IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DAN L. BOGER, *on behalf of himself and others similarly situated*,	)	
Plaintiff,	)	Civil Action No. 19-cv-01234-LKG
v.	)	Date: January 31, 2023
CITRIX SYSTEMS, INC.,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER ON PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

I. INTRODUCTION

Plaintiff, Dan L. Borger, brings an unopposed motion for preliminary approval of class action settlement to settle certain claims on behalf of himself, and a potential class of similarly situated individuals, against Defendant, Citrix Systems, Inc. ECF No. 56. The proposed settlement agreement and release (the "Settlement Agreement") resolve alleged violations of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, and the Maryland Telephone Consumer Protection Act ("MTCPA"), Md. Code Ann. Com. Law S 14-3201. ECF No. 56-1. No hearing is necessary to resolve this motion. *See* L. R. 105.6 (D. Md. 2021).

For the reasons that follow, the Court **GRANTS** Plaintiff's motion for preliminary approval of class action settlement.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY[1]

A. Factual Background

The Plaintiff's Claims

[1] The facts recited herein are taken from the complaint and Plaintiff's Motion for Preliminary Approval of Class Action Settlement. Unless otherwise stated, the facts recited herein are undisputed.

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This civil action involves alleged violations of the TCPA, which prohibits, among other things, initiating a telephone call using an automated dialing system to telephone numbers assigned to a cellular telephone service; making any call for telemarketing purposes to any residential subscriber on the National Do Not Call Registry; and making any call for telemarketing purposes to any residential or wireless telephone subscriber, unless the caller has implemented the required minimum procedures for maintaining a list of persons who do not want to receive calls made by or on behalf of such person or entity. *See* 47 U.S.C. § 227(b)(1) and (c).[2]

Plaintiff, Dan L. Boger, is an individual residing in Maryland who received five solicitation calls from Defendant to his cellular telephone number, despite previously placing his number on the National Do Not Call Registry. ECF No. 56 at 2. In this putative class action, Plaintiff alleges that that Defendant violated the TCPA by, among other things, placing unsolicited telemarketing calls to him and to the members of the putative class on residential and cellular telephone numbers. *Id.* at 3.

Plaintiff commenced this putative class action on April 26, 2019. ECF No. 1. Thereafter, the parties engaged in informal discovery, and they participated in a mediation on April 26, 2022, with Judge Jay Gandhi (Ret.). ECF No. 56 at 3. The Parties did not reach a settlement at that time. *Id.* And so, the parties engaged in further discovery over several months. *Id.* On or about November 17, 2022, the Parties tentatively agreed to a potential settlement (the "Settlement") of this case. *Id.*

The Settlement Agreement

The proposed Settlement would establish a "Settlement Class" defined as follows:

> All persons or entities within the United States to whom Defendant or a third party acting on its behalf: (a) made one or more telephone calls to their cellular telephone number; (b) made two or more telephone calls while the call recipient's number was on the National Do Not Call Registry; and/or (c) made one or more calls after asking Defendant or a third party acting on Defendant's behalf to stop calling.

[2] Plaintiff also alleges a claim under the Maryland Telephone Consumer Protection Act, Md. Code Ann. Com. Law §§ 14-3201, *et seq*.

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Settlement Agreement at ¶ 1.29. The key provisions of the Settlement Agreement are summarized below.

First, the proposed Settlement Agreement would establish a non-reversionary $2,750,000 Settlement Fund (the "Settlement Fund"), which will exclusively be used to pay: (1) cash settlement awards to settlement class members; (2) settlement administration expenses; (3) court-approved attorneys' fees of up to one-third of the total amount of the Settlement Fund; (4) Plaintiff's out-of-pocket expenses not to exceed $60,000; and (5) a Court-approved service payment to the Plaintiff of up to $10,000. ECF No. 56 at 5.

The Settlement Agreement also provides that each settlement class member whose telephone number is on the Class List and who submits a timely and valid claim form shall be entitled to receive an equal *pro rata* amount of the Settlement Fund, after all settlement administrative expenses, service payment, and fees, costs, and expenses awards are paid out of the Settlement Fund. Settlement Agreement at ¶ 3.2.1.[3] If approved by the Court, the Plaintiff will receive a service payment of $10,000 from the Settlement Fund (the "Class Representative Service Payment"). *Id.* at ¶ 2.1.3.

Second, the Settlement Agreement provides that, upon preliminary approval, Plaintiff's counsel will apply to the Court for a fees, costs, and expenses award in the amount of up to one-third of the total amount of the Settlement Fund, in addition to out-of-pocket expenses. *Id.* at ¶ 2.1.4. The Settlement Agreement further provides that any amount remaining in the Settlement Fund, after paying all authorized claimant awards, settlement administration expenses, and any fees, costs, and expenses award and service payment, will be distributed to a Court-approved *cy pres* recipient. *Id.* at ¶¶ 3.5, 3.6, 3.8.

The Settlement Agreement further provides that all settlement administration expenses will be exclusively paid from the Settlement Fund. In this regard, the parties propose that the nationally recognized class action administration firm A.B. Data, Ltd. be the Settlement Administrator and implement the Class Notice and administer the Settlement. *Id.* at ¶ 1.28. The Settlement Administrator's duties will include: (1) sending the class notice to the Settlement

[3] The Settlement Agreement also provides for a potential second distribution for any funds remaining due to uncashed settlement distribution checks to those Settlement Class Members that cashed their first distribution checks. *Id.* at ¶ 3.7.

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Class pursuant to the Settlement; (2) responding to inquiries regarding the settlement process from persons in the Settlement Class; (3) processing and evaluating requests for exclusion and objections; and (4) issuing Authorized claimants' individual allocated payment amounts. Specifically, the Settlement Administrator will send Postcard Notice *via* the U.S. Postal Service to the names and addresses of Settlement Class members identified as being the owners or users of the phone numbers contained on the Class List (the "Settlement Class Members"). *Id.* at ¶ 4.4.2. The Settlement Administrator will also administer a settlement website, through which Settlement Class Members will be able to obtain further details and information about the Settlement. *Id.* at ¶ 4.3. The anticipated administration costs are $509,617.90. *See* Misny Decl. at ¶ 6.

Pursuant to the opt-out and objection procedures in the Settlement Agreement, persons in the Settlement Class will have the opportunity to exclude themselves from the Settlement or to object to its approval. Settlement Agreement at ¶¶ 6.1, 6.2. In addition, the Class Notice informs Settlement Class Members that they will have an opportunity to appear and to have their objections heard by the Court at a final approval hearing. *Id.* This notice also informs Settlement Class Members that they will be bound by the release contained in the Settlement Agreement, unless they timely exercise their opt-out right. *Id.* In this regard, the release provides that:

> Released Claims. Any and all claims, causes of action, suits, obligations, debts, demands, agreements, promises, liabilities, damages, losses, controversies, costs, expenses, and attorneys' fees of any nature whatsoever, whether based on any federal law, state law, common law, territorial law, foreign law, contract, rule, regulation, any regulatory promulgation (including, but not limited to, any opinion or declaratory ruling), common law or equity, whether known or unknown, suspected or unsuspected, asserted or unasserted, foreseen or unforeseen, actual or contingent, liquidated or unliquidated, punitive or compensatory, as of the date of the Preliminary Approval Order, that arise out of or relate in any way to the Released Parties' use of any telephone, cell phone, calling or dialing software or platforms, or an "automatic telephone dialing system," or an "artificial or prerecorded voice" to contact or attempt to contact Settlement Class Members. This release expressly includes, but is not limited to, all claims under the Telephone Consumer Protection Act or any corollary state law.
> The Released Claims include any and all claims that were brought or could have been brought in the Action.

Id. at ¶ 1.23.; *see also id.* at ¶¶ 1.24, 1.25.

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B. Relevant Procedural History

Plaintiff commenced this putative class action on April 26, 2019. ECF No. 1. On December 14, 2022, Plaintiff filed an unopposed motion for preliminary approval of class action settlement, a memorandum in support thereof, a proposed settlement agreement and related documents. ECF Nos. 56 and 56-1.

III. STANDARDS FOR DECISION

A. Preliminary Approval Of Class Action Settlement

The decision of "[w]hether to preliminarily approve a class action settlement lies within the sound discretion of the district court." *Stephens v. Farmers Rest. Grp.*, 329 F.R.D. 476, 482 (D.D.C. 2019). In this regard, courts have recognized that "there is an overriding public interest in favor of settlement, particularly in class action suits." *Lomascolo v. Parsons Brinckerhoff, Inc.*, 2009 WL 3094955, at *10 (E.D. Va. Sept. 28, 2009) (citing *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)). But, when the parties are seeking class certification and settlement at the same time, the proposed settlement agreement requires closer judicial scrutiny. *Stephens*, 329 F.R.D. at 482 (internal quotations and citations omitted); *see also* Manual for Complex Litigation (Fourth) § 21.612 (2004).

In this regard, the Court's analysis of whether a proposed Rule 23 class action settlement is fair and reasonable involves a two-step process. First, the Court determines whether the settlement is "within the range of possible approval," such that there is "probable cause to notify the class members of the proposed settlement." *Starr v. Credible Behav. Health, Inc.*, No. CV 20-2986 PJM, 2021 WL 2141542, at *5 (D. Md. May 26, 2021) (quoting *Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 855 F. Supp. 825, 827 (E.D.N.C. 1994)). "At this initial stage, the Court must make 'a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms' and 'direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing.'" *Id.* (quoting Manual for Complex Litigation § 21.632)."

To determine whether it can give preliminary approval to the Settlement Agreement, the Court looks to the factors in Fed. Rule Civ. P. 23(e)(2). This Rule provides that the Court may find that a settlement is fair, reasonable, and adequate after considering whether:

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