UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

In Re NORVERGENCE, INC., Debtor.	Case No. 04-32079 (RG)
WANLAND & ASSOCIATES, INC., on behalf of itself and all others similarly situated, Plaintiff, v. NORTEL NETWORKS LIMITED, NORTEL NETWORKS, INC., QWEST COMMUNICATIONS INTERNATIONAL INC., THOMAS N. SALZANO, ALEXANDER L. WOLF, and ROBERT J. FINE, Defendants.	Adv. Proc. No. 05-2439 **BRIEF IN SUPPORT OF JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS AND PROCEDURAL HISTORY 3

A. The Lengthy History of This Case 3

B. The Settlement Between Plaintiff and the Nortel Defendants 7

ARGUMENT 10

PRELIMINARY SETTLEMENT APPROVAL SHOULD BE GRANTED 10

A. The Court Should Preliminarily Approve the Settlement 14

B. Certification of the Proposed Class for Purposes of Settlement Only is Appropriate 15

1. Numerosity Under Rule 23(a)(1)..16

2. Commonality Under Rule 23(a)(2) 17

3. Typicality Under Rule 23(a)(3) 18

4. Adequacy of Representation Under Rule 23(a)(4).........................18

5. The Requirements of Rule 23(b)(3) Are Met......................................*20*

C. The Court Should Approve the Notice Plan..23

D. A Final Approval Hearing Should be Scheduled 24

CONCLUSION...24

TABLE OF AUTHORITIES

Cases **Page(s)**

Amchem Prods. v. Windsor,
521 U.S. 591 (1997).. 15

Armstrong v. Board of School Directors of the City of Milwaukee,
616 F.2d 305 (7th Cir. 1980)..11

Baby Neal v. Casey,
43 F.3d 48 (3d Cir. 1994)..17

Chemetron Corp. v. Jones,
72 F.3d 341 (3d Cir. 1995)..23

DeBoer v. Mellon Mortg. Co.,
64 F.3d 1171 (8th Cir. 1995)..23

Ehrheart v. Verizon Wireless,
609 F.3d 590 (3d Cir. 2010)..12, 24

Gotthelf v. Toyota Motor Sales, U.S.A., In.,
525 F. App'x 94 (3d Cir. 2013)..18, 19

Hoxworth v. Blinder, Robinson & Co.,
980 F.2d 912 (3d Cir. 1992)..4

In re Am. Family Enters.,
256 B.R. 377 (D.N.J. 2000)..15

In re Comty. Bank of N. Va. & Guaranty Nat'l Bank of Tallahassee Second Mortg. Loan Litig.,
622 F.3d 275 (3d Cir. 2010)..19

In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.,
55 F.3d 768 (3d Cir. 1995)..11

In re Ins. Brokerage Antitrust Litig.,
282 F.R.D. 92 (D.N.J. 2012)..18, 20

In re Prudential Ins. Co. Am. Sales Practice Litig.,
148 F.3d 283 (3d Cir. 1998) 17

In re Prudential Sec. Inc. Ltd. Pshps. Litig.,
163 F.R.D. 200 (S.D.N.Y. 1995)...11

In re Warfarin Sodium Antitrust Litig.,
391 F.3d 516 (3d Cir. 2004) 10

Jones v. Commerce Bancorp, Inc.,
2007 U.S. Dist. LEXIS 52144 (D.N.J. July 16, 2007) 11

McCoy v. Health Net, Inc.,
569 F. Supp. 2d 448 (D.N.J. 2008)... 12, 21

Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
259 F.3d 154 (3d Cir. 2001) 18

O'Brien v. Brain Research Labs, LLC,
2012 U.S. Dist. LEXIS 113809 (D.N.J. Aug. 9, 2012) 21

Reyes v. Netdeposit, LLC,
802 F.3d 469 (3d Cir. 2015) 17, 21

Singleton v. First Student Mgmt. LLC,
2014 U.S. Dist. LEXIS 108427 (D.N.J. Aug. 6, 2014) 11, 14

Skeen v. BMW of N. Am.,
2016 U.S. Dist. LEXIS 939 (D.N.J. Jan. 6, 2016)..11

Stewart v. Abraham,
275 F.3d 220 (3d Cir. 2001) 16

Sullivan v. DB Invs., Inc.,
667 F.3d 273 (3d Cir. 2011) 20, 21, 22

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011)..17

Weissman v. Philip C. Gutworth, P.A.,
2015 U.S. Dist. LEXIS 8543 (D.N.J. Jan. 23, 2015)....................................11

Williams v. First Nat'l Bank,
216 U.S. 582 (1910)..12

Statutes

28 U.S.C. § 1292(b) 5

28 U.S.C. § 1334(b) 4

28 U.S.C. § 1715 24

Manual for Complex Litig- Fourth, § 30.212.. 23

Manual for Complex Litig.-Fourth, § 30.44...24

N.J. Stat. Ann. § 56:8-1 (West) 4

Other

Fed. R. Civ. P. 12(b)(6)...3

Fed. R. Civ. P. 23 14

Fed. R. Civ. P. 23(a)...25

Fed. R. Civ. P. 23(a)(1) 16

Fed. R. Civ. P. 23(a)(2) 17

Fed. R. Civ. P. 23(a)(3) 18

Fed. R. Civ. P. 23(a)(4) 18

Fed. R. Civ. P. 23(b)(3)...20, 22, 25

Fed. R. Civ. P. 23(b)(3)(D) 20

Fed. R. Civ. P. 23(c)(2)(B) 23, 24

Fed. R. Civ. P. 23(e) 23

Fed. R. Civ. P. 23(e)(1) 11

Fed. R. Civ. P. 23(e)(2) 10

PRELIMINARY STATEMENT

This putative consumer fraud class action was filed over twelve years ago. The allegedly wrongful conduct that underlies this matter occurred fifteen years ago, in 2001. In essence, plaintiff Wanland & Associates ("Plaintiff") has alleged that all defendants, as well as third party NorVergence, Inc. ("NorVergence"), defrauded numerous businesses by inducing them to enter into leases for "Matrix boxes" and other equipment in connection with the purchase of telecommunications services without disclosing that the leases purported to create an absolute obligation to pay regardless of whether services were actually rendered, and even though the value of the leased equipment was allegedly less than the lease price.

This case was heavily litigated before being stayed by this Court as part of Adversary Proceeding, Case No. 05-02439-RG, under the bankruptcy case NorVergence, Inc. Bankruptcy Proceeding, Case No. 04-32079. The NorVergence bankruptcy pre-dated this lawsuit by several months.

Plaintiff has now entered into a proposed classwide settlement agreement ("the Settlement") with defendants Nortel Networks Limited ("NNL") and Nortel Networks Inc. ("NNI," and together with NNL, "the Nortel Defendants" or "the Settling Nortel Defendants"), the only remaining active defendants, that will grant the Settlement Class a general unsecured claim against NNI in the amount of

$400,000 ("the Wanland Settlement Claim") for the benefit of all members of the Settlement Class.[1] When NNI ultimately makes distributions of its assets to its creditors, the Wanland Settlement Claim will be paid *pari passu* with other holders of non-priority general unsecured claims against NNI ("the Wanland Settlement Claim Distribution"). Settlement Class members who file a valid claim with the Claim Administrator will be paid from the Wanland Settlement Claim Distribution, less certain costs of administering the Settlement and an incentive award of $10,000 for Plaintiff. The Settlement permits Plaintiff to apply for attorneys' fees to Plaintiff's counsel in an amount in addition to what Settlement Class members will receive, so that any fee awarded will not reduce the monies available to be claimed by Settlement Class members.

As will be shown *infra*, the Settlement meets all requirements of Federal Rule of Civil Procedure 23. The Court should grant preliminary approval of the Settlement.

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[1] NNI and NNL, as the Settling Nortel Defendants, have mutually agreed that NNI shall file this brief and the related motion for preliminary approval on behalf of the Settling Nortel Defendants and that such filing shall satisfy ¶2 of the Settlement requiring a joint filing of the preliminary approval motion by the parties to the Settlement.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Lengthy History of This Case

This matter has had a long and winding history, in three different courts, as the accompanying Declaration of Lisa J. Rodriguez ("Rodriguez Decl.") recounts. The following discussion is drawn from the Rodriguez Decl.

Plaintiff commenced this case on September 27, 2004 by filing it in the Superior Court of New Jersey, Law Division, Ocean County. Nortel Networks Corporation, which was then one of the named defendants, removed the case to the United States District Court for the District of New Jersey on February 28, 2005, where it was assigned to Hon. Mary L. Cooper, U.S.D.J., under Civil Action No. 3:05-cv-01191(MLC)(TJB). District Court ECF No. 1.[2]

On March 7, 2005, Nortel Networks Corporation filed a motion to dismiss the Complaint under Fed. R. Civ. P. 12(b)(6). District Court ECF No. 2. Thereafter, on March 24, 2005, Plaintiff filed an Amended Complaint ("AC"), which remains the operative pleading. District Court ECF No.3. The AC named as defendants Qwest Communications International Inc. ("Qwest"), Thomas N. Salzano, Peter J. Salzano, Alexander L. Wolf, Robert J. Fine (all of whom were

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[2] "District Court ECF No. ___" refers to docket entries in Civil Action No. 3:05-cv-01191(MLC)(TJB). "ECF No.," used below, refers to docket entries in this adversary proceeding.

former executives of NorVergence), and the two Nortel Defendants, who replaced Nortel Networks Corporation as defendants. *Id.* The AC asserted claims under the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 *et seq*. ("NJCFA") and consumer protection statutes of other jurisdictions, as well as theories of negligent misrepresentation and unjust enrichment. *Id.*

On March 28, 2005, Judge Cooper issued an Order to Show Cause as to why the case should not be remanded to the Superior Court due to lack of subject matter jurisdiction. District Court ECF No. 7. After parties made submissions that contended that the Court had subject matter jurisdiction under 28 U.S.C. §1334(b), because the AC was related to the NorVergence bankruptcy action, Judge Cooper issued a June 20, 2005 opinion that agreed that there was subject matter jurisdiction. District Court ECF No. 29. Judge Cooper terminated motions to dismiss that had meanwhile been filed, referred the AC to this Court as an adversary proceeding. District Court ECF Nos. 29, 30.

On April 13 and 14, 2006, respectively, the Nortel Defendants and Qwest filed motions to dismiss the AC. ECF Nos. 23, 25. Defendant Fine filed a motion for summary judgment on April 17, 2006. ECF No. 27. After the parties completed briefing on all three motions, this Court held a hearing on those motions on September 13, 2006. ECF September 13, 2006 minute entry. On February 28, 2008, this Court issued a 94-page opinion that denied the motions of Qwest and the

Nortel Defendants, and found the record insufficient either to grant or deny Fine's motion. ECF No. 55. An Order embodying that opinion was entered on March 24, 2008. ECF No. 61.

On April 30, 2008, Qwest and the Nortel Defendants filed Answers to the AC. ECF Nos. 79, 81. Those Answers denied the material allegations of the AC, and asserted numerous affirmative defenses. In addition to merits defenses, defendants contended that no class could be certified in this matter.[3]

The Nortel Defendants sought leave to appeal to the District Court, under 28 U.S.C. §1292(b), the denial of their motion to dismiss. Plaintiff filed opposition. On December 8, 2008, Judge Cooper issued an opinion and an Order that denied the motion for leave to appeal. ECF Nos. 118, 119.

On December 16, 2008, following his deposition, defendant Fine was dismissed from this proceeding by stipulation. Settlement, at 2, Recital J.

On January 14, 2009, Plaintiff filed a motion for class certification. ECF No. 133. That motion never proceeded, however, because of bankruptcy proceedings filed that very same day.

On January 14, 2009, NNI and certain of its affiliates filed voluntary petitions for relief pursuant to Chapter 11 of the United States Bankruptcy Code in

[3] The remaining defendants, Thomas N. Salzano, Peter J. Salzano, and Alexander J. Wolf, have not figured in this case. Wolf was never served, and the Salzanos, though served, never appeared. Settlement, at 2-3, Recital N. Plaintiff does not intend to pursue claims against any of those defendants. *Id.*

the United States Bankruptcy Court for the District of Delaware (the "Delaware Bankruptcy Court"), Case No. 09-10138 (KG) (the "Delaware Bankruptcy Proceedings"). Settlement, at 2, Recital K. Plaintiff filed a proof of claim in the Delaware Bankruptcy Proceedings for $360,000,000 (the "Delaware Bankruptcy Proof of Claim"). Settlement, at 3, Recital O. That figure resulted from Plaintiff's most favorable view of the class size and provable damages and then trebling the resulting $120,000,000 damage amount since the NJCFA affords treble damages. To date, the Nortel Defendants have not allowed the Delaware Bankruptcy Proof of Claim in any amount against any of the Nortel Defendants in the Delaware Bankruptcy Proceedings. The Nortel Defendants have reserved all rights and defenses related to the Delaware Bankruptcy Proof of Claim and will continue to do so until the Settlement becomes fully effective and the Delaware Bankruptcy Proof of Claim is allowed against NNI in exchange for the Plaintiff releasing the Nortel Defendants for all claims related to the Delaware Bankruptcy Proof of Claim in accordance with the terms of the Settlement.

Also on January 14, 2009, Nortel Networks Corporation, NNL, and certain of their affiliates commenced a proceeding in the Ontario Superior Court of Justice (the "Ontario Court") under the Companies' Creditors Arrangement Act of Canada, styled *In the Matter of a Plan of Compromise or Arrangement of Nortel Networks Corporation, et al.*, Case No. 09-CL-7950 ("the Canadian Insolvency

Proceedings"). Settlement, at 2, Recital L. On that same date, Nortel Networks Corporation, NNL and certain of their affiliates filed petitions for relief and recognition in the United States of the Canadian Insolvency Proceedings pursuant to Chapter 15 of the United States Bankruptcy Code in the Delaware Bankruptcy Court, Case No. 09-10166 (KG) ("the Chapter 15 Proceedings"). Settlement, at 2, Recital M.

By virtue of the filing of the Delaware Bankruptcy Proceedings and the Chapter 15 proceedings, this adversary proceeding was stayed as against NNI and NNL, respectively. Settlement, at 2-3, Recital N; ECF No. 143.

On February 9, 2011, Qwest was dismissed from this proceeding by stipulation. Settlement, at 3, Recital O. Functionally, therefore, the only remaining defendants are the Nortel Defendants. *See supra* at 5 n.3 (describing Plaintiff's intent not to proceed against the individual defendants, who were not served or have not appeared). The docket reflects no substantive activity in this adversary proceeding since that date.

B. The Settlement Between Plaintiff and the Nortel Defendants

Plaintiff and the Settling Nortel Defendants have now reached a settlement that will allow all Settlement Class members, after more than twelve years of this litigation, to recover from the Settling Nortel Defendants and conclude this matter. The Settling Nortel Defendants continue to deny Plaintiff's allegations, as to both

Plaintiff and the putative class. Settlement, at 3, Recital Q. Nonetheless, all parties believe that the Settlement is to their mutual benefit, Settlement, at 3, Recital R, and if approved, it would conclude this lengthy adversary proceeding.

The Settlement Class is defined as:

> All persons, including businesses, in the United States of America and its territories who, between January 1, 2001 and June 30, 2004, entered into a written agreement with NORVERGENCE, INC. for the lease of one or more Matrix boxes, Matrix SoHo boxes, or other network equipment provided by NORVERGENCE, INC. Excluded from the Settlement Class are the presiding judges in each of the New Jersey Federal Action, the NORVERGENCE Bankruptcy Proceeding, the Delaware Bankruptcy Proceedings, the Canadian Insolvency Proceedings, the staff of each of those presiding judges, Class Counsel, SETTLING NORTEL DEFENDANTS' in-house and outside counsel and the respective immediate families of all persons listed above.

SA, at 4, ¶3(a). The Settlement Class will be based on a customer list obtained from the Trustee in the NorVergence bankruptcy. Settlement, at 5, ¶(c). Using that list, notice to Settlement Class members will be given by direct mail by a professional claims administrator (the "Claims Administrator") to be agreed upon by the parties and approved by the Court. Settlement, at 4-5, ¶3(b)-(c).

Under the Settlement, NNI was required to obtain an Order in the Delaware Bankruptcy Proceedings that lifts the bankruptcy stay and permits NNI to enter

into the Settlement. Settlement, at 3, ¶1. NNI obtained that Order on October 24, 2016. Delaware Bankruptcy Court ECF No. 17299.

The Settlement provides that Plaintiff's claim in the Delaware Bankruptcy Proceedings will be reduced and allowed as a non-priority general unsecured claim against NNI in the amount of $400,000 plus the amount of attorneys' fees and costs that this Court awards, if this Court approves the Settlement and awards fees and costs to Plaintiff's counsel. Settlement, at 6, ¶4(e). Costs of notice and administration, as well as an incentive award for plaintiff of $10,000, will be deducted from the $400,000 Wanland Settlement Claim Distribution before payments are made to Settlement Class members who file valid claims with the Claims Administrator. Settlement, at 6, ¶4(e).[4] A detailed and objective claims procedure, to be implemented by the Claims Administrator, ensures the proper processing of claims by Settlement Class members. Settlement, at 5-6, ¶4. Funds remaining after deduction of notice costs and the incentive award will be divided equally among all Settlement Class members who file valid claims. Settlement, at 7, ¶4(e)(iii).

Pursuant to the Settlement, Plaintiff's counsel shall be entitled to receive a non-priority general unsecured claim against NNI for attorneys' fees and expenses

[4] NNI will advance up to $41,500 of the reasonably anticipated costs of notice and administration, which amount is to be deducted from any distribution made on account of Plaintiff's claim in the Delaware Bankruptcy Proceedings that will be the source of the Wanland Settlement Claim Distribution. Settlement, at 5, ¶3(e).

of up to $100,000, which will be in addition to the Wanland Settlement Claim Distribution described *supra*. Settlement, at 8-9, ¶6. The Settling Nortel Defendants have agreed not to oppose a fee and expense application for up to $100,000. Settlement, at 8, ¶6(a). The actual amount that Plaintiff's counsel will receive will depend on the ultimate distribution made in the Delaware Bankruptcy Proceedings. Settlement, at 8, ¶6(b). If unsecured creditors receive less than 100% of the amount of their allowed claims, Plaintiff's counsel will not be able to seek or receive anything more than that percentage of any fee and expense award that this Court makes. *Id*.

In consideration of these settlement benefits, Plaintiff and the putative class will release all claims and potential claims against the Settling Nortel Defendants related to the claims made by Plaintiff in the Delaware Bankruptcy Proof of Claim, as described in additional detail in the Settlement (the "Settlement Releases"). Settlement, at 9-10, ¶8.

ARGUMENT

PRELIMINARY SETTLEMENT APPROVAL SHOULD BE GRANTED

Before a class action settlement can be finally approved, the Court must determine "after a hearing" that the settlement is "fair, reasonable, and adequate." *See* FED. R. CIV. P. 23(e)(2); *see also In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 534 (3d Cir. 2004) ("A class action may not be settled under Rule 23(e)

without a determination by the district court that the proposed Settlement is 'fair, reasonable and adequate.'") (quoting *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995) ("*GMC*"), *cert. denied*, 516 U.S. 824 (1995)). The Court must also "direct notice in a reasonable manner to all class members who would be bound by the proposal." *See* FED. R. CIV. P. 23(e)(1).

"Review of a proposed class action settlement is a two-step process: preliminary approval and a subsequent fairness hearing." *Jones v. Commerce Bancorp.*, 2007 U.S. Dist. LEXIS 52144, at *4 (D.N.J. July 16, 2007). "The purpose of having a preliminary stage is to ensure that there are no obvious deficiencies in the Settlement that would preclude final approval." *Singleton v. First Student Mgmt., LLC*, 2014 U.S. Dist. LEXIS 108427, at *15 (D.N.J. Aug. 6, 2014). In other words, "[p]reliminary approval is granted unless the proposed Settlement is obviously deficient." *Skeen v. BMW of N. Am.*, 2016 U.S. Dist. LEXIS 939, at *14 (D.N.J. Jan. 6, 2016) (citing *Weissman v. Philip C. Gutworth, P.A.*, 2015 U.S. Dist. LEXIS 8543, at *4 (D.N.J. Jan. 23, 2015)).

The Court's duty during preliminary review is only "'to ascertain whether there is any reason not to notify the class members of the proposed Settlement and to proceed with a fairness hearing.'" *In re Prudential Sec. Inc. Ltd. Pshps. Litig.*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995) (quoting *Armstrong v. Board of School*

Directors of the City of Milwaukee, 616 F.2d 305, 314 (7th Cir. 1980)). A proposed class action settlement is entitled to a presumption of fairness. *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594-95 (3d Cir. 2010); *McCoy v. HealthNet, Inc*., 569 F. Supp. 2d 448, 458 (D.N.J. 2008). This approach is consistent with the principle that "[c]ompromises of disputed claims are favored by the courts." *Williams v. First Nat'l Bank,* 216 U.S. 582, 595 (1910).

The ratio of the settlement amount (up to $400,000) to Plaintiff's $360,000,000 proof of claim in the Delaware Bankruptcy Proceedings (*see supra* at 6) does not counsel against preliminary settlement approval. "[T]here is no reason, at least in theory, why satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *In re Remeron End-Payor Antitrust Litig*., 2005 U.S. Dist. LEXIS 27011, at *70 (D.N.J. Sept. 13, 2005) (quoting *City of Detroit v. Grinnell Corp*., 495 F.2d 448, 455 n.2 (2d Cir. 1974)). The settlement amount "must represent a material percentage recovery to plaintiff in light of all the risks" of the particular litigation. *In re Cendant Corp. Sec. Litig*., 109 F. Supp. 2d 235, 263 (D.N.J. 2000).

Applying those principles, many cases have approved settlements where the recovery is a tiny fraction of claimed damages. *See*, *e.g*., *In re N.J. Tax Sales Certificates Antitrust Litig*., 2016 U.S. Dist. LEXIS 137153, at *37 (D.N.J. Oct. 3, 2016) (settlement represented 2.5% of claimed damages); *see also Cendant*, 109 F.

Supp. 2d at 263 (citing cases approving settlements as low as 1.6% of claimed damages); *Lazy Oil Co. v. Witco Corp*., 95 F. Supp. 2d 290, 339 (W.D. Pa. 1997) (quoting *Grinnell Corp*. and citing additional cases that approved settlements as low as 1% of claimed damages).

Here, the amount stated by Plaintiff years ago in the proof of claim represents the most favorable views at the time of class size and potential class damages. In any case, the significant risks facing Plaintiff here amply justify the proposed Settlement. The Settlement was reached after the Settling Nortel Defendants both entered bankruptcy, creating a serious question as to how much could be collected from them and when, if ever, any such amount could be collected.

Moreover, though this Court denied the Nortel Defendants' motion to dismiss, the Nortel Defendants retain substantial defenses, on both class certification and the merits, which would make this case a risky one for Plaintiff even if the Nortel Defendants were not in bankruptcy. Among other things, unlike Plaintiff's claims against the individual defendants, who had founded and operated NorVergence and thus were alleged to have directly damaged Plaintiff and the Class, the claims against the Nortel Defendants relied on a more indirect theory: that the Nortel Defendants had a duty to prevent licensees such as NorVergence from using the Nortel logo on allegedly misleading communications, and that the

Nortel Defendants had breached that duty by failing to monitor NorVergence's promotional materials.

"[I]n light of all the risks" of this case, *Cendant*, 109 F. Supp. 2d at 263, the Settlement has no "obvious deficiencies," *Singleton*, 2014 U.S. Dist. LEXIS 108427, at *15, and the standards for preliminary settlement approval are satisfied. Therefore, the parties respectfully request that this Court enter the proposed order granting preliminary approval, which will: (i) preliminarily approve the proposed Settlement; (ii) certify the Settlement Class pursuant to the provisions of FED. R. CIV. P. 23; (iii) schedule a Final Approval Hearing to consider final approval; and (iv) direct that notice of the proposed Settlement and hearing be provided to Class Members in a manner consistent with the agreed-upon notice plan in the Settlement.

A. The Court Should Preliminarily Approve the Settlement.

There are no "obvious deficiencies" in the Settlement. On the contrary, the Settlement is fair for Settlement Class members, who have litigated this matter for twelve years, and who (absent the Settlement) would wait still longer given the bankruptcy stay. Assuming that the litigation might resume at some point, Plaintiff and Settlement Class members would still face significant defenses, both on the merits and as to class certification. The Settlement, in which all Settlement Class

members who make valid claims will share equally, is fair, reasonable, and adequate in light of the risks of litigation and other factors.[5]

In light of the applicable legal standards, the criteria for granting preliminary approval of this complex class action lawsuit are met. The Settlement was reached as a result of extensive, arduous, arm's-length negotiations between experienced counsel. Moreover, Plaintiff's counsel and counsel for the Settling Nortel Defendants believe the Settlement is in the best interests of their respective clients. The Settlement will also remove the uncertainties and risks to plaintiff and the Settlement Class from proceeding further in this matter, which has already lasted twelve years. For these reasons, preliminary approval should be granted.

B. Certification of the Proposed Class for Purposes of Settlement Only is Appropriate.

Both the Supreme Court and the Third Circuit have recognized that the benefits of a proposed settlement of a class action can be realized only through the certification of a Settlement Class. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997); *GMC,* 55 F.3d at 782-800. As such, Plaintiff seeks preliminary certification of the Settlement Class set forth above and in the Settlement, for settlement purposes only.

[5] "[S]ingle damages, not treble or punitive damages, are the appropriate yardstick by which the fairness of a proposed class action settlement should be measured." *In re American Family Enters*., 256 B.R. 377, 425 (D.N.J. 2000). Thus, the potential for a treble damages recovery under the NJCFA does not enter the analysis of whether the Settlement is fair, reasonable, and adequate.

For the Court to certify a class for settlement, the "[s]ettlement [c]lass[] must satisfy the Rule 23(a) requirements of numerosity, commonality, typicality, and adequacy of representation, as well as the relevant 23(b) requirement[.]" *GMC*, 55 F.3d at 778. In addition, Plaintiff seeks certification of the Settlement Class pursuant to Rule 23(b)(3), which provides that certification is appropriate where "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members [predominance], and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy [superiority]." FED. R. CIV. P. 23(b)(3).

As discussed *infra*, each of these requirements is met for purposes of settlement in this case.

1. Numerosity Under Rule 23(a)(1).

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). "[G]enerally[,] if the named plaintiff demonstrates that the potential number of plaintiffs exceeds [forty], the [numerosity requirement] of Rule 23(a) has been met." *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001). The AC, at ¶49, alleges that the Class comprises at least 10,000 businesses. Numerosity is therefore easily satisfied.

2. Commonality Under Rule 23(a)(2).

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." FED. R. CIV. P. 23(a)(2). "Commonality does not require perfect identity of questions of law or fact among all class members." *Reyes v. Netdeposit, LLC*, 802 F.3d 469, 486 (3d Cir. 2015). Instead, "'even a single common question will do.'" *Id*. (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011)). "'[F]actual differences among the claims of the putative class members do not defeat certification.'" *In re Prudential Ins. Co. Am. Sales Practice Litig*., 148 F.3d 283, 310 (3d Cir. 1998) (quoting *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994)).

The test for commonality is "easily met." *Baby Neal*, 43 F.3d at 56. "Again, th[e] bar is not a high one," *Reyes*, 802 F.3d at 486 (citation omitted), especially in the context of a settlement class.

In this case, many common questions of law and fact exist. These include (among other things) whether the Settling Nortel Defendants violated the NJCFA or consumer protection statutes of other jurisdictions, whether the Nortel Defendants had a duty to "ensure that their licensees do not use their mark in such manner as to deceive the public," AC, ¶70, whether the Settling Nortel Defendants were unjustly enriched by virtue of their alleged conduct, and whether the Settling

Nortel Defendants acted wrongfully in any way, a question that is common to all Counts of the AC. Commonality is therefore satisfied.

3. Typicality Under Rule 23(a)(3).

Rule 23(a)(3) requires that a representative plaintiff's claims be "typical" of those of other class members. FED. R. CIV. P. 23(a)(3). "As with numerosity, the Third Circuit has 'set a low threshold' for satisfying typicality, holding that '[i]f the claims of the named plaintiffs and class members involve the same conduct by the defendant, typicality is established….'" *In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 107 (D.N.J. 2012) (alterations in original) (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 183-84 (3d Cir. 2001)).

Here, all of the claims of Plaintiff and Settlement Class members are asserted to arise out of the same alleged conduct of defendants in connection with the equipment leases of matrix boxes or other equipment to customers. Accordingly, the typicality requirement is met here.

4. Adequacy of Representation Under Rule 23(a)(4).

The final requirement of Rule 23(a) is that "the representative part[y] will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4). In determining the adequacy of representation, the court should "'evaluate [both] the named plaintiffs' and … counsel's ability to fairly and adequately represent class interests.'" *Gotthelf v. Toyota Motor Sales, U.S.A., Inc.*, 525 Fed. Appx. 94,

100-01 (3d Cir. 2013) (alterations in original) (quoting *In re Comty. Bank of N. Va. & Guaranty Nat'l Bank of Tallahassee Second Mortg. Loan Litig.*, 622 F.3d 275, 291 (3d Cir. 2010)). In doing so, "the district court ensures that no conflict of interest exists between the named plaintiffs' claims and those asserted on behalf of the class, and inquires whether the named plaintiffs have the ability and incentive to vigorously represent the interests of the class." *Gotthelf*, 525 Fed. Appx. at 101 (citing *In re Comty. Bank*, 622 F.3d at 291). There is a "relatively low threshold" for adequacy of representation. *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 923 (3d Cir. 1992).

Plaintiff is an adequate class representative. It has the same claims, on the same overarching facts, as Settlement Class members do. Plaintiff thus has at all times had every incentive to represent the Settlement Class appropriately, and in no way do Plaintiff's interests diverge from those of Settlement Class members.

Plaintiff's counsel are similarly adequate. They have invested considerable time and resources, for twelve years, into the prosecution of this matter. Plaintiff's counsel investigated the allegations at issue, drafted the initial complaint and the operative AC, briefed multiple motions to dismiss and a motion for summary judgment, took and responded to significant discovery, filed a motion for class certification, and engaged in protracted and difficult settlement negotiations, as well as negotiating and drafting the Settlement. Plaintiff's counsel are highly

experienced, as reflected in the firm resumes attached to the Rodriguez Decl. as Exhibit B. The adequacy requirement is, accordingly, met here.

5. The Requirements of Rule 23(b)(3)Are Met.

Plaintiff seeks to certify the Settlement Class under Rule 23(b)(3), which has two components: predominance and superiority. *See* FED. R. CIV. P. 23(b)(3). "Parallel with Rule 23(a)(2)'s commonality element, which provides that a proposed class must share a common question of law or fact, Rule 23(b)(3)'s predominance requirement imposes a more rigorous obligation upon a reviewing court to ensure that issues common to the class predominate over those affecting only individual class members." *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 297 (3d Cir. 2011) (en banc) (citing *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 266 (3d Cir. 2009)). When assessing predominance and superiority, the Court may consider that the class will be certified for settlement purposes only, and that a showing of manageability at trial is not required. *See Amchem*, 521 U.S. at 620 ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, see FED. R. CIV. P. 23(b)(3)(D), for the proposal is that there be no trial.").

"Predominance is a test readily met in certain cases alleging consumer … fraud … ," especially where the class is being certified for settlement purposes. *Id.*

at 625. The Third Circuit has reiterated that the focus of the predominance "inquiry is on whether the defendant's conduct was common as to all of the class members, and whether all of the class members were harmed by the defendant's conduct." *Sullivan*, 667 F.3d at 298. "To determine whether common issues predominate over questions affecting only individual members, the Court must look at each claim upon which the [p]laintiff seeks recovery and … determine whether generalized evidence exists to prove the elements of the plaintiff's claims on a simultaneous, class-wide basis, or whether proof will be overwhelmed by individual issues." *O'Brien v. Brian Research Labs, LLC,* 2012 U.S. Dist. LEXIS 113809, at *23 (D.N.J. Aug. 9, 2012) (citations omitted). Predominance "does not require the absence of all variations in a defendant's conduct or the elimination of all individual circumstances." *Reyes*, 802 F.3d at 489.

Superiority requires the Court to consider whether or not "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Sullivan,* 667 F.3d at 296. Rule 23(b)(3) provides a non-exhaustive list of factors to be considered when making this determination. *McCoy*, 569 F. Supp. 2d at 457. Since manageability is not a consideration in a settlement class context, these factors include: "(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; [and] (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum." *Id.* (quoting FED. R. CIV. P. 23(b)(3)).

Here, the common questions of law and fact identified *supra* predominate over any questions that may affect individual Settlement Class members. The issues are subject to generalized proof, and are questions that are common to all class members. *See Sullivan*, 667 F.3d at 299. Therefore, the predominance prong of Rule 23(b)(3) is satisfied.

The second prong of Rule 23(b)(3)—that a class action must be superior to other available methods for the fair and efficient adjudication of the controversy—is also readily satisfied. The Settlement provides Settlement Class members with the ability to obtain prompt and certain relief, and contains well-defined claims procedures to assure due process. This includes the right of any Settlement Class members who are dissatisfied with the Settlement to object to, or to exclude themselves from, the Settlement. Settlement, at 7-8, ¶5. Since the amounts of which plaintiff and Settlement Class members were allegedly wrongly charged are relatively small, few if any Settlement Class members have much interest in pursuing separate actions for relief. Thus, a class action is plainly superior.

In sum, because the requirements of Rule 23(a) and Rule 23(b)(3) are satisfied, certification of the proposed Settlement Class is appropriate.

C. The Court Should Approve the Notice Plan.

Under FED. R. CIV. P. 23(e), Settlement Class members who would be bound by a settlement are entitled to reasonable notice of it before the Settlement is ultimately approved by the Court. *See* Fed. Jud. Ctr., *Manual for Complex Litig-* Fourth, § 30.212. And because Plaintiff seeks certification of the Settlement Class under Rule 23(b)(3), "the Court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable efforts." FED. R. CIV. P. 23(c)(2)(B)). In order to satisfy these standards and comply with the requirements of due process, notice must be "reasonably calculated to reach interested parties." *Chemetron Corp. v. Jones*, 72 F.3d 341, 346 (3d Cir. 1995) (citations omitted); *see also DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1176 (8th Cir. 1995) ("Notice of a settlement proposal need only be as directed by the district court... and reasonable enough to satisfy due process.").

The notice plan in this case is the best notice practicable under the circumstances to reach all Settlement Class members. Using NorVergence's database of customers, which was obtained from the Trustee appointed in the NorVergence bankruptcy proceeding, the Claims Administrator will send notice, by direct mail, to every customer who leased the Matrix boxes or other equipment at issue. *See* Settlement, at 5, §3(c).

Finally, the substance of the proposed Class Notice, which is attached as Exhibit B to the Settlement, meets all necessary legal requirements and provides a comprehensive explanation of the Settlement in simple, non-legalistic terms. *See* FED. R. CIV. P. 23(c)(2)(B). Accordingly, it is respectfully requested that the Court approve the notice plan.

D. A Final Approval Hearing Should be Scheduled.

Lastly, the Court should schedule a fairness hearing to decide whether to grant final approval to the Settlement; to address Class Counsel's request for attorneys' fees and expenses, and to determine whether to dismiss this action with prejudice. *See* Fed. Jud. Ctr., *Manual for Complex Litig.*-Fourth, § 30.44; *Ehrheart*, 609 F.3d at 600. The parties respectfully request that the Court set the final hearing for February 28, 2017 at 10:00 a.m., if such a date is acceptable to the Court.[6]

CONCLUSION

For the foregoing reasons, the parties respectfully request that this Court enter an Order: (1) preliminarily certifying the Settlement Class in this case

[6] Under the Class Action Fairness Act of 2005, final approval of a class action settlement may not be granted fewer than 90 days after notice is provided to certain government officials. *See* 28 U.S.C. §1715 ("An order giving final approval of a proposed settlement may not be issued earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served with the notice required under subsection (b)"). Here, that notice will be provided by November 25, 2016. Settlement, at 5, ¶3(d).

pursuant to Fed. R. Civ. P. 23(a) and 23(b)(3), designating Plaintiff as the class representative, and appointing Plaintiff's counsel as class counsel; (2) preliminarily approving the Settlement; (3) directing notice to Class Members consistent with the notice plan in the Settlement; and (4) scheduling a Final Approval Hearing.

Dated: November 15, 2016

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