

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ANDREW PARKER, et al.,

Plaintiffs,

-against-

MEMORANDUM AND ORDER
98-CV-4265 (ILG) (JMA)

TIME WARNER ENTERTAINMENT
COMPANY, L.P., and TIME WARNER
CABLE, INC.

Defendants.

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GLASSER, United States District Judge:

In a separate Order issued on this day, the Court granted the parties' motion pursuant to Federal Rule of Civil Procedure 23(e) ("Rule 23") for preliminary approval of the revised settlement agreement ("Settlement Agreement")¹ submitted on April 2, 2008. See docket no. 196. The Court now issues this brief opinion for the purpose of discussing the differences between the currently pending Settlement Agreement and the previous settlement proposal, of which the Court denied final approval in an opinion reported at 239 F.R.D. 318 (E.D.N.Y. 2007) (hereinafter the "January 2007 Order"), and explaining the Court's reasons for granting preliminary approval of the revised Settlement Agreement. Familiarity with the January 2007 Order and the underlying facts of this case is herein assumed.

Because the terms and structure of the Settlement Agreement differ only in relatively small details from the version rejected by the Court in the January 2007 Order, much of the Court's analysis of the previous settlement proposal applies with

¹ The Settlement Agreement is attached as Exhibit A to the Declaration of Daniel Hume in Support of Motion for Preliminary Approval of Class Action Settlement ("Hume Decl."), submitted in support of the pending motion for preliminary approval of the class action settlement.

equal force to this one. For example, the Court's determination that the Rule 23(a) factors were satisfied by the previous agreement is equally applicable to the current Settlement Agreement. See 239 F.R.D. at 328-30. Likewise, the Court's conclusion that the previous settlement agreement was procedurally and substantively fair applies with equal force to the current agreement. See id. at 337. Thus, this opinion shall focus on the three aspects of the previous settlement agreement that the Court held to preclude final approval of the settlement: (1) the certifiability of the settlement class under Rule 23(b)(2); (2) the failure of the proposed plan of notice to meet the stringent requirements applied by Rule 23(c)(2)(B) to a Rule 23(b)(3) class; and (3) the distributional fairness of the proposed settlement.

I. Summary of Revised Settlement Terms

A. Definition of the Class

The Settlement Agreement defines the Class as “[a]ll persons throughout the United States who were Time Warner Cable subscribers at any point in time between January 1, 1994 and December 31, 1998, except for current Time Warner Cable officers, directors, employees and counsel.” Settlement Agreement at 3 ¶ A. The Settlement Agreement stipulates to the certification of the settlement class “under Fed. R. Civ. P. 23(b)(2) and/or 23(b)(3),” id. ¶ 2, notwithstanding this Court's determination in the January 2007 Order that the class is not certifiable under Rule 23(b)(2) because the damages component of the settlement predominates over the equitable relief.² See 239

² The minor changes in the benefits to the Class contemplated by the proposed Settlement Agreement are insufficient to warrant reconsideration of that conclusion with respect to the current agreement. As discussed below, the choices regarding damages benefits available to each Class member have been expanded in the current Settlement Agreement, but the equitable relief to be provided under this agreement is identical to that contemplated by the previous one. Compare 239 F.R.D. at 332

F.R.D. at 332. Notably, in response to the Court's instruction in the January 2007 Order that "[s]hould the parties again seek settlement certification, any and all readable [list sales databases ("LSDBs")] must be used to identify the class," *id.* at 340, the Settlement Agreement provides that Time Warner will perform a "computer match" on all of the LSDB backup tapes in its possession and will provide the plaintiffs with the result of that search. Settlement Agreement ¶ 3. Thus, all persons whose names appear on any of the recoverable backup tapes in Time Warner's possession, not only those listed on the 1999 LSDB, will be identified as members of the Class.³

B. Settlement Benefits

In the January 2007 Order, the Court identified four subclasses to which the proposed settlement agreement provided disparate levels of benefits:

(describing equitable relief contemplated by previous settlement agreement) with Settlement Agreement ¶¶ 12-15.

In their Memorandum of Law in Support of Preliminary Approval of the Revised Settlement ("Settlement Mem."), the parties contend that the Settlement Agreement provides for the certification of separate 23(b)(2) and 23(b)(3) classes for equitable relief and damages. Settlement Mem. at 14. The text of the Settlement Agreement, quoted above, hardly makes clear that the certification of two separate classes is intended, and indeed uses the term "Class" in the singular throughout. The parties also request "in the alternative" that the Class be certified solely pursuant to 23(b)(2) or 23(b)(3). *Id.* at 19-20. This request is discussed at greater length in Part II(A), *infra*.

³ The Affidavit of Gary Olmstead ("Olmstead Aff."), attached as Exhibit C to the Hume Declaration, states that Time Warner was able to restore five backup tapes from 1996, which contained a total of 2.4 million names that were not duplicative of names on the 1999 list. Olmstead Aff. ¶ 5. Olmstead asserts that no other LSDB backup tapes exist. *Id.*

(1) those Class Members who are listed on the Time Warner List Sales Database dated January 1, 1999, (“LSDB”), and who currently subscribe to Time Warner Cable services, which are defined as “List Class Member Current Subscribers” (hereinafter “Category I” Class Members); (2) those Class Members who are listed on the LSDB and who no longer subscribe to Time Warner Cable services, but live in an area served by Time Warner Cable (hereinafter “Category II” Class Members); (3) those Class Members who are listed on the LSDB and who no longer subscribe to Time Warner Cable services, and who do not live in an area served by Time Warner Cable (hereinafter “Category III” Class Members); and, (4) those Class Members who are not listed on the LSDB (hereinafter “Category IV” Class Members).

39 F.R.D. at 326. While the Settlement Agreement purports to identify only two subclasses– List Class Current Member Subscribers and List Class Former Member Subscribers– the categories recognized by the Court in the January 2007 Order remain applicable to the current Settlement Agreement, as a class member’s place in Categories I-IV determines the benefits available to that class member under the proposed settlement.⁴ The benefits available to each category of class member are provided by the Settlement Agreement as follows:

⁴ It should be noted that, as discussed above, Time Warner is required under the Settlement Agreement to review the backup tapes of former LSDBs in order to discover the identities of additional class members whose names appeared on previous LSDBs to the extent those documents are recoverable. Thus, Categories I through III under the current Settlement Agreement will not be limited to those whose names appeared on the 1999 LSDB, but will include all class members whose names appeared on any LSDB during the Class Period whose names are recoverable. Likewise, Category IV class members will be only those class members whose names do not appear on any recoverable LSDB.

| Class Category | Benefits Available |
|-----------------------|--|
| Category I | (i) One free month of any Time Warner Cable service that is available on a monthly basis and to which the customer does not currently subscribe, or (ii) two free Movies on Demand, or (iii) a \$5 check. |
| Category II | (i) One free month of any Time Warner Cable service that is available on a monthly basis, with no installation fee of any kind, or (ii) two free Movies on Demand, or (iii) the ability to transfer to any other person who lives within an area serviced by Time Warner Cable one free month of service or two free Movies on Demand, or (iv) a \$5 check. |
| Category III | (i) The ability to transfer to any other person who lives within an area serviced by Time Warner Cable one free month of service or two free Movies on Demand, or (ii) a \$5 check. |
| Category IV | No benefit. |

See Settlement Agreement ¶ 4(a)-(b). The primary change to the availability of benefits made by the pending Settlement Agreement to the agreement rejected in the January 2007 Order is that all three categories of Class Members that are eligible to receive benefits may now opt to receive a \$5 check rather than in-kind benefits.⁵ All class members who select as their benefit a free month of service shall be free to continue the service at Time Warner's usual rate after the free month, or to cancel the service at the end of the month. *Id.* ¶ 4(e).

C. Proposed Plan of Notice

⁵ The Settlement Agreement provides that any Class members that submitted a claim for benefits under the previous settlement agreement (identified as "Former Claimants") may receive either one month of free service or two free Movies on Demand without submitting another claim form, or may request a benefit that was not previously available to them under the prior agreement by submitting a new claim form. *See id.* ¶ 4(c)-(d).

The plan of notice has been substantially revised since the January 2007 Order was issued. The current plan is described in substantial detail in the Affidavit of Jeanne C. Finegan, APR (“Finegan Aff.”),⁶ attached as Exhibit B to the Hume Declaration. The Settlement Agreement would require Time Warner to update its address lists through its own subscriber lists and also through the National Change of Address (“NCOA”) database, and to send a “long form” 6-page notice and a claim form to every Class Member for whom an updated address can be obtained.⁷ See Settlement Agreement at 4 ¶ J & Ex. 1 App’x B; Settlement Mem. at 5-6. For class members for whom updated address information is not available, Time Warner will send a “short form” postcard, which will include basic information about the case as well as the URL for the settlement website, a telephone number and mailing address dedicated to the Settlement, and the date, time, and location of the fairness hearing, to the class members’ last known address. See Settlement Agreement at 5 ¶ K & Ex. 1 App’x C; Finegan Aff. ¶ 15. Each of the 286,503 Former Claimants shall also receive a postcard notice. Id. at 5 ¶ L; Finegan Aff. ¶ 16. The parties will engage in a substantial publication notice campaign, publishing notice of the settlement in a number of national periodicals.⁸ The Finegan Affidavit estimates that “[t]he publication component

⁶ Ms. Finegan is a Senior Vice President of the Garden City Group (“GCG”).

⁷ The Finegan Affidavit estimates that the long form notice will be sent to 1.3 million current subscribers and an unspecified number of former subscribers whose address information Time Warner obtains through the NCOA database. See Finegan Aff. ¶ 14.

⁸ The Finegan Affidavit states that the publication notice “will be published in each of the following general interest publications once: Parade Magazine, USA Weekend, Jet, People en Español, Southern Living, Better Homes and Gardens, The New York Times, and The Wall Street Journal; twice in Reader’s Digest and Sports Illustrated and four times in People Magazine.” Finegan Aff. ¶ 21.

alone of the Notice Program will reach an estimated 80.1% of the target audience, with an average[] ‘frequency’ of 2.92 times.” Finegan Aff. ¶ 26. GCG will also establish a settlement website, which will make available the long form notice and claim form in both English and Spanish, see id. ¶ 27, and a toll-free 24-hour “telephone helpline” in which callers may obtain information about the settlement in both English and Spanish. Id. ¶ 28.

II. Analysis of Proposed Settlement Agreement

A. Settlement Class Certification

In the January 2007 Order, the Court held that the settlement class could not be certified under Rule 23(b)(2) because the damages component of the settlement predominated over the equitable relief, which the Court deemed “insignificant.” 239 F.R.D. at 332. As noted above, see supra note 2, the revisions implemented in the current Settlement Agreement do not warrant reconsideration of this Court’s earlier conclusion that the Class cannot be certified exclusively pursuant to Rule 23(b)(2) under the analysis articulated by the Second Circuit in Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 164 (2d Cir. 2001).⁹ However, the Court finds that the proposed class meets all of the criteria required for certification under Rule 23(b)(3), and since, as discussed below, the proposed plan of notice is sufficient under Rule 23(c)(2)(B), there would appear to be no impediment to certifying the settlement class solely under

⁹ This conclusion is consistent with the view expressed by Judge Newman in his opinion concurring with the decision to remand the case to this Court following its initial denial of the motion for class certification, in which he noted that “I am somewhat doubtful about the possibility of a (b)(2) class that would include monetary claims but believe that there are strong arguments favoring a (b)(3) class.” Parker v. Time Warner Entm’t Co., L.P., 331 F.3d 13, 23 (2d Cir. 2003) (Newman, J., concurring).

Rule 23(b)(3).

The Settlement Agreement and the Settlement Memorandum indicate that the parties' preferred solution is the certification of two separate settlement classes under Rule 23(b)(2), for the equitable relief portion of the settlement, and 23(b)(3), for the damages portion. The parties' submissions do not make clear why they prefer the certification of two separate classes, as opposed to a single class under Rule 23(b)(3). Settlement Agreement ¶ 2; Settlement Mem. at 19-20. While they are correct that the requirements for certification of a Rule 23(b)(2) class are met as to the equitable elements of the settlement, they make no attempt to explain what purpose the certification of separate damages and equitable relief classes would achieve.¹⁰ Since the membership of the two contemplated classes would appear to be co-extensive, notice sufficient to comply with Rule 23(c)(2)(B) would need to be sent to each individual class member regardless of whether one or two classes are certified; indeed, the Settlement Agreement does not appear to anticipate providing a separate notice, pursuant to Rule 23(c)(2)(A), to the Rule 23(b)(2) class.¹¹ Moreover, as the parties point out,

¹⁰ When the Court raised this issue with the parties at the preliminary approval hearing, counsel for the plaintiffs suggested that the parties viewed the certification of dual 23(b)(2) and 23(b)(3) classes as a necessary consequence of the Court's earlier ruling that the class cannot be certified exclusively under Rule 23(b)(2). For the reasons herein stated, the Court does not view its holding in the January 2007 Order as precluding the certification of a single Rule 23(b)(3) class incorporating both the damages and equitable portions of the settlement.

¹¹ The Second Circuit has recognized the logistical complications that may arise in the dual certification of co-extensive 23(b)(2) and 23(b)(3) classes. See Chateau de Ville Prods., Inc. v. Tams-Witmark Music Library, Inc., 586 F.2d 962, 966 n. 14 (2d Cir. 1978) ("While an action may meet the requirements of both 23(b)(2) and 23(b)(3), unless there is more than one class involved in the action, major problems can arise from certification under more than one subsection where different procedural consequences attach depending upon the subsection used. Particularly, we make reference to the fact that under (b)(3) class members must be given an opportunity to opt out of the class and avoid the binding effect of the judgment, whereas that is not the case under (b)(2).") (citing 3B Moore's Federal Practice § 23.31(2), at 23-261 & n.1 (2d ed. 1978); C. Wright, Law of Federal Courts 350 (3d ed. 1976); other citations omitted).

there would be no difficulty under the federal rules with certifying a Rule 23(b)(3) settlement class when the settlement includes both damages and equitable relief, particularly where, as this Court determined in the January 2007 Order, the damages component of the settlement predominates over the equitable relief. See Settlement Mem. at 20. The Court has therefore certified a single settlement class pursuant to Rule 23(b)(3) rather than separate settlement classes for damages and equitable relief.

B. Proposed Plan of Notice

In the January 2007 Order, the Court held that the proposed class could not be certified pursuant to Rule 23(b)(3) because the proposed notice was not the “best notice that is practicable under the circumstances,” as required by Rule 23(c)(2)(B). The Court reached this conclusion on the ground that the proposed plan of notice did not require Time Warner to update the addresses of former subscribers and send individual notice to them, which the objectors argued could be accomplished through the NCOA database at relatively little expense. 239 F.R.D. at 335-36.

The plan of notice described above satisfies all of the Court’s concerns expressed in the January 2007 Order. Under the terms of the Settlement Agreement, Time Warner is required to review any available LSDB backup tapes

The D.C. Circuit has approved the use of “hybrid” 23(b)(2)/(b)(3) classes when the criteria for certification under both subsections are met. See Eubanks v. Billington, 110 F.3d 87, 95-96 (D.C. Cir.1997); Bynum v. District of Columbia, 214 F.R.D. 27, 38-39, 41 (D.D.C. 2003) (citing Eubanks). However, it is unclear whether the Eubanks approach is consistent with the Robinson analysis adopted by the Second Circuit, and it does not appear that any courts within this circuit have granted certification to a “hybrid” class. Moreover, in light of the fact that Rule 23(b)(3) notice and opt-out requirements would have to be met even in the case of hybrid certification, it is not at all clear what benefit such an approach would bestow as an alternative to certification under Rule 23(b)(3) alone.

to identify as many prospective class members as possible, and is further required to refer to its own subscription lists and to the NCOA database to update as many addresses as possible prior to sending notice— indeed, the Olmstead and Finegan Affidavits state that Time Warner has already taken those steps. The Court therefore concludes that the plan of notice described in the Finegan Affidavit complies with Rule 23(c)(2)(B) as the best notice practicable under the circumstances.

C. Distributional Fairness

The January 2007 Order held that the proposed settlement was distributionally unfair because it discriminated against Category III class members by providing them a lesser benefit despite the fact that their claim against Time Warner is no weaker than that of Category I and Category II members.¹² See 239 F.R.D. at 340. The parties attempt to resolve the distributional fairness problem primarily by permitting members of Categories I-III to choose, in the alternative to the benefits contemplated by the settlement proposal previously rejected, to accept a \$5 check in lieu of an in-kind benefit or of the right to transfer an in-kind benefit to another person who lives within Time Warner's area of service. The parties assert that the \$5 cash benefit option puts Category III Class Members “on par with those who live in an area serviced by Time Warner, thereby eliminating any meaningful distinction between the benefits offered to Class members within and without a Time Warner area.”

¹² In their memorandum of law in favor of the current settlement, the parties seek to distinguish all of the cases cited in the January 2007 Order regarding the concept of distributional fairness from the present case. Because it finds that the proposed Settlement Agreement is, at least for purposes of preliminary approval, distributionally fair, the Court need not address the parties' arguments on this point.

Settlement Mem. at 8.

Like most aspects of settlement approval, the issue of whether the new proposal is distributionally fair is one over which the Court has discretion, which should be exercised in accordance with a policy generally favoring class action settlement. In re NASDAQ Market-Makers Antitrust Litig., 187 F.R.D. 465, 473 (S.D.N.Y.1998) (citing In re Ivan F. Boesky Sec. Litig., 948 F.2d 1358, 1368 (2d Cir.1991); Weinberger v. Kendrick, 698 F.2d 61, 73 (2d Cir.1982)). The most substantial question regarding the distributional fairness of the revised Settlement Agreement arises from the comparative value of the benefits available to Category III class members in comparison to those available to Categories I and II class members. The Settlement Agreement acknowledges that the monetary value of the in-kind benefits available to Category I and II Class Members ranges from \$7.90 (for two Movies on Demand) to \$129.95 (for one month of Time Warner's All-In-One Triple Play Package), based on rates within the New York City area. See Settlement Agreement ¶ 6. While some discount should obviously be made for a cash award, the fact remains that the value of the in-kind benefits available to Category I and II class members is somewhat greater than that available to Category III members. Nevertheless, the Court is cognizant of the facts that the provision of in-kind relief to class members located outside the area of Time Warner's service coverage is a logistical impossibility, and that no plausible reading of the case law cited in the January 27 Order would support the view that a settlement agreement negotiated in good faith and at arms' length must be rejected by the Court simply because factors outside the parties' control precludes the possibility of perfect parity in the compensation of class members.

It is clear in this case that the parties have made substantial efforts to provide meaningful consideration to each member of the class. Moreover, as counsel for Time Warner pointed out at the preliminary approval hearing, the right to transfer an in-kind benefit to an individual located within Time Warner's service area is itself of some potential pecuniary value to Category III class members inclined to sell it, and further pursuit of compensational parity between the categories of class members would run the self-defeating risk of leading to a reduction in the availability of in-kind benefits to Category I and II class members, rather than an increase in the benefits available to Category III members. Without prejudice to any objections that may subsequently be raised by class members, the Court finds that the proposed Settlement Agreement would establish a sufficient degree of distributional fairness among class members of Categories I, II, and III that preliminary approval of the agreement is warranted.¹³

¹³ In reaching this conclusion, the Court has taken into account the fact that counsel for two groups of objectors to the previous settlement— Daniel Anderson on behalf of Sharon and Rick Lobur, and Steven Witman on behalf of Lydia Townsend and Rosalie Vitrano—spoke in favor of the revised Settlement Agreement at the preliminary approval hearing.

CONCLUSION

For the reasons stated above, the Court finds that the revised Settlement Agreement meets the criteria for preliminary approval set forth by Federal Rule of Civil Procedure 23, and has signed the model order submitted by the parties to that effect.

SO ORDERED.

Dated: May 8, 2008
Brooklyn, New York

_____/s/
I. Leo Glasser
United States District Judge

On this day, copies of the foregoing were electronically transmitted to:

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