6-7-2010

Order on Attorneys' Fees and Costs and Incentive Awards to Class Representatives (DEBORAH EAVES)

Alice D. Bonner
Superior Court of Fulton County

COPY

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

DEBORAH EAVES, WILLIAM O'HARA, and DAVID TEGART, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

EARTHLINK, INC.,

Defendant.

Civil Action No. 2005-CV-97274
(Business Division 1 – AB)

B

~~[PROPOSED]~~ ORDER ON ATTORNEYS' FEES AND COSTS AND INCENTIVE AWARDS TO CLASS REPRESENTATIVES

Counsel for the parties appeared at a hearing held on June 7, 2010 to present oral argument and evidence regarding the application of Class Counsel for an award of attorneys' fees and expenses, as well as for incentive awards to the three class representatives. The Court, having considered the record of the case and the arguments and evidence presented, and the briefing submitted on the issues, finds as follows:

Class Counsel seek an award of attorneys' fees and expenses of $3,700,000, which the parties agreed to in their Settlement Agreement subject to this Court's approval. Class Counsel have zealously litigated this case on behalf of the Class for five years and achieved excellent results for the Class, including significant damages and injunctive relief. Class Counsel have presented evidence that the requested award would constitute approximately 7% to 11% of the common benefit to the Class of the settlement, that it would be paid separately by Defendant, and that it would not reduce the benefits provided to the Class by the Settlement. Accordingly, the requested award is clearly a reasonable percentage of the common benefit under Georgia law. Moreover, each of the applicable factors set forth in *Johnson v. Georgia Highway Express, Inc.*,

488 F.2d 714 (5th Cir. 1974) supports the requested award, which constitutes less than 1.61 times Class Counsel's total lodestar. The Court also finds that Class Representatives are entitled to the requested incentive awards, having borne the burden and risk of advancing the interests of the entire Class as representatives in this matter for five years and having thereby achieved significant benefits for the Class.

The Court therefore grants Class Counsel's Motion for Award of Attorneys' Fees and Costs and Incentive Awards to Class Representatives.

BACKGROUND

Plaintiffs are past or present customers of EarthLink, Inc. ("EarthLink"), a company that provides Internet access through a variety of technologies. Plaintiffs alleged that EarthLink violated Georgia law and damaged Plaintiffs by uniformly charging or threatening to charge its customers an arbitrary early termination fee ("ETF") for canceling service prior to the completion of a twelve-month contract term. The parties submitted a Settlement Agreement on February 8, 2010, which the Court preliminarily approved on February 19, 2010, and finally approved on June 7, 2010.

The Court observes that Class Counsel achieved an excellent result for the class by negotiating damages relief for the Class, despite that this Court had granted Defendant's motion for partial judgment on the pleadings based on the voluntary payment doctrine, which eliminated the class's claims for damages. The Court's ruling meant that no class members who had paid an ETF could recover it barring reversal of that ruling by the Georgia Court of Appeals. While the Court and the Court of Appeals certified that issue for interlocutory appeal, the Georgia Court of Appeals had not ruled on the issue at the time the parties entered the settlement.

The total Class includes more than a million and a half current and former subscribers of EarthLink. The Settlement Agreement provides significant relief to class members, including: cash refunds of half of ETFs actually paid; clearance of unpaid ETFs from former subscribers' EarthLink accounts and credit reports; EarthLink's agreement to cease any collection efforts for such unpaid amounts; and injunctive relief substantially reducing and prorating the amount of the ETFs EarthLink will charge its subscribers in the future.

Class Counsel have estimated, based on EarthLink's records, that the aggregate value of the damages and injunctive relief ranges from $33 to $50 million. Declaration of Bruce V. Spiva in Support of Plaintiffs' Motion for (1) Final Approval of Class Action Settlement; (2) Award of Attorneys' Fees and Costs; and (3) Incentive Awards to Class Representatives ("Spiva Decl.") ¶ 13. Class Counsel calculated this range of value using data EarthLink produced during discovery pursuant to a protective order. The range is based on estimations of: (1) the total amount of money available to class members who paid the fee and are entitled to claim half of their money back; (2) an estimate of the value of the reduction of EarthLink ETFs going forward, using 2009 data to project the number of likely ETFs over the three years covered by the injunction; and (3) the value of EarthLink agreeing to refrain from attempting to collect its purported "bad debt" related to ETFs that subscribers were charged but never paid. Spiva Decl. ¶¶ 13-14.

Class Counsel aver that their estimated range of value is conservative, because it does not include many significant elements of the settlement that, while clearly valuable, are difficult to quantify. For instance, Class Counsel observe that the settlement provides for the proration of ETFs after six months of a subscriber's contract has run. This means that in the future many subscribers who terminate early will be charged an ETF that is less than *one-third* as much as it

would have been under EarthLink's pre-settlement terms. However, Class Counsel state that due to a lack of data that would allow a projection of the likely number of subscribers who will terminate their contracts after the first six months, Class Counsel do not include the cost savings from proration in their estimate of the total value of the Class benefits. In addition, Class Counsel point out that under the Settlement Agreement EarthLink has agreed that it will not require a subscriber who has completed a twelve-month term contract to enter into a new term contract that contains an ETF unless the new contract involves the supply of new equipment or a different service. Class Counsel have not attempted to place a value on this benefit due to data limitations, but this injunctive relief will certainly result in many customers being able to terminate service without paying an ETF, when they would have under EarthLink's pre-settlement terms.

The Court finds that Class Counsel's estimate of the range of value of the benefits to the Class is credible and conservative, and finds that the likely range of benefits to the Class of the Settlement Agreement is between $33 and $50 million. Under the terms of the settlement, EarthLink has agreed to pay attorneys' fees and expenses of $3,700,000 plus incentive awards to the three named Plaintiffs in the amount of $7,500 each, for the time and effort undertaken in and risks of pursuing this five-year long litigation. Settlement Agreement ¶ 6.1. No award of attorneys' fees, costs, expenses or incentive awards made by the Court will decrease or have any other effect on the relief to be provided to class members. The requested attorneys' fee and expense award constitutes from 7% to 11% of the common benefit created for the Class.

I. THE COURT GIVES SIGNIFICANT WEIGHT TO THE FAIR AND REASONABLE AMOUNT OF ATTORNEYS' FEES AND EXPENSES NEGOTIATED BY THE PARTIES

Courts generally encourage fee agreements between plaintiffs and defendants in class actions that, like this one, are negotiated at arm's-length: "[i]n cases of this kind [class actions], we encourage counsel on both sides to utilize their best efforts to understandingly, sympathetically, and professionally arrive at a settlement as to attorney's fees." *Johnson*, 488 F.2d at 720. This maxim applies with even greater force in this case. Unlike many common fund cases, here, a decision to reduce the negotiated fee would not result in any additional benefit to the class, as EarthLink has agreed to pay the fee separately from the class recovery. The Court finds that the parties negotiated the attorneys' fees and expenses at arm's-length. Because the fee will be paid separately from the settlement benefit, EarthLink had a particular incentive to keep the fee as low as possible. *See Elkins v. Equitable Life Ins. Co. of Iowa*, No. 96-296, 1998 U.S. Dist. LEXIS 1557, *99 (M.D. Fla. 1998) (observing that where fee will not be deducted from a fixed fund, the defendant "had a particular incentive to bargain strenuously to keep the fee as low as possible."). Under these circumstances, the Court gives "great weight" to the negotiated fee in considering the fee request. *Id.* The Court sees no reason, and none has been presented, to reduce the amount of fees and incentives negotiated by the parties.

II. THE FEE IS REASONABLE UNDER A COMMON FUND ANALYSIS

Under Georgia law, Class Counsel who create a common fund or benefit for a class are entitled to have their fees and costs based on the common benefit achieved. *See, e.g., Barnes v. City of Atlanta*, 281 Ga. 256, 260 (2006) ("[A] person who at his own expense and for the benefit of persons in addition to himself, maintains a successful action for the preservation, protection or creation of a common fund in which others may share with him is entitled to reasonable

attorney fees from t he fund as a whole."); *see also Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("a lawyer who recovers a common fund for the benefit of persons other than . . . his client is entitled to a reasonable attorney's fee from the fund as a whole"); *Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768, 771 (11th Cir. 1991) ("*Camden I*") ("Under [common fund] doctrine, fee reimbursement is permitted . . . when litigation indirectly confers substantial monetary or nonmonetary benefits on members of an ascertainable class" (quoting H. Newberg, *Attorney Fee Awards* § 2.01 at 28-29 (1986))). This method of awarding attorneys' fees is appropriate whether the benefits conferred on class members are in cash – as are a substantial portion of the benefits available to the class in this case – or in non-monetary benefits such as discounts or injunctive relief.. *See, e.g., Camden I*, 946 F.2d at 771 (quoted above); *Hillis v. Equifax Consumer Svcs., Inc.*, No. 04-CV-3400, 2007 U.S. Dist. LEXIS 48278, *12, 15-16 (awarding $4 million in attorneys' fees based on substantial "in-kind benefits" and "injunctive relief").[1]

Georgia primarily looks to the "common fund" or "percentage of recovery" method for determining the reasonableness of attorneys' fees in class action cases. *Camden I*, 946 F.2d at 774; *Friedrich v. Fidelity Nat'l Bank*, 247 Ga. App. 704, 545 S.E.2d 107 (Ga. App. 2001) (adopting *Camden I's* rationale and holding that the "'percentage of the fund' method is the most

[1] As Class Counsel point out in their application, even the supposedly "non-monetary" benefits in this case actually have a monetary value. For example, EarthLink customers who terminate early going forward will be charged an ETF that is 40% lower than the fee they would have paid under pre-settlement terms. That savings constitutes a real monetary value: namely, $60 in the consumer's pocket that otherwise would have gone to EarthLink under pre-settlement terms. Likewise, proration of the ETF will result in a savings of $105 for many DSL subscribers who terminate after six months of service. Not only will these reduced fees save class members money in the future, but the future ETF reductions benefit all current subscribers subject to an ETF, because all will have more freedom – in the form of lower termination costs – to choose whether to stay with EarthLink or choose another Internet Service Provider.

appropriate."). While allowing that "[t]here is no hard and fast rule mandating a certain percentage of a common fund which may reasonably be awarded as a fee because the amount of any fee must be determined upon the facts of each case," the court in *Camden I* nevertheless found that "the majority of common fund fee awards fall between 20% to 30% of the fund," and some courts have approved fees above that range. *Camden I*, 946 F.2d at 774; *see also id.* at 775 (observing that an "upper limit of 50% of the fund may be stated as a general rule, although even larger percentages have been awarded") (citations omitted); *Waters v. International Precious Metals Corp.*, 191 F.3d 1291, 1295, 1300 (11th Cir. 1999) (upholding award of 33%).

In cases such as this one, involving a claims made process where class members must make a claim to receive a cash payment, courts generally determine a reasonable percentage for attorneys' fees and expenses based on the total amount of potential value created for the class, not just the amount of monetary claims actually made. *Boeing Co.*, 444 U.S. at 480 ("[The class members'] right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel."); *Waters*, 191 F.3d at 1295-1298 (finding that district court did not abuse discretion in basing fee on amount of total fund, rather than claims actually made); *Hillis*, 2007 U.S. Dist. LEXIS 48278, *15-16 ("The Court is aware that not all consumers will avail themselves of an opportunity to redeem this benefit. Nevertheless, the offer of the benefit to each class member has a substantial value, as of course does the injunctive relief agreed to."). The Court is aware that not all class members who are eligible to make a claim for a cash refund of ETFs will actually make a claim, resulting in less than the total possible value being achieved. However, the Court finds that it is appropriate to award fees on the basis of the total benefit created. Class Counsel have negotiated a fair and robust notice program, funded by EarthLink

separately from any benefits reserved to the class, and an uncapped commitment from EarthLink to pay any and all legitimate claims made during the claims period. Moreover, the Court finds that the injunctive relief provides real value to the class. Under these circumstances, it is appropriate to look to the total value of the package of benefits negotiated by the parties in determining the reasonableness of the requested fee award.

Class Counsel estimate, based on records provided by EarthLink during discovery, that the settlement obtained by Class Counsel has resulted in $33 to $50 million in tangible benefits being conferred upon the class.[2] Spiva Decl. ¶ 13. As previously noted, Class Counsel request, and EarthLink does not oppose, an award of $3,700,000 for both attorneys' fees *and* expenses. The requested fee and expense award is approximately 7% to 11% of the minimum value of the benefits obtained for the class – a percentage well below the 20% to 30% that Georgia courts recognize as a reasonable norm. Moreover, as discussed above, the value to the class of many of the settlement benefits cannot be easily estimated and therefore Class Counsel's estimated range does not include those benefits. Accordingly, the fee and expense award sought by Counsel is likely even lower than 7% to 11% of the common benefit created for the class. Because these percentages are well below the fees of 20 % to 30% of the common fund routinely found to be

[2] Class Counsel have submitted the following facts to the Court in the form of a Declaration by Bruce V. Spiva. In discovery, EarthLink produced a summary spreadsheet, along with voluminous backup spreadsheets, which purport to summarize data concerning the amount of ETFs charged and paid by early terminating subscribers from 2002 through a portion of 2009. Because EarthLink has stated that it does not have complete data for the entire class period – 2001 to present – Class Counsel's total estimate of value includes estimated values for the year 2001 and for portions of 2009 and 2010, based on extrapolation from existing EarthLink data. The range of total estimated value derives from a combination of: (1) the monetary payments available to class members who actually paid an ETF if they make a claim; (2) the likely future monetary benefits, based on historical data, of the reduction and proration of EarthLink's ETFs; and (3) the value to class members of EarthLink agreeing to refrain from attempting to collect its purported "bad debt" related to ETFs from customers who were charged but never paid an ETF. Spiva Dec. ¶ 13-15.

reasonable in Georgia, the Court grants Class Counsel's request for an award of $3,700,000 in fees and expenses. *See Camden I*, 946 F.2d at 774-75; *Waters*, 191 F.3d at 1295, 1300.

Finally, although the requested fee constitutes a reasonable percentage of the common benefit provided to the Class in its own right, the amount sought is even more reasonable because, unlike many common fund cases, in which the fees are deducted from the common fund and thus reduce the amount of benefits to class members, in this case, EarthLink has agreed to pay the requested award separate and apart from the cash and other benefits provided to class members. *Elkins*, 1998 U.S. Dist. LEXIS 1557 at *97 (characterizing as "far superior" an approach, as in this case, of not capping class recovery and not deducting attorneys' fees from common fund).

III. THE FEE IS REASONABLE UNDER THE "*JOHNSON*" FACTORS

Georgia and Eleventh Circuit courts also evaluate the reasonableness of attorneys' fee awards in common fund cases under the so-called "*Johnson* factors," first articulated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). *See Camden I*, 946 F.2d at 772-773. The twelve *Johnson* factors are: (1) the time and labor required to prosecute the case; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Camden I*, 946 F.2d at 772 (citing *Johnson*, 488 F.2d at 717-19). In this case, each of the

applicable *Johnson* factors supports the requested attorneys' fees. The Court discusses each of these factors below.

A. The Time and Labor Required to Prosecute the Case

Class Counsel obtained the extraordinary results in this settlement through five years of hard-fought litigation. The firms working on behalf of the class have spent over 5,200 hours in attorney and professional time prosecuting this case, which translates into a lodestar of $2,284,754.42, as well as over $75,000 in expenses. Spiva Decl. ¶ 9; Worley Decl. ¶¶ 6-8; Wallace Decl. ¶¶ 5-7; Berk Decl. ¶¶ 6-8.

Class Counsel's fee and expense declarations confirm, under a lodestar/multiplier cross-check, the reasonableness of the attorneys' fee and expense payment agreed to by the parties. The requested fee award would result in a multiplier of approximately 1.62, and likely less. This multiplier is clearly at the low end of attorneys' fee multipliers in complex class actions such as this one. For example, in *Elkins*, the court approved a fee that resulted in a lodestar multiplier of 2.34, noting that it was "much lower than the midrange of the multipliers in contingent fee awards in [complicated class actions]." *Elkins*, 1998 U.S. Dist. LEXIS at *104.

B. The Novelty and Difficulty of the Questions Involved

This case involved difficult and novel issues, as evidenced by the fact that it has been up to the Court of Appeals twice. Most recently, this case went before the Court of Appeals on an interlocutory appeal of the Court's ruling on the voluntary payment doctrine, which this Court certified for interlocutory review, as did the Court of Appeals. One of the factors weighing in favor of interlocutory certification was the novelty of the issue and the potential for difference of opinion among judges.

In addition, the primary claim in this case – that EarthLink's ETFs are unlawful penalties and not lawful liquidated damages – has rarely been litigated in a class action. EarthLink also raised several difficult and/or novel constitutional issues in opposing Plaintiffs' ultimately successful motion for class certification.

The fact that Class Counsel have skillfully addressed these novel and difficult issues, achieving a valuable settlement even in the face of the Class's damages claims having been dismissed, supports the requested fee award.

C. The Skill Requisite to Perform the Legal Service Properly

All class actions are complex and require a high level of skill and experience to litigate properly. Nationwide class actions such as this one are even more difficult and complex. Class Counsel achieved class certification of this nationwide class action against a determined, sophisticated and skillful defense by EarthLink. EarthLink raised a number of challenges to class certification, including several constitutional defenses, which Class Counsel successfully overcame. EarthLink also tenaciously attempted to reverse this Court's certification decision, and Plaintiffs successfully defended certification in the Georgia Court of Appeals and resisted certiorari review by the Georgia Supreme Court. As noted above, the voluntary payment doctrine also presented another difficult and novel legal issue. Class Counsel's perseverance in the face of an adverse ruling on that issue required skill and determination, and no doubt played a significant role in EarthLink agreeing under the settlement to repay 50% of the ETFs to class members who make a claim. This factor also supports the requested fee award.

D. The Preclusion of Other Employment by the Attorney Due to Acceptance of the Case

The Court does not doubt Lead Class Counsel's representation that vigorous litigation of this lawsuit precluded Class Counsel from accepting some other opportunities during the five years that they litigated this case. Spiva Decl. ¶ 9. The attorneys working on the matter are highly skilled and experienced, but each of their firms is relatively small in size. Class Counsel collectively worked over 5,200 hours on this matter, a substantial commitment to this case which was necessary to litigate it properly and achieve the excellent results for the class included in the settlement. Spiva Decl. ¶ 9.

E. The Customary Fee

As noted above, the requested fee falls well below the typical range of common fund and lodestar awards to counsel in other class actions in Georgia and the Eleventh Circuit. *See supra.* Sections I(A) & (B)(1).

F. Whether the Fee is Fixed or Contingent

Class Counsel undertook this litigation on a purely contingency fee basis and thus faced a real risk of recovering nothing and losing a substantial sum in cost and expense advances. *See* Spiva Decl. ¶ 2; Worley Decl. ¶ 3; Berk Decl. ¶ 2; Wallace Decl. ¶ 2. "Courts have long recognized, particularly in [the Eleventh Circuit], that the attorneys' contingent risk is an important factor in determining the fee award." *Elkins*, 1998 U.S. Dist. LEXIS at *102.

G. Time Limitations Imposed by the Client or the Circumstances

"Priority work that delays the lawyer's other legal work is entitled to some premium." *Johnson*, 488 F.2d at 718. The Court credits Lead Class Counsel's statement that this litigation took an enormous amount of Class Counsel's time, and frequently required prioritizing this case

over other work and/or turning down new work that would have interfered with the vigorous prosecution of this matter. Spiva Decl. ¶ 9.

H. The Amount Involved and the Results Obtained

As set forth above, the result obtained by Class Counsel is excellent. Those class members who paid EarthLink an ETF will be able to receive half of the ETF back *in cash* by filling out a simple claim form that may be submitted online or by mail. This result is particularly remarkable in that, as of the time the parties entered this settlement, this Court's February 18, 2009 Order granting EarthLink's motion for partial judgment on the pleadings based on the voluntary payment doctrine had completely eliminated the potential for class members to recover any damages, barring a reversal of that ruling by the Georgia Court of Appeals. Yet Class Counsel still were able to negotiate damages relief for the class, *i.e.*, half of their money back. All class members who make a valid claim for a refund will receive half of the ETF they actually paid back, regardless of how many class members make a claim. The agreed upon attorneys' fees will not diminish the class relief in any respect.

Furthermore, Class Counsel have negotiated significant injunctive relief on behalf of those class members who are subject to being charged an ETF in the future, and on behalf of those class members who were charged an ETF but never paid it. For those class members who were charged a fee but never paid it, EarthLink has agreed to cease any further collection efforts to collect unpaid ETFs, and to clear any negative credit reports relating to unpaid ETFs. For those subscribers subject to being charged an ETF in the future, the injunctive relief includes a substantial reduction of the ETF EarthLink will charge on existing services that are subject to ETFs, which will result in a certain monetary savings to current subscribers who are charged an ETF in the future. EarthLink will lower the ETF for its DSL service and DSL & Home Phone

Service from $149.95 to $90, and the ETF for its Home Networking service from $79.95 to $48. Moreover, EarthLink will prorate ETFs if the subscriber cancels after six months of service by cutting the reduced ETF in half. For example, a subscriber who cancels DSL service after six months would be subject to a $45 ETF, as opposed to the $149.95 ETF under pre-settlement EarthLink terms. These results are extraordinary and strongly support the requested fee.

I. The Experience, Reputation, and Ability of the Attorneys

The Court has previously found that the attorneys who have litigated this case are highly experienced and skilled class action lawyers with good reputations in their legal communities. The Court has observed and finds that Class Counsel have applied their experience and skill in a determined fashion in this matter. This factor also supports the requested fee award.

J. The "Undesirability" of the Case

This factor appears to have particular application to civil rights cases such as *Johnson*, in which the Court noted "attorneys face hardships in their communities because of their desire to help the civil rights litigant." *Johnson*, 488 F.2d at 719. Class Counsel do not purport to have faced such hardships in bringing this case. However, to the extent that this factor is read more broadly to encompass as "undesirable" a case with uncertain economic remuneration, this case certainly fits that description. There was no ready way for Class Counsel to know at the beginning of the case, or even during most of the time they were litigating the case, the economic value of the case, as most of the data concerning the number of people who had been charged the ETF remained solely in EarthLink's hands and unavailable to Plaintiffs. Moreover, Class Counsel made an early strategic decision to embrace EarthLink's Georgia choice of law and venue provision, which they successfully argued allowed a nationwide class to be certified in the

Georgia courts. However, this decision meant taking on a major Atlanta-based corporation on its "home turf." In that respect, the case could be considered undesirable by many attorneys.

K. The Nature and Length of the Professional Relationship with the Client

As noted above, Class Counsel have been working on behalf of the named plaintiffs and the class for over five years with no assurance that they would be compensated for the time dedicated to the litigation or reimbursed for substantial litigation expenses. This factor also weighs in favor of approving the requested and agreed-to fee.

L. Awards in Similar Cases

As noted above, the requested fee falls well below the typical range of common fund and lodestar awards in other class actions in Georgia and the Eleventh Circuit.

In sum, all of the *Johnson* factors favor approval of the requested fee award. Accordingly, the Court approves the fee application and awards $3.7 million in attorneys' fees and expenses. The negotiated fee avoids the prospect of litigation over a fee award, provides for a fair and reasonable fee for the results obtained, and comports with the Supreme Court's observation that "[a] request for attorneys' fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983); *see also Johnson*, 488 F.2d at 720 (encouraging settlement of attorney's fees).

IV. THE REACTION OF THE CLASS SUPPORTS APPROVAL OF THE FEE AWARD

The reaction of the class also supports approval of the fee award. The claims administrator sent out hundreds of thousands of individual email and postcard notices of the settlement and published notices in the *New York Times*, *Atlanta Journal-Constitution*, *Los Angeles Times*, and *Washington Post*. *See* Settlement Agreement ¶¶ 52., 5.3, 5.4; Fenwick Decl.

¶¶ 4-10 & Ex. B. The parties also established a toll-free number with an Interactive Voice Response ("IVR") system, and a settlement website, www. earthlinkearlyterminationfee.com, which provide class members with information in both Spanish and English regarding the settlement and how to make a claim. *See* Settlement Agreement ¶¶ 5.1; Fenwick Decl. ¶ 11. The notice advised the class members that Class Counsel would apply for an award of fees and expenses of $3.7 million and that class members could object to the fee application. Yet, out of over a million and a half class members, only a single objection regarding attorneys' fees had been lodged as of the May 21, 2010 deadline for filing objections to the Settlement. This is an exceedingly small number of objectors and the Court takes it as "'some indication that the class members as a group did not think the settlement was unfair.'" *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 691 n.7 (N.D. Ga. 2001) (quoting *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 506 n.4 (5th Cir. 1981)).

On April 20, 2010, Class Counsel received an objection from purported Class Members Dean Mostofi and his wife Young Sun Kim ("Mostofi/Kim" objection). Mostofi/Kim do not object to any of the substantive provisions of the settlement. Rather, Mostofi/Kim complain that the attorney's fees are too high and that Class Counsel would not provide them a detailed accounting or billing records purportedly to determine the reasonableness of the requested award. In addition, objectors assert, without support, that "every dollar saved in legal fees will lead to an extra dollar for class members."

The Court finds that this objection is not well-founded and thus overrules the objection. Class Counsel have submitted with this fee petition and their final approval brief declarations of Class Counsel setting forth Class Counsel's lodestar and hours worked. These declarations demonstrate that Mostofi's unsupported assumptions are wrong. Contrary to Mostofi's

assertions, more than three attorneys worked on this case, and they collectively worked in excess of 5,200 hours. Spiva Decl. ¶¶ 9, 10. The number of hours expended by Plaintiffs' counsel is not surprising to the Court. This is complex litigation, and Class Counsel pursued it in a diligent and persistent manner.

Moreover, to the extent Mostofi/Kim claim that Class Counsel may not receive an attorneys' fee that constitutes a multiplier of their lodestar, their argument is contrary to settled Georgia and Eleventh Circuit caselaw. Georgia follows the common fund method to determine the reasonableness of the attorneys' fee, and the requested award constitutes in the range of 7% to 11% of the benefit conferred on the class by the settlement. This is an exceedingly modest percentage of the common benefit. Moreover, as discussed above, the approximate 1.61 lodestar multiplier resulting from the Court's fee award is below the low end of accepted multipliers in cases of this type.

Finally, Mostofi/Kim are simply wrong that "every dollar saved in legal fees will lead to an extra dollar for class members." The Settlement Agreement was negotiated at arm's-length, and the attorneys' fees were negotiated separately from the substantive terms of the settlement. Spiva Decl. ¶ 9, 12. EarthLink has agreed to refund half of the money of any class member who files a legitimate claim, regardless of how many make such claims and regardless of the amount of attorneys' fees paid. Thus, the attorneys' fees will not reduce the amount paid to class members; nor will they reduce or impact in any way the value of the injunctive relief to which EarthLink has agreed. Any reduction in the fee to which EarthLink has already agreed would

not inure to the benefit of the class, but would inure only to the benefit of EarthLink.[3] The Court overrules the Mostofi/Kim objection.

V. THE COURT APPROVES INCENTIVE AWARDS FOR THE CLASS REPRESENTATIVES

Class Counsel seek approval of an incentive award of $7,500 to each of the named Plaintiffs. Courts routinely approve similar payments to class representatives for their willingness to take the risks entailed in being a class representative and to shoulder the burden and inconvenience of litigation on behalf of the class. *See, e.g., Hillis*, 2007 U.S. Dist. LEXIS *51 (approving incentive awards of $7,500 each and noting that "[i]ncentive awards to class representatives are an accepted element of class action cases"); *Huguley v. General Motors Corp.*, 128 F.R.D. 81, 85 (E.D. Mich. 1989) (named plaintiffs "are entitled to more consideration than class members generally because of the onerous burden of litigation that they have borne"). The Court finds such incentive awards appropriate in this case. Each Class Representative undertook the burdens and risks of representing the Class throughout this five-year long litigation. Each was deposed and produced documents and interrogatory responses in discovery. Each followed the progress of the litigation and provided input to Class Counsel regarding the litigation and settlement prior to Class Counsel seeking preliminary approval from the Court. Spiva Decl. ¶ 21.

Moreover, EarthLink has agreed to pay these incentive awards separate and apart from the relief being provided to the class. Thus, these *de minimis* awards do not in any way take

[3] Apart from the Mostofi/Kim objection, only one other objection has been filed. That objection, involving the effect of the breadth of the release on another matter involving EarthLink, had nothing to do with either the attorneys' fees or the substance of the settlement. That objection has been resolved and has been withdrawn by the objector without the need for a change to the Settlement Agreement.

away from the recovery on behalf of the rest of the class. The Court therefore grants approval of the incentive awards set forth in the Settlement Agreement.

VI. CONCLUSION

Class Counsel's application for an award of attorneys' fees, litigation expenses, and incentive awards for the Class Representatives is granted for the reasons set forth above. Class Counsel are awarded attorneys' fees and expenses of $3,700,000 to be paid by EarthLink to Lead Class Counsel no later than 10 days after the date of this Court's Final Order and Judgment, and to be allocated and distributed among Class Counsel by Lead Class Counsel, in its sole discretion, as set forth in the Settlement Agreement.

The Court further Orders that the three Class Representatives are hereby awarded an incentive award of $7,500 each, in addition to any amount owed to the Class Representatives as Class Members. The incentive award is to be paid not later than 10 days after the date of this Court's Final Order and Judgment, in accordance with the provisions of the Settlement Agreement.

SO ORDERED, this 7 day of June, 2010

Alice D. Bonner

ALICE D. BONNER
Senior Judge, Superior Court of Fulton County
Business Case Division

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