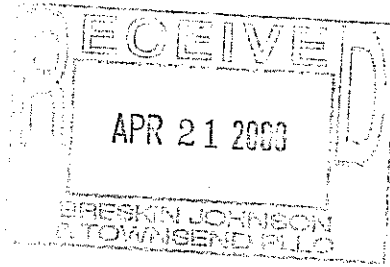


The Honorable Laura Inveen
Noted for Hearing: April 24, 2008, 10:00 a.m.
With Oral Argument



SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

BAXTER AIR, INC., and all others similarly situated,

Plaintiffs,

v.

NOS COMMUNICATIONS, INC.; NOSVA LIMITED PARTNERSHIP; AFFINITY NETWORK, INC.; ROBERT A. LICHTENSTEIN; and JOSEPH T. KOPPY,

Defendants.

No. 05-2-37411-0 SEA

DEFENDANTS' JOINDER IN PLAINTIFFS' MOTION FOR SETTLEMENT HEARING AND PRELIMINARY APPROVAL OF CLASS SETTLEMENT

Defendants NOS Communications, Inc., Affinity Network, Inc. and NOSVA Limited Partnership (collectively, "Defendants") join Plaintiffs' Motion for Settlement Hearing and Preliminary Approval of Class Settlement, pursuant to CR 23(e) and KCLR 23(e)(1).

Defendants agree that preliminary approval is sought, and is appropriate, on the grounds that the parties have reached a fair and reasonable settlement of the claims.

I. INTRODUCTION

As the Court docket reflects, this case was only resolved after significant litigation between the parties. That litigation has shown the existence of significant unresolved issues that remain for trial and/or appeal. The resolution of these issues is both uncertain and may have dramatic consequences for either or both parties. There has been extensive discovery and investigation by experts, prior to the resolution proposed herein. Finally, the matter was the subject of a mediation in January of 2008 before retired Washington Supreme Court

COPY

1 Justice Roselle Pekelis and then months of arms length negotiations, by counsel for both
2 parties, who have extensive prior experience with similar class actions.

3 In addition, Defendants, and Plaintiff, were required to address and consider the
4 economic situation of Defendants. As set forth in the Declaration of Joseph T. Koppy, Chief
5 Executive Officer of Defendants, submitted herewith, Defendants would be unable to satisfy a
6 multi-million dollar judgment in the amount claimed by Plaintiff, have not made significant
7 distributions to shareholders or owners in recent months, and are financially unable to make
8 the payments under this Agreement on a shorter schedule than that provided in the Settlement
9 Agreement submitted herewith.

10 **II. PERTINENT ISSUES**

11 Plaintiff Baxter Air, Inc. brought a single count Washington Consumer Protection Act
12 ("CPA") claim against Defendants. The claim arises out of the Defendants offering of long
13 distance telecommunications services that were billed in total call units ("TCUs") instead of
14 cents per minute. Defendants have asserted numerous defenses to this claim including that
15 the claim is barred because TCUs are regulated by the Washington State Transportation and
16 Utilities Commission and therefore preempted from a CPA claim. Defendants also contend
17 that federal law preempts the CPA claim. These defenses were dismissed by the trial court
18 but present issues for appeal.

19 Defendants also claimed a violation of due process by having the claims here tried on
20 a class wide basis. Under the controlling Court of Appeals decision *Sitton v. State Farm*,
21 Defendants contend that individualized proof of causation and damages is required. While
22 the trial court disagreed with this position, on a motion for discretionary appeal,
23 Commissioner Neal found that this issue would best be resolved after a trial and final
24 judgment. This obviously creates significant uncertainty for both parties. Finally, Defendants
25 have asserted as affirmative defenses accord and satisfaction, accounts stated and release.
26 The trial court has found that these matters present issues of fact that must be resolved by a

1 jury. Once again, this creates the possibility that the name Plaintiffs' claim could be rejected
2 at the time of trial.

3 **III. SETTLEMENT IS IN THE BEST INTERESTS OF THE PARTIES**

4 The net result of this uncertainty was that a trial would be necessary. Defendants
5 recognize that the cost of a trial itself coupled with the uncertainty of the outcome and the
6 likely need for an appeal to resolve certain issues determine that settlement was the best
7 option. This was reinforced by the fact that Defendants' financial condition is such that they
8 would not be able to satisfy, or bond, a judgment in the amounts claimed by plaintiff. Further,
9 Defendants negotiated the agreement that is presented for the Court's preliminary approval
10 based upon the fact they do not have sufficient cash flow to pay the current settlement
11 amounts in a lump sum or on a faster schedule.

12 **IV. THE SETTLEMENT STRUCTURE IS FAIR AND REASONABLE**

13 The structure of the settlement reflects a fundamental reality running across the Class
14 – complications related to the issues of causation and damages. Defendants claim that each
15 solicitation of each Class Member was different and that any claim as to how any alleged
16 deceptive act caused any alleged loss would have to be addressed on a Class Member by
17 Class Member basis. Further, Plaintiff's theory of causation and damages was that a Class
18 Member could not, at the time of solicitation, distinguish between the overall cost to them for
19 long distance telecommunications services billed in TCUs versus a similar service billed in
20 cents per minute that they each suffered a loss by overpaying for Defendants' long distance
21 services. Defendants countered, that, if that was to be accepted as true, then those consumers
22 that remained on service for a period of seven months or more would have had an opportunity
23 to compare their total dollar costs for long distance services from Defendants with their total
24 dollar costs from their previous carrier. Thus, each such Class Member could determine
25 whether or not they had been misled.
26

1 For this reason, the settlement breaks the class down into three types of claimants.
2 The first is Class Members who were on service from zero to six months. Those entities
3 (through a formula) will be sent an amount that approximates 100% refund of the amount paid
4 by each to Defendants for long distance services billed in TCUs. The second type, Class
5 Members who were on service for seven months or more but who eventually terminated are
6 being offered, through a claims made procedure, the option of a \$750 one time payment or
7 two years of long distance service provided by Defendants at 50% off their current per minute
8 rate. The third and last type are current customer Class Members who will receive a
9 \$100/month credit for 12 months.

10 V. CONCLUSION

11 Thus, as the Court can see, the settlement was reached after significant litigation,
12 investigation of the relevant facts and law, significant negotiation, including the involvement
13 of retired Washington Supreme Court Justice Roselle Pekelis who was involved with the
14 discussions regarding the separation of the Class Members into the three types identified
15 above, and several months of intensive negotiations. Defendants concur with Plaintiff that the
16 standard for settlement of a class action is met here and respectfully request that the Court
17 grant preliminary approval of same.
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1 DATED this 21st day of April, 2008.

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5 By 

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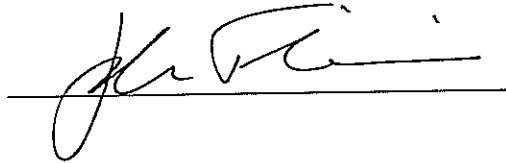
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CERTIFICATE OF SERVICE

The undersigned attorney certifies that on the 21st day of April, 2008, a true copy of the foregoing pleading was served upon the following individuals:

VIA HAND DELIVERY

David E. Breskin
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A handwritten signature in black ink, appearing to read "Daniel F. Johnson", is written over a horizontal line.