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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ROBERT J. SERAPHIN, on behalf of himself
and all others similarly situated,

Plaintiff,

vs.

SBC INTERNET SERVICES, INC., d/b/a
AT&T INTERNET SERVICES, INC., and
YAHOO! INC., a Delaware Corporation,

Defendants.

Case No. 1:09-cv-00131-REB

CLASS ACTION

**PLAINTIFFS' MEMORANDUM IN
SUPPORT OF UNOPPOSED
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT AND FOR AWARD
OF ATTORNEYS' FEES AND
COSTS TO CLASS COUNSEL**

PLAINTIFF'S MEMORANDUM IN SUPPORT OF UNOPPOSED
MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION
SETTLEMENT AND FOR AWARD OF ATTORNEYS' FEES AND
COSTS TO CLASS COUNSEL

TABLE OF CONTENTS

| | Page No. |
|--|-----------------|
| I. INTRODUCTION AND RELIEF REQUESTED | 1 |
| II. STATEMENT OF FACTS | 1 |
| A. Factual and Procedural Background | 1 |
| B. Plaintiff’s Counsel Thoroughly Investigated the Claims of the Proposed Class | 3 |
| C. The Proposed Settlement | 4 |
| III. AUTHORITY AND ARGUMENT | 6 |
| A. Settlement and Class Action Approval Process | 6 |
| B. The Parties’ Settlement Meets the Criteria for Preliminary Approval | 7 |
| 1. The Settlement Is a Product of Serious, Informed and Arm’s- Length Negotiations | 8 |
| 2. The Settlement Provides Substantial Relief to Settlement Class Members Considering Their Putative Damages and the Risks of Litigation | 9 |
| 3. The Settlement Fairly Allocates Settlement Funds | 12 |
| 4. The Settlement Class Representative Enhancement Award Is Reasonable | 13 |
| 5. The Requested Fees and Costs Payments Are Fair and Reasonable | 13 |
| a. The Amount of Time Spent by Class Counsel Is Reasonable | 15 |
| b. Class Counsel’s Hourly Rates Are Reasonable | 16 |
| c. Counsel’s Requested Fee Is Particularly Reasonable Given It Is Less Than Actual Lodestar | 17 |
| d. Counsel’s Expense Reimbursement Request Is Reasonable | 18 |

| | | |
|-----|---|----|
| C. | Provisional Certification of the Settlement Class Is Appropriate..... | 18 |
| 1. | The Requirements of Rule 23(a) Are Satisfied..... | 19 |
| 2. | The Proposed Class Also Meets the Provisions of Rule 23(b)(3) | 21 |
| D. | The Proposed Notice Program Is Constitutionally Sound | 22 |
| E. | The Scheduling of a Final Fairness Hearing Is Appropriate..... | 24 |
| IV. | CONCLUSION..... | 25 |

TABLE OF AUTHORITIES

Page No.

FEDERAL CASES

Amchem Prods., Inc. v. Windsor,
521 U.S. 591 (1997)..... 22

Bjornson v. Dave Smith Motors/Frontier Leasing & Sales,
578 F. Supp. 2d 1269 (D. Idaho 2008) 18

Blum v. Stenson,
465 U.S. 886 (1984)..... 14

Chrapliwy v. Uniroyal, Inc.,
670 F.2d 760 (7th Cir. 1982), *cert. denied*, 461 U.S. 956 (1983)..... 16

Class Plaintiffs v. City of Seattle,
955 F.2d 1268 (9th Cir. 1992) 6, 8

Deloach v. Philip Morris Cos.,
No. 1:00CV01235, 2003 WL 23094907 (M.D.N.C. Dec. 19, 2003)..... 14

Dewey v. Volkswagen of Am.,
728 F. Supp. 2d 546 (D.N.J. 2010) 18

Hanlon v. Chrysler Group,
150 F.3d 1011 (9th Cir. 1998) 14

Hensley v. Eckerhart,
461 U.S. 424 (1983)..... 14

Hughes v. Microsoft Corp.,
No. C98-1646C, 2001 WL 34089697 (W.D. Wash. Mar. 26, 2001)..... 8

Hutchison v. AT&T Internet Servs, Inc.,
No. CV07-3674-SVW (JCx), 2009 WL 1726344 (C.D. Cal. May 5, 2009) 1, 2, 11

Hutchison v. Yahoo! Inc.,
No. 09-55847, 2010 WL 3706571 (9th Cir. Sept. 20, 2010) 1, 2, 11

In re Immune Response Sec. Litig.,
497 F. Supp. 2d 1166 (S.D. Cal. 2007)..... 18

Lewis v First Am. Title Ins. Co.,
265 F.R.D. 536 (D. Idaho 2010) 19, 20, 21, 22

Lonardo v. Travelers Indem. Co.,
706 F. Supp. 2d 766 (N.D. Ohio 2010)..... 18

Maciera v. Pagan,
698 F.2d 38 (1st Cir. 1983)..... 16

Moore v. Nat’l Ass’n of Sec. Dealers, Inc.,
762 F.2d 1093 (D.C. Cir. 1985) 7

Morales v. City of San Rafael,
96 F.3d 359 (9th Cir. 1996) 14, 15, 17

Moreno v. City of Sacramento,
534 F.3d 1106 (9th Cir. 2008) 15

Mullane v. Cent. Hanover Bank & Trust Co.,
339 U.S. 306 (1950)..... 22

Ortiz v. Fibreboard Corp.,
527 U.S. 815 (1999)..... 8

Perez v. Asurion Corp.,
501 F. Supp. 2d 1360 (S.D. Fla. 2007) 24

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985)..... 22

Playfair v. S. Lemhi Sch. Dist. 292 Bd. of Trustees,
Case No. CV09-375-BLW, 2010 WL 1138958 (D. Idaho March 20, 2010) 14, 17

Schipper v. TXU Corp.,
Civil Action No. 3:07-CV-1281-L, 2008 WL 2002044 (N.D. Texas May 9, 2008) 14

Silber v. Mabon,
18 F.3d 1449 (9th Cir. 1994) 22

Staton v. Boeing Co.,
327 F.3d 938 (9th Cir. 2003) 13

Trevino v. Gates,
99 F.3d 911 (9th Cir. 1996) 14

Varacallo v. Mass. Mut. Life Ins. Co.,
226 F.R.D. 207 (D.N.J. 2005)..... 18

FEDERAL RULES

Fed. R. Civ. P. 23(a)(1)..... 19

Fed. R. Civ. P. 23(a)(3)..... 20

Fed. R. Civ. P. 23(a)(4)..... 20

Fed. R. Civ. P. 23(b)(3)..... 18, 21

Fed. R. Civ. P. 23(c)(2)..... 22

OTHER AUTHORITIES

4 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* (“*Newberg*”) § 11.24
(4th ed. 2002)..... 7

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(4th ed. 2002)..... 7

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(4th ed. 2002)..... 6

Manual for Complex Litigation (Fourth) (“*MCL 4th*”) §13.14 (2009) 7

Manual for Complex Litigation (Fourth) (“*MCL 4th*”) §§ 21.632 – 21.634 (2009) 7

I. INTRODUCTION AND RELIEF REQUESTED

Plaintiff Robert J. Seraphin (“Plaintiff”) respectfully moves the Court for preliminary approval of the class action settlement that he has reached with Defendants SBC Internet Services, Inc. d/b/a AT&T Internet Services and Yahoo! Inc. (collectively, “Defendants”). For the reasons set forth in this memorandum and the supporting documents, the settlement is fair and reasonable and serves the best interests of the class members. Accordingly, Plaintiff respectfully requests that the Court enter an order: (1) preliminarily approving the settlement; (2) provisionally certifying the proposed settlement class; (3) appointing Plaintiff’s lawyers as class counsel; (4) approving the proposed notice plan, language of the class notice, and directing that notice be given to the provisionally certified settlement class; (5) appointing Class Action Administration, Inc. to serve as the independent claims administrator; and (6) scheduling a hearing to consider the final approval of the settlement (“Final Approval Hearing”).

II. STATEMENT OF FACTS

A. Factual and Procedural Background

Plaintiff initiated this case on March 23, 2009. In his First Amended Complaint, Plaintiff alleges that, beginning no later than 2005, Defendants assessed an Early Termination Fee (“ETF”) against consumers such as himself who cancelled their DSL internet service before the end of a purported contractual commitment to subscribe for a defined period of time, usually one year. (FAC ¶ 1 [Dkt. # 19].) Plaintiff sought to represent a class composed of persons who “(a) subscribed to DSL service with Defendants and were charged \$20 a month or less for service; and (b) cancelled their DSL service before the expiration of their service agreement with Defendants; and (c) paid or are subject to a \$200 ETF for cancellation of their service before the end of the service term.” (*Id.* ¶ 20.) Plaintiff alleged he had been obligated to pay \$14.95 a month for DSL service. (*Id.* ¶ 13.)

Defendants filed a motion to dismiss Plaintiff’s claims, relying largely on the decision in *Hutchison v. AT&T Internet Servs., Inc.*, No. CV07-3674-SVW (JCx), 2009 WL 1726344, at *3

(C.D. Cal. May 5, 2009), *aff'd*, *Hutchison v. Yahoo! Inc.*, No. 09-55847, 2010 WL 3706571 (9th Cir. Sep. 20, 2010). *Hutchison* involved similar claims to those raised in this case, except that the plaintiff had been charged more than \$20 a month for service. The district court granted summary judgment to AT&T in *Hutchison* on the ground that AT&T's ETF was an alternative performance provision rather than an unenforceable liquidated damages provision. *See Hutchison*, 2009 WL 1726344, at *5. The district court's decision was affirmed on appeal by the Ninth Circuit. *See Hutchison v. Yahoo! Inc.*, No. 09-55847, 2010 WL 3706571 (9th Cir. Sept. 20, 2010).

In denying Defendant's motion to dismiss, this Court distinguished the district court's decision in *Hutchison*. The Court found that "the \$200 ETF in the present case was *always* more than the remaining payments under Seraphin's term commitment, even if he cancelled in the first month of his twelve-month commitment. Thus, the parties here did not enter 'into an agreement wherein alternative modes of performance were stipulated that could each benefit either party depending on subsequent circumstances.'" (Mem. Decision and Order filed March 29, 2010 [Dkt. No. 58] at 9) (emphasis in original).

After this Court denied the motion to dismiss, the parties decided to discuss an early resolution to the case. (Declaration of Michael Lieder ("Lieder Decl.") ¶ 5.) The parties engaged in a one-day mediation followed by several months of telephonic negotiations. (*Id.* ¶ 6.) At all times the negotiations were adversarial, non-collusive, and at arm's length. (*Id.* ¶ 9.) During the course of the negotiations, Defendants provided Plaintiff with critical informal discovery, including data concerning the number of Class members. (*Id.* ¶¶ 5, 7.) The discussions culminated in an agreement through exchange of emails on the material terms of a class-wide settlement. (*Id.* ¶ 8.)

While the parties were finalizing a written term sheet, the Ninth Circuit Court of Appeals issued an unpublished decision affirming the grant of summary judgment in *Hutchison*. *See Hutchison v. Yahoo! Inc.*, No. 09-55847, 2010 WL 3706571 (9th Cir. Sep. 20, 2010).

Defendants spent several weeks considering what impact, if any, the decision should have on their willingness to move forward with the settlement, while Plaintiff took the position that the parties had already entered into a binding agreement. (Lieder Decl. ¶ 10.)

Ultimately, Defendants decided to proceed with the settlement. The parties concluded the negotiation of the Term Sheet, and then negotiated and signed a Settlement and Release Agreement (“Settlement Agreement”), which is attached as Exhibit A to the Declaration of Michael Lieder.¹ (*Id.*)

B. Plaintiff’s Counsel Thoroughly Investigated the Claims of the Proposed Class

Before filing the action in March 2009, Plaintiff’s counsel spent approximately six weeks investigating the allegations made by named Plaintiff Robert J. Seraphin, researching related legal issues, deciding on an appropriate venue, and preparing the complaint. (Lieder Decl. ¶ 2.) This investigation made clear that there would be few disputed facts affecting a liability determination, which would depend primarily on legal arguments.

A little over a month after the complaint was filed, Defendants filed a motion to dismiss in this case, relying largely on arguments made in a similar case, *Hutchison*, which, as noted *supra*, had just been dismissed on summary judgment. Counsel spent considerable time researching and drafting an opposition that, among other things, successfully distinguished *Hutchison*. (Lieder Decl. ¶ 3.) The Court denied Defendants’ motion to dismiss by its Memorandum Decision and Order filed March 29, 2010. (Mem. Decision and Order filed March 29, 2010 [Dkt. No. 58].) The preparation of this opposition fully familiarized Plaintiff’s counsel with the legal issues raised by the claims, to the limited extent that they had not been investigated prior to the filing of the complaint.

In order to obtain the factual information relevant to class certification, Plaintiff’s counsel then served formal written discovery requests. (Lieder Decl. ¶ 4.) After the parties agreed to

¹ The settlement agreement attached to the Lieder Declaration has not been signed by AT&T. However, Defendants’ counsel has informed Plaintiff’s counsel that AT&T has approved the form of the settlement agreement and as of the date of this filing is in the process of obtaining the authorized signature on the settlement agreement.

discuss an early resolution of the case, the parties engaged in informal discovery, requesting and receiving information about the number of customers with contractual payments below \$20 per month against whom defendants had assessed an ETF as well as certain related information. (*Id.* ¶¶ 5, 7.) This information permitted Plaintiff's counsel to evaluate the size of the class and the damages sustained by the proposed settlement class. In addition, toward the end of the negotiations Defendants responded to Plaintiff's formal written discovery requests. (*Id.* ¶ 10.) By these means, Plaintiff's counsel had the information necessary to evaluate the settlement terms.

C. The Proposed Settlement

The terms of the parties' agreement are contained within the Settlement Agreement. For purposes of preliminary approval, Plaintiff offers the following summary.

The proposed settlement class is defined as "all consumers in the United States and its territories whose contractual payment rate was \$20.00 per month or less and who were charged the \$200 early termination fee ("ETF") upon termination of their DSL term contract during the period June 1, 2005 through the date of preliminary approval," except for "Defendants' business customers, the presiding judge and his staff, and Defendants' in-house and outside legal counsel." (Lieder Decl., Ex. A ¶ 2.a.) The beginning date of the settlement class differs from the definition of the class in the Amended Complaint because AT&T's records do not permit identification of the customers who were charged an ETF prior to June 1, 2005. (Lieder Decl. ¶ 7.) Defendants have identified approximately 140,000 settlement class members. (*Id.*)

If the Court preliminarily approves the settlement, the Claims Administrator shall mail a postcard to the address of each settlement class Member as shown in Defendants' data, as updated by the Claims Administrator from the National Change of Address database. (Lieder Decl., Ex. A ¶ 2.c.) Class Counsel also may, and intends to, provide information about the settlement on a website, www.sbcetfcase.com. (*Id.*)

In order to submit a valid claim, settlement class members will need only affirm:

- (a) they were DSL term contract consumer subscribers of Defendants during the class period,
- (b) they or Defendants terminated the[ir] contract prior to the end of the term,
- (c) they were charged the \$200 ETF,
- (d) they paid any money to Defendants or their representatives in partial or complete satisfaction of the ETF, and
- (e) that money was not refunded or reimbursed.

(*Id.* ¶ 3.a.) Settlement class members may submit claims through a web-based system or telephonically. (*Id.*) The claim period will expire 30 days after the Final Approval Hearing or 90 days from the date notice of the settlement is mailed to class members, whichever is later.

(*Id.*) Defendants may contest the claims but must prove by a preponderance of the evidence to the Claims Administrator that the claimant is not eligible. (*Id.* ¶ 3.b.) Settlement class members who timely submit claims, which are not procedurally deficient or successfully challenged by Defendants, will be eligible claimants.

Eligible claimants whose contractual payment rate was below \$16.67 per month shall receive an award of \$40.00, while eligible claimants whose contractual payment rate was between \$16.67 and \$20.00 per month shall receive an award of \$20.00. (*Id.*, ¶ 3.d(i).) Defendants calculate that about 2/3 of the settlement class members are in the former group and about 1/3 in the latter. (Lieder Decl. ¶ 7.) The Settlement Agreement does not provide any minimum or maximum amount to be paid; the total amount that Defendants will pay will be determined entirely by the number of eligible claimants from each of the two groups.

In addition, settlement class members who did not pay any or all of the ETF are relieved of the obligation to pay the balance. (Lieder Decl., Ex. A ¶ 3.d(i).) Defendants will notify settlement class members of a toll-free number that they may contact to obtain, at no cost to the settlement class member, documentation showing the discharge of the debt that they can use, for example, to address adverse information on their credit reports. (*Id.*)

In exchange for these benefits, settlement class members will release Defendants of all claims “by reason of, or arising out of, the ETF,” whether or not they file claims, and are barred from filing any proceeding based on any released claim. (Lieder Decl., Ex. A ¶¶ 7.a and 7.b.) The release does not extend beyond claims arising out of the ETF. (*Id.*)

Settlement class members shall have the right to opt out of the settlement within 45 days after the notice date. (Lieder Decl., Ex. A ¶ 4.a.) Defendants may void the Settlement Agreement if more than 10% of the settlement class members opt out. (*Id.*)

The Settlement Agreement provides for an incentive award for the named Plaintiff of \$2,500. (Lieder Decl., Ex. A ¶ 5.b.) In conjunction with the Motion for Preliminary Approval of Class Action Settlement, Plaintiff’s counsel are also applying for an award of attorneys’ fees of \$300,000 and for reimbursement of out-of-pocket expenses of \$14,300, which will compensate Plaintiff’s counsel for all fees and costs incurred in this action in its entirety. (*Id.* ¶ 5.a.) Defendants will not oppose a request for fees and costs up to these stated amounts. (*Id.*) The proposed award of attorneys’ fees is less than Plaintiff’s counsel’s lodestar, and will compensate and reimburse them for the work they have already performed in this case as well as the work remaining to be performed in documenting the settlement, securing Court approval of the settlement, making sure that the settlement is fairly administered and implemented, and obtaining dismissal of the action.

III. AUTHORITY AND ARGUMENT

A. Settlement and Class Action Approval Process

As a matter of public policy, federal courts strongly favor and encourage settlements—particularly in class actions and other complex matters, where the inherent costs, delays and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992) (“strong judicial policy . . . favors settlements, particularly where complex class action litigation is concerned”); *see also* 4 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions*

(“*Newberg*”) § 11.41 (4th ed. 2002) (gathering cases). Individual litigation would unduly tax the court system, would require a massive expenditure of public and private resources and, given the relatively small value of the claims of the individual settlement class members, would be impracticable. The proposed settlement therefore is the best vehicle for settlement class members to receive the relief to which they are entitled in a prompt and efficient manner.

The *Manual for Complex Litigation* describes a three-step procedure for approval of class action settlements:

1. Preliminary approval of the proposed settlement based on briefing or an informal hearing;
2. Dissemination of notice of the settlement to all affected class members; and
3. A “formal fairness hearing” or final settlement approval hearing, at which class members may be heard regarding the settlement, and at which evidence and argument concerning the fairness, adequacy and reasonableness of the settlement may be presented.

Manual for Complex Litigation (Fourth) (“*MCL 4th*”) §§ 21.632 – 21.634, at 484–85 (2009).

This procedure, which is used by courts in this Circuit and endorsed by class action commentator Professor Herbert Newberg, safeguards settlement class members’ due process rights and enables the Court to fulfill its role as the guardian of settlement class interests. *See Newberg* § 11.24.

The Court’s preliminary approval will allow all settlement class members to receive notice of the proposed settlement’s terms and the date and time of the final settlement approval hearing, at which settlement class members may be heard regarding the settlement, and at which further evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement may be presented. *See MCL 4th* §§ 13.14 & 21.634, at 233–35, 485.

B. The Parties’ Settlement Meets the Criteria for Preliminary Approval

The purpose of preliminary evaluation of proposed class action settlements is to determine whether the settlement is within the “range of reasonableness,” and thus whether notice to the settlement class of the settlement’s terms and the scheduling of a formal fairness

hearing is worthwhile. *Newberg* at § 11.25. The decision to approve or reject a proposed settlement is committed to the Court's sound discretion. *See Moore v. Nat'l Ass'n of Sec. Dealers, Inc.*, 762 F.2d 1093, 1106 (D.C. Cir. 1985) ("Rule 23 places the determination [to approve or reject a proposed settlement] within the sound discretion of the trial judge who can be sensitive to the dynamics of the situation"); *see also City of Seattle*, 955 F.2d at 1276.

Neither formal notice nor a hearing is required at the preliminary approval stage. The Court may grant such relief upon an informal application by the settling parties, or even on the basis of information already known, at the Court's discretion. *MCL 4th* § 21.632, at 484–85.

While consideration of the requirements for *final* approval is unnecessary at this stage, the settlement proposed here not only meets the criteria for preliminary approval but also meets the heightened standard for final approval because it is "fundamentally fair, adequate, and reasonable" for the reasons set forth below. *City of Seattle*, 955 F.2d at 1276. This proves the settlement is "within the range of reasonableness" and should be preliminarily approved.

1. The Settlement Is a Product of Serious, Informed and Arm's-Length Negotiations

Courts recognize that arm's-length negotiations conducted by competent counsel after extensive discovery are prima-facie evidence of fair settlements. As the United States Supreme Court has held: "One may take a settlement amount as good evidence of the maximum available if one can assume that parties of equal knowledge and negotiating skill agreed upon the figure through arms-length bargaining, unhindered by any considerations tugging against the interests of the parties ostensibly represented in the negotiation." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 852 (1999); *see also Hughes v. Microsoft Corp.*, No. C98-1646C, 2001 WL 34089697, at *7 (W.D. Wash. Mar. 26, 2001) ("A presumption of correctness is said to attach to a class settlement reached in arms-length negotiations between experienced capable counsel after meaningful discovery." (citing *Manual for Complex Litigation (Third)* § 30.42 (1995))).

In this case, the parties participated in extensive negotiations over several months, including one all-day conference with a highly respected mediator on June 22, 2010. (Lieder Decl. ¶¶ 5–10.) In advance of that conference, the parties submitted mediation statements that addressed the strengths and weaknesses of their respective positions and the relevant facts and law. (*Id.* ¶ 5.) After that meeting, the parties had a series of telephone conferences and email exchanges that served two purposes. First, Defendants collected the information necessary for both parties to make informed settlement decisions. (*Id.* ¶ 7.) Second, the parties narrowed the gap between their respective positions that remained after the mediation in small increments with neither party willing to make a large move, but they finally succeeded in closing the gap entirely. (*Id.* ¶ 8.) Even after the parties had agreed on the benefits to be provided to settlement class members, the settlement was in doubt after the Ninth Circuit issued its decision in *Hutchison*. (*Id.* ¶ 10.) This was in every way an intensive, arm’s length negotiation. (*Id.* ¶ 9.)

These arm’s-length negotiations occurred between experienced attorneys who are highly familiar with class action litigation in general and with the legal and factual issues of this case in particular. Counsel for both parties have many years of experience in the litigation, certification, trial, and settlement of consumer cases in particular and class action lawsuits in general. (Lieder Decl. ¶¶ 12–15; Terrell Decl. ¶¶ 2–5; Schwartzman Decl. ¶ 2–4.)

As discussed in Section II.B above, counsel spent a considerable amount of time engaging in discovery and analyzing legal issues related to the lawsuit’s claims. During the course of the settlement negotiations, Defendants provided substantial information relating to the size of the class and assured Plaintiff’s counsel that the class could be identified from Defendants’ records. (Lieder Decl. ¶ 7.) In addition to this information, counsel extensively analyzed the legal risks of the litigation through the decisions in the *Hutchison* litigation. By the time the settlement was reached, counsel was well-informed regarding the claims’ factual bases and the legal issues relating to the claims.

2. The Settlement Provides Substantial Relief to Settlement Class Members Considering Their Putative Damages and the Risks of Litigation

Plaintiff's claims are based on the assumption that settlement class members who paid the entire \$200 ETF were only obligated to pay the combined amount of their remaining monthly service payments as damages to Defendants for terminating the term contract early, an amount which was less, in all cases, than \$200. Plaintiff contends that, on average, settlement class members would have been liable for six months of service payments. According to Plaintiff's theory, a consumer paying \$14.95 a month on average would have been liable for \$89.70 of payments, while a consumer paying \$19.95 a month on average would have been liable for \$119.70 of payments. Thus, the average settlement class member who contracted to pay \$14.95 a month and paid the full \$200 ETF was, according to Plaintiff's theory, penalized an additional \$110.30 in damages, while the average settlement class member who contracted to pay \$19.95 a month and paid the full \$200 ETF was, according to Plaintiff's theory, penalized an additional \$80.30 in damages. An award of \$40 is about 36% of the alleged damages of the average settlement class member who contracted to pay \$14.95 a month and paid the full ETF, while an award of \$20 is about 25% of the alleged damages of the average settlement class member who contracted to pay \$19.95 a month and paid the full ETF.

Of course, some settlement class members paid less than the full ETF. Those individuals had smaller putative damages than those who paid the full ETF, or even none if they paid less than \$89.70 or \$119.70 toward the ETF. Defendants' records are inadequate to determine the amount paid by each settlement class member toward the ETF, (Lieder Decl. ¶ 7), but it is reasonable to believe that the settlement on average pays settlement class members whose contractual payment rate was below \$16.67 per month over 40% of the alleged damages claimed by Plaintiff, while settlement class members whose contractual payment rate was between \$16.67 and \$20.00 per month will receive on average over 30% of the alleged damages Plaintiff seeks in this case.

In addition, the Settlement Agreement's provision relieving settlement class members of the obligation to pay any previously unpaid portion of the ETF and providing a means by which they can obtain documentation of the discharge of their debts provides additional benefits for the settlement class. Regardless of the amount of future payments that the provision may save settlement class members, it also undoubtedly will help some settlement class members obtain credit in the future.

Entering into mediation, Plaintiff and Plaintiff's counsel were confident in the strength of their case but also pragmatic in their awareness of the risks inherent to litigation and the various defenses available to Defendants. The reality that class members could end up recovering only a fraction of the settlement benefits or even losing at trial was significant enough to convince Plaintiff and Plaintiffs' counsel that the benefits of the settlement reached with Defendants outweigh the risks of continued litigation.

Throughout the negotiation process, for example, Defendants have steadfastly maintained that, as in *Hutchison*, the ETF imposed here is not a penalty but rather is an alternative performance provision. In *Hutchison*, the district court granted summary judgment to AT&T on the ground that the ETF constituted a reasonable alternative means of performance for the Hutchisons at the time of contracting: if the contract was cancelled early in the term, the ETF would be less than the remaining contractual payments, while if the contract was cancelled late in the term, the remaining contractual payments would be less than the ETF. *See Hutchison*, 2009 WL 1726344, at *5. The Court of Appeals affirmed in a divided unpublished panel opinion, with the lone dissenter adopting a rationale similar to the district court's, *see* 2010 WL 3706571, at *2 & n.1, and the two-judge majority adopting a different rationale focused on the combine value of the amount of the monthly discount and the fees the Hutchisons saved by agreeing to a contract with a set term rather than entering a month-to-month arrangement, *see id.* at *2. Because the panel's decision was not binding on this Court, it is unclear, if this case had not settled and Defendants had moved for summary judgment, whether this Court would have (a)

reaffirmed the reasoning in its denial of Defendants' motion to dismiss, in which case Plaintiff and members of the settlement class should have prevailed, (b) adopted the panel's second rationale focusing instead on the delta between what Plaintiff and members of the settlement class paid on a monthly basis under a term contract and other savings they accrued and what they actually paid on the discounted term contract, in which case it might have granted the summary judgment motion, or (c) adopted an altogether different rationale for resolving the dispute. The uncertainty caused by the lack of a published Ninth Circuit decision in *Hutchison* created litigation risks over and above the typical level of risks in consumer litigation.

Another risk Plaintiff faced going forward is that this Court might decline to certify this case as a class action. If Defendants were able to present convincing facts to support their position, the Court could have refused to certify the class, leaving only the named Plaintiff to pursue his claims.

Finally, there is a substantial risk of losing inherent in any jury trial. Even if Plaintiff did prevail, any recovery could be delayed for years by an appeal. The settlement obtained provides substantial monetary relief to settlement class members without further delay.

3. The Settlement Fairly Allocates Settlement Funds

The funds distributed to the settlement class will be allocated in a manner that is fair and reasonable. As described above, settlement class members whose contractual payment rate was below \$16.67 per month are eligible to receive over 40% of the alleged damages, while settlement class members whose contractual payment rate was between \$16.67 and \$20.00 per month are eligible to receive over 30% of the alleged damages. The difference in strength of claims justifies the differential in percentages. As this Court said of the Plaintiff in denying the motion to dismiss, so too for settlement class members whose contractual payment was below \$16.67 per month: "the \$200 ETF in the present case was *always* more than the remaining payments under [their] term commitment[s], even if [they] cancelled in the first month of [their] twelve month commitment." (Mem. Decision and Order filed March 29, 2010 [Dkt. No. 58] at

9.) This provides a strong response to Defendants' argument that the ETF was an alternative performance provision. Settlement class members whose contractual payment rate was \$16.67 or above cannot make the same argument as convincingly since their combined 12-months of service fees equaled or exceeded the \$200 ETF.

The provision relieving the settlement class members' obligation to pay any previously unpaid portion of the ETF and providing a means by which they can obtain documentation of the discharge of their debts is equally available to all settlement class members with any unpaid balance on the ETF.

4. The Settlement Class Representative Enhancement Award Is Reasonable

Subject to Court approval, the Settlement Agreement provides that the named Plaintiff, Robert J. Seraphin, will be paid \$2,500 in incentive compensation. This compensation to Mr. Seraphin recognizes his substantial service to and efforts on behalf of the proposed settlement class. Mr. Seraphin agreed to serve as a named Plaintiff because he believed the ETF was unjust. Because he did so, approximately 140,000 similarly-situated consumers will be entitled to relief. Mr. Seraphin assisted Plaintiff's counsel in investigating the claims, preparing the complaint and understanding the factual background of the lawsuit. He was prepared to participate in written discovery, was prepared to testify at deposition or trial, and was consulted during settlement negotiations. (Lieder Decl. ¶¶ 2, 11.) Plaintiff's incentive compensation is reasonable based on his contributions to the case. *See generally Staton v. Boeing Co.*, 327 F.3d 938, 976-77 (9th Cir. 2003) (citing approvingly incentive awards in five cases ranging from \$2,000 to \$25,000).

5. The Requested Fees and Costs Payments Are Fair and Reasonable

Pursuant to the Settlement Agreement, Plaintiff's counsel seek an award of \$300,000 for their attorneys' fees and \$14,300 for reimbursement of litigation expenses. Defendants do not contest Plaintiff's counsel's application up to these stated amounts. The parties negotiated that Defendants would not contest awards up to these amounts only after the substantive terms of the

settlement were agreed upon. (Lieder Decl. ¶ 8.) As set forth below, Plaintiff's counsel's requested fee is reasonable in light of the amount of work done by counsel, the results obtained, the quality of representation, and the novelty of the issues presented.

The Ninth Circuit has held that in the context of class action settlements, courts have the discretion to choose either the "lodestar/multiplier" method or the "percentage of the fund" method to determine a reasonable attorneys' fee. *Hanlon v. Chrysler Group*, 150 F.3d 1011, 1029 (9th Cir. 1998). Where, as here, settlement relief will be paid on a claims-made basis with no cap to the relief available, there is no "common fund" from which attorneys' fees can be paid, and even if the various benefits could be construed as a "common fund," its value would be difficult if not impossible to calculate. Thus, the requested attorneys' fees do not lend themselves to a percentage-of-the-fund analysis, and the lodestar method should be used instead. *See, e.g., Schipper v. TXU Corp.*, Civil Action No. 3:07-CV-1281-L, 2008 WL 2002044, at *2 (N.D. Texas May 9, 2008) (using the lodestar method to determine reasonable attorneys' fees because "the Fifth Circuit has approved the lodestar approach for awarding attorney's fees in a class action that did not involve a 'common fund'"); *Deloach v. Philip Morris Cos.*, No. 1:00CV01235, 2003 WL 23094907, at *4 (M.D.N.C. Dec. 19, 2003) ("Since no common fund or constructive common fund exists, the court concludes that it is more appropriate to use the lodestar methodology in awarding attorneys' fees in this case.").

The lodestar is calculated by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. *See Playfair v. S. Lemhi Sch. Dist. 292 Bd. of Trustees*, Case No. CV09-375-BLW, 2010 WL 1138958, *5 (D. Idaho March 20, 2010) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). In determining a reasonable hourly rate, the court considers the "experience, skill and reputation of the attorney requesting fees." *Id.* (quoting *Trevino v. Gates*, 99 F.3d 911, 924 (9th Cir. 1996)). The court also considers "the prevailing

market rates in the relevant community.” *See id.* (citing *Blum v. Stenson*, 465 U.S. 886, 895 (1984)).

“Once the lodestar amount is determined, the Court ‘then assesses whether it is necessary to adjust the presumptively reasonable lodestar figure’” to reflect factors not considered to that point. *Playfair*, 2010 WL 1138958, at *5 (quoting *Morales v. City of San Rafael*, 96 F.3d 359, 363–64 (9th Cir. 1996)). “There is a strong presumption that the lodestar figure represents a reasonable fee. Only in rare instances should the lodestar figure be adjusted on the basis of other considerations.” *Id.* (quoting *Morales*, 96 F.3d at 363 n.8).

a. The Amount of Time Spent by Class Counsel Is Reasonable

Under the lodestar approach, the court first decides whether the amount of time reported by counsel is reasonable. As set forth in the declarations submitted herewith, Plaintiff’s counsel have devoted more than 850 hours to the investigation, development, litigation and resolution of this complex case. (Lieder Decl. ¶ 19; Schwartzman Decl. ¶ 5; Terrell Decl. ¶ 6.) The declarations also break down this total by timekeeper. (*Id.*) In addition, the declarations contain a detailed summary of the work underlying the reported time, performed from inception of the representation of Mr. Seraphin to the filing of the instant motion. (*Id.*)

The 851.6 hours underlying this fee application were reasonably spent. As detailed in the procedural section above, Plaintiff faced determined adversaries represented by highly motivated and experienced counsel in a dispute over unsettled legal issues. As is their right, Defendants immediately tested the validity of the claims by filing a motion to dismiss, necessitating a thorough response by Plaintiff. Only after that motion was resolved were the parties in a position to discuss settlement. The services provided by Plaintiff and his counsel were necessary to bring this case to a successful conclusion and should be compensated.

Throughout this case, Plaintiff’s counsel prosecuted the claims efficiently and effectively. Knowing it was possible they would never be paid for their work, counsel had no incentive to act

in a manner that was anything but economical. *See Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008) (“[L]awyers are not likely to spend unnecessary time on contingency cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee.”). That said, counsel took their charge seriously and endeavored to represent the interests of the class members to the greatest extent possible.

b. Class Counsel’s Hourly Rates Are Reasonable

Class Counsel’s time, when multiplied by their attorney fee rates, represents a lodestar of \$399,477.50. The rates of all attorneys, paralegals and legal assistants whose time is included in this application are listed in the Plaintiff’s counsel declarations, submitted herewith. The rates for attorneys fall within the following rates:

- \$385 to \$450 for the Boise firm Banducci Woodard Schwartzman PLLC;
- \$265 to \$600 for the Seattle firm of Terrell Marshall & Daudt PLLC;
- \$375 to \$695 for the Washington D.C. firm of Sprenger + Lang, PLLC.

Paralegal and legal assistant rates at Terrell Marshall & Daudt and Sprenger + Lang ranged from \$190 to \$250. These are the hourly rates Plaintiff’s counsel charges in similar matters and these rates have been approved by state and federal courts in other contingent matters. (Lieder Decl. ¶ 19; Schwartzman Decl., ¶ 8; Terrell Decl., ¶ 9.)

The rates of the non-Idaho lawyers are higher than those of Mr. Schwartzman and of other Idaho lawyers. That does not make them unreasonable.

When a party reasonably engages counsel from outside the jurisdiction where the case is conducted, the relevant community for determination of counsel’s hourly rate is that where outside counsel normally practice law. *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 768-69 (7th Cir. 1982), *cert. denied*, 461 U.S. 956 (1983); *Maciera v. Pagan*, 698 F.2d 38, 40 (1st Cir. 1983); *Nat’l Wildlife Fed’n v. Hanson*, 859 F.2d 313, 317-18 (4th Cir. 1988). In determining whether the choice of outside counsel was reasonable, the court must consider whether “services of like quality [are] truly available in the locality where the services are rendered; and did the party

choosing the attorney from elsewhere act reasonably in making that choice[.]” *Hanson*, 859 F.2d at 317 (citing *Chrapliwy*, 670 F.2d at 769); accord *Ass'n of Flight Attendants v. Horizon Air Indus., Inc.*, No. 89-465-MA, 1990 WL 267362, at *2 (D. Or. Dec. 14, 1990) (following *Chrapliwy* and *Hanson*), *aff'd in part, rev'd in part on other grounds*, 976 F.2d 541 (9th Cir. 1992).

Plaintiff acted reasonably in engaging firms outside Idaho, for two reasons. First, at the time representation began, it was unclear where suit should be filed. Ultimately, the choice boiled down to California, where Defendants are located, and Idaho, where Plaintiff resides. Class Counsel chose Idaho for the benefit of the Plaintiff and proposed class: if the suit had been filed in the Central District of California, it probably would have been related to *Hutchison* with possibly adverse consequences, and litigation promised to move more quickly in Idaho than in California. (Lieder Decl. ¶ 2.) Courts should not create a disincentive for plaintiffs’ lawyers to select the best forum to decide their clients’ case by punishing those lawyers through imposition of the forum’s lower rates in an attorney fee award. Second, few Idaho firms have experience litigating ETF actions in federal court. (Schwartzman Decl. ¶ 10.)

c. Counsel’s Requested Fee Is Particularly Reasonable Given It Is Less Than Actual Lodestar

“‘There is a strong presumption that the lodestar figure represents a reasonable fee.’” *Playfair*, 2010 WL 1138958, at *5 (quoting *Morales*, 96 F.3d at 363 n.8). Given the risks present in this case, the contingent nature of the fee, and the outstanding results achieved, a fee consisting of the lodestar enhanced by a multiplier would be reasonable. Counsel, however, are seeking a fee that is less than their unenhanced lodestar. Plaintiff’s counsel took on this case with no guarantee of ever being paid. Their fee was entirely dependent upon a favorable outcome. Plaintiff’s counsel obtained excellent results for the Plaintiff and settlement class, especially in comparison to the results in *Hutchison*. They exhibited considerable skill in their planning of the litigation, their opposition to the motion to dismiss, and their settlement strategy

that not only allowed these results to be achieved, but achieved efficiently. This efficiency meant that they spent no more than the time required on the litigation.

Plaintiffs' lawyers often receive fees in excess of lodestar when they successfully litigate a consumer class action lawsuit and pursue the matter on a contingency basis, but here Plaintiff's counsel are willing to accept an award of slightly below lodestar in exchange for Defendants' agreement not to contest the fees and costs application up to the stated amounts and avoid further litigation over this issue. *See, e.g., Dewey v. Volkswagen of Am.*, 728 F. Supp. 2d 546, 609 (D.N.J. 2010) (2 times lodestar); *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 796 (N.D. Ohio 2010) (1.3 times lodestar); *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 256 (D.N.J. 2005) (2.83 times lodestar). For these reasons, the requested fee is reasonable.

d. Counsel's Expense Reimbursement Request Is Reasonable

The litigation expenses Plaintiff's counsel incurred in this case on a contingency basis consist primarily of the following: (1) copying, mailing, and messenger expenses; (2) computer research expenses; (3) half of the expenses of a mediator; and (4) travel expenses. (*See Lieder Decl.* ¶¶ 25–26; *Terrell Decl.*, Ex. 1.; *Schwartzman Decl.*, Ex. 1) These out-of-pocket costs were necessary to secure the resolution of this litigation, and are therefore properly compensable. *See In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1177-1178 (S.D. Cal. 2007) (finding that costs such as filing fees, photocopy costs, travel expenses, postage, telephone and fax costs, computerized legal research fees, and mediation expenses are relevant and necessary expenses in a class action litigation); *see also Bjornson v. Dave Smith Motors/Frontier Leasing & Sales*, 578 F. Supp. 2d 1269, 1289 (D. Idaho 2008) (holding that costs of computerized legal research fees are recoverable).

All in all, Plaintiff's counsel worked hard but efficiently to bring this case to a successful resolution in the face of a defense judgment affirmed on appeal in another case brought against the same defendants raising very similar issues, and, therefore, the unopposed fees and costs amount provided for in the settlement is fair and reasonable.

C. Provisional Certification of the Settlement Class Is Appropriate

This Court has not yet certified this case as a class action. For settlement purposes, the parties respectfully request that the Court provisionally certify the following settlement class under Rule 23(a) and 23(b)(3): “all consumers in the United States and its territories whose contractual payment rate was \$20.00 per month or less and who were charged the \$200 early termination fee (“ETF”) upon termination of their DSL term contract during the period June 1, 2005 through the date of preliminary approval,” except for “Defendants’ business customers, the presiding judge and his staff, and Defendants’ in-house and outside legal counsel.” (Lieder Decl., Ex. A ¶ 2.a.)

Provisional certification will allow the settlement class to receive notice of the settlement and its terms, including the right to submit a claim and recover money if the settlement is approved, the right to be heard on the settlement’s fairness, the right to opt out of the settlement, and the date, time and place of the final fairness hearing. (*Id.* ¶ 2.c.) Defendants reserve the right to oppose class certification if the settlement is not approved.

1. The Requirements of Rule 23(a) Are Satisfied

Rule 23(a) contains four requirements. The first, the “numerosity” requirement of Rule 23(a)(1), is satisfied because the settlement class consists of almost 140,000 consumers spread throughout the United States. *See* Fed. R. Civ. P. 23(a)(1). This makes joinder of all such persons indisputably impracticable.

To meet the commonality requirement of Rule 23(a)(2), “there need be only a single issue common to all members of the class.” *Lewis v First Am. Title Ins. Co.*, 265 F.R.D. 536, 555 (D. Idaho 2010) (internal citation and marks omitted). The requirement is satisfied in this case because there are questions of law and fact common to the settlement class. The primary common question is the same one this Court initially addressed in the context of Defendants’ motion to dismiss, namely whether, at the time of contracting, the ETF provision was an

alternative performance provision or an unenforceable liquidated damages provision. As the Seventh Circuit has summarized:

Common nuclei of fact are typically manifest where, like in the case *sub judice*, the defendants have engaged in standardized conduct towards members of the proposed class by mailing to them allegedly illegal form letters or documents. *See Chandler v. Southwest Jeep-Eagle, Inc.*, 162 F.R.D. 302, 308 (N.D.Ill.1995) (citing cases); *Kleiner v. First Nat'l Bank of Atlanta*, 97 F.R.D. 683, 691 (N.D.Ga.1983) (“When viewed in light of Rule 23, claims arising from interpretations of a form contract appear to present the classic case for treatment as a class action....”); *Heartland Communications, Inc. v. Sprint Corp.*, 161 F.R.D. 111 (D.Kan.1995) (certifying class where contracts signed by all class members contained virtually same provision as that challenged by class representative). The fact that [some class members] did not pay the [early termination] fee is largely irrelevant; factual variations among class members’ grievances do not defeat a class action. *See Patterson v. General Motors Corp.*, 631 F.2d 476, 481 (7th Cir.1980) (citation omitted).

Keele v. Wexler, 149 F.3d 589, 594 (7th Cir. 1998).

The typicality requirement is satisfied because Plaintiff’s claims arise from the same course of conduct that gives rise to the claims of other settlement class members. *See Fed. R. Civ. P. 23(a)(3)*; *see Lewis*, 265 F.R.D. at 556 (“The test of typicality is whether other members have the same or similar injury[,] whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same conduct.” (quoting *Hanon v. Dataprods. Corp.*, 976 F.2d 497, 508 (9th Cir.1992))). The adequacy of representation requirement is satisfied because Plaintiff’s contract contained the same ETF as other settlement class members and Defendants assessed the ETF against him, just as they did against other settlement class members.

The final requirement of Rule 23(a) is that “the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). This requires resolution of two questions: “(1) do the named plaintiffs and their counsel have any conflicts of interest

with other class members; and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Lewis*, 265 F.R.D. at 557 (citing *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978)). The typicality of Plaintiff's claim, and Defendants' failure to identify any unique affirmative defense against that claim, essentially eliminates the possibility of a conflict of interest, and the history of the litigation in this case shows that Plaintiff and his counsel have prosecuted the action vigorously.

Thus, the Court should conclude that all requirements of Rule 23(a) are provisionally certified. For the same reasons, at the final fairness hearing the Court should eliminate the provisional nature of the certification and conclude that all of the requirements of Rule 23(a) are satisfied.

2. The Proposed Class Also Meets the Provisions of Rule 23(b)(3)

The settlement class may be approved under Rule 23(b)(3) if "the questions of law or fact common to class members predominate over any questions affecting only individual members" and if "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

Predominance is determined not by counting the number of common issues, but by weighing their significance. *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 627 (5th Cir. 1999). "Where, after adjudication of the classwide issues, plaintiffs must still introduce a great deal of individualized proof or argue a number of individualized legal points to establish most or all of the elements of their individual claims, such claims are not suitable for class certification under Rule 23(b)(3)." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1255 (11th Cir. 2004).

Lewis, 265 F.R.D. at 559.

In this case, the predominance requirement is satisfied because the question of whether, at the time of contracting, the ETF provision was an alternative performance provision or an unenforceable liquidated damages provision, is the single most significant issue in the case and

can be resolved for all settlement class members in a single adjudication. In *Lewis*, Rule 23(b)(3) was satisfied because “[a]ny putative class members who were overcharged when they were entitled to a discounted rate would be in exactly the same position.... Defendant follows the same standard procedures, uses the same standard forms, and calculates the applicable rates in exactly the same way for each putative class member.” 265 F.R.D. at 560. Similarly, in this case, any putative class members who were charged an ETF would be in exactly the same position. Defendants follow the same standard procedures, use the same standard forms, and assess the ETF in the same way for each settlement class member.

Because the claims are being certified for purposes of settlement, there are no issues with manageability. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Class certification is superior to other means of adjudication for other reasons: the amounts in dispute are too small for settlement class members to have a significant interest in controlling the litigation individually; with *Hutchison* dismissed, there is no other litigation involving ETFs charged after termination of Defendants’ DSL service; and resolution of approximately 140,000 claims in one action is far superior to individual lawsuits and promotes consistency and efficiency of adjudication. *See Lewis*, 265 F.R.D. at 560 (internal citation and marks omitted) (finding that a class action is superior to other potential means of adjudication because otherwise “each individual plaintiff would have to establish the same elements on an individual basis,” “unnecessarily burden[ing] the judiciary,” and “much of the putative class would not have the resources to pursue litigation or may not even be aware of their claims against Defendant”).

For these reasons, certification of the settlement class for purposes of settlement is appropriate.

D. The Proposed Notice Program Is Constitutionally Sound

To protect their rights, the Court must provide class members with the best notice practicable regarding the proposed settlement. Fed. R. Civ. P. 23(c)(2).² The best practicable notice is that which is “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Settlement class members can be reasonably identified through Defendants’ own records, which contain information on all customers within the class period, including each person’s last known phone number, address, and Social Security Number. (Lieder Decl. ¶ 7.) The settlement requires the Claims Administrator to send notice via postcard in the form attached as Exhibit A to the Settlement Agreement to all such persons after updating their addresses through the National Change of Address database (Lieder Decl., Ex. A ¶ 2(c)), a database maintained by the United States Postal Service from the Change of Address forms submitted by relocating postal service customers. If any notices are returned as undeliverable, the claims administrator will make reasonable attempts to determine a current mailing address and will promptly re-mail the notice to any new addresses disclosed through such efforts. *Id.* This approach will ensure that direct notice reaches as many settlement class members as possible.

Given the size of the awards, \$40 and \$20 per settlement class member, any more expensive means of notice would not be practicable. Indeed, the settlement is voidable by Defendants if the Court requires additional notice.

The language of the proposed notice is plain and easily understood, providing neutral and objective information about the nature of the settlement. The notice includes the definition of the settlement class, a statement of each settlement class member’s rights (including the right to opt-

² See also *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) (provision of “best notice practicable” under the circumstances with description of the litigation and explanation of opt-out rights satisfies due process); *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994) (holding “[w]e do not believe that *Shutts* changes the traditional standard for class notice from ‘best practicable’ to ‘actually received’ notice”).

out of the settlement class or object to the settlement), explanations of how to submit a claim and share in the settlement fund, a statement of the consequences of remaining in the settlement class, an explanation of how settlement class members can exclude themselves from the settlement class or object to the settlement, and methods for contacting Plaintiff's counsel and obtaining more information. (Lieder Decl., Ex. A at Ex. A.)

Submission of a claim is made as easy as possible. Anyone with access to the Internet will be able to submit a claim electronically. There also will be provision for telephonic submission of claims. Submitting a claim requires only certification of five facts. (Lieder Decl., Ex. A ¶ 3.a.)

This notice program is the best practicable notice under the circumstances of this case, and the parties believe that it will be highly effective. *See Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1377 (S.D. Fla. 2007) (approving postcard notice program).

E. The Scheduling of a Final Fairness Hearing Is Appropriate

The last step in the settlement approval process is a final fairness hearing at which the Court may hear all evidence and argument necessary to make its final evaluation. Proponents of the settlement may explain the terms and conditions of the settlement and offer argument in support of final approval. In addition, settlement class members, or their counsel, may be heard in support of or in opposition to the Settlement Agreement. At the conclusion or after this hearing, the Court will determine whether the settlement should be finally approved, and whether to enter a final order and judgment under Rule 23(e). Plaintiff requests that the Court set a date for a hearing on final approval at the Court's convenience at least 100 days after the date on which notice is mailed to the settlement class.

Plaintiff proposes the following schedule of events:

Preliminary Approval Hearing: Plaintiff respectfully requests that the motion be decided without oral argument.

Last Day for Claims Administrator to Give Notice to the Settlement Class: 45 days following entry of order granting preliminary approval.

Motion for Final Approval of Proposed Settlement Due: 30 days after the date notice is sent to settlement class members.

Objections due: 45 days after the date notice is sent to settlement class members.

Briefs in Response to Objections Due: 5 days prior to the Final Approval Hearing

Final Approval Hearing: To be set by the Court at least 100 days after the date notice is mailed to class.

IV. CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests that the Court: (1) grant preliminary approval of the Settlement Agreement, including the payments to settlement class members and the fees and costs payment to Plaintiff's counsel; (2) provisionally certify the proposed settlement class; (3) appoint the law firms of Sprenger + Lang, PLLC, Terrell Marshall & Daudt PLLC, and Banducci Woodard & Schwartzman PLLC as settlement class counsel; (4) approve the proposed notice plan and the notice form; (5) appoint Class Action Administration, Inc. to serve as the independent claims administrator; and (6) schedule the Final Approval Hearing and related dates as proposed by the parties.

DATED: February 22, 2011

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CERTIFICATE OF SERVICE

I, Beth E. Terrell, hereby certify that on February 22, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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