

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

Jill B. Savedoff, individually and on behalf of all others similarly situated,	:	CASE № 1:06cv00135
	:	
	:	CIVIL ACTION
	:	
	:	
Plaintiff,	:	
	:	
vs.	:	JUDGE JAMES S. GWIN
	:	
	:	
Access Group, Inc.,	:	
	:	
	:	MAGISTRATE JUDGE LIMBERT
	:	
Defendants.	:	

**CLASS PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION
FOR PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT
AND FOR AUTHORIZATION TO DISSEMINATE NOTICE**

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I. INTRODUCTION

Plaintiff Jill B. Savedoff, on behalf of herself and a certified Class of borrowers of student loans, have entered into a settlement agreement with defendant Access Group, Inc. (“Access”). Under the Settlement Agreement, a copy of which is attached hereto as Exhibit A (“Settlement Agreement”), Access has agreed to pay \$82,500.00 to the Class (“Settlement Amount”). *See* Settlement Agreement at ¶ 26. This payment represents a substantial portion of the liquidated present value of the remaining claim in this litigation, if the Class were to prevail at trial, and is in addition to the benefit in excess of \$400,000.00 previously obtained in this case.

Plaintiff now moves the Court to enter a Preliminary Approval Order: (1) finding that the proposed settlement (“Settlement”) with Access is sufficiently fair, reasonable, and adequate to allow dissemination of notice of the Settlement to the Class; (2) establishing a date for a hearing on final approval of the Settlement and related matters; (3) approving the notice plan, including notice, and authorizing dissemination of notice; (4) establishing a deadline for filing papers in support of final approval of the Settlement; (5) establishing a deadline for Class Members to file objections to the Settlement and other matters; and (6) establishing a deadline for Class Members to exclude themselves from the Settlement.¹ Plaintiff submits herewith a proposed Preliminary Approval Order, attached as Exhibit B, and a proposed notice attached as Exhibit C. Access concurs with the relief sought in the Order, although the motion and memorandum of law in support is Plaintiff’s alone.

II. BACKGROUND

A. Summary of Plaintiffs’ Allegations

On September 9, 2006 (Docket No. 99), Plaintiff filed a Second Amended and Supplemental Class Action Complaint on behalf of the Class. The Class alleged that Access breached the terms of

¹ Access will be serving notifications to the appropriate federal and state officials pursuant to 28 U.S.C.A. § 1715.

certain student loan agreements in two ways: (1) by compounding “Additional Interest”² which had accrued during each Class Member’s loan repayment period and (2) by applying each Class Member’s monthly payments to pay off Additional Interest before applying payments to reduce loan principal.

With regard to the first claim, the Court entered judgment determining that Access’s compounding of Additional Interest breached certain Class Members’ student loan agreements. The Court enjoined Access from engaging in this practice in the future. This injunction and the related judgment were affirmed by the Sixth Circuit and are no longer subject to further review.

With regard to the second claim, which is still open before this Court, the Class maintains that by applying Class Members’ monthly payments to pay off Additional Interest first, Access in effect compounded the Additional Interest by delaying payment of an equal amount of loan amortization, thus charging more interest on the delayed payment. Access disagrees.

B. Procedural History of Litigation

This action was commenced on January 19, 2006, with the filing of a complaint (Docket No. 1) against Access as well as other defendants who have since been dismissed by agreement. The complaint asserted that the defendants had breached certain Class Members’ student loan agreements by compounding Additional Interest. An amended complaint was filed in April 2006 to address some housekeeping issues (e.g., substitution of a defendant) and to add a claim for unjust enrichment (Docket No. 32).

In response to these claims, in July 2006, Access recalculated Class Members’ accounts to undo the compounding of Additional Interest. The amount of Additional Interest involved was more than \$3.3 million. In unwinding the compounding, however, Access made the decision to

² “Additional Interest” means outstanding interest that accrued or accrues during the repayment period of a student loan under an Easy Pay Plan due to interest rate changes or other reasons, but which Access did not or does not bill as currently due when owed.

apply borrowers' monthly payments to pay Additional Interest before paying principal and interest on the loans. Plaintiff moved both for class certification and to amend the pleadings to reflect this new breach.

Class certification was granted in November 2006, as was Plaintiff's request for leave to file an amended pleading (Docket No. 98). Class Plaintiffs filed their Second Amended and Supplemental Class Action Complaint ("Second Amended Complaint") on November 9, 2006, against Access.

Access moved for summary judgment on the Second Amended Complaint; the Class moved for partial summary judgment. The Court denied Access' motion and granted the Class' motion for partial summary judgment on February 26, 2007 (Docket No. 106). The effect was to enter summary judgment on liability in favor of the Class, leaving open the issue of appropriate equitable remedies. Thereafter, on February 26, 2007 (Docket No. 106), the Court entered a final order enjoining Access from compounding Additional Interest and from applying Class Members' payments to Additional Interest instead of to amortizing principal and ongoing interest on their loans.

In May 2007, Access appealed the denial of its summary judgment motion to the Sixth Circuit (Docket No. 121). The Sixth Circuit affirmed the grant of partial summary judgment on the Class' first claim (improper compounding of interest), but reversed the District Court on the second claim (misapplication of monthly payments), and remanded for further proceedings on the issue of whether Access acted in good faith when it collected Additional Interest through the monthly payments. This Settlement followed.

C. Settlement Negotiations

The parties initially attempted to resolve this litigation in July 2006 with the assistance of an early neutral evaluator. Other attempts were made during the course of the litigation, during which time discovery was exchanged and experts were retained for consultative purposes (and, later, for testimonial purposes). The most recent attempt at negotiating a settlement commenced in August

2008, culminating in an agreement in principal in September 2008, and execution of the Settlement Agreement in November 2008. During the course of the litigation, and in connection with the settlement negotiations, the parties exchanged significant amounts of information and thoroughly examined the strengths and weaknesses of their respective positions. The negotiations, conducted by experienced and able counsel, were vigorous in nature and at all time conducted at arm's length.

III. SUMMARY OF AGREEMENT

A. Fund

The Settlement Agreement provides that Access will pay \$82,500.00 (the "Settlement Amount") to settle the remaining claim (misapplication of monthly payments) and this litigation Ex. A at ¶¶ 15, 26. The Settlement Amount will be deposited into an interest bearing account where it shall remain until distribution. *Id.* at ¶ 26. Any interest accrued on the Settlement Amount, less any deductions approved by the Court, shall be distributed to the Class. *Id.*

Subject to Court approval, the Settlement Fund shall be distributed by Access to the Class Members having private loans and, for prior to program year 2001-2002, federal loans, either by (a) crediting the principal of an outstanding Easy Pay loan balance that is the subject of this litigation (for Class Members who have existing Easy Pay loan balances) or (b) sending a check in the appropriate amount (to Class Members whose qualifying loan has been paid off). *Id.* at ¶ 28. Distribution of the Settlement Fund shall be on a *pro rata* basis, net of any Court-allowed expenses, costs, incentive award, and fees. *Id.* Access is obligated to complete the distribution of the Settlement Fund and provide Class Counsel with a verification of the distribution within thirty days after the Effective Date. *Id.*

B. Notice

Access will, as an initial step in the proposed notice program, provide written notice by first-class mail to the Class Members of the proposed settlement and any right to opt-out. *Id.* at ¶

20. Class Counsel, Weinstein Kitchenoff & Asher LLC, will set up a link on its website to a page containing the notice; the Second Amended and Supplemental Class Complaint, the Order granting class certification, the Sixth Circuit decision on appeal, the motions for preliminary and final settlement approval, the motion for approval of an incentive award to Plaintiff and payment of attorneys' costs and expenses, and any orders relating to the proposed Settlement Agreement.

C. Release

The Settlement Agreement provides for a release of Access ("Releasees") by Plaintiff and the Class, *Id.* at ¶ 24, and a release of Plaintiff and the Class ("Releasers") by Access, *Id.* at ¶ 25. Paragraph 24, the release of the Releasees (including Access). provides:

Upon the occurrence of the Effective Date and in consideration of payment of the Settlement Amount, as specified in Section D of this Agreement, and for other valuable consideration, the Releasees shall be completely released, acquitted, and forever discharged from any and all claims, demands, actions, suits and causes of action, whether class, individual, or otherwise in nature, that Releasers, or each of them, ever had, now has, or hereafter can, shall, or may have, against Releasees, whether known or unknown, on account of or arising out of or resulting from conduct alleged or asserted in the complaints filed in the Action. The Releasers shall not, after the date of this Agreement, seek to recover against any of the Releasees on any of the Released Claims.

Paragraph 25, the release of the Releasers (including Plaintiff and Class Members), provides:

Upon the occurrence of the Effective Date and in consideration of the Release and Discharge described in Paragraph 24 herein, and for other valuable consideration, Plaintiff, the Class, Class Members, and Class Counsel shall be completely released, acquitted, and forever discharged from any and all claims, demands, actions, suits and causes of action, whether class, individual, or otherwise in nature, that Releasees ever had, now has, or hereafter can, shall, or may have against Plaintiff, the Class and its Members, and/or Class Counsel, whether known or unknown, on account of or arising out of or resulting from the commencement and/or prosecution of this action. This release language does not affect Plaintiff's and the Class's obligations under their loan agreements.

D. Incentive Award, Expenses, and Attorneys' Fees

Class Counsel intend to seek an incentive award not to exceed \$5,000.00 in favor of Jill Savedoff, as well as reimbursement of costs and expenses expended by Class Counsel in litigation of this matter. Class Counsel have elected to treat this matter *pro bono publico* and do not intend to seek attorneys' fees notwithstanding the substantial time and effort expended by Class Counsel in prosecuting this litigation. Class Counsel will file a motion seeking the proposed incentive award and reimbursement of Class Counsel's costs and expenses at least 15 days before Class Members' deadline to object to the Settlement, the incentive award, or the reimbursement of costs and expenses.

E. Right to Opt-Out or Object

Both the notice that Class Members will directly receive from Access and the notice posted on Class Counsel's website will inform Class Members of (1) their right to opt-out from the settlement and (2) their right to object to the Settlement Agreement, application for incentive award, or attorneys' costs and expenses. *Id.* at ¶ 20.

According to the terms of the Settlement Agreement and the notice provisions, a Class Member who wishes to exclude himself from the Settlement may do so by simply setting forth his name and address, indicating that he wishes to be excluded from the Class in Savedoff v. Access, No. 06-135, N.D. Ohio, and mailing the completed request to Class Counsel at:

Access Settlement
c/o Weinstein Kitchenoff & Asher LLC
1845 Walnut Street, Suite 1100
Philadelphia, PA 19103

The request to be excluded must be postmarked no later than 45 days after notice is disseminated. *See* Notice at Section 5. (A precise date will be included in the notice when finalized.)

Those Class Members who wish to object to the Settlement Agreement, application for incentive award, or attorneys' costs and expense reimbursement, shall do so no later than 45 days after

notice is disseminated. *See id.* at Section 6. (A precise date will be included in the notice when finalized.) Objections must be in writing, signed by the Class Member, sent to the Court and Class Counsel (at above address), and postmarked by the designated date.

Class Counsel will file their motion for final approval, along with their requests for an incentive award for Jill Savedoff and reimbursement of costs and expenses, 15 days before any objections are due (30 days after notice). Papers by Class Counsel in reply to objections will be filed one week before the final hearing.

IV. PROPOSED TIMETABLE

Class Counsel proposes the following timetable:

- Notice – date “X” (but, in any event, not before January 1, 2009);
- Opt-outs – “X” plus 45 days;
- Motion for Final Approval and related applications for reimbursement of costs and expenses and for an incentive award for plaintiff – “X” plus 30 days;
- Objections – “X” plus 45 days; and
- Final Hearing – “X” plus 65 days.

V. THE PROPOSED SETTLEMENT IS SUFFICIENTLY FAIR, REASONABLE, AND ADEQUATE TO AUTHORIZE DISSEMINATION OF NOTICE TO THE CLASS

Before a class action may be dismissed or compromised in whole or in part, court approval must be obtained, and notice of the proposed dismissal or compromise must be given to all class members in the manner the court directs. *Fed. R. Civ. P. 23(e)*. It is well established that there is an overriding public interest in settling litigation, and this is particularly true in class actions. *See, e.g., Clark Equip. Co. v. Int’l Union, Allied Indus. Workers*, 803 F.2d 878, 880 (6th Cir. 1986) (noting strong federal policy favoring settlement agreements); *Armstrong v. Board of School Directors of the City of Milwaukee*, 616 F.2d 305, 312 (7th Cir. 1980) (“It is axiomatic that the federal courts look with great favor upon the voluntary resolution of litigation through settlement”), *overruled on other grounds, Felzen v. An-*

areas, 134 F.3d 873 (7th Cir. 1998). Class action settlements minimize the litigation expenses of both parties and reduce the strain such litigation imposes upon already scarce judicial resources. *See Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977)).

The MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.632 (2004) provides a framework for the Court’s preliminary evaluation of a proposed class action settlement:

Review of a proposed class action settlement generally involves two hearings. First counsel submit the proposed terms of settlement and the judge makes a preliminary fairness evaluation. . . .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 the date of the [formal Rule 23(e)] fairness hearing.

See also 2 NEWBERG ON CLASS ACTIONS, §11.24 (3d ed. 1992); *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 254 (D. Del. 2002); *In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997). A court’s authorization to disseminate notice constitutes its recognition that the settlement is within the range of possible approval. *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 205 (5th Cir. 1981); *Holden v. Burlington Northern, Inc.*, 665 F. Supp. 1398, 1402 (D. Minn. 1987); *In re Montgomery County Real Estate Antitrust Litig.*, 83 F.R.D. 305, 313 (D. Md. 1979). As one court noted, approving dissemination of notice “is at most a determination that there is what might be termed ‘probable cause’ to submit the proposal to class members and hold a full-scale hearing as to its fairness.” *In re Traffic Executive Assoc.-Eastern R.R.*, 627 F.2d 631, 634 (2d Cir. 1980).

A proposed settlement falls within the “range of possible approval” under Rule 23(e) where there is a conceivable basis for presuming that the proposed settlement will meet the more rigorous standards applied for final approval. The standard for final approval of a class action settlement is whether the proposed settlement is fair, reasonable and adequate. *Fed. R. Civ. P. 23(e)(1)(C)*; *Granda Invs., Inc. v. DWG Corp.*, 962 F.2d 1203, 1205 (6th Cir. 1992); *Williams v. Vukovich*, 720 F.2d 909, 922-23 (6th Cir. 1983).

When authorizing the dissemination of notice, a court does not conduct a “definitive proceeding on the fairness of the proposed settlement, and the judge must be careful to make clear that the determination permitting notice to members of the class is not a finding that the settlement is fair, reasonable and adequate.” *In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1384 (D. Md. 1983). That determination must await the final hearing where the fairness, reasonableness and adequacy of the settlement is assessed under the factors set forth in, *inter alia*, *Granada Invs.*³

A. The Settlement Is Fair And Resulted From Arm’s Length Negotiations

The requirement that class action settlements be fair is designed to protect against collusion among the parties. *In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. at 1383. There is usually an initial presumption that a proposed settlement is fair and reasonable when it was the result of arm’s length negotiations. *See* 2 NEWBERG ON CLASS ACTIONS, § 11.40 at 451 (2d ed. 1985); *In re Art Materials Antitrust Litig.*, 100 F.R.D. 267, 369 (N.D. Oh. 1983) (court must make finding that settlement is result of arm’s length negotiations); *Goldsmith v. Tech. Solutions Co.*, No. 92-4374, 1995 U.S. Dist. LEXIS 15093, at *10 n.2 (N.D. Ill. October 10, 1995) (“A number of courts have held that it may be presumed that the agreement is fair and adequate where, as here, a proposed settlement is the product of arm’s-length negotiations”). Settlements proposed by experienced counsel and which result from arm’s-length negotiations are entitled to deference from the court. *See, e.g., In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 640 (E.D. Pa. 2003) (“A presumption of correctness is said to attach to a class settlement reached in arms-length negotiations between experienced, capable counsel

³ The factors that the Sixth Circuit considers on a motion for final approval of a class settlement as “fair, reasonable and adequate” include the following: (a) the likelihood of success on the merits weighed against the amount and form of the relief offered in the settlement; (b) the risks, expense, and delay of further litigation; (c) the judgment of experienced counsel who have competently evaluated the strength of their proofs; (d) the amount of discovery completed and the character of the evidence uncovered; (e) whether the settlement is fair to the unnamed class members; (f) objections raised by class members; (g) whether the settlement is the product of arm’s length negotiations as opposed to collusive bargaining; and (h) whether the settlement is consistent with the public interest. *Granada Invs. Inc.*, 962 F.2d at 1205-06.

after meaningful discovery.”) (*citing Hanrahan v. Britt*, 174 F.R.D. 356, 366 (E.D. Pa. 1997)). The initial presumption in favor of such settlements reflects courts’ understanding that vigorous negotiations between seasoned counsel protect against collusion and advance the fairness concerns of Rule 23(e).

As set forth above (Section II.C.), this settlement was the culmination of arm’s-length negotiations. After litigating this matter for several years, including an appeal to the Sixth Circuit, the parties settled their differences shortly before the final pretrial conference and trial of this matter. Both Class Counsel and their consulting experts independently reviewed and analyzed the value of the remaining claim. From this review, Plaintiff and Class Counsel concluded that settlement is in the best interest of the Class based on the prospects of success on the remaining claim and the present value of the liquidated claim of the Class, if the Class were to prevail at trial.

To summarize: The Class and Access had a fundamental difference of opinion whether Access was entitled to use a Class Member’s monthly payments to pay down Additional Interest before paying routine amortization of loan principal and interest on the principal. The Class maintained that Additional Interest was to be paid in a balloon payment at the end of loan term; Access maintained that it was to be paid first. The Sixth Circuit determined that payment of Additional Interest at the end of the loan term was not reasonable, but that the contract was silent in any event, and the District Court was to determine whether Access acted in good faith in applying Class Members’ monthly payments to Additional Interest first, instead of last or in some other fashion.

Assuming, *arguendo*, that Class Members were to lose the argument on good faith before the District Court, then Class Members would be in precisely the same situation in which they are presently. If Class Members were to prevail on the argument, however, presumably, the District Court would have to determine how Class Members’ monthly payments should have been applied to Additional Interest versus loan principal and interest (and other fees and costs).

Before settling this litigation, Class Counsel and their experts analyzed the present value of Class Members' claim as if the Sixth Circuit had ruled in the Class' favor, *i.e.*, as if Additional Interest is properly paid at the end of the loan term, and not before. This was the Class' best case scenario. Recognizing that the Sixth Circuit criticized that outcome as unreasonable, Class Counsel and their experts then compared that number to the present value of Access' best case scenario, *i.e.*, payment of Additional Interest first. The resulting analysis demonstrated that, while it would be advantageous for the Class to pay the Additional Interest at the end of the loan term it was reasonable to compromise the claim in light of the risks of litigation, and settle for the Settlement Amount of \$82,500. This Settlement Amount is in addition to the benefit of \$404,715.72 that Access has conceded inured to the Class when the compounding of Additional Interest was undone as a result of this litigation.

Counsel's informed and reasoned judgment and their weighing of the relative risks and benefits of protracted litigation are entitled to great deference. *E.g., Williams*, 720 F.2d at 922-23 (citing *Cotton*, 559 F.2d at 1330) (court "should defer to the judgment of experienced counsel who has competently evaluated the strength of his proofs"); *Mich. Hosp. Ass'n v. Babcock*, 1991 U.S. Dist. LEXIS 2058, at *6 (W.D. Mi. 1991) ("It is...well recognized that the court should defer to the judgment of experienced counsel who has competently evaluated the strength of the proofs"); *Hughes v. Microsoft Corp.*, 2001 U.S. Dist. LEXIS 5976, at *21 (W.D. Wash. 2001) ("Class counsel's opinion is accorded considerable weight and supports the fairness and adequacy of the proposed settlement"); *Int'l Union of Elec., Salaried, Mach. & Furniture Workers v. Unisys Corp.*, 858 F. Supp. 1243, 1265 (E.D.N.Y. 1994). Accordingly, the settlement is fair, reasonable, and adequate to the Class.⁴

⁴ "[T]he essence of a settlement is compromise. A just result is often no more than an arbitrary point between competing notions of reasonableness." *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1322, 1325 (5th Cir. 1981).

B. Notice

Federal Rule of Civil Procedure 23(e)(1)(B) provides that “[t]he Court must direct notice in a reasonable manner to all class Members who would be bound by the proposed settlement”

While the Court has discretion as to the form and content of the notice, the notice must meet certain due process requirements. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 172-177 (1974). The notice must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the [settlement] and afford them an opportunity to present their objections.” *See Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314 (1950). The notice must be given “in a manner and form that does not systematically leave an identifiable group without notice.” *Mendoza v. Tucson School District*, 623 F.2d 1338, 1351 (9th Cir. 1980). Moreover, the notice “may consist of a very general description of the proposed settlement” and should provide a fair recital of its terms. *Id.*

The content and proposed method of dissemination of the notices fulfill the requirements of Federal Rule of Civil Procedure 23(e)(1) and due process. The notice directly targets the potential members of the Class – known to Access and Plaintiff by virtue of what type of loan and loan repayment plan the borrower has or had.⁵ In addition, Class Members will be able to consult Class Counsel’s website, which will post all of the information relevant to this lawsuit, including the full notice. *See* Ex. C. The notice describes the settlement as well as provides a fair recital of its terms. *See id.* Accordingly, the proposed notice is reasonable.

VI. CONCLUSION

For the foregoing reasons, Plaintiff and the Class respectfully request that this Court enter the proposed Order for Preliminary Approval, attached hereto as Exhibit B:

⁵ Publication notice is not necessary because in this case, unlike many other cases, the Class Members are identifiable. *Compare, e.g., In re Prudential Ins. Co. America Sales Litig.*, 148 F.3d 283, 326-27 (3d Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999).

- (1) finding that the proposed Settlement is sufficiently fair, reasonable, and adequate to allow dissemination of notice of the Settlement to the Class;
- (2) establishing a date for a hearing on final approval of the Settlement and related matters;
- (3) approving the notice plan and the notice, and authorizing dissemination of notice;
- (4) establishing a deadline for filing papers in support of final approval of the Settlement;
- (5) establishing a deadline for Class Members to file objections to the Settlement and other matters; and
- (6) establishing a deadline for Class Members to exclude themselves from the Settlement.

Access concurs in the relief sought in the proposed Order.

Respectfully submitted,

Dated: December 23, 2008

/s/ David H. Weinstein
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