

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

THOMAS H. KRAKAUER,)
)
 Plaintiff,)
)
 v.) 1:14-CV-333
)
 DISH NETWORK, LLC,)
)
 Defendant.)

ORDER

Dish has filed a motion for reconsideration of the Court’s decision on the plaintiff’s motion for judgment. To the extent Dish’s motion is based on “reorganized” information and the arguments made in Section B of the brief, *see* Doc. 423 at 5-8, the Court previously denied the motion. *See* Doc. 428. The Court concludes that Dish has raised legitimate concerns about the February Lists submitted by the plaintiff in connection with the plaintiff’s motion for judgment, that those lists should be stricken, and that the Special Master shall oversee modifications to the November Lists in compliance with the Court’s orders and shall prepare and recommend to the Court a Final List of class members who are not required to submit a claim, if the parties cannot agree.

RELEVANT BACKGROUND

After the jury verdict in favor of the class in January 2017 and this Court’s willfulness finding in May 2017, the Court in July 2017 established the broad outlines for a claims process. *See* Doc. 351. The Court also offered a mechanism for naming class members identified fully and consistently in the existing data who would be entitled to

damages without submitting a claims form; the Court required the plaintiff to provide a list of such persons to Dish in mid-September, allowed six weeks for the parties to “meet and confer in an effort to identify and narrow any disputes so that individual issues are not included in the plaintiffs’ motion,” and set an early November deadline for filing a motion for judgment. *Id.* at 19-20. These deadlines were later extended. Doc. 369.

During the meet-and-confer process, Dish chose to largely rely on new data rather than to engage in a review of the existing data. *See, e.g.*, Doc. 382 at 1.

In its November motion for judgment, the plaintiff moved for entry of judgment as to some 11,471 persons, contending their class membership could not reasonably be disputed based on the existing data. Doc. 381. In support of his motion, he provided two lists of class members for judgment, Doc. 382-1, which his expert, Anya Verkhovskaya, identified with testimony and analysis. Doc. 382-2. Group 1A contained persons whose full names and phone numbers were found in the Five9/SSN records; whose names and association with the telephone number were then confirmed or corroborated via a reputable data source that was part of the existing data in this case; and whose addresses were updated via the United States Postal Service’s National Change of Address database. *Id.* at ¶ 17. Group 1B included class members whose names were found in the either Five9/SSN records or, where names in the Five9/SSN records were incomplete or missing, in other existing data from LexisNexis or Microbilt; whose telephone numbers were found in the Five9/SSN records; and whose addresses were updated via the National Change of Address database. *Id.* at ¶ 18. These lists, filed on the docket at Doc. 382-1 (redacted) and Doc. 385-1 (sealed), will be referenced herein as the “November Lists.”

In its opposition to the plaintiff's motion, Dish again chose to largely rely on new data. Doc. 390. Nonetheless, upon reviewing Dish's materials, the plaintiff agreed to remove 191 persons from the November Lists. Doc. 395 at 14; Doc. 407 at 5.

By Order entered January 25, 2018, the Court found that with the removal of the 191 persons agreed to by the plaintiff, the class members identified in the November Lists were entitled to recover without going through a claims process, with two exceptions. Doc. 407 at 6-7. The first exception was the group of persons listed in Group 1B only by first name and as to whom the plaintiff had not presented evidence in the existing data of a last name and persons listed in Group 1B only by last name as to whom the plaintiff had not presented evidence in the existing data of a first name or initial. *Id.* at 6. The second exception was one person listed in Group 1A, Elia Batista, as to whom the plaintiff believed that there has been a surname change. *Id.* at 6-7.

The Court directed the plaintiff to revise the November Lists to remove those persons, as well as the 191 persons the plaintiff agreed should come off the list, and to file the revised lists. Doc. 407 at 11. The plaintiff filed the revised lists on February 8, 2018. *See* Docs. 409, 410, 411, 412. These lists will hereinafter be referenced as the "February Lists."

Dish filed its motion to reconsider on February 23, 2018. Doc. 422. The Court denied part of this motion without requiring the plaintiff to respond, ruling that Dish was not entitled to a second bite at the apple. Doc. 428. Briefing is now complete on the remainder of Dish's motion. *See* Doc. 429; Doc. 433.

1. Unauthorized Changes to the November Lists

Dish contends that the February Lists include changes and additions to the November Lists that are beyond those authorized by the Court's January 2018 Order. The plaintiff concedes this is accurate and concedes the changes should not have been made without the Court's approval. The plaintiff explains that the changes were made as part of correcting data entry and transposition errors and that court approval was not sought as a result of a lack of communication with his expert.

The Court will strike the February Lists.

The parties shall meet and confer in order to modify the November Lists in compliance with the terms of the Court's January 2018 Order and this Order, and as may otherwise be agreed to by the parties to correct errors. Other than corrections based on transposition errors as discussed *infra*, the plaintiff is not authorized to seek to add anyone to the list of persons who do not have to go through the claims process or to change an initial to a full name, absent agreement by Dish.

To the extent the parties agree, they shall advise the Special Master who shall include the correction in the Final List. To the extent a dispute remains as to whether a name should be removed from the November Lists, the parties shall submit the matter to the Special Master. The Special Master will recommend a Final List to the Court, pursuant to a procedure established in a separate Claims Procedure Order.

2. Inconsistent Information from Claims Process

In its initial brief in support of the motion to reconsider, Dish contends that information submitted through the claims process contradicts five entries on the

plaintiff's November Lists and that those errors remain in the February Lists. Doc. 423 at 8-9. Dish identified additional contradictions in its reply brief. Doc. 433 at 3-4. These "contradictions" fall into two categories.

a. "Transposition" Errors

The plaintiff contends that four of the originally-identified conflicts are explained by transposition errors during the data entry and proofreading process and Dish has not disputed this contention in its reply brief. Specifically, the plaintiff contends that on the November/February Lists, Tina Myers, Faith Clements, Barbara Brey, and Rick Sellman were erroneously listed with phone numbers and numbers of calls associated with other class members instead of their own phone numbers, and that the class members with those phone numbers—Yukiko Miyamoto or Masato Miyamoto, Ed and Marla Logue, Henry Horner, Jr., and Dawn Robbins—also should have been included on the November Lists but were not. Doc. 429 at 5-6; Doc. 430-1 at ¶¶ 22-24. In its response, the plaintiff also identified an additional transposition error. Doc. 429 at 4-5 (Zirkle/Moyer). According to Dish's reply brief, the parties agree that there are other similar errors. Doc. 433 at 3-4 (George/Ver Strate; Parks/Shanks Jr.; Brown/Calcote); *id.* at 4-5 (Enriquez/Laforte).

Last year the Court established a detailed process that gave the parties significant time to work together to locate these kinds of clerical and data entry errors as well as more substantive individual disputes before the motion for judgment was filed. The Court is at a loss to understand why Dish did not raise these problems earlier, since these incorrect "matches" between class members and phone numbers were present in the

November Lists and are not new to the February Lists. *See, e.g.*, Doc. 385-1 at 22, 35, 49 (showing errors in entries for Brey, Myers, and Clements). Had Dish raised these problems during the long period allowed for the meet and confer process or presented this argument to the Court when the November motion for judgment was pending, they could have been resolved months ago. It is frustrating that Dish chose to delay a full review of the existing data against the plaintiff's list until 2018 and seeks to do now what it should have done last fall. It is also frustrating that the plaintiff did not identify these errors earlier and that the plaintiff did not himself promptly bring them to the Court's attention.

Nonetheless, it now appears undisputed that the November Lists contain inaccurate phone numbers for these class members. It further appears that Dish did not have a clear and direct opportunity to challenge the inclusion of Miyamoto, Logue, Horner, Robbins, Zirkle, Ver Strate, Shanks, Calcote, and Laforte because their names were not on the November Lists submitted to the Court. Therefore, the Court will require the parties to meet and confer as to whether the existing data support correcting the phone number and number of calls to Tina Myers, Faith Clements, Barbara Brey, Rick Sellman, Deborah George, Esther Parks, Jay Brown, and Ramon Enriquez and whether the existing data supports including Yukiko Miyamoto and Masato Miyamoto, Ed and Marla Logue, Henry Horner, Jr., Dawn Robbins, Wilda Zirkle, Michael Ver Strate, Jack Shanks, Rhonda Calcote, and John Laforte in the Final List. To the extent they do not agree, the disputes will be submitted to the Special Master pursuant to the procedure established in the Claims Procedures Order the Court will enter shortly.

The parties shall immediately examine the existing data as compared to the November Lists in order to identify any additional transposition errors. So long as the error was a transposition error and the existing data is consistent, any such class members listed by name or class members with phone numbers on the November Lists and affected by such errors do not have to go through the claims process. Disputes will be submitted to the Special Master pursuant to the procedure established in the Claims Procedures Order that the Court will enter shortly.

b. Conflicts Between Claims Submitted and the November Lists

In its initial brief, Dish contended there was a fifth phone number on the November Lists as to which there is now an inconsistent claims form. Doc. 423 at 9 (Blackley/Hogrewe dispute). The plaintiff agrees there is a conflict. Doc. 429 at 6. In its reply brief, Dish contends there are additional conflicts. Doc. 433 at 4 (Tharpe/Wesley, Newcomb/Fields, Krumwiede/Severson, Bekdas/Konopinski Jr., Hernandez/Sewart).

The Court concludes that the conflicts between persons on the Final List and persons submitting claims before the original claims deadline of March 7 should go through the claims administration process and these persons should be removed from the Final List. However, any claim submitted after March 7 for a phone number on the Final List shall be denied in favor of the class member on the Final List, absent agreement of the parties otherwise.

3. Deceased Class Members

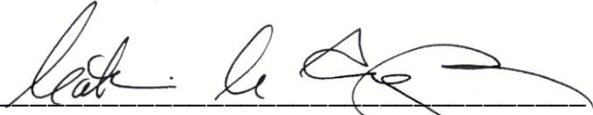
Dish contends that claims submissions show that some persons on the plaintiff's November Lists, and who remain on the February Lists, are deceased and thus cannot

recover on a TCPA claim. Doc. 423 at 10-11. The plaintiff disagrees that there can be no recovery, but he has agreed to remove these persons from the November Lists. Doc. 429 at 3, 7. The Court directs that these persons shall not be included in the Final List and their estates are required to go through the claims process.

It is **ORDERED** that:

1. The motion to reconsider, Doc. 422, is **GRANTED IN PART AND DENIED IN PART**, to the extent stated herein.
2. The February Lists filed at Docs. 409, 410, 411, and 412 are **STRICKEN** from the record.
3. The parties shall meet and confer in order to prepare a proposed Final List that complies with the Court's January 2018 Order, Doc. 407, and this Order. To the extent a dispute remains, the parties shall submit the matter to a Special Master, pursuant to a procedure established in a separate Claims Procedure Order.

This the 5th day of April, 2018.


UNITED STATES DISTRICT JUDGE