

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

Case No. 1:18-cv-24407-UU

MARCELO PENA, *et al.*,

Plaintiffs,

v.

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

Defendant.

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**CORRECTED ORDER PRELIMINARILY APPROVING CLASS SETTLEMENT**  
**[correction as to Final Approval Hearing date only]**

THIS CAUSE comes before the Court on Magistrate Judge O’Sullivan’s Report and Recommendation (D.E. 49) (the “Report”) as to Plaintiffs’ Unopposed Motion for Preliminary Approval of Class Action Settlement and Incorporated Memorandum of Law (D.E. 24) (the “Motion”).

THE COURT has considered the Report, the Motion, and the pertinent portions of the record and is otherwise fully advised in the premises.

**I. Background**

Plaintiffs filed the instant putative class action on October 23, 2018. D.E. 1. In the operative Complaint, Plaintiffs assert claims against Defendant for violating the Telephone Consumer Protection Act (the “TCPA”), 47 U.S.C. § 227(b) (Count I) and knowingly or willfully violating the TCPA, 47 U.S.C. § 227(b) (Count II). *See* D.E. 22. Plaintiffs’ claims arise from “Defendant’s unauthorized use of text messages” and “automated and prerecorded telemarketing calls” to consumers. *Id.* ¶ 3.

The parties have negotiated a settlement. On May 3, 2019, the plaintiffs filed the Motion

seeking class certification and preliminary approval of the settlement. *See* D.E. 24. The Motion was referred to Magistrate Judge O’Sullivan, who issued the Report on September 10, 2019.

## **II. Legal Standard**

A district court may accept, reject, or modify a magistrate judge’s report and recommendation. 28 U.S.C. § 636(b)(1). Those portions of the report and recommendation to which objection is made are accorded *de novo* review, if those objections “pinpoint the specific findings that the party disagrees with.” *United States v. Schultz*, 565 F.3d 1353, 1360 (11th Cir. 2009). However, the district court need not review the report and recommendation *de novo* if the parties do not object with specificity. *Macort v. Prem, Inc.*, 208 F.App’x 781, 784 (11th Cir. 2006).

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).

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). 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. R. Civ. P. 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.” *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1188 (11th Cir. 2003) (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. *Id.* at 1187.

### **III. Analysis**

In the Report, Magistrate Judge John J. O’Sullivan recommends that Plaintiffs’ Unopposed Motion for Preliminary Approval of Class Action Settlement be granted. D.E. 49. Magistrate Judge O’Sullivan provided the Parties with fourteen days to file written objections with this Court and noted that:

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.

*Id.* at 16.

The Report sets out a detailed explanation and rationale for recommending that the Court should (1) conditionally certify the class for settlement purposes only and (2) preliminarily approve the settlement and enter an order establishing appropriate deadlines, including setting the date for the fairness hearing. *Id.* No party has objected or otherwise responded to the Report. Accordingly,

after thorough review of the record and the Report, the undersigned agrees with Magistrate Judge O’Sullivan’s recommendation in all respects.

**IV. Conclusion**

As no party has objected and the Court finds no error in the Report, it is hereby

ORDERED AND ADJUDGED that the Report and Recommendation, D.E. 49, is ADOPTED, RATIFIED AND AFFIRMED in all respects. Plaintiffs’ Motion for Preliminary Approval of Class Action Settlement, D.E. 24, is GRANTED. It is further

ORDERED AND ADJUDGED that Plaintiffs’ proposed Order Preliminarily Approving Class Action Settlement and Certifying the Settlement Classes, D.E. 24-1 at 93–102 (the “Proposed Order”), is ADOPTED and INCORPORATED BY REFERENCE herein. To the extent any portions of this Order conflict with the Proposed Order, this Order shall supersede and control.

It is further

ORDERED AND ADJUDGED that the parties shall convene before the undersigned for a Final Class Action Settlement Approval Hearing on **March 31, 2020, at 10:30 a.m.**, at the United States Courthouse, 400 North Miami Avenue, Room 12-4, Miami, Florida.

ORDERED AND ADJUDGED that the Schedule of Events set forth in the Motion (D.E. 24 at 21) and the Proposed Order (D.E. 24-1 at 102) is hereby ADOPTED AS MODIFIED BELOW:

<b><u>Event</u></b>	<b><u>Date</u></b>
Deadline for Completion of Mailed Notice Program	<b>January 27, 2020</b>
Deadline for the Email Notice Program	<b>January 27, 2020</b>
Deadline for filing papers in support of Final Approval of the Settlement	<b>February 26, 2020</b>

Class Counsel's application for an award of attorneys' fees and expenses	<b>February 26, 2020</b>
Deadline for opting-out of Settlement and submission of objections	<b>February 26, 2020</b>
Responses to Objections	<b>March 2, 2020</b>
Final Approval Hearing	<b>March 31, 2020, at 10:30 a.m.</b>
The last day that Settlement Class members may submit a Claim Form to the Settlement Administrator	<b>May 4, 2020</b>

DONE AND ORDERED in Chambers at Miami, Florida, this 2d day of December, 2019.



UNITED STATES DISTRICT JUDGE

cc: counsel of record via cm/ecf