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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



10           CLAUDIA WILKEN  
11           United States District Judge

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