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FILED
LOS ANGELES SUPERIOR COURT

SEP 12 2016

ORDERED BY Nancy Navarro Deputy
EXECUTIVE OFFICER/CLERK
NANCY NAVARRO

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES**

LAW ENFORCEMENT OFFICERS, INC., and
CHRISTOPHER DANCEL, individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

J2 WEB SERVICES, INC., and J2 GLOBAL,
INC., each doing business as ONEBOX, and
DOES 1 through 20, inclusive,

Defendants.

Case No.: BC555721
Related to BC549422

**ORDER GRANTING
MOTION FOR PRELIMINARY
APPROVAL OF CLASS ACTION
SETTLEMENT**

Date: September 12, 2016
Time: 9:00 a.m.
Dept.: 307

I. BACKGROUND

In this consumer class action, Law Enforcement Officers, Inc. and Christopher Dancel allege that Defendants, providers of virtual telecommunication services (virtual phone, fax, and email) charged customers exorbitant late fees without notice.

The operative pleading, the Third Amended Complaint, alleges the following causes of action: 1. Negligence; 2. Unfair Business Practices; 3. Violation of the Consumer Legal Remedies Act; 4. Breach of the Implied Covenant of Good Faith and Fair Dealing; 5. Money Had and Received; 6. Unjust Enrichment; and 7. Violation of CC §1671.

1 Following mediation, the parties entered into a settlement and calendared a motion for
2 preliminary approval. Prior to the hearing of that motion the Court issued a Checklist for further
3 briefing and continued the hearing to August 31, 2016; the Court later continued the hearing to
4 today's date. Defendants filed Supplemental Briefing on August 12, 2016, attached to which is
5 an amended *Class Action Settlement and Release* (Settlement Agreement), signed by Defendants
6 but not Plaintiffs; the agreement has been sent out for Plaintiffs' signatures, however.

7 (Supplemental Briefing at page 8, FN 2.)

8 Now before the Court is the continued hearing on Plaintiffs' motion for preliminary
9 approval of the settlement.

10 **II. DISCUSSION**

11 **A. SETTLEMENT CLASS DEFINITION**

12 "Settlement Class Members or Settlement Class" is defined as, "all United States
13 resident Services customers who were charged a late fee for the Services during the Class
14 Period by any Defendant." (Settlement Agreement, ¶1.34)

15 "Eligible Settlement Class Members" is defined as, "all United States resident Services
16 customers who paid any Defendant a late fee for the Services during the Class Period." (¶1.12)

17 "Services" is defined as "voice products offered by either Defendant under the brand
18 names eVoice ® and Onebox ® (including legacy brand Phone People ®, which has been
19 migrated into Onebox ®). (¶1.30)

20 "Class Period" means August 26, 2010, until the effective date of a customer agreement
21 with an arbitration provision and class waiver, which is September 18, 2014 for Onebox ® or
22 Phone People ® and April 10, 2015 for eVoice ®. (¶1.6)

1 The parties stipulate to certification of the Settlement Class for purposes of this
2 settlement only. (¶3.1.1)

3 **B. TERMS OF SETTLEMENT AGREEMENT**

4 Other essential terms are as follows:

- 5 • Each Eligible Settlement Class Member who has an active account for any Existing
6 Service as of the Response Deadline and who makes a valid claim will receive credit for
7 one late fee, the amount of which will be based off the highest late fee for which that
8 Settlement Class Member provides Evidence via the Settlement Website. (¶3.3.1.A)
- 9 • Each Eligible Settlement Class Member who does not have an active account for any
10 Existing Service as of the Response Deadline and who makes a valid claim will be sent a
11 check in the cash value of one late fee, the amount of which will be based off the highest
12 late fee for which that Settlement Class Member provides Evidence via the Settlement
13 Website. (¶3.3.1.B)
- 14 ○ Evidence means proof that an Eligible Settlement Class Member paid either
15 Defendant a late fee for the Services during the Class Period: a copy of a credit or
16 debit card statement, or a copy of the monthly billing statement for any of the
17 Services showing payment of a late fee, or a copy of the Eligible Settlement Class
18 Member's online billing history showing that a late fee was assessed and paid.
19 (¶1.12)
 - 20 ○ Existing Services means voice products currently offered by Defendant j2 Web
21 Services, Inc. under the brand names eVoice[®] or Onebox[®].
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- 1 • As of the Final Approval Date, Defendants agree not to sue or pursue Settlement Class
2 Members for the non-payment of late fees incurred on or before September 30, 2015.
3 (§3.3.2)
- 4 • Within 30 days of Final Approval Defendants will amend their customer agreements to
5 specifically identify the amount of the late fees associated with that existing service, and
6 will notify customers by email of this change. (§3.3.3)
- 7 • After 30 days have passed from the Final Approval Date, Defendants will not charge a
8 late fee of more than \$10 for a single late payment on the Existing Services. (§3.3.4)
- 9 • The Response Deadline is 90 days after the Settlement Administrator emails the
10 Summary Notice to Potential Settlement Class Members. (§1.29)
 - 11 ○ If more than 10,000 of the class opts-out, Defendant may withdraw from this
12 agreement. (§3.20.2)
- 13 • Funds from uncashed checks --
 - 14 ○ The supplemental brief indicates that uncashed checks will be escheated to the
15 federal government but does not state that this was made a provision of the
16 Settlement Agreement. (Supplemental Brief at 10:19.)
- 17 • The Settlement Administrator will be Heffler Claims Group. (§1.33)
- 18 • Class Representative Enhancement Award means \$2,500 as to Christopher Dancel only.
19 Class Counsel will request an award for fees and costs of no more than \$385,000. (§§1.4,
20 3.16)
- 21 • The named Plaintiffs and Settlement Class Members who do not opt out will release
22 certain claims against Defendant. (See further discussion below)
- 23
- 24

25 **C. SETTLEMENT STANDARDS AND PROCEDURE**

1 California Rules of Court, rule 3.769(a) provides: "A settlement or compromise of an
2 entire class action, or of a cause of action in a class action, or as to a party, requires the approval
3 of the court after hearing." "Any party to a settlement agreement may serve and file a written
4 notice of motion for preliminary approval of the settlement. The settlement agreement and
5 proposed notice to class members must be filed with the motion, and the proposed order must be
6 lodged with the motion." See CRC rule 3.769(c).

7 "In a class action lawsuit, the court undertakes the responsibility to assess fairness in
8 order to prevent fraud, collusion or unfairness to the class, the settlement or dismissal of a class
9 action. The purpose of the requirement [of court review] is the protection of those class
10 members, including the named plaintiffs, whose rights may not have been given due regard by
11 the negotiating parties." (*Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America*
12 (2006) 141 Cal. App.4th 46, 60 (internal quotation marks omitted); *Wershba v. Apple Computer,*
13 *Inc.* (2001) 91 Cal.App.4th 224, 245 ("*Wershba*"): Court needs to "scrutinize the proposed
14 settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is
15 not the product of fraud or overreaching by, or collusion between, the negotiating parties, and
16 that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned," internal
17 quotation marks omitted.)

18 "The burden is on the proponent of the settlement to show that it is fair and reasonable.
19 However 'a presumption of fairness exists where: (1) the settlement is reached through arm's-
20 length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court
21 to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of
22 objectors is small.'" (*Wershba* at 245, citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th
23 1794, 1802 ("*Dunk*").) Notwithstanding an initial presumption of fairness, "the court should not
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1 give rubber-stamp approval.” (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116,
2 130 (“*Kullar*”). “Rather, to protect the interests of absent class members, the court must
3 independently and objectively analyze the evidence and circumstances before it in order to
4 determine whether the settlement is in the best interests of those whose claims will be
5 extinguished.” *Id.* In that determination, the court should consider factors such as “the strength
6 of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk
7 of maintaining class action status through trial, the amount offered in settlement, the extent of
8 discovery completed and stage of the proceedings, the experience and views of counsel, the
9 presence of a governmental participant, and the reaction of the class members to the proposed
10 settlement.” *Id.* at 128. “Th[is] list of factors is not exclusive and the court is free to engage in
11 a balancing and weighing of factors depending on the circumstances of each case.” (*Wershba* at
12 245.)

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14 “A settlement need not obtain 100 percent of the damages sought in order to be fair and
15 reasonable. Compromise is inherent and necessary in the settlement process. Thus, even if ‘the
16 relief afforded by the proposed settlement is substantially narrower than it would be if the suits
17 were to be successfully litigated,’ this is no bar to a class settlement because ‘the public interest
18 may indeed be served by a voluntary settlement in which each side gives ground in the interest
19 of avoiding litigation.’” (*Id.* at 250.)

20 **D. ANALYSIS OF SETTLEMENT AGREEMENT**

21 **1. Does a presumption of fairness exist?**

- 22 a. Was the settlement reached through arm’s-length bargaining? Yes. The parties
23 participated in a full day of mediation with the Hon. Dickran M. Tevrizian (Ret.),
24 and included multiple rounds of negotiations. (Jardini Declaration, ¶6.) The
25

1 parties conducted negotiations at arms'-length and in a non-collusive manner. (Id.
2 at ¶9.)

- 3 b. Were investigation and discovery sufficient to allow counsel and the court to act
4 intelligently? Yes. The parties engaged in written discovery, pursuant to which
5 Plaintiffs produced roughly 500 documents and Defendants 1,000, including
6 several large spreadsheets. (Id. at ¶4.) Following mediation, Defendants provided
7 additional information regarding the number of late fees charged per customer,
8 the amount of late fees charged and collected, by year, and the costs incurred by
9 Defendants associated with late payments. (Id. at ¶7.)
- 10 c. Is counsel experienced in similar litigation? Yes. Class Counsel is experienced
11 in class action litigation. (Id. at ¶¶ 18-20.)
- 12 d. What percentage of the class has objected? This cannot be determined until the
13 fairness hearing. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before
14 Trial (The Rutter Group 2014) ¶ 14:139.18: "Should the court receive objections
15 to the proposed settlement, it will consider and either sustain or overrule them at
16 the fairness hearing.")

17
18 CONCLUSION: The settlement is entitled to a presumption of fairness.

19 **2. Is the settlement fair, adequate, and reasonable?**

- 20 a. Strength of Plaintiffs' case. "The most important factor is the strength of the case
21 for plaintiffs on the merits, balanced against the amount offered in settlement."
22 (*Kullar* at 130.) Risk, expense, complexity and likely duration of further
23 litigation. Given the nature of the class claims, the case is likely to be expensive
24 and lengthy to try. Procedural hurdles (e.g., motion practice and appeals) are also
25 likely to prolong the litigation as well as any recovery by the class members.

1 b. Risk of maintaining class action status through trial. Even if a class is certified,
2 there is always a risk of decertification. (*Weinstat v. Dentsply Intern., Inc.*
3 (2010) 180 Cal.App.4th 1213, 1226: “Our Supreme Court has recognized that
4 trial courts should retain some flexibility in conducting class actions, which
5 means, under suitable circumstances, entertaining successive motions on
6 certification if the court subsequently discovers that the propriety of a class action
7 is not appropriate.”)

8 c. Amount offered in settlement. The Supplemental Briefing summarizes what
9 class members will receive:

10 a. any class member who can establish payment of a late fee
11 will be reimbursed at the highest late fee amount they
12 paid, the majority of which are around \$10;

13 b. all class members will receive relief from any unpaid late
14 charges. (Supplemental Briefing at 6:25-7:6.)
15

16 There is no cap on the amount paid to class members. (Supplemental Briefing at
17 6:14-15.)

18 d. Extent of discovery completed and stage of the proceedings. As discussed above,
19 at the time of the settlement, Class Counsel had conducted extensive discovery.

20 f. Experience and views of counsel. The settlement was negotiated and endorsed
21 by Class Counsel who, as indicated above, is experienced in class action
22 litigation.

23 g. Presence of a governmental participant. This factor is not applicable here.
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1 h. Reaction of the class members to the proposed settlement. The class members'
2 reactions will not be known until they receive notice and are afforded an
3 opportunity to opt out or object. This factor becomes relevant during the fairness
4 hearing.

5 CONCLUSION: The settlement can be preliminarily deemed “fair, adequate, and
6 reasonable.”

7 **3. Scope of release**

8 The release language was modified in response to the Checklist.

9 “Released Claims” is defined as “any and all causes of action . . . and demands
10 of whatsoever kind or character, known or unknown, suspected to exist or not suspected to exist,
11 anticipated or not anticipated, whether or not heretofore brought before any state or federal
12 court or before any state or federal agency or other governmental entity, which Plaintiffs or any
13 member of the Settlement Class have or may have by reason of any and all acts, omissions,
14 events or facts arising during the Class Period, including without limitation, equitable, statutory,
15 constitutional, contractual, or common law claims related to late fees charged to Settlement
16 Class Members or payment of late fees by Eligible Settlement Class Members and any and all
17 related compensatory and punitive damages, mental or emotional distress, interests, attorneys’
18 fees, litigation costs, expenses, penalties, restitution or equitable relief, or injunctive or
19 declaratory relief arising from or related to any and all claims that were asserted or could have
20 been asserted in the Action.” (¶1.26)

22 As of the Effective Date, Settlement Class Members (and their agents, heirs, assigns,
23 etc.) who do not opt out, release the Released Parties from the Released Claims. (¶3.2.1)

24 **4. May conditional class certification be granted?**

1 a. Standards

2 A detailed analysis of the elements required for class certification is not required, but it
3 is advisable to review each element when a class is being conditionally certified. (*Amchem*
4 *Products, Inc. v. Winsor* (1997) 521 U.S. 591, 620, 622-627.) The trial court can appropriately
5 utilize a different standard to determine the propriety of a settlement class as opposed to a
6 litigation class certification. Specifically, a lesser standard of scrutiny is used for settlement
7 cases. (*Dunk* at 1807, FN 19.) Finally, the Court is under no “ironclad requirement” to conduct
8 an evidentiary hearing to consider whether the prerequisites for class certification have been
9 satisfied. (*Wershba* at 240.)

10 b. Analysis

- 11 i. Numerosity. There are approximately 170,824 potential class members.
12 (Jardini Declaration, ¶11.) Thus, numerosity has been established. (*Rose*
13 *v. City of Hayward* (1981) 126 Cal.App.3d 926, 934, stating that “[n]o set
14 number is required as a matter of law for the maintenance of a class
15 action” and citing examples wherein classes of as little as 10 [*Bowles v.*
16 *Superior Court* (1955) 44 Cal.2d 574] and 28 [*Hebbard v. Colgrove*
17 (1972) 28 Cal.App.3d 1017] were upheld).
- 18 ii. Ascertainability. The class is defined above. The class definition is
19 “precise, objective and presently ascertainable.” (*Sevidal v. Target Corp.*
20 (2010) 189 Cal.App.4th 905, 919.)
- 21 iii. Community of interest. “The community of interest requirement involves
22 three factors: (1) predominant common questions of law or fact; (2) class
23 representatives with claims or defenses typical of the class; and (3) class
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1 representatives who can adequately represent the class.” (*Linder v.*
2 *Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) Plaintiffs argue that the class
3 claims raise common questions as to whether Defendants charged
4 excessive late fees without proper notice. (Motion at 14:6-9.)

5 iv. Adequacy of class counsel. As indicated above, Class Counsel has
6 shown experience in class action litigation.

7 v. Superiority. Given the relatively small size of the individual claims, a
8 class action appears to be superior to separate actions by the class
9 members.

10 CONCLUSION: The class may be conditionally certified since the prerequisites of class
11 certification have been satisfied.

12 **5. Is the notice proper?**

13 a. Method of class notice.

14 Notice will be by e-mail. No more than 20 calendar days after preliminary approval,
15 Defendant will provide the Settlement Administrator with the Class Information. (Settlement
16 Agreement, ¶3.6.) Upon receipt of the Class Information, the Settlement Administrator will e-
17 mail Summary Notice to all Potential Settlement Class Members. (¶3.7.1)

18 The proposed method of class notice appears to sufficient.

19 b. Content of class notice.

20 The proposed summary class notice is attached as Exhibit A. This will be emailed to all
21 Potential Settlement Class Members, and will alert them to the website, where additional
22 information including the full notice may be viewed.
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1 The proposed long form notice is attached as Exhibit B. Such notice appears to be
2 acceptable. It includes information such as: a summary of the litigation; the nature of the
3 settlement; the terms of the settlement agreement; the maximum deductions to be made from the
4 gross settlement amount (i.e., attorney fees and costs, the enhancement award, and claims
5 administration costs); the procedures and deadlines for participating in, opting out of, or
6 objecting to, the settlement; the consequences of participating in, opting out of, or objecting to,
7 the settlement; and the date, time, and place of the final approval hearing.

8 Cost of class notice.

9
10 Defendants will pay the settlement administrator the cost of administration of this
11 settlement. (¶3.17) As clarified in the Supplemental Briefing, there is no cap on this cost.
12 (Supplemental Briefing at 6:14-15.) Prior to the time of the final fairness hearing, the claims
13 administrator must submit a declaration attesting to the total costs incurred and anticipated to be
14 incurred to finalize the settlement for approval by the Court.

15
16 **6. Attorney fees and costs**

17 CRC rule 3.769(b) states: “Any agreement, express or implied, that has been entered into
18 with respect to the payment of attorney fees or the submission of an application for the approval
19 of attorney fees must be set forth in full in any application for approval of the dismissal or
20 settlement of an action that has been certified as a class action.”

21 Ultimately, the award of attorney fees is made by the court at the fairness hearing, using
22 the lodestar method with a multiplier, if appropriate. (*PLCM Group, Inc. v. Drexler* (2000) 22
23 Cal.4th 1084, 1095-1096; *Ramos v. Countrywide Home Loans, Inc.* (2000) 82 Cal.App.4th 615,
24 625-626; *Ketchum III v. Moses* (2000) 24 Cal.4th 1122, 1132-1136.) Despite any agreement by
25 the parties to the contrary, “the court ha[s] an independent right and responsibility to review the

1 attorney fee provision of the settlement agreement and award only so much as it determined
2 reasonable.” (*Garabedian v. Los Angeles Cellular Telephone Company* (2004) 118 Cal.App.4th
3 123, 128.)

4 The question of class counsel’s entitlement to \$385,000 in attorney fees and costs will be
5 addressed at the fairness hearing when class counsel brings a noticed motion for attorney fees.
6 Class counsel must provide the court with billing information so that it can properly apply the
7 lodestar method, and must indicate what multiplier (if applicable) is being sought.

8 Evidence of the clients’ written consent to the fee-splitting agreement was provided.
9 (Supplemental Jardini Declaration, ¶2.)

10 Class counsel should also be prepared to justify the costs sought by detailing how they
11 were incurred.

12
13 **7. Enhancement Award to Class Representatives**

14 The Settlement Agreement provides for an enhancement award of up to \$2,500 to two
15 class representatives. At the Motion for Preliminary Approval Counsel agreed that only
16 Christopher Dancel will receive the enhancement award. In connection with the final fairness
17 hearing, the named Plaintiff must submit a declaration attesting to why he should be entitled to
18 an enhancement award in the proposed amount. The named Plaintiff must explain why he
19 “should be compensated for the expense or risk he has incurred in conferring a benefit on other
20 members of the class.” (*Clark v. American Residential Services LLC* (2009) 175 Cal.App.4th
21 785, 806.) Trial courts should not sanction enhancement awards of thousands of dollars with
22 “nothing more than *pro forma* claims as to ‘countless’ hours expended, ‘potential stigma’ and
23 ‘potential risk.’ Significantly more specificity, in the form of quantification of time and effort
24 expended on the litigation, and in the form of reasoned explanation of financial or other risks
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1 incurred by the named plaintiffs, is required in order for the trial court to conclude that an
2 enhancement was ‘necessary to induce [the named plaintiff] to participate in the suit’” (Id.
3 at 806-807, italics and ellipsis in original.)

4 **III. CONCLUSION AND ORDER**

5 **A. TENTATIVE RULING**

6 Contingent upon the filing of a copy of the amended Settlement Agreement signed by
7 Plaintiffs:

- 8 (1) Grant preliminary approval of the settlement as fair, adequate, and reasonable;
- 9 (2) Grant conditional class certification;
- 10 (3) Appoint Law Enforcement Officers, Inc. and Christopher Dancel as Class
11 Representatives, although only Dancel is entitled to receive the enhancement;
- 12 (4) Appoint Andre E. Jardini of Knapp, Petersen & Clarke and Joseph Farzam of Joseph
13 Farzam Law Firm as Class Counsel;
- 14 (5) Appoint Heffler Claims Group as Claims Administrator;
- 15 (6) Approve the proposed notice plan; and
- 16 (7) Approve the proposed schedule of settlement proceedings.

17 **B. PROPOSED SCHEDULE OF SETTLEMENT PROCEEDINGS**

- 18 • Preliminary approval hearing: September 12, 2016
- 19 • Deadline for Defendant to provide class information to claims administrator: October 3,
20 2016 (20 calendar days after preliminary approval)
- 21 • Deadline for claims administrator to e-mail notices: October 24, 2016 (20 calendar days
22 after receiving class information)
- 23
- 24
- 25

- Deadline for class members to submit a claim form, object, or opt-out: January 23, 2017 (90 days after e-mailing of notice)
- Deadline for class counsel to file motion for final approval: January 22, 2017, (16 court days prior to final fairness hearing)
- Final fairness hearing: February 15, 2017, at 10:00 a.m.

Dated: September 12, 2016


LISA HART COLE
Judge of the Superior Court