

**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 SETTLEMENT WITH FIDELITY CO-OPERATIVE BANK AND JOHN MERRILL**

I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 23(e) and this Court’s Order granting preliminary approval of the proposed settlement (Dkt. No. 1097), Plaintiffs now seek final approval of the settlement reached with Fidelity Co-Operative Bank and John Merrill (together the “Fidelity Defendants”).

As explained in detail in Plaintiffs’ Motion for Preliminary Approval (Dkt. Nos. 1055-56), the settlement is a strong recovery for the class—securing a significant cash settlement and cooperation that will provide important evidence essential to the advancement of Plaintiffs’ claims and the prosecution of this ongoing case.

This Court granted preliminary approval on November 6, 2020 and directed that notice be given to the Settlement Class. Dkt. No. 1097. Notice has been provided as ordered by the Court and the reaction of the class members overwhelmingly supports final approval of the settlement. To date, only eight of the over 700,000 potential class members to whom notice was sent have requested exclusion from the settlement and no objections have been filed. Declaration of Robert J. Bonsignore in Support of Final Approval, ¶ 49; Declaration of Eric Schachter in Support of Final Approval, ¶ 15-16.

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

II. FACTUAL AND PROCEDURAL HISTORY

The factual and procedural history of this case was set forth in detail in Plaintiffs' Memorandum in Support of Motion for Preliminary Approval of Settlements with Defendants Fidelity Co-Operative Bank and John Merrill (Dkt. No. 1056) (hereinafter "Motion" or "Mot."). Mot. 2-4. Plaintiffs focus here on the events since the Motion was filed to avoid repetition.

a. Litigation Developments

On July 28, 2020, the Court granted Plaintiffs' Motion for Final Approval of the settlements reached with Defendants Base Commerce, Synovus Bank, and Joseph Craft and several related parties and entered final judgment as to them. Dkt. Nos. 1057-1060. On the same day, the Court granted Plaintiffs' Motion for Litigation Expenses. Dkt. No. 1061.

On July 29, 2020, Plaintiffs sought leave to file a sur-reply to Wells Fargo Advisor's Motion to Compel. Dkt. No. 1064. Leave to file was granted and Plaintiffs filed their sur-reply on September 18, 2020. Dkt. Nos. 1077, 1080. Wells Fargo Advisor's Motion to Compel is now pending before the Court.

On August 6, 2020, Plaintiffs filed their reply memoranda in support of their pending Motion to Amend their complaint. Dkt. Nos. 1065-1071. On August 17, 2020, PNC Bank sought leave to file a sur-reply in opposition to Plaintiffs' Motion to Amend, which Mauricio Cardenas sought leave to join on August 21, 2020. Dkt. Nos. 1072-73. On August 26, 2020, the Estate of Babener filed a Motion to Strike Plaintiffs' reply memorandum submitted in support of

Plaintiffs' Motion to Amend as to the Babener Estate. Dkt. Nos. 1074-75. On September 16, 2020, this Court granted leave to file the sur-reply and Cardenas' motion for joinder. Dkt. Nos. 1077, 1078. PNC Bank filed its sur-reply on that same date. Dkt. No. 1079. The Babener-filed Motion remains pending before this Court.

On September 22, 2020, the Court heard argument on Plaintiffs' Motion to Amend. Dkt. Nos. 1083. This hearing continued over two further sessions, with arguments completed on October 14, 2020. Dkt. Nos. 1088 (October 7, 2020 hearing notes); 1091 (October 14, 2020 hearing notes). On October 22, 2020, Babener filed a supplemental opposition to the Motion to Amend, to which Plaintiffs responded. Dkt. Nos. 1092, 1093. Plaintiffs' Motion to Amend is now pending before the Court.

On October 29, 2020, the Court heard argument on Plaintiffs' Motion for Preliminary Approval of their settlement with Fidelity Co-Operative Bank and John Merrill. Dkt. No. 1094. On November 2, 2020, Plaintiffs submitted an amended Class Notice as directed by the Court at the preliminary approval hearing. Dkt. No. 1095. On November 6, 2020, the Court preliminarily approved the settlement, directed that Notice be given to the class, and scheduled a hearing on final approval. Dkt. Nos. 1096-97. On November 16, 2020, the Court clarified that Plaintiffs' fee briefing should be submitted by January 4, 2021. Dkt. No. 1098. Plaintiffs' fee brief is being submitted concurrently with this Motion for Final Approval.

b. Notice and Class Response

On November 24, 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. Schachter Decl. ¶ 5, Exhibit 1 ("Notice"). Stephen Darr, the bankruptcy trustee, was also sent the Class Notice via email. *Id.* A.B. Data sent

the class notice to 716,185 email addresses. Of these, 75,471 emails were ultimately undeliverable. *Id.* at ¶¶ 7-9.

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 previous settlements and their rights. *Id.* at ¶ 10. On November 23, 2020, A.B. Data updated the automated interactive voice response system to assist potential class members in understanding the terms of the Fidelity settlement and their rights. *Id.* at ¶ 11. Callers had the option to speak with a live operator during business hours if they needed further help, with assistance offered in five languages. *Id.* To date, the toll-free telephone number has received 1749 calls from potential class members, of whom 599 spoke to a live operator. *Id.* at 12.

On November 19, 2020, A.B. Data updated the case-specific website at www.telexfreesettlement.com to include the Fidelity settlement. The website featured a summary version of the class Notice on the homepage, a link to download pdf versions of the full class Notice and related court documents, a list of important dates, and contact information for A.B. Data and Lead Counsel. *Id.* at ¶ 13. The website also includes a translate function allowing for the website content to be translated into over 100 languages. *Id.* On December 29, 2020, at the direction of Lead Counsel, A.B. Data issued a press release via PR Newswire announcing the settlement. *Id.* at ¶ 14.

The deadline to object to the settlement or request exclusion is January 11, 2020. *Id.* at ¶¶ 15-16, Notice, 1. The Preliminary Approval Order directed that objections and any supporting papers be filed with the Clerk of the Court and that requests for exclusion be mailed to the Settlement Administrator. Dkt. No. 1097 ¶ 14; Notice, 6. To date, no objections have been filed

and no requests for exclusion or objections have been received by the Settlement Administrator or Lead Counsel. Schachter Decl. ¶¶ 15-16; *See* Bonsignore Decl. ¶ 49.

c. The Terms of The Settlement

The Fidelity Defendants agreed to pay a total of \$22,500,000 in exchange for dismissal with prejudice and a release of all claims asserted or that could have been asserted against them. Fidelity Settlement Agreement (Dkt. No. 1056-2).¹ In addition, the Fidelity Defendants will cooperate with Plaintiffs in the ongoing pursuit of this litigation, according to the terms of the Settlement Agreement. *Id.* at ¶¶ 14-20. In return for the settlement payment and full cooperation, Plaintiffs and members of the Settlement Class will relinquish any claims they have against the Fidelity Defendants relating to TelexFree, including claims that were or could have been brought in this litigation. *Id.* at ¶ 21.

The settlement permits the Fidelity Defendants to terminate their settlement if 50 or more of the settlement class members or any number of settlement class members alleging a net loss of \$500,000 or more opt out of the settlement. *Id.* at ¶ 33. To date, 8 class members have purported to opt out of the settlement. Schachter Decl. ¶ 16. The deadline to opt out of the settlement is January 11, 2021. *Id.* Plaintiffs will provide an update to the Court regarding opt-outs and/or objections after the deadline has passed. The Fidelity Defendants have the right to terminate the settlement within 10 days of receiving notice that 50 or more class members or class members alleging a net loss of \$500,000 or more opt out of the settlement. Fidelity Settlement Agreement ¶ 33.

¹ The full settlement agreement was submitted as part of Plaintiffs' Preliminary Approval Motion at Dkt. No. 1056-2. For ease of reading, the agreement is directly cited in this memorandum.

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. Dkt. No. 1097, ¶ 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 to date. Dkt. No. 1097, ¶ 21; Schachter Decl. ¶ 16; Bonsignore Decl. ¶ 49

B. The Settlement Is Fair, Reasonable, and Adequate and Should Be Approved

The Court preliminarily approved the settlement as "appearing on its face to be fair, reasonable, and adequate." Dkt. No. 1097, ¶ 3. The settlement meets the requirements of Rule 23 and final approval is supported by the Settlement Class.

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

Class Counsel and the Class Representative have worked hard 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 representative).

Class Counsel have continued this zealous representation, including engaging in discovery, drafting pleadings and arguing their Motion to Amend before the Court, securing a further report from their banking expert, and continuing to participate in settlement negotiations with other defendants. Bonsignore Decl. ¶¶ 33-37.

Throughout these proceedings, the Class Representative and Class Counsel have adequately represented the class and, therefore, this factor weighs in favor of final approval of the settlement.

2. The Settlement Was Negotiated at Arm's-Length

The settlement was negotiated at arm's-length over a significant period of time. Mot. 9-11; Bonsignore Decl. in Support of Prelim. Approval ¶¶ 14-20; Prelim. Approval Order ¶ 3. This factor also weighs in favor of final approval of the settlement.

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

The settlement provides for a total cash recovery of \$22.5 million and the cooperation of the Fidelity Defendants, as set forth in the settlement agreement. The cash recovery is a substantial sum that provides a material benefit to the putative class and is reasonable in light of the financial standing of the Fidelity Defendants. Fidelity Bank is a community bank with relatively limited resources. John Merrill is an individual. The cash settlement amount exhausts all available insurance coverage and requires an additional payment by Fidelity Bank. Mot. 11. The settlement also serves as a further ice-breaker, incentivizing other defendants to come to the settlement table. *See 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, while Plaintiffs believe they have a strong case that should prevail on the merits, they also understand that the costs, risks, and delay are significant in complex class action litigation. Mot. 12. *See also In re Cathode Ray Tube (CRT) Antitrust Litig.*, MDL No. 1917, 2015 WL 9266493, *4 (N.D. Cal. Dec. 17, 2015) (collecting cases). This case is already almost seven 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. Further discovery, related *Daubert* motions, trial, and any appeals remain. Settlement now avoids this extended litigation and secures an immediate 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)).

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. This approach is common in complex class actions involving multiple defendants. *See, e.g., In re Lithium Ion Batteries Antitrust Litig.*, Case No. 13-MD-02420 YGR (DMR), 2020 WL 7264559, *25 (N.D. Cal. Dec. 10, 2020) (collecting cases regarding separate approval motions for settlements and plans of distribution for those settlements). Any plan of allocation will be informed by the ultimate size of the total settlement fund and will be submitted to the Court for approval. Fidelity Settlement Agreement, ¶ 41. 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.

Dkt. No. 1097, ¶ 18. Finally, the class received notice of this approach and, with one week remaining in the objection period, no objections to the proposed deferral have been filed.

Schachter Decl. ¶ 16. The Class Notice specifically explained:

8. When can I get a payment?

No money will be distributed to any Settlement 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.

Notice, 5. 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. 13; Notice, 8 (explaining class counsel would seek \$7,492,500 in attorneys' fees, plus reimbursement of costs, the actual cost of class notice up to \$500,000, and an incentive award of \$25,000). As described previously, the deadline to submit objections is January 11, 2021. Notice, 1. However, to date, no class member has objected to this request. Schachter Decl. ¶ 16. Notably, Plaintiffs' Motion for Attorneys' Fees filed concurrently herewith further limits the request to \$6,750,000 in fees at this time, with no request for expenses or incentive awards. 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 agreement sets forth the

terms of the settlement and no other agreements have been made. Mot. 14; Bonsignore Decl. in Support of Preliminary Approval (Dkt. No. 1056-1), ¶ 20. 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 settlement.

4. The Settlement Treats Class Members Equitably

The settlement provides for a single settlement class, with no subclasses. No class members are favored under the terms of the settlement and any plan of distribution will apply objective terms, such as *pro rata* weighting, to distribute funds in accordance with class members' respective losses.

5. The Class Response Supports Final Approval of the Settlement

Pursuant to the Court's Preliminary Approval Order, the Settlement Administrator emailed notice of the settlement to potential class members and updated the case-dedicated website and toll-free telephone number to incorporate information about the Fidelity Settlement. Schacter Decl. ¶¶ 5-13. The Settlement Administrator also issued a press release announcing the settlement. *Id.* at ¶ 14. Of the 716,185 potential class members emailed, to date, only 8 have requested exclusion from the settlement. *Id.* at ¶¶ 9,16.

The Court's Preliminary Approval Order directed that objections to the settlement be submitted to the Clerk's Office by January 11, 2021. Dkt. No. 1097, ¶ 16, Notice, 6. To date, no objections have been filed on the docket and no objections have been received by the Settlement Administrator or Lead Counsel. Bonsignore Decl. ¶ 49; Schachter Decl. ¶ 16.

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 and for the prior settlements in this litigation. Mot. 20-22, Prelim. Approval Order (Dkt. No. 1097) ¶¶ 6, 11. Of the 716,185 email addresses to be sent email notice of the settlement, 75,471 emails were ultimately undeliverable. Schachter Decl. ¶ 9. Thus, email notice successfully reached approximately 89% of the email addresses. *Id.*

In addition, A.B. Data updated the case-specific website to publish the settlement notices as well as relevant pleadings and important dates and deadlines and issued a press release via PR Newswire. *Id.* at ¶¶ 13-14. 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. Notice, 1-4. It defined the certified class and explained that a class member may enter an appearance through his or her own attorney if wished. *Id.* at 4, 7. 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 5-6. It also explained that Plaintiffs would seek attorneys' fees and expenses. *Id.* at 8. The Notice also explained that the full settlement agreement was available to settlement class members online at www.telexfreesettlement.com. *Id.* Consequently, every provision of the settlement was available to class members. The Notice provided to the class therefore constitutes valid, due, and sufficient notice to class members, is the best notice practicable under the circumstances, and supports final approval of the settlement.

IV. CONCLUSION

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

Dated: January 4, 2021

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 4th day of January 2021, I caused the foregoing together with the attachments identified in the associated MOTION FOR FINAL APPROVAL OF SETTLEMENTS WITH DEFENDANTS FIDELITY CO-OPERATIVE BANK AND JOHN MERRILL 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