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notice, there simply is no way to provide restitution to 1.2 million consumers with

stipulated order on January 22, 2008 that, among other things, permanently enjoined the defendants from misrepresenting, or not clearly disclosing, the nature of their products or services, and from debiting consumers' bank accounts without their express informed consent. *FTC v. EDebitPay, LLC*, No. CV 07-4880 ODW (AJWx), 2008 U.S. Dist. LEXIS 122126 (C.D. Cal. Jan. 17, 2008).

Defendants immediately began violating this order by, *inter alia*, deceptively advertising their Century Platinum shopping club as though it were a general line of credit. On May 27, 2010, the FTC moved for an order to show cause why the defendants should not be held in contempt. After an evidentiary hearing, the court found the defendants in contempt. Specifically, the court found by clear and convincing evidence that EDP had deceived consumers, wrongly billing them more than $3.7 million. It ordered the defendants to pay that amount to the FTC in compensatory sanctions. *FTC v. EDebitPay, LLC*, No. CV 07-4880 ODW (AJWx), 2011 U.S. Dist. LEXIS 15750, at *41 (C.D. Cal. Feb. 3, 2011), *aff'd* 695 F.3d 938 (9th Cir. 2012). The court's findings are entitled to collateral estoppel. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326-33 (1979).

II. The Allegations Against EDP and the Terms of the Settlement

Six months after the order holding EDP in contempt, plaintiffs' counsel filed this case. The plaintiffs allege that EDP misrepresented its shopping clubs and related products as a short-term loan, and then debited consumers for membership

fees, including a $99 enrollment fee, without their informed consent. (Am. Compl.) Plaintiffs claim that approximately 1.2 million consumers thereby incurred more than $42 million in damages.[3]

The parties propose to settle plaintiffs' claims for $1 million. Settlement Agreement ("Agreement") at ¶ I.35. Plaintiffs' counsel would receive $250,000 in attorneys' fees, and as much as $150,000 in expenses from the settlement. *Id*. at ¶¶ VIII, I.2.

Tellingly, the Agreement does not guarantee that a single class member – other than the two named plaintiffs – will receive any money. Rather, after paying for attorneys' fees and expenses, the remaining monies fund a notice and claims process (collectively "claims administration"). *See id*. at ¶¶ I.4, V.1. The Agreement, however, fails to cap the amount of money the administrator may spend on this process, which will exceed the amount in the settlement pool even with an exceedingly low response rate. *Id*. at ¶¶ III, V.

Class members, in turn, will release all claims they now have or may in the future have arising out of the Defendants' collection or attempted collection of Membership Fees from Settlement Class Members' bank accounts. *Id*. at ¶ X.1.M.

[3] Plaintiffs represent that the class consists of more than 1.2 million consumers, who each have claims of "approximately ninety-nine dollars ($99) for those individuals who had money withdrawn from their accounts, and Bank Account Fees of approximately thirty-five dollars ($35) per attempted withdrawal." Pl. Mot. at 12, 16.

Indeed, the settlement "[b]ars and permanently enjoins all Settlement Class Members who have not been properly excluded from the Settlement Class (i) from filing, commencing, prosecuting, intervening in or participating as plaintiff, claimant or class member in any other lawsuit or administrative, regulatory, arbitration or other proceeding against Defendants."[4] *Id*. at ¶ X.1.0. The release applies to *all* class members who do not opt out – even if they never receive compensation or notice of the case.

For those consumers who happen to receive notice, the settlement ensures that virtually no one will opt out for two reasons. First, while the settlement permits defendants the ease of email notice, to opt out consumers must use regular mail – thus imposing additional costs for removing themselves from the class, and thereby decreasing the chance consumers will opt out. More importantly, the opt-out must contain the name of the membership program in which EDP enrolled the consumer and his or her signed statement asking for exclusion. Consumers are

[4] The FTC is concerned that the defendants will make frivolous arguments, based on this broad language, that the settlement would preclude the 30,000 consumers eligible to receive distributions through the FTC's contempt action from doing so. Of course, as noted above, a court has ruled that those consumers are entitled to compensation, and EDP cannot use this settlement to collaterally attack them because those determinations are entitled to collateral estoppel. *See Parklane,* 439 U.S. at 326-33 (1979). Accordingly, the settlement should not be approved with this language. At a minimum, the Agreement should expressly exclude from the release consumer compensation under the contempt judgment.

highly unlikely to know the name of the membership program where, as here, the defendants allegedly billed consumers without their authorization.

As set forth below, the Agreement should not be adopted because: (1) it is not fair, adequate, and reasonable; and (2) the settlement does not provide reasonable notice.

III. The Settlement Agreement Is Not Fair, Adequate, and Reasonable

This settlement does not meet the high standard for fairness mandated by Rule 23 when the settlement is proposed before the class has even been certified.[5] *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). When, as here, settlement takes place before class certification, review of the fairness and adequacy of the settlement is subject to a "higher standard of fairness." *Shaffer v. Cont'l Cas. Co.*, 362 F. App'x 627, 629 (9th Cir. 2010). Specifically, the proposed Agreement guarantees that there is no possibility of real class recovery. Either all the money will be spent on attorneys' fees and administrative costs, or, more likely, the response rate will be vanishingly small because of the deeply flawed notice. Of course, class counsel had no incentive to negotiate an effective notice or a fair and reasonable settlement – their fees are guaranteed even if no class members respond.

[5] Federal Rule of Civil Procedure 23(e) requires the district court to determine whether a proposed settlement is "fair, adequate, and reasonable."

A. The Settlement Fund Cannot Cover the Costs of Claims Administration for More than a Tiny Fraction of the Class.

FED. R. CIV. P. 23(e)(1). All class members bound by a proposed settlement are entitled to "the best notice that is practicable under the circumstances." FED. R. CIV. P. 23(c)(2)(B); *see Hanlon*, 150 F.3d at 1025 ("Adequate notice is critical to court approval of a class settlement."). Here, neither the method of providing notice, nor the content of the notice, is reasonable.

1. The Notice Would Not Reach Most Class Members.

Emailing notices to putative class members, as the parties propose, is flawed for at least three reasons. First, the administrator would send notices to email addresses that EDP obtained years ago. Many of the accounts associated with these addresses are likely closed or inactive. Second, spam filters will likely block emails sent to valid accounts. *Pokorny v. Quixtar Inc.*, 2011 WL 2912864, at *3 (N.D. Cal. July 20, 2011) ("In this era of spam-filters and mass email advertising . . . email notice alone may be insufficient to draw the attention of class members.").[8] Third, because the emails will reference EDP in the subject line, class members are

[8] Even if consumers were to receive the message and read it, they may doubt the

apt to think the emails are another scam, and delete or ignore them. *Cf. Karvaly v. eBay, Inc.*, 245 F.R.D. 71, 91-92 (E.D.N.Y. 2007) ("eBay and PayPal are popular targets of unscrupulous email spoofing schemes; as such, it is likely that many prospective Eligible Class Members would delete or ignore an electronic communication from PayPal that purports to address a class action settlement in which the recipient may be entitled to a monetary award.").

The *Cohorst* case, favorably cited by plaintiffs' attorneys, underscores the futility of email notice. In *Cohorst*, much like the proposal here, the administrator sent email notice to 1.1 million class members, placed advertisements in *USA Today*, and operated a settlement website. With that notice, 99.83% of the consumers failed to submit claims.[9] There is no reason to believe that the response rate would be any better here, leaving essentially the entire class uncompensated.

2. The Notice Does Not Adequately Inform Class Members of the Settlement Terms.

Even if consumers receive them, the proposed settlement notices do not provide class members with "the best notice that is practicable under the circumstances." FED. R. CIV. P. 23(c)(2)(B). To do so, the notices must "clearly

[9] Administration costs in that case were more than $190 dollars per claim received. *See Cohorst v. BRE Properties, Inc.*, Case No. 3:10-cv-02666-JM-BGS, Supplemental Declaration of Lisa Mullins in Further Support of the Motion for Final Approval (April 2,

and concisely state in plain, easily understood language . . . the binding effect of a class judgment on members." *Id.*

The proposed notice does not inform consumers of the effect of the class judgment. In particular, the "Short Form Notice"—the notice sent to class members by email—fails to inform class members which claims they will release under the settlement. On the second page, the notice merely informs class members that they "will be bound by the settlement terms and give up [their] right to sue regarding the Released Claims." The email notice does not define the term "Released Claims." Instead, a footnote to text located elsewhere says "Capitalized terms not otherwise defined herein have the same definitions as set forth in the Class Action Settlement Agreement and Release (the "Settlement Agreement"), a copy of which can be found online at www.edebitpaysettlement.com." It is highly unlikely consumers will undertake this cumbersome process.

Indeed, the email notice is so fundamentally flawed that if it were a commercial mailing, it would likely violate the FTC Act. The FTC's "Dot.com Disclosures" publication advises "[f]or disclosures to be effective, consumers must be able to understand them. Advertisers should use clear language and syntax and avoid legalese or technical jargon. Disclosures should be as simple and straightforward as possible." FTC, DOT.COM D

email notice here does not identify the claims that class members will release if they are included in the settlement, contains pages of legalese, and buries much of

that class counsel will have bargained away something of value to the class." *Jones v. GN Netcom, Inc.* (*In re Bluetooth Headset Prods. Liab. Litig.*), 654 F.3d 935, 948 (9th Cir. 2011).

This case illustrates the very problems discussed by these courts. As set forth above, class members lose under the proposed settlement. Specifically, it deprives the class of essentially all compensation, either because administration of the fund will deplete all monies available for redress or the notice procedure will ensure that virtually no class member responds.

In contrast, the defendants and plaintiffs' counsel win. The settlement would eliminate a substantial liability, significantly increasing the value of the company. EDP's owners could then sell the company for millions, and pocket a substantial sum free from class members' claims.[11] *See FTC v. EDebitPay et al.*, Case No. 2:07-cv-04880-ODW-AJW (C.D. Cal. March 5, 2013). The victims of

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