

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

Stanford Glaberson, et al.,	§	Civ. No. 03-6604
	§	The Honorable John R. Padova
Plaintiffs,	§	
	§	
v.	§	
	§	
Comcast Corporation, et al.,	§	
	§	
Defendants.	§	

**PLAINTIFF'S SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR
FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND RESPONSES TO
OBJECTIONS**

Plaintiff Stanford Glaberson respectfully submits this supplemental memorandum to update the Court on modifications to the Settlement Agreement agreed to by the parties and on the claims administration process and to respond to the three objections to the settlement.

Updated Claims Administrator Report.

The accompanying Supplemental Declaration of Brian Painter Regarding Opt-Outs, Objections and Settlement Administration Services Update provides the Court with updated information concerning notice and claims administration. The claims administrator notes that through August 29, 2015, Rust Consulting, Inc. received 22,997 claim forms, 16,127 of which are from current subscribers and 6,870 are from former subscribers. *Id.* ¶ 11. The report provides a breakout of claimants' selection of the \$15 bill credit or from among the range of free services (Settlement Credits) provided under the Settlement. *Id.* Rust's updated report also confirms that as of August 29, 2015, Rust has received three requests for exclusion from the Settlement Class and three objections to the settlement (Painter Decl. Exs. A and B list the names of those opting out or objecting and Exs. C, D and E contain the letters from the three objectors). *Id.* ¶¶ 12, 13.

Modifications to Settlement Agreement.

As explained in their joint September 2, 2015, correspondence to the Court, the parties have cooperated in resolving issues that arose in the process of implementing the Settlement. First, because Comcast was unable to provide one of the free services (Settlement Credits) provided under the Class Action Settlement Agreement (the six free pay-per-view movies option) to current commercial subscriber class members due to contractual provisions, Rust on March 20, 2015, mailed a postcard notice to 9,170 commercial subscriber class members, informing them that the pay-per-view services option was not available to them. However, such class members are entitled to all other options under the Settlement Agreement, including the

choice of a one-time \$15 bill credit or a selection from the remaining free Comcast services available to all current subscriber Class Members.

Second, because current subscriber Class Members who elected in their claim form but already receive another of the free services options, The Movie Channel, would not be able to receive this option in light of the fact that they already receive it, the parties have agreed that the Claims Administrator will provide notice to such current subscribers, asking them to select an alternative Settlement Credit option. If such subscribers do not choose an alternative, each such subscriber will receive a one-time bill credit of \$15. There are an estimated 437 such current subscribers. Painter Decl. ¶ 10.

Comcast has agreed to pay the Claims Administrator's costs in providing notices to class members affected by these modifications.

Additionally, the Settlement Agreement provides that current subscriber Class Members who do not elect in their claim form another free services option, as well as those who do not submit a claim form, would receive the default option of two free months of The Movie Channel. The parties have agreed that any such subscriber who already receives The Movie Channel and has not elected an alternative Settlement Credit option, will automatically receive a one-time credit of \$15 off his or her bill.

These modifications are incorporated in to the Amended Class Action Settlement Agreement filed with the Court on September 2, 2015. The Amended Settlement Agreement has been posted on the dedicated settlement website, www.CableSettlement.com. Painter Decl. ¶ 3.

For the reasons set forth in Plaintiff's final approval papers, we respectfully ask that the Amended Class Action Settlement Agreement be approved following the fairness hearing on September 9, 2015.

Late Claims

As the updated Claim Administrator's report also explains, Rust has received 101 late claims (61 from current Comcast subscribers and 40 from former subscribers), the majority of which were received within two weeks of the close of the claims period on July 10, 2015. *Id.* ¶ 11. Plaintiff and Comcast have agreed that such claims of eligible class members may be paid from the settlement. We respectfully request the Court's approval for consideration and payment of these eligible late claims from the Settlement Fund.

Reaction of the Class to the Settlement.

One of the factors courts within the Third Circuit use in evaluating the fairness of class action settlements is "the reaction of the class to the settlement." *Girsh v. Jepsen*, 521 F.2d 153, 157 (3d Cir. 1975) (citation omitted); *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 319-20 (3d Cir. 2011). Out of a Settlement Class estimated to include over 800,000 persons, Rust has received only three requests for exclusion and three objections. This strong positive response from Settlement Class Members supports a finding that the settlement is fair, reasonable and adequate. *See, e.g., Nichols v. SmithKline Beecham Corp.*, No. Civ.A.00-6222, 2005 WL 950616, at *13 (E.D. Pa. Apr. 22, 2005) (noting that "[o]nly eight objections were filed" and that "[t]he small number of objections" weighs in favor of final settlement approval); *In re Rite-Aid Corp. Sec. Litig.*, 396 F.3d 294, 305 (3d Cir. 2005) (finding no abuse of discretion by district court in finding absence of substantial objections by class members to fee requests favored approval of fee request where only two of 300,000 class members filed objections); *Sullivan*, 667 F.3d at 321 (noting that district court "determined the reaction of the class was overwhelmingly positive" based on twenty objections filed relating to an indirect purchaser class and all but four objections relating to a consumer subclass and stating, "[w]e agree with the District Court's observation that

the minimal number of objections and requests for exclusion are consistent with class settlements we have previously approved”); *see also* Pl.’s Mem. in Supp. of Mot. for Final Approval at 9-10, ECF No. 621-1 (collecting cases).

Plaintiff’s Responses to Objections.

In her letter dated April 2015, Ms. Donna Recupito states that “Comcast owes me alot more than \$15 or whatever they are proposing!” Ms. Recupito also states that “every month they promised 1 price & came up with much more pricing” and that “[i]t’s ashamed [sic] that we even have to pay for TV.” Painter Decl., Ex. C.

In her letter dated May 20, 2015, Ms. Carrie Chandler states that she has two accounts with Comcast and “I am objecting to the settlement offers because I believe that I’m entitled to money offer” and that “I feel as though Comcast packaged that their offering is definitely not acceptable for the money given for both accounts and years of dedicated service.” *Id.*, Ex. D. Rust telephoned Ms. Chandler on June 5, 2015 to make sure that she was aware of her options under the settlement and to explain the objection process. Ms. Chandler indicated at that time that she wanted to withdraw her objection, as she was not fully aware of the objection process; however, in a follow-up call by Rust on June 15, Ms. Chandler stated that as long as she could submit a claim for a benefit, she did not wish to withdraw her objection. Ms. Chandler has submitted a claim electing the six free pay-per-view movies option provided under the settlement. *Id.* ¶ 13.

While understandable, Ms. Recupito’s and Ms. Chandler’s concerns about the settlement benefits being too low do not undermine the overwhelmingly positive support of the Settlement Class of at least 800,000 persons. Every settlement represents a compromise. Courts recognize that counsel should not be held to “an impossible standard, as a settlement is virtually always a

compromise, a yielding of the highest hopes in exchange for certainty and resolution.” *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 179 (E.D. Pa. 2000) (citations, internal quotations omitted). Plaintiff submits that application of the *Girsh* and the relevant *Prudential* factors, as discussed in Plaintiff’s initial memorandum, strongly favor final approval of the settlement.

In his June 10, 2015 letter, Mr. Mark Rhoades expresses four reasons for objecting to the settlement. Plaintiff respectfully submits that none has merit. Mr. Rhoades states that “the value of ‘Settlement Credits’ is over-stated given that the actual value of the Settlement Credits depends on the settlement options selected by the consumer.” Painter Decl., Ex. E. Contrary to Mr. Rhoades’ apparent misunderstanding, the Settlement is beneficial to the Settlement Class in providing a settlement valued at \$50 million, consisting of a Settlement Fund of \$16,670,000 cash and services valued at \$33,330,000. The fact that different free services benefits carry different individual values, to be provided at the option of and in the exercise of choice by current subscriber Class Members, does not affect or alter the actual value of the Settlement Credits provided under the settlement. Under the Settlement Agreement, there is no reverter of any portion of the Settlement Fund to Comcast. Settlement Agreement and Am. Settlement Agreement ¶ 8.1.

Under the Settlement, former subscriber Class Members are entitled to receive a cash payment in the amount of \$15 and Class Members who are current subscribers are entitled to elect a one-time credit of \$15 off their bill, or to select a range of free Comcast services. Settlement Agreement and Am. Settlement Agreement ¶ 8.2. The value of the free service options reflects the rate card price for such services at the time of the settlement – that is, the cost

to a subscriber purchasing the particular service as a standalone service multiplied by the length of the free service selected.

The Settlement Agreement simply states that “[d]ifferent pay-per-view movies have different actual values, so the value listed next to each pay-per-view option above is an estimate determined by the total potential value (i.e., value of pay-per-view movies based off of cost per rental of a high-definition movie)” and that “[t]herefore, the actual compensation received by a Claimant will vary based upon the Claimant’s pay-per-view selection.” Settlement Agreement and Am. Settlement Agreement ¶ 8.2.3. Nothing in the Settlement Agreement or Amended Settlement Agreement supports Mr. Rhoades’ assertion that ¶ 8.2.3 represents any acknowledgement that “the value of the Settlement Credits may be overstated.”

Mr. Rhoades further asserts that Plaintiff’s requested award of attorney fees is “unreasonable” because the cash component of the settlement “totals only \$16,670,000.” To the contrary, for the reasons set forth in Plaintiff’s papers in support of the request for counsel fees and reimbursement of expenses, the Court should consider the total value of the settlement, including both the cash component and the free services, all of which are available to Class Members. Indeed, this objection entirely ignores the free services component of the settlement and controlling precedent. In *Boeing Co. v. Van Gemert*, 444 U.S. 472 (1980), the Supreme Court held that the district court properly awarded attorneys’ fees from the total amount of a class action judgment, including the unclaimed portion of the judgment. The Court stated that it “has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole.” *Id.* at 478 (citations omitted). The Court recognized the value of class members’ rights, whether exercised or not: “Their right to share the harvest of the lawsuit . . .

whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel.” *Id.* at 480.

Other courts have agreed. *See, e.g., In re: Southwest Airlines Voucher Litig.*, Nos. 13-3264, 13-3462, 14-2591, 14-2602 and 14-2495, 2015 WL 4939676, at *5 (7th Cir. Aug. 20, 2015) (“Under the ‘common fund’ doctrine, an attorney who recovers a common fund for the benefit of a class is entitled to a reasonable portion of the fund that is *made available* to the class rather than the amount actually *claimed* by the class.”) (citing *Boeing Co. v. Van Gemert*, 444 U.S. at 478 and *Americana Art China Co. v. Foxfire Printing & Packaging, Inc.*, 743 F.3d 243, 247-48 (7th Cir. 2014)). It is also well accepted that “[i]t is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).

In *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934 (9th Cir. 2015), the settlement agreement provided that defendant would pay a total amount of \$27,250,000, consisting of both a “Cash Component” and a “Gift Card Component.” *Id.* at 940. The Ninth Circuit approved an award of attorney fees representing 25% of the total settlement fund of \$27,250,000. The Ninth Circuit determined that the district court “correctly held that the Walmart gift cards in [the] settlement do not constitute a coupon settlement that falls under the umbrella of CAFA.” 779 F.3d at 950. The Ninth Circuit affirmed approval of the settlement that provided class members either a gift card of roughly \$12 each or a cash payment of \$12 and concluded that “the settlement does not constitute a ‘coupon settlement’ within the meaning of CAFA.” 779 F.3d at

951-52. *See also Reibstein v. Rite Aid Corp.*, 761 F. Supp. 2d 741, 255-56 (E.D. Pa. 2011) (holding that \$20 gift cards are “more like ‘cash’ than ‘coupon’”).¹

Indeed, courts routinely award attorneys’ fees based on settlements providing for valuable non-cash benefits. *See, e.g., In re Payment Card Interchange Fee & Merch. Discount Antitrust Litig.*, 991 F. Supp. 2d 437, 442 (E.D.N.Y. 2014) (awarding attorneys’ fees in settlement consisting of cash and injunctive relief, reasoning that counsel should be rewarded for undertaking significant risks, achieving substantial value for the class and that “the settlement cannot be reduced to the damages alone”); *In re HP Power Plug and Graphic Card Litig.*, Case No. C-06-02254 RMW, 2008 WL 2697192, at *2 (N.D. Cal. July 8, 2008) (court awarded attorneys’ fees where “the main value of the settlement is the provision of a repair option”); *Hillis v. Equifax Consumer Servs., Inc.*, Case Nos. 104-CV-3400-TCB, 107-CV-314-TCB, 2007 WL 1953464, at *17 (N.D. Ga. June 12, 2007) (court awarded attorneys’ fees based on a settlement that allowed class members to obtain free credit report monitoring); *Browning v. Yahoo! Inc.*, No. C04-01463 HRL, 2007 WL 4105971, at *14 (N.D. Cal. Nov. 16, 2007) (court awarded attorneys’ fees based on a settlement providing class members with free credit scores and credit monitoring); *Cohen v. Chilcott*, 522 F. Supp. 2d 105, 123 (D.D.C. 2007) (awarding attorneys’ fees of roughly 23% of the constructive common fund of \$8.3 million, even though the fund was to be distributed to charity).

For all of the reasons set forth in Plaintiff’s papers in support of the fees and expense request, we believe that the requested fee and expense award is fair, reasonable and supported by established fee jurisprudence. Additionally, we note that the fact that, despite notice, no other

¹ The Class Action Fairness Act does not apply to this case. The Act applies to any civil actions commenced on or after February 18, 2005. Public Law 109-2, § 9. This action was filed December 8, 2003. In any event, the free services component of the settlement clearly does not constitute a coupon settlement. *See In re Online DVD-Rental Antitrust Litig.*, 779 F.3d at 950-52.

class member has objected to Plaintiff's request for fees and no class member has objected to Plaintiff's request for reimbursement of expenses weighs in favor of granting Plaintiff's fee request. *See, e.g., Meijer v. 3M*, Civ. Action No. 04-5871, 2006 WL 2382718, at *20 (E.D. Pa. Aug. 14, 2006) (finding that the "total absence of objections to the requested fees weighs in favor of approval"); *In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 515 (W.D. Pa. 2003) (noting that "the absence of substantial objections by other class members to the fee application supports the reasonableness of Lead Counsels' request"); *In re Aetna, Inc. Sec. Litig.*, MDL No. 1219, 2001 WL 20928, at *15 (E.D. Pa. Jan. 4, 2001) ("[T]he Class members' view of the attorneys' performance, inferred from the lack of objections to the fee petition, supports the fee award."); *Bradburn Parent Teacher Store, Inc. v. 3M*, 513 F. Supp. 2d 322, 338 (E.D. Pa. 2007) ("We find that the total absence of objections to the requested fees weighs in favor of finding that the percentage of the settlement fund requested is appropriate.").

Mr. Rhoades also asserts that in light of the Settlement Cash Amount (\$16,670,000) and the requested fees and expense request, "there is the possibility of insufficient funds to pay the Former Subscribers under the settlement." Again, this comment reflects a misunderstanding of the term of the Settlement terms. Under the Settlement Agreement, in the event that cash elections by current subscribers, claims of former subscribers, credits to current subscribers who make no affirmative election and already receive The Movie Channel, the requested attorneys' fees and expenses and administrative costs exceed the Settlement Cash Amount, Comcast is obligated to contribute additional cash to the Settlement Fund to fund such amounts as needed to pay all claims of former subscribers, and the amount of the Settlement Credits to current subscribers would be correspondingly reduced. Settlement Agreement and Am. Settlement Agreement ¶ 8.7. Correspondingly, in the event that cash elections of \$15 off their bills made by

current subscribers, valid claims by former subscribers, credits to current subscribers who make no affirmative election and already receive The Movie Channel, the amount of any attorneys' fees and expenses awarded and administrative costs are less than the Settlement Cash Amount, Comcast is obligated to pay the remaining cash pro rata to current subscribers by issuing a one-time credit off their bill. *Id.* Thus, contrary Mr. Rhoades' assertion, there is no possibility of insufficient funds to pay claims of former subscribers under the settlement.

Finally, Mr. Rhoades asserts that "there is the possibility of a conflict of interest between Class Counsel and Former Subscribers possibly resulting in deficient notice to Former Subscribers." To the contrary, no conflict of interest exists between Class Counsel and any member of the Settlement Class and Mr. Rhoades does not assert or identify any actual conflict or specific notice deficiency. The notice plan, including all notices to Class Members, was carefully crafted to satisfy Rule 23 and due process standards and the Court previously found that the forms of notice to the Class and the methods of dissemination of class notices satisfy the requirements of Fed. R. Civ. P. 23(c) and due process, and are fair and reasonable. Prelim. Approval Order at 11, ECF No. 614.

Plaintiff respectfully submits that upon consideration, the Court should overrule the three submitted objections.

Dated: September 3, 2015

Respectfully submitted,

s/ David Woodward

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that on this day, September 3, 2015, he filed the foregoing document via the Court's CM/ECF system and that the document is available for viewing and downloading from the ECF system, and further certifies that the document was served on counsel of record by the Court's ECF system.

s/ David Woodward
David Woodward