

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

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

Plaintiffs,

v.

NOS COMMUNICATIONS, INC.,
NOSVA LIMITED PARTNERSHIP, and
AFFINITY NETWORK, INC.,

Defendants.

NO. 05-2-37411-0 SEA

CLASS ACTION

PLAINTIFFS' MOTION FOR
SETTLEMENT HEARING AND
PRELIMINARY APPROVAL OF
CLASS SETTLEMENT

Plaintiff Baxter Air, Inc., on behalf of the Plaintiff Class, moves the Court for preliminary approval of a class settlement reached in this consumer class action and to set a hearing for final approval of the settlement after notice to the class and opportunity to object to the terms of settlement. The motion is made pursuant to CR 23 (e) and KCLR 23(e)(1). The settlement is for the following previously defined class:

All Washington State customers of the Defendants who, at any time on or after November 16, 2001, purchased defendants' interstate, intrastate, and/or international long distance telecommunications services for which Defendants billed in "cents per call unit."

Plaintiffs seek preliminary approval on the grounds that the parties have reached a fair and reasonable settlement of the claims. The settlement was reached only after the

1 case and the claims had been thoroughly and aggressively litigated by the parties,
2 extensive discovery had been undertaken and the Court had certified the class on all
3 issues. The settlement agreement was only reached after an initial private mediation with
4 retired Washington Supreme Court Justice Roselle Pekelis and then months of arms
5 length negotiations, by counsel for both parties, who have extensive prior experience with
6 similar class actions and the settlement of those actions.

7 The proposed order provides:

- 8 a. Preliminary approval of the terms of settlement;
- 9 b. Approval of the form of notice to be mailed to class members no later than **May**
10 **9, 2008**;
- 11 c. A 30 day notice period for putative class members to file objections to the
12 settlement, ending **June 9, 2008**; and
- 13 e. The setting of a hearing on final approval of the settlement on **June 26, 2008**.

14 II. PERTINENT FACTS

15 A. Summary of the Case and Claims

16 Plaintiff Baxter Air purchased telecommunications services from NOS
17 Communications and/or its affiliates in January 2003, and filed this suit in November
18 2005. It asserted a claim under the Washington Consumer Protection Act (CPA) on
19 behalf of a class of all Washington customers of the Defendants who purchased long
20 distance telephone services and were billed and paid for those services in “total call
21 units” (TCUs) rather than minutes or seconds as is traditionally used. Plaintiff claimed
22 Defendants failed to disclose material information about its unique TCU billing method,
23 and that it resulted in much higher costs of service, thereby injuring the class members.

24 B. Prosecution of Action

25 Shortly after the Complaint was filed in late 2005, Defendants removed the action
26 from this court to the U.S. District Court for the Western District of Washington based on

1 federal preemption. Plaintiff moved to remand the case, and that motion was granted on
2 March 10, 2006. Discovery proceeded, but involved significant motion practice.
3 Defendants took depositions of two representatives of Plaintiff Baxter Air, one day each,
4 in Seattle. Depositions of representatives and employees of Defendants' took place in
5 Las Vegas, Nevada, where the Defendants are headquartered.¹

6 In October 2006, Plaintiff moved for class certification on the liability elements of
7 the claim, and Defendants moved for summary judgment based on settlement and release.
8 In December, the Court granted Plaintiff's motion and denied Defendants' motion,
9 holding that the liability elements of Plaintiff's claim could be decided on a class-wide
10 basis, and deciding there was a genuine issue of fact whether Plaintiff released its claim
11 when it canceled service in 2003. Defendant sought discretionary review of the
12 certification order, which was denied. In early 2007, Plaintiffs' counsel sent the Court-
13 approved notice to all class members, which numbered about 1,100.

14 Thereafter, Plaintiffs propounded extensive written discovery and depositions
15 ensued. Plaintiffs took additional depositions of Defendants' representatives in Las
16 Vegas. Defendants also propounded additional written discovery on Plaintiff Baxter Air
17 and took depositions of five class member witnesses. These witnesses also personally
18 produced documents in response to the requests for documents requested by Defendants.

19 Defendants brought additional motions for summary judgment, and Plaintiffs
20 brought a motion for partial summary judgment on liability. After extensive briefing and
21 oral argument, the Defendants' motions were denied and the Plaintiffs' motion was
22 granted. Plaintiffs retained two experts and devised a theory and formula for calculating
23 damages to the class members, based on Plaintiffs' claim of common evidence and

24
25 ¹ Plaintiffs originally named NOS Communications, Inc., and Affinity Network, Inc., as
26 defendants. Based on initial discovery, Plaintiffs added a third defendant, NOSVA Limited
Partnership. The Court later held that the three Defendants were sufficiently linked to be held
jointly liable on Plaintiffs' claims.

1 Defendants' records. Both experts were deposed by Defendants, one in Seattle, and one
2 in Boston.

3 In June 2007, Plaintiffs moved to certify the remaining issues of causation and
4 damages. The Defendants again vigorously opposed the motion, and cross-moved to
5 decertify the existing class. After extensive briefing and oral argument, the Court granted
6 the Plaintiffs' motion and denied the Defendants' motion. Defendants again moved for
7 discretionary review in the Court of Appeals. The Commissioner denied discretionary
8 review, stating that with trial less than four months away, the issues raised by Defendants
9 were "best left to review from a final judgment."

10 The parties agreed to mediation in January 2008 with Rosselle Pekelis at Judicial
11 Dispute Resolution. Two representatives of Baxter Air attended; negotiations lasted all
12 day, and while unsuccessful, the parties did have the opportunity to thoroughly discuss
13 with Justice Pekelis, the approach to a class wide settlement embodied in the settlement
14 eventually reached. Over the two months following the mediation, the parties exchanged
15 settlement positions and vigorously negotiated the relief to be afforded to the class.
16 Baxter Air was actively involved in each offer and counter-offer.

17 **C. The Proposed Settlement Terms**

18 The parties' settlement provides valuable benefits to each member of the class as
19 well as injunctive relief on behalf of the public, attorneys' fees, and litigation costs. *See*
20 Settlement Agreement, attached as Exhibit A to Johnson Dec. The class of 1,064 was
21 divided into the following three groups for purposes of quantifying the benefits payable:

22 1) Class members who received service from Defendants for six months or less.

23 These class members will receive a cash payment of 88% of the amount they paid
24 Defendants. This group numbers approximately **293 class members**, and the average
25 benefit paid is anticipated to be about **\$800**, for a total benefit of about **\$235,000**. The
26

1 Defendants agreed to make these payments over the course of seven months beginning on
2 or about September 1, 2008, as set forth in the proposed Settlement Agreement.

3 2) Class members who received service from Defendants for more than six
4 months. These class members will have an option, on a claims-made basis, between (a)
5 returning to Defendants for long distance service at 50% off the per-minute rates they are
6 paying their current carrier or (b) \$750 in cash. There are approximately 669 class
7 **members** in this group.² Accordingly, this benefit is potentially worth at least
8 approximately \$467,250. Defendants agreed to make these payments at \$22,500 per
9 month beginning on or about September 1, 2008, as set forth in the proposed Settlement
10 Agreement, until all are paid.³

11 3) Class members who are current customers of Defendants. These class
12 members will receive \$1,200 in credits on their phone bills, at a rate of \$100 per month.
13 There are approximately 112 class members in this group, and the total value of the
14 credits is approximately \$134,400. These credits would begin in or about September
15 2008, as set forth in the proposed Settlement Agreement.

16 The total monetary value of the benefits to be paid the Class is \$836,650. In
17 addition, Defendants will warrant that, if they ever market long distance telephone
18 services in Washington again, they will clearly and conspicuously disclose that their rates
19 are in call units rather than minutes, which may result in higher per-minute rates. They
20 will also provide simple conversion information with every written solicitation for sale of
21 service in TCUs.

22 In addition to these benefits to the Class, Defendants have agreed to pay incentive
23 payments to Baxter Air (\$20,000) and to the five class member witnesses who have

24 _____
25 ² Of these, approximately 46 class members began service with Defendants prior to the putative
26 class period and paid no money to the Defendants and therefore would receive no benefits.

³ Those who opted for discount service would begin receiving that benefit promptly and could
continue for up to two years.

1 produced documents and testified in deposition in support of the class claims (\$1,000
2 each), and to pay \$600,000 for Plaintiffs' attorneys' fees and litigation costs.⁴ This
3 would be paid in monthly installments beginning on or about September 1, 2008.⁵

4 In exchange for the above consideration, Defendants will receive a release of
5 claims from class members and dismissal with prejudice of the lawsuit.

6 **D. The Provision for Notice**

7 Individual notice of the settlement and the class members' right to object will be
8 provided after Preliminary Approval. A proposed detailed notice, with directions on how
9 to get further information, is attached to the proposed order.

10 **E. The Schedule Preceding Final Approval and Hearing on Approval**

11 Counsel for the parties will receive any objections to the Proposed Settlement
12 from class members by June 9 and will file with the court their motion for final approval
13 of the settlement on or before June 19. The hearing on final approval would be set for
14 Thursday, June 26, 2008, at 1:30 p.m.

15 **III. ISSUE FOR RESOLUTION**

16 Should the Court grant Preliminary Approval of the Proposed Settlement pending
17 notice to the class and the opportunity of class members to object?

18 **IV. LEGAL DISCUSSION**

19 **A. Standards Applicable to Approval of Class Settlement**

20 This action was previously certified under CR 23(b)(3). CR 23(e) provides for
21 settlement of a Rule 23(b)(3) class action upon court approval after notice and
22 opportunity for objection. KCLR 23(e)(1) provides for the setting of a hearing for final
23 approval of a class wide settlement upon notice to the class. "The primary concern of [the
24 rules] is the protection of those class members, including the named plaintiffs, whose

25 _____
26 ⁴ Plaintiffs have incurred approximately \$60,000 in litigation costs.

⁵ The first payment would be in the amount of \$100,500, and \$33,500 each thereafter until paid.

1 rights may not have been given due regard by the negotiating parties.” *Pickett v. Holland*
2 *America Line-Westours, Inc.*, 145 Wn.2d 178, 188 (2001). The requirements of the rules
3 are “for the most part procedural, requiring notice of a proposed settlement be given to
4 class members and that they be given an opportunity to object to the settlement.” *Id.* In
5 this case, the class has already received notice of the pendency of the action and the
6 opportunity to opt out of the case. Four class members out of 1,064 who received the
7 notice opted out.

8 On a motion for approval of a class action settlement, the Court must determine
9 whether the terms are “fair, adequate, and reasonable.” *Id.* Some of the criteria to
10 consider are:

11 the likelihood of success by plaintiffs; the amount of discovery or evidence;
12 the settlement terms and conditions; recommendation and experience of
13 counsel; future expense and likely duration of litigation; recommendation
of neutral parties, if any; number of objectors, and the nature of the
objections; and the presence of good faith and the absence of collusion.

14 *Id.* at 188-89 (citing 2 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions*
15 §11.43 (3d ed.1992)). This list is not exhaustive and each factor is not necessarily
16 relevant in every case; each case must be decided on the unique facts and circumstances
17 presented. *Id.* (quoting *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th
18 Cir. 1982)). Finally, when experienced and skilled class counsel support a settlement,
19 their views are given great weight. *Id.* at 200.

20 **B. Reasons For Approving the Proposed Settlement**

21 The main reasons for approving the Proposed Settlement in this case are (1) it
22 would avoid further delay in obtaining relief for the Class; (2) it will avoid the risk of not
23 prevailing at trial or of partial or complete reversal on appeal; and (3) it will avoid the
24 risk of not being able to collect all or part of any judgment from Defendants because of
25 insolvency. As shown in the Plaintiffs’ recent motion for prejudgment writ of
26 attachment, there has been significant concern about Defendants’ ability to satisfy a

1 judgment for Plaintiffs if the case proceeded to trial and a substantial monetary award
2 were made. Defendants ceased marketing its long distance services to new customers
3 nearly three years ago, and their revenues have dropped significantly since then. The
4 Proposed Settlement is premised on the Defendants' statements that (a) if the class
5 prevailed in full at trial Defendants would likely be unable to pay the judgment due to
6 insolvency, and (b) that Defendants do not have sufficient cash in hand to pay the
7 settlement benefits to the class more rapidly than set forth in the Proposed Settlement.
8 Defendants will present sworn statements supporting these assertions in support of
9 approval of the Proposed Settlement.

10 A portion of the monetary benefits provided for in the Proposed Settlement will
11 be paid upon final approval with the remaining benefits to be paid over a period of time,
12 due to the Defendants' stated inability to pay it all at once. In order to safeguard the
13 Class's benefits, the Plaintiffs' secured through the Proposed Settlement a requirement
14 that Defendants provide a Letter of Credit in the amount of \$1,453,100 upon final
15 approval. This Letter of Credit will enable Class Counsel to withdraw funds sufficient to
16 meet all of the monetary obligations under the Proposed Settlement, should Defendants
17 be unable to do so. Class Counsel consulted with many experts in the process of
18 negotiating the terms and security to be provided under the Proposed Settlement and are
19 confident that the Class's interests in the settlement payments are secure.

20 The principal reason for the distinctions between the three groups of class
21 members was that customers who canceled service with Defendants relatively soon after
22 commencing service presented a much simpler case of causation than those who
23 remained on service for longer. Defendants took the position that Plaintiffs could not
24 prove that their deceptive marketing practices had "caused" injury to customers who
25 remained on service for longer than six months, some for as many as five to seven years.
26 This issue would have figured prominently in the presentation of evidence at trial and in

1 any appeal. Under the Proposed Settlement, short-term customers will get a percentage
2 of their payments back, while long-term customers will get a flat amount that is higher
3 than the average payment to the short term customers, and/or discount service. Thus,
4 each member of the class will receive a substantial monetary payment and/or potentially
5 more valuable service credits.

6 The provision for payment of Class Counsel's attorneys' fees and costs in a total
7 amount of \$600,000 is fair and reasonable. Class Counsel has invested over 1,340 hours
8 of attorney and paralegal time in this case, and has invested nearly \$60,000 in out-of-
9 pocket expenses in the litigation of this case. Counsel's "lodestar" at this stage is over
10 \$415,000.⁶ See *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597 (1983)
11 (explaining that the calculation of a reasonable attorney fee begins with calculation of the
12 "lodestar"). A multiplier of at least 1.5 would be appropriate in this case given the risk of
13 non-recovery at the outset of the litigation. See *Banuelos v. TSA Wash., Inc.*, 134 Wn.
14 App. 603, 617 (2006); *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 343 (2002);
15 *Morgan v. Kingen*, 141 Wn. App. 143, 167 (2007) (risk that judgment may not be
16 satisfied is appropriate risk to consider in awarding multiplier). The result would be a fee
17 award of \$622,000, plus litigation expenses. Under the Proposed Settlement, Class
18 Counsel would receive only approximately \$540,000 after litigation expenses are
19 deducted. This is only 1.3 times the amount Class Counsel has invested to date, and that
20 quotient will diminish with the time invested in the process of final approval and
21 distribution. In addition, the proposed payment schedule will significantly delay payment
22 of these fees to Class Counsel.

23 Finally, an incentive fee payment to the named plaintiffs and to those members of
24 the class who spent time in the service of the class, such as producing documents,

25 ⁶ Plaintiffs' counsel also incurred over \$200,000 in unrecovered fees and costs in a previous
26 action against Defendants, which was dismissed on the ground of federal preemption. The
investment in the previous case was instrumental in bringing and prosecuting this case.

1 testifying in depositions, and participating in mediation and settlement negotiations, is
2 customary and appropriate. *Staton v. Boeing Co.*, 327 F.3d 938, 976 (9th Cir. 2003). The
3 proposed payments to Baxter Air and to the five testifying class members are fair and
4 reasonable.

5 **V. CONCLUSION**

6 Based on the facts and law and their evaluation of the immediate benefits which
7 the Proposed Settlement makes available to the class members, Class Counsel believe
8 that the terms of the Proposed Settlement are fair and reasonable, and that the Proposed
9 Settlement is in the best interest of the Class.

10 DATED this 22 day of April, 2008.

11 BRESKIN JOHNSON & TOWNSEND
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13
14 By: 

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1 **CERTIFICATE OF SERVICE**

2 The undersigned certifies that on this day she caused to be served in the manner
3 noted below, a copy of the document to which this certificate is attached, on the
4 following counsel of record:
5


6 Joseph A. Boyle
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15 DATED this 21st day of April, 2008.

16 By 
17 Kasey Johansen