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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOY NWABUEZE, individually and on behalf of a class of similarly situated individuals,

Plaintiffs,

vs.

AT&T, INC., a Delaware corporation; PACIFIC BELL TELEPHONE COMPANY d/b/a AT&T CALIFORNIA, a California corporation; AT&T SERVICES, INC., a Delaware corporation; AT&T OPERATIONS, INC., a Delaware corporation; and DOES 1 through 21,

Defendants.

Case No. CV 09-1529 SI

Hon. Susan Illston

FEDERAL TRADE COMMISSION'S MEMORANDUM OF LAW AS AMICUS CURIAE

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The Federal Trade Commission ("FTC" or "Commission") opposes the proposed class action settlement because it is neither fair, reasonable, nor adequate. The settlement purports to compensate approximately 16 million consumers who had unauthorized charges from third-party merchants placed on their phone bills through a practice known as "cramming." In reality, this relief is largely illusory because consumers must navigate a convoluted claims process and overcome unnecessary obstacles to recover their money.

For this remote chance of recovery, the proposed settlement forces class members to surrender significant rights. Whether or not they obtain anything of value, class members would release from liability not only AT&T, but also thousands of third-party merchants and billing aggregators that placed unauthorized charges on their phone bills. To avoid such an outcome, consumers must timely opt out from the settlement. However, the few consumers who actually read the notices are unlikely to do so because they are unaware that they were scammed due to the nature of cramming.

Ultimately, everyone in this case but the consumers benefits from the settlement. AT&T obtains a beneficial release even if it does not pay a penny in claims, the non-parties that fraudulently billed consumers walk away cleansed of liability, but with most of their ill-gotten gains intact, and the Plaintiffs' attorneys receive millions of dollars in fees. The settlement is thus little more than a way to purchase broad *res judicata* at bargain basement prices – a tactic the Court should not countenance.

I. The FTC's Interest in This Matter

A. Enforcement Actions Against Cramming Operations

The FTC is an independent federal agency charged with protecting consumers from unfair or deceptive acts or practices, and increasing consumer choice by promoting vigorous competition.[1] The Commission's primary mandate is to enforce the FTC Act, 15 U.S.C.

[1] In 2012, for example, the FTC obtained judgments and orders requiring defendants to pay over $741 million in consumer redress or disgorgement of ill-gotten gains in consumer fraud matters, including cramming cases. *See* FED. TRADE COMM'N, FTC ANNUAL HIGHLIGHTS APRIL

§§ 41-58, which prohibits unfair or deceptive acts or practices and unfair methods of competition, 15 U.S.C. § 45(a).

As part of its consumer protection mission, the Commission seeks to halt cramming and redress victimized consumers. Crammers prey on the complexity and length of telephone bills, which make it increasingly difficult for consumers to locate unauthorized charges. In the FTC's *Inc21.com* case, for example, this Court (J. Alsup) found a mere five percent of the defendants' so-called "customers" were aware of the third-party charges on their phone bills. *FTC v. Inc21.com*, 745 F. Supp. 2d 975, 996 (N.D. Cal. 2010), *aff'd*, No. 11–15330, 2012 WL 1065543 (9th Cir. Mar. 30, 2012). The even smaller percentage of consumers who actually use the services for which they are charged underscores that they did not purchase them. Indeed, a recent Senate report found actual usage rates in the one to two percent range.[2] This result is consistent with FTC cramming cases, in which such rates were well below one percent.[3]

The Commission has brought numerous cramming cases against third-party merchants and billing aggregators.[4] In its ongoing contempt case against Billing Services Group ("BSG"),

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2012-MARCH 2013, STATS & DATA 2012 (2013), available at http://www.ftc.gov/os/highlights/2013/stats.shtm.

[2] STAFF OF S. COMM. ON COMMERCE, SCIENCE AND TRANSPORTATION, UNAUTHORIZED CHARGES ON TELEPHONE BILLS 27-28 (2011), available at http://1.usa.gov/1860SG2 ("Senate Report").

[3] *See, e.g.*, FTC's Mot. Order Show Cause Why Billing Servs. Grp. Ltd.; Billing Servs. Grp. N. America, Inc.; HBS Billing Servs. Co.; Enhanced Billing Servs., Inc.; Billing Concepts, Inc.; and ACI Billing Servs., Inc. Should Not Be Held in Contempt 4-5, 11-12, *FTC v. Hold Billing Servs.*, 5:98-CV-00629-FB-HJB (W.D. Tex. Mar. 28, 2012) (describing usage rates of .01 percent for streaming video services) ("BSG Contempt Motion" or "BSG contempt litigation"), attached as ex. 1.

[4] *See, e.g., FTC v. Inc21.com Corp.*, 745 F. Supp. 2d 975 (N.D. Cal. 2010), *aff'd* No. 11-5330, 2012 WL 1065543 (9th Cir. Mar. 30, 2012); Stipulated Order, *FTC v. Nationwide Connections, Inc.*, No. 06-80180 (S.D. Fla. Sept. 18, 2008), ECF No. 814; Stipulated Order, *FTC v. Websource Media, LLC*, No. H-06-1980 (S.D. Tex. July 17, 2007), ECF No. 453; Stipulated Order, *FTC v. Epixtar Corp.*, No. 03-8511 (S.D.N.Y. Nov. 29, 2006); *FTC v. Mercury Mktg. of Del., Inc.*, No. Civ.A.00-3281, 2004 WL 2677177 (E.D. Pa. Nov. 22, 2004); Stipulated Order, *FTC v. 800 Connect, Inc.*, No. 03-CIV-60150 (S.D. Fla. Feb. 4, 2003), ECF No. 3; Stipulated Order, *FTC v. Access Resources Servs., Inc.*, No. 02-CIV-60336 (S.D. Fla. Nov. 4, 2002); *FTC v.*

for example, the FTC seeks to hold the largest aggregator in the country in contempt for placing – for just nine of its merchants – more than $52 million in unauthorized charges on consumers' bills. (BSG Contempt Motion, ex. 1.) BSG is one of the entities allegedly released under the terms of the proposed settlement in the instant case. In addition, the FTC continues to investigate aggregators and third-party merchants engaged in cramming schemes, and will likely bring additional enforcement actions to stop these unlawful practices and obtain refunds for injured consumers.

B. Role as Amicus in Cramming Case Against Verizon

In this class action, Plaintiffs claim AT&T allowed billing aggregators and third-party merchants to fraudulently bill nearly 16 million customers. Specifically, Plaintiffs allege that AT&T failed to ensure consumers authorized the third-party charges on their bills, and described such charges in a misleading and deceptive manner.[5]

Plaintiffs' counsel filed virtually identical allegations on behalf of another class against Verizon in *Moore v. Verizon Communications, Inc.*, 4:09-cv-1823-SBA (N.D. Cal.). In *Verizon*, the FTC and Department of Justice ("DOJ") filed briefs opposing the proposed settlement.[6] The parties then agreed to implement several critical modifications which allayed some of the agencies' most serious concerns by, among other things, removing the third-party crammers from the release and clarifying that the release would not operate to preclude monetary relief such as restitution, compensation, or disgorgement of profit in government enforcement actions against the billing aggregators. (Stip. Regarding FTC & DOJ Filings Regarding Settlement, *Moore v. Verizon Commc'ns, Inc.*, 4:09-cv-1823-SBA (N.D. Cal. Mar. 1, 2013), ECF No. 158.)

Cyberspace.com, LLC, No. C00-1806L, 2002 WL 32060289 (W.D. Wash. July 10, 2002), *aff'd* 453 F.3d 1196 (9th Cir. 2006).

[5] First Am. Compl. ¶¶ 1-5, 99, ECF No. 38; Decl. John Jacobs Support Pls.' Mot. Prelim. Approval ¶ 14, ECF No. 153-5.

[6] FTC Mem. Law Amicus Curiae, *Moore v. Verizon Commc'ns, Inc.*, 4:09-cv-1823-SBA (N.D. Cal. Aug. 17, 2012), ECF No. 136; Statement Interest United States, *Moore v. Verizon Commc'ns, Inc.*, 4:09-cv-1823-SBA (N.D. Cal. Aug. 17, 2012), ECF No. 137.

This settlement resurrects the most egregious flaws that plagued the initial proposed *Verizon* settlement. Even after the FTC and DOJ apprised Plaintiffs' counsel of these problems, they elected to make only minor revisions, thus precipitating this amicus. (Stip. Regarding Modific. Settlement Resp. FTC & DOJ Comments, Mar. 29, 2013, ECF No. 160.)[7]

II. The Proposed Settlement Fails to Meet The Rule 23 Requirement That It Be Fundamentally Fair, Adequate, and Reasonable.

To gain district court approval, a class settlement must be "fundamentally fair, adequate, and reasonable." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998); *see also* Fed. R. Civ. P. 23(e). Moreover, when, as here, parties reach a settlement prior to class certification, the court's approval requires a "more probing inquiry than may normally be required under Rule 23(e)." *Hanlon*, 150 F.3d at 1026 (collecting cases); *see also In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946-47 (9th Cir. 2011) (holding that agreements made prior to formal class certification "must withstand an even higher level of scrutiny for evidence of collusion or other conflicts of interest than is ordinarily required under Rule 23(e) before securing the court's approval as fair"). In this case, the proposed settlement falls far below Rule 23's standard.

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[7] The Court recently approved the *Verizon* settlement. (Order, *Moore v. Verizon Commc'ns, Inc.*, 4:09-cv-1823-SBA (N.D. Cal. Aug. 28, 2013), ECF No. 196.) When analyzing the settlement, the Court acknowledged the FTC's outstanding concerns regarding the claims-made process and found that the FTC's proposal for improving the settlement would indeed provide a better outcome for the class, but concluded this did not establish a basis for rejecting the settlement outright. *Id.* at 24-25 (noting that a proposed settlement "is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators") (quoting *Officers for Justice v. Civil Serv. Comm'n of the City & Cty. of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982)). While the FTC respectfully disagrees with the Court's determination that the claims-made process and notices in that case satisfied Rule 23, the circumstances presented here are materially different. In the instant case, among other differences, the notices do not offer class members the option to receive a flat fee recovery. Moreover, Plaintiffs' counsel reinstated the problematic release provisions they previously agreed to remove from the Verizon settlement, thus negotiating a class settlement that leaves AT&T customers worse off than Verizon customers who were defrauded by the very same aggregators and third-party merchants. In these circumstances, therefore, the flawed claims-made process and deficient settlement notices produce a settlement that is neither fair, adequate, nor reasonable as Rule 23 requires, because consumers in this case (unlike the *Verizon* class members) are forced to release significant rights in exchange for illusory benefits.

A. The Settlement Does Not Provide Class Members With Any Meaningful Benefit.

For class members to receive any redress, they must negotiate a byzantine process that will effectively preclude the vast majority of cramming victims from obtaining any relief. Moreover, the settlement's injunctive relief does not protect consumers from future cramming.

1) Deficient Settlement Notices And an Onerous Claims Process Make It Unduly Difficult For Class Members to Recover Their Money.

(a) The Form of The Notice Is Inadequate.

The proposed settlement falls well short of providing class members with "the best notice that is practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B). AT&T disseminated the notice primarily through the same conduit as the unauthorized charges: customers' monthly phone bills.[8] Crammers use telephone billing because their complexity makes it unlikely consumers will notice additional information.[9] Therefore, consumers were unlikely to read the "bill stuffer" notices, especially because the bulk of such materials usually comprise advertising.

Moreover, because of crammers' deceptive and unfair marketing tactics, cramming victims often do not know they were defrauded, and likely think the notice – even if they read it – does not apply to them. For the few consumers who do see the charges and complain, crammers often falsify documents or voice recordings to convince consumers they agreed to the charges.[10] Thus, those consumers may be left with the misimpression that they have suffered no

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[8] To effectuate notice of the settlement, AT&T conducted an electronic search of its "reasonably available" billing data to identify class members. AT&T enclosed notices in current customers' billing statements and sent postcards to former customers. AT&T also sent an email titled "Class Action Settlement Notice" to current and former customers for whom it had email addresses. In addition, AT&T published a ½ page notice in two issues of *USA Today* newspaper and ¼ page notices in *Parade* regional magazine for five states on two separate dates, and included notice of the settlement on its website with a link to the settlement website. *See* Settlement Agreement § VII, ECF No. 153-1.

[9] *See* Senate Report at iv, 1.

[10] *See* Senate Report at 12, 15-16 (discussing manipulation and falsification of third-party verification recordings); BSG Contempt Motion at 9-11, 19-20 (describing an aggregator's use

legal wrong. When they later receive a settlement notice about unauthorized third-party charges, many likely disregard it on the mistaken belief that they are not entitled to payment. The *Verizon* settlement employed comparable notice methods, and scarcely 3.1 percent of the class submitted valid claims, demonstrating the inadequacy of this approach.[11]

(b) The Claims Process Is Unnecessarily Complicated.

The few class members who read the notices and realize they were defrauded have to work through a burdensome process to pursue a claim. First, they must ascertain the exact amounts they paid in unauthorized third-party charges, dates they paid the charges, and names of the third parties that placed those charges. To do so, consumers must either locate their monthly telephone bills spanning an eight-year period dating back to January 1, 2005, or timely submit a detailed "billing summary request"[12] to AT&T.[13] If, and when, they secure these voluminous

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of letters of authorization consumers never saw as supposed "proof" they authorized the contested charges); *Inc.21.com*, 745 F. Supp. 2d at 990-91.

[11] *See* Decl. Julie Redell ¶¶ 7, 27, *Moore v. Verizon Commc'ns, Inc.*, No. 4:09-cv-01823 (N. D. Cal. June 11, 2013), ECF No. 170 (statement of court-appointed settlement administrator indicating that, as of June 7, 2013, of the 8,089,893 million consumers to whom notices were sent, only 250,236 submitted valid claim forms). Even in non-cramming cases, average claim submission rates are extremely low and readily fall below 10 percent. *See Walter v. Hughes Commc'ns, Inc.*, No. 09-2136, 2011 WL 2650711, at *13 (N.D. Cal. Jul. 6, 2011) (collecting cases with settlement claims submission rates of 0.1 percent to 9.7 percent). While the 3.1% figure falls on the low side of average claim submission rates, it is unconscionable to countenance such a low response rate in a case where nearly all class members are victims of pure theft.

[12] Notably, the settlement notice sent to former AT&T customers does not enclose a claim form, nor does it include the billing summary request form. Thus, these customers face the additional preliminary step of having to request and obtain those forms separately.

[13] The billing summary request form requires: (i) current legal name and, if different, name(s) used for the AT&T accounts at issue; (ii) current mailing address and, if different, address(es) used for the AT&T accounts at issue; (iii) for current customers, the 13-digit "billing telephone account number" (or BTN) AT&T originally assigned to identify the telephone customer's account; (iv) for former customers, if no BTN is provided, the 10-digit telephone number(s) on which there may have been unauthorized charges; (v) dates setting forth the class member's time period as an AT&T customer; and (vi) last four digits of the class member's Social Security or tax identification number. *See* Settlement Agreement § VIII.B, ECF No. 153-1.

materials, they must review all billed and paid third-party charges to determine which were unauthorized.

This requirement is particularly inappropriate for cramming victims. As explained above, and as Plaintiffs' counsel acknowledge, cramming succeeds because the overwhelming majority of consumers "may not even know that their rights may have been violated." (Pls.' Mem. Support Mot. Prelim. Approval Class Action Settlement 13-14, Dec. 28, 2012, ECF No. 153).[14] Therefore, most consumers likely will not realize they were scammed – let alone engage in the back and forth needed to request and obtain billing information, then review the charges.

Those few consumers who jump through all these hoops are not done. The claim form requires them to swear under penalty of perjury that they paid for third-party charges appearing on their AT&T bill between January 1, 2005 and January 14, 2013, and that such charges were unauthorized or that the crammers obtained authorization through deceptive or misleading practices.[15] To do so with confidence, consumers must investigate the names of each third-party merchant. Crammers, however, frequently change names to conceal their practices. *See Inc21.com*, 745 F. Supp. 2d at 997-98 (describing misrepresentations and falsified local exchange carrier ("LEC") billing applications used by defendants to "circumvent[] safeguards designed to prevent known fraudsters from re-entering the LEC billing industry using 'new' products and business entities"). This ever-morphing slate of entities that appear on phone bills will likely confuse consumers, dramatically increasing the burden of submitting a claim.

Moreover, claimants must swear they have not been previously reimbursed or "otherwise legally resolved any dispute regarding such charge."[16] This requirement presumes consumers

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[14] Plaintiffs' counsel underscored this reality when seeking approval of the *Verizon* class action settlement. *See* Pls.' Mem. Support Mot. Prelim. Approval Class Action Settlement 2, *Moore v. Verizon Communic'ns, Inc.*, 4:09-cv-1823-SBA (N.D. Cal. Feb. 1, 2012), ECF No. 91 ("[T]he reason cramming is able to thrive is that most people – upwards of 95% – do not even realize that the charges have been placed on their bills, and the charges are allowed to go on and on.") (emphasis in original).

[15] *See* Settlement Agreement § VIII.C, ECF No. 153-1; ECF No. 161 ex. 1 at § 1.

[16] *Id.*

know whether they were part of a previous class action and will likely further confuse and dissuade them from submitting a claim. Again, the fact that merely 3.1 percent of *Verizon* class members filed valid claims in a similar process demonstrates this structure is fatally flawed.[17]

(c) The Challenge Process Unfairly Blocks Claims.

Even after clearing these various hurdles, class members would be unfairly deprived of compensation. AT&T or the non-party aggregators can challenge victims' claims by submitting a statement averring the claimant authorized the charges and submitting related records. Such records may consist of a service agreement, "proof" the claimant used the product or service, refund or adjustment records, or a letter of authorization ("LOA") or third-party verification ("TPV") voice recording.

Permitting such challenges is patently unreasonable. Most such challenges are likely to be based on fraudulent or incomplete records. For instance, an aggregator like BSG typically receives billing data from third-party merchants that includes codes indicating whether the charges were "authorized."[18] BSG apparently treats a charge as authorized as long as it has this coding data and the billing information appears accurate.[19] However, merely validating certain customer information – much of which is publicly available (such as a telephone number or date of birth) – proves nothing about whether a consumer actually authorized the charge. Indeed, the staggering percentage of consumers who do not know they have been billed and the miniscule percentage using the billed product or service demonstrate this data has no bearing on whether consumers knowingly authorized the charges. *See* Senate Report at 27 (describing low usage

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[17] *See supra* n. 11.

[18] *See* Dep. Cathy Coleman-Ackerman, Pl.'s Combined App. Evidence Support: (1) Consolidated Reply Support Pl.'s Mot. Class Certification & (2) Resp. Opp'n ESBI's Mot. Summ. J., ex. A, at 37:21–39:6, 41:11–42:20, 63:9–64:13, *Lady Di's, Inc. v. Enhanced Servs. Billing, Inc.*, 10-3903 (7th Cir. Apr. 20, 2011), ECF No. 23-7 (describing process of validating charges as checking that the data submitted by vendors contains a single-digit code that the charge is authorized and checking, among other things, that the phone number is valid), attached as ex. 2.

[19] *Id.*

rates as "strong evidence that consumers did not knowingly purchase the services" for which they were billed); *Inc21.com*, 745 F. Supp. 2d at 1000-01 (finding that, on average, 97 percent of consumers did not agree to purchase defendants' products). Yet, because aggregators routinely acquire this data from third-party merchants, they likely have it for every consumer.

Although LOA and TPV recordings might appear to be more trustworthy, they are just as suspect. Crammers often fabricate or manipulate these records.[20] Using these highly unreliable materials is even more troubling because aggregators have made clear they intend to challenge as many claims as possible.[21]

In other contexts, allowing parties with the best information to challenge a claim may be appropriate in an ordinary settlement, but it is not here. Allowing "con artists and unscrupulous companies" (Senate Report at ii) such as the aggregators and third-party merchants to use unreliable evidence to thwart legitimate claims is unfair and unreasonable. Moreover, after AT&T or the aggregators challenge their claims, class members must rebut the challenge with evidence or further sworn testimony. The proposed settlement thus saddles consumers with the extra burden of essentially repeating what they already testified to when they submitted their sworn claim – further deterring valid claims.

The current proposal, therefore, inequitably favors fraudulent billers and those who abetted them at the expense of the consumers they victimized. Given the extremely small

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[20] *See* Senate Report at 12, 15-16 (discussing unreliability of LOAs and practice of falsifying TPV recordings); *Inc21.com*, 745 F. Supp. 2d at 990-92, 996 (finding that TPV recordings had been fabricated and manipulated). *See also* Press Release, U.S. Dep't of Justice, President of Telemarketing Fraud Business Pleads Guilty (Oct. 30, 2009), http://www.justice.gov/usao/pae/News/2009/oct/safersteinpleasrelease.pdf (describing the creation of "fake sales-verification tapes" that purported to show consumers' consent as part of the cramming scam).

[21] For example, Enhanced Services Billing Inc. ("ESBI"), BSG's subsidiary, indicated it plans to challenge claims "rigorously . . . to show that the charges were indeed authorized . . . ." Supp. Br. Support ESBI Mot. Intervene 7-8 n.6, *Moore v. Verizon Commc'ns, Inc.*, No. 4:09-cv-01823 (N.D. Cal. Aug. 2, 2012), ECF No. 129-1. Indeed, it appears ESBI will challenge as many claims as possible with these unreliable LOAs and TPV recordings, imposing an additional and unfair obstacle to consumers' recovery.

percentage of legitimate third-party charges, the only fair and reasonable process is to provide refunds to all consumers who paid such charges, unless there is reliable evidence a consumer actually used the billed item or previously received reimbursement.[22] AT&T should have at its disposal the records necessary to identify such consumers and the amounts to be reimbursed, and the third-party merchants should have whatever records might exist to show a customer actually used the billed product or service. Accordingly, the settlement should place the burden of determining who is owed compensation on them, rather than consumers.

2) The Injunctive Relief Is Inadequate.

AT&T represents it has implemented a series of "remedial remedies" pursuant to the settlement, but they are not meaningful safeguards. One measure provides that when a customer contacts AT&T concerning an unauthorized charge, AT&T will give the customer the option to request a billing adjustment and block further third-party charges on their phone bill. (Settlement Agreement § V.B., ex. 12 at ¶ 1, ECF No. 153-3.) This remedy, however, assumes the customer actually noticed the charge and recognized it as improper – a presumption contrary to the overwhelming evidence.[23] Likewise, the "clearinghouse requirements" described in

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[22] Because the fraudulent billing alleged in this case typically emanates from the same third-party merchants that have consumer usage data, an independent third party, such as the settlement administrator, should review and decide the reliability of any evidence submitted to exclude consumers from recovery based on their actual use of the product or service. Indeed, in *United States v. Saferstein*, a parallel criminal action to the FTC's *Mercury Marketing* cramming case, the CEO and CIO were indicted for conspiring to commit perjury through the CIO's false testimony about the number of consumers who used the company's services. *See* Indictment, *United States v. Saferstein*, Crim. No. 07-CR-557 (E.D. Pa. July 17, 2007) 13-15, ECF No. 1. The CIO pleaded guilty to this count. *See* Minute Entry, *United States v. Saferstein*, Crim. No. 07-CR-557 (E.D. Pa. Nov. 16, 2007), ECF No. 52 (entering guilty plea).

[23] For the same reason, the provision that AT&T will include in two months of phone bills to current customers an "Informational Bulletin about Third-Party billing which shall include a statement of AT&T end-user rights in the form and substance as then applicable for Third-Party billing provided to current customers" (Settlement Agreement § VII.B., ECF No. 153-1; ECF No. 161 at ¶ 1) accomplishes nothing. Because consumers are inclined to disregard a notice regarding charges they know nothing about, this provision is unlikely to prompt fraudulently billed consumers to discover and halt such charges.

AT&T's "summary of remedial remedies" merely reiterate procedures that have already proven ineffective.[24]

In addition to these measures, AT&T has represented it no longer allows certain categories of third-party billing, but this is likewise insufficient to stop cramming. Specifically, the proposed settlement states that "effective September 17, 2012, AT&T eliminated and no longer allows Third-Party Billing of Enhanced Services." (Settlement Agreement § V.B, ECF No. 153-1.) However, consumers may still be vulnerable to cramming for products or services that are not "Enhanced Services."[25]

The proposed injunctive relief places the burden of detecting and halting unauthorized billing largely on consumers. This burden is misplaced. Given the paucity of legitimate third-party charges and the insignificant percentage of consumers aware that their phone bill can be used by third parties to bill them for a wide variety of good and services, the most effective way to protect consumers and prevent a recurrence of the conduct alleged in this lawsuit is to prohibit third-party charges altogether, unless consumers affirmatively request that AT&T permit such charges on their bills.[26] That the settlement does not take this simple and effective approach underscores its inadequacy.

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[24] These requirements specify the forms of documentation acceptable to demonstrate customer authorization and outline methods for demonstrating compliance with these procedures, as well as for giving consumers the option to report and resolve billing inquiries. (Settlement Agreement §V.B., ex. 12 at ¶¶ 2-7, ECF No. 153-3.) BSG's own documentation shows they have allowed third-party merchants to bypass these requirements. *FTC v. Hold Billing Servs.*, No. SA-98-CA-0629-FB (W.D. Tex. Mar. 28, 2012), ECF No. 71 at 15-16.

[25] For example, because AT&T purportedly agreed to eliminate only third-party billing of "any services other than toll, operator services, directory assistance or 900/976 services" (Settlement Agreement § V.B and § II, ECF No. 153-1), the proposed settlement would not protect consumers from unauthorized charges for nonexistent calls. In another cramming case, the FTC obtained judgments totaling close to $35 million against third-party merchants who placed unauthorized charges on consumers' phone bills for collect calls that were never made. *See FTC v. Nationwide Connections, Inc.*, Case No. 9:06-cv-80180-KLR (S.D. Fla. Apr. 11, 2008), ECF No. 788.

[26] *See* FCC Report & Order & Further Notice of Proposed Rulemaking ¶ 89, *In the Matter of Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges*

B. The Release Is Fundamentally Unfair And Unreasonable.

Regardless of whether class members receive any benefit, the proposed settlement forces them to release claims against everyone involved in cramming, including thousands of fraudulent third-party merchants and aggregators who are not parties to this case. Moreover, it is nearly impossible for class members to avoid this inequity because the notices obscure the released entities' identities and fail to provide essential information concerning the rights consumers forego by participation or inaction.

1) Class Members Automatically Lose Their Rights.

Even if class members never recover their money through the claims process, they would be bound by the settlement's release. Releases that are not tied to compensation give the defendant "an incentive to suppress the number of claimants by undertaking minimal notice procedures and making the process for submitting [p]roofs of [c]laim unduly difficult." *Kagan v. Wachovia Secs., LLC*, Nos. 09-5337 SC, 11-0412 SC, 2012 WL 1109987, at *7 (N.D. Cal. Apr. 2, 2012). As detailed above, the proposed settlement suffers from just this problem, thereby failing to protect the interests of the class. *See Walter v. Hughes Commc'ns, Inc.*, No. 09-2136, 2011 WL 2650711, at *11 (N.D. Cal. Jul. 6, 2011) (finding that a settlement contains "no structural protections of the interests of the class as a whole" when, among other things, a defendant receives a release regardless of whether claims were submitted or funds were distributed to the class).

2) The Notices Fail to Provide Essential Information.

Compounding these issues, the settlement notices do not provide critical information concerning the release, exacerbating the difficulty consumers face in making an informed

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("Cramming"), Consumer Information and Disclosure, Truth-in-Billing and Billing Format, CG Docket Nos. 11-116, 09-158, 98-170 (Apr. 17, 2012) (citing comments by the FTC, state attorneys general, and consumer groups recommending similar limitations on third-party billing as the most effective means to combat cramming).

decision. Rather than flag the release of thousands of non-party entities, the notices merely directed consumers to a settlement website "for a description of Released Parties."[27] Upon reaching the site, class members had to click on a hyperlink for the term "Released Parties," which sent them to a webpage that tersely stated the settlement agreement's definition of "Released Parties."[28] From there, consumers had to click yet again on separate hyperlinks for "AT&T Entities," "Clearinghouses" (*i.e.*, the aggregators), and "Third Parties" to learn the names of entities ostensibly covered by the release.

Class members who follow all of these steps still end up with inaccurate and incomplete information. For instance, the website does not include all the names that appeared on customers' phone bills in connection with unauthorized charges.[29] Indeed, the notice to current customers characterized the list of third-party merchants as "non-exhaustive." (ECF No. 161 ex. 3.) Moreover, the site incorrectly identifies the names of some billing aggregators.[30]

The settlement website also provides a "list of existing litigation" which purportedly identifies the pending cases brought "by or on behalf of AT&T ILEC landline customers that raise claims relating to unauthorized charges on AT&T landline bills that are covered by the Release."[31] Neither the website nor the settlement notice, however, mentions the FTC's ongoing

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[27] Email notices sent to a subset of customers were marginally better, in that they included a hyperlink, rather than requiring the reader to go online and type in the lengthy url (www.ATTthirdpartybillingsettlement.com). *Compare* ECF No. 161 ex. 5 *with* ECF No. 161 exs. 2 and 3. The email notices, however, were only sent to customers for whom AT&T had email addresses, regardless of whether those addresses were still in active use.

[28] *See* http://www.attthirdpartybillingsettlement.com/released ("Released Parties are defined in Section II of the Settlement Stipulation and Agreement ("Agreement") as follows . . . .").

[29] Among the entities identified as "Released Parties" on the website are nine aggregators and over 3,400 third-party merchants. Even if consumers take these steps, they are unlikely to recognize the names of entities from whom they purchased nothing and by whom they did not expect to be billed.

[30] For example, there is no entity known as "Billing Services Group Clearing Solutions," and BSG bills in the name "OAN Services Inc." – not "OAN."

[31] In addition to the instant class action, the webpage lists nine other cases, all of which appear to be civil lawsuits by private parties.

contempt case against BSG, even though the district court's injunction and the contempt action predate the settlement, and Plaintiffs' counsel were well aware of their existence. This is hardly an exemplar of the "plain, easily understood language" notices must use to "clearly and concisely state . . . the binding effect of a class judgment on members" as required. Fed. R. Civ. P. 23(c)(2)(B)(vii).

3) The Overbroad Release Is Contrary to Public Policy.

In the FTC's ongoing contempt litigation, BSG recently argued that, pursuant to this settlement, the AT&T releases "will have *res judicata* effect on the FTC's attempt to recover restitution on behalf of those very same consumers in the FTC's civil contempt proceeding." (Resps.' Mot. Order Mediation at 3 n.16, *FTC v. Hold Billing Srvcs., Ltd.*, No. 5:98-CV-00629-FB-HJB (W.D. Tex. July 1, 2013), ECF No. 122.) BSG's contention is erroneous.[32] Nonetheless, if the district court in that case were to accept BSG's argument, the vast majority of class members could be barred from restitution in the FTC action and, due to the deficient notices and claims process, receive nothing in this class action settlement.

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[32] The argument rests on a single district court case, *FTC v. Amrep Corp.*, 705 F. Supp. 119 (S.D.N.Y. 1988), in which a court ruled that *res judicata* barred the FTC from seeking restitution for consumers who previously settled claims against an FTC defendant. Courts have since refused to apply *Amrep* in this manner, citing principles of fundamental fairness and lack of privity between class action consumers and the FTC. *See, e.g.*, *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 971-72 (N.D. Ill. 2006), *amended by* 472 F. Supp. 2d 990 (N.D. Ill. 2007), *aff'd*, 512 F.3d 858 (7th Cir. 2008).

Moreover, attempts to use a collateral class action settlement to bar the FTC in a contempt action would undermine a court's ability to enforce its orders through compensatory sanctions. *See United States v. United Mine Workers of Am.*, 330 U.S. 258, 303-04 (1947) (sanctions for civil contempt may be employed to coerce compliance with court order); *Am. Airlines, Inc. v. Allied Pilots Ass'n*, 228 F.3d 574, 584-85 (5th Cir. 2000) (compensatory civil contempt reimburses the losses the contemnor caused); *Vuitton et Fils S.A. v. Carousel Handbags*, 592 F.2d 126, 130 (2nd Cir. 1979) (once plaintiff proves harm resulting from violation of an injunction, district court must award compensation). A contempt defendant like BSG therefore should not be allowed to use a class action release to subvert an order by eviscerating the recovery available through compensatory sanctions for its contumacious conduct. *See, e.g., Teas v. Twentieth Century-Fox Film Corp.*, 413 F.2d 1263, 1267 (5th Cir. 1969); *United States v. New York Tel. Co.*, 434 U.S. 159, 172 (1977).

Such an outcome would be particularly unfair because it would penalize consumers simply for being AT&T customers. The class action settlement with Verizon ultimately included a modified release that makes clear the settlement does not affect consumers' rights to receive restitution from government enforcement actions.[33] If the proposed settlement were approved, therefore, similarly situated consumers could have different outcomes depending on the LEC that wrongfully billed them, even though they were defrauded by the same set of aggregators and third-party merchants. The disparity further underscores the settlement's fundamental unfairness.[34]

The only fair and appropriate way to address the problematic release would be for the parties to modify the settlement to include a provision similar to the one Plaintiffs' counsel agreed to in *Verizon*. Specifically, the modified release should: (a) exclude all aggregators and third-party merchants; and (b) make clear that the settlement does not affect consumers' rights to receive restitution from government enforcement actions.

C. The Proposed Settlement Improperly Rewards Plaintiffs' Counsel.

In addition to the deficiencies detailed above, the settlement proposal assures Plaintiffs' counsel up to $5.5 million in fees. Plaintiffs' counsel's decision to pursue this settlement – despite its obvious flaws and despite their recent experience negotiating the class action settlement in *Verizon* – calls into question the adequacy of the settlement. *See Bluetooth*, 654

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[33] *See* Stip. Regarding FTC & DOJ Filings Regarding Settlement 3, *Moore v. Verizon Commc'ns, Inc.*, No. 4:09-cv-01823 (N.D. Cal. Mar. 1, 2013), ECF No. 158 ("Th[e] release shall not operate to preclude monetary relief, including but not limited to restitution, compensation, or disgorgement of profit, in any law enforcement action, regulatory proceeding, or other action by the government against the Aggregator Releasees.") (emphasis added).

[34] Moreover, AT&T is among several LECs through which consumers were fraudulently billed. If a court concluded that the FTC must exclude AT&T customers from receiving restitution, the administrative costs of providing restitution to the remaining consumers (*i.e.*, those who are not AT&T customers) could increase greatly, reducing the funds available to other consumer victims.

F.3d at 947 (identifying "a disproportionate distribution of the settlement" going to counsel as a sign that plaintiffs' counsel placed their own interests above those of the class).

The Ninth Circuit has long recognized that class action settlements "present unique due process concerns for absent class members." *Id.* at 946 (internal citations and quotations omitted). In this case, Plaintiffs' counsel reached a deal that guarantees they will receive a lump-sum payment irrespective of the payout to the class – a result that courts view with grave concern. *See Kagan*, 2012 WL 1109987, at *7 (observing that, where the attorneys' payment "is unaffected by the size of the benefit received by the class," they "lack any structural incentive to ensure that the class benefits from robust notice and simplified claim procedures"); *see also Bluetooth*, 654 F.3d at 947 (finding that such "clear sailing" arrangements indicate a "subtle sign that [p]laintiffs' counsel have allowed pursuit of their own self-interests . . . to infect the negotiations") (citation omitted).

"Attorneys' fees provisions included in proposed class action settlement agreements are, like every other aspect of such agreements, subject to the determination whether the settlement is 'fundamentally fair, adequate, and reasonable.'" *Staton v. Boeing Co.*, 327 F.3d 938, 963 (9th Cir. 2003). Given the small percentage of consumers likely to receive any compensation after surviving the convoluted claims system – coupled with the overbroad, detrimental release – the $5.5 million in uncontested fees vastly outweighs the actual benefits to the class and should therefore be rejected. *See Bluetooth*, 654 F.3d at 942-43 (reasonableness of attorneys' fees must be assessed in light of the results obtained).[35]

III. Requested Relief

For the reasons above, the proposed settlement is not fair, adequate, or reasonable. Accordingly, the Court should withhold final approval unless the settlement is modified to:

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[35] *See also Ferrington v. McAfee, Inc.*, No. 10-CV-01455-LHK, 2012 WL 1156399, at *11-12 (N.D. Cal. Apr. 6, 2012) (calculating the benefit to the class based on the claims participation rate and rejecting settlement where, among other things, counsel's fee would have been more than 83 percent of the total amount defendants paid to settle the lawsuit); *Walter*, 2011 WL 2650711, at *12-13 (calculating benefit to the class based on claim submission rate).

(1) Provide refunds to all class members who paid third-party charges placed on their AT&T phone bill during the class period, unless the settlement administrator determines there is reliable evidence proving the consumer has already been reimbursed or actually used the product or service billed;

(2) Release consumers' claims against only the AT&T Defendants – not aggregators or third-party merchants;

(3) State clearly that the settlement does not affect consumers' rights to receive restitution from government enforcement actions;

(4) Prohibit third-party charges on phone bills unless customers affirmatively request that AT&T permit such charges on their bills;

(5) Provide notices that clearly and prominently inform class members what rights they lose if they do not exclude themselves from the settlement; and

(6) Reduce the fees awarded to Plaintiffs' counsel commensurate with the recovery they negotiated for consumers.

Dated: August 30, 2013

Respectfully submitted,

/s/ Reenah L. Kim

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CERTIFICATE OF SERVICE

I am a resident of the Commonwealth of Virginia and over the age of 18 years, and I am not a party to this action. My business address is 600 Pennsylvania Avenue NW, M-8102B, Washington, DC 20580. On August 30, 2013, I served the foregoing FEDERAL TRADE COMMISSION'S MEMORANDUM AS AMICUS CURIAE by filing the document using the CM/ECF system, which will send a notice of electronic filing to:

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