

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

LATONYA SIMMS, on behalf of itself)
and all others similarly situated,)
)
Plaintiff,)
)
vs.) Cause No. 1:14-cv-737-WTL-MJD
)
EXACTTARGET, LLC,)
)
Defendant.)

ENTRY REGARDING PROPOSED CLASS NOTICES AND CLAIM FORMS

This cause is before the Court on the Plaintiff’s Unopposed Motion for Preliminary Approval of Class Action Settlement (Dkt. No. 158). The Court **takes the motion under advisement**, pending the submission of an amended proposed class notices and claim forms that address the Court’s concerns, as set forth below.

First, the Court notes that the notices submitted for approval refer to a potential award of “litigation costs (up to \$50,000)” in addition to a potential award of “attorneys’ fees (no more than one-third of the Settlement Fund)”. However, the settlement agreement does not appear to contemplate a separate award of litigation costs; rather, it defines “Fee Award” as “an award of attorneys’ fees and expenses” and limits that award to “no more than one-third of the Settlement Fund.” This discrepancy between the terms set forth in the settlement agreement and the terms as described in the notices should be corrected.

Next, the proposed notices require that a putative class member who wishes to object to the settlement and/or speak at the fairness hearing must mail a written objection and/or request to speak to the clerk of court, class counsel, defense counsel, and the claims administrator. The

Court finds that requirement to be unnecessarily burdensome. The parties' amended proposed notices should require that such objections and requests be mailed only to the clerk of court.¹

Next, the Court notes that the claim form found at Exhibit A to the settlement agreement, found at Dkt. No. 159-2 p. 34-35, requires a class member ID number. If that claim form will be used in conjunction with the internet banner ad notices, it is not clear to the Court that a person who clicks on such an ad would have a class member ID number. This claim form should either be modified to remove that requirement (perhaps by adding "(if known)"), or the Court should be provided with the claim form that will be used in the banner ad context.

The Court also believes that the following non-substantive changes to the notices and claim forms should be made:

1. On Exhibit A, the deadline sentence should be modified to read: "YOUR CLAIM FORM MUST BE SUBMITTED ONLINE BY 11:59 P.M. CENTRAL TIME ON [DATE] OR SENT BY MAIL TO THE ADDRESS BELOW AND POSTMARKED BY [DATE]."
2. On the first version of the notice found at Exhibit B to the settlement agreement, Dkt. No. 159-2 at 37-38 (hereinafter referred to as the "email Notice"), in the "Who is included?" paragraph, the dates defining the class period should read either "from July 23, 2009, through September 30, 2013" or "from July 23, 2009, to and including September 30, 2013" (rather than "between . . . and including").
3. In the email Notice, in the "What are my options?" paragraph, there should be a period after "right now." Also, given the understandable reluctance of people to open attachments contained in unsolicited emails, the Court suggests that instead of including

¹Counsel will receive notice of any objection or request received by the Clerk via the court's cm/ecf system when it is entered on the docket.

the claim form as an attachment, the notice direct recipients to the downloadable form by providing both a link and a web address that a wary recipient can type into a browser.

Further, the web address given in this paragraph for submitting a claim online is incorrect, and this paragraph should not reference “the front of this postcard” if it is to be sent as an email. Finally, this paragraph should clearly direct the reader to the long-form notice on the website for specific instructions on how to opt-out or object/request to appear.

4. In the email Notice, in the “The Fairness Hearing” paragraph, the last sentence should read: “The motion for attorneys’ fees and costs will be posted on the website after it is filed.”
5. In the second version of the notice found at Exhibit B to the settlement agreement, Dkt. No. 159-2 at 39-42 (hereinafter referred to as the “Postcard Notice”), in the “Who is included?” paragraph in Dkt. No. 159-2 at 40, the dates defining the class period again should read either “from July 23, 2009, through September 30, 2013” or “from July 23, 2009, to and including September 30, 2013” (rather than “between . . . and including”). In the fourth paragraph, there again needs to be a period after “right now” and the last sentence of that paragraph should read: “The motion for attorneys’ fees and costs will be posted on the website after it is filed.” There also appears to be an extra period after “this postcard” in that paragraph.
6. The Postcard Notice directs recipients to “include the Claim Identification number on the front of this postcard,” but the claim form that accompanies it does not include a space for an ID number. Further, it appears that the front of the postcard will include a “Class Member ID,” not a “Claim Identification number.” Consistent terminology should be used.

7. The language to the left of the address on the return postcard (Dkt. No. 159-2 at 42) should read:

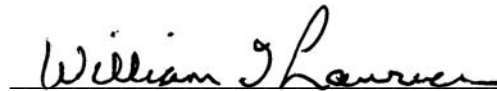
TO RECEIVE BENEFITS FROM THIS SETTLEMENT, YOU MUST PROVIDE ALL OF THE INFORMATION ON THE CLAIM FORM ON THE REVERSE SIDE, AND YOU MUST SIGN THE CLAIM FORM.

YOUR CLAIM FORM MUST BE SUBMITTED ONLINE BY 11:59 P.M. CENTRAL TIME ON [DATE] OR SENT BY MAIL TO THE ADDRESS BELOW AND POSTMARKED BY [DATE].

8. On Exhibit D, Dkt. No. 159-2 at 47-52, the term “Defendant” should be defined as “ExactTarget, LLC” before it is used.
9. Also on Exhibit D, the second bullet point is missing an “or.” On the following page, in number 3, “requested” should be changed to “request.” In number 5, the dates should be expressed consistent with ¶¶ 2 & 5 above, and there is no need for the last sentence to be separated from the rest of the paragraph. Finally, in number 6, the second sentence should read “. . . Members who file approved claims.”
10. On Exhibit D, page three (Dkt. No. 159-2 at 49), the last sentence in number 8 is worded in a confusing manner. The Court suggests: “You may make only one claim for each cellular phone number that received” Also in number 8, the deadline sentence should read “Claim Forms must be submitted online by 11:59 p.m. Central Time on [date] or postmarked by [date].” In number ten, the first sentence should begin “Yes, the Court has appointed” and the period at the end of that sentence should be inside the quotation marks.
11. On Exhibit D, page four (Dkt. No. 159-2 at 50), “or received” should be deleted from number 14 and number 16 should not reference a “subclass.” On the following page, the last sentence in number 20 should be corrected to read “. . . .after it is filed.”

12. On the last page of Exhibit D, in number 22, “for a fee” should be added after “has the ability to make copies of any such public documents for you.” The following sentence should be added: “Any questions that you may have concerning this Notice should not be directed to the Court, but should be directed to the Settlement Administrator.”

SO ORDERED: 11/15/17

A handwritten signature in black ink, reading "William T. Lawrence", written over a horizontal line.

Hon. William T. Lawrence, Judge
United States District Court
Southern District of Indiana

Copies to all counsel of record via electronic notification