The Court shall retain exclusive and continuing jurisdiction over this Actions, the Parties, and this Agreement with respect to the performance of its terms and conditions (and disputes arising out of or relating to this Agreement), the proper provision of all benefits, and the implementation and enforcement of its terms, conditions, and obligations.

Id. at 30. These provisions confer a benefit to the class which is tantamount to injunctive relief.

The range of possible recovery also favors settlement.

iii. Complexity, Expense, and Duration of Continued Litigation

The plaintiffs argue that:

> The traditional means for handling claims like those at issue here would tax the court system, require a massive expenditure of public and private resources, and, given the relatively small value of the claims of the individual class members, would be impracticable. Thus, the Settlement is the best vehicle for Settlement Class Members to receive the relief to which they are entitled in a prompt and efficient manner.

Motion at 17.

The undersigned finds that this factor is met. The instant action involving claims under the TCPA is not particularly complex. Nonetheless, it would be expensive to prosecute through trial and may include an appeal.

The expense and duration of continued litigation favors settlement.

iv. Opposition to Settlement

The plaintiffs do not address this argument. As previously noted, a plaintiff in a related class action, Eugene Rosales, filed a motion to intervene. The purpose of that

motion was not to object to the settlement, but to allow Mr. Rosales to stay the instant proceedings to allow Mr. Rosales to proceed with his own putative class action in the District of Nebraska. For the reasons discussed in the Report and Recommendation on the motion to intervene, the Court should not stay these proceedings.

Aside from Mr. Rosales' motion to intervene, there has been no opposition to the settlement. Mr. Rosales and any other putative class members will have an opportunity to object to the settlement at the fairness hearing. Moreover, class members will have the opportunity to opt-out of the settlement and pursue their claims individually against the defendant.

v. State of Proceedings at which Settlement was Achieved

The plaintiffs argue that although settlement was achieved early in the instant action, "[t]he Settlement was reached only after discovery in 5 separate matters, including the production and review of documents and electronic data produced by Lexington and third parties." Motion at 18. The plaintiffs argue that given the benefit of this related litigation, "Class Counsel were extremely well-positioned to confidently evaluate the strengths and weaknesses of Plaintiff's claims and prospects for success at trial and on appeal." Id.

Given the extensive litigation history between the parties and their participation in multiple, lengthy mediations, the state of the proceedings favors settlement.

In sum, the record in the instant case favors the preliminary approval of the settlement. It appears that the settlement is the product of arms-length negotiations and there is no evident fraud or collusion influencing the settlement.

The undersigned finds that all the Rule 23 requirements for class certification are

met and that the factors relevant to the preliminary approval of the class settlement favors settlement.

3. Notice to the Class

The plaintiffs also seek approval of their proposed notice to the class. Motion at 20. Pursuant to Rule 23(c)(2)(B), notice must consist of the "best notice that is practicable under the circumstances," and "must clearly and concisely state in plain, easily understood language:"

> (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).

Here, the proposed class notice appears to state all of the required information in a reasonably clear and concise manner and otherwise satisfies the requirements of Rule 23(c). It adequately informs potential class members of the litigation, the relevant terms of the proposed settlement, the costs and attorney's fees, how to submit claims and notifies the class of the opportunity to object to the settlement or opt-out of the class.

The proposed method of notice consists of the class administrator emailing notice to the email addresses from defendant's records. Motion at 5. The defendant has email addresses for approximately over 80 percent of the class. Id. The class administrator will also provide notice by post card to the mailing address of those class members for which the defendant does not have an email address and utilize "reverse

lookup" to obtain mailing addresses. Id. at 6. The settlement also provides for an online advertising campaign to notify potential class members of the settlement. Id. The undersigned finds that the email notice, post card notice, advertising campaign and the measures to locate and notify members of the class are satisfactory and that the contents of the notice meet the requirements of Rule 23(c)(2)(B).

If the Court adopts this Report and Recommendation, the Court should enter an order establishing appropriate deadlines including setting the date for the fairness hearing.

RECOMMENDATION

Based on the foregoing, it is respectfully RECOMMENDED that the Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement and Incorporated Memorandum of Law (DE# 24, 5/3/19) be **GRANTED**. The Court should conditionally certify the class for settlement purposes only. The Court should also preliminarily approve the settlement and enter an order establishing appropriate deadlines including setting the date for the fairness hearing.

The parties shall have fourteen (14) days from the date of being served with a copy of this Report and Recommendation within which to file written objections, if any, with the Honorable Ursula Ungaro, United States District Judge. Failure to file objections timely shall bar the parties from a de novo determination by the District Judge of an issue covered in the Report and shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained in this Report except upon grounds of plain error if necessary in the interest of justice. See 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140, 149 (1985); Henley v. Johnson, 885 F.2d 790,

794 (1989); 11th Cir. R. 3-1 (2016).

RESPECTFULLY SUBMITTED at the United States Courthouse, Miami, Florida this 10 day of September, 2019.

JOHN J. O'SULLIVAN
CHIEF UNITED STATES MAGISTRATE JUDGE