WILLIAM BLUMENTHAL
General Counsel
Federal Trade Commission

David M. Newman
Attorney, Western Region
Federal Trade Commission
901 Market Street, Suite 570
San Francisco, California 94103
(415) 848-5123
(415) 848-5184 (fax)
dnewman@ftc.gov
California Atty. No. 54218

CAROL J. JENNINGS
ROBERT M. FRISBY
JAMES A. KOHM
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580
(202) 326-3010

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

FRANK CHAVEZ, an individual, and California resident, on behalf of himself, those similarly situated, and the general public, Plaintiff, v. NETFLIX, INC., a foreign corporation; and DOES 1 THROUGH 10, Defendants.	CASE NO. CGC-04-434884 FEDERAL TRADE COMMISSION'S MEMORANDUM OF LAW AS AMICUS CURIAE CLASS ACTION Hon. Thomas J. Mellon Dept. 514

The Federal Trade Commission (FTC) opposes the pending class action settlement in this case because the class members' compensation is coupled with a "negative option"[1] – which

[1] A negative option is a term in an offer to provide a good or service stating that the offeree's silence or failure to take an affirmative action to reject the good or service is interpreted by the

leaves many class members without any compensation and could leave others worse off than if they had not participated in the settlement at all.[2] Because the only relief provided by the settlement is linked to this negative option plan, class members who do not wish to assume the risks and obligations associated with such a plan must forgo any compensation through the settlement. Many others who do participate ultimately could pay for services they never wanted either because Netflix inadequately disclosed the negative option feature or because the class members simply did not cancel in time to avoid incurring a charge.

The settlement benefit offered to current Netflix members is a free one-month upgrade in the level of service, while the benefit available to former members is a free one-month membership. In both cases, the benefit is coupled with a negative option plan. This means that the new or upgraded service will continue automatically, and the member will be billed accordingly, unless he or she takes steps to cancel or modify the subscription.

The negative option aspect of this settlement requires special scrutiny. In the usual commercial transaction, a consumer must act affirmatively to agree to buy a good or service and incur a charge. In the negative option transaction, on the other hand, the consumer must act affirmatively to *avoid* receiving the good or service and incurring a charge. Negative option plans are not illegal if properly disclosed to consumers. Here, however, the Commission, is concerned that the existence and terms of the negative option will be inadequately disclosed to class members. Because this is a class action settlement and not an ordinary commercial transaction, consumers may be less likely to look carefully at the offer. Thus, predictably some class members will accept the free month or free upgrade, not realizing that the service will continue and that they will incur charges unless they take action to cancel at the appropriate time. Nothing in the settlement requires Netflix to disclose the terms of the negative option adequately to class members who participate in the settlement. The settlement, therefore, is likely to result

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offeror as acceptance of the offer.

[2] The Commission has not undertaken an investigation of the underlying facts in this case, and therefore, takes no position with respect to the allegations of the complaint.

in at least some class members incurring charges for unwanted services.

In addition, even if the terms of the negative option plan were fully and clearly disclosed to class members before they chose to accept the benefit, the use of negative option features poses special problems in class action settlements.[3] In the instant case, the Commission believes that the negative option aspect of the proposed settlement appears dangerously close to being a promotional gimmick. Specifically, the value of the benefit offered to each class member is very low, both because those members who accept the benefit receive very little of value and because it is reasonably foreseeable that many class members will forgo any benefit altogether to avoid the negative option. This apparently small benefit to class members, however, provides a larger benefit to Netflix if members inadvertently either continue service at higher prices or re-enroll in the plan and continue beyond the free month based on the negative option. While the Commission has no knowledge of the strength of plaintiff's case, it nonetheless questions whether any settlement in which a defendant benefits potentially at consumers' expense would be appropriate.

Given these deficiencies, the FTC opposes the settlement. The Commission believes that the settlement should be either rejected or restructured to correct these deficiencies. As explained, *infra* at note 17, the settlement could be restructured in such a way that (1) the terms of the negative option plan and method for cancelling are disclosed fully before class members choose to accept the benefit; and (2) the negative option component of the benefit is made optional, not mandatory, for class members who accept the benefit.

I. The FTC's Interest in This Matter

The FTC is an independent federal law enforcement agency whose mission is to protect consumers from unfair or deceptive acts or practices and to increase consumer choice by promoting vigorous competition. The Commission's primary legislative mandate is to enforce the FTC Act, 15 U.S.C. § 41 *et seq.*, which prohibits unfair methods of competition and unfair or

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[3] *See* Erikson v. Ameritech Corp., No. 99CH18873, order (Cir. Ct. Cook County, Ill. Sept. 18, 2002) (copy attached as Exhibit A), discussed below at pages 13-14.

deceptive acts or practices in or affecting commerce.[4] This *amicus* brief is based upon the Commission's general experience prosecuting unfair and deceptive trade practices, including the formulation of restitution programs for injured consumers; its particular experience with regard to unfair or deceptive practices connected to negative option plans; and its interest in ensuring that class action settlements provide appropriate relief for consumers.

Pursuant to its statutory authority, the FTC routinely brings enforcement actions under the consumer protection and antitrust laws, often seeking monetary relief, including refunds for consumers. In fiscal year 2005, for example, the FTC obtained 103 federal district court judgments in its consumer protection cases, ordering the payment of more than $824 million in redress or disgorgement. The FTC, therefore, has extensive experience implementing redress programs, including the drafting and mailing of notices, the processing of consumer claims, and the payment of cash refunds to consumers.[5]

As part of the Commission's consumer protection mission, the Commission has sought to halt the deceptive use of various kinds of negative option plans. For example, the FTC has challenged deceptive free trial offers used to market various goods and services, including credit monitoring services, buying club memberships, computer software, and Internet access services.[6]

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[4] The FTC Act provides the Commission with broad law enforcement authority over entities engaged in, or whose business affects, commerce. *See* 15 U.S.C. § 41 *et seq.*

[5] The FTC typically dispenses millions of dollars in redress to consumers each year. In addition, the Commission has experience with non-pecuniary redress, including programs involving product discounts and computer upgrades. *See, e.g.*, Sharp Electronics Corp., Docket No. C-4002 (Order Mar. 7, 2001) (respondent ordered to upgrade handheld personal computers for a shipping and handling fee of $10); Apple Computer, Inc., 124 F.T.C. 184 (1997) (respondent ordered to provide personal computer upgrade kits at less than half the original list price); and American Body Armor and Equipment, Inc., 118 F.T.C. 982 (1994) (respondent ordered to provide a 40% discount on replacement body armor).

[6] FTC v. Consumerinfo.com, Inc., No. CV-SACV05-801 AHS (MLGx), stipulated order (C.D. Cal. Aug. 31, 2005) <www.ftc.gov/opa/2005/08/consumerinfo.htm> (FTC alleged that defendant failed to disclose adequately that after a free trial period for a credit monitoring service, consumers automatically would be charged an annual membership fee unless they canceled the service within 30 days); U.S. v. Micro Star Software, Inc., No. 02 CV 1003, consent decree (S.D.

In addition, the Commission promulgated and enforces a trade regulation rule concerning the Use of Prenotification Negative Option Plans, 16 C.F.R. pt. 425. The rule sets forth detailed requirements to ensure the clear and conspicuous disclosure of the material terms of the plan, including the means by which a subscriber can decline to receive and be billed for unwanted merchandise. Thus, the Commission has developed considerable expertise regarding the marketing of negative option offers.

As a consumer protection agency, the FTC also is concerned about class action settlements that do not provide appropriate relief for consumers.[7] To address this concern, the FTC has taken a number of actions. First, since January 2002, the FTC has filed *amicus* briefs or intervened in six class action cases, including Erikson v. Ameritech Corp., discussed *infra*, to raise concerns about proposed settlements. Second, the FTC, in February 2002, filed comments with the Judicial Conference's Committee on Rules of Practice and Procedure concerning proposed amendments to Rule 23 of the Federal Rules of Civil Procedure, governing class action litigation. Third, in September 2004, the FTC and the Georgetown Journal of Legal Ethics cosponsored a workshop on "Protecting Consumer Interests in Class Actions" during which judges, academics, practitioners, corporate and government attorneys, economists, consumer advocates, and claims facilitators gathered to discuss the current state of class action practice, as

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Cal. May 24, 2002) <www.ftc.gov/opa/2002/05/microstar.htm>; FTC v. Smolev, No. 01-8922-CIV-ZLOCH, stipulated order (S.D. Fla. Nov. 27, 2001) <www.ftc.gov/opa/2001/10/triad.htm> (FTC alleged that defendants failed to disclose adequately that a consumer who fails to contact the defendants within 30 days to cancel the trial membership is enrolled as a buying service member, and that the consumer's credit card is charged an annual fee); and America Online, Inc., 125 F.T.C. 403 (1998); Compuserve, Inc., 125 F.T.C. 451 (1998); and Prodigy Services Corp., 125 F.T.C. 430 (1998) <www.ftc.gov/opa/1997/9705/online.htm> (FTC alleged that respondents failed to disclose adequately that consumers had an affirmative obligation to cancel before the Internet service trial period ended to avoid charges, and as a result, consumers who failed to cancel were enrolled as members and began incurring unexpected monthly charges).

[7] Concerns about class actions motivated Congress to enact the Class Action Fairness Act of 2005, signed into law in February 2005.

well as promising proposals for the future.[8] Through these actions, the FTC has gained experience in analyzing class action settlements.

II. The Allegations against Netflix and the Terms of the Settlement

The named plaintiff has alleged that Netflix failed to provide "unlimited" DVD rentals and "one day delivery" of DVDs, as promised in its marketing materials. Netflix has denied all allegations of liability and wrongdoing. Under the terms of the settlement, however, Netflix has agreed to provide new disclosures to protect future consumers of its services, as well as certain benefits to redress past injury to current and former subscribers.

To protect future consumers, the prospective relief includes modification and amplification of language in the "terms of use" disclosures that appear on the Netflix website. Previous statements that subscribers will be able to "rent as many DVDs as you want" and promises of delivery "in about one business day" have been replaced by an explanation of the various factors that will determine the number of DVD rentals a subscriber can expect to receive in a month and the factors that may have an impact on the speed of DVD delivery. Furthermore, both print and broadcast advertisements will refer the prospective subscriber to the detailed information on the "terms of use" web page.

To compensate current and former consumers, the settlement affords certain benefits to class members who enrolled in a paid Netflix membership program prior to January 15, 2005, and who complete the claims form process in a timely and accurate manner. Former subscriber class members, *i.e.*, those who terminated their membership prior to October 19, 2005, are entitled to a free one-month Netflix membership in the one, two, or three-DVDs-at-a-time, unlimited program, at their choice. The service renews automatically at the end of the free month, at the regular subscription rate for the chosen level. This service will continue unless and until the individual cancels or modifies the subscription.

Current subscriber class members are entitled to receive a one-month, one-level upgrade

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[8] Information about the FTC's Class Action Fairness Project, including the FTC briefs, Rule 23 comment, and details about the workshop is available at www.ftc.gov/bcp/workshops/classaction/index.htm.

(*e.g.*, from three to four DVDs at a time) for the price of their existing (non-upgraded) level of service. The upgraded service renews automatically at the end of the upgraded month, at the regular subscription rate for the upgraded program level, unless and until the individual cancels the service or modifies the subscription.[9]

No less than four, nor more than seven, days before the end of the benefit period for both categories of class members, Netflix will send an email to the class member reminding the subscriber that he or she may elect not to renew the service at that benefit level. The email will inform the individual of: (1) the level of service in which the subscriber is enrolled as a result of the class action settlement; (2) the date upon which the automatic renewal will occur; (3) the price of continuing to subscribe at the new level of service; and (4) the method for the subscriber to modify or cancel the membership or upgraded service level.

The settlement does not specify or explain the procedures class members will be required to follow if they accept the benefit offered to them, and later wish to cancel to avoid incurring an obligation to pay for the service or upgrade in subsequent months. The class notice is silent about the cancellation procedures, and the settlement fails to require Netflix to disclose the cancellation procedures to class members before they accept the free service or upgrade on a negative option basis.

III. The Settlement Is Inadequate

The Commission has two basic concerns with the Netflix settlement. First, the notice to class members does not adequately inform them about the existence of the negative option plan which is packaged with the settlement offer, and the settlement agreement does not require disclosure of the terms of that plan or specify how consumers can cancel once they are enrolled. Second, the settlement itself seems to be more of a promotional vehicle for Netflix, rather than redress for any injury suffered by class members. For example, class members who do not wish to assume the risks and obligations of participating in a negative option plan are effectively

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[9] There is an exception to this provision for current subscriber class members receiving up to eight DVDs at a time. These subscribers will be upgraded to receive nine DVDs at a time for one month and will be returned to the eight DVD level at the end of that month.

precluded from receiving any compensation.

A. Inadequate Disclosure of the Negative Option to the Class

A class member choosing to accept a benefit in a class action settlement is in a different position than a consumer considering a "free trial" offer in the context of an ordinary commercial transaction. In the latter situation, the consumer begins in a neutral position (*i.e.*, one in which he or she has not yet purchased and the vendor has not yet sold the relevant good or service). A consumer in such a circumstance generally can choose to forgo the offered good or service, buy the good or service elsewhere, or enter the deal on the terms offered. Under these circumstances, consumers have an incentive to "shop" for the best deal and to enter into a contract that they fully understand. They, therefore, have a strong incentive to study the terms of the deal.

In a class action settlement, on the other hand, the class member is offered the "free" benefit as a remedy for an alleged past wrong or injury. Class members cannot shop for a better deal from another vendor because they were presumably allegedly injured only by the vendor in the action. Class members considering the settlement, therefore, may be less likely to scrutinize the notice and read a relatively inconspicuous negative option disclosure than would consumers considering a free trial offer in an ordinary commercial transaction.

The Summary Notice of the class action settlement, sent by email to current and former subscribers of Netflix and attached hereto as Exhibit B, is the primary means of notifying class members about participation in the settlement.[10] The first page describes the terms of the settlement applicable to current and former Netflix subscribers. This is followed by a list of options for class members, including those of opting out of the class and objecting to the settlement. Near the conclusion of the notice, and well below the immediately viewable area on a computer screen – the format in which most recipients likely will read the notice – there appears the following disclosure: "After the benefit period ends, the new or upgraded level of service will continue automatically (following an email reminder) and you will be billed

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[10] Class Action Settlement Agreement, Part 5, Notice.

accordingly, unless you cancel or modify your subscription. You can cancel or modify your subscription at any time."

The notice is inadequate for two reasons. First, the disclosure of the negative option is insufficiently conspicuous to put consumers on fair notice of its terms. This is important information that might lead some class members to reject the offer. Such information should be disclosed in conjunction with and in close proximity to the description of the benefit, not placed at the end of the email message where some class members might fail to notice or read it.[11]

Second, the notice does not disclose all of the material terms of the negative option provision to the offer. Specifically, it does not disclose: (1) the cost of the new or upgraded service; (2) the manner and timing of billing; (3) the deadline for canceling the service or upgrade to avoid a charge; and (4) the procedure and relevant contact information for exercising the right to cancel. Moreover, the proposed settlement does not require the clear and conspicuous disclosure of this important information before the class member has agreed to accept the benefit coupled with a negative option plan. Class members need this information to understand the cost they will incur if they do not cancel the free service or upgrade before the deadline, and the steps they will need to take to cancel the service or upgrade and avoid future charges.

Furthermore, adequate disclosure of the negative option is necessary to ensure that class members have enough information to decide whether to object to or opt out of the settlement. Disclosures made after final approval of the settlement come too late to assist class members in making this choice.

Presumably the vast majority of class members are happy with their current status (whether former Netflix members who dropped their membership or current members at a

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[11] To ensure that a disclosure is clear and conspicuous, it should be placed near, and when possible, on the same screen as the triggering claim or the information to which it relates. In addition, a disclosure must be effectively communicated to consumers before they incur a financial obligation. *See* the Federal Trade Commission's staff working paper on Dot Com Disclosures, Information about Online Advertising, at www.ftc.gov/bcp/conline/pubs/buspubs/dotcom/index.html.

particular level), or they would have changed that status on their own. The class members' willingness to accept the settlement benefit, therefore, will hinge on balancing the benefit of a free month's service or upgrade with the cost they will incur absent timely cancellation and the amount of time or effort needed to cancel. Without the clear disclosure of cost and cancellation information, such a balancing is impossible, and class members cannot make an informed decision.

Furthermore, the terms of the settlement raise concerns even if Netflix should assert at the settlement hearing that it intends to disclose the existence of and details regarding the negative option during the claims process before class members incur any obligation to pay for the new service or upgrade. Nothing in the settlement agreement *requires* Netflix to make additional disclosures to class members before they incur an obligation to pay for the service or upgrade. To address concerns that the settlement may cause injury to class members who incur charges for unwanted services, at the very least the settlement should require Netflix to make adequate disclosures before class members agree to accept service on a negative option basis and provide an easily accessible means of cancelling the service.

B. The Negative Option Plans Are Inappropriate Promotional Vehicles for Netflix.

Even if the material terms of the negative option are clearly and conspicuously disclosed, the Commission has serious concerns about the use of a mandatory negative option in this class action. The negative option here is more of a promotional vehicle for Netflix than compensation for consumers, many of whom could end up worse off by joining the class and accepting the benefit unless the negative option is optional.

It is reasonably foreseeable that some class members who fully understand the negative option provision will reject the "free" offer simply to avoid the inconvenience of canceling or the risk that they will forget to cancel and thereby incur charges for an unwanted service.[12] For these class members, the only available option is to exclude themselves from the class and file a

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[12] In fact, any former members who experienced difficulty cancelling their membership would be highly unlikely to take advantage of the settlement, given the small benefit of participation in the settlement.

separate action. This is not a practical or feasible alternative, as the time and expense involved likely would bear little relationship to any expected benefit.

The value of the benefit offered to each class member appears to be very low, particularly for current subscribers. For example, according to the Netflix website, the current cost of the Netflix 2-DVDs-at-a-time, unlimited plan is $14.99 per month. The cost of the 3-DVDs-at-a-time, unlimited plan is $17.99 per month. The value of the free upgrade (the only remedy available to current subscribers) in this instance would be only $3.00. The value of the free service (the only remedy available to former subscribers), assuming the class member selects the 3-DVDs-at-a-time, unlimited plan, would be only $17.99. Although the Commission takes no position on the strength of the allegations, a class has been certified for purposes of this settlement and it seems unlikely that any class members would consider filing individual actions to obtain such modest compensation.

One central purpose of class actions is to enable class members with low-value claims not worth pursuing individually to obtain some relief. As stated by the U.S. Supreme Court:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 617 (1997).[13] The paramount value of the class action is in its ability to produce a remedy that will include most, if not all, class members. Here, requiring class members to accept the negative option plan as a condition of receiving compensation will likely result in many class members forgoing compensation for the injury they allegedly suffered. This result would frustrate one of the central purposes of the class action mechanism and effectively deny compensation to many class members.

Moreover, many class members who choose to participate in the settlement could ultimately find themselves in a worse position than if they had decided not to participate.

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[13] *See also*, Linder v. Thrifty Oil Co., 23 Cal. 4th 429, 445, 97 Cal. Rptr. 2d 179, 2 P.3rd 27 (2000); Vasquez v. Superior Court, 4 Cal. 3d 800, 808, 94 Cal. Rptr. 796, 484 P.2d 964 (1971).

Specifically, as explained above, these class members are presumably happy with their current status, either as former Netflix members or as current members at a particular level. Based on our experience with negative option plans, it is reasonably foreseeable, however, that many such participants will fail to cancel before the conclusion of their "benefit" month, either because they were not adequately informed that they needed to cancel or because it was too inconvenient or time-consuming to cancel. These individuals, therefore, will incur an obligation to pay for unwanted services, placing them in a worse position than that in which they started.[14]

The FTC helped persuade an Illinois court to reject a class action settlement with a similar negative option feature in Erikson v. Ameritech Corp., No. 99CH18873, order (Cir. Ct. Cook County, Ill. Sept. 18, 2002) (copy attached as Exhibit A). The Erikson Court rejected a proposed class action settlement providing class members with one month of free speed-dial telephone service on a negative option basis. The Court concluded that the speed dial provision "is likely to benefit Ameritech more than the class and it smacks of a court-sponsored promotion gimmick." Id. at 15.[15] The FTC had filed an *amicus* brief opposing the settlement, in part because it did not provide for adequate disclosure of the material terms of the negative option.[16] Specifically, the FTC argued that the class notice failed to disclose: (1) the cost of the speed dial

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[14] The fact that Netflix is currently offering a free two-week trial period to attract new members only bolsters the Commission's concern that the present settlement is more of a promotional tool for the benefit of Netflix than a true remedy for injured consumers. <http://www.netflix.com/Register>.

[15] At the fairness hearing, the parties agreed to modify the settlement to address concerns about the negative option feature; however, the Court ultimately rejected the settlement despite these improvements. The proposed revised settlement provided that Ameritech would: (1) inform class members who requested the free month of speed-dial service that they had the option of requesting cancellation after the free month without the need for an additional cancellation call; (2) provide an 800 number for class members seeking to claim the free month of service; and (3) maintain a policy of providing credits to class members who notified Ameritech within a reasonable period, not less than 60 days, that they incurred charges for the service that they did not request or desire. Id. at 6-7.

[16] The FTC press release announcing the *amicus* filing and links to the *amicus* motion and brief are at www.ftc.gov/opa/2002/06/fyi0236.htm.

service; (2) the manner and timing of billing; (3) the deadline for cancelling the service to avoid a charge; and (4) the procedure for canceling and contact information. The states of Illinois, Indiana, Michigan, Ohio, and Wisconsin also objected to the negative option offer and other aspects of the settlement. Id. at 5.

Given the unique features of the class action settlement situation, the Commission submits that courts should be highly skeptical of proposed settlements that attach a negative option plan to the receipt of a benefit designed to remedy a past injury. In general, the marketing advantage that accrues to the seller offering such a plan is less appropriate in a class action settlement, where the focus should be on the remedy for past injury, than in the usual transaction where the consumer bears more responsibility for weighing the risks and obligations of an offer by a particular seller.[17]

[17] The risk that many class members will not receive compensation, as well as the risk of confusion and the resulting consumer injury, could be reduced in two ways. First, the offer could be revised so that class members can elect at the outset to receive the free upgrade or free month of service *without* agreeing to automatic enrollment in the negative option plan. Those class members who believe that they will want to continue the upgrade or membership after the free benefit period could choose to "opt in" to the negative option plan. Only that group of class members, *i.e.*, those who affirmatively request continuation of the membership or upgrade after the month of free benefit, would be charged by Netflix unless and until they acted affirmatively to cancel the service or upgrade. Second, the disclosure regarding the negative option plan could be made clearly and conspicuously, next to the description of the benefit, together with complete information about cost, billing, and the deadline and easy procedures for canceling to avoid charges. With clear and adequate disclosures, those class members who choose to "opt in" to the negative option will do so with full knowledge of the consequences of their choice.

IV. Conclusion

For the foregoing reasons, the FTC respectfully submits that the settlement should not be approved.

Dated: January 5, 2006

Respectfully submitted,

WILLIAM BLUMENTHAL
General Counsel
Federal Trade Commission

David M. Newman

David M. Newman
Attorney, Western Region
Federal Trade Commission
901 Market Street, Suite 570
San Francisco, California 94103
(415) 848-5123
California Atty. No. 54218

CAROL J. JENNINGS
ROBERT M. FRISBY
JAMES A. KOHM
Division of Enforcement
Bureau of Consumer Protection
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580
(202) 326-3010

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

MICHAEL ERIKSON, individually and on behalf of all others similarly situated,	)	No. 99 CH 18873
	)	(Consolidated with
Plaintiff,	)	99 CH 11536, 00 L 011474,
v.	)	00 L 00500, 01 CH 3373)
AMERITECH CORPORATION,	)	
Defendant.	)	

ENTERED
SEP 18 2002
JUDGE
ROBERT V. BOHARIC

MEMORANDUM ORDER

I. INTRODUCTION

Plaintiff Michael Erikson brought this class action lawsuit against Ameritech. The issue currently before this court is whether it should approve the parties' proposed class action settlement.

A. BACKGROUND

This case has an unusual procedural history. Plaintiff filed this class action lawsuit, 99 CH 18873, on December 30, 1999 as a successor action of a previously dismissed action, McDermott v. Ameritech Corporation (98 L 8301). The Amended Complaint sought certification of the following class:

> All present and former customers, residential and commercial, who contracted with Ameritech Corporation for Voice Mail, and who are or were charged, in addition to a flat monthly rate, a local call charge each time a message was left in their Voice Mailbox and each time they called the System Phone Number from a phone other than their own to obtain messages.

The Amended Complaint states various claims against Ameritech including breach of contract and consumer fraud. Other similar cases were filed in Illinois, Michigan and Ohio, though not in Indiana or Wisconsin, which states Ameritech also serves.

Plaintiff claims Ameritech's way of advertising and billing for its Voice Mail services is deceptive to its customers. Given Ameritech's practices, consumers see the flat rate charge ($5.00/month in Illinois) as covering the service. Instead, the consumer is charged the flat rate plus the local rate when the customer calls her own mailbox as well as for each call put into the mailbox by others calling the consumer (including telemarketing and other unsolicited calls). Allegedly, consumers find this billing procedure counterintuitive and deceptive. Since consumers are not expecting such a billing scheme, the major goal of the case, according to Plaintiff's attorneys at the fairness hearing, is to obtain injunctive relief by requiring more disclosure by Ameritech of how the billing actually works beyond its allegedly inadequate disclosures, thus preventing further consumer deception.

On February 15, 2001 this court ruled on two motions brought by Ameritech, each seeking dismissal of Erikson's Amended Complaint. The court denied the motion brought under §2-615 of the Illinois Code of Civil Procedure ("Code"), finding that plaintiff pled enough facts to state a cause of action against Ameritech (p. 57-59 of transcript of February 15, 2001). However, the court ruled for Ameritech on its motion brought under §2-619 of the Code, dismissing the case with prejudice on three separate grounds.

The first ground for dismissal was the filed rate doctrine. Justice Miller set forth a good summary of the filed rate doctrine in his concurrence in the case of In Re Ill. Bell Switching Station Litig., 161 Ill.2d 233, 248, 641 N.E.2d 440, 447 (1994). In Illinois, telecommunications carriers are required by law to file tariffs with the Illinois Commerce Commission. 220 ILCS

5/13-501 (et. seq.). Such a filed tariff is binding law. Ill. Cent. Gulf R.R. Co. v. Sankey Bros., Inc., 67 Ill. App. 3d 435, 439, 384 N.E.2d 543, 545 (4th Dist. 1978) (aff'd 78 Ill. 2d 56, 398 N.E.2d 3 (1979)). The tariff specifies the nature and extent of a public utilities' obligation to its customers. J. Meyer & Co. v. Ill. Bell Tel. Co., 88 Ill. App. 3d 53, 55, 409 N.E.2d 557, 559 (2nd Dist. 1980). Furthermore, a customer is presumed to have knowledge of the terms of a filed tariff. Phillips Elec. Co. v. Seco Messenger Serv., Inc., 235 Ill. App. 3d 513, 517, 602 N.E.2d 62, 65 (1st Dist. 1992). The amounts charged by Ameritech conformed to a tariff imposed by the Illinois Commerce Commission, which regulates and determines the propriety of rates charged by Ameritech.

This court also looked to the reasoning of the U. S. Supreme Court in Amer. Tel. & Tel. Co. v. Cent. Office Tel., Inc., which ruled that a carrier cannot be held to a promised rate if such rate conflicts with the published tariff; the filed rate doctrine barred such claims in contract and tort. 524 U.S. 214, 118 S. Ct. 1956 (1998). The damages plaintiff sought amounted to avoiding the charges set forth in the filed rate and thus were disallowed. Amer. Tel. & Tel. Co., 524 U.S. at 228, 118 S. Ct. at 1965. The Second Circuit also held that failure to actively publicize the tariff rate was not a basis for liability for breach of warranty, fraud and deceit, negligent misrepresentation, deceptive acts or practices, unjust enrichment, or false advertisement. Marcus v. AT&T Corp., 138 F.3d 46, 65, 1998 U.S. App. LEXIS 3648, *51 (2d Cir. 1998) (rates were disclosed in the tariff although not in any advertising or marketing materials). Ameritech cited other trial courts which had dismissed similar voice mail cases based on this filed rate doctrine. This court followed this substantial precedent and dismissed the case finding the tariff unambiguously covered the facts pled in Plaintiff's complaint. The filed rate doctrine barred the Plaintiff's claim.

The court further dismissed the Amended Complaint based on the voluntary payment doctrine. This doctrine states that "money voluntarily paid under a claim of right to the payment, and with knowledge of the facts by the person making the payment, cannot be recovered by the payor solely because the claim was illegal." Dreyfus v. Ameritech Mobile Comm., Inc., 298 Ill. App. 3d 933, 938, 700 N.E.2d 162, 165 (1st Dist. 1998) (quoting Smith v. Prime Cable, 276 Ill. App. 3d 843, 847, 658 N.E.2d 1325, 1329 (1st Dist. 1995)). Under this doctrine, a Plaintiff must show both that the claim to the payment was unlawful and that the payment made was not voluntary. Dreyfus, 298 Ill. App. at 938, 700 N.E.2d at 165. Mr. Erikson subscribed to Voice Mail service in March of 1999 and continued to pay notwithstanding the tariff and the terms and conditions sent to voice mail customers setting forth the charges. Mr. Erikson failed to show that the payments were not voluntary and therefore the voluntary payment doctrine barred Plaintiff's claims.

Finally, the court agreed with Ameritech's third theory for dismissal that this court lacked primary jurisdiction. Because the Illinois Commerce Commission determines such rates and regulates the carriers, the dispute should be resolved there. The controversy ought not to have been brought in the Circuit Court.

Plaintiff proceeded with a timely appeal. On January 29, 2002, before the Appellate Court ruled, Plaintiff Erikson filed in this court a "Motion for Conditional Certification of a Settlement Class, Preliminary Approval of Settlement, and Authorization to Disseminate Notice." The class requested for certification was as follows:

> All present and former customers, residential and commercial who contracted with Ameritech Corporation, Illinois Bell Telephone Company, Michigan Bell Telephone Company, Ohio Bell Telephone Company, Indiana Bell Telephone Company, Wisconsin Bell Telephone Company and/or SBC Communications, Inc. for Ameritech Voice Mail, and who are or were charged, in addition to a flat monthly rate for the Ameritech Voice Mail service, a local call charge each time a message was left in their Voice

Mailbox and each time they called the System Phone Number from a phone other than their own to obtain messages.

Thus, the class covered Ameritech Voice Mail customers in five states: Illinois, Indiana, Ohio, Michigan and Wisconsin.

B. THE NATURE OF THE SETTLEMENT

The settlement agreement (the Stipulation and Agreement of Settlement, hereafter the "Settlement") first entered into between the parties had five main components: (1) various disclosure provisions to the public; (2) a reminder notice to be sent to Ameritech customer service representative to disclose local usage charges and that separate call forwarding is required for Voice Mail; (3) an offer of 1 month free use of Ameritech Speed-Dial 30 service; (4) fees and expenses for Plaintiff's attorneys to be determined by the Court but not to exceed $971,000; (5) that counsel shall file an agreed motion to vacate the opinion of the Court of Appeals in Gary Phillips & Associates v. Ameritech Corporation, 144 Ohio App.3d 149, 759 N.E.2d 833 (Ohio Ct. App. 2001). On February 28, 2002, this court preliminarily approved the Settlement, set a schedule for Notice to Class Members, made provision for customers to opt out of the class, allowed for objections to the Settlement and responses thereto and set the matter for a hearing to consider final approval for July 25, 2002.

Prior to the hearing, the states of Illinois, Indiana, Michigan, Ohio and Wisconsin by their respective Attorneys General asked leave to intervene and object to the Settlement on various grounds. The Citizens Utility Board on behalf of certain members of the class objected to the Settlement and further joined in the objections raised by James Pope, another class member who had filed a separate Illinois case. The Federal Trade Commission also filed an amicus curiae brief urging the court to reject the Settlement.

On July 25, 2002, the court heard argument from all the parties, having allowed the States' Petition to Intervene. The objectors made a number of criticisms of the Settlement and Ameritech and Plaintiff agreed to some clarifications and modifications in their Settlement, in response to some of the criticisms and suggestions made by the objectors. As a result the proposed Settlement was modified as follows:

[13]a. The disclosures specified in paragraphs 13, 14 and 15 of the Stipulation shall be modified to read as follows:

> If your local service is billed on a per-call or per-minute basis, you will be charged for all local calls associated with the use of your Voice Messaging Service. You will be charged for a local call every time you retrieve a message or otherwise access your mailbox using your local telephone number. You will also be charged for a local call every time a caller leaves or attempts to leave you a message. For customers on calling plans, such calls will be counted against your monthly allowance. If you access your mailbox from outside your local calling area, you will incur applicable local toll or long distance charges.

b. Advertisements that refer to the monthly fee for voice mail will also include the language specified above in paragraph 13(a) of this Order.

c. Ameritech will send 4 notices to existing customers reminding them of the usage charges associated with voice mail.

d. With respect to the Speed Dial 30 component of the settlement specified in the Stipulation, only class members who specifically request the free month of speed Dial 30 will receive Speed Dial 30. Ameritech will inform class members who request the free month of Speed Dial 30 that they have the option of requesting that the Speed Dial 30 service be cancelled after the free month without the need for an additional cancellation call. Ameritech will also provide an 800 number for class members seeking to claim the free month of Speed Dial

30. Ameritech will maintain a policy with respect to providing credits to class members who notify Ameritech within a reasonable period, not less than 60 days, that they incurred charges for Speed Dial 30 service that they did not request or desire. Ameritech representatives will receive no commission or incentive in connection with the Speed Dial 30 component of the settlement.

The attorney for Mr. Pope objected to any changes in the Settlement on due process grounds.

II. CLASS ACTION SETTLEMENT STANDARDS IN ILLINOIS

The general rule for approval of class action settlements in Illinois is that approval should be given if the settlement offer is fair, reasonable and adequate. People ex rel. Wilcox v. Equity Funding Life Ins. Co., 61 Ill.2d 303, 335 N.E.2d 448 (1975). The settlement must be in the best interest of all those who will be affected by it, including any subclass, fraction of or absent class members. Waters v. Chicago, 95 Ill. App. 3d 919, 924, 420 N.E.2d 599, 603 (1st Dist. 1981). The court should not judge the legal and factual questions by the same criteria applied in a trial, nor should the court turn the settlement approval hearing into a trial. Wilcox, 61 Ill.2d at 316, 335 N.E. 2d at 455. The burden is on the proponents of a class action settlement to prove that the compromise is fair and reasonable. Waters, 95 Ill. App. 3d at 925, 420 N.E. 2d at 603.

Relevant factors to consider in determining whether a settlement offer is fair, reasonable, and adequate are:

1. the strength of the case for plaintiffs on the merits, balanced against the money or other relief offered in settlement;
2. the defendant's ability to pay;
3. the complexity, length and expense of further litigation;
4. the amount of opposition to the settlement;
5. the presence of collusion in reaching a settlement;

6. the reaction of members of the class to the settlement;
7. the opinion of competent counsel, and
8. the stage of proceedings and the amount of discovery completed.

City of Chicago v. Korshak, 206 Ill. App. 3d 968, 972, 565 N.E.2d 68, 70 (1st Dis., 1990); GMAC Mortg. Corp. v. Stapleton, 236 Ill. App. 3d 486, 493, 603 N.E.2d 767, 774 (1st Dist. 1992). The list of factors in Korshak is not meant to be exhaustive (note the language "among the factors"). In Langendorf v. Irving Trust Co., the Appellate Court added a ninth factor: whether the settlement initiates or authorizes questionable or illegal conduct. 244 Ill. App. 3d 70, 77, 614 N.E.2d 23, 27 (1st Dist. 1992). The strength of the plaintiff's case on the merits balanced against the settlement amount is the most important factor in determining whether a settlement should be approved. Korshak, 206 Ill. App. 3d at 972, 565 N.E.2d at 70.

III. DISCUSSION

A. THE DUE PROCESS OBJECTION TO THE SETTLEMENT AS MODIFIED

At the fairness hearing, the proponents of the Settlement agreed to modify the initial Settlement and Ameritech agreed to additional terms that strengthened the agreement for customers. Ameritech agreed as above to the better disclosure language, to put such improved notices in their ads for Voice Mail, to send four notices to existing customers, and to limit the Speed Dial 30 component making it easier for customers to cancel beyond the free month. Mr. Pope, citing no authority, objected to these modifications pointing out that the class was not notified of these changes and hence those who opted out were denied due process. Neither side has cited any Illinois law on this point and the court's research finds nothing on point in Illinois.

Outside Illinois, a leading case is Harris v. Graddick, 615 F.Supp. 239, 1985 U.S. Dist. Lexis 17683 (M.D. Ala. 1985). Harris was a statewide class action claiming that Alabama

provided disproportionately too few black poll officials in violation of the Voting Rights Act of 1965. The parties agreed to a settlement in the form of a consent decree. Harris, 615 F.Supp. at 241, 1985 U.S. Dist. Lexis at *4. The agreement contained an injunction which set specific requirements for the increased appointment of black persons as poll officials. Id. at 242, *5. One provision of the consent order required that appointing authorities record and report the race of registered voters. At the settlement hearing, one objector, Mobile County, was allowed by amendment to supply this required information by means other than actual records. The District Court held that:

> Under these limited circumstances where the amendment is narrow and it is clearly apparent that the interests of the classes are not substantially impaired, the court is of the opinion that the notice already given is adequate and that additional notice is not required...15 F.Supp. at 244, 1985 U.S. Dist. Lexis at *14.

Here, the amendments improved the disclosure requirements and prospective injunctive relief sought by Plaintiff and certainly did not substantially impair the interests of the class. The court sees no prejudice to the class or the objectors or to those excluded by these improvements agreed upon by the parties. Nor do the other changes as to Speed Dial 30 substantially impair or modify the agreement such that the Settlement requires re-notice to be approved. This is not a case, for example, where an award jumps from $5,000 per class member to $50,000 per class member after opt outs and objections were made. In that case, those excluding themselves for the $5,000 amount could easily be prejudiced if the $50,000 amount were approved after an objection by remaining class members and, say, defendant's financial condition were substantially worsened by a settlement. No such scenario is present here. Since no one is prejudiced by the changes, the court finds no due process requirement that forces a re-notice of the proposed Settlement as modified.

B. THE KORSHAK FACTORS

The Korshak Court stated that of the non-exclusive factors used to assess the fairness, reasonableness and adequacy of class action settlements, the most important is the first factor – balancing the strength of the case for plaintiffs on the merits against the money or other relief offered in settlement. 206 Ill. App. 3d at 972, 565 N.E.2d at 70. On the merits, the procedural position of Plaintiff Michael Erikson is difficult. This court has already dismissed his case on what this court believes are solid grounds for dismissal. Yet this court's confidence in its decision is tempered by the Ohio decision in Gary Phillips v. Ameritech, which carves out an exception to the filed rate doctrine for deceptive advertising practices and rejects the theory that jurisdiction was proper only in the Ohio Public Utilities Commission. 144 Ohio App.3d at 153-155, 759 N.E.2d at 833-837. Without the Ohio Appeals Court decision in Phillips, which came after this court's dismissal, the present Settlement would have been much more acceptable. However, the fact is that the highest court to consider these issues has ruled against Ameritech and contrary to this court's ruling. Given the state of the law, it is a possibility that the Illinois Appellate Court would follow the Ohio precedent and reverse this court's ruling. It is very difficult to quantify the chances of such a reversal. For purposes of this opinion, it might be best to say there is a good chance of reversal.

Also difficult is assessing the likelihood of Plaintiff obtaining class certification in this case without a settlement. At the hearing, the Court was advised that in Michigan such an effort resulted in denial of class certification based on individual issues of fact and law predominating over common issues as well as manageability issues. Notwithstanding that decision, this court believes there is a strong chance of obtaining class certification in Illinois and beyond should the case survive. These judgments on the risks of this type of difficult litigation are certainly the

kind on which reasonable minds can and do differ. On balance, this court rejects the bleak picture painted by the proponents of this Settlement of the strength of the Plaintiff's case. The Plaintiff's position was materially enhanced by the customer victory in Ohio.

The court now turns to the relief offered in the Settlement itself. First, the court notes that this Settlement is more favorable to the class in some respects than the only comparable result in such Voice Mail litigation: the Bell Atlantic settlement entered on December 22, 1999. Weinstein v. Bell Atlantic Corporation, No. 02131, Court of Common Pleas, Philadelphia County Pennsylvania. That settlement provided that, as here, a disclosure was to be made by a "Welcome Letter" and in the "Terms and Conditions." It required disclosure to be made for three years. Current customers were to receive a notice that these changes were to be made in the Terms and Conditions. Counsel would receive fees and expenses to be determined by the Court not to exceed $200,000. Lastly, the Bell Atlantic settlement included a provision as to customer service representatives similar to the current Settlement. Prior rulings limited the class to Pennsylvania customers and limited the class cause of action to breach of contract.

Here, Ameritech has argued at the hearing that the benefits to the class of the present Settlement exceed those in Bell Atlantic. First, here the disclosure will appear on Ameritech's website. Second, four notices will be sent to existing customers. Third, the disclosure will appear on Voice Mail ads. Fourth, the disclosure language is an improvement over that of Bell Atlantic. Fifth, the present Settlement has the provision for free Speed Dial 30 service.

The objectors level much criticism at the Settlement. The objectors point out the lack of "point of sale" disclosure. They complain that there is no forceful provision in the Settlement requiring the disclosure at the time the customer actually makes the choice and signs up for the service. Clearly the disclosures are not as strong as is desirable here given their timing;

disclosures, to mean anything, ought to be given at the time of sale, not just on advertisements or websites, "Terms and Conditions" or Welcome Letters. This omission of meaningful provisions for point of sale disclosure is a major defect in this Settlement. It is also puzzling, since Ameritech claimed at the hearing that its policy is to mention the rates. This court sees no valid reason then for such an obvious improvement to be omitted. On balance, this court agrees with the objectors that the disclosure provisions, even with the modifications, are not strong.

Next, the objectors sharply criticize the Speed Dial 30 provision as of dubious value. They claim it amounts to a promotional gimmick for Ameritech. They point out that such a "coupon" type provision should be aimed at capturing some service credit or item likely to help the class. They question why the Settlement does not provide an equivalent amount of money or a coupon for services - why limit this alleged benefit to the new and unrelated service of speed dialing? The objectors point out the class gets almost no monetary benefit – although they must concede that some (unknown) percentage of the class, at least those who are already signed up for Speed Dial 30, will derive some benefit from this provision. The objectors claim the real winner on this Speed Dial 30 provision is likely to be Ameritech, not the class. The objectors cite In Re GMC Pick-Up Truck Fuel Tank Prod. Liab. Litig., where the Third Circuit held that the trial judge erred in approving a coupon settlement providing class members with $1000 coupons for the purchase of new trucks. 55 F.3d 768, 1995 U.S. App. LEXIS 8815 (3rd Cir. 1995). Here, the objectors claim the only ones on the Plaintiff side likely to benefit financially from the Settlement are the Plaintiff's attorneys, not the class they represent.

The Citizens Utility Board severely criticizes the provision requiring the parties to present an agreed motion to vacate the Phillips decision. The Board sees no benefit to Ohio customers from this Settlement. Counsel for plaintiff pointed out, however, that the vast

majority of Ohio customers pay a flat rate, that the Ohio claims were brought on behalf of business and not residential customers, and that since such businesses have no cause of action under the Ohio Consumer Fraud Act, counsel anticipated problems on certifying the class and proving common law fraud.

For these reasons, this court sees a very mixed result on the first Korshak factor. The Plaintiff's case itself is not strong, and although the Settlement is better than nothing, it is problematical, flawed and of little value to the class.

The second Korshak factor – the defendant's ability to pay is not important here.

The third factor – the complexity, length and expense of further litigation – here favors an immediate settlement. The case is likely to drag on for a considerable time if it is not settled. Years of legal battles are foreseen – and an expenditure of everyone's time, effort and money. In a sense, this litigation, despite long years in the trenches, is still in the pleadings stage and there is much to go.

The fourth and sixth factors (considered together) – opposition to the Settlement and reaction of class members on balance are unusually strong against the proponents. There were few direct objections received from customers – approximately 20 class members out of 1.2 million customers. On the other hand, the Attorneys Generals from the five affected states oppose this Settlement. This by itself is significant opposition. The Citizens Utilities Board and the Federal Trade Commission join the states in this opposition. In the world of class action objections, this opposition is substantial.

The fifth factor is collusion. The court finds none - this case is hotly contested.

The seventh factor is the opinion of competent counsel. Here the proponents are, no doubt, competent counsel and they see the Settlement as fair, reasonable and adequate. The

Attorneys General of five states and the other objectors' attorneys are equally competent counsel and they see things differently. The high level of competence on both sides is equal and therefore this factor is a wash.

The eighth factor is the stage of proceedings and the amount of discovery done. Here, the parties indicate that though the attorneys for Plaintiff have examined about 60,000 pages of discovery, there is still much discovery to go through. There is no report at all of work done in Wisconsin and Indiana. In Michigan, the class faces an adverse class certification ruling. In Ohio, the class despite the victory in the Court of Appeals, has a long road ahead in order to obtain relief. In Illinois, even if the ruling of this court is reversed, the parties face a great deal of litigation. This factor favors a prompt resolution of the dispute to save the time, effort and expense of further litigation.

Lastly, another factor explored in Langendorf is whether a settlement initiates or authorizes questionable or illegal conduct. 244 Ill. App. 3d at 77, 614 N.E.2d at 27. Though not illegal, this court finds the Speed Dial 30 provision very problematical. The Settlement has the appearance of the court promoting this Ameritech service. That is not the role of this court. Even more questionable is the Settlement's provision for the parties to seek to vacate the ruling in Ohio of the Appeals Court. Black's Law Dictionary defines 'Judicial comity' as "[t]he principle in accordance with which the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect." Black's Law Dictionary (6th edition, 1990). This provision would appear to be the very opposite of the comity due a superior court of a sister state.

C. THE FAIRNESS, REASONABLENESS AND ADEQUACY OF THIS SETTLEMENT

The burden of persuading this court of the fairness, reasonableness and adequacy of a settlement rests with the proponents of the settlement. Waters, 95 Ill. App. 3d at, 925, 420 N.E.2d at 603. Here the plaintiff's case is not strong, yet it is stronger than they now claim. The benefit of the Settlement to the class is relatively small. Having considered and balanced all the factors and arguments by counsel, this court finds that this is not a good settlement – even though Plaintiff has a weak case. First, the disclosure provisions are deficient in that they are lacking at the crucial point of sale. As the objectors note, timing is important on disclosures given a realistic view of consumers' focus of attention when making the purchase decision. Second, the Settlement gives no financial reward to the customers who claim they were deceived. The provisions for one month of Speed Dial 30 service seems to be an irrelevant and inadequate way of compensating the class. This provision is likely to benefit Ameritech more than the class and it smacks of a court-sponsored promotion gimmick. Third, the provision to seek an agreed vacation of the Phillips decision in Ohio is a questionable feature of the settlement causing an Illinois court to be placed in an awkward position as to a higher court of a sister state. Moreover, the court feels this Settlement is a bad deal for Ohio customers, an important subclass who are treated the same as non-Ohioans who lack the leading precedent of Phillips. This court agrees with the Citizens Utility Board and the Ohio Attorney General that on balance the Settlement is not beneficial to Ohio customers.

IV. CONCLUSION

This court finds that the proponents of this settlement have failed to meet their burden that the proposed Settlement is fair, reasonable and adequate. Therefore, the court denies the request to approve this Settlement.

ENTERED
SEP 18 2002
JUDGE
ROBERT V. BOHARIC - 181

R V Boharic #181

ROBERT V. BOHARIC
CIRCUIT COURT JUDGE

DATED: September 18, 2002

From: info@netflix.com

Subject: Notice of Class Action Settlement. Please Read.

You are receiving this notice because you were a paid Netflix member before January 15, 2005. Under a proposed class action settlement, you may be eligible to receive a free benefit from Netflix.

A class action lawsuit entitled Chavez v. Netflix, Inc. was filed in San Francisco Superior Court (case number CGC-04-434884) on September 23, 2004. The lawsuit alleges that Netflix failed to provide "unlimited" DVD rentals and "one day delivery" as promised in its marketing materials. Netflix has denied any wrongdoing or liability. The parties have reached a settlement that they believe is in the best interests of the company and its subscribers.

Netflix will provide eligible subscribers with the benefit described below, if the settlement is approved by the Court.

- **Current Netflix Members:** If you enrolled in a paid membership before January 15, 2005 and were a member on October 19, 2005, you are eligible to receive a free one-month upgrade in service level. For example, if you are on the 3 DVDs at-a-time program, you will be upgraded to the 4 DVDs at-a-time program for one month. There will be no price increase during the upgraded month. (If you cancel your membership after October 19, 2005 and before you receive the upgrade, you will have to rejoin to get the upgrade.)

- **Former Netflix Members:** If you enrolled in a paid membership before January 15, 2005 but were not a member on October 19, 2005, you are eligible to receive a free one-month Netflix membership on your choice of the 1, 2 or 3 DVDs at-a-time unlimited program. (If you rejoin after October 19, 2005 but before you receive the free one-month membership, you will receive a credit for the free month when it becomes available.)

These benefits will be provided after the Effective Date as defined in the Settlement Agreement. Your eligibility for the benefits is based on your membership status as of October 19, 2005. The full Settlement Agreement is available for review at www.netflixsettlement.com.

You have four options to respond to the proposed settlement. You have until December 28, 2005 to make your decision:

Option 1. Sign Up For The Benefit As Part Of The Settlement
To receive the benefit, you must complete the online registration process no later than February 17, 2006, at www.netflixsettlement.com. By signing up for the benefit, you waive your right to bring a separate lawsuit against Netflix concerning the Released Claims (as defined in the Settlement Agreement found at www.netflixsettlement.com).

Option 2. Do Nothing
If you do not wish to receive the benefit, do nothing. You will not receive the benefit but will remain a Class Member. You therefore waive your right to bring a separate lawsuit against Netflix concerning the Released Claims.

Option 3. Exclude Yourself From the Class
To exclude yourself from the class, you must mail a letter by December 28, 2005.

By excluding yourself, you preserve your right to bring a lawsuit against Netflix concerning the Released Claims. However, you will not get the benefit described above.

Option 4. Make An Objection To The Settlement In Court
To object to the settlement, you must file legal papers in the San Francisco Superior Court by January 5, 2006.

To receive your benefit, you must register by February 17, 2006 as described above in Option 1. You will not receive any other reminders to register for the benefit. If you have registered for the benefit and your eligibility is confirmed, then you will be provided additional information by email following the Effective Date as defined in the Settlement Agreement.

After the benefit period ends, the new or upgraded level of service will continue automatically (following an email reminder) and you will be billed accordingly, unless you cancel or modify your subscription. You can cancel or modify your subscription at any time.

In addition, if the settlement is approved by the Court, Netflix will modify portions of its Terms of Use. Netflix also will refer to its Terms of Use in certain advertisements.

To get more information about the settlement and procedures, and to take options 1, 3 or 4, visit www.netflixsettlement.com.