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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

STEVEN MCARDLE,

Plaintiff,

v.

AT&T MOBILITY LLC, et al.,

Defendants.

CASE NO. 4:09-cv-01117-CW

[PROPOSED] ORDER GRANTING
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT

Re: Dkt. No. 395

1 Plaintiff Steven McArdle (Class Representative) moves for
2 preliminary approval of a proposed class action settlement with
3 Defendants AT&T Mobility LLC, New Cingular Wireless PCS LLC, and
4 New Cingular Wireless Services, Inc. (collectively, Defendants),
5 the terms and conditions of which are set forth in the Settlement
6 Agreement filed with the Court, Docket No. 395-1 ("Settlement
7 Agreement").

8 This case concerns the charging of international roaming
9 fees for unanswered incoming calls to the U.S.-based mobile
10 numbers of California residents from February 6, 2005, and
11 January 31, 2009 ("Class Period"), and it has been extensively
12 litigated for over eleven years. Although the history of this
13 litigation is summarized in Part I of the Settlement Agreement, a
14 brief summary is as follows. This case was filed in California
15 state court on February 10, 2009. Defendants removed the
16 litigation to this Court and subsequently answered the Complaint,
17 denying Plaintiff's allegations and asserting several affirmative
18 defenses, including that the litigation was subject to
19 arbitration. Plaintiff moved to strike the defense and
20 Defendants cross-moved to compel arbitration. This Court struck
21 the affirmative defense of arbitrability and denied Defendants'
22 motion to compel arbitration. Defendants filed an appeal and
23 Plaintiff moved to certify the class. While the appeal was
24 pending, the United States Supreme Court ruled on a preemption
25 issue that subsequently led the Ninth Circuit Court of Appeals to
26 reverse the order denying Defendants' motion to compel
27 arbitration. On remand from the Ninth Circuit, Defendants filed
28 a renewed motion to compel arbitration, which the Court granted.

1 In June 2016, an arbitrator held an in-person arbitration
2 despite Plaintiff's request to stay arbitration pending a
3 California Supreme Court decision on another question relating to
4 the enforceability of the underlying arbitration cause. In
5 September 2016, the arbitrator issued a decision in favor of
6 Defendants. After the California Supreme Court ruled that
7 contracts including waivers of public injunctive relief are
8 unenforceable under California law, Plaintiff moved this Court to
9 vacate the arbitral award and to reconsider its order granting
10 Defendants' motion to compel arbitration on the ground that
11 AT&T's arbitration provision included such a waiver. Defendants
12 cross-moved to confirm the arbitral award. The Court granted
13 Plaintiff's motion for reconsideration, denied Defendants' motion
14 to confirm the arbitral award, and denied Plaintiff's motion to
15 vacate the arbitral award as moot. Defendants appealed to the
16 Ninth Circuit. While the appeal was pending, Plaintiff renewed
17 his motion for class certification, which the Court granted in
18 part on August 13, 2018. The Court certified a class that
19 includes "[a]ll California residents who, any time between
20 February 6, 2005 and January 31, 2009, were charged international
21 roaming fees by Defendants for unanswered incoming calls to their
22 U.S.-based mobile number." Defendants petitioned the Ninth
23 Circuit Court of Appeals for leave to appeal the order certifying
24 this class. The Ninth Circuit denied the petition and affirmed
25 this Court's order vacating the arbitral award. Defendants
26 subsequently petitioned the United States Supreme Court for
27 certiorari on the arbitration issue, which it denied.

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1 Throughout the litigation, Plaintiff's counsel and
2 Defendants' counsel have conducted extensive investigation and
3 discovery, included requesting and receiving written discovery
4 responses; examining Defendants' documents; retaining expert
5 witnesses and reviewing their expert reports; and conducting
6 depositions. Plaintiff's counsel and Defendants' counsel have
7 also participated in multiple efforts to resolve the litigation,
8 including Early Neutral Evaluation, mediation with the Honorable
9 Edward A. Infante (Retired), discussions with the Honorable
10 Magistrate Judge Sallie Kim, and additional conversations between
11 the parties.

12 Under the settlement agreement, members of the settlement
13 class are entitled to one day of free international roaming (a
14 "Day Pass") on their AT&T accounts or, at their option, credits
15 on their AT&T accounts for amounts paid during the Class Period
16 for international roaming fees for unanswered calls, up to a
17 maximum of \$50. Class members who are no longer AT&T customers
18 are eligible to receive refunds of amounts paid for international
19 roaming fees for unanswered calls during the Class Period, with a
20 minimum refund of \$4 and a maximum of \$50. Credits and refunds
21 are available only to members of the settlement class who file
22 claims according to the instructions in the Long Form Notice, but
23 the Day Pass will be distributed automatically to members of the
24 settlement class who are current customers without need for
25 filing a claim.

26 As part of the Settlement Agreement, Plaintiff's attorneys
27 may apply to this Court to award them up to \$6,130,000.00
28 inclusive of fees and costs, and up to \$15,000 as a payment to

1 the Class Representative. Attorneys' fees and costs and any
2 payment to the Class Representative approved by the Court will be
3 paid by Defendants under the terms of the Settlement Agreement.
4 Plaintiff's counsel have represented that the amount of fees and
5 expenses is less than their out-of-pocket expenses and lodestar
6 incurred to date. The fees, expenses, and Class Representative
7 payment shall not be awarded unless approved by the Court after
8 members of the settlement class have an opportunity to comment or
9 object.

10 Notice is to be provided as described in the Settlement
11 Agreement consistent with Plaintiff's proposed notice plan, which
12 will be carried out by KCC, the Claim Administrator. KCC also
13 will receive and process Claim Forms. Defendants alone will pay
14 the notice and administration costs associated with the
15 Settlement Agreement.

16 Defendants deny all of Plaintiff's allegations and charges
17 of wrongdoing or liability against them arising out of any of the
18 conduct, statements, acts, or omissions alleged, or that could
19 have been alleged, in the litigation. Defendants also deny that
20 Plaintiff, the settlement class, or any member of the settlement
21 class, has suffered damage or harm by reason of any alleged
22 conduct, statement, act, or omission of Defendants. Defendants
23 further deny that the evidence is sufficient to support a finding
24 of liability on any of Plaintiff's claims in the litigation.

25 FINDINGS AND CONCLUSIONS

26 Having considered all matters submitted to it at the hearing
27 on the motion and otherwise, including the complete record of
28

1 this action, and good cause appearing therefore, the Court hereby
2 finds and concludes as follows:

3 1. The capitalized terms used in this order shall have the
4 same meaning as defined in the Settlement Agreement except as
5 otherwise expressly provided.

6 2. The Court preliminarily approves the Settlement Agreement
7 as likely to be approved under Rule 23(e)(2) and as meriting
8 notice to the members of the settlement class for its
9 consideration. Considering the factors set forth in Rule
10 23(e)(2), the Court preliminarily finds as follows:

11 a. Class Representative and Class Counsel
12 have adequately represented the Class.

13 b. The Settlement Agreement was negotiated at
14 arm's length.

15 c. The relief provided to the settlement
16 class in the form of injunctive and monetary
17 relief is fair and adequate given the risks and
18 uncertainty of trial.

19 d. The proposed award of attorneys' fees
20 appears to be reasonable, as the amount requested
21 is less than the lodestar and represents a
22 multiplier of .84.

23 e. The proposed plan of distribution is fair
24 and reasonable.

25 3. The Settlement also complies with the Northern District
26 of California's Procedural Guidance for Class Action Settlements,
27 <https://www.cand.uscourts.gov/ClassActionSettlementGuidance>.
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1 4. A Final Approval Hearing shall be held before this Court
2 at 2:30 p.m. on March 17, 2021, in a courtroom to be determined
3 at the United States District Court for the Northern District of
4 California, 1301 Clay Street, Oakland, California, 94612, to
5 address: (a) whether the Settlement Agreement should be finally
6 approved as fair, reasonable, and adequate, and whether the Final
7 Approval Order should be entered, and (b) whether Class Counsel's
8 application for attorneys' fees, costs, and a payment to the
9 Class Representative should be approved.

10 5. The Court approves, as to form and content, the Claim
11 Form and the Notices, substantially similar to the forms attached
12 as Exhibits A and B1 to B3 to the Settlement Agreement. The
13 Claim Form and all of the notices are written in plain English,
14 are easy to comprehend, and fully comply with the requirements of
15 the Due Process Clause of the United States Constitution and Rule
16 23 of the Rules of Civil Procedure. The Parties shall have
17 discretion to jointly make non-material minor revisions to the
18 Claim Form or Notices. Responsibility regarding settlement
19 administration, including, but not limited to, notice and related
20 procedures, shall be performed by KCC, the Claim Administrator,
21 subject to the oversight of the Parties and this Court as
22 described in the Settlement Agreement.

23 6. The Court finds that the Parties' plan for providing
24 notice to the members of the settlement class (the Notice Plan)
25 is reasonably calculated to provide notice to the settlement
26 class of the pendency and the terms of the Settlement Agreement,
27 the Final Approval Hearing, and applicable deadlines, and that it
28 complies fully with the requirements of the Due Process Clause of

1 the United States Constitution and Rule 23 of the Rules of Civil
2 Procedure. The Parties and the Claim Administrator shall comply
3 with the Notice Plan and other deadlines as set forth in the
4 Settlement Agreement and this Order. Defendants shall pay the
5 Claim Administrator its reasonable costs and expenses in
6 complying with the Notice Plan.

7 7. Any member of the settlement class who desires to be
8 excluded from the Settlement Agreement, and therefore not be
9 bound by the terms of the Settlement Agreement, must submit a
10 timely request for exclusion to the Claim Administrator, pursuant
11 to the instructions set forth in the Long Form Notice. The
12 request must be submitted online or mailed to the Claim
13 Administrator no later than February 19, 2021. No one shall be
14 permitted to exercise any exclusion rights on behalf of any other
15 person, whether as an agent or representative of another or
16 otherwise, except upon proof of a legal power of attorney,
17 conservatorship, trusteeship, or other legal authorization, and
18 no one may exclude other persons within the settlement class as a
19 group, class, or in the aggregate. Any such purported exclusion
20 shall be void, and any members of the settlement class who are
21 the subject of the purported opt-out shall be treated as members
22 of the settlement class for all purposes. Nothing in this order
23 shall bar a member of the settlement class from retaining an
24 attorney to exercise his or her exclusion rights.

25 8. No later than fourteen (14) days before the Final
26 Approval Hearing, the Claim Administrator shall prepare a list of
27 the names of the persons who, pursuant to the Class Notice
28 described herein, have excluded themselves from the settlement

1 class in a valid and timely manner, and Plaintiff's counsel shall
2 file that list with the Court. The Court retains jurisdiction to
3 resolve any disputed exclusion requests.

4 9. Any member of the settlement class who elects to be
5 excluded shall not receive any benefits of the Settlement
6 Agreement, shall not be bound by the terms of the Settlement
7 Agreement, and shall have no standing to object to the Settlement
8 Agreement.

9 10. If the Settlement Agreement is not approved, or if
10 the Effective Date does not occur for any other reason, then the
11 litigation will continue on behalf of the Class. Members of the
12 settlement class who do not wish to be bound by a judgment in
13 favor of or against the Class must exclude themselves from the
14 litigation.

15 11. Any member of the settlement class who does not
16 submit a valid and timely request for exclusion may submit an
17 objection to the Settlement Agreement (Objection). The Objection
18 must be postmarked (if mailed) or filed via Electronic Case
19 Filing (ECF) by February 19, 2021. Any Objection must include:
20 (a) a reference at the beginning to this case, McArdle v. AT&T
21 Mobility LLC, Case No. 4:09-cv-01117-CW (N.D. Cal.) and the name
22 of the undersigned judge, the Honorable Claudia Wilken; (b) the
23 name, address, telephone number, and, if available, the email
24 address of the person objecting, and if represented by counsel,
25 of his or her counsel; (c) a written statement of all grounds for
26 the Objection, accompanied by any legal support for each ground;
27 (d) a statement indicating whether the person intends to appear
28 at the Final Approval Hearing, either with or without counsel;

1 and (e) a statement confirming the person's membership in the
2 settlement class, including all information required by the Claim
3 Form. Failure to include this information may be a ground for
4 overruling and rejecting the Objection. Any member of the
5 settlement class who fails to timely submit a written Objection
6 prior to February 19, 2021, shall be deemed to have waived his or
7 her objections, and those objections will not be considered by
8 the Court.

9 12. Any member of the settlement class shall have the
10 right to appear and be heard at the Final Approval Hearing,
11 either personally or through an attorney retained at the
12 settlement class member's own expense. However, if the
13 settlement class member wishes to object to the Settlement
14 Agreement at the Final Approval Hearing (either personally or
15 through counsel), the settlement class member must submit a
16 timely written Objection in compliance with the requirements
17 referenced in the preceding paragraph of this order.

18 13. Plaintiff shall file a motion for final approval of
19 the Settlement Agreement and for any award of attorneys' fees,
20 costs, and a Class Representative payment no later than January
21 15, 2021. Plaintiff may file responses to any Objections no
22 later than ten days before the Final Approval Hearing. All such
23 filings and supporting documentation shall be posted to the
24 Settlement Website within one day of filing.

25 14. Any member of the settlement class wishing to make a
26 claim must submit a Claim Form to the Claim Administrator,
27 pursuant to the instructions set forth in the Settlement Notice.
28 The request must be submitted online no later than February 19,

1 2021, or, if mailed, it must be delivered to, and received by,
2 the Claim Administrator no later than February 19, 2021. A
3 person who files an Objection to the Settlement Agreement and
4 also wishes to submit a Claim Form must timely submit a Claim
5 Form according to the instructions in the Settlement Notice.

6 15. No later than fourteen days prior to the Final
7 Approval Hearing, the Claim Administrator shall file a
8 declaration regarding the provision of notice as required by the
9 Settlement Agreement; the number and dollar amount of claims
10 received; and the number of opt-outs.

11 16. In the event that the proposed Settlement Agreement
12 is not finally approved by the Court, or in the event that the
13 Settlement Agreement becomes null and void or terminates pursuant
14 to its terms, this Preliminary Approval Order and all orders
15 entered in connection herewith shall become null and void, shall
16 be of no further force and effect, and shall not be used or
17 referred to for any purposes whatsoever in this litigation or in
18 any other case or controversy. In such event, the Settlement
19 Agreement and all negotiations and proceedings directly related
20 thereto shall be deemed to be without prejudice to the rights of
21 any and all of the Parties, who shall be restored to their
22 respective positions as of the date and time immediately
23 preceding the execution of the Settlement Agreement.

24 17. This order shall not be construed as an admission or
25 concession by Defendants as to the truth of any allegations made
26 by the Plaintiff or of liability or fault of any kind.

27 18. The Court may, for good cause, extend any of the
28 deadlines set forth in this order without further notice to

1 members of the settlement class, and any such extensions shall be
2 posted to the Settlement Website. The Final Approval Hearing
3 may, from time to time and without further notice to members of
4 the settlement class beyond updates to the Court's docket and the
5 Settlement Website, be continued by order of the Court. In the
6 event that the Final Approval Hearing is held remotely, counsel
7 shall update the Settlement Website to provide instructions for
8 remote access.

9 19. If the Court grants Final Approval to the Settlement
10 Agreement, then settlement class members who did not timely
11 request to be excluded, including persons who objected to the
12 Settlement Agreement or submitted a Valid Claim, shall be deemed
13 to have released their claims as set forth in the Settlement
14 Agreement.

15 20. All further proceedings and deadlines in this action
16 are hereby stayed except for those required to effectuate the
17 Settlement Agreement and this Order.

18 21. Plaintiff shall correct the notices to indicate that
19 the Honorable Edward Infante is a retired magistrate judge and
20 not a retired district judge, as well as correct the misspelled
21 word "miniute" to "minute."

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1 22. The Court will not require members of the settlement
2 class who wish to object to the Settlement Agreement to state in
3 their objection whether they have objected to other class actions
4 in the last five years. Plaintiff shall remove from the notices
5 the language stating that members of the settlement class are
6 required to indicate whether they have objected to other class
7 actions in the last five years.

8 IT IS SO ORDERED.

9 Dated: November 25, 2020



CLAUDIA WILKEN
United States District Judge

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