

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

**IN RE: TELEXFREE SECURITIES
LITIGATION**

MDL No. 4:14-md-2566-TSH

**This Document Relates to:
ALL CASES**

**MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL
OF SETTLEMENTS WITH DEFENDANTS BASE COMMERCE, LLC,
SYNOVUS BANK, JOSEPH CRAFT, CRAFT FINANCIAL SOLUTIONS, INC.,
AND CERTAIN RELATED INDIVIDUALS**

I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 23(e) and this Court’s Order granting preliminary approval of the proposed settlements (Dkt. No. 948), Plaintiffs now seek final approval of the settlements reached with Base Commerce, LLC, John Hughes, Brian Bonfiglio, John Kirchhefer, Alex Sidel and Synovus Bank (together the “Base/Synovus Defendants”), and Joseph Craft and Craft Financial Solutions, Inc. (together, the “Craft Defendants”) and Related Parties BWFC Processing Center, LLC, ACE LLP and Audra Craft (collectively with the Craft Defendants, the “Craft Parties”).

As explained in detail in Plaintiffs’ Motion for Preliminary Approval (Dkt. Nos. 762-63), the settlements reached to date are strong recoveries for the class—securing the first cash settlements and cooperation that has already provided, and will continue to provide, critically important evidence from the settling defendants essential to the advancement of Plaintiffs’ claims and the prosecution of this case.¹

¹ See also Dkt. No. 1037 (Joint Motion to Stay Proceedings as to Fidelity Bank Defendants and Notice of Settlement by Fidelity Co-Operative Bank, Merrill F. John).

This Court granted preliminary approval on April 8, 2020 and directed that notice be given to the Settlement Class. Dkt. No. 948. Notice has been provided as ordered by the Court and the reaction of the class members overwhelmingly supports final approval of these settlements. Just nine of the over 900,000 potential class members to be sent notice requested exclusion from the settlements—0.00097% of the potential class. There were also only four objections to the settlements, each of which should be overruled.

In light of the results achieved, the obstacles overcome, and the reaction of the settlement class, Plaintiffs request that the Court grant final approval of the settlements on the grounds that they are fair, reasonable and adequate, certify the settlement class, and direct that final judgment be entered as to the Settling Defendants.

II. FACTUAL AND PROCEDURAL HISTORY

The factual and procedural history of the case was set forth in detail in Plaintiffs' Memorandum in Support of Motion for Preliminary Approval of Settlements with Defendants Joseph Craft and Craft Financial Solutions, Inc., Base Commerce, LLC, Synovus Bank, and Certain Related Parties (Dkt. No. 763) (hereinafter "Motion" or "Mot."). Mot. 2-5. Plaintiffs focus on the events since the Court's Preliminary Approval Order here to avoid repetition.

a. Litigation Developments

On April 8, 2020, the Court issued its order granting preliminary approval of the settlements, directing that notice be given to the class, and directing counsel to file all papers in support of final approval, including any motion for attorneys' fees, by July 8, 2020. Dkt. No. 948 ("Prelim. Approval Order"). On the same day, the Court granted Plaintiffs' motion for clarification and allowed Plaintiffs to seek leave to file a further fifth amended complaint. Dkt. No. 947.

On April 9, 2020, the Court entered a Scheduling Order modifying the prior Scheduling Order to account for the proposed fifth amended complaint and in response to the Covid-19 pandemic. Dkt. No. 950.

On April 21, 2020, Wells Fargo Advisors, LLC (“WFA”) filed its Second Motion to Compel. Dkt. Nos. 965-66. On May 26, 2020, Plaintiffs filed their Opposition to Wells Fargo Advisors’ Motion. Dkt. No. 995. On June 25, 2020, WFA filed its reply to Plaintiffs’ Opposition. Dkt. No. 1002.

On April 28, 2020, the Court held a hearing on Plaintiff’s Motion for Entry of Final Judgment and took the matter under advisement. Dkt. No. 971.

On May 19, 2020, Plaintiffs filed their Motion for Leave to Amend seeking leave to file a fifth amended complaint, which attached the proposed Fifth Consolidated Amended Complaint.² Dkt. Nos. 983-84. On May 26, 2020, the Court directed that all responses to Plaintiffs’ motion be filed by July 2, 2020. Dkt. No. 992. Several defendants and proposed defendants have now filed oppositions to Plaintiffs’ motion. Dkt. Nos. 1003-04, 1007-08, 1011, 1013, 1019-21, 1024, 1026, 1029-34.

b. Notice and Class Response

On April 16, 2020, A.B. Data commenced sending the Court-approved Class Notice to potential class members via email utilizing a list of class member email addresses received from the related TelexFree bankruptcy proceedings. *See* Declaration of Eric Schachter (“Schachter Decl.”) ¶ 4, attached hereto as Attachment A. Stephen Darr, the bankruptcy trustee, was also sent

² Plaintiffs’ Motion to Amend was first filed on May 14, 2020 as part of Plaintiffs’ Motion for Leave to File Excess Pages. The proposed Fifth Consolidated Amended Complaint was also attached to that Motion. Dkt. Nos. 978-80.

the Class Notice via email. *Id.* at ¶ 5. A.B. Data sent the class notice to 930,629 email addresses. Of these, 181,561 emails were ultimately undeliverable. *Id.* at ¶¶ 6-9.

Also on April 16, 2020, A.B. Data implemented a toll-free telephone number, (877) 829-4140, with an automated interactive voice response system to assist potential class members in understanding the terms of the settlements and their rights. *Id.* at ¶ 10. Callers had the option to speak with a live operator during business hours if they needed further help. *Id.* The toll-free telephone number has received 474 calls from potential class members, of whom 193 spoke to a live operator. *Id.* On the same day, A.B. Data implemented a case-specific website at www.telexfreesettlement.com. The website featured a summary version of the class notice on the homepage, a link to download pdf versions of the full class notices and related court documents, a list of important dates, and contact information for A.B. Data and Lead Counsel. *Id.* at ¶ 11.

The postmark deadline to object to the settlements or request exclusion was May 22, 2020. *Id.* at ¶¶ 12-13. Four objections were received and nine requests for exclusion were received. *Id.* While the notice directed that requests for exclusion be mailed to A.B. Data's P.O. Box, six of the nine requests for exclusion were submitted via email. *Id.* at ¶ 13. Plaintiffs intend to treat all nine requests for exclusion as valid. *See Declaration of Robert J. Bonsignore* ("Bonsignore Decl.") ¶ 4, attached hereto as Attachment B.

c. The Terms of The Settlement

The Base/Synovus Defendants and the Craft Parties (the "Settling Defendants") have agreed to pay a total of \$2,100,000 in exchange for dismissal with prejudice and a release of all claims asserted or that could have been asserted against them. Dkt. No. 763-1, Exs. 1 & 2.³ In

³ The full settlement agreements were submitted as part of Plaintiffs' Preliminary Approval Motion and are attached to Dkt. No. 763-1 as Exhibit 1 (Craft Agreement) and Exhibit 2

addition, the Settling Defendants have already cooperated, and will continue to cooperate, with Plaintiffs in the ongoing pursuit of this litigation, according to the terms of their respective settlement agreements. *See* Base/Synovus Agreement ¶¶ 13-35; Craft Agreement ¶¶ 13-38. In return for the settlement payments and the Settling Defendants' full cooperation, Plaintiffs and members of the Settlement Class will relinquish any claims they have against Settling Defendants relating to TelexFree, including claims that were or could have been brought in this litigation. Base/Synovus Agreement ¶¶ 39-42; Craft Agreement ¶¶ 39-42.

The settlements permit the Settling Defendants to terminate their respective settlements if class members amounting to 25% or more of the class, calculated by number of members or by amount of payments to TelexFree, request exclusion. Base/Synovus Agreement ¶¶ 50-51, Craft Agreement ¶¶ 50-51. Only nine class members opted out of the settlement. Schachter Decl. ¶ 13. To date, Plaintiffs have not received notice from any of the Settling Defendants that they intend to terminate the settlements. Bonsignore Decl. ¶ 5. The deadline to exercise these termination rights was June 29, 2020.⁴

(Base/Synovus Agreement). For ease of reading, the agreements are directly cited in this memorandum.

⁴ The deadlines are determined from the date Plaintiffs provided notice of the class members requesting exclusion. The Settling Defendants had ten days from such notice. Base Agreement ¶ 51; Craft Agreement ¶ 51. Plaintiffs provided the list to counsel for the Settling Defendants directly via email on June 19, 2020. Schachter Decl. ¶ 15.

III. ARGUMENT

A class action may only be settled with court approval. Fed. R. Civ. P. 23(e). Where a settlement will bind class members, the court must hold a hearing and must find that the settlement is fair, reasonable, and adequate. *Id.* In making this finding, the Court should consider whether:

- (A) the class representatives and class counsel have adequately represented the class;
- (B) the proposal was negotiated at arm's length;
- (C) the relief provided for the class is adequate, taking into account:
 - (i) the costs, risks, and delay of trial and appeal;
 - (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
 - (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
 - (iv) any agreement required to be identified under Rule 23(e)(3); and
- (D) the proposal treats class members equitably relative to each other.

Id. Courts “enjoy great discretion to ‘balance [a settlement’s] benefits and costs’ and apply this [fair, reasonable, and adequate] standard.” *Voss v. Rolland*, 592 F.3d 242, 251 (1st Cir. 2010) (quoting *Nat’l Ass’n of Chain Drug Stores v. New England Carpenters Ass’n*, 582 F.3d 30, 45 (1st Cir. 2009)).

Where, as here, the settlement provides for certification of a settlement class, the Court must also ensure that the elements of Rule 23(a) and at least one branch of Rule 23(b) are met. Rule 23(a) requires numerosity (Fed. R. Civ. P. 23(a)(1)); commonality in the questions of law or fact (*Id.* at 23(a)(2)); typicality in the claims or defenses of the representative parties and the class (*Id.* at 23(a)(3)); and that the representative parties will “fairly and adequately protect the interests of the class.” *Id.* at 23(a)(4). Rule 23(b)(3) allows for class actions where common questions of law or fact predominate over individual questions and “where a class action is superior to the other available methods for fairly and efficiently adjudicating” the case. *Id.* at 23(b)(3).

A. The Settlement Class Should be Certified

The Court's Preliminary Approval Order provisionally certified a Settlement Class consisting of persons who purchased TelexFree AdCentral or AdCentral Family packages and suffered a Net Loss during the period from January 1, 2012 to April 16, 2014 and submit to the jurisdiction of the MDL 2566 Court. Prelim. Approval Order ¶ 19. A "Net Loss" means that the class member invested more funds than they withdrew. *Id.* In provisionally certifying the Settlement Class, this Court held that each of the elements for certification of a Rule 23(b)(3) Settlement Class were met. *Id.* at ¶ 21.

The Court should now certify the Settlement Class. As set forth in detail in Plaintiffs' Motion, the Settlement Class meets all the criteria for certification as a Rule 23(b)(3) Settlement Class. Mot. 15-20. The Court has already found that each required element is met and, following notice, no class member has objected to the Settlement Class definition. Prelim. Approval Order ¶ 21; Schachter Decl. Ex. 2.

B. The Settlements are Fair, Reasonable, and Adequate and Should Be Approved

The Court preliminarily approved the settlements as "appearing on their face to be fair, reasonable, and adequate." Prelim. Approval Order ¶ 3. The settlements meet the requirements of Rule 23 and final approval is supported by the Settlement Class.

1. The Class Representatives and Class Counsel Have Adequately Represented the Class

Class Counsel and the Class Representatives have worked hard since these cases were first filed in 2014 to represent the interests of the class and zealously litigate this case. This fact was recognized in the Court's Preliminary Approval Order. *Id.* at ¶ 4 (noting that class counsel "have zealously represented the putative class") and ¶ 20 (appointing class representatives).

Since entry of the Court's Preliminary Approval Order, Class Counsel have continued this zealous representation, including engaging in formal written discovery, drafting motions, obtaining the opinions of experts, presenting the proposed Fifth Consolidated Amended Complaint and continuing to participate in settlement negotiations with other defendants. Bonsignore Decl. ¶ 6.

The Class Representatives and Class Counsel have adequately represented the class and this factor weighs in favor of final approval of the settlements.

2. The Settlements Were Negotiated at Arm's-Length

The settlements were negotiated at arm's-length over a significant period of time. Mot. 10-11; Dkt. No. 763-1 ¶¶ 15-22; Prelim. Approval Order ¶ 3. This factor also weighs in favor of final approval of the settlements.

3. The Relief Provided for the Class is Fair, Reasonable, and Adequate

The settlements provide for a total cash recovery of \$2.1 million and the cooperation of the Settling Defendants, as set forth in their respective settlement agreements. These settlements also serve as an ice-breaker, incentivizing other defendants to come to the settlement table. *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 643 (E.D. Pa. 2003). The relief provided for the class is fair, reasonable, and adequate and comports with the criteria outlined in Rule 23.

First, the costs, risks and delay are profound in complex class action litigation. *See In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 14-cv-2058 JST, 2015 WL 9266493, *4 (N.D. Cal. Dec. 17, 2015) (collecting cases). This case is already six years old and the docket has reached over 1000 entries at the motion to dismiss stage. *See* § II(a), *supra*. Plaintiffs are awaiting an order on their motion to amend, and discovery, related *Daubert* motions and, finally, trial and

any appeals remain. Settlement now avoids this extended litigation and secures a cash recovery for the class.

Cooperation pursuant to the settlement agreement is also valuable in lowering the cost and difficulty of securing the evidence needed to pursue the litigation against the remaining Defendants. See *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2015 WL 9266493 at *6; *In re Processed Egg Products*, 284 F.R.D. 278, 303-05 (E.D. Pa. 2012); *In re New Motor Vehicles Canadian Export Antitrust Litig.*, MDL No. 1532, 2011 WL 1398485, *3 n.17 (D. Me. Apr. 13, 2011) (supplemented by 800 F. Supp. 2d 328 (D. Me. Aug. 1, 2011)); Synovus Mem. on Preliminary Approval of Settlements 5 (Dkt. No. 768) (acknowledging the convenience and cost benefit of cooperation commitments).

Second, Plaintiffs have proposed deferring distribution of the settlement fund until after further funds are secured to minimize administrative expenses and to ensure the maximum recovery for class members. Mot. 13-14. This approach is common in complex class actions involving multiple defendants. Any plan of allocation will be informed by the ultimate size of the settlement fund and will be submitted to the Court for approval (Base/Synovus Agreement ¶ 59; Craft Agreement ¶ 59). Class members will have the opportunity to comment on or object to the proposed allocation. The Court's Preliminary Approval Order also anticipates an administrative dispute resolution process for claims both involving the claims administrator and allowing for an appeal to class counsel. Prelim. Approval Order ¶ 18. Finally, the class received notice of this approach and no objections were received to the proposed deferral. The Class Notice specifically explained:

8. When can I get a payment?

No money will be distributed to any Class Member yet. The lawyers will continue to pursue the lawsuit against the other, non-settling Defendants to see if any future settlements or judgements can be obtained in the case and then the funds will be

distributed in the best method available in order to reduce administrative expenses.

The plan of distribution for the settlement funds will depend on the total amount recovered from the Defendants, attorney fees and case costs. You will be notified when and how to submit a claim. The plan of distribution for the settlement funds must be approved by the Court before the funds can be distributed.

Schachter Decl., Ex. 1 (Class Notice); Ex. 2 (Objections). This factor weighs in support of final approval.

Third, Plaintiffs' Motion for Preliminary Approval and the Class Notice indicated that Plaintiffs would seek attorneys' fees, costs, and incentive awards from this settlement fund. Mot. 14; Notice 8 (Explaining class counsel would seek \$700,000 in attorneys' fees, plus reimbursement of costs, the actual cost of class notice, and \$125,000 in incentive awards). While attorneys' fees are properly paid from a common settlement fund, Plaintiffs have elected to request only reimbursement of certain litigation expenses from this settlement fund and defer any request for attorneys' fees or incentive awards to a later point in this litigation. This factor weighs in support of final approval.

Fourth, Rule 23(e)(3) requires that parties seeking approval of a settlement must identify any agreement made in connection with the proposal. The settlement agreements set forth the terms of the settlements and no other agreements have been made. Mot. 14; Dkt. No. 763-1 ¶ 36. This factor weighs in support of final approval.

In short, the relief provided for the class is fair, reasonable, and adequate and supports final approval of the settlements.

4. The Settlement Treats Class Members Equitably

The settlements provide for a single settlement class, with no subclasses. No class members are favored under the terms of the settlements and any plan of distribution will apply

objective terms, such as *pro rata* weighting, to distribute funds in accordance with class members' respective losses. The Class Representatives do not seek incentive awards for their representation of the class to date.

5. The Class Response Supports Final Approval of the Settlements

Pursuant to the Court's Preliminary Approval Order, the Claims Administrator emailed notice of the settlements to potential class members and established a case-dedicated website and toll-free telephone number. Schacter Decl. ¶¶ 4, 10, 11. Of the 930,629 potential class members emailed, only nine requested exclusion from the settlement and only four objections were received. *Id.* at ¶¶ 12-13. That is, 0.00097% of the class requested exclusion and 0.00043% of the class objected to the terms of the settlement.

The four objections to the settlements should be overruled. One objection expresses possible concern about the size of the settlement and the potential recovery for all class members. *Id.* Ex 2 (Objection 2). The settlement is an ice breaker; the cooperation of TelexFree's CFO has provided, and will continue to provide, powerful evidence that will advance Plaintiffs' cause; and the amounts of settlement were reached after in-depth consideration by experienced counsel of the liability of the Settling Defendants, their respective ability to pay, and the requirement that Base Commerce indemnify Synovus Bank, among other issues. Mot. 11-13. These are also the first settlements in the litigation and, with numerous remaining Defendants and joint and several liability, the class can still seek recovery from the other Defendants. The Settlement Agreements also provide that the accuracy of the financial information provided to Plaintiffs is a material term of the settlements (Base Agreement p. 2; Craft Agreement p. 2), while the Craft Agreement expressly provides a remedy for Plaintiffs should additional TelexFree-related income be uncovered in the future. Craft Agreement p.2.

The other objections received do not squarely address these settlements. One appears to request that the attorneys be paid from the settlement funds rather than by the class member personally. Schachter Decl. Ex. 2 (Objection 1). This is already the case. The other two objections appear to address issues with the claims process in the bankruptcy proceedings and are more properly directed to the Bankruptcy Trustee. *Id.*, Ex. 2 (Objections 3-4).

C. The Court-Approved Notice Program Satisfies Due Process and Has Been Fully Implemented

The Court-approved notice plan satisfies due process. *See*, § II(b), *supra*. Federal Rule of Civil Procedure 23(c)(2)(B) requires that the Court “direct to class members the best notice that is practicable under the circumstances.” Fed. R. Civ. P. 23(c)(2)(B). This notice process may be through “United States mail, electronic means, or other appropriate means.” *Id.* “‘Individual notice of class proceedings is not meant to guarantee that every member entitled to individual notice receives such notice,’ but ‘it is the court’s duty to ensure that the notice ordered is reasonably calculated to reach the absent class members.’” *Reppert v. Marvin Lumber & Cedar Co., Inc.*, 359 F.3d 53, 56 (1st Cir. 2004) (quoting *Hallman v. Pa. Life Ins. Co.*, 536 F. Supp. 745, 748-49 (N.D. Ala. 1982)).

The notice plan implemented by A.B. Data was designed in response to TelexFree’s internet-based business model, the broad geographical sweep of class members, and in light of the e-mail notice program used in the related bankruptcy proceedings. Mot. 21, Prelim. Approval Order ¶¶ 6, 11. A.B. Data utilized industry best practices to avoid SPAM and junk filters and maximize deliverability of the email notice. Schachter Decl. ¶ 6. Of the 930,629 email addresses to be sent email notice of the settlements, 184,561 emails were ultimately undeliverable. *Id.* at ¶¶ 7-9. Thus, email notice successfully reached approximately 80% of the email addresses.

In addition, A.B. Data established a case-specific website to publish the settlement notices as well as relevant pleadings and important dates and deadlines. *Id.* at ¶ 11. The notice plan as implemented is the best notice practicable under the circumstances and reasonably calculated to reach absent class members. This factor supports final approval of the settlement.

A settlement notice is a summary, not a complete source, of information. *See, e.g., Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1153 (8th Cir. 1999); *In re "Agent Orange" Prod. Liab. Litig. MDL No. 381*, 818 F.2d 145, 170 (2d Cir. 1987). The notice must clearly and concisely set out in plain language:

- (1) The nature of the action;
- (2) The definition of the class certified;
- (3) The class claims, issues, or defenses;
- (4) That a class member may enter an appearance through an attorney if the member so desires;
- (5) That the court will exclude from the class any member who requests exclusion;
- (4) The time and manner for requesting exclusion; and
- (5) The binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B).

The Court has already approved the notice and the notice plan. Prelim. Approval Order ¶¶ 5, 6, 11. The notice explained the nature of the action and the class claims, issues, and defenses. Schachter Dec., Ex. 1 ("Notice") 3-4. It defined the certified class and explained that a class member may enter an appearance through their own attorney if they wish. *Id.* at 4-6. It also explained that the Court will exclude from the class any member who requested exclusion, detailed the process and deadlines to request exclusion, and explained the binding effect of a class judgment on members should they choose to remain in the class. *Id.* at 6-7. It also explained that Plaintiffs would seek attorneys' fees and expenses. *Id.* at 8. The Notice also explained that the full settlement agreements were available to settlement class members online

at www.telexfreesettlement.com. *Id.* at 5. Consequently, every provision of the settlements was available to class members. The notice provided to the class constitutes valid, due, and sufficient notice to class members, is the best notice practicable under the circumstances, and supports final approval of the settlements.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter orders granting final approval of the settlements, certifying the settlement class, and granting final judgments of dismissal with prejudice as to the Settling Defendants.

Dated: July 8, 2020

Respectfully submitted,

TELEXFREE CLASS PLAINTIFFS

By their attorneys,

/s/ Robert J. Bonsignore

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CERTIFICATE OF SERVICE

I, Robert J. Bonsignore, hereby certify that on this 8th day of July 2020, I caused the foregoing together with the attachments identified in the associated MOTION FOR FINAL APPROVAL OF SETTLEMENTS WITH DEFENDANTS JOSEPH CRAFT AND CRAFT FINANCIAL SOLUTIONS, INC., BASE COMMERCE, LLC, SYNOVUS BANK, AND CERTAIN RELATED PARTIES to be electronically filed with the Clerk of the Court by using the Case Management/Electronic Case Filing (CM/ECF) system, which will send a notice of electronic filing to all parties registered with the CM/ECF system in the above-captioned matter. A copy will be forwarded via first class mail, postage prepaid, to those parties not electronically registered at their last and/or only known address.

/s/ Robert J. Bonsignore
Robert J. Bonsignore