

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: COMCAST CORP. PEER-TO-PEER : MDL No. 08-1992
(P2P) TRANSMISSION CONTRACT :
LITIGATION :
:

ORDER

AND NOW, this 14th day of December 2009, upon consideration of Plaintiff Jon Hart's Motion for Entry of Pretrial Order No. 1 Consolidating the Related Cases and Establishing Plaintiffs' Leadership Structure (Doc. Nos. 7-9) and Plaintiffs Sony Tan, Robert M. Topolski, Roger Lis, Daniel Libonati, Jr., Jordan Leigh, and Michael Arana's ("Objecting Plaintiffs") Response in Opposition thereto (Doc. Nos. 20 & 21), Plaintiff Hart's Motion for Entry of Pretrial Order No. 1 Consolidating the Related Cases and Establishing Plaintiffs' Leadership Structure (Doc. Nos. 26-30) and Objecting Plaintiffs' Supplemental Opposition thereto (Doc. No. 38); Objecting Plaintiffs' Motion for Consolidation Pursuant to F.R.C.P. 42(a) and Appointment of Co-Lead Counsel Pursuant to F.R.C.P. 23(g) (Doc. Nos. 2-5), Defendants' Response thereto (Doc. No. 14), Plaintiff Hart's Response in Opposition thereto (Doc. Nos. 15 & 16), Objecting Plaintiffs' Submission in Support thereof (Doc. No. 25), and Plaintiff Hart's Response in Opposition thereto (Doc. Nos. 35-37); Defendants' Omnibus Response to Plaintiffs' Cross-Motions for Consolidation and Appointment of Lead and Liaison Counsel (Doc. No. 31); Plaintiff Mario Aliano's Response to Motions Relating to Appointment of Lead Counsel (Doc. No. 33), it is hereby ORDERED that Plaintiff Hart's Motion (Doc. Nos. 7-9) is GRANTED. Plaintiff's counsel, Lexington Law Group, LLP and Scott + Scott, LLP, are appointed as co-class

counsel. All other motions on this issue are DENIED as moot.

Further, upon consideration of Plaintiff Jon Hart's ("Hart" or "Moving Plaintiff") Motion for Preliminary Approval of Proposed Settlement, Conditional Certification of Class, Selection of Class Counsel, Approval of Notice Plan, and Setting Settlement Fairness Hearing ("Hart's Mot. for Preliminary Approval") (Doc. Nos. 39-43), Plaintiffs Sony Tan, Robert M. Topolski, Roger Lis, Daniel Libonati, Jr., Jordan Leigh, and Michael Arana's ("Objecting Plaintiffs") Response in Opposition thereto ("Objecting Pls.' Opp'n") (Doc. No. 48), Plaintiff Mario Aliano's ("Aliano" or "Supporting Plaintiff") Declaration of Support for Proposed Class Settlement (Doc. No. 49), Moving Plaintiff's Response to Objection to Preliminary Approval of Proposed Class Action Settlement in further support thereof ("Hart's Resp.") (Doc. No. 51 & 53), and Defendant Comcast Corporation's ("Comcast") Omnibus Memorandum of Law in further support thereof ("Comcast Mem.") (Doc. No. 52), it is hereby ORDERED that the Motion is GRANTED.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY¹

The following matters are currently pending before this Court pursuant to transfer by the Judicial Panel on Multidistrict Litigation: Hart v. Comcast (3:07-6350 (N.D. Cal.)); Tan v. Comcast (2:08-2735 (E.D. Pa.)); Topolski v. Comcast (3:08-852 (D. Or.)); Lis v. Comcast (1:08-3984 (N.D. Ill.)); Libonati v. Comcast (1:08-3518 (D.N.J.)); Leigh v. Comcast (2:08-4601 (C.D. Cal.)); and Aliano v. Comcast (1:09-5320 (N.D. Ill.)). These actions share factual questions arising out of allegations that Comcast (1) slowed, delayed or otherwise impeded peer-to-peer

¹ The recitation of the facts is taken from the allegations contained in Hart's Mot. for Preliminary Approval, Objecting Pls.' Opp'n, and Hart's Resp., unless otherwise indicated.

(“P2P”) transmissions sent using its broadband high-speed Internet service despite advertising “unfettered” access; and (2) failed to disclose this practice to its subscribers. See In re Comcast Corp. Peer-To-Peer Transmission Contract Litig., 588 F. Supp. 2d 1381, 1382 (J.P.M.L. 2008).

Plaintiff Topolski first uncovered the underlying conduct at issue when, in late 2007, he noticed that his Internet connection was interrupted each time he attempted to upload a specific file using a P2P application. He built a diagnostic tool that allowed him to monitor his Internet connectivity to determine whether Comcast was blocking his attempts to use P2P. The diagnostic tool revealed that Comcast’s network transmitted hidden signals that severed the connection between two computers attempting to share files through P2P applications. Comcast initially publicly denied these findings and any role in blocking P2P transmissions. The Associated Press and the Electronic Frontier Foundation (“EFF”)—a donor-funded non-profit organization—reproduced Topolski’s experiments. Topolski and EFF then presented these results to an organization called Free Press, which filed a complaint against Comcast with the Federal Communications Commission (“FCC”) on November 1, 2007.

On November 17, 2007, Plaintiff Hart filed a putative class action in the United States District Court for the Northern District of California seeking relief strictly on behalf of California residents, alleging violations of federal consumer protection, contract, competition, and advertising laws. In December 2007, Comcast answered the Complaint, and in March 2008, moved for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) or, in the alternative, to stay the action pending the FCC investigation into actions brought by Free Press. In June 2008, the Court granted Comcast’s request for a stay of all claims during the pendency of the FCC

proceedings. Following the ruling, Hart and Comcast re-entered into settlement negotiations.² In August 2008, the FCC announced that it had determined that Comcast had unlawfully interfered with its subscribers' right to access lawful Internet content and to use P2P file sharing applications of their choice. Comcast subsequently appealed the FCC ruling, and the appeal remains pending.

In September 2008, Comcast and Hart (the "Negotiating Parties") participated in the first of two formal mediation sessions with Professor Eric Green of Resolutions, LLC, to facilitate settlement negotiations. In advance of this session, Comcast complied with an informal discovery request from Hart, and Hart reviewed the information produced with his consultants. With Professor Green's assistance, the Negotiating Parties reached a tentative settlement agreement, which was finalized and executed on April 13, 2009. Neither Aliano nor Objecting Plaintiffs were aware of these negotiations and did not participate in them. The Negotiating Parties agreed, for settlement purposes only, to certify the following class:

[A]ll current and former Account Holders who either: (1) used or attempted to use the Comcast service in order to use the Ares, BitTorrent, eDonkey, FastTrack or Gnutella P2P protocols at any time from April 1, 2006 to December 31, 2008; or (2) used or attempted to use the Comcast service in order to use Lotus Notes to send emails at any time from March 26, 2007 to October 3, 2007.

(Class Action Settlement Agreement ("Proposed Settlement"), attached to Christopher M. Burke Aff. at Ex. A, 13-14.) The Proposed Settlement creates a \$16 million settlement fund to pay all fees, expenses, and settlement payments and entitles each valid claimant to a payment of up to

² Hart avers that the first substantive conversation regarding settlement occurred on January 8, 2008, when Comcast indicated that it might be willing to discuss a possible resolution, but that it would first file a motion for judgment on the pleadings. The parties continued discussions regarding the possibility of settlement pending the hearing on the motion, and had a substantive conference call on the issue on April 4, 2008.

\$16. (Id. at Ex. 1.) The Proposed Settlement also provides for a \$3 million fee award to class counsel. (Id. at Ex. A, 26.) In addition, the Proposed Settlement releases Comcast from any future liability relating to its management of P2P or Lotus Notes prior to the effective date of the final settlement. (Id. at Ex. A, 12.)

On April 15, 2009, the Court held a hearing that was originally scheduled to address the Objecting Plaintiffs' motion for appointment of lead counsel, but instead addressed the Proposed Settlement, which was presented to the Court on April 14, 2009. Because neither Aliano nor Objecting Plaintiffs were involved in the settlement negotiations, and had only become aware of the Proposed Settlement hours before the hearing, the Court set a schedule for the parties to review the agreement and to file preliminary objections if necessary. Objecting Plaintiffs subsequently filed objections to the Proposed Settlement arguing that (1) the Proposed Settlement does not provide a fair, reasonable, and adequate class action settlement pursuant to Federal Rule of Civil Procedure 23(e); (2) the notice provisions are insufficient; and (3) Hart's counsel should not be appointed as class counsel.

II. CLASS COUNSEL

Pursuant to Rule 23(g), "a court that certifies a class must appoint class counsel." Fed. R. Civ. P. 23(g)(1). In appointing class counsel, the Court "must consider: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A).

Respective counsel for Hart and Objecting Plaintiffs have both moved the Court to

appoint them as lead counsel, and have submitted multiple affidavits attesting to their respective resources and experience litigating class actions, their knowledge on the relevant legal issues, and extensive work on this litigation to date. The Court finds that Hart's counsel, Lexington Law Group, LLP and Scott + Scott, LLP, are qualified to act as class counsel for the limited purpose of approving the Proposed Settlement, and will be appointed as co-class counsel. The firms' attorneys have many years of experience litigating consumer class actions. Additionally, the two firms have already devoted substantial resources to this action, and have drafted substantial pleadings and briefings on behalf of Hart and the proposed class. Finally, the firms are responsible for negotiating the Proposed Settlement with Defendant, discussed herein.

III. PRELIMINARY APPROVAL OF THE PROPOSED SETTLEMENT

A class action cannot be dismissed, compromised, or settled without the Court's approval, or without notice of the proposed dismissal, compromise, or settlement given to all class members in a manner that the Court directs. See Fed. R. Civ. P. 23(e). "The ultimate approval of a class action settlement depends on 'whether the settlement is fair, adequate, and reasonable.'" Mehling v. New York Life Ins. Co., 246 F.R.D. 467, 472 (E.D. Pa. 2007) (quoting Walsh v. Great Atl. & Pac. Tea Co., 726 F.2d 956, 965 (3d Cir. 1983)). However, prior to granting final approval, the Court must first determine whether preliminary approval should be granted. "The judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the . . . proposed settlement, and date of the fairness hearing." Curiale v. Lenox Group, Inc., 2008 U.S. Dist. LEXIS 92851, at *10 (E.D. Pa. Nov. 14, 2008) (quoting Moore's Federal Practice, Manual For Complex Litigation (Fourth) § 21.632 (2004)).

“In evaluating a settlement for preliminary approval, the court need not reach any ultimate conclusions on the issues of fact and law that underlie the merits of the dispute.” Thomas v. NCO Fin. Sys., 2002 U.S. Dist. LEXIS 14157, at *14 (E.D. Pa. July 31, 2002) (citing Detroit v. Grinnell Corp., 495 F.2d 448, 456 (2d Cir. 1974)). Instead, the Court is required to determine only whether “the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation of attorneys, and whether it appears to fall within the range of possible approval.” Id. (citing In re Prudential Sec. Inc. Ltd. P’ships Litig., 163 F.R.D. 200, 209 (S.D.N.Y. 1995)). The Court will make an initial presumption of a proposed settlement’s fairness if it finds that: “(1) the negotiations occurred at arm’s length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.” In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 785 (3d Cir. 1995). However, “[i]f the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, then the court should direct that the notice be given to the class members of a formal fairness hearing.” Samuel v. Equicredit Corp., 2002 U.S. Dist. LEXIS 8234, at *1 n.1 (E.D. Pa. May 6, 2002) (quoting Manual for Complex Litigation (Second) § 30.44 (1985)).³

³ The Third Circuit has adopted a nine-factor test to help district courts make their final decisions as to whether to approve settlements as fair, reasonable, and adequate. See Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975). These factors include: (1) the complexity and duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the

Hart argues that the Court should preliminarily approve the Proposed Settlement because it was reached at arms length following the completion of “substantial investigation and discovery.” (Hart Mem. In Supp. of Preliminary Approval 5.) He also argues that the settlement is within a reasonable range of possible recovery, (id. at 8), and that his counsel, proponents of the Proposed Settlement, are experienced in similar class action litigation, (id. at 9). Hart further argues that not granting the Proposed Settlement would require the parties to conduct additional discovery and incur additional expenses, and the issue of a possible “class action waiver in Comcast’s subscriber agreement presents substantial risks to the Class’s likelihood of success.” (Id. at 7-8.) Objecting Plaintiffs oppose the Proposed Settlement, arguing that (1) the \$16 million settlement fund is unreasonable in light of the best possible recovery, (Objecting Pls.’ Opp’n 9); (2) the Proposed Settlement is unreasonable without injunctive protection, (id. at 10-11); (3) five of the seven named Plaintiffs object to the Proposed Settlement,⁴ (see id. at 13); and (4) additional discovery is required due to the early stage of the litigation, (id. at 13-14).

Objecting Plaintiffs first argue that the \$16 million settlement fund is unreasonable because the Proposed Settlement only covers the claims of the one million Comcast subscribers who used P2P or Lotus Notes during a defined period when Comcast had blocked access, and not

risks of maintaining a class action; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement in light of the best recovery; and (9) the range of reasonableness of the settlement in light of all the attendant risks of litigation. Id. “At the preliminary approval stage, however, we need not address all of these factors, as ‘the standard for preliminary approval is far less demanding.’” Curiale, 2008 U.S. Dist. LEXIS 92851, at *26 (quoting Gates v. Rohm & Haas Co., 248 F.R.D. 434, 444 n.7 (E.D. Pa. 2008)).

⁴ Opposing Plaintiffs state that six of the seven named Plaintiffs oppose the Proposed Settlement; however, Plaintiff Aliano filed a declaration in support of the Proposed Settlement. (See Doc. No. 49.)

the over 13 million individuals it regards as “prospective class members.” (Objecting Pls.’ Opp’n 8.) Viewing the proposed fund as a “mere fraction” of the best possible recovery, they aver that when considering these 13 million prospective class members, the potential settlement fund should be “in the hundreds of millions, if not billions, of dollars,” because of potential statutory and equitable remedies, as well as their belief that Comcast should be required to disgorge the total monthly subscription fee for each class member for up to six years. (Id. at 8-9.) However, Objecting Plaintiffs overstate the potential class size and amount of damages. Objecting Plaintiffs fail to explain why the class should consist of all 13 million of Comcast’s high-speed Internet subscribers at the time Plaintiffs filed their respective suits, (id. at 3), and not merely the six or seven percent of Comcast subscribers who used P2P protocols during the relevant period. (See Comcast Mem. 6.) Further, damages may be difficult to prove or quantify, and ultimately may be minor—doubtfully reaching the level of a full refund of the entire subscription fee for up to six years for each subscriber. Because the Proposed Settlement’s class definition is more narrow than Objecting Plaintiffs’ proposed definition, Objecting Plaintiffs are not precluded from filing further suit on behalf of those Comcast subscribers not included in the Proposed Settlement’s class definition.

Objecting Plaintiffs also object to the Proposed Settlement’s lack of injunctive protection. Comcast had voluntarily discontinued the conduct at issue in early 2008. After its investigation, the FCC further determined that an injunction was unnecessary due to Comcast’s voluntary actions, and instead indicated that it would issue an injunction if Comcast reverted to its prior practices. (Id. at 16-17.) Because Comcast has voluntarily ceased its allegedly problematic conduct, and the Proposed Settlement does not bar the proposed class from challenging future

Comcast conduct, the lack of injunctive protection in the Proposed Settlement does not render it less fair, reasonable, or adequate.

Based on Hart and Comcast's representations, the Court finds no reason to doubt the Proposed Settlement's fairness. The Proposed Settlement appears to fall within the range of approval. A proposed settlement of up to \$16 per claimant, for damages that may not be easily proven or quantifiable, appears reasonable even in consideration of the associated costs and fees. In addition, the Negotiating Parties conducted arms-length negotiations with the assistance of a mediator, Professor Eric Green of Resolutions, LLC. Although Opposing Plaintiffs argue that five of the seven named Plaintiffs oppose the settlement, those five named Plaintiffs are collectively represented by two aligned law firms that competed against Hart's counsel for the role of lead counsel at the onset of the action's consolidation before this Court.

Furthermore, there appears to have been sufficient discovery, information available to the parties to negotiate a settlement in an informed manner, and time to negotiate an informed settlement agreement. Hart first filed his action in November 2007. When the District Court for the Northern District of California granted Comcast's request to stay the action in the summer of 2008, the Negotiating Parties resumed settlement negotiations. The FCC subsequently announced the results of its investigation: that Comcast had unlawfully interfered with its subscribers' right to access lawful Internet content and to use P2P file sharing applications of their choice. With knowledge of the results of the FCC's investigation, as well as information obtained during informal discovery, the Negotiating Parties finalized the Proposed Settlement agreement on April 13, 2009. Finally, the Proposed Settlement does not appear to unreasonably favor the class representative or any specific class participant. Therefore, the Court will

preliminarily approve the Proposed Settlement.

IV. CERTIFICATION OF THE SETTLEMENT CLASS

Hart's motion also requests certification of the settlement class defined in the Proposed Settlement. "[W]hether a district court certifies a class for trial or for settlement, it must first find that the class satisfies all the requirements of Rule 23." In re Cmty. Bank of N. Va. & Guar. Nat'l Bank of Tallahassee Second Mortgage Loan Litig., 418 F.3d 277, 300 (3d Cir. 2005). Hart has the burden to prove that this action satisfies all the requirements of Rule 23(a) and at least one of the requirements of Rule 23(b). Johnston v. HBO Film Mgmt., Inc., 265 F.3d 178, 183-84 (3d Cir. 2001). Federal Rule of Civil Procedure 23(a) requires that the four following factors be satisfied by any proposed class:

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Hart also seeks certification of the settlement class pursuant to Rule 23(b)(3), which provides that certification is proper if the Court finds that "questions of law or fact common to the members of the class predominate over any questions affecting individual class members, and that a class action is superior to other available methods for fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

Hart alleges that the class fulfills the numerosity requirement of Rule 23(a)(1) because he estimates that approximately one million of Comcast's customers (six percent of the total sixteen million Comcast subscribers) are members of the proposed class. Accordingly, the numerosity

requirement has been satisfied. See, e.g., Stewart v. Abraham, 275 F.3d 220, 226-27 (3d Cir. 2001) (“No minimum number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met.”).

“The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class.” See Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 183 (3d Cir. 2001) (quoting Baby Neal v. Casey, 43 F.3d 48, 56 (3d Cir. 1994)). “Because the requirement may be satisfied by a single common issue, it is easily met.” Baby Neal, 43 F.3d at 56. Hart alleges that there are six common questions to the proposed class including: (1) whether Comcast violated the consumer protection, advertising, and contract laws alleged in the Complaint; (2) whether Comcast’s alleged interference with P2P use by its customers breached the terms of its subscriber agreements; (3) whether statements made by Comcast to the public misrepresented material facts about Internet services and products of Comcast; (4) whether Comcast knew or recklessly disregarded that its alleged statements were materially false and misleading; (5) whether Comcast adequately disclosed its network management practices; and (6) to what extent the members of the class have sustained damages and the proper measure of damages. Because of these common questions arising from Comcast’s practices, the named Plaintiff satisfies the commonality requirement.

Typicality requires the named Plaintiff’s claims to be “typical, in common-sense terms, of the class, thus suggesting that the incentives of the plaintiffs are aligned with those of the class.” Beck v. Maximus, Inc., 457 F.3d 291, 296 (3d Cir. 2006) (quoting Baby Neal, 43 F.3d at

55). “The requirement does not mandate that all putative class members share identical claims because even relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories or where the claim arises from the same practice or course of conduct.” Newton, 259 F.3d at 184 (citations omitted). The named Plaintiff’s claims and the claims of the prospective class would arise out of the same allegedly unlawful conduct by Comcast, and the proof that the named Plaintiff would be required to present to establish his claims would also prove the claims of the rest of the class. Therefore, the named Plaintiff’s claims are typical of the claims of the class, and Rule 23(a)(3) is satisfied.

Named Plaintiff has also demonstrated his adequacy in representing the class. “The adequacy of representation inquiry has two components intended to assure that the absentees’ interests are fully pursued: it considers whether the named plaintiffs’ interests are sufficiently aligned with the absentees’, and it tests the qualifications of the counsel to represent the class.” In re Gen. Motors Corp., 55 F.3d 768, 800 (3d Cir. 1995) (citing Weiss v. York Hosp., 745 F.2d 786, 811 (3d Cir. 1984)). As discussed above, the Court finds that the named Plaintiff’s claims are typical of the class. Furthermore, named Plaintiff has submitted evidence attached to his competing motion for appointment of lead counsel demonstrating that his attorneys are qualified, experienced, and competent to conduct this litigation. Accordingly, Rule 23(a)(4) is satisfied.

Hart also argues that the proposed class satisfies the predominance and superiority requirements of Rule 23(b)(3). “The predominance inquiry tests whether the proposed class is sufficiently cohesive to warrant adjudication by representation.” In re Cmty. Bank of N. Va. & Guar. Nat’l Bank of Tallahassee Second Mortgage Loan Litig., 418 F.3d at 308-309 (citing Amchem Prods. v. Windsor, 521 U.S. 591, 623-24 (1997)). This analysis is similar to the Rule

23(a)(3) typicality. Amchem Prods., 521 U.S. at 623 n.18. “Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws.” Id. at 625. Superiority “asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication.” In re Prudential Ins. Co., 148 F.3d 283, 316 (3d Cir. 1998) (citations omitted). Rule 23(b)(3) identifies four considerations pertinent to this determination:

(A) the class members’ interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

The purported class has met the predominance requirement. Questions regarding Comcast’s actions regarding its P2P practices and any possible liability are common for all the potential members of the narrowly defined class, and predominate over any individual claims that may arise. Furthermore, a class action would be the superior method of adjudication here. There are potentially one million individuals affected by Comcast’s alleged actions and their individual damages may be very small. The putative class is nationwide and there is no suggestion that the members are disproportionately located in any other forum or region. Comcast maintains its principal office in Philadelphia, and litigation in this district would be less burdensome for the parties than litigation elsewhere. Finally, there is no evidence that the management of this class for settlement purposes would present any particular difficulties.

Accordingly, the requirements of Rule 23(a) and (b) are satisfied, and the Court will certify the class for the purpose of settlement only.

V. NOTICE

Hart moves the Court to approve the Proposed Settlement's notice plan pursuant to the Rule 23 requirement that the Court "must direct notice in a reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23(e)(1). "To satisfy due process concerns, notice to class members must be reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mehling, 246 F.R.D. at 477 (citations omitted). Additionally, "[f]or any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2). This "best notice" must inform the proposed class members of the nature and terms of the action, their right to appear through counsel, their right to opt-out, and the method for and effects of opting-out.⁵ Id.

The proposed notice plan provides detailed information about the case history, eligibility requirements, settlement terms, relevant legal rights, and how to opt-out of the settlement. It also includes multiple methods for contacting a claims administrator for additional information. Further, the notice plan provides four methods of notifying potential class members: (1) publication of notice on a search engine-supported website maintained by a claims administrator;

⁵ Rule 23(c)(2) requires that:

The notice must clearly and concisely state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(2) publication of notice in People Magazine and Maxim Magazine, and third party websites run by Yahoo, 24/7 Real Media, and Microsoft Media Networks; (3) electronic copies of notice to appropriate federal and state officials; and (4) including notice to each account holder inside the paper monthly bill for Comcast Internet service.

Objecting Plaintiffs object to the proposed method of notice in favor of notifying prospective class members by emailing the Comcast-provided email address of every customer who subscribes to Comcast's high-speed Internet. Objecting Plaintiffs argue that the proposed method is too expensive and the costs will be deducted from the total \$16 million Proposed Settlement's recovery fund. They also argue that the Proposed Settlement's proposed method will reduce the number of class members. Objecting Plaintiffs, however, provide no support for their position in favor of email notice only. "It is well settled that in the usual situation first-class mail and publication fully satisfy the notice requirements of both Fed. R. Civ. P. 23 and the due process clause." Zimmer Paper Prods., Inc. v. Berger & Montague, P.C., 758 F.2d 86, 90 (3d Cir. 1985). The Court is further concerned that only emailing notice to the Comcast-provided email addresses of Comcast high-speed Internet customers will miss subscribers who do not use their Comcast email addresses, or who may have set their email filter settings to block out emails like the Objecting Plaintiff's proposed notice email. The Proposed Settlement's method targets both current customers who pay their Comcast high-speed Internet bills, and former customers via magazines and websites.

Because the Proposed Settlement's notice plan provides potential class members with the proper information about the class action, so they may make an informed decision about their participation, in a manner that satisfies the due process requirements of 23(c)(2) and Rule 23(e),

the Court preliminarily approves the Proposed Settlement's notice plan.

VI. CONCLUSION

Accordingly, Plaintiff Jon Hart's Motion for Entry of Pretrial Order No. 1 Consolidating the Related Cases and Establishing Plaintiffs' Leadership Structure (Doc. No. 7) is GRANTED. All other motions on this issue are DENIED as moot.

Further, Plaintiff Jon Hart's Motion for Preliminary Approval (Doc. No. 39) is GRANTED and the Court preliminarily concludes that, for the purposes of approving this settlement only, and for no other purpose and with no other effect on the litigation should the Proposed Settlement not ultimately be approved or the effective date not occur:

1. The definitions in the Proposed Settlement are incorporated herein;
2. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, the Proposed Settlement is preliminarily approved because it is fair, reasonable, and adequate;
3. The members of the settlement class include all persons with accounts for Internet service from affiliates and subsidiaries of Comcast Corporation in any U.S. state or territory in which Comcast offers high-speed Internet service and who either:
 - (a) used or attempted to use the Comcast service in order to use the Ares, BitTorrent, eDonkey, FastTrack or Gnutella P2P protocols at any time from April 1, 2006 to December 31, 2008; or
 - (b) used or attempted to use the Comcast service in order to use Lotus Notes to send emails at any time from March 26, 2007 to October 3, 2007;
4. The proposed class likely meets the requirements for certification under Rule 23(b)(3) of the Federal Rules of Civil Procedure: (a) the proposed class is so numerous that joinder of all members of the class is impracticable; (b) there are questions of law or fact common to the proposed class; (c) the claims of class representative are typical of the claims of the members of the proposed class; (d) class representative will fairly and adequately protect the interests of the members of the class; (e) a class action is superior to other available methods for an efficient adjudication of this controversy; (f) the counsel of record for the class representative are qualified to serve as counsel for the class representative and for the class; and (g) common issues will likely predominate over individual issues, to the extent material to the Court's certification of a class for settlement purposes

only;

5. Plaintiff Jon Hart is designated as representative of the class for the purpose of seeking final approval of the Proposed Settlement;
6. Lexington Law Group, LLP and Scott + Scott, LLP are approved as class counsel and Berger Montague are approved as liaison counsel for the purpose of seeking final approval of the Proposed Settlement;
7. A settlement fairness hearing pursuant to Rule 23(e) of the Federal Rules of Civil Procedure is hereby scheduled to be held before the Court on April 15, 2010, at 10:00 a.m., Courtroom 6A, United States Courthouse, 601 Market Street, Philadelphia, Pennsylvania, for the following purposes: (a) to determine whether this action should be finally certified as a class action for settlement purposes pursuant to Rule 23 of the Federal Rules of Civil Procedure; (b) to determine whether the Proposed Settlement is fair, reasonable, and adequate, and should be approved by the Court; (c) to determine whether final judgment should be entered, dismissing the Complaint on the merits and with prejudice, as against the Defendant, and to determine whether the release by the class of the settled claims, as set forth in the stipulation, should be provided to the released parties; (d) to consider class counsel's application for an award of attorneys' fees and expenses; and (e) to rule upon such other matters as the Court may deem appropriate;
8. The Court reserves the right to approve the Proposed Settlement with or without modification and with or without further notice of any kind;
9. The Court approves the timing, form, substance and requirements of the class notice and the claim form, set forth in the Stipulation and attached as exhibits thereto;
10. Class counsel shall, at or before the settlement fairness hearing, file with the Court proof of publication of dissemination of the Notice;
11. The form and content of the Notice, and the method set forth in the Stipulation for notifying the class of the Proposed Settlement and its terms and conditions, meet the requirements of Rule 23 of the Federal Rules of Civil Procedure and due process, constitute the best notice practicable under the circumstances, and shall constitute due and sufficient notice to all persons and entities entitled thereto;
12. The Court approves the appointment of the Claims Administrator who shall oversee, among other things, the processing, handling, reviewing, approval of and paying of claims made by Claimants as set forth in the Stipulation;

13. The Court will consider comments and/or objections to the Settlement, or the award of attorneys' fees and reimbursement of expenses only if such comments or objections and any supporting papers are properly and timely filed, submitted and served as set forth in Part IV.A of the Stipulation. Attendance at the Fairness Hearing is not necessary; however, persons wishing to be heard orally in opposition to the approval of the Settlement and/or the request for attorneys' fees are required to indicate in their objection their intention to appear at the hearing. Persons who intend to object to the Settlement and/or counsel's application for an award of attorneys' fees and expenses and desire to present evidence at the Fairness Hearing shall also include in their written objections the identity of any witnesses they may call to testify and exhibits they intend to introduce into evidence at the Fairness Hearing. Class members do not need to appear at the hearing or take any other action to indicate their approval of the Settlement;
14. Class members requesting exclusion from the class shall not be entitled to receive any payment out of or otherwise participate in the benefits described in the Stipulation;
15. Class members who do not make objections in the manner provided shall be deemed to have waived their objections and shall forever be foreclosed from making any such objections;
16. In the event the Settlement receives final approval and is effected in accordance with all of the terms and conditions set forth in the Stipulation, each class member must timely comply with the terms, conditions and procedures set forth in Part VI of the Stipulation. As part of the claim form, each class member is deemed to have submitted to the jurisdiction of the Court with respect to the claim submitted, and shall (subject to effectuation of the Settlement) release all released claims as provided in the Stipulation. Class members shall be bound by all determinations and judgments in this Action, whether favorable or unfavorable, unless such persons request exclusion from the class in a timely and proper manner, as set forth in Part IV.B of the Stipulation;
17. Pending final determination of whether the Settlement should be approved, all discovery and all proceedings in the action are stayed, except for proceedings relating to the Settlement;
18. If the Settlement is terminated pursuant to the terms of the Stipulation, then the Stipulation, including any amendments thereof, and this Order certifying the class and the class representative for purposes of the Settlement, shall be null and void, of no further force or effect, and without prejudice to any party; may not be introduced as evidence or referred to in any actions or proceedings by any person or entity; and each party shall be restored to his, her or its respective position as it

existed before the Stipulation was executed; and

19. The Court reserves the right to adjourn the date of the final hearing without any further notice to the class members, and retains jurisdiction to consider all further applications arising out of, or connected with, the Proposed Settlement.

BY THE COURT:

/S/LEGROME D. DAVIS

Legrome D. Davis, J.