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16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
18 SAN FRANCISCO DIVISION

19 IN RE TRACFONE UNLIMITED
20 SERVICE PLAN LITIGATION

Lead Case No. 13-cv-03440-EMC

Consolidated Cases:
13-cv-05295-EMC
13-cv-05296-EMC
14-cv-01347-EMC

**PLAINTIFFS' MOTION FOR FINAL
APPROVAL OF CLASS ACTION
SETTLEMENT; MEMORANDUM OF
POINTS AND AUTHORITIES**

25 Date: June 23, 2015
26 Time: 2:30 p.m.
Judge: Hon. Edward M. Chen
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NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 23, 2015, at 2:30 p.m., in the Courtroom of the Honorable Edward M. Chen, United States District Judge for the Northern District of California, 450 Golden Gate Avenue, 17th Floor, Courtroom 5, San Francisco, California 94102, Plaintiffs David Hansell, Edward Tooley, Christopher Valdez, Mona Gandhi, Marisha Johnston, Marshall Tietje, Martin Blaqmoor, and John Browning, the Plaintiffs in the above-captioned action (“Plaintiffs”), will and hereby do move the Court, pursuant to Federal Rule of Civil Procedure 23, for an Order granting final approval of the proposed Class Settlement Agreement (“Settlement”) entered into between the parties in this action.¹

This motion is based on this notice of motion and motion, the accompanying memorandum of points and authorities, the proposed Settlement and all exhibits thereto, the declarations filed in support hereof, the papers filed in support of preliminary settlement approval, the argument of counsel, all papers and records on file in this matter, and such other matters as the Court may consider.

Dated: April 20, 2015

By: /s/ Michael W. Sobol

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Gandhi, and Blaqmoor*

¹ The Settlement is on file at *Hansell* Docket No. 107-1.

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Class Counsel and Attorneys for Plaintiff in Browning

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Court has preliminarily approved the proposed Settlement reached by the parties in
4 this Action, and approved the parties' proposed notice program. *See* Docket No. 118. Notice has
5 been disseminated, and is being disseminated, to the Class as directed by the Court. By this
6 motion, Plaintiffs respectfully request that the Court conduct a final review of the Settlement, and
7 approve the Settlement as fair, reasonable and adequate.

8 The Settlement is the product of extensive arms-length negotiations between the parties
9 and their experienced and informed counsel, was vetted by Federal Trade Commission ("FTC")
10 personnel, and is absolutely fair, reasonable, and adequate given the claims, the alleged harm, and
11 the parties' respective litigation risks.

12 Pursuant to the terms of the Settlement,¹ Defendant TracFone Wireless, Inc. ("TracFone")
13 has paid \$40 million to establish a non-reversionary Settlement Fund from which Class Members
14 who submit valid claims, and all Class Members for whom TracFone has a mailing address
15 (whether or not they submit a claim), will be sent cash payments. It is expected that the *full*
16 amount of net settlement funds will be distributed to the Class as part of an initial distribution,
17 with at least 20 percent (or even more) of Class Members receiving payments. Moreover, the
18 Settlement provides for a secondary distribution if the residual uncashed checks are sufficient to
19 make a second distribution practical. Further, the Settlement provides for separate payment of
20 Class Counsel's court-awarded attorneys' fees and expenses, on top of the \$40 million fund.

21 In addition to the monetary relief, TracFone has also agreed to make industry-leading
22 practice changes, including improving and replacing its advertising and packaging to clearly and
23 prominently disclose its restrictions on the amount and speed of mobile data in its "unlimited"
24 plans.

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¹ The Settlement was negotiated and entered into in conjunction with a settlement reached
between TracFone and the FTC in a related action (the "FTC Settlement").

1 Moreover, the Settlement provides for a robust, multi-pronged notice program and user-
2 friendly claims process, which have been, and are being, implemented by the Settlement
3 Administrator and the parties.

4 The effectiveness of the notice program, the simplicity of the claims process, and the
5 adequacy of the Settlement, are all reflected in the very positive reaction from the Class thus far.
6 The deadline for Class Members to submit claims is June 19, 2015, and the deadline for Class
7 Members to opt-out or object is May 20, 2015. As of April 16, 2015, more than 350,000 claims
8 have already been submitted.² And including the Class Members who will receive automatic
9 payments because TracFone has their mailing address, the overall take rate in this case is already
10 approximately 20-25%, with two months still remaining in the claims period. By contrast, as of
11 April 14, 2015, only 65 persons have requested to be excluded from the Class and just two
12 objections have been submitted.

13 For the foregoing reasons and the other detailed below, the Settlement meets the standards
14 for final settlement approval, and it should therefore be approved.

15 **II. BACKGROUND**

16 **A. Procedural History**

17 This litigation began in 2013. The first-filed *Hansell* case was filed in this Court on
18 July 24, 2013, alleging various claims based the advertising of TracFone's Straight Talk-branded
19 mobile service plans as providing "unlimited" data when, in fact, TracFone had a practice of
20 "throttling" (*i.e.*, slowing) or suspending customers' data, or terminating their service altogether,
21 when the customer reached a certain undisclosed and/or inadequately disclosed data usage limit.
22 The *Hansell* case was filed on behalf of a putative nationwide class of Straight Talk customers.

23 On August 15, 2013, the *Browning* case was filed in the Southern District of Florida. The
24 general allegations in the *Browning* case were substantially identical to the *Hansell* case. The
25 initial complaint in the *Browning* case related to the Straight Talk brand and was filed on behalf
26 of a putative statewide class of Florida Straight Talk customers.

27 ² More than 275,000 of those claims were submitted since the Court entered the Preliminary
28 Approval Order and the notice program commenced. Simmons Decl., ¶ 32.

1 On October 7, 2013, Defendants filed a motion to transfer the *Hansell* case to the
2 Southern District of Florida. The Court denied Defendants' motion to transfer on November 22,
3 2013. (*Hansell* Docket No. 50).

4 On November 14, 2013, two additional related cases were filed in this District, the *Gandhi*
5 and *Blaqmoor* cases. The general allegations and claims asserted in *Gandhi* and *Blaqmoor* were
6 likewise substantially identical to the *Hansell* case, except that they related to two different
7 TracFone brands, Net10 (*Gandhi*) and Simple Mobile (*Blaqmoor*). The *Gandhi* case was filed on
8 behalf of a putative statewide class of California Net10 customers. The *Blaqmoor* case was filed
9 on behalf of a putative nationwide class of Simple Mobile customers. The *Gandhi* and *Blaqmoor*
10 cases were formally related to the first-filed *Hansell* case and assigned to this Court on November
11 21, 2013 (*Hansell* Docket No. 47).

12 On November 18, 2013, plaintiff in the *Browning* case filed an amended complaint in the
13 Southern District of Florida, which expanded the scope of the putative class in that case to a
14 nationwide class of customers who purchased service through four TracFone brands: Straight
15 Talk, Net10, Simple Mobile, and Telcel America.

16 On December 20, 2013, the parties in the *Browning* case entered into a settlement
17 agreement (the "Browning Settlement"), and on February 10, 2014, plaintiff in the *Browning* case
18 filed a motion for preliminary approval of the Browning Settlement before Judge Marcia Cooke
19 of the Southern District of Florida.

20 On March 19, 2014, Judge Marcia Cooke transferred the *Browning* case to this District,
21 where it was assigned to this Court. The parties in the *Browning* case submitted an amended
22 Browning Settlement on May 30, 2014, seeking preliminary approval of same. The Court
23 permitted the *Hansell* plaintiffs to conduct additional discovery prior to considering the proposed
24 *Browning* settlement. While the motion for preliminary approval of the amended Browning
25 Settlement was pending in this Court, the parties in all of the cases reached an agreement in
26 principle to resolve the entire litigation.

27 Defendants responded to each of the complaints in the Action by filing motions to compel
28 arbitration. Defendants' arbitration motions in the *Hansell*, *Gandhi*, and *Blaqmoor* cases remain

1 pending, subject to further briefing which has been stayed. Defendants' arbitration motion in the
2 *Browning* case was taken off calendar after the parties in *Browning* filed the initial Browning
3 Settlement.

4 **B. Class Counsel's Investigation and Discovery**

5 Class Counsel conducted significant discovery and an extensive investigation regarding
6 the issues in this Action prior to entering into the Settlement. Before filing suit, Class Counsel
7 conducted a thorough investigation, including reviewing and analyzing TracFone's marketing
8 materials and packaging, making multiple visits to stores where TracFone products and services
9 are sold, reviewing TracFone's purported terms of service and the methods by which such terms
10 were communicated to consumers, and speaking with numerous customers about their
11 experiences with TracFone products. Moreover, Class Counsel conducted extensive ongoing
12 factual investigation and legal research regarding the issues in the litigation. Further, Class
13 Counsel have taken significant formal discovery, including reviewing thousands of documents
14 produced by Defendants (including internal correspondence and documents regarding TracFone's
15 marketing of "unlimited" plans and relevant policies and the development and implementation of
16 the throttling and other practices at issue), reviewing and analyzing pertinent TracFone customer
17 and sales data, and deposing four senior TracFone employees about the issues in the litigation.
18 Sobol Decl., ¶¶ 5-7; Hattis Decl., ¶¶ 9-12; Yanchunis Decl., ¶¶ 10-15.

19 **C. Settlement Negotiations**

20 The parties engaged in two full-day mediation sessions with Prof. Eric Green of
21 Resolutions, LLC, the first on September 15, 2014 and the second on October 30, 2014. With
22 Prof. Green's assistance, an agreement in principle was reached on improved settlement terms.
23 The parties agreed that a class settlement would be entered into in conjunction with the resolution
24 of a then-pending investigation of TracFone's practices by the FTC, which resolution TracFone
25 was also in the process of negotiating. After the parties reached an agreement in principle on the
26 merits they were able to reach an agreement, with Prof. Green's assistance, regarding Class
27
28

1 Counsel's request for attorneys' fees and expenses. Sobol Decl., ¶ 8; Hattis Decl., ¶ 13;
 2 Yanchunis Decl., ¶ 20.³

3 Following the mediation, all Class Counsel worked hard on negotiating and finalizing the
 4 written settlement agreement, forms of notice, claim form and other exhibits to the settlement,
 5 and have devoted substantial time and resources to ensuring that the settlement presented to the
 6 Court for its approval represents the best result achievable for the Class Members, including
 7 working closely with the Settlement Administrator and media consultant on the design and
 8 implementation of the notice program and claims process, and conferring extensively with
 9 Defendants and the FTC regarding how best to coordinate the Settlement and the FTC
 10 Agreement. Sobol Decl., ¶ 9; Hattis Decl., ¶¶ 13-14; Yanchunis Decl., ¶ 21.

11 **D. Preliminary Settlement Approval**

12 On February 20, 2015, the Court granted preliminary approval of the Settlement, and
 13 ordered that class notice be disseminated pursuant to the parties' proposed multi-pronged notice
 14 program. Docket No. 118.

15 **III. THE SETTLEMENT**

16 The following summarizes the Settlement's key terms.

17 **A. The Settlement Class**

18 The "Class" is defined as:

19 All persons who purchased, in the United States, a Straight Talk,
 20 Net10, Simple Mobile, or Telcel America wireless service plan with
 21 "unlimited" data, who, at any time during the Class Period (July 24,
 22 2009 through December 31, 2014), at TracFone's request, had their
 data usage Throttled, Suspended, or had all of their Services
 Terminated prior to the expiration of their service plan.

23 Defendants are excluded from the Class as well as any entity in
 24 which either of the Defendants has a controlling interest, along with
 25 Defendants' legal representatives, officers, directors, assignees, and
 successors. Also excluded from the Class is any judge to whom the
 Class Action Lawsuits are assigned, together with any relative of
 such judge and the spouse of any such persons.

26 (Settlement, § III)

27 _____
 28 ³ Additionally, the parties in *Browning* engaged in two full-day mediation sessions before Rodney
 Max, a highly skilled and experienced mediator, in connection with the Browning Settlement.

1 **B. Benefits to the Class**

2 **1. The Settlement Fund**

3 Pursuant to the terms of the Settlement, TracFone has paid \$40 million to the FTC to
 4 establish a Settlement Fund to be used for: (a) providing cash payments to Class Members who
 5 are “Valid Claimants”; and (b) payment of administrative costs.⁴ Any attorneys’ fees and
 6 expenses for Class Counsel, and service awards for the Plaintiffs, that are awarded by the Court
 7 will be paid by TracFone *on top of and in addition to* the Settlement Fund, and thus will not
 8 reduce Class Members’ payments. (Settlement, §§ IV.B) As discussed herein, it is expected that
 9 the *entire* net settlement fund (net of administrative costs) will be mailed to Valid Claimants, with
 10 at least 20 percent (or even more) of Class Members receiving payments.

11 **a. Payments to Valid Claimants**

12 Pursuant to the Settlement, payments will be sent via mailed check to all Class Members
 13 who either: (a) submit a timely and valid claim; and/or (b) are an “Identified Class Member”
 14 (meaning that TracFone has a mailing address for them). In other words, Class Members for
 15 whom TracFone has a mailing address, whether or not they submit a claim, will automatically be
 16 considered “Valid Claimants,” and will be sent a check.⁵ (Settlement, §§ IV.B, II.36 & 59)

17 Payment amounts for Valid Claimants will depend on the number of timely, valid claims
 18 that are submitted, how their service was affected, and when they were a TracFone customer.
 19 Specifically, for purposes of payment calculation, there are four “Categories” of Class Members
 20 (Settlement, § IV.B.4):

- 21 • Category 1: Class Members whose data service was Throttled at TracFone’s request
 22 between October 28, 2013 and December 31, 2014 (the end of the Class Period).

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 26 ⁴ The Settlement Administrator estimates that the total administrative costs will be approximately
 27 \$3,680,544. Simmons Decl., ¶ 36. The estimate has increased subsequent to the preliminary
 28 approval hearing primarily because the number of available mailing addresses and claims rate
 have exceeded the Settlement Administrator’s prior expectations. *Id.*

⁵ TracFone has mailing addresses for approximately 1.8 million to 1.9 million Identified Class
 Member accounts.

- 1 • Category 2: Class Members whose data service was Throttled at TracFone’s request
2 between July 24, 2009 (the beginning of the Class Period) and October 27, 2013.⁶
- 3 • Category 3: Class Members whose data service was Suspended at TracFone’s request
4 during the Class Period.
- 5 • Category 4: Class Members who had all of their Services Terminated at TracFone’s
6 request during the Class Period.

7 Payments will be calculated using this “Reference Chart” and as described further below:

8 Category	Initial Amount	Maximum Amount
9 Category 1	\$2.15-\$2.50	\$45.00
10 Category 2	\$6.50	\$45.00
11 Category 3	\$10.00	\$45.00
12 Category 4	\$65.00	\$65.00

13
14 Valid Claimants will receive payments in the following amounts based on their applicable
15 “Category”:

- 16 (a) The Initial Amounts in the Reference Chart; or
- 17 (b) If the total aggregate amount of payments to Valid Claimants, as calculated
18 using the Initial Amounts in the Reference Chart, is less than the “Net Distributable Funds” (*i.e.*,
19 the \$40 million fund minus administrative costs), then additional amounts will first be applied to
20 Category 1 until said payment is equal to the payment under Category 2. Thereafter, the payment
21 amounts to each of the four Categories will be increased on a *pro-rata* basis up to the Maximum
22 Amounts in the Reference Chart. (Settlement IV.B.4)

23 It should be noted that the “Initial Amounts” listed in the above Reference Chart are
24 intended to reflect the approximate payments that would be made if there were a *100% claim*
25 *rate*, meaning the actual payment amounts to Valid Claimants will almost certainly be higher.

26
27 ⁶ The distinction between Categories 1 and 2 has to do with whether the customer had their data
28 service throttled before or after October 28, 2013, which date is based on the approximate timing
of disclosure changes that TracFone made about its “unlimited” plans.

1 or (b) only if a secondary distribution is not feasible or practical, or if funds remain in the
2 Settlement Fund after a secondary distribution, to the FTC for its use as provided in the FTC
3 Agreement. None of the Settlement Fund will revert to Defendants. (Settlement, § IV.B.6)

4 **2. Conduct Changes**

5 In addition to the monetary relief, TracFone has agreed in the Settlement to make
6 industry-leading practice changes including modifying its “unlimited plan” advertising and
7 packaging to clearly and prominently disclose any throttling caps or limits and the lower speeds
8 to which customers will be throttled. TracFone has agreed to not only make changes to its future
9 advertising, but also to instruct its retailers to remove existing advertising, plan cards, and
10 products from the shelves and replace them with new Settlement-compliant materials. TracFone
11 has also agreed to adopt customer service measures to ensure that customers receive accurate
12 information about the policies at issue. The agreed conduct changes, the details of which are set
13 forth in Section IV.C of the Settlement, include but are not limited to:

- 14 • TracFone will not advertise its mobile service plans as providing access to “unlimited”
15 data unless it also makes clear and adjacent disclosures, as detailed in the Settlement,
16 regarding any applicable throttle limits or caps and the actual speeds to which customer
17 data will be slowed.
- 18 • TracFone’s terms and conditions have been updated to describe the impact throttling can
19 have on the functionality of services.
- 20 • TracFone has implemented changes to its customer service to ensure that customers
21 contacting TracFone receive accurate information about TracFone’s throttling,
22 suspension, and service termination policies, and about the impact throttling can have on
23 the functionality of services.
- 24 • TracFone has implemented a system to advise customers by SMS message when their data
25 speed has been throttled upon reaching specified data usage caps.

26 (Settlement, § IV.C)

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1 **C. Opt-Out and Objection Procedures**

2 Any person within the Class definition may opt-out of the Class by sending a written
3 request, clearly stating their desire to be excluded, to the Settlement Administrator, postmarked
4 by the opt-out deadline of May 20, 2015. (Settlement, § VI; Docket No. 118)

5 Any Class Member who does not timely and validly request to be excluded may object to
6 the Settlement, Class Counsel's fee application, and/or the requests for Plaintiff service awards,
7 by mailing an objection to the Settlement Administrator, postmarked by the objection deadline of
8 May 20, 2015. (Settlement, VII, Ex. 2; Docket No. 118)

9 **D. Attorneys' Fees and Expenses; Service Awards.**

10 Class Counsel are filing herewith an application for an award of reasonable attorneys' fees
11 and expenses. Class Counsel are requesting attorneys' fees in the amount of \$5 million, plus
12 reimbursement of \$63,644.75 in litigation expenses. Any attorneys' fees and expenses awarded
13 to Class Counsel will be paid by TracFone in addition to (*i.e.*, on top of) the Settlement Fund.
14 (Settlement, § IX)

15 Class Counsel's fee application also requests service awards of \$2,500 for each of the
16 Plaintiffs. Any service awards will likewise be paid by TracFone on top of the Settlement Fund.
17 (Settlement, § IX.F)

18 **E. Release**

19 In exchange for the benefits provided pursuant to the Settlement, Plaintiffs and Settlement
20 Class Members will release Defendants and related entities from any claims they may have
21 related to the issues in these cases. (Settlement, § VIII)

22 **IV. NOTICE HAS BEEN DISSEMINATED TO THE CLASS PURSUANT TO THE**
23 **COURT-APPROVED NOTICE PROGRAM.**

24 The multi-pronged program approved by the Court in the Preliminary Approval Order
25 (Docket No. 118) has been, and is being, implemented by the parties and the Settlement
26 Administrator. Such program includes direct notice where possible (via mail, email, SMS) and
27 numerous other methods of notice, and is well-designed and tailored to ensure the best notice
28 practicable under the circumstances. *See generally* Finegan Decl.; Simmons Decl.

1 **1. Mailed and Email Notice**

2 Pursuant to the Court-approved notice program, TracFone’s customer records were
3 utilized to provide direct mail and email notice where Class Members’ contact information was
4 available. TracFone provided the Settlement Administrator with Customer Data which included,
5 to the extent available, names, last known mailing addresses, and email addresses for Class
6 Members. (Settlement, §§ V.C.1, II.24; Simmons Decl., ¶¶ 6-9) On or before March 21, 2015
7 (the “Notice Date” set by the Court, *see* Docket No. 118), the Settlement Administrator updated
8 the mailing addresses in the Customer Data through the National Change of Address Database,
9 and mailed the Summary Settlement Notice to each mailing address in the Customer Data, as
10 updated. A total of 1,834,683 notices were mailed, with over 90% delivered. Appropriate steps
11 are being taken to re-mail notices that are returned undeliverable. (Settlement, § V.C.B, Ex. 6;
12 Simmons Decl., ¶¶ 10-13.)

13 On or before the Notice Date, the Settlement Administrator also emailed the Email
14 Summary Notice to each email address in the Customer Data that was not indicated in the
15 Customer Data as being on TracFone’s do not contact list. Within seven days following the
16 Notice Date, the Settlement Administrator also emailed the Email Summary Notice to each
17 email address that was not in the Customer Data but that was provided on a Claim Form received
18 by the Settlement Administrator prior to or on the Notice Date. A total of 1,133,253 notices
19 were emailed, approximately 82% of which (934,057 notices) were successfully delivered (*i.e.*,
20 did not bounce back). (Settlement, § V.C.2, Ex. 8; Simmons Decl., ¶¶ 14-15)

21 **2. SMS Notice**

22 As approved and directed by the Court (*see* Docket No. 118 at ¶ 17), notice has also been
23 sent via SMS (text message) to Class Members who are current subscribers to a TracFone data
24 service plan and who have not opted out of receiving such messages. TracFone reports that SMS
25 Notices were sent to more than 2.1 million current subscriber phone numbers in the Class.
(Settlement, § V.5, Ex. 7)

26 **3. Media and Internet Notice**

27 Class notice has also been provided through an extensive media and Internet notice
28 program, which commenced following the entry of the Preliminary Approval Order. This

1 extensive program, which was designed and has been implemented with the assistance of HF
 2 Media, has included: banner ads on Internet sites and mobile applications, publication in wide-
 3 circulation magazines, a Facebook page dedicated to the Settlement, audio advertisements, social
 4 media advertisements, and media outreach efforts which included a multi-media press release
 5 and audio news release. (Settlement, § V.C.3; Finegan Decl., ¶¶ 11, 13-24)

6 **4. Additional Internet-Based Notice**

7 Additionally, by the Notice Date, TracFone posted notice of the Settlement on the
 8 Straight Talk, Net10, Simple Mobile, and Telcel America brands' Facebook pages and Internet
 9 home pages—including the pages that customers view when logging into their online TracFone
 10 accounts. These notices will remain posted until the claim deadline. (Settlement, § V.C.4)

11 **5. Settlement Website and Toll-Free Number**

12 As directed by the Court, the Settlement Administrator also established a Settlement
 13 Website, www.PrepaidPhoneRefund.com, where Class Members can submit claims
 14 electronically, obtain additional information, and access copies of the operative complaints, the
 15 Settlement, the long-form Class Notice, and Class Counsel's Fee Application. The Settlement
 16 and online claim portal are optimized for use with mobile devices like smart phones and tablets
 (Settlement, § V.C.6; Simmons Decl., ¶¶ 21-30)

17 The Settlement Administrator also established a toll-free telephone number where Class
 18 Members can obtain additional information, in English or Spanish, and request a hard copy
 19 Claim Form or long-form Class Notice. (Settlement, § V.C.7; Simmons Decl., ¶¶ 16-18)

20 **V. THE RESPONSE FROM THE CLASS HAS BEEN VERY POSITIVE.**

21 The response from the Class thus far has been very positive. The deadline for Class
 22 Members to submit claims is June 19, 2015. The Settlement Administrator reports that as of
 23 April 16, 2015, with two still months remaining in the claims period, 355,593 claims have
 24 already been submitted (including 351,325 claims submitted online via the Settlement Website
 25 and 4,268 mailed claims). (Simmons Decl., ¶¶ 31-33) Including the Identified Class Members,
 26 who will automatically be mailed checks without the need to submit a claim, the overall take rate
 27 is already approximately 20-25%.⁷

28 ⁷ Including the approximately Identified Class Member accounts and the submitted claims to date,

1 The deadline for Class Members to opt-out or object is May 20, 2015. As of April 14,
 2 2015, only 65 persons have asked to be excluded, and just two objections have been submitted.⁸
 3 (Simmons Decl., ¶¶ 34-35)

4 **VI. THE COURT SHOULD GRANT FINAL APPROVAL OF THE SETTLEMENT**

5 **A. The Class Action Settlement Approval Process**

6 Judicial proceedings under Federal Rule of Civil Procedure 23 have led to a defined three-
 7 step procedure for approval of class action settlements:

- 8 (1) Certification of a settlement class and preliminary approval
 9 of the proposed settlement after submission to the Court of a written
 10 motion for preliminary approval.
- 11 (2) Dissemination of notice of the proposed settlement to the
 12 affected class members.
- 13 (3) A formal fairness hearing, or final settlement approval
 14 hearing, at which evidence and argument concerning the fairness,
 15 adequacy, and reasonableness of the settlement are presented.

16 *See* Manual for Complex Litigation, Fourth (Fed. Jud. Center 2004), §§ 21.63 *et seq.*

17 In granting preliminary approval of the Settlement and ordering that notice be disseminated to the
 18 Class, the Court has taken the first two steps in the process. Docket No. 118. By this motion,
 19 Plaintiffs respectfully request that the Court take the third and final step in the settlement approval
 20 process by granting final approval of the proposed Settlement.

21 **B. The Settlement is Fair, Reasonable and Adequate and Should be Approved**

22 The law favors the compromise and settlement of class action suits. *See, e.g., Byrd v.*
 23 *Civil Serv. Comm'n.*, 459 U.S. 1217 (1983); *Churchill Village, LLC v. Gen. Elec.*, 361 F.3d 566,
 24 576 (9th Cir. 2004); *Officers for Justice v. Civil Serv. Comm'n.*, 688 F.2d 615, 625 (9th Cir. 1982)
 25 (“[V]oluntary conciliation and settlement are the preferred means of dispute resolution. This is
 26 especially true in complex class action litigation.”).

27 the current take rate is already approximately 20-25% (assuming approximately 8 million Class
 28 Members), and could be higher depending on the extent of overlap between the claimants and the
 Identified Class Members.

⁸ The final numbers of claims, opt-outs, and objections will be reported to the Court in advance of
 the Fairness Hearing. Pursuant to the procedure established by the Court in the Preliminary
 Approval Order, Plaintiffs and Class Counsel will address in their reply papers any timely
 objections that may be submitted before the May 20, 2015 objection deadline. *See* Docket No.
 118 at ¶ 30.

1 In weighing final approval of a class settlement, the Court's role is to determine whether
 2 the settlement, taken as a whole, is fair, adequate, and reasonable. *Staton v. Boeing Co.*, 327 F.3d
 3 938, 952 (9th Cir. 2003) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)).
 4 The Ninth Circuit has established a list of factors to consider when assessing whether a proposed
 5 settlement is fair, reasonable and adequate: (1) the strength of the plaintiffs' case; (2) the risk,
 6 expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class
 7 action status throughout the trial; (4) the benefits offered in the settlement; (5) the extent of
 8 discovery completed and the stage of the proceedings; (6) the experience and views of counsel;
 9 (7) the presence of a governmental participant; and (8) the reaction of the class members to the
 10 proposed settlement. *See Churchill Village*, 361 F.3d at 575; *Hanlon*, 150 F.3d at 1026.
 11 Application of these factors here supports the conclusion that the Settlement is fundamentally
 12 fair, reasonable, and adequate, and should be finally approved.

13 **1. The Strength of Plaintiffs' Case and the Risk, Expense, Complexity,**
 14 **and Likely Duration of Further Litigation**

15 The proposed Settlement here appropriately balances the costs, risks, and likely delay of
 16 further litigation, on the one hand, against the benefits provided, on the other hand. *See* 4
 17 *Newberg on Class Actions* § 11:50 at 155 ("In most situations, unless the settlement is clearly
 18 inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with
 19 uncertain results.").

20 Plaintiffs and the Class here face significant risks if the litigation were to continue.
 21 Among other risks, Defendants have filed motions to compel arbitration in each of the underlying
 22 cases. Obviously, if those motions were successful, it would spell the end of the litigation.⁹
 23 Moreover, both liability and damages remain disputed. Among other arguments and defenses that
 24 Defendants have asserted and/or indicated they will assert are: (a) Class Members' purchase
 25 decisions were not motivated by, or exclusively by, the representations about the "unlimited" data
 26 plan; (b) TracFone's service agreements permitted the conduct at issue; (c) TracFone's service

27 _____
 28 ⁹ Consumers would be faced to pursue their individualized claims through arbitration, unlikely
 given the small damages suffered by each Class Member.

1 plans are less expensive than comparable plans available in the market; and; (d) Plaintiffs and the
2 class members cannot demonstrate that they have been harmed.

3 While Plaintiffs believe that they can overcome these defenses, they are indicative of the
4 risks and hurdles that Plaintiffs and the Class face should this matter proceed in litigation. The
5 proposed Settlement provides considerable monetary and injunctive relief for the Class Members
6 while allowing them to avoid the risks of unfavorable, and in some cases dispositive, rulings on
7 these and other issues.

8 The Settlement also provides the Class Members with another significant benefit that they
9 could not receive if they proceeded to trial—prompt relief. Proceeding to trial could add years to
10 the resolution of this action, given the legal and factual issues raised and likelihood of appeals.
11 Prompt relief is particularly critical in this case. Due to the nature of TracFone’s no-contract
12 services, the more time that passes, the more difficult it will be to get Class Members relief as the
13 members of the Class become more and more difficult to identify.

14 **2. The Risk of Maintaining Class Action Status Throughout the Trial**

15 Defendants do not concede that a nationwide class trial in this case would be manageable,
16 and have made clear that they would likely oppose a motion for class certification on that basis.
17 While Plaintiffs believe that they would have a strong argument for certifying a litigation class,
18 obtaining and maintaining class action status throughout the trial is always a challenge, and is far
19 from guaranteed, in a complex case like this one.

20 **3. The Benefits Offered in the Settlement**

21 The Settlement provides substantial, valuable relief to the Class, including both substantial
22 monetary relief and important conduct changes that will protect millions of Class Members and
23 other consumers going forward.

24 **a. Strong Monetary Relief**

25 The \$40 million Settlement Fund, from which Class Members will be paid, represents a
26 strong monetary result for the Class given the harm alleged and the substantial risks of ongoing
27 litigation. All Class Members who submit timely and valid claims, as well as all Identified Class
28 Members (*i.e.*, Class Members for whom TracFone has a mailing address, whether or not they

1 submit a claim) will be sent payments. Based on the provision in the Settlement for automatic
2 payment to Identified Class Members, and the number of claims submitted to date, it is expected
3 that the *full* amount of net settlement funds (*i.e.*, the \$40 million, less Administrative Costs) will
4 be sent to Valid Claimants as part of an initial distribution, with at least 20 percent (or even more)
5 of Class Members receiving payments. Moreover, to the extent funds remain in the Settlement
6 Fund (*e.g.*, due to uncashed checks), the Settlement provides for a secondary distribution to Valid
7 Claimants as long as the residual amounts are sufficient to make such secondary distribution
8 practical. None of the Settlement Fund will revert to Defendants. (Settlement, § IV.B.5 & 6)

9 To put the \$40 million amount in perspective, the average cost of a monthly “unlimited”
10 service plan from TracFone during the Class Period was approximately \$45.00. Assuming
11 Plaintiffs were to overcome the numerous pre-trial obstacles in this Action, prevail at trial and on
12 an inevitable appeal, and ultimately recover damages equal to the full cost of one month of
13 service for each of the approximately 8 million Class Members, then the total class damages in
14 that scenario would be approximately \$360 million. While Plaintiffs believe they would have a
15 credible basis for seeking twice that amount at trial (*i.e.*, the cost of two months of service),
16 Defendants argue that Class Members were on notice of TracFone’s policies the first month their
17 service was affected, and could have discontinued their no-contract service plans at that time.
18 Thus, there is uncertainty regarding whether Plaintiffs could have recovered more than one full
19 month’s charge per Class Member even in the proverbial “home run” scenario.

20 Defendants further argue that any damages would have to be limited to reflect the fact that
21 Class Members’ plans included three services—talk, text, and data—and that TracFone’s
22 throttling and suspension practices only affected one of the three services (data). If accepted by
23 the fact finder, this argument could reduce damages by as much as two-thirds (*i.e.*, to \$120
24 million if one month of service is the starting point).

25 Defendants also argue that even for the data portion, Class Members got some of what
26 they paid for—*i.e.*, data service for the period of the month before they were throttled or
27 suspended. Defendants have argued, the throttling and suspension typically occurred in the latter
28 part of the service month. However, if on average customers were throttled in the middle of the

1 month, this could cut in half the amount claimed for any one-month's throttling (resulting in a
2 \$60 million recovery at trial, if the \$120 million starting point referenced above was accepted).

3 While Plaintiffs do not agree with them, TracFone's damages arguments present
4 significant risks to recovering two full months' service charges. Even before these arguments are
5 considered, the \$40 million Settlement Fund represents a substantial amount. When the
6 possibility of Defendants prevailing on some or all of its damages arguments is considered, it is
7 clear that \$40 million represents a very strong monetary result for the Class, particularly in light
8 of the arbitration issue and other litigation risks in this case.

9 Further, the Settlement provides for the payment of Class Counsel's attorneys' fees and
10 costs *on top of* the Settlement Fund. By contrast, if the case were litigated to trial, most or all of
11 Class Counsel's fee would likely come out of whatever class damages were recovered, which
12 would reduce the actual payments to the Class Members accordingly.

13 **b. Important Practice Changes**

14 In addition to the monetary relief, the Settlement also provides for important, industry-
15 leading practice changes that are well-tailored to the claims in this action and will benefit and
16 protect millions of Class Members and other consumers going forward. Among other things,
17 TracFone has agreed to improve and replace its advertising and packaging to clearly and
18 prominently disclose its restrictions on the amount and speed of mobile data in its "unlimited"
19 plans, and to adopt customer service measures to ensure that customers receive accurate
20 information about the policies at issue. *See supra* section III.B.2. This injunctive relief has
21 significant value.

22 **4. The Extent of Discovery and the Stage of Proceedings**

23 For this factor, courts look to whether the parties have sufficient information to make an
24 informed decision with respect to the settlement. *See In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d
25 454, 459 (9th Cir. 2000).

26 The Settlement here is informed by Plaintiffs' extensive investigation and discovery
27 regarding the legal and factual issues in the Action. Before filing suit, Class Counsel conducted a
28 thorough investigation, including reviewing and analyzing TracFone's marketing materials and

1 packaging, making multiple in-store visits, reviewing TracFone’s purported terms of service and
2 the methods by which such terms were communicated to consumers, and speaking with numerous
3 customers about their experiences with TracFone products. Moreover, Class Counsel have
4 conducted extensive ongoing factual investigation and legal research regarding the issues in the
5 Action. Further, Class Counsel have taken significant formal discovery in this Action, including
6 reviewing thousands of documents produced by Defendants (including internal correspondence
7 and documents regarding TracFone’s marketing of “unlimited” plans and relevant policies and
8 the development and implementation of the throttling and other practices at issue), reviewing and
9 analyzing pertinent TracFone customer and sales data, and deposing four senior TracFone
10 employees about the issues in the Action. Sobol Decl., ¶¶ 5-7; Hattis Decl., ¶¶ 9-12; Yanchunis
11 Decl., ¶¶ 10-15. Accordingly, Plaintiffs and their counsel had sufficient information to make an
12 informed decision about the Settlement and to determine that it represented a favorable and fair
13 result for the Class.

14 **5. The Experience and Views of Counsel**

15 The recommendation of experienced plaintiffs’ counsel weighs in favor of granting final
16 approval and creates a presumption of reasonableness. *Knight v. Red Door Salons, Inc.*, 2009 U.S.
17 Dist. LEXIS 11149, at *11 (N.D. Cal. Feb. 2, 2009); *see also Linney v. Cellular Alaska*
18 *Partnership*, 1997 U.S. Dist. LEXIS 24300, *15-17 (N.D. Cal. July 18, 1997). “Parties
19 represented by competent counsel are better positioned than courts to produce a settlement that
20 fairly reflects each party’s expected outcome in litigation.” *In re Pac. Enters. Sec. Litig.*, 47 F.3d
21 373, 378 (9th Cir. 1995). Class Counsel here have extensive experience litigating and settling
22 consumer class actions and other complex matters, including cases involving false and misleading
23 advertising and unfair business practices,¹⁰ and they have conducted an extensive investigation
24 into the factual and legal issues raised. The fact that qualified and well-informed counsel endorse
25 the Settlement as being fair, reasonable, and adequate weighs heavily in favor of the Court
26 approving the Settlement.

27
28 ¹⁰ Sobol Decl., ¶¶ 2-4, 12-21; Hattis Decl., ¶¶ 3-8; Yanchunis Decl., ¶¶ 1-8.

1 **6. The Presence of a Government Participant**

2 The Settlement here was vetted by FTC personnel, further supporting its reasonableness
3 and adequacy. Moreover, notice has been issued to numerous governmental agencies pursuant to
4 the Class Action Fairness Act, 28 U.S.C. § 1715, and to date no governmental entity has raised
5 objections or concerns about the proposed Settlement.

6 **7. The Reaction of the Class**

7 The reaction of the Class has been very positive to date, providing further support for the
8 conclusion that the Settlement is fair, reasonable and adequate. The deadline for Class Members
9 to submit claims is June 19, 2015. As of April 16, more than 350,000 claims have already been
10 submitted. (Simmons Decl., ¶¶ 31-33)

11 The deadline for Class Members to opt-out or object is May 20, 2015. In contrast to the
12 hundreds of thousands of claims that have been submitted, as of April 14, 2015, only 65 persons
13 have requested to be excluded from the Class, and just two objections have been submitted.
14 (Simmons Decl., ¶¶ 34-35) This very positive reaction further supports the reasonableness of the
15 proposed Settlement. *See, e.g., Churchill Village*, 361 F.3d at 577 (upholding district court’s
16 approval of class settlement with 45 objections and 500 opt-outs for a class of 150,000).

17 **8. Lack of Collusion Between the Parties**

18 “Before approving a class action settlement, the district court must reach a reasoned
19 judgment that the proposed agreement is not the product of fraud or overreaching by, or collusion
20 among, the negotiating parties.” *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1290 (9th Cir.
21 1992). Where a settlement is the product of arms-length negotiations conducted by capable and
22 experienced counsel, the court begins its analysis with a presumption that the settlement is fair
23 and reasonable. *See 4 Newberg* § 11.41; *In re Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS
24 13555, at *32 (C.D. Cal. June 10, 2005); *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18
25 (N.D. Cal. 1980).

26 The Settlement submitted for the Court’s consideration here is the product of arms-length
27 negotiations between the parties and their well-qualified counsel, was informed by Class
28

1 Counsel’s extensive discovery and investigation, and was negotiated with the assistance of an
2 experienced and well-respected mediator, Eric Green of Resolutions, LLC.

3 **VII. CONCLUSION**

4 For the foregoing reasons, Plaintiffs respectfully request that the Court enter an Order
5 granting final approval of the Settlement.

6

7 Dated: April 20, 2015

By: /s/ Michael W. Sobol

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