

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

PAUL IZOR,  
Plaintiff,  
v.

ABACUS DATA SYSTEMS, INC,  
Defendant.

Case No. [19-cv-01057-HSG](#)

**ORDER GRANTING MOTION FOR  
PRELIMINARY APPROVAL FOR  
CLASS ACTION SETTLEMENT**

Re: Dkt. No. 69

Pending before the Court is the unopposed motion for preliminary approval of class action settlement filed by Plaintiff Paul Izor. *See* Dkt. No. 69. The parties have reached a settlement regarding Plaintiff's claims and now seek the required court approval. For the reasons set forth below, the Court **GRANTS** the motion.

**I. BACKGROUND**

**A. Factual Background**

Plaintiff brings this Telephone Consumer Protection Act, 46 U.S.C. § 227 ("TCPA"), class action against Defendant Abacus Data Systems Inc. ("Abacus") on behalf of himself and two putative classes of others similarly situated. *See generally* Dkt. No. 1 ("Compl."). Plaintiff seeks to represent two classes:

**Autodialed No Consent Class:** All persons in the United States who from four years prior to the filing of this action through class certification (1) Defendant (or an agent acting on behalf of Defendant) text messaged, (2) on the person's cellular telephone number, (3) using a text messaging platform substantially similar to the text messaging platform Defendant used to text message Plaintiff, (4) for whom Defendant claims (a) it obtained prior express written consent in the same manner as Defendant claims it supposedly obtained prior express written consent to text message Plaintiff, or (b) it did not obtain prior express written consent.

from four years prior to the filing of this action through class certification (1) Defendant (or an agent acting on behalf of Defendant) texted more than one time; (2) within any 12-month period (3) where the person's telephone number had been listed on the DNC for at least thirty days; (4) for a substantially similar reason that Defendant texted Plaintiff; and (5) for whom Defendant claims (a) it obtained prior express written consent in the same manner as Defendant claims it supposedly obtained prior express written consent to text message Plaintiff, or (b) Defendant did not obtain prior express written consent.

Compl. at ¶ 26.

Defendant sells software services to professionals, including HotDocs, “a document automation software company for the legal profession.” *Id.* at ¶ 1 n.2. Plaintiff alleges that Defendant, or a third party acting on behalf of Defendant, “sen[t] out unsolicited text messages to consumers purportedly ‘notifying’ them that their version of HotDocs is out of date and asking them to ‘press y’ to schedule an appointment presumably to update their accounts.” *Id.* at ¶ 2, 16. For such updates, however, consumers “must pay a monthly software service fee of \$75, and the appointments they schedule with Abacus are nothing more than sales pitches for HotDocs.” *Id.* at ¶ 2. Plaintiff alleges that Defendant sent “two autodialed texts messages to his cellular phone.” *Id.* at ¶ 4. The first text read: “HotDocs: Your HotDocs version is out of date and requires an update. Reply Y to schedule an appointment. Txt STOP to OptOut.” *Id.* at ¶ 11. Plaintiff immediately texted “STOP,” to which he received a second text: “AbacusNext: You opted out and will no longer receive messages from AbucusNext 8588824894.” *Id.* at ¶ 20.

Plaintiff brings two causes of action under the TCPA: (1) Defendant allegedly sent unsolicited text messages using an automatic telephone dialing system (“ATDS”) in violation of 47 U.S.C. § 227(b)(1)(A)(iii); and (2) Defendant allegedly violated a regulation, 47 C.F.R. § 64.1200, promulgated under the statute in violation of 47 U.S.C. § 227(c)(5). *Id.* at ¶¶ 32–44.

### **B. Procedural Background**

Plaintiff filed this action on February 26, 2019. *See* Dkt. No. 1. After the Court denied Defendant’s motion to dismiss and motion to stay, Defendant filed an answer on August 19, 2019. Dkt. No. 45. After months of discovery, the parties engaged in a full-day mediation with mediator Bruce A. Friedman on January 31, 2020. Dkt. No. 69-2 (“Kaufman Decl.”) at ¶ 18. While the

5, 2020, after conducting more discovery and engaging in further settlement negotiations with Mr. Friedman. *Id.* at ¶ 7; *see also* Dkt. No. 67.

### C. Settlement Agreement

The parties entered into a settlement agreement, fully executed on June 17, 2020. Dkt. No. 69-1, Ex. 1 (“SA”). The parties filed an amendment to the settlement agreement on August 6, 2020. Dkt. No. 72-1 (“Amendment”). The key terms are as follows:

Settlement Class Definition: The Settlement Class is defined as:

[A]ll regular users or subscribers of numbers assigned to a paging service, cellular telephone service, specialized mobile radio service, radio common carrier service, or any service for which the called party is charged for the call to which a text message was transmitted by Trumpia on behalf of Defendant within four years of February 26, 2019.

SA ¶ 1.1.36.

Settlement Benefits: Defendant will make a \$1,950,000 non-reversionary Settlement Fund. *Id.* ¶¶ 1.1.40, 4.1. The Settlement Fund will include payments to the Class Members, administrative expenses (estimated between \$72,496 and \$103,996), Plaintiff’s attorneys’ fees (not to exceed \$650,000) and costs (not to exceed \$25,000), and any incentive payment for Lead Plaintiff (not to exceed \$5,000).

In addition to the Settlement Fund, Defendant agreed that it will “implement policies and procedures to prevent against the sending of text messages without prior express consent to numbers assigned to wireless carriers using an automated telephone dialing system, and . . . will not send any telemarketing text messages to promote its products and/or services in violation of the TCPA.” *Id.* at ¶ 4.3. Specifically, the parties agreed that “Defendant will not make any telemarketing calls or send any telemarketing text messages for a period of 2 years to any Settlement Class Member without an independent investigation into the existence of consent,” “Defendant will obtain a subscription to the National Do Not Call Registry,” Defendant will perform a quarterly spot check of 10 telemarketing calls and/or texts made on its behalf,” and Defendant will require any vendors making telemarketing calls to identify any sub-vendors they

1           Release: All Settlement Class Members will release:

2                   [A]ny and all claims, liabilities, demands, causes of action, or lawsuits  
3                   of the Settlement Class Members, whether known or unknown,  
4                   whether legal, statutory, equitable, or of any other type or form,  
5                   whether under federal, state, or local law (such as any violations of  
6                   the Telephone Consumer Protection Act, 47 USC § 227, the FCC's  
7                   related regulations—including Do Not Call requirements, or unfair or  
8                   deceptive practices act), and whether brought in an individual,  
9                   representative, or any other capacity, (a) that were brought in the  
10                  Litigation or could have been brought under state or local laws similar  
11                  to the Telephone Consumer Protection Act, (b) that arise from the  
12                  manner in which text messages were sent, or attempted to be sent, by  
13                  or on behalf of Defendant, (c) that arise from a lack of consent for  
14                  sending text messages or (d) that arise from the sending, or attempted  
15                  sending, of text messages by or on behalf of Defendant to telephone  
16                  numbers registered on any federal or state do not call list, within the  
17                  four years preceding February 26, 2019.

18           *See id.* at 1–2 (amending SA ¶ 1.1.29).

19           Class Notice: A third-party settlement administrator will send summary class notices via  
20           first-class U.S. mail to each member of the class. SA ¶ 7.5.3. The notice will include the nature  
21           of the action; the class definition; a summary of the settlement terms; instructions on how to  
22           complete a claim form in order to receive payment; instructions on how to object to and opt out of  
23           the settlement, and relevant deadlines. *Id.* at Ex. C.

24           In addition to the mailed summary notices, the third-party settlement administrator will  
25           also publish a one-time summary notice “in a magazine, website, or through targeted social media  
26           ads.” *Id.* at ¶ 7.5.4; *see also id.* at Ex. C. The parties indicate that the settlement administrator  
27           will use Google Display Network and Facebook Ads, which they anticipate will produce  
28           105,000,000 impressions. *See id.* at Ex. C. Finally, the settlement administrator will set up a  
29           Settlement Website, which will include a long-form notice, within 30 days of preliminary  
30           approval. *Id.* at ¶ 7.3.1; *see also id.* at Ex. B.

31           Opt-Out Procedure: The deadline for a class member to submit a request for exclusion or  
32           to object to the Settlement is 60 days after the initial mailing and electronic posting date of the  
33           notice. SA at ¶¶ 1.1.25, 10.4. In order to opt-out, the Class Member must send a written request  
34           with a clear indication that he or she would like to be excluded as well as the “Class Member’s  
35           name, address, and the telephone number that allegedly received a text or text messages sent by

Trumpia on behalf of Defendant during the Settlement Class period.” *Id.* at ¶ 10.4. Defendant has the right to terminate the Settlement Agreement if the total number of opt outs exceeds 1,000. *Id.* at ¶ 10.4.4.

Claims Process and Distribution: Each Class Member is entitled to submit one claim through the proposed claim form. *Id.* at Ex. A. Each valid claim form submitted before the claims deadline will receive a *pro rata* share of the Settlement Fund within 60 days of the date any judgment becomes “Final.” “‘Final’ means one business day following the latest of the following events: (i) the expiration of three (3) business days after the time to file a motion to alter or amend a judgment under Fed. R. Civ. P. 59(e) has passed without any such motion having been filed; (ii) the expiration of the time in which to file an Appeal of any judgment entered pursuant to this Agreement has passed without any Appeal having been taken; or (iii) the resolution of any such Appeal in a manner that does not reverse or vacate the Judgment and in a manner that permits the consummation of the Settlement substantially in accordance with the terms and conditions of this Agreement.” *Id.* at ¶ 1.1.14.

Incentive Award: The named Plaintiff may apply for an incentive award of no more than \$5,000. *See* Dkt. No. 69 at 11; *see also* SA at ¶ 5.

Attorneys’ Fees and Costs: Class counsel intends to apply for attorneys’ fees not to exceed one-third of the Settlement Fund (or \$650,000), as well as costs not to exceed \$25,000. *See* Dkt. No. 69 at 12; *see also* SA at ¶ 6.

## II. PROVISIONAL CLASS CERTIFICATION

The plaintiff bears the burden of showing by a preponderance of the evidence that class certification is appropriate under Federal Rule of Civil Procedure 23. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011). Class certification is a two-step process. First, a plaintiff must establish that each of the four requirements of Rule 23(a) is met: numerosity, commonality, typicality, and adequacy of representation. *Id.* at 349. Second, she must establish that at least one of the bases for certification under Rule 23(b) is met. Where, as here, a plaintiff seeks to certify a class under Rule 23(b)(3), she must show that “questions of law or fact common to class members

predominate over any questions affecting only individual members, and that a class action is



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