IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Colin Lateano, Plaintiff, v. Chicago Cubs Baseball Club, LLC, Defendant.	)	Case No. 23 CV 2757 Judge Joan B. Gottschall

ORDER

The court has before it Plaintiff Colin Lateano's ("Lateano") motion for preliminary approval of the parties' proposed class settlement. Lateano filed this proposed class action under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227(c), and its implementing regulations, 47 C.F.R. § 64.1200(d), on behalf of a proposed class of persons who received unwanted text messages from defendant Chicago Cubs Baseball Club, LLC ("The Cubs"). Lateano alleges that he and members of the proposed class followed the procedure for opting out of marketing text messages from The Cubs, but the messages did not stop. *See* Compl. ¶¶ 14–16, ECF No. 1.

The proposed settlement agreement creates a $1,225,000 common settlement fund to be distributed to an estimated 2,486 class members on a *pro rata* basis. Mot. Prelim. Approval 3–4, 4 n.3, ECF No. 37. The costs of sending notice to the proposed class, administration costs, and any incentive payment to Lateano (he plans to request $10,000) will be paid out of the settlement fund. *Id.* at 4–5, 4 n.3. Counsel for the proposed class intend to seek up to 36% of the settlement fund in reasonable attorneys' fees, plus costs, also to be paid out of the settlement fund. *Id.* at 7–8, 4 n.3. After these deductions, counsel estimate that each class member stands to receive approximately $300. *See id.* at 1–2, 14–15. Lateano compares this amount favorably to smaller recoveries in approved settlements of TCPA class actions. *See id.* at 15–16; *see also, e.g.*, *In re Capital One TCPA Litig.*, No. 12CV10064 (MDL No. 2416) (N.D. Ill. Feb. 12, 2015).

To obtain preliminary approval, "The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class." Fed. R. Civ. P. 23(e)(1)(A). The parties must also show that "the court will likely be able to (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B). The court need only determine whether the proposed settlement is "within the range of possible approval" before authorizing notice to the proposed class. *Gautreaux v. Pierce*, 690 F.2d 616, 621 & n.3 (7th Cir. 1982). In making this determination, the court considers the fairness factors analyzed at the final approval stage, albeit not with the same level of rigor. *See, e.g.*, *In re TikTok, Inc., Consumer Privacy Litig.*, 565 F.Supp.3d 1076, 1087 (N.D. Ill. 2021); *In re AT&T Mobility Wireless Data Servs. Sales Litig.*, 270 F.R.D. 330, 347–49 (N.D. Ill. 2010). The factors are: "(1) the strength of plaintiffs' case compared to the amount of defendants' settlement offer; (2) an assessment of the likely complexity, length and expense of the litigation; (3) an evaluation of the amount in opposition to settlement among affected parties; (4) the opinion of competent counsel; and (5) the stage of the proceedings and the amount of discovery completed at the time of settlement." *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006) (numbering added) (quoting *Isby v. Bayh,* 75 F.3d 1191, 1199 (7th Cir. 1996)). The following issues must be addressed before preliminary approval is granted:

1. **Number of text messages class members received and distribution among the proposed class.**

Lateano alleges in his complaint that, despite being told to stop, The Cubs "sent numerous text messages to Plaintiff's number." Compl. ¶ 16. The TCPA provision under which Lateano sues authorizes $500 in statutory damages for "each such violation," 47 U.S.C. § 227(c)(5)(B), a phrase courts have interpreted as meaning each phone call or text message. *See Martin v. PPP, Inc.*, 719 F.Supp.2d 967, 974–75 (N.D. Ill. 2010); *see also Wilkins v. HSBC Bank Nev., N.A.*, 2015 WL 890566, at *2 (N.D. Ill. Feb. 27, 2015). In his motion for preliminary approval, Lateano compares the estimated recovery per class member with this $500 figure,

which would be the proper basis of comparison if each class member received one text message in violation of the TCPA. [1] *See* Mot. Prelim. Approval 2, 15–16, 2 n.2.

Without knowing how many text messages each putative class member allegedly received, the court cannot perform the preliminary analysis required by the Seventh Circuit–comparing the likely recovery under the proposed settlement agreement with the range of possible outcomes if the proposed class does not settle. *See Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 652 (7th Cir. 2006); *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 284–85 (7th Cir. 2002). The number of text messages each putative class member received also bears on the preliminary class certification analysis of typicality, adequacy, and predominance. *See* Fed. R. Civ. P. 23(e)(2)(B), 23(a)(2)–(3), 23(b)(3). Relatedly, the court would find it helpful to understand whether all class members received roughly the same number of messages or whether some received substantially more than others. This would assist the court in conducting a preliminary analysis of the fairness of distributing the settlement fund on a pro rata basis rather than based on the number of text messages each putative class member received.

In sum, before the court can perform a preliminary approval analysis, it needs to know, assuming such information is readily accessible, whether each class member received roughly the same number of messages and, if not, how the number of messages varied. If this information is not readily accessible, the court needs to be so informed.

2. Postcard notices.

The court must direct "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). Due process requires the notice to be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." *In re Ticktock*, *supra*, 565 F. Supp. 3d at 1091 (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)); (other citation omitted).

[1] If either party believes that TCPA damages should be computed on a different basis, counsel should file a memorandum of law supported by citations to pertinent authority.

The parties propose sending notice to class members by email and by postcard. Proposed Settlement Agrmt. ¶ 54(a); *see also* Proposed Postcard Notice, ECF No. 37-1. There is a documented history of low response rates to postcard notices, raising a question about whether such notices are the best form of notice practicable. *See, e.g., Pearson v. NBTY, Inc.*, 772 F.3d 778, 782 (7th Cir. 2014); *Kaufman v. Am. Express Travel Related Servs., Inc.*, No. 07CV1707 (N.D. Ill. Aug. 9, 2013) (approving re-notice to class after low response rates to postcards in consumer class action); *see also In re Navistar Maxxforce Engines, Mktg., Sales Pracs. & Prods. Liab. Litig.*, No. 14CV10318, Order at 1 n.1. (N.D. Ill. May 31, 2019). The court does not mean to imply that it is ruling out notice by postcard. Rather, it needs more information to assess the costs and benefits of postcard notice. For instance, the record does not show how another method of mail notice would affect administration costs. The court also has no sense of how many potential class members' email addresses are known or how many will receive notice by postcard only. The plan to send postcard notices must either be replaced by regular mail notices (assuming most class members will receive notice only by mail) or further justified.

3. Claim submission process.

Lateano represents that the proposed settlement agreement does not create a claim submission process. *See* Mot. Prelim. Approval 14. But the proposed settlement agreement requires each class member to submit a form indicating whether the class member wishes to be paid by check or electronic funds transfer. *See* Proposed Settlement Agrmt. ¶¶ 52, 54(a), 62, 63. It is unclear whether class members who do not submit this form will be paid. *See id.* The parties must therefore clarify whether a check will be issued by default if a class member does not return a form electing a payment method.

4. Requirement that objections be signed by the putative class member.

The proposed settlement agreement (¶ 59) requires an objector personally to "sign the objection" and provide certain information. The parties cite no authority for this request in their motion for preliminary approval, and the requirement of a personal signature is not typical in this court's experience. As stated by this court when disapproving another signature requirement for

objections, "Requiring the objector, not just his or her attorney, to sign personally the objection exceeds the requirements of Fed. R. Civ. P. 11." *In re Navistar*, Order at 4. Here, the requirement that the class member personally sign an objection must be removed, or a legal justification for it must appear in the record.

CONCLUSION

For the reasons stated, plaintiff's motion for preliminary approval is denied without prejudice. Plaintiff may address the issues raised in this order by refiling his motion for preliminary approval within 21 days, on or before January 31, 2024.

Dated: January 10, 2024

/s/ Joan B. Gottschall
United States District Judge