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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

NANSEE PARKER and PHONG PHAM, on behalf of themselves and those similarly situated,

Plaintiffs,

v.

DISH NETWORK L.L.C.,

Defendant.

Case No. 4:11-CV-01457-PJH

NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS SETTLEMENT

Date: March 21, 2012
Time: 9:00 a.m.
Judge: Hon. Phyllis J. Hamilton

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on March 21, 2012, at 9:00 a.m. before the Honorable Phyllis J. Hamilton in Courtroom 3, 3rd Floor of the United States District Court for the Northern District of California, Oakland Division, located at 1301 Clay Street, Oakland, California 94612, Plaintiffs Nansee Parker and Phong Pham will and hereby do move for an order granting final approval of the parties' proposed class settlement.

Plaintiffs' motion is based on this notice; the accompanying Memorandum of Points and Authorities and Joint Declaration of Eric H. Gibbs, Andrew N. Friedman, and Richard B. Wentz; and all other papers filed and proceedings had in this action.

DATED: February 13, 2012

Respectfully submitted,

GIRARD GIBBS LLP

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Court previously approved the parties' proposed class settlement on November 23, 2011, finding the terms sufficiently fair, reasonable, and adequate to inform the class and proceed to a formal fairness determination. (Dkt. No. 60 (Order).) Pursuant to that Order, Plaintiffs now file this Motion for Final Approval of Class Settlement, asking that the Court grant final approval of the proposed settlement and enter the parties' proposed form of judgment.

II. SUMMARY OF THE LITIGATION AND SETTLEMENT NEGOTIATIONS

Plaintiffs Nansee Parker and Phong Pham filed this class action lawsuit after DISH Network L.L.C. ("DISH") increased its monthly rates for certain satellite television services. Plaintiffs contend that they, along with other DISH subscribers, understood that their rates were locked-in for the first year of their 24-month commitment term and thus sought to recover damages for DISH's price increase.

DISH provides satellite television services to customers across the United States. (Dkt. No. 1 (Compl.) ¶ 1.) Customers can choose to pay set-up fees and subscribe on a monthly basis or avoid the set-up fees by agreeing to a 24-month term commitment subject to an early termination fee. (*Id.*) DISH advertised 24-month subscriptions for new customers with a discounted rate for the first year. (*Id.* ¶¶ 18-23.) Plaintiff Parker signed up for DISH service in March 2010, and Plaintiff Pham signed up for DISH service in November 2010. (*Id.* ¶¶ 36 & 39.) Plaintiffs contend that they expected to pay a locked-in monthly rate for the first twelve months, and that for the subsequent twelve months, they would pay the regular rate DISH had advertised when they subscribed to their programming packages. (*Id.* ¶¶ 38-40.)

In February 2011, DISH imposed a $3-$5 rate increase on all subscribers to certain programming packages, including those subscribers who had signed up for a 24-month commitment with promotional discounted pricing.[1] (*Id.* ¶ 24.) At the same time, DISH asserted a "Price Guarantee until February 2013" on 7 of the 13 programming packages subject to the rate increases. (*Id.* ¶ 29.)

[1] DISH imposed a $5 increase for its America, America Silver, America Gold, America's Top 120 (AT120), America's Top 120 Plus (AT120+), America's Top 200 (AT200), America's Top 250 (AT250), America's Everything Pak (AEP), Latino Dos, and Latino Max programming packages. DISH imposed a $3 increase for its Latino Welcome Pack, Latino Clasico, and Latino Plus programming packages.

Soon after the filing of the Complaint, the parties began discussing mediation to test the merits of the case and explore the possibility of early resolution. (Joint Decl. of Eric H. Gibbs, Andrew N. Friedman, and Richard Wentz (hereinafter, "Joint Decl.") ¶¶ 8 & 9.) To maximize the value of the mediation, the parties developed an informal, streamlined discovery plan pursuant to which DISH produced highly relevant advertising materials, numerical subscriber data, customer contracts, customer representative disclosure scripts, and internal training documents. (*Id.* ¶¶ 9-11.) While discovery discussions progressed, DISH filed motions to transfer venue and to dismiss the action. (Dkt. No.s 36 & 37 (Mot.s).) On July 26-27, 2011, the parties attended a two-day mediation at which each side presented and responded to merits arguments. (Joint Decl. ¶ 14.) The document production and DISH's motions along with the mediation briefs and related dialogue allowed the parties to evaluate the strengths and weaknesses of their respective positions, and the mediation culminated in a well-reasoned agreement in principle. (*See id.* ¶¶ 11 & 13-14.) The parties then worked to draft the final settlement agreement, corresponding exhibits and preliminary approval papers. (*Id.* ¶ 15.) On November 23, 2011, this Court granted preliminary approval of the settlement, (Dkt. No. 60 (Order), and DISH subsequently provided notice of the settlement to the class, (*see* Joint Decl. ¶ 16).

III. SUMMARY OF THE PROPOSED SETTLEMENT

A. Benefits Available to the Class

Pursuant to the proposed settlement, DISH will provide benefits to a settlement class defined as all persons residing in the United States who activated DISH programming services between February 1, 2009 and January 31, 2011 with a 24-month commitment term and an initial 12-month, promotional discounted price, and subscribed to a programming package that was subject to DISH's February 2011 Price Increase, excluding only: (a) customers who received programming, equipment, and/or monetary accommodations after the February 2011 Price Increase in response to complaint(s) about the price increase, (b) customers who were in the second year (i.e., months 13 to 24) of their 24-month commitment term for one of the following packages: DISH's America's Everything Pak, Latino Welcome Pack, Latino Clasico, Latino Plus, Latino Dos, or Latino max at the time of the February 2011 Price Increase, and (c) the judge to whom this case is assigned, any member of the judge's immediate

family, and the judge's staff and their immediate families. (Joint Decl., Exh. 1 (Settlement Agreement) at I.A.17.)

Under the Settlement Agreement terms, DISH covenants not to raise rates before January 31, 2013 for the following packages: DISH America, DISH America Silver, DISH America Gold, America's Top 120 (AT120), America's Top 120 Plus (AT120+), America's Top 200 (AT200), and America's Top 250 (AT250), provided, however, that when the initial 12-month, promotional price has terminated, the price going forward shall be replaced by the then-current price (i.e., the regular price for the applicable programming package that is in effect at the time of the expiration of the customer's initial 12-month period). (*Id.* at III.A.)

For purposes of distributing additional relief, the Class is subdivided according to current subscriber status and the number of months that the subscriber paid the February 2011 Price Increase. (*Id*. at III.B). Thus, Class Members can choose credits of $5-$15 to an existing DISH account, credits of 3-5 free Pay-Per-View vouchers to an existing DISH account (worth $15-$35), or 2-4 months of free online DVD rentals with home delivery through the Blockbuster By Mail service (worth $20-$40) according to the following schedule:

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SUBSCRIBER STATUS	NUMBER OF MONTHS THE SUBSCRIBER PAID THE FEB. 2011 PRICE INCREASE WHILE IN THE FIRST 12-MONTHS OF A 24-MONTH COMMITMENT	BENEFIT OPTIONS
Current DISH Customer	1-4	2 months of Blockbuster By Mail
		3 Pay-Per View Vouchers
		$5 Credit to the Class Member's DISH Account
	5-8	3 Months of Blockbuster By Mail
		4 Pay-Per-View Vouchers
		$10 Credit to the Class Member's DISH Account
	9-12	4 Months of Blockbuster By Mail
		5 Pay-Per-View Vouchers
		$15 Credit to the Class Member's DISH Account
Former DISH Customer	1-4	2 Months of Blockbuster By Mail
	5-8	3 Months of Blockbuster By Mail
	9-12	4 Months of Blockbuster By Mail

(*Id*.)

Blockbuster By Mail: The Blockbuster By Mail service, currently $9.99/month, allows users to rent movies for mail delivery. (*Id*. at I.A.2.) Class Members who choose this option will receive a promotional code and instructions on how to activate their free subscription, or apply the benefit to their existing subscription. For new subscriptions, the service will automatically terminate at the end of the benefit period. Unredeemed subscriptions will not be replaced with any other benefit. (*Id*. at III.C.6.)

Pay-Per-View Vouchers: Each Pay-Per-View voucher allows DISH subscribers to view DISH Pay-Per-View programming valued at $4.99-$6.99 per program. (*Id*. at I.A.7.) The vouchers will be issued electronically to the DISH accounts of Class Members who select this option and will remain valid for 18 months; unredeemed vouchers will not be replaced with any other benefit. (*Id*. at III.C.5.)

Value of the Benefits: The settlement structure allows Class Members to choose the benefit of the most use and value to each individual Class Member. Thus, Class Members who are current DISH customers and who paid the February 2011 Price Increase for 1-4 months during the first 12 months of a 24-month commitment term – and thus allegedly overpaid between $3 and $20 – may choose $20 worth of the Blockbuster By mail service, $15-$21 worth of Pay-Per-View vouchers or a $5 account credit. A Class Member who is a current DISH customer and who paid the price increase for 5-8 months – and thus allegedly overpaid between $15 and $40 – may choose $30 worth of the Blockbuster By Mail service, $20-$28 worth of Pay-Per-View vouchers, or a $10 account credit. A Class Member who is a current DISH customer and who paid the price increase for 9-12 month – and thus allegedly overpaid between $27 and $60 – may choose $40 worth of the Blockbuster By Mail service, $25-$35 worth of Pay-Per-View vouchers, or a $15 account credit.

Selection of a Benefit: Claim forms in substantially the form approved by the Court were provided to Class Members with class notice or via the settlement website maintained by class counsel. Class Members have until March 12, 2012 to return completed claim forms via U.S. Mail or e-mail.

Change in Subscriber Status After Submission of a Claim Form: If a Class Member validly selects Pay-Per-View vouchers or an account credit but no longer has an active DISH account when benefits are distributed, DISH will send the Class Member a Blockbuster By Mail promotional code. (*Id*. at III.C.3.)

B. Class Notice

DISH distributed class notice to approximately 3.2 million Class Members by e-mail and U.S. mail on a rolling basis throughout January. For Class Members with an e-mail address on file with DISH, DISH sent a full class notice and claim form. Other Class Members received a summary notice with their DISH bill or via postcard; the summary notice directed Class Members to the settlement website for additional information and claim forms. (*See* Joint Decl. ¶ 16; Settlement Agreement at IV.A.1.)

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IV. ARGUMENT

A. The Class Action Settlement Process

A class action settlement like the one proposed here must be approved by the Court to be effective. *See* Fed. R. Civ. P. 23(e). The court approval process has three principal steps:

1. A preliminary approval hearing, at which the Court considers whether the proposed settlement is within the range of reasonableness and possibly meriting final approval;
2. A notice period, during which time Class Members are notified of the proposed settlement and given an opportunity to express any objections; and
3. A "formal fairness hearing," or final approval hearing, at which the Court decides whether the proposed settlement should be approved as fair, adequate, and reasonable to the Class.

See Manual for Complex Litig. (Fourth) §§ 21.632-34 (2004).

The first two steps have been completed. The Court granted the motion for preliminary approval of the proposed settlement in November 2011, (Dkt. No. 60 (Order)), and notice was disseminated to 1,104,219 Class Members via e-mail, 409,986 Class Members via postcards sent separately through the U.S. Mail, and 1,688,430 Class Members via summary notice included with their DISH statements sent through the U.S. Mail. Defendants will attest in their Certification of Compliance with the Notice Requirements that they have notified Class Members of the proposed settlement and fairness hearing.

B. The Court Should Grant Final Approval of the Proposed Settlement

A proposed class action settlement may be approved if the Court, after allowing absent class members an opportunity to be heard, finds that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). In making this determination, "the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable, and adequate to all." *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009) (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)); *see also Officers for Justice v. Civ.*

Serv. Comm'n, 688 F.2d 615, 625 (9th Cir. 1982) ("voluntary conciliation and settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation . . . .").

The decision whether to approve the parties' proposed settlement is committed to the sound discretion of the trial judge, and will not be overturned except upon a strong showing of a clear abuse of discretion. *Hanlon*, 150 F.3d at 1026-27. The Ninth Circuit, however, has set forth a list of non-exclusive factors that a district court should balance in deciding whether to grant final approval, namely:

1. the strength of plaintiffs' case;
2. the risk, expense, complexity, and likely duration of further litigation;
3. the risk of maintaining class action status throughout the trial;
4. the amount offered in settlement;
5. the extent of discovery completed, and the stage of the proceedings;
6. the experiences and views of counsel
7. the presence of a governmental participant; and
8. the reaction of the class members to the proposed settlement.

Rodriguez, 563 F.3d at 963 (referred to herein as "the *Hanlon* factors"). Settlements that follow sufficient discovery and genuine arms-length negotiations are presumed fair. *Nat'l Rural Telecomms. Coop. v. Directv, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004).

The first four *Hanlon* factors are designed to assist the Court in comparing the compromise with the likely rewards of the litigation. By evaluating the strength of the Plaintiffs' case, the risk, expense, complexity, and delay associated with further proceedings, and the risk of maintaining class certification through trial, the Court can get a good idea of the value of the Class Members' claims. The Court can then evaluate the amount offered by the parties' proposed settlement in context to determine whether it provides fair compensation for those claims – or, stated another way, "whether the interests of the class are better served by the settlement than by further litigation." *Manual for Complex Litig. (Fourth)* §§ 21.61 (2004); *see generally In re TD Ameritrade Accountholder Litig.*, No. C 07-2852 VRW, 2009 WL 6057238, at *4 (N.D. Cal. Oct. 23, 2009) ("Basic to the process of deciding whether a proposed settlement is fair, reasonable and adequate is the need to compare the terms of the compromise with the likely rewards of litigation.") (quoting from *Protective Comm. For Indep. Stockholders of TMT Trailer*

Ferry, Inc. v. Anderson, 390 U.S. 414, 424-25 (1968)) (brackets and ellipsis removed).

The remaining *Hanlon* factors offer additional perspectives on whether the amount offered by the settlement is fair, with the fifth factor designed to ensure that the parties and the court have sufficient information to intelligently assess the value of the class members' claims, the sixth and eighth factors taking into account class counsel's and individual class members' opinions about the settlement, and the seventh factor accounting for the position or views of any governmental participant.

A thorough evaluation of the *Hanlon* factors in this case shows that the proposed settlement provides strong value to Class Members without the risk and delay associated with further litigation, and should be approved as a fair, adequate, and reasonable resolution of their claims against DISH.

1. The Strength of Plaintiffs' Case

Plaintiffs believe that they have a strong case on the facts, which is borne out by the strength of the settlement itself. The benefits provided under the settlement, valued at up to almost $40 per Class Member, permit a significant recovery in light of the $3-$60 value of Class Members' claims for overpayment during the discounted first year. The calculation of available benefits is proportionate to the length of time that each customer paid the February 2011 Price Increase during their initial twelve months. Furthermore, these benefits were secured in the face of DISH's vigorously asserted defenses, *e.g.*, that (1) the price change disclaimer in DISH's advertisements and customer contracts were conspicuously disclosed and legally enforceable, (2) DISH circulated a number of different types of advertisements, which cumulatively reflected that the introductory, promotional price was a discounted price, not a fixed rate, and (3) Plaintiffs would be unable to prove the "intent to defraud" prong of their false advertising claim. (*See* Dkt. No. 37 (DISH's Motion To Dismiss and Strike).) Plaintiffs also secured locked-in pricing on certain packages through January 31, 2013 in exchange for claims relating to rate increases during the second year of Class Members' 24-month commitment terms. Plaintiffs recognize the relative weakness of these second-year claims, illustrated by DISH's contention that references to a "regular" or "then-current" rate for the second year superseded any stated price amount, and consider the benefit achieved meaningful in light of the litigation risk. Even if Plaintiffs were to prevail on their claim that Class Members were entitled to a "fixed" rate during the first 12 months of their contracts, there was a risk that Plaintiffs would be unable to prove any damages at trial. For

example, DISH argued it could have raised rates for these customers after the customers' first year in an amount to compensate for any "fixed" prices during the first 12-month contract period.

The parties also considered the possibility that the Court would deny class certification based on DISH's argument that individual issues predominate over common issues. For example, DISH contended that individual issues regarding each Class Member's reliance on DISH's advertising would predominate over any common issues. DISH also argued that its advertising did not uniformly rely on price promotion and that the majority of advertisements emphasized that the initial, promotional price was a discounted rate, not a fixed rate. In agreeing to the settlement, the parties took the foregoing risks into account. (*See* Joint Decl. ¶ 5.)

In the judgment of Plaintiffs' Counsel, the proposed settlement is a fair and reasonable compromise of the issues in dispute in light of the strengths and weaknesses of each side's case. (Joint Decl. ¶¶ 5 & 22 .) If the case were to proceed to trial and if Plaintiffs were to prevail both at trial and on appeal, a class recovery would likely come no earlier than 2013. And any damage award at that time would need to be distributed to Class Members based on subscription records that would then be several years old; Class Members would also likely need to locate payment records for their subscriptions that would be equally old, significantly reducing the overall recovery of the Class. In other words, a victory at trial, coming a year or two after the claims period that has just concluded, would not necessarily deliver results superior to the settlement before the Court.

2. The Risks, Expense, Complexity, and Likely Duration of Further Litigation

Courts weigh the benefits of the settlement against the expense and delay involved in achieving an equivalent or more favorable result at trial, as well as the risk of maintaining class action status throughout the trial. *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003). If the parties had been unable to resolve this case through settlement, the litigation could have been even more expensive and lengthy. The parties would need to conduct further discovery, including taking the depositions of DISH personnel and class representatives. This discovery would be followed by a motion for class certification, a potential motion for summary judgment, and then trial. It is therefore unlikely that the case would go to trial before mid-2013, with post-trial activities to follow.

As noted above, certifying a class here would not have been easy. Even if Plaintiffs had prevailed on the merits, there is also the likelihood that Defendant would have appealed the verdict, thereby further delaying any recovery for Class Members.

Courts recognize the risks associated with litigating a case through trial. In finally approving a class settlement, one district court observed:

> An evaluation of the benefits of settlement must also be tempered by a recognition that any compromise involves concessions on the part of all the settling parties. Indeed, "the very essence of a settlement is compromise, 'a yielding of absolutes and an abandoning of highest hopes.'" *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 624 (9th Cir. 1982) (citations omitted). The outcome of this action was by no means a foregone conclusion. Had . . . Plaintiffs continued to litigate, they would have faced a host of potential risks and costs, including the potential for successful attacks on the pleadings, high costs associated with lengthy and complex litigation, potential loss on summary judgment, and risks and costs associated with trial, should the case progress that far. Indeed, even a favorable judgment at trial may face post-trial motions and even if liability was established, the amount of recoverable damages is uncertain. The Settlement eliminates these and other risks of continued litigation, including the very real risk of no recovery after several years of litigation.

In re NVIDIA Corp. Derivative Litig., No. C 06-06110-SBA (JCS), 2008 WL 5382544, at *3 (N.D. Cal. Dec. 22, 2008).

3. The Risk of Maintaining Class Action Status Through Trial

DISH would likely oppose certification if the case were to proceed on the merits. "The value of a class action 'depends largely on the certification of the class,' and . . . class certification undeniably represents a serious risk for plaintiffs in any class action lawsuit." *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 392 (C.D. Cal. 2007) (quoting *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 817 (3d Cir. 1995)). While Class Counsel believes that this case is appropriate for class certification in the litigation context, there is always a risk that a Court would not find this action suitable for certification as a nationwide class or a multi-state class. Further, even if class certification were granted in the litigation context, class certification can always be reviewed or modified before trial, and a class may be decertified at any time. *Dukes v. Wal-Mart Stores*, 603 F.3d 571, 579 (9th Cir. 2010) (en banc), *rev'd on other grounds*, 131 S. Ct. 2541 (2011). The bottom line is that there is much risk in procuring class certification, and maintaining it through trial.

4. The Benefits Offered in Settlement

The proposed settlement provides valuable benefits to Class Members comparable to the relief Plaintiffs could hope to gain through success at trial. The benefits provided under the settlement, valued at up to almost $40 per Class Member, permit a significant recovery in light of the $3-$60 value of Class Members' claims for overpayments during the discounted first year. The calculation of available benefits is proportionate to the length of time that each customer paid the February 2011 Price Increase during their initial twelve months. In addition, the settlement has no cap – there is no dollar limit assigned to the specific benefits under this settlement. By securing relief for Class Members now, the settlement not only avoids the uncertainty associated with prolonged litigation, but also permits the prompt distribution of benefits to Class Members when they are easier to locate and thus makes it easier to file claims for benefits.

5. The Extent of Discovery Completed and the Stage of the Proceedings

Class Counsel has sufficient information to evaluate the strengths and weaknesses of the claims intelligently. *Rodriguez*, 563 F.3d at 967. Class Counsel was well-informed by targeted discovery – thousands of pages were produced by DISH reflecting DISH's advertising materials, customer contracts, and customer representatives' protocols, as well as internal training documents. In addition, DISH provided extensive subscriber data information, which Plaintiffs analyzed. *See, e.g., Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454, 459 (9th Cir. 2000) ("[I]n the context of class action settlements, formal discovery is not a necessary ticket to the bargaining table where the parties have sufficient information to make an informed decision about settlement.") (internal quotation marks and citation omitted). The informal discovery conducted by the parties permitted Class Counsel to fully evaluate the merits of Plaintiffs' claims and negotiate an appropriate settlement. Furthermore, the settlement was negotiated by counsel familiar with the legal and factual issues of the case and well-versed in litigating similar consumer class actions. In short, the parties were fully informed of all relevant facts when they negotiated the proposed settlement.

6. The Experience and Views of Counsel

The recommendation of experienced counsel weighs in favor of approving the settlement. *See In re Omnivision Tech., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D. Cal. 2008). Class Counsel includes Girard

Gibbs LLP and Cohen Milstein Sellers & Toll PLLC, two of the most respected and experienced consumer class action litigation firms in the country. *See* Dkt. No. 30 (Gibbs Decl.) ¶¶ 4-6; Dkt. No. 31 (Friedman Decl.) ¶¶ 5-10; Dkt. No. 53-2 (Gibbs Decl.), Exh. 2 (Girard Gibbs Firm Resume); *id.*, Exh. 3 (Cohen Milstein Firm Resume). The remaining Class Counsel also has extensive experience with consumer class action litigation. (*See id.*, Exh. 4 (Wentz Firm Resume.) Moreover, the proposed settlement is the result of arm's-length negotiations by the parties and is thus entitled to an initial presumption of fairness. *See Harris v. Vector Mktg. Corp.*, No. C-08-5198, 2011 WL 1627973, at *8 (N.D. Cal. Apr. 29, 2011) ("An initial presumption of fairness is usually involved if the settlement is recommended by class counsel after arm's-length bargaining."). The parties were assisted by a neutral and experienced mediator, Randy Wulff. *See Harris*, 2011 WL 1627973, at *8; *Satchell v. Federal Express Corp.*, Nos. C03-2659 SI, C03-2878, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007) ("The assistance of an experienced mediator in the settlement process confirms that the settlement is non-collusive.") These experienced Class Counsel recommend the settlement without reservation. (*See* Joint Decl. ¶¶ 5 & 22.)

7. The Presence of a Governmental Participant

No governmental agency is directly involved in this lawsuit, and Class Counsel is unaware of any government action against DISH relating to the February 2011 price increase. The Attorney General of the United States and Attorneys General of each of the States were notified of the proposed settlement pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715, on November 07, 2011. To date, no governmental entity has filed an objection to the proposed settlement or intervened in the lawsuit.

8. The Reaction of the Class Members to the Proposed Settlement

The reaction of the class cannot be fully evaluated until after March 2, 2012, the deadline for Class Members to comment on or object to the settlement. However, the initial feedback has been largely positive. From a class of approximately 3.2 million class members, only 69 exclusion requests and ten objection letters have been received to date, along with two comment letters expressing approval of the settlement. Meanwhile, thousands of Class Members have reached out to Class Counsel with informal questions and comments about the settlement; most are seeking claim forms and many have

expressed gratitude for the benefits made available. (Joint Decl. ¶ 16.) Plaintiffs will more fully address the reaction of Class Members to the proposed settlement in their reply filing due on March 9, 2012.

9. Evidence of Collusion or Other Conflicts of Interest

Where a proposed settlement is negotiated prior to class certification, as was the case here, the Ninth Circuit has recently emphasized that "consideration of th[e] eight *Hanlon* factors alone is not enough to survive appellate review." *In re Bluetooth Headset Products Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011). The Court must also scrutinize the settlement "for evidence of collusion or conflicts of interest," including "more subtle signs that class counsel have allowed pursuit of their own self-interest and that of certain class members to infect the negotiations." *Id.*

One of the warning signs of implicit collusion is when the class receives relief of little value but class counsel receives a hefty fee. Here, Plaintiffs believe that the quality of the settlement they negotiated and the reasonableness of the fees they are asking the Court to award collectively show that Class Counsel did not exchange potential class benefits for increased attorney fees. Class Members are receiving benefits that compare favorably with both the potential damages caused by the February 2011 price increase and the likely recovery through a successful trial. There is no indication that counsel compromised the interests of the class; rather, class counsel negotiated an early resolution of class claims that provides valuable benefits to Class Member in a short time.

Another possible indication of collusion is when class counsel negotiates a "clear sailing" arrangement, under which the defendant will not object to an award of attorney fees up to a certain amount. Here, DISH has agreed not to oppose class counsel's request for fees up to a capped amount, but that term was included to establish DISH's comprehensive liability in the settlement; without this certainty regarding its overall liability exposure, DISH would have been unwilling to accept the settlement. *See Staton v. Boeing Co.*, 327 F.3d at 971 (defendants have a right to assurance as to the limits of their liability exposure, including exposure to any attorneys' fee award). The "clear sailing" provision in the parties' settlement, in other words, is not for class counsel's benefit, as would be the case in a collusive class settlement, but rather for DISH's, and, because DISH would not have proceeded without such an agreement, for the Class's benefit.

V. CONCLUSION

The proposed settlement is fair, reasonable, and adequate. It will provide prompt and significant benefits to the Class and does not represent a significant discount from what Plaintiffs might hope to achieve through a successful trial. In light of the benefits available under the settlement, there is minimal, if any, value in enduring the risk, complexity, delay and expense of continued litigation. Rather, the class's interests are best served by prompt implementation of the proposed settlement. Plaintiffs thus respectfully request that the Court grant final approval of the proposed settlement and enter final judgment.

Dated: February 13, 2012

Respectfully submitted,
GIRARD GIBBS LLP

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