

**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, AFFINITY
NETWORK, INC.,

Defendants.

NO. 05-2-37411-0 SEA

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (this "Agreement") is submitted to the Superior Court in the State of Washington, King County (the "Court") pursuant to Rule 23 of the Washington Rules of Civil Procedure and Local Rule 23(e). Subject to Court approval, this Agreement is entered into between and among the following parties (the "Parties"), by and through their respective counsel: (i) class representative Baxter Air, Inc. ("Class Representative") on behalf of itself and the members of the Baxter Air Class (as hereinafter defined); and (ii) NOS Communications, Inc., Affinity Network, Inc. and NOSVA Limited Partnership (collectively, "Defendants");

WHEREAS there is a class action case brought pursuant to the Washington State Consumer Protection Act, RCW 19.86.010 (the "CPA") entitled *Baxter Air, Inc., and all others similar situated vs. NOS Communications, Inc., Affinity Network, Inc., and NOSVA Limited Partnership*, Superior Court of the State of Washington For King County, No. 05-2-37411-0 SEA (the "Baxter Air Class Action");

WHEREAS by Orders dated November 30, 2006 and September 27, 2007 the

Court certified a class of: “[a]ll 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,’” for purposes of establishing all five elements of a consumer protection act claim (the “Baxter Air Class”);

WHEREAS notice of the pendency of the class action was mailed to all members of the class identified by Defendants from their records, 1,065 Class Members received the notice, and four of them opted out of the class and are therefore no longer Class Members;

WHEREAS Defendants have asserted a number of defenses to the Class Representative’s and the Baxter Air Class’s claims, particularly as to causation and damages, and have asserted counterclaims;

WHEREAS the Parties have conducted a thorough examination of the facts and law relating to the asserted and potential claims, counterclaims and defenses in this class action;

WHEREAS Class Representative and class counsel, Breskin Johnson & Townsend, PLLC (“Class Counsel”), and Defendants agree that settlement on the terms set forth herein are in the best interests of the Baxter Air Class, and have engaged in mediation with Roselle Pekelis of King County Superior Court, Court of Appeals & Supreme Court Judge (Retired), Judicial Dispute Resolution, 1411 Fourth Avenue, Suite 200, Seattle, Washington 98101;

WHEREAS the Parties have engaged in extensive arms length negotiations regarding settlement of the Baxter Air Class Action;

WHEREAS Class Counsel have concluded, after extensive discovery and investigation of the facts, and after carefully considering the financial circumstances of

Defendants, and the Class Action, including the claims and counterclaims asserted therein and the possible legal and factual defenses thereto, that it would be in the Baxter Air Class's best interests to enter into this Agreement to avoid the uncertainties, burdens, and risks of litigation, the risks attendant to the financial circumstances of Defendants and to assure that the substantial benefits reflected herein are obtained for the Baxter Air Class, and further, that this Agreement is fair, reasonable, adequate, and in the best interests of the Baxter Air Class;

WHEREAS Defendants have likewise concluded, after investigation of the facts and careful consideration of the relevant claims by the Baxter Air Class, including the possible legal and factual defenses thereto, and the financial condition of Defendants, have agreed to enter into this Agreement to avoid further expense, burden, and to protect its financial viability and to resolve finally and completely the claims asserted herein; and

WHEREAS the Parties agree that this Agreement shall not be deemed or construed as an admission or as evidence of any violation of any statute or law, or of any liability or wrongdoing by any of Defendants, or of the truth of any claims or allegations alleged in the Baxter Air Class Action or as a waiver of any defenses thereto.

NOW, THEREFORE, the undersigned counsel on behalf of Defendants, Class Counsel, Class Representative agree that the Baxter Air Class Action, and all claims described therein shall be settled, compromised and/or dismissed on the merits and with prejudice on the terms and conditions set forth in this Agreement, and without costs to Defendants (except as provided herein), or the Baxter Air Class, subject to Court approval of this Agreement as a good faith, fair, reasonable and adequate settlement under Washington Court Rule 23(e).

I. PAYMENT CATEGORIES FOR BAXTER AIR CLASS MEMBERS

The Parties agree that for purposes of this Agreement that Baxter Air Class will be divided into the following three categories:

Baxter Air Class Members who were customers of Defendants for up to six months (approximately 293 members) ("Group I Baxter Air Class Members");

Baxter Air Class Members who were customers of Defendants from six months or greater but who cancelled their service before May 1, 2008 (approximately 659 members) ("Group II Baxter Air Class Members");

Baxter Air Class Members who are current customers of Defendants as of May 1, 2008 (approximately 112 members) ("Group III Baxter Air Class Members").

II. SETTLEMENT TERMS

In exchange for dismissal with prejudice and release of the claims made in the lawsuit, including all claims of any Class Member against any Defendant (or Defendants collectively), Defendants will provide the following:

A. Group I Baxter Air Class Members will receive from Defendants a payment equal to 88% of the amounts they paid to Defendants for long distance services. Defendants and Class Counsel have identified approximately 293 Class Members in this group, to whom checks will be issued in a total approximate amount of \$234,373.19. Defendants will make these payments, by check made payable to each Group I Baxter Air Class Member, over seven (7) months, beginning on or about the first business day after Final Court Approval of this Agreement, or September 1, 2008, whichever is later, in installments totaling approximately \$33,482 each. Checks issued to Group I Baxter Air Class Members will be valid for ninety (90) days from the date of issuance. Defendants will promptly report to Class Counsel **any** undelivered payments that they learn of, and will re-issue a check to the payees if substitute addresses can be found. If any check is not cashed within ninety (90) days from its issuance (or re-issuance as the case may be), neither the payee nor any person other than Defendants shall have any claim to those funds.

For purposes of this Agreement, the phrase "Final Court Approval of this Agreement" shall mean the date on which the time to file an appeal from a Court Order

approving this Agreement expires (which is anticipated to occur on or about July 28, 2008) and no such appeal has been filed. If there is an appeal, the payments will begin on the first business day after the appeal is exhausted, and only if such appeal affirms the Order approving this Agreement.

B. Group II Baxter Air Class Members will have two options, presented on a claims-made basis: (1) to receive long distance phone service from Defendants for two years at 50% off their current per-minute rates (as defined immediately hereinafter), or (2) a one-time cash payment of \$750. For purposes of this Agreement, the phrase "current per-minute rates" shall mean the rates (including intrastate, interstate, etc.) in cents-per-minute reflected on the Class Member's most recent long distance bill at the time of switching service to Defendants. In addition to these rates, Defendants may charge Class Members who elect discount service the lawful and customary ancillary charges for long distance service. The parties will agree on the contents of a claim form, which will be mailed to members of this group the first business day after Final Court Approval of this Agreement, or September 1, 2008, whichever is later. If there is an appeal, the forms will be mailed on the business day after the appeal is exhausted and only if such appeal affirms the Order approving this Agreement. Defendants will pay the cost of printing and mailing the mutually agreed claim form. Group II Baxter Air Class Members will have thirty (30) days to return the claim forms to Plaintiffs' counsel, who will forward them to Defendants. Discount service will commence as soon as practicable following receipt of the claim form by Defendants. If Defendants are unable to provide all the service due, they shall pay the balance in cash, calculated based on a \$750 total value. Defendants will issue checks to Class Members who return the claim form within thirty (30) days of mailing and who elect to receive the cash alternative, in the order their claims were received, at a rate of 30 claims per

month (\$22,500 per month), until checks are issued to all claimants. Group II Baxter Air Class Members who began service before the putative class period and have paid nothing to Defendants (approximately 46 Class Members) shall not be entitled to receive any payment or benefit under this Agreement.

C. Group III Baxter Air Class Members will receive \$1200 in credits (the "Group III Credits") on their phone bills beginning in September 2008 or on the first monthly bill after Final Court Approval of this Agreement, whichever is later. The Group III Credits will be remitted to the Group III Baxter Class Members by a \$100 per month credit for twelve (12) months. If there is an appeal, the credits will begin in the month after the appeal is exhausted and only if such appeal affirms the Order approving this Agreement. If Defendants are unable to provide all credits due, they shall pay the balance in cash.

D. Defendants will pay a total of \$600,000 to Class Counsel, in full settlement of any claim for attorneys' fees and/or costs, and it shall be Class Counsel's responsibility to satisfy any attorneys' liens and Class Counsel releases Defendants from any claim for attorneys fees and/or costs (other than the payments called for in this paragraph). Defendants will pay \$100,500 on the first business day after Final Court Approval of this Agreement or on September 1, 2008, whichever is later, and make fifteen (15) monthly payments of \$33,500 each on the first of each month thereafter. The amount of the monthly payments will increase to \$55,500 (and the total number of payments will correspondingly decrease) if and when the payments set forth to Group II Baxter Air Class Members above are paid and the claim period has expired. If there is an appeal, the payments will begin on the business day after the appeal is exhausted and only if such appeal affirms the Order approving this Agreement.

E. Defendants will pay a \$20,000 incentive payment to Baxter Air and a \$1,000 incentive payment to each of the five (5) Class Members who have testified as witnesses and participated in discovery (the "Incentive Payment Class Members"), or their respective designees,¹ on the first business day after Final Court Approval of this Agreement or August 1, 2008, whichever is later. If there is an appeal, the payments will be made on the business day after the appeal is exhausted and only if such appeal affirms the Order approving the settlement.

F. Defendants also agree that, if they or their affiliates ever market telephone services in the State of Washington that would be billed in TCUs following the Final Court Approval of this Agreement (and after the exhaustion of any appeal), then in any written representation of a rate in TCUs to Washington State prospective customers, they will make the following statement, in 12-point font or larger, in close proximity to the rate or in a footnote that contains no other text: "We bill this rate in call units rather than minutes, which may result in a higher per-minute rate." Defendants also agree that, with any written representation of a rate in TCUs and with every Letter of Agency provided to a Washington State prospective customer, they will contemporaneously provide the document agreed to by the Parties in the Settlement Agreement executed by Defendants on April 1, 2008.

G. Upon Final Court Approval of this Agreement, Defendants shall deliver to Class Counsel a Letter of Credit in the amount of \$1,453,100 (minus any payments made under this Agreement as of the date that the Letter of Credit is issued) as security for the full and faithful performance of the monetary payment provisions of this Agreement to be performed by

¹ The Incentive Class Members, or their respective designees, are as follows: (1) Tom Pierce (of Veach Co.); (2) Murray Johnstone; (3) Nancy Johnson (of Information Management Corp.); (4) Kurt Ross (of Ross Trucking et al.); and (5) Maruji & Raines, P.S.

Defendants. The Letter of Credit shall: (a) be issued by a federal or state chartered bank or other depository institution acceptable to Class Counsel, (b) name Class Counsel as beneficiary, (c) permit a partial draw, in the amount of any missed payment due under this Agreement, upon submission of a signed statement by a member of Class Counsel that Defendants have failed to meet a payment obligation under this Agreement and setting forth the amount of that missed payment, and, upon the occurrence of two (2) consecutive missed payments, shall permit Class Counsel to draw the entire remaining balance of the payments required under this Agreement without delay, (d) be in a form and substance satisfactory to Class Counsel in their reasonable discretion, and (e) be unconditional and irrevocable until all payments required by this Agreement are paid.

III. COURT APPROVAL

Defendants will make every good faith effort to accomplish Final Court Approval of this Agreement and avoid appeal. This includes submitting an affidavit in support of the settlement, by an officer or director of Defendants, that states that Defendants would be unable to satisfy a multi-million dollar judgment, have not made significant distributions to shareholders or owners in recent months, and are financially unable to make the payments under this Agreement on a shorter schedule than provided herein. The parties also jointly agree to make good faith efforts to meet the following timeline, providing Court availability: A Formal Settlement Agreement, if any, executed by April 11, 2008; Preliminary Approval hearing by April 25, 2008; Notice sent to class by May 15, 2008; Opt-out deadline by June 16, 2007; Final Approval hearing by June 27, 2008; Appeal deadline July 28, 2008.

IV. DISMISSAL WITH PREJUDICE

The Parties agree to execute a Stipulation of Dismissal with Prejudice and file the same with the Court upon Final Approval of this Agreement by the Superior Court of the State of

Washington in and for the County of King, dismissing any and all claims by any Baxter Air Class Member against Defendants, except for those Baxter Air Class Members (other than the Incentive Payment Class Members) who chose to opt-out of this Agreement.

V. RELEASES

Upon the Effective Date of this Agreement, Defendants including, their officers, directors, shareholders, partners, employees and/or agents, shall be released and forever discharged by the Class Representative, Baxter Air Class Members, specifically including the Incentive Payment Class Members but excluding any non-Incentive Payment Class Member that opted-out of this Action ("Class Releasers"), from any and all claims, demands, actions, suits, causes of action, damages whenever incurred, and liabilities asserted in the Baxter Air Class Action and/or arising out of the allegations therein, including costs, expenses, penalties, and attorneys' fees, known or unknown, suspected or unsuspected, in law or equity, which Class Representative, Incentive Payment Class Member and any Baxter Air Class Member who has not timely and validly excluded himself, herself, or itself from this settlement, whether or not they object to this Agreement or make a claim upon or participate in the compensation provided for herein ever had, now has, or hereafter can, shall or may have, directly, indirectly, representatively, derivatively, or in any capacity, arising out of the claims brought in this case or the allegations therein ("Released Class Claims"). All Class Releasers covenant and agree that they shall not hereafter seek to establish liability against any Defendant including, their officers, directors, shareholders, partners, employees and/or agents, based, in whole or in part, on any of the claims brought in this case or the allegations herein. Each Class Releaser expressly waives and fully, finally, and forever settles and releases any known or unknown, suspected or unsuspected, contingent or non-contingent Release Class Claims without regard to the subsequent discovery or existence of different of additional facts.

VI. MISCELLANEOUS PROVISIONS

A. Reasonable Best Efforts

Subject to preliminary approval of this Agreement by the Court, all proceedings in the Baxter Air Class Action shall be stayed. The Parties agree to use their reasonable best efforts, including all steps required by this Agreement and other efforts that may be necessary or appropriate, by order of the Court or otherwise, to carry out the terms of this Agreement.

B. No Admission

Nothing in this Agreement, including any of its provisions, any statement made or document related to or filed in connection therewith, or the Parties' willingness to enter into this Agreement, shall be construed as an admission as to the propriety of the litigation in this matter or any other litigation, any liability or wrongdoing of any Defendant, or of the truth of any allegations in any complaint against any Defendant; and neither the Agreement nor any statement made or document related to or filed in connection therewith shall be admissible in evidence for any such purpose in any proceeding.

C. No Fund

The parties do not intend that anything herein create a fund or residual fund (as that term is defined in CR 23(f) or otherwise), including but not limited to the designation of the categories identified in Section I of this Agreement. .

D. Enforcement

Notwithstanding Paragraph B, this Agreement may be pleaded as a full and complete defense to any action, suit or other proceeding that has been or may be instituted, prosecuted or attempted with respect to any of the Released Class Claims, and may be filed, offered, received into evidence, and otherwise used for such defense. This Agreement may also be used in connection with the Parties' application for approval or enforcement of this

Agreement and all proceedings incident thereto.

E. Authorization to Enter Agreement

The undersigned represent that they are fully authorized to enter into and execute this Agreement on behalf of Defendants. Class Counsel represent that they are fully authorized to conduct settlement negotiations with Defendants' counsel on behalf of the Baxter Air Class Members and to enter into and execute this Agreement on behalf of the Baxter Air Class Members, subject to approval by the Court pursuant to Washington Civil Rule 23(e).

F. No Party Is the Drafter

None of the Parties to this Agreement shall be considered the drafter of this Agreement or any included provision for the purpose of any statute, case law or rule of construction that would or might cause any provision to be construed against the drafter.

G. Choice of Law

This Agreement shall be governed by and interpreted according to the substantive laws of the State of Washington without regard to its choice of law or conflict of laws principles.

H. Amendment or Waiver

This Agreement shall not be modified in any respect except by a writing executed by all Parties to this Agreement. The waiver of any rights conferred by this Agreement shall be effective only if made in writing by the waiving Party. The waiver by any Party of any breach of this Agreement shall not be deemed or construed as a waiver of any other breach, whether prior to, subsequent to, or contemporaneous with this Agreement.

I. Execution in Counterparts

This Agreement may be executed in counterparts. Facsimile or PDF signatures shall be valid signatures as of the date thereof, although the original signature pages shall be

appended to this Agreement and filed with the Court thereafter.

J. Integrated Agreement

This Agreement contains an entire, complete, and integrated statement of the terms agreed to by and between the Parties.

K. Construction

This Agreement shall be construed and interpreted to effectuate the Parties' intent, which is to resolve completely the claims through this Agreement.

VII. TERMINATION OF THIS AGREEMENT

A. Automatic Termination

Except as provided below, this Agreement shall be terminated automatically, without notice, if the Court declines to enter an order approving this Agreement, or if such approval order does not become Final (as a result of reversal on appeal or otherwise).

B. Effect of Termination

In the event of such termination, this Agreement shall be of no force or effect, the Parties shall request the Court to enter an appropriate scheduling order to continue this case.

VIII. APPEAL

In the event there is an appeal that delays Final Court Approval (as defined here) beyond September 1, 2008, the determination of whether a Class Member is in Group II or Group III will be made at the time of Final Court Approval. Notwithstanding any other provision of this agreement, if there is an appeal concerning solely the issue of any alleged residual funds relating to payments to Group I Baxter Air Class Members under CR 23(f), all other provisions of this agreement shall be enforceable as if there were no appeal.

IN WITNESS WHEREOF, the Parties hereto, by and through their fully authorized representatives, have executed this Agreement as of April 26, 2008.

DATED: April 21, 2008

KELLEY DRYE & WARREN LLP

By: 

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