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 PRELIMINARY APPROVAL OF SETTLEMENTS WITH DEFENDANTS JOSEPH CRAFT AND CRAFT FINANCIAL SOLUTIONS, INC., BASE COMMERCE, LLC, SYNOVUS BANK, AND CERTAIN RELATED PARTIES

I. INTRODUCTION

Plaintiffs Waldamara Martin, Igor Shikhman, Tyzza Hartman, Edivaldo A. Reis and Rita Dos Santos (together "Plaintiffs" or "Proposed Class Representatives") have reached three settlements which encompass the claims against twelve parties, nine of which are Defendants and three of which are related third-parties. The first is with Defendants Joseph Craft and Craft Financial Solutions, Inc. (the "Craft Defendants") and related parties BWFC Processing Center, LLC, ACE LLP and Audra Craft (collectively with the Craft Defendants, the "Craft Parties"). The second is with Defendants Base Commerce, LLC ("Base Commerce"), John Hughes, Brian Bonfiglio, John Kirchhefer, and Alexander Sidel (together with Base Commerce, the "Base Commerce Defendants") and the third is with Synovus Bank (together with the Base Commerce Defendants, the "Base/Synovus Defendants" and together with the Craft Parties, the "Settling Defendants/Related Parties"). These are the first settlements reached in this litigation and represent an excellent result for the class.

Both the Craft Parties and the Base/Synovus Defendants have offered cooperation that provides support for the soon-to-be-filed Fifth Consolidated Amended Complaint and committed to provide meaningful cooperation in Plaintiffs' continued prosecution of the class claims against

the non-settling Defendants. The Craft Defendants will pay the putative settlement class a total of $100,000. The Base/Synovus Defendants will pay the putative settlement class a total of $2,000,000. These settlements are the product of thorough and hard-fought negotiations between experienced and informed counsel. Plaintiffs move for orders preliminarily approving the settlements, provisionally certifying the settlement class, approving the form and manner of notice to the settlement class, appointing counsel for the settlement class, establishing a schedule for final approval, and staying the litigation with respect to the Settling Defendants/Related Parties through the final approval hearing. Plaintiffs also request that the Court set a schedule for Plaintiffs' application for attorneys' fees and expenses and for incentive awards and approve the administrative plan that addresses appeals by class members who are dissatisfied with their awarded compensation.

II. STATEMENT OF RELEVANT FACTS

A. The Procedural History

In mid-April 2014, TelexFree, LLC, TelexFree, Inc., and TelexFree Financial, Inc. declared bankruptcy. Thereafter, in June 2014, Waldamara Martin filed the first civil action against TelexFree. Other complaints followed in various district courts across the country alleging an illegal pyramid/Ponzi scheme. Attachment 1 - Declaration of Ronald A. Dardeno in Support of Motion for Preliminary Approval ("Dardeno Decl."), ¶¶ 4-5. In October 2014, the Judicial Panel on Multidistrict Litigation ("JPML") consolidated six actions from three districts and transferred them to this Court. Dkt. 1. In February 2015, the JPML transferred another action to this Court from the District of Arizona. Dkt. 86.

In March 2015, this Court granted Plaintiffs leave to file a master consolidated complaint that superseded the underlying complaints. Dkt. 110 (CMO No. 4). On April 30, 2015, Plaintiffs filed their Second Consolidated Amended Complaint (the "Second CAC"). Dkt. 141.

B. The Court-Imposed Stays

Near the outset of the litigation, the MDL 2566 Court stayed Plaintiffs' ability to obtain formal discovery. On December 12, 2014, the Department of Justice ("DOJ") filed a motion seeking a stay of all discovery pending resolution of its criminal cases against TelexFree's founders, Wanzeler and Merrill. Dkt. 62. On February 20, 2015, most of the Defendants that thereafter filed a motion to dismiss the Second CAC urged this Court to reject Plaintiffs' request to conduct discovery. Dkt. 94. On March 10, 2015, this Court granted the DOJ's motion and stayed all discovery subsequent to the Putative Class providing their Rule 26 disclosures to the Defendants but prior to the Defendants providing their Rule 26 Disclosures to the Putative Class. Dkt. 111; Dardeno Dec. ¶ 6.

On March 3, 2016, this Court entered a further order "staying all further action in this case until further notice" and directing Plaintiffs and their counsel to "take no further action" of any kind "until the stay is lifted by the Court." Dkt. 414. These stays remained in effect for nearly four years and prevented Plaintiffs from obtaining formal discovery from any Defendant and from taking any further action without leave of court.

C. Plaintiffs' Efforts to Obtain Information Informally

On May 20, 2015, Plaintiffs requested that this Court lift the stay on formal discovery to, *inter alia*, permit them to receive initial disclosures from the Defendants and the production of documents provided to the TelexFree bankruptcy trustee (the "Trustee") by certain bank and

payment processor Defendants pursuant to Federal Rule of Bankruptcy Procedure 2004. Dkt. 152. The MDL 2566 Court thereafter rejected the requests of the Putative Class.

On October 26, 2015, Plaintiffs filed a motion to allow them to serve a subpoena upon the Trustee to obtain the Rule 2004 materials. Dkt. 310. On November 16, 2015, certain financial services providers opposed the motion, arguing that discovery should be stayed until a ruling was issued on their pending motions to dismiss and that Plaintiffs were not entitled to the Trustee's Rule 2004 materials. Dkt. 339. On May 26, 2017, the Court partially modified the stay on discovery to allow Plaintiffs to serve a subpoena upon the Trustee. Dkt. 494.

On May 26, 2017, the Court also granted Plaintiffs' motion to partially modify the stay to allow Plaintiffs to file a Fourth Consolidated Amended Complaint ("Fourth CAC"). Dkt. 495. On June 6, 2017, Plaintiffs filed their Fourth CAC to name additional Defendants they possessed sufficient evidence to proceed against.[1] Dkt. 503. The Fourth CAC made no alterations to the substantive allegations against any Defendants named in the Second CAC.

On June 22 and June 28, 2017, several Defendants filed motions to quash the subpoena Plaintiffs had served on the Trustee, seeking to keep the blanket stay on discovery even though the subpoena required no effort at all to be expended by any of them. Dkt. 507, 509. Plaintiffs opposed that motion and cross-moved to compel. Dkt. 510. On August 9, 2017, the Trustee produced to Plaintiffs a very narrow and limited set of documents. Trustee Darr refused to produce any documents he alleged to be subject to a confidentiality agreement or requested in the subpoena of the putative class. Dardeno Decl. ¶ 13. Plaintiffs' motion to compel the Trustee to produce the documents withheld in violation of this Court's order remained pending until the

[1] A third consolidated amended complaint to include an unjust enrichment claim against a defendant class of top promoters was denied by this Court on January 15, 2016. Dkt. 379.

Certain Defendants' Motion to Quash was denied on September 23, 2019.[2] Dkt. 752. Only within the last few weeks did the Trustee produce documents in accordance with this Court's September 23, 2019 order, and the Putative Class is presently reviewing that production.[3] Dardeno Decl. ¶ 14.

D. The Parties' Efforts to Reach a Settlement

Plaintiffs and the Base/Synovus Defendants engaged in continued, and occasionally contentious, arm's-length settlement negotiations concerning the scope and extent of the Base/Synovus Defendants' monetary payments, the scope and timing of the litigation cooperation, the ESI protocol, and the form of the stipulated protective order. Dardeno Decl. ¶¶ 15, 21. This process involved numerous meetings and telephone calls between the parties over an extended period. Dardeno Decl. ¶21. On more than one occasion, Plaintiffs walked away from the settlement discussions. Id. ¶ 22.

Plaintiffs and the Craft Defendants also engaged in arm's-length settlement negotiations that involved numerous meetings and telephone calls between the parties over an extended period. *Id.* ¶¶ 15-18. The parties exchanged multiple drafts of the proposed settlement agreement and heavily negotiated its terms. *Id.* ¶ 20.

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[2] Certain Defendants for purposes of the Motion to Quash consisted of Bank of America, N.A., Fidelity Co-Operative Bank, Citizens Bank, TD Bank N.A., Wells Fargo Bank N.A., PricewaterhouseCoopers LLP, Propay, Inc., and International Payout Systems.

[3] The obstacles in obtaining those documents underscores the value of Defendant Craft (TelexFree's former CPA and CFO) as well as Base Commerce and Synovus Bank. Synovus notified Base Commerce it would not do further business with TelexFree within 30 days of beginning to serve it. Moreover, the Base Commerce Defendants possess and can offer evidence as a payment processor who described TelexFree as a "hot potato" and whose services TelexFree admitted were essential to its continued operation. They are also able to establish MDL 2566 jurisdiction over a previously dismissed Defendant.

III. THE TERMS OF THE SETTLEMENTS

The parties have entered into written agreements outlining the terms of their settlements. Dardeno Decl. Ex. 1 ("Craft Agreement"), Dardeno Decl. Ex. 2 ("Base/Synovus Agreement") (collectively, the "Settlement Agreements"). Importantly, the Settling Defendants/Related Parties have offered cooperation. The Settling Defendants/Related Parties have also agreed to cash settlements that will be paid into an escrow account established for the benefit of the class members. Base/Synovus Agreement ¶¶ 10-12 (Base Commerce Defendants-$1,575,000; Synovus Bank-$425,000); Craft Agreement ¶¶ 10-11 ($100,000). The total payment by Base Commerce exceeds available insurance.[4]

The Craft Defendants must cooperate with Plaintiffs by, among other things, providing documents in their possession, making Joseph Craft available for formal and informal interviews, providing comprehensive affidavits from Joseph Craft, and, if necessary, providing one or more witnesses to appear at trial. Craft Agreement ¶¶ 13-38.

The Base Commerce Defendants must cooperate with Plaintiffs by, among other things, providing information as well as affidavits and a chart from John Hughes,[5] testimony from witnesses, and all discoverable documents in their possession, and, if necessary, providing one or more witnesses who has personal knowledge of admissible evidence to appear at trial. Base/Synovus Agreement ¶¶ 13–20, 22, 24–35. Synovus Bank must cooperate with Plaintiffs by, among other things, providing informal and formal discovery, including interviews and testimony from key witnesses, and, if necessary, providing one or more witnesses who have

[4] To date, at least three Defendants have entered into bankruptcy: Jay Borromei, Opt 3 and Allied Wallet, LTD UK.

[5] Mr. Hughes already has begun cooperating by providing Plaintiffs with a lengthy affidavit detailing key facts related to his interactions with TelexFree and others on Base Commerce's behalf. Dardeno Decl. ¶ 28.

personal knowledge of admissible evidence to appear at trial. Base/Synovus Agreement ¶¶ 13–19, 21–25, 27–35.

In return for the settlement payments and the Settling Defendants'/Related Parties' full cooperation, Plaintiffs and members of the settlement class will relinquish any claims they have against the Settling Defendants/Related Parties relating to TelexFree, including claims that were or could have been brought in this litigation.[6] Craft Agreement ¶¶ 39-42; Base/Synovus Agreement ¶¶ 39–42.

The Settlement Agreements become final upon (1) the Court's approval pursuant to Rule 23(e) and entry of a final judgment of dismissal with prejudice and (2) the expiration of the time for appeal or, if any appeal is taken, the affirmance of the approval and judgment with no further possibility of appeal. Craft Agreement ¶ 48; Base/Synovus Agreement ¶ 48.

Subject to Court approval and direction, the proceeds of the settlement, plus accrued interest, will be used to (1) make a distribution to settlement class members in accordance with a proposed allocation plan (Base/Synovus ¶ 59; Craft Agreement ¶ 59); (2) pay notice costs and costs incurred in settlement administration (Base/Synovus Agreement ¶¶ 12(d), 52–57 (up to a maximum of $200,000); Craft Agreement ¶¶ 12(d), 52-57 (up to a maximum of $100,000)); (3) pay class counsel's attorneys' fees, costs and expenses as awarded by the Court and incentive awards to class representatives (Base/Synovus Agreement ¶¶ 60–62; Craft Agreement ¶¶ 60-62); and (4) pay taxes on any interest earned on the escrow account (Base/Synovus ¶ 12(e); Craft Agreement ¶ 12(e)).

Settling Defendants/Related Parties have the right to terminate their settlements within

[6] Jason Doolittle is not a party to the Settlement Agreement, but he is being released/dismissed as a former officer of Base Commerce pursuant to the terms of the Base/Synovus Settlement Agreement.

ten days of receipt of requests for exclusion 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. Craft Agreement ¶¶ 50-51; Base/Synovus Agreement ¶¶ 50-51.

IV. ARGUMENT

Class actions may only be settled with the court's approval. Fed. R. Civ. P. 23(e). Before notice of a settlement may be given to the class, the court must find that "giving notice is justified by the parties' showing that the court will likely be able to (1) approve the proposal under Rule 23(e)(2); and (2) certify the class for purposes of judgment on the proposal." *Id.* at (e)(1)(B). Notice to the class is appropriate here, where the Settlement Agreements meet the requirements for approval by the Court under Rule 23(e)(2) and settlement class certification.

A. The Settlements Warrant Preliminary Approval Pursuant to Rule 23(e)(2).

Rule 23(e)(2) requires that, where a settlement would bind class members, "the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

> (A) the class representatives and class counsel have adequately represented the class;
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> (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."

Fed. R. Civ. P. 23(e)(2). "The central concern in reviewing a proposed class-action settlement is that it be fair, reasonable, and adequate." Advisory Committee Notes to 2018 Amendments to

Fed. R. Civ. P. 23. "The goal of this amendment is not to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal." *Id.* However, "[a]t the preliminary approval stage, the court is simply determining whether it is 'likely' these . . . requirements for settlement approval will be met at the final approval stage." 4, *Newberg on Class Actions* § 13:14 (procedural requirements), § 13:15 (substantive requirements) (5th ed.) (June 2019 Update).

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

When evaluating adequate representation under Rule 23(e)(2)(A), "the focus at this point is on the actual performance of counsel acting on behalf of the class." Advisory Committee Notes to 2018 Amendments to Fed. R. Civ. P. 23. Class counsel and the Proposed Class Representatives here have zealously represented the class to date and will continue to do so.

Even before the underlying cases were filed, Proposed Class Representative Martin brought the litigation to Lead Counsel's attention prior to the government raid and shuttering of TelexFree's worldwide headquarters, repeatedly met with him, provided evidence and facilitated the coming forward of other victims. Dardeno Decl. ¶ 29. She also prompted and cooperated in gathering information that enabled the near immediate filing of the initial pre-MDL complaint. *Id.* Other Proposed Class Representatives have provided, on a continuing basis, essential and indispensable information that was of particularly great use during the four-year DOJ and SEC-demanded stay. *Id.* ¶ 30. For example, Igor Shikhman's assistance includes, but is not limited to, the discovery and early attachment of approximately $8 million of assets that Defendant Daniil Shoyfer unlawfully obtained through the TelexFree scheme. *Id.* ¶ 31; Dkt. 138-39. All have attended court hearings, fully cooperated and gone the extra distance. *Id.* ¶ 30.

Class counsel have worked with the Proposed Class Representatives to zealously represent the class and address the particular challenges of this litigation. Class counsel's work

on behalf of the class will be more fully presented in their proposed Motion for Attorneys' Fees, Costs, and Class Representative Incentive Awards; however, representation of the class to date has included (1) filing and amending complaints as facts were discovered; (2) opposing motions to dismiss and for reconsideration filed by numerous named defendants; (3) investigating and analyzing facts outside any formal discovery process to inform and guide the litigation, including reviewing and coding millions of documents; (4) retaining, consulting with, otherwise working for motion practice and trial preparation purposes with experts in the fields of banking, payment processing, legal malpractice, accounting, and economics to guide and inform the litigation; (5) participating in formal mediation and informal negotiations with the Trustee; (6) ongoing settlement negotiations with counsel for the Settling Defendants to reach strong results for the class; and (7) reviewing proffered sworn testimony and other evidence. *Id.* ¶ 32.

In sum, and especially in light of the hardships presented by the stays and the non-receipt of the Rule 26 disclosures, the Proposed Class Representatives and class counsel have more than adequately represented the class to date and meet the requirements of Rule 23(e)(2)(A).

2. The Settlement Agreements Are the Result of Protracted, Arm's-Length Negotiations.

The settlements are the product of good faith, arm's-length negotiations among experienced and well-informed counsel. *See, supra,* § II(D); Dardeno Decl. ¶¶ 15-22. The parties engaged in continued and occasionally contentious negotiations involving numerous meetings and telephone conferences over an extended period of time. *Id.* While the formal discovery process has only recently begun, courts have recognized the validity of informal discovery methods and the experience of counsel in ensuring settlements are the result of informed negotiations. *See, e.g., In re Processed Egg Products Antitrust Litig.*, 284 F.R.D. 278, 299 (E.D. Pa. 2012). Here, Plaintiffs' extensive use of informal discovery methods to draft the complaints

and discover responsible parties and viable legal claims as well as their review and knowledge of the Settling Defendants' financial standing allowed counsel to understand the strengths and weaknesses of their case against them during settlement negotiations.[7] Dardeno Decl. ¶¶ 33-34. Plaintiffs also hired an expert to review the liquidity of the Settling Defendants and concluded that settlement with cooperation and some funds was in the best interests of the class as to these Defendants. *Id.* ¶ 32. Additionally, Plaintiffs have closely followed the related TelexFree bankruptcy and criminal proceedings to further inform and guide strategy and negotiations in this litigation. *Id.* ¶ 35.

3. The Relief Provided for the Class Is Adequate and Supports Approval.

The Settlement Agreements impose cooperation requirements on the Settling Defendants/Related Parties. Base/Synovus Agreement ¶¶ 13-35; Craft Agreement ¶¶ 13-38. Cooperation is a recognized benefit during class action litigation, and it is particularly valuable in the present setting where the case is five years old, formal discovery has only recently begun and most of the Defendants are still actively litigating the case. Cooperation "may save time, reduce the [Plaintiffs'] costs, and provide information, witnesses, and documents that the [Plaintiffs] may otherwise not be able to access." *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. 14-cv-2058, 2015 WL 9266493 at *6 (N.D. Cal. Dec. 17, 2015); *see also In re Processed Egg Products*, 284 F.R.D. at 303-305 (recognizing value of cooperation "in light of the risks in proceeding . . . against the remaining Defendants" and granting final approval of settlement with no monetary recovery); *In re New Motor Vehicles Canadian Export Antitrust Litig.*, MDL No.

[7] The truth and completeness of Base Commerce's presented financial documents are material settlement terms. Base/Synovus Agreement 2. Similarly, if the Craft Defendants are found to have directly or indirectly received undisclosed substantial income or benefit from TelexFree, their settlement agreement is null and void. Craft Agreement, 3.

1532, 2011 WL 1398485, at *3 n.17 (D. Me. Apr. 13, 2011) (recognizing the "important value" of defendants' "promised cooperation in discovery during the ongoing litigation.")(supplemented by 800 F. Supp. 2d 328 (D. Me. Aug. 1, 2011)).

The Base/Synovus Agreement provides for a total cash payment of $2,000,000 to the class and the Craft Agreement provides for a total cash payment of $100,000. These are the first settlements in this litigation and represent the first recovery for the proposed MDL 2566 settlement class after five years in suit. While the cash value of the settlements may be low compared to the potential total damages at issue, the cash amount is appropriate in light of counsel's analysis of the Settling Defendants'/Related Parties' financial standing, the risks of continued litigation, and the cooperation and evidence provided. Courts recognize that "frequently, the plaintiff gives a break to the first settling defendant, puts some money in the bank, and aims for a higher judgment against non-settling defendants." *TMTV, Corp. v. Mass Productions, Inc.*, 645 F.3d 464, 472 (1st Cir. 2011). The Settling Defendants conduct will remain in the litigation as a potential basis for liability and damages against non-settling defendants and any joint and several liability claims. Base/Synovus Agreement ¶ 71; Craft Agreement ¶ 71. The value of these first settlements is further increased by their potential to serve as an "ice-breaker." *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 643 (E.D. Pa. 2003) (a "settlement has significant value as an 'ice-breaker' settlement—[when] it is the first settlement in the litigation—and should increase the likelihood of future settlements.").

Costs, Risks, and Delay of Trial and Appeal: Complex class action litigation can be time-consuming and expensive for the class. *In re Cathode Ray Tube*, 2015 WL 9266493, at *6 (N.D. Cal. Feb. 13, 2017) ("[P]reparing for trial would itself be expensive and further delay any recovery to the class members."). This litigation began in 2014 and has been subject to an

extended stay. Dkt. 111, 414. In weighing the settlement, Plaintiffs have considered, *inter alia*, (1) Base Commerce's recommendation of TelexFree as a customer to Synovus Bank; (2) Synovus Bank's relatively brief servicing and prompt closure of all TelexFree accounts; (3) the Court's Order granting Synovus Bank's motion to dismiss (Dkt. 599); (4) Base Commerce's contractual obligation to indemnify Synovus Bank; (5) Base Commerce's ability to pay based on counsel's review of its relevant financial records; (6) the fact the settlement exhausts Base Commerce's related insurance policy and requires them to contribute out-of-pocket funds; (7) the Craft Parties' ability to pay; (8) the need for timely discovery to support the Fifth Consolidated Amended Complaint and otherwise advance the litigation; (9) the nature and extent of the evidence and cooperation offered by the Settling Defendants/Related Parties; and (10) the cost and risk for the class of continuing to litigate the case through trial against the Settling Defendants/Related Parties. While Plaintiffs are confident in their position in this litigation, after consideration of the above issues, among others, and in light of class counsel's extensive experience in class action and MDL litigation, Plaintiffs believe settlement is appropriate.

Effectiveness of Any Proposed Method of Distribution: Plaintiffs propose that any distribution to the class be made on a *pro rata* basis in line with class member's respective losses following a claims process. Pro rata allocation has been approved in numerous class action settlements. *See, e.g., In re Cathode Ray Tube*, 2015 WL 9266493, at *8. 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). The settlement funds may be used to defray future class wide expenses and thus provide a real and tangible benefit to the class. Class members will have the opportunity to comment on or object to the proposed allocation.

Plaintiffs propose delaying any distribution of these settlements to the putative class members until the litigation is concluded as to more, or all, Defendants. This will minimize the administrative expenses associated with distributing claims in light of the cash value of the present settlements, the costs involved in any claims process, and the class size. The class will also immediately benefit from the cooperation obligations imposed on the Settling Defendants/Related Parties.

The Proposed Award of Attorney's Fees Is Appropriate and Fair: Plaintiffs ask that the Court establish a briefing schedule for attorneys' fees, costs, and incentive awards pursuant to Rule 23(h). As will be detailed in the motion, the proposed attorneys' fees award amounting to one-third of the settlement fund is appropriate and fair in light of the work done over the last five years on behalf of the class and the results achieved. The proposed motion for attorneys' fees, costs and incentive awards would be filed and posted to the settlement website before the deadline for class members to opt out or object to the settlement to ensure that they have the opportunity to consider and comment on the proposed award ahead of the final fairness hearing.

There Are No Other Agreements Required to be Identified Under Rule 23(e)(3): Pursuant to Rule 23(e)(3), "[t]he parties seeking approval must file a statement identifying any agreement made in connection with the proposal." The Settlement Agreements detail the agreements reached between the parties. There are no other agreements connected with them. Dardeno Decl. ¶ 36.

4. The Settlement Agreements Treat Class Members Equitably.

The Settlement Agreements treat class members equitably. No class member is favored over any other under the terms of the Agreements and there are no proposed subclasses. Incentive awards are appropriate in class action litigation and do not render a settlement

inequitable. Any plan of distribution will apply objective terms, such as *pro rata* weighting, to distribute funds in accordance with class members' respective losses suffered.

B. The Court Should Provisionally Certify the Settlement Class, Appoint Plaintiffs as Class Representatives, and Appoint Plaintiffs' Counsel as Settlement Class Counsel.

When asked to certify a class, "[a] district court must conduct a rigorous analysis of the prerequisites established by Rule 23." *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 38 (1st Cir. 2003) (citation omitted). When conducting this analysis, "the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Waste Mgt. Holdings, Inc. v. Mowbray,* 208 F.3d 288, 298 (1st Cir. 2000) (citation omitted). "[W]hen '[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, for the proposal is that there be no trial.'" *Id.* (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)). However, the district court should "give heightened scrutiny to the requirements of Rule 23 in order to protect absent class members." *In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 88 (D. Mass. 2005) (citing *Amchem,* 521 U.S. at 620). "This cautionary approach notwithstanding, the law favors class action settlements." *Id.* (citing *City P'ship Co. v. Atl. Acquisition Ltd. P'ship,* 100 F.3d 1041, 1043 (1st Cir. 1996)).

Here, the Settlement Agreements contemplate certification of a settlement class consisting of all persons subject to the jurisdiction of the MDL 2566 Court who purchased TelexFree AdCentral or AdCentral Family packages and suffered a Net Loss during the period from January 1, 2012, to April 16, 2014. Net Loss is defined as the class member having invested more funds than they withdrew. Craft Agreement ¶ 6; Base/Synovus Agreement ¶ 6.

1. The Proposed Class Satisfies All Rule 23(a) Requirements.

The proposed settlement class meets all the Rule 23(a) requirements for certification: numerosity, commonality, typicality, and adequacy of representation. Fed. R. Civ. P. 23(a).

a. The settlement class is sufficiently numerous.

Before certifying a class, the court must be satisfied that "the class is so numerous that joinder of all members is impracticable[.]" *Id.* at 23(a)(1). "Courts have routinely found the numerosity requirement satisfied when the class comprises 40 or more members." *Vasquez v. Coast Valley Roofing, Inc.*, 670 F. Supp. 2d 1114, 1121 (E.D. Cal. 2009); *see also García-Rubiera v. Calderón*, 570 F.3d 443, 460 (1st Cir. 2009) (citing the 40-member threshold in finding that "the total number of individuals in the class far exceeds the low threshold for numerosity."); *In re Nexium (Esomeprazole) Antitrust Litig.*, 296 F.R.D. 47, 53 (D. Mass. 2013) (finding a class size below 30 members met the numerosity requirement).

Here, the settlement class easily satisfies the numerosity requirement because it includes hundreds of thousands of people who lost money through the TelexFree scheme. Joinder of all class members is likely impossible, not just impracticable.

b. The settlement class members' claims share common questions of law and fact.

The commonality requirement is met when "there are questions of law or fact common to the class[.]" Fed. R. Civ. P. at 23(a)(2). "While at least one common issue of fact or law at the core of the action must shape the class, Rule 23(a) does not require that every class member share every factual and legal predicate of the action." *In re Lupron,* 228 F.R.D. at 88. "The threshold of commonality is not a difficult one to meet." *In re Relafen Antitrust Litig.,* 231 F.R.D. 52, 69 (D. Mass. 2005). "A question is common if it is 'capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Parent/Professional Advocacy League v. City of Springfield, Mass.*, 934 F.3d 13 (1st Cir. Aug. 8, 2019).

Here, the settlement class members' claims share numerous common questions of law and fact. These common questions include, for example, whether TelexFree operated an unlawful business model and scheme; whether the named defendants aided and abetted TelexFree in its operation of an unlawful business model and scheme; and the measure of classwide damages. Although some variations between class members may exist, it is beyond dispute that common core questions of fact and law lie at the heart of this litigation and satisfy the requirements of Rule 23(a)(2).

c. *The class representatives' claims are typical of the settlement class members' claims.*

A class representative meets the typicality requirement if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "The representative plaintiff satisfies the typicality requirement when its injuries arise from the same events or course of conduct as do the injuries of the class and when plaintiff's claims and those of the class are based on the same legal theory." *In re Credit Suisse–AOL Sec. Litig.*, 253 F.R.D. 17, 23 (D. Mass. 2008). The purpose of the typicality requirement is "to align the interests of the class and the class representatives so that the latter will work to benefit the entire class through the pursuit of their own goals." *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions,* 148 F.3d 283, 311 (3d Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999). "Rule 23(a)(3), however, does not require that the representative plaintiff's claims be identical to those of absent class members." *In re Credit Suisse,* 253 F.R.D. at 23.

Here, Plaintiffs' injuries arise from the same course of uniform conduct as the absent class members and share the same legal theories for recovery. Each paid money to purchase a TelexFree package, was similarly defrauded by the TelexFree scheme and suffered an economic net loss. The Proposed Class Representatives' claims are typical of all members' claims.

d. *The class representatives and their chosen counsel adequately represent the class.*

The final prong of Rule 23(a) requires that the proposed class representatives "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "The moving party must show first that the interests of the representative party will not conflict with the interests of any of the class members, and second, that counsel chosen by the representative party is qualified, experienced and able to vigorously conduct the proposed litigation." *Andrews v. Bechtel Power Corp.*, 780 F.2d 124, 130 (1st Cir. 1985), *cert. denied*, 476 U.S. 1172 (1986).

Here, the Proposed Class Representatives' interests and objectives do not conflict with those of the absent class members. Every class member shares the interest of establishing liability against all parties responsible for the class members' losses and recovering as much of those losses as possible. The Proposed Class Representatives have devoted an extraordinary amount of time and effort to this litigation, subjected themselves to the public by lending their names and efforts to the pursuit of the putative class claims and not refused one request to assist.

Plaintiffs' counsel, who share these goals, are a group of diverse, experienced attorneys who have, and will continue to, pursue this action to its conclusion to maximize class recovery.[8] They have worked without compensation for five years and done a remarkable job, especially in light of the massive size and scope of TelexFree's fraudulent scheme and its related money laundering and movement of funds off shore, the stay imposed, and non-receipt of Rule 26 disclosures.

2. The Proposed Settlement Class Meets All Rule 23(b)(3) Requirements.

In addition to satisfying all Rule 23(a) elements, the parties in a class action must show that the proposed class meets the requirements of at least one of the Rule 23(b) prongs. A court

[8] Plaintiffs' counsel provided individual and/or firm resumes when applying to be appointed interim class counsel near the MDL's outset (Dkt. 21) and will, should the Court require it, submit updated individual and/or firm resumes.

may certify a class pursuant to Rule 23(b)(3) when "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

a. Common questions of law and fact predominate over any individual questions.

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem,* 521 U.S. at 623. Even if some individual issues arise in the course of litigation, "Rule 23(b)(3) requires merely that common issues predominate, not that all issues be common to the class." *In re M3 Power Razor System Marketing & Sales Practice Litig.*, 270 F.R.D. 45, 56 (D. Mass. 2010) (quoting *Smilow,* 323 F.3d at 39). Indeed, "[p]redominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws." *Amchem*, 521 U.S. at 625. As outlined above, the common core of factual and legal questions shared by Plaintiffs and all class members easily predominates over any potential individual differences.

b. A class action is the superior procedural vehicle to fairly and efficiently adjudicate class members' claims.

Certification under Rule 23(b)(3) also requires "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). A non-exhaustive list of factors courts should consider include:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> (D) the likely difficulties in managing a class action.

Id. at 23(b)(3)(A)–(D).

In this case, with hundreds of thousands of potential plaintiffs, most of whom have relatively small individual claims, a class action is the only realistic mechanism for the courts to address these claims. First, the lack of any other filed cases suggests that class members have little (or no) interest in individually controlling their claims. Second, the JPML consolidated the actions seeking redress for members' losses from the TelexFree scheme nationwide before this Court. Finally, any potential case management difficulties are not implicated by this settlement-only class certification as "the proposal is that there be no trial." *Amchem*, 521 U.S. at 620. Accordingly, Plaintiffs request an order conditionally certifying the proposed settlement class.

C. The Proposed Form and Manner of Notice Comply with Rule 23.

Rule 23(e)(1)(B) requires that the court direct notice of a proposed class action settlement "in a reasonable manner to all class members who would be bound by the proposal[.]" Notably, Rule 23(c)(2)(B) makes clear that notice "may be by . . . electronic means[.]"

"'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) (citation omitted). Plaintiffs have retained one of the most reputable class notice firms in the United States – A.B. Data. Ltd. A.B. Data Ltd. has administered hundreds of class action cases involving billions of dollars in total settlements. *See* Attachment 2 - Declaration of Eric Schacter ("Schacter Decl.").

Plaintiffs also propose that the Notice, along with the Settlement Agreements, be posted to a website accessible to class members. The Amendments to Rule 23 specifically identify email

as an appropriate means of notice.[9] A.B. Data has confirmed that under the circumstances, notice by email to members of the settlement class meets the requirements of Rule 23 of the Federal Rules of Civil Procedure, satisfies the due process rights of the Class Members and that "digital means of providing notice by email is the best practicable under the circumstances. *See* Schacter Decl. ¶ 7.

TelexFree was largely an e-commerce and web-based fraud. TelexFree almost exclusively conducted its business via the internet and communicated with the proposed settlement class through electronic communications, making electronic notice particularly appropriate in this case. The Trustee has provided electronic notice multiple times with regard to the bankruptcy proceedings and has provided Class Counsel with that clean and thoroughly vetted list of email addresses for hundreds of thousands of potential class members. Dardeno Decl. ¶ 25. As such, the reasonable efforts in this case include prior communication efforts undertaken by the Trustee to an identical set of victims. Notice via email is consistent with the requirements of Rule 23 and is a material term of the Settlement Agreements. *See, e.g., In re Sony PS3 "Other OS" Litigation*, No. 10-cv-1811, 2017 WL 5598726, at *3 (N.D. Cal. Nov. 21, 2017) (approving notice plan consisting of email notice to class, publication on settlement website, and publication of notice in agreed online publications); Base/Synovus Agreement ¶¶ 52–57; Craft Agreement ¶¶ 52-57.

Rule 23(c)(2)(B) also sets forth the requirements for the form of the notice to the class:

> [t]he notice must clearly and concisely state in plain, easily understood language:
> (i) the nature of the action;
> (ii) the definition of the class certified;

[9] Notice by electronic means is now specifically mentioned in Rule 23(c)(2) as an appropriate means of providing notice to the class, assuming the proposed class has sufficient access to the internet. This amendment is consistent with the trend of courts, and society, to use electronic communications rather than traditional first-class mail.

(iii) the class claims, issues, or defenses;
(iv) that a class member may enter an appearance through an attorney if the member so desires;
(v) that the court will exclude from the class any member who requests exclusion;
(vi) the time and manner for requesting exclusion; and
(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Plaintiffs request that the Court approve the draft Notice attached hereto as Attachment 3 (Proposed Class Notice) (the "Notice"). The Notice explains the nature of the action and the class claims, issues, and defenses. Notice at 3-4. It defines the certified class and explains that a class member may enter an appearance through their own attorney if they wish. *Id.* at 4-5, 6. It also explains that the court will exclude from the class any member who requests exclusion, details the process and deadlines to request exclusion, and explains the binding effect of a class judgment on members should they chose to remain in the class. *Id.* at 6-7. It explains that Plaintiffs will seek attorneys' fees and states the maximum amount they will request will be one-third of the settlement fund or $700,000.00. *Id.* at 8. This amount is below the lodestar. It also sets forth that costs and incentive awards (in the amount of $125,000) will also be requested. *Id.* The Notice explains that the fee application will be filed and posted to the settlement website by a specific date and that class members may comment on or object to the fee application. *Id.*

D. Request to Set Final Fairness Hearing and Related Deadlines

Plaintiffs ask the Court to establish the following dates and deadlines related to the settlement approval process:

Event	Proposed Date/Deadline
Deadline to send notice via e-mail and publish on website; activation of telephone information system.	30 days after entry of Preliminary Approval Order
Last day for Plaintiffs to file motion for attorneys' fees, costs, and class representative incentive awards.	30 days after entry of Preliminary Approval Order

Event	Proposed Date/Deadline
Deadline to request exclusion from the settlement classes, object to settlements, object to Plaintiffs' application for an award of attorneys' fees and expenses and incentive awards, and/or file a notice of intention to appear at fairness hearing.	65 days after entry of the Preliminary Approval Order and 35 days after the publication of Notice
Deadline for Plaintiffs to provide a list of requests for exclusion to the Settling Defendants.	70 days after entry of Preliminary Approval Order and 5 days after Exclusion Deadline
Deadline for Settling Defendants to exercise right to withdraw from Settlement Agreement if opt-outs exceed 25% of the class	80 days after entry of Preliminary Approval Order and 10 days after receiving the Requests for Exclusion from the Settlement
Last day to file memorandum in support of final approval of settlements, reply brief in support of Plaintiffs' application for an award of attorneys' fees and expenses and incentive awards.	80 days after entry of Preliminary Approval Order and 35 days before the Hearing on Final Approval
Final Fairness Hearing	115 days after entry of Preliminary Approval Order and 35 days after the filing of the papers supporting Final Approval

E. Request for Stay of Settling Defendants' Obligations Pending Final Approval Hearing.

If approved, the settlements will resolve all class claims against the Settling Defendants/Related Parties. To avoid unnecessary expense and prevent the parties and counsel from devoting further time to these claims, Plaintiffs request a stay related to the Settling Defendants/Related Parties through the Final Fairness Hearing. Should the Court deny final settlement approval, Plaintiffs ask the Court to immediately lift this stay.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request orders: (1) preliminarily approving the Settlement Agreements; (2) provisionally certifying the settlement class and appointing Plaintiffs as class representatives and Plaintiffs' counsel as class counsel; (3) approving the proposed form and method of notice; (4) establishing dates for the final approval hearing and all related

deadlines; (5) setting a briefing schedule for Plaintiffs' Motion for attorneys' fees, costs and incentive awards; and (6) approving the administrative means for claimants to appeal their award if they are dissatisfied; and (7) staying the litigation with respect to the Settling Defendants/Related Parties through the Final Approval hearing. A proposed order is attached hereto as Attachment 4 (Proposed Order).

Dated: November 5, 2019

Respectfully submitted,

/s/ Robert J Bonsignore

Robert J. Bonsignore, Esq. (NH Bar No 21241)
Lisa Sleboda, Esq. (PA No. 71580)
Bonsignore Trial Lawyers, PLLC
3771 Meadowcrest Drive
Las Vegas, NV 89121
Telephone: 781-856-7650
Email: rbonsignore@class-actions.us
Email: lsleboda@class-actions.us

Plaintiffs' Interim Lead Counsel

Ronald A. Dardeno, Esq.
(BBO No. 548278)
Alexander D. Wall, Esq.
(BBO No. 688881)
Law Offices of Frank N. Dardeno, LLP
424 Broadway
Somerville, MA 02145
Telephone: 617-666-2600
Email: rdardeno@dardeno.com
Email: awall@dardeno.com

R. Alexander Saveri, Esq.
(CA Bar No. 173102)
Sarah Van Culin, Esq.
(CA Bar No. 293181)
Saveri & Saveri, Inc.
706 Sansome Street
San Francisco, CA 94111
Telephone: 415-217-6810
Email: rick@saveri.com

William Coulthard, Esq. (NV Bar No. 3927)
Michael J. Gayan, Esq. (NV Bar No. 11135)
Anna A. Karabachev (NV Bar No. 14387)
Kemp, Jones & Coulthard, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, NV 89169
Telephone: 702-385-6000
Email: a.karabachev@kempjones.com

William R. Baldiga, Esq.
(MA Bar No. 542125)
(NY Bar No. 4813846)
Brown Rudnick LLP
One Financial Center
Boston, MA 02110
Telephone: 617-856-8586
Email: wbaldiga@brownrudnick.com

D. Michael Noonan, Esq.
(NH Bar No. 8214)
(MA Bar No. 558247)
(VT Bar No. 4050)
(ME Bar No. 7240)
Christine Craig
Shaheen and Gordon
140 Washington Street
P.O. Box 977
Dover, NH 03821
Telephone: 603-871-4144
Email: mnoonan@shaheengordon.com

Plaintiffs Interim Executive Committee

CERTIFICATE OF SERVICE

I, Robert J. Bonsignore, hereby certify that on this 5th day of November, I caused the foregoing 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.

/s/ Robert J. Bonsignore
Robert J. Bonsignore