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UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF CALIFORNIA

STEVEN MCARDLE, an individual, on behalf of himself, the general public and those similarly situated, Plaintiff, v. AT&T MOBILITY LLC; NEW CINGULAR WIRELESS PCS LLC; NEW CINGULAR WIRELESS SERVICES, INC., AND DOES 1 THOUGH 50, Defendants.	Case No. 4:09-cv-01117-CW PLAINTIFF'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLANTIFF'S REQUEST FOR ATTORNEYS' FEES, COSTS AND REPRESENTATIVE PAYMENT Judge: Honorable Claudia Wilken Date: March 17, 2021

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A. Introduction

Class notice was emailed approximately 600,000 times and mailed, first class US Post, over 76,000 times, to the approximately 254,000 class members. Nearly 22,000 claims have been filed, with only 24 opt-outs. This overwhelmingly positive response weighs strongly in favor of final approval of the settlement and the requested fees, costs and incentive. *See In re: Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 459 (9th Cir. 2000) (low number of objectors and opt-outs supports trial court's finding that settlement was "fair, adequate and reasonable"); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998) (same).

Two one-page objections were submitted *in pro per* by Tom Griley and Jon Andresen. (Dkt.# 404; Dkt.# 405 (Declaration of Jay Geraci re Notice Procedures), ¶ 20, Ex. J.) Neither objector complied with this Court's order setting forth the requirements for an objection, nor provided evidence of class membership.[1] (Dkt.# 402, § 11.) Neither challenges the substantive terms of the settlement. Instead, each makes only a conclusory claim that the case was "frivolous" and that the fee request is thereby unjustified, without addressing any of the factual or legal arguments presented by Plaintiff. The objections should be overruled.

B. Argument

1. Neither Objector Has Demonstrated Standing.

"[I]n the class action context, simply being a member of the class does not automatically confer standing to challenge a fee award to class counsel—the objecting class member must be

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[1] The Court ordered:

> The Objection must be postmarked (if mailed) or submitted via ECF by the Objection Deadline set forth above. Any Objection must include: (a) a reference at the beginning to this case, *McArdle v AT&T Mobility LLC et al.*, Case No. 4:09-cv-01117-CW (N.D. Cal.) and the name of the undersigned judge, the Hon. Claudia Wilken; (b) the name, address, telephone number, and, if available, the email address of the Person objecting, and if represented by counsel, of his/her counsel; (c) a written statement of all grounds for the Objection, accompanied by any legal support for such Objection; (d) a statement indicating whether the person intends to appear at the Final Approval Hearing, either with or without counsel; and (e) a statement of his/her membership in the Class, including all information required by the Claim Form. Failure to include this information and documentation may be grounds for overruling and rejecting the Objection.

(Dkt.# 402, ¶ 11.)

'aggrieved' by the fee award." *Glasser v. Volkswagen of Am., Inc*., 645 F.3d 1084, 1088 (9th Cir. 2011) *citing In re First Capital Holdings Corp. Financial Prods. Sec. Litig*., 33 F.3d 29, 30 (9th Cir. 1994). If "modifying the fee award would not 'actually benefit the objecting class member,' the class member lacks standing because his challenge to the fee award cannot result in redressing any injury." *Id., citing Knisley v. Network Assocs., Inc*., 312 F.3d 1123, 1126 (9th Cir. 2002). Neither Griley nor Andresen can meet the redressability requirement, because a reduction in the fee award will benefit only Defendants, not class members. Even if the reduction in fees could be used to increase payments to class members, neither objector would benefit, as neither submitted a claim form (Dkt.# 405 (Geraci Decl.), ¶ 20.) And by attacking the entire case as "frivolous," the "objections do not comment on any aspect of the Settlement," but "appear to support no recovery for the Class;" as such, "these objectors' interests are adverse to the Class," so they must be overruled. *See Perkins v. LinkedIn Corp*., No. 13-CV-04303-LHK, 2016 U.S. Dist. LEXIS 18649, at *11 (N.D. Cal. Feb. 16, 2016) (rejecting 44 objections "that this case should never have been brought" because "such objections appear to support no recovery for the Class," holding "these objectors' interests are adverse to the Class, and the objections are overruled"); *see also Ko v. Natura Pet Prods., Inc*., No. C 09-02619 SBA, 2012 U.S. Dist. LEXIS 128615, at *6 (N.D. Cal. Sept. 10, 2012) ("[A]n objection based on a concern for the Defendants and an apparent non-substantive assessment of the frivolity of the action are not germane to the issue of whether the settlement is fair."); *Wren v. RGIS Inventory Specialists*, No. C-06-05778 JCS, 2011 U.S. Dist. LEXIS 38667, at *13 (N.D. Cal. Apr. 1, 2011) (overruling objections submitted that "do not go to the fairness of the settlement").[2]

2. The Objections Are Unsupported.

Objectors do not address any of Plaintiff's legal and factual arguments in support of the fee

[2] Separately, the Court may strike the objections for failure to comply with the information requirements set forth *supra*, footnote 1. *See, e.g.*, *Moore v. Verizon Communs., Inc.*, No. C 09-1823 SBA, 2013 U.S. Dist. LEXIS 122901, at *42-43 (N.D. Cal. Aug. 28, 2013) ("The Class Notice (long form) instructs class members that any objection to the Settlement must include . . . the caption and case number appearing on the Settlement Class Notice. . . . Specifically, Mr. and Mrs. Fix's objection is OVERRULED because it does not contain the caption and case number appearing on the Settlement Class Notice.").

award, even though the class notice indicated that Plaintiff's supplemental fee motion would be posted (and it was posted) on the settlement website over a month prior to the objection deadline. (Dkt.# 405 (Geraci Decl.), ¶ 15; Dkt.## 403, 403-1.) They complain that the case was litigated for too long, but do not address the reason why: that the parties were fighting about arbitrability, which led to an in-person arbitration, two Ninth Circuit appeals and a petition for certiorari. (*Cf.* Dkt.# 403 (Plaintiff's Sup. Br.), at pp. 4-7, 14-16) Andersen complains that he will receive "only" one day of free roaming but does not dispute that the value of that benefit is greater than the average class member's loss, nor does he deny that he (and virtually all class members) can obtain an account credit or cash refund for 100% of their allegedly improper charges. (*Cf. id*., at p. 7.)[3] Neither objector disputes that Plaintiff also obtained changed practices to benefit them, such as implementation of Voicemail Call Completion (VMCC) to avoid future charges and improved disclosures in AT&T documents. (*Cf. id.,* at pp. 4-6.) And neither mentions that Plaintiff succeeded in invalidating the arbitration provision, which will enable them to sue (and benefit from other class suits) for other misconduct. (*Cf. id.*, at pp. 4-7.)

Mr. Griley argues that the fee should be limited to "30% of the amounts paid out" but does not address any of Plaintiff's legal arguments (*cf. id*., at pp. 10-18) as to why the Court should evaluate the fee based on the lodestar-multiplier method. Mr. Griley claims that the rate paid to Plaintiff's counsel should be "$300 per hour" but does not dispute Plaintiff's evidence of prevailing reasonable market rates, nor deny that even a full fee award will give them below-market compensation. (*Cf. id.,* at pp. 8-10, 15; Dkt.# 395-1, ¶¶ 3-62.) And objectors do not deny that any of counsel's hours were actually worked nor explain why the work was unreasonable. They therefore provide no basis to reject the fee request. *See, e.g., Hefler v. Wells Fargo & Co.,* No. 16-cv-05479-JST, 2018 U.S. Dist. LEXIS 213045, at *41 (N.D. Cal. Dec. 17, 2018) (holding that generalized fee objections do not provide a basis to contravene the Court's analysis regarding

[3] Because he does not justify *why* he would be entitled to a larger benefit, the objection must be rejected. *See Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 20 (N.D. Cal.1980). And even if it had been possible to obtain more, "[s]ettlement is the offspring of compromise; the question we address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion." *Hanlon v. Chrysler Corp*., 150 F.3d at 1027

attorneys' fees); *Asghari v. Volkswagen Grp. of Am., Inc.,* No. CV1302529MMMVBKX, 2015 U.S. Dist. LEXIS 188824, at *30 (C.D. Cal. May 29, 2015) (overruling objections that "conclusorily assert that the fees are too high"); *Miller v. Ghirardelli Chocolate C*o., No. 12-cv-04936-LB, 2015 U.S. Dist. LEXIS 20725, at *33 (N.D. Cal. Feb. 20, 2015) (overruling similar objection to fee amount as "overreaching and unjust," as conclusory and unsubstantiated); *In re Toyota Unintended Acceleration*, 2013 WL 8541175 (C.D. Cal. July 24, 2013) (rejecting unsupported objections to a proposed fee award where the objectors presented no expert declaration or other evidence undermining the Court's conclusions); *EnPalm, LLC v. Teitler,* 162 Cal. App. 4th 770, 775 (2008) (objection to attorney fee award forfeited where unsupported by discussion and analysis of the record); *Lucas v. White*, 63 F. Supp. 2d 1046, 1057 (N.D. Cal. 1999) ("the party opposing the fee application has a burden of rebuttal that requires submission of evidence to the district court challenging the accuracy and reasonableness of the hours charged or the facts asserted by the prevailing party in its submitted affidavits.")

3. Class Notice Was Reasonable and Adequate as Are the Number of Claims.

Class Members' reactions to the Settlement have been overwhelmingly positive. More than 650,000 notices of the settlement notice were delivered via mail and email. (Dkt.# 405 (Geraci Decl.), ¶¶ 7-14.) The Settlement Website received almost 22,000 unique visits, and the claims administrator responded to numerous inquiries made via e-mail and the toll-free number. (Id. ¶¶ 15-16.) There were a total of timely 21,933 claims, of which approximately 6,024 have been preliminarily determined to be valid, and of which another 15,909 are likely invalid but are being sent deficiency letters and an opportunity to provide additional evidence of Class membership. (Id., ¶¶ 17-18.) Thus, the claims rate was within or above the predicted range of 4,000-10,000 claims. (Dkt.# 395-1, ¶ 81.) An additional 129,663 current customer Class members will receive the free International Day Pass even without having made a claim. (Id., ¶¶ 6, 17.) Only 24 people opted out. (Id., ¶ 19.)

"A court may appropriately infer that a class action settlement is fair, adequate, and reasonable when few class members object to it," as is the case here. *Evans v. Linden Research, Inc.*, No. C-11-01078 DMR, 2014 WL 1724891, at *4 (N.D. Cal. April 29, 2014); *see also Spann*

v. J.C. Penney Corp., 211 F. Supp. 3d 1244, 1257 (C.D. Cal. 2016) ("It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members."). And where, as here, notice satisfies due process, "the number of claims submitted at any particular time is not a relevant factor in evaluating the fairness, reasonableness, or adequacy of the settlement." *Hall v. Bank of Am.*, No. 1:12-cv-22700-FAM, 2014 WL 7184039, at *8 (S.D. Fla. Dec. 17, 2014).

Considering only the 6,024 valid claims, the claim rate is approximately 2.4%. That understates the relief, because another approximately 129,663 Class members will receive the Day Pass, whose $10 value is higher than the average amount they would have received by making a claim. (Dkt.# 405, ¶¶ 6, 17.) And all benefit from the changed practices and invalidation of the arbitration clause. But even the approximately 2.4% claim rate alone would be sufficient. "Courts around the country have approved settlements where the claims rate was less than one percent"—because "the claims rate does not dictate whether the notice provided was the best notice practicable under the circumstances" and "does not govern whether the settlement is fair, reasonable, or adequate." *Pollard v. Remington Arms Co.*, LLC, 320 F.R.D. 198, 214-15 (W.D. Mo. 2017) (collecting cases); *see also In re Online DVD–Rental Antitrust Litig.*, 779 F.3d 934, 941 (9th Cir. 2015) (upholding settlement in which the parties sent direct notice to 35,000,000 class members and received 1,183,444 claims, representing a 3.4% claim rate).

C. Conclusion

For all these reasons, and for the further reasons set forth in Plaintiff's motion to approve the settlement (Dkt.# 395) and supplemental memorandum (Dkt.# 403), Plaintiff respectfully requests that the Court approve the settlement, full requested fee award, for a total award of fees and expenses of $6,130,000.00, and the representative payment.

Dated: March 3, 2021

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