IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

JACQUELINE DOTSON, JANET OVERTON, MARION ROBINSON and MOJGAN THELEN, individually and on behalf of all others similarly situated,	*	
Plaintiffs	*	
v.	*	Case No. CAL 99-21004
BELL ATLANTIC-MARYLAND, INC. and MARYLAND PUBLIC SERVICE COMMISSION,	*	
Defendants	*	
FAUSTO SCROCCO, MOJAN, INC. and SYSNET, INC., individually and on behalf of all others similarly situated,	*	
Plaintiffs	*	
v.	*	Case No. CAL 00-09962
BELL ATLANTIC-MARYLAND, INC. and MARYLAND PUBLIC SERVICE COMMISSION,	*	
Defendants	*	

* * * * *

OBJECTIONS TO STIPULATION OF SETTLEMENT
BY BOYD OBJECTORS

COME NOW, Objecting class members Tamala Boyd, Emily Deborah Kahuhanda, Jane and John Bourgeois, Edward L. Gesser, Lauri Spencer, Denise M. Kochanek, Marcella Hogan, Roy N. Sipes, Coleen S. Sipes, Kathryn Mitchell, Harry Kettmer, and Mary V. Jones (the "Boyd Objectors"), and file these objections to the Stipulation of Class Action Settlement (the "Settlement Agreement") between plaintiffs Jacqueline Dotson and Fausto Scrocco and defendants Bell Atlantic-

Maryland, Inc. ("Bell Atlantic"). These objections shall also serve as the Bourgeois Objectors' notice that they intend to participate through their counsel in this Court's Fairness Hearing. Attached hereto are the accompanying declarations of expert witnesses Stephen Gardner, Esq. (the "Gardner Declaration") and Beverly C. Moore, Jr. (the "Moore Affidavit"), and fact witness Philip Friedman (the "Friedman Affidavit").[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

This Settlement Agreement illustrates the type of class action settlement that awards enormous benefits to the defendant and to class counsel, but provides far less in relief to the class members themselves. The proposed settlement gives Bell Atlantic a broad release from liability for any claims arising out of its practice of charging late fees to consumers, while awarding Class Counsel a guaranteed attorneys' fee of $13 million. At the same time, the settlement would only provide relief to those class members who obtain, fill out, and return a claim form in order to receive a payment of six dollars or who submit a claim form and additional proof of payments to recover

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[1] Mr. Gardner is a recognized expert on the ethics of class actions. He has worked as an Assistant Attorney General in Texas and New York, has been an Assistant Dean at Southern Methodist University Law School, has lectured and written about class action issues, and has represented objectors to class action settlements in several precedent-setting cases. He was a principal author of the *National Association of Consumer Advocates' Standards and Guidelines for Litigating and Settling Consumer Class Actions* (the "NACA Guidelines"), 176 F.R.D. 375 (1998). Mr. Moore is a nationally recognized expert on class action litigation. Since 1974, he has been Editor and Publisher of *Class Action Reports*, a legal periodical that provides comprehensive coverage and scholarly analysis of class action lawsuits and settlements. He has been retained to give expert testimony in connection with class action matters on approximately 30 occasions. Mr. Friedman is a Washington, D.C. attorney who specializes in consumer class action litigation. He was class counsel for the prevailing plaintiffs in *Burch v. United Cable Television of Baltimore Limited Partnership*, a consumer class action involving illegal late fee charges that was litigated to judgment in favor of the plaintiffs and resulted in the disgorgement of more than $12,000,000 by the defendant. *See generally United Cable Television of Baltimore Ltd. Partnership v. Burch*, 354 Md. 658 (1999).

60% of the late fees they paid. Experience and empirical evidence show that it is very likely that more than 90% of the class members will not file claims. Since the Settlement Agreement allows Bell Atlantic to retain all unclaimed funds, Class Counsel will receive a substantial majority of the money that Bell Atlantic actually has to pay. The Court should therefore reject this settlement.

The court must undertake a close and searching scrutiny of the proposed Settlement Agreement. Maryland law provides that parties cannot settle or dismiss class action litigation without the approval of the court. MD. R. CIV. P. 2-231(h). Under the identical requirement of the Federal Rules of Civil Procedure, *see* FED. R. CIV. P. 23(e), a court reviewing a proposed class action settlement has a fiduciary duty to protect the interests of class members who are absent from the negotiations between class counsel and the defendant and therefore may not have their interests adequately represented. *See*, *e.g.*, *In re General Motors Corp. Pickup Truck Fuel Tank Products Liability Litig.* ("*In re GMC Fuel Tank*"), 55 F.3d 768, 784 (3d Cir.), *cert denied*, 516 U.S. 824 (1995). Based on this duty, the reviewing court must "independently and objectively analyze the evidence and circumstances before it" in order to determine whether the proponents have shown their proposed class action settlement to be "fair, reasonable and adequate." *Id*. at 785 (citations omitted). The proposed Settlement Agreement reached by the parties here cannot withstand such scrutiny.

First, the Settlement Agreement is not fair to the class members because most of the money that Bell Atlantic would have to pay out would go to Class Counsel in the form of attorneys' fees, while a far smaller amount would be paid as relief to the class. The Settlement Agreement requires class members to go through a claims process to obtain any relief, but only a small percent of class members are likely to make submissions. In contrast to the contingent nature of the class relief, the

Settlement Agreement seeks a guaranteed fee award of $13 million for Class Counsel. The unfairness of this disparity between the relief for the class and the fee for Class Counsel is compounded by the fact that the settlement fails to guarantee any minimum payment of relief, but instead allows Bell Atlantic to retain all of the settlement funds that class members do not claim. The Court should hold that it is not fair, reasonable, or adequate for Class Counsel to claim most of the money that will be paid out under this proposed Settlement Agreement.

Second, the notice that the parties provided to the class is inadequate. The Class Notice fails to disclose to the absent class members the most salient fact about the Settlement Agreement, namely its guaranteed payment of $13 million in fees to class counsel. At least five federal circuit courts and numerous other federal and state courts have held that the notice of a class action settlement should apprise absent class members as to the amount of fees that class counsel intends to seek. These decisions recognize that "[n]otice of the potential extent of attorneys fee awards is deemed essential because it allows class members to determine the possible influence of the fees on the settlement and to make informed decisions about their right to challenge the fee award." *Goldenberg v. Marriott PLP Corp.*, 33 F. Supp. 2d 434, 441 (D. Md. 1998). Putting aside the failure to disclose the fee, the publication notice authorized by the Settlement Agreement is inadequate to apprise class members who are former Bell Atlantic customers as to their rights under the settlement. These deficiencies in the content and publication of the Class Notice provide an independent basis for the Court to reject the proposed Settlement Agreement.

Finally, even if the Court were to approve the settlement for the class, the Court should deny Class Counsel's request for $13 million in attorneys' fees. This fee is clearly unreasonable and excessive in light of the absence of any guaranteed pay-out by Bell Atlantic to the class and in light

of evidence showing that class members will very likely obtain a far smaller aggregate amount of relief. Numerous courts have held that, where attorneys' fees in a class action settlement are sought or justified on a percentage-of-fund basis, the fees should either be based on the *minimum* guaranteed pay-out under the settlement or should be deferred until the court can accurately assess the actual value that is paid out under the settlement. These decisions are consistent with Maryland law recognizing that it is generally inappropriate for an attorney's stake in the outcome of a case to exceed that of the clients. Since the Settlement Agreement here fails to guarantee *any* minimum payment by Bell Atlantic, either to the class members themselves or in the next best possible form of a *cy pres* award, and since Class Counsel have made no attempt to justify their fee based on the hours of work in this case, the request for a $13 million award of attorneys' fees is clearly excessive and should be rejected.

STATEMENT OF FACTS

This case arises out of Bell Atlantic's collection of unlawfully excessive late fees from its local telephone service customers. Plaintiffs filed this case as a putative class action in September 1999, alleging that Bell Atlantic charged its late-paying customers a $5.00 monthly fee that was in excess of the six-percent (6%) per annum cap that Article III, § 57 of the Maryland Constitution places on interest rates that are not specifically authorized by legislation. First Amended Complaint at ¶¶ 7, 24, 32, 36. The plaintiffs asserted claims for restitution of all illegal late fees paid (plus prejudgment interest) and for disgorgement of all profits that Bell Atlantic realized on these charges. *Id*. at ¶¶ 44 and 51. The plaintiffs moved for class certification in November 1999. The parties stipulated to a proposed class definition that included all persons who paid one or more late charges in excess of 6% per annum within the applicable limitations period. The Court approved this class

definition in February 2000. *See* Order of Court dated February 4, 2000.

Bell Atlantic moved to dismiss the plaintiffs' amended complaint on the grounds that the late fees at issue had been authorized by the Maryland Public Service Commission (the "Commission"); that the plaintiffs had failed to exhaust their administrative remedies through the Commission; and that the claims for restitution and unjust enrichment failed as a matter of law. Motion to Dismiss the Amended Complaint at 12, 16, 18-19. Prior to the Court's ruling on Bell Atlantic's motion, the plaintiffs moved for summary judgment on all issues. In May 2000, the Court granted Bell Atlantic's motion to dismiss in part and denied the motion in part. The Court dismissed the plaintiffs' cause of action for restitution, but allowed them to go forward on their cause of action alleging unjust enrichment. Order of Court entered May 16, 2000 at 3. The Court rejected Bell Atlantic's arguments for dismissal based on the Commission's authority, finding that the late fees at issue do not constitute a rate that would be subject to the filed rate doctrine and that the plaintiffs' challenge to the constitutionality of these late fees is not subject to the Commission's jurisdiction. *Id*. at 5-6, 7-8. The Court then granted the plaintiffs' motion for summary judgment on liability issues, but not on damages. *Id*. at 16.[2]

In August 2000, Bell Atlantic filed motions for leave to file an answer to the second amended complaint and for a stay of all proceedings. The Court granted Bell Atlantic's motion to stay all proceedings pending a final decision in another case regarding the constitutionality of legislation

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[2] This ruling is significant in evaluating the legal arguments set forth below because the posture of a case at the time of settlement is a key consideration in determining whether a settlement is fair, reasonable and adequate. *See Flinn v. FMC Corp.*, 528 F.2d 1169, 1173-74 (4th Cir. 1975); *Strang v. JHM Mortgage Securities, LP*, 890 F. Supp. 499 (E.D. Va 1995). Where, as here, the status of the litigation at the time of settlement was quite favorable to the plaintiffs, the settling parties cannot defend a settlement that is nominal to the class itself (although not to class counsel).

enacted during the pendency of this case that would retroactively authorize the late fees at issue for the entire class period. Memorandum and Order of Court dated August 9, 2000. The Court lifted the stay more than two years later after the retroactive legislation was held unconstitutional in *Dua v. Comcast Cable of Maryland, Inc.* and *Harvey v. Kaiser Found. Health Plan of the Mid-Atlantic States, Inc.*, 370 Md. 604 (2002).[3] Order of Court dated September 17, 2002.

After filing their unopposed motion to lift the stay, the plaintiffs filed an opposition to Bell Atlantic's motion for leave to file an answer to their second amended complaint, arguing that Bell Atlantic had not filed its answer within the time allowed and therefore had waived all affirmative defenses. Class Plaintiff's Opposition to Bell Atlantic's Motion for Leave to File Answer, filed September 4, 2002. On September 17, 2002, the Court denied Bell Atlantic's motion for leave to file an answer. Order of Court dated September 17, 2002.[4]

During the fall of 2002, the parties undertook settlement negotiations. In December 2002, the parties submitted a Stipulation of Settlement to the Court and moved for preliminary approval

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[3] Undersigned counsel were Counsel of Record for the prevailing plaintiffs in *Harvey* and briefed and argued the case in the Court of Appeals; counsel also submitted an *amicus curiae* brief in support of the prevailing plaintiffs in *Dua*.

[4] Although the Order does not reveal the basis for the Court's decision, it is an established rule of law in Maryland that a failure to *timely* file an affirmative defense pursuant to Maryland Rule 2-323(g) constitutes a waiver of all affirmative defenses. *See Foos v. Steinberg*, 247 Md. 35, 38 (1967) ("the plea must be filed within the time required by the rules of court. It has generally been the practice in Maryland to require pleas in limitations by the rule day") (internal citations and quotations omitted). The effect of the Court's ruling in this regard is significant – all of Bell Atlantic's defenses to this case (including the affirmative defense of statute of limitations) are waived, thus increasing Bell Atlantic's potential monetary obligation and exposure to the class. *See Colao v. County Council of Prince George's County*, 346 Md. 342, 362 (1997) ("under our jurisprudence it is incumbent on a defendant/respondent to raise limitations timely as an affirmative defense and that the failure to do so constitutes a waiver of that defense").

of the settlement. The Court granted the motion for preliminary approval.

The proposed Settlement Agreement releases all claims that could have been asserted by class members that "arise out of or relate to the billing and collection of late fees by [Bell Atlantic], including all claims that were brought in the Actions." Stipulation of Settlement at § II, ¶ 21 and § III (F). In exchange for this broad release of liability, the Settlement Agreement provides that class members who submit a claim form by June 21, 2003 can receive a payment of $6.00 from Bell Atlantic. *Id*. at § II, ¶ 4 and § III (A), ¶ 1. Current Bell Atlantic customers who file a claim form would receive a $6.00 credit to their accounts. Former Bell Atlantic customers would be mailed a $6.00 check. *Id*. at § III (A), ¶ 3. Alternatively, the Settlement Agreement permits class members to claim sixty percent (60%) of their actual late fees paid if they submit, in addition to their Proof of Claim form, a Proof of Payment taking the form of either a sworn statement under penalty of perjury identifying the total amount of late fees they paid between 1996 and 1999 (for claims up to $50) or documentary evidence of these paid late fees (for claims exceeding $50). *Id*. at § II, ¶ 16 and § III (A), ¶ 2. Bell Atlantic reserves the right to verify all Proofs of Claim that are submitted. *Id*. at § III (C). The Settlement Agreement caps Bell Atlantic's potential liability to the class at $51,900,000, *id*. at § III (A), but sets no minimum dollar value that Bell Atlantic is required to pay out either in direct relief to the class or in indirect relief through a *cy pres* fund.

As compensation for their work in obtaining this relief for the class members, Class Counsel have asked the Court to approve an award of $13 million in attorneys' fees. *Id*. at § III (B), ¶ 1. The parties contend that this $13 million fee "constitutes approximately 20% of the total *maximum* consideration made available by [Bell Atlantic] under this Settlement." *Id*. (emphasis added). Bell Atlantic has agreed not to oppose this fee application. *Id*. The settlement also provides that Bell

Atlantic will pay "incentive awards" of $500 to each of the named plaintiffs. *Id*. at § III (B), ¶ 2.

Pursuant to the Settlement Agreement, the parties provided notice of the pending settlement to the class. The Notice of Class Certification, Proposed Settlement and Hearing ("Class Notice") states the amount of relief that class members may obtain through the claims processes described herein and states that "attorneys' fees and expenses of Settlement Class Counsel shall be paid separately by [Bell Atlantic] as set forth in the Stipulation of Settlement," Class Notice at § II, but fails to state the dollar value of these fees and expenses. The Class Notice provides the names and address of Class Counsel, but does not give a telephone number that class members can call for additional information regarding how the settlement may affect their rights. *See* Class Notice § IV and VII. The Class Notice also lists an address on the Internet, although not the World Wide Web, where class members may view the Settlement Agreement itself. *Id*. at § VII. Copies of the Class Notice were mailed as a billing insert to all of Bell Atlantic's current customers on or before March 10, 2003. Stipulation of Settlement § II, ¶ 11 and § III (D), ¶ 4. The Class Notice was also published in a single day's edition of *USA Today*. *Id*. at § II, ¶ 17 and § III (D), ¶ 4.

ARGUMENT

I. THE COURT SHOULD CLOSELY SCRUTINIZE THE PROPOSED SETTLEMENT AGREEMENT.

Unlike settlements in ordinary litigation between individual parties, class action settlements must be approved by courts. MD. R. CIV. P. 2-231(h); *see also* FED. R. CIV. P. 23(e).[5] Courts have recognized that the primary purpose of this requirement for judicial approval is "to protect class

[5] In light of the "dearth of authority in Maryland analyzing the specific requirements of Maryland Rule 2-231[,]" cases interpreting and applying the federal rule's substantially identical provisions are persuasive authority with regard to Maryland's class action rule. *Philip Morris, Inc. v. Angeletti*, 358 Md. 689, 724-26 (2000).

members . . . . whose rights may not have been given due regard by the negotiating parties." *Ficalora v. Lockheed California Co.*, 751 F.2d 995, 996 (9th Cir. 1985). Because the parties negotiating a class action settlement may not adequately represent the interests of absent class members, the reviewing court "acts as a fiduciary who must serve as a guardian of the rights of absent class members," so that the court "cannot accept a settlement that the proponents have not shown to be fair, reasonable and adequate." *In re GMC Fuel Tank*, 55 F.3d at 785 (citation omitted). When reviewing a class action settlement, a court must "independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interest of those whose claims will be extinguished." *Id.* (citation omitted). "The burden of proving the fairness of the proposed settlement is on the proponents." *In re Matzo Food Products Litig.*, 156 F.R.D. 600, 605 (D.N.J. 1994).

Class action settlements require careful judicial scrutiny because of the profound differences between them and ordinary settlements. As one federal court of appeals has observed:

> [T]he settlement of a class action lawsuit is fundamentally different from the settlement of traditional litigation. . . . [C]lass members, unlike individual litigants in traditional lawsuits, are bound by the settlement even though they do not individually consent to its terms. Instead, consent is given by class representatives, who derive authority to represent members not by obtaining their consent, but by obtaining a court order designating them the representatives.
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> [I]n order to protect the rights of absent class members, the court must assume a far more active role than it typically plays in traditional litigation.

Epstein v. MCA, Inc., 50 F.3d 644, 666-67 (9th Cir. 1995), *rev'd on other grounds sub nom.*, *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996); *see also In re GMC Fuel Tank*, 55 F.3d at 785. The United States Supreme Court has thus directed that the rules designed to protect interests of absent class members "demand undiluted, even heightened, attention in the settlement

context," and that these interests must be the "dominant concern" of a court when class representatives propose a settlement. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620-21 (1997).

Finally, courts have recognized the need for especially close judicial scrutiny of settlements where the class representatives may have been tempted to sacrifice the absent class members' interests in exchange for a generous payment of attorneys' fees. As one federal appeals court recently warned, "concerns about the fairness of settlement agreements warrant special attention when the record suggests that settlement is driven by fees; that is, when counsel receive a disproportionate share of the settlement." *Staton v. Boeing Co.*, 313 F.3d 447, 462 (9th Cir. 2002) (citation omitted).

II. THE PROPOSED SETTLEMENT AGREEMENT IS NOT FAIR, REASONABLE, AND ADEQUATE.

On its face, the proposed Settlement Agreement is an extremely poor deal for the absent class members. In exchange for a broad release from liability for Bell Atlantic, the settlement creates a claims process for distributing relief that will result in very few class members receiving compensation. The settlement also fails to guarantee a minimum pay-out by Bell Atlantic either in the form of direct relief to the class or indirect relief through a *cy pres* fund. Instead, Bell Atlantic is allowed to keep all unclaimed funds. Thus, the class will obtain little benefit under this settlement despite the fact that the plaintiffs have already obtained class certification and won summary judgment on liability issues. At the same time, the settlement seeks an unopposed payment of $13 million in attorneys' fees to Class Counsel, a figure that was omitted from the notice of settlement sent to the class. The Court should reject this proposed settlement for failing to provide a fair, reasonable, or adequate allocation of relief to the class.

A. THE CLAIMS PROCESS AND LACK OF MINIMUM PAYMENT WILL RESULT IN CLASS COUNSEL RECEIVING ALMOST ALL OF THE MONEY PAID OUT UNDER THIS SETTLEMENT.

1. The Claims Process is Not Necessary for Most Class Members.

The Settlement Agreement requires all class members to fill out and submit a proof of claim form in order to recover six dollars in relief or to submit the claim form and additional proof of payments in order to recover a percentage of their actual late fees paid. Settlement Agreement § III (A). These claims requirements are almost certainly unnecessary for most class members because Bell Atlantic's records contain the names and addresses of class members who are currently Bell Atlantic customers and, because Bell Atlantic is part of a regulated industry, these records will likely show which current customers paid late fees during the class period. *See* Declaration of Stephen Gardner, attached hereto as Exhibit 1, at ¶ 40; Affidavit of Beverly C. Moore, Jr., attached hereto as Exhibit 2, at ¶ 6. If Bell Atlantic has the records to calculate the total amount of late fees, then it should be possible to mine that data with modest effort to identify who paid those fees.[6]

At the very least, the parties have not satisfied their burden of showing that this claims process is necessary as the *exclusive* means for providing relief to *all* class members. In the absence of such justification, the most likely purpose for a claims filing procedure is to limit the liability of Bell Atlantic by restricting the number of class members who will recover from the settlement fund:

> [When] the defendant's ultimate monetary exposure is directly proportional to the number and size of claims filed by class members . . . the defendant's interest is usually to limit its pecuniary liability as much as possible, and the defendant would seek to have the court adopt affirmative response requirements and forms that would discourage, or at least not encourage, the filing of claims by class members.

2 NEWBERG ON CLASS ACTIONS § 8.35 at 8-116 (3d ed. 1992). The claims process established by

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[6] The Boyd Objectors have served discovery aimed at this point.

the proposed Settlement Agreement here will almost certainly have this exact effect.

2. The Claims Process Is Expected to Result in Less Than $5 Million of Relief Being Paid to the Class.

The Settlement Agreement's reliance on a claims process as the exclusive means of providing relief to class members is also highly problematic because substantial evidence shows that very few class members will take the time to go through such a process. *See*, *e.g.*, *Strong v. Bellsouth Telecommunications, Inc.*, 173 F.R.D. 167, 169 (W.D. La. 1997), *aff'd*, 137 F.3d 844 (5th Cir. 1998) (consumer class action based on telephone company's illegal billing charges where only 4.3% of class members responded to claims process offering payments of $12 to $20). Powerful evidence of the low rate of response to claims processes comes from the recent case of *Burch v. United Cable TV of Baltimore Ltd. Partnership*, 354 Md. 658 (1999), a Maryland consumer class action involving illegal late fee charges that was litigated to judgement. The claims process in *Burch* produced a response rate of approximately 9.7%, despite offering claimants an average payment of almost $90 and despite a far more extensive notice campaign than was undertaken in this case. *See* Affidavit of Philip Friedman, attached hereto as Exhibit 3, at ¶¶ 2, 6, and 7. Based on this evidence alone, it is extremely likely that the overwhelming majority of class members will not submit claim forms and therefore will never obtain any relief under this settlement.

The single-digit response rates in *Strong* and *Burch* are consistent with evidence regarding claims-made class action settlements more generally. A treatise on class action litigation and settlements has examined and compiled empirical data showing response rates in different types of class action settlements where proofs of claim were required. *See* 2 NEWBERG ON CLASS ACTIONS, Appendix 8-4 (3d ed. 1992), attached hereto as Exhibit 4. In over half of the 33 claims-made settlements that *Newberg* examined, fewer than 20% of the class members filed claims. *Id*. Of the

17 antitrust and consumer class action settlements examined by *Newberg*, all had claims rates under 50% and the overwhelming majority (13 out of 17) had claims rates under 20%. *Id*. at 8-187 to 8-190 and 8-194; *see also* Gail Hillebrand & Daniel Torrence, *Claims Procedures in Large Consumer Class Actions and Equitable Distribution of Benefits*, 28 SANTA CLARA L. REV. 747, 751-53 (1988) (study of consumer class actions with claims-made settlements showing response rates ranging from 3 to 33 percent of class members). Response rates like this support *Newberg's* conclusion that, "[f]or all practical effects, the use of a mandatory proof of claim procedure or other affirmative response from class members as a condition of sharing in a class recovery results in a significant reduction of the number of identifiable class members who will ultimately share in the benefits of the class settlement." 3 *Newberg* § 8.35 at 8-272 (4th ed. 2002).

The response rate in this case is likely to be especially low because the Settlement Agreement requires class members to file claim forms to receive payments of just six dollars. "Experience has demonstrated that persons with modest or nominal potential recoveries will not bother to file a proof of claim." 3 *Newberg* § 8.41 at 8-289 (4th ed. 2002). This prediction is almost certain to be borne out here, where two of the nation's foremost authorities on consumer class actions have reviewed the Settlement Agreement and concluded, based on their decades of experience in examining dozens of class action settlements, that this claims process will likely result in extremely small numbers of claims being filed due to the minimal value of the relief. *See* Gardner Declaration at ¶ 22; Moore Declaration at ¶ 6.

Furthermore, the Settlement Agreement requires class members who seek higher payments of 60% of their total late fees to submit either a sworn statement under penalty of perjury regarding their late fee payments or documentary proof of these payments. Both requirements will likely

discourage class members from submitting claims for a measure of their actual damages. *See* Gardner Declaration at ¶¶ 23, 43-44; 3 *Newberg* § 8.40 at 8-286 ("A litigation procedure that tends to reduce the number of proofs of claim filed is the requirement to complete a complicated proof of claim form which may also be encumbered with notarized signature and attachment of purchase receipts requirements."). These proof of claim and proof of payment requirements suggest that less than ten percent of the class members will obtain any relief under this Settlement Agreement. *See* Gardner Declaration at ¶¶ 24, 38. Therefore, the aggregate value of the relief that the class is expected to recover under this settlement is under $5 million.

The inadequacy of the relief that will be paid out through this claims process is compounded by the fact that the proposed Settlement Agreement fails to guarantee any minimum payment to the class by Bell Atlantic, either in the form of direct relief to class members or indirect relief through a *cy pres* fund. Instead, all of the unclaimed funds will revert to or be retained by Bell Atlantic. The settlement therefore gives Bell Atlantic a strong incentive to minimize both the number of class members who make claims and the amount of relief that these class members actually obtain. *See* 2 *Newberg* § 8.35 at 8-116 (3d ed. 1992); Gardner Declaration at ¶ 36; *cf*. Friedman Affidavit at ¶¶ 4 and 8 (describing judgment in *Burch* where defendant paid out all unclaimed funds through *cy pres* awards totaling $7,583,045.92 to designated charitable organizations). Meanwhile, by tying Class Counsel's fixed $13 million fee to the "theoretical maximum" value of $51.9 million in relief that the class *could* recover rather than the actual value of relief that the class *does* recover, *see* Gardner Declaration at ¶¶ 17-18, the settlement gives Class Counsel no countervailing incentive to protect the class members by opposing Bell Atlantic's interests in minimizing the number and amount of their claims. The structure of the proposed Settlement Agreement itself therefore provides even

stronger support for the prediction that Bell Atlantic will pay less than $5 million in aggregate relief to the class.

3. Class Counsel's $13 Million Fee Will Take Up More Than 70% of the Money that Bell Atlantic Pays Out Under this Settlement Agreement.

Bell Atlantic's willingness to pay attorneys' fees of $13 million to Class Counsel when the settlement is expected to provide less than $5 million in relief to the class should only magnify the Court's concerns about the fairness and adequacy of the proposed Settlement Agreement. The settlement specifically provides that Bell Atlantic will not oppose Class Counsel's fee application. Settlement Agreement at § III(B), ¶ 2. Numerous courts have recognized the need for careful scrutiny of settlements containing such "clear sailing agreements" because the absence of any adversarial process between class counsel and the defendant who negotiated the fee arrangements "exacerbate[s] the potential for conflict between the plaintiff class and class counsel." *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 524-25 (1st Cir. 1991); *see also In re Prudential Insurance Co. of America Sales Practices Litig.*, 148 F.3d 283, 333 (3d Cir. 1998) ("When parties are negotiating settlements, the court must always be mindful of the danger that the lawyers might urge a class settlement at a lower figure or on a less-than-optimal basis in exchange for red-carpet treatment for fees.") (citation omitted). This danger is very real here, where Class Counsel's unopposed $13 million fee would take up more than 70% of the money that Bell Atlantic is expected to pay out under the proposed Settlement Agreement.

The combined $13 to $18 million value of the expected relief for the class and the unopposed attorneys' fees, taken together as a whole, constitutes a reasonable estimate of what Bell Atlantic is willing to pay out in the aggregate to settle the plaintiffs' claims. *See In re GMC Fuel Tank*, 55 F.3d at 810. In the *GMC Fuel Tank* case, the Third Circuit held that a defendant's willingness to

make a generous payment of attorneys' fees should be considered as evidence that casts doubt upon the adequacy of a settlement agreement that provides less substantial relief for the class:

> GM's apparent willingness to pay plaintiffs' counsel close to $9.5 million indicates that the party in perhaps the best position to evaluate the claim may have thought the action, which both plaintiffs' counsel and the defense contend was not worth much, posed a significant enough threat to cause GM to strike a lucrative deal with plaintiffs' counsel.

Id; *see also Staton*, 313 F.3d at 473 ("Ordinarily, 'a defendant is interested only in disposing of the total claim asserted against it[;] the allocation between the class payment and the attorneys' fees is of little or no interest to the defense'") (quoting *In re GMC*, 55 F.3d at 819-20); *Bloyed v. General Motors Corp.*, 881 S.W.2d 422, 435-36 (Tex. Ct. App. 1994) ("Any settlement represents a total value figure that one party is willing to pay to end the controversy."), *aff'd sub nom*, *General Motors Corp. v. Bloyed*, 916 S.W.2d 949 (Tex. 1996).

The fact that settling parties may represent that they engaged in separate negotiations regarding class relief and attorneys' fees does not in any way diminish a court's duty to carefully scrutinize the dollar value of both in determining whether the settlement provides fair, reasonable, and adequate relief for the class. As the Ninth Circuit recently explained, "[t]hat the defendant in form agrees to pay the fees independently of any monetary award or injunctive relief provided to the class in the agreement does not detract from the need carefully to scrutinize the fee award." *Staton*, 313 F.3d at 473; *see also Bloyed*, 881 S.W.2d at 435-36 ("Attorneys' fees, even though they may not be technically deducted from the amount paid to the litigants, represent an integral part of the overall amount that the settling party is willing to pay.").

Therefore, the primary issue here is whether a settlement agreement that awards attorneys' fees of $13 million while paying less than $5 million in relief to the class should be approved as fair,

reasonable, and adequate. A total payment by Bell Atlantic of $13 to $18 million may very well be adequate consideration to settle the plaintiffs' claims in this case. But a proposed settlement that allocates less than 30% of that money to the class, while allowing Class Counsel to collect more than 70% in attorneys' fees, does not provide fair, reasonable and adequate relief. The Court should therefore reject the proposed Settlement Agreement.

B. THE CLASS NOTICE IS INADEQUATE BOTH IN CONTENT AND FORM.

Even putting aside the foregoing arguments about the relief, the Settlement Agreement should still not be approved because the Class Notice was equally defective on its face. Notice and an opportunity to be heard are essential elements of an absent class member's due process rights in class action proceedings. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). Under *Mullane*, the notice provided to the class must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id*. at 314. Accordingly, the federal rules require that courts order the "*best notice practicable* under the circumstances." FED. R. CIV. P. 23(c)(2) (emphasis added). Measured against these standards, the Class Notice here is deficient in several respects and therefore establishes an independent basis for the Court to reject the proposed Settlement Agreement.

1. The Class Notice Fails to Disclose Class Counsel's $13 Million Fee.

First, and foremost, the Class Notice is deficient for failing to disclose the dollar value of Class Counsel's fee request. On this subject, the notice states only that "[a]ll costs of notice to the Settlement Class, costs of claims administration and attorneys' fees and expenses of Settlement Class Counsel shall be paid separately by [Bell Atlantic] as set forth in the Stipulation of Settlement

. . ." Class Notice at § 2. This, despite the fact that the Settlement Agreement that the parties had previously submitted to the Court specifically stated that Class Counsel would be seeking fees and expenses totaling $13 million, and that Bell Atlantic would not oppose this request. Settlement Agreement at § III (B), ¶ 1. The parties' failure to disclose the dollar value of Class Counsels' attorneys fees by itself should renders the notice deficient on its face.

Notice regarding the value of the attorneys' fee award in a class action settlement is critical because it allows class members to assess the influence of fees on the overall settlement in deciding whether they will approve or object to the settlement. Accordingly, at least five federal circuit courts, the federal district courts for the Districts of Maryland and Eastern Virginia, and numerous other federal and state courts have held that the notice of a class action settlement should disclose the amount of attorneys' fees that class counsel are seeking when that information is available. *See Staton*, 313 F.3d at 472 n. 15; *In re GMC Fuel Tank*, 55 F.3d at 802-03; *Piambino v. Bailey*, 610 F.2d 1306, 1328 (5th Cir. 1980); *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1130 (7th Cir. 1979); *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 122 (8th Cir. 1975); *Goldenberg v. Marriott PLP Corp.*, 33 F. Supp. 2d 434, 441 (D. Md. 1998); *Cosgrove v. First & Merchants Nat'l Bank*, 68 F.R.D. 555, 561 (E.D. Va. 1975); *In re Ford Motor Co. Bronco II Products Liability Litig.*, 1995 WL 222177 at *8 (E.D. La. April 12, 1995); *GMC v. Bloyed*, 916 S.W.2d at 957-58; *State v. Homeside Lending, Inc.*, ___A.2d___, 2003 WL 367449 at ¶ 31 (Vt. Feb. 21, 2003).

These decisions recognize that the parties' failure to provide notice of the attorneys' fee award to the class deprives class members of necessary information for assessing their rights and interests under a settlement and also raises concerns regarding the fairness of the overall settlement.

See, *e.g.*, *GMC v. Bloyed*, 916 S.W.2d at 957 ("the settlement must be set aside because the class members did not receive adequate notice of all of the material terms of the proposed settlement, specifically the projected amount of attorney's fees and expenses"); *Staton*, 313 F.3d at 472 n. 15 (failure to provide precise dollar value of attorneys' fees in notice results in extra judicial scrutiny of settlement). These concerns are especially important here, where the parties omitted from the Class Notice the fact that Class Counsel would be seeking a $13 million fee that is likely to be a substantial majority of all the money that Bell Atlantic pays out under the settlement.

The parties' failure to provide notice of Class Counsel's proposed $13 million fee award deprived many class members of the opportunities "to determine the possible influence of the fees on the settlement and to make informed decisions about their right to challenge the fee award." *Goldenberg*, 33 F. Supp. 2d at 441. This omission therefore renders the Class Notice facially defective and provides an independent basis for the Court to reject the Settlement Agreement.

2. The Publication Notice for Former Customers Is Inadequate.

Additionally, the publication of notice that the parties provided for class members who are no longer Bell Atlantic customers and therefore did not receive the mailed notice was woefully inadequate to "apprise [these] parties of the pendency of the action and afford them an opportunity to present their objections." *See Mullane*, 339 U.S. at 314. The Settlement Agreement provided for "Publication Notice"consisting of an ad published in one-day's edition of *USA Today* and the posting of the Class Notice and Settlement Agreement on the Internet (although not the World Wide Web). *See* Settlement Agreement ¶ 11; *see also* Class Notice at ¶ 7 (stating that information regarding the settlement is available at md.latefeesettlement.com, a cite that is not on the World

Wide Web).[7] The single issue of *USA Today* was likely to reach fewer than three-million adults nation-wide, according to studies by a leading supplier of media audience research. *See* Mediamark Research, Inc., "Mediamark Research Spring 2002 Technical Guide," attached hereto as Exhibit 5, at 6 (also posted on Mediamark's web site, www.mediamark.com). Obviously, far less than 100% of these newspaper readers would have read the ad itself.

The Settlement Agreement's one-ad notice campaign that did not even reach more than 90% of the former Bell Atlantic customers who are class members cannot be deemed the "best notice practicable under the circumstances." Fed. R. Civ. Pr. 23(c)(2). In *Burch v. United Cable Television of Baltimore*, also a consumer class action involving illegal late fee charges, the court approved a publication notice program that included half-page newspaper advertisements run in at least six different editions of the Baltimore Sun over a period of more than three weeks plus ads in three different weekly editions of approximately nine neighborhood newspapers in Baltimore. *See* Friedman Affidavit at ¶ 5. In light of the far more extensive notice program undertaken in *Burch* and in light of the fact that there is plainly enough money at issue here given Bell Atlantic's offer to pay $13 million in fees, the one-day publication that the parties provided should not be approved as adequate to apprise the class members who are former customers of their rights under the settlement.

In sum, the Class Notice that the settling parties sent out to class members in this case is deficient both in content and in form. The notice fails to disclose to class members the most salient

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[7] The overwhelming majority of Internet sites with any appreciable traffic are on the World Wide Web. When a consumer is given an internet address, the first thing he or she is likely to do is type in "www." It can therefore be expected that many class members would have trouble locating the Internet site where the Settlement Agreement is posted.

fact about this settlement, namely Class Counsel's proposed fee award of $13 million that will constitute a substantial majority of the money that Bell Atlantic has to pay under the settlement. The publication notice also falls far short of the constitutional minimum with respect to the class members who are former customers. These deficiencies in the class notice provide an independent basis for the Court to reject the Settlement Agreement, and also are additional evidence for the Court to find that the settlement as a whole is not fair, reasonable, and adequate for the class.

III. THE COURT SHOULD REJECT CLASS COUNSEL'S FEE REQUEST AS EXCESSIVE.

A. THE FEE IS EXCESSIVE IN RELATION TO THE RESULTS OBTAINED.

The proposed fee award of $13 million for Class Counsel should be rejected as excessive for much the same reason that the relief to the class under this settlement is inadequate. Just as the adequacy of relief to the class must be measured in comparison to the combined value of class relief and attorneys' fees that Bell Atlantic is expected to pay out, so too should the attorneys' fees be measured in comparison to the value of actual relief that the class receives under the settlement.

The parties have represented to the Court that the proposed $13 million fee constitutes "approximately 20% of the *maximum* total consideration made available by [Bell Atlantic] under this Settlement." Settlement Agreement § III (B), ¶ 1. Assuming that the "percentage of recovery" is an appropriate method for awarding fees and assuming further that 20% might be an appropriate benchmark for a percentage-based award in this case, the Court should still reject the proposed fee award because it is tied to the "theoretical maximum" value of $51.9 million that the class *could* receive *if every single class member were to submit a claim form*, rather than to the actual value of relief that the class *will* receive under the Settlement Agreement's claims process.

In *Strong v. Bellsouth Telecommunications, Inc.*, 173 F.R.D. 167 (W.D. La. 1997), *aff'd*, 137

F.3d 844 (5th Cir. 1998), the court presided over an almost identical consumer class action settlement involving a telephone company's imposition of illegal billing charges. *Id*. at 168. The parties' settlement made a maximum of $64.5 million available to class members who had to submit claim forms for payments of between $12 and $20. Out of more than four-million class members, fewer than 200,000 (4.3% of the class) submitted claims. *Id*. at 169-70. Even though Bellsouth paid out less than $2 million in actual relief to the class, counsel sought an attorneys' fee award of $6 million as 10% of the maximum value that the settlement could have paid. The court resoundingly rejected this application, finding that "it is clear that *the $64 million figure is a phantom*," and that:

> **A request for $6 million in attorneys' fees where counsel has provided no more than $2 million in benefits to the class is astonishing. It as a sad day when lawyers transmogrify from counselors into grifters. Suffice it to say that we find the request unreasonable.**

Id. at 172 (emphasis added). Thus, in a class action settlement that was stunningly similar to this one with regard to the defendant's identity, the nature of the underlying allegations, the theoretical maximum value of available relief, and the expected value of relief that would actually be paid, the federal district court rejected out-of-hand a proposed $6 million fee award that was less than half the size of the award sought by Class Counsel here because it bore no meaningful relationship to the relief that was actually paid to the class.

Numerous other courts, including the Delaware Supreme Court, have similarly held that the attorneys' fees in a class action settlement involving a claims process or some other mechanism that limits payments to class members should be based on the value of relief actually recovered by the class. In *Goodrich v. E.F. Hutton Group, Inc.*, 681 A.2d 1039 (Del. 1996), the court addressed a fee application in a securities class action settlement where the defendant paid $3.3 million into a fund from which class members who submitted claim forms could recover varying amounts of relief. *Id*.

at 1042-43. Although counsel for the class sought a guaranteed fee of $515,000 as 16% of the settlement fund, the trial court rejected this application and ordered instead that counsel be paid a fee equal to one-third the value of claims actually paid through the claims process up to a maximum of $515,000. *Id*. at 1043. The Delaware Supreme Court affirmed this award, holding that:

> By conditioning the award of attorneys' fees upon the claims actually submitted, the Court of Chancery exercised its discretion equitably, to correlate the attorneys' compensation with the structure of the settlement benefits the attorneys had negotiated for the class.

Id. at 1049.[8] These federal and state court decisions establish that an award of attorneys' fees in a class action settlement that relies exclusively on a claims process to distribute relief should not be based on a percentage of a theoretical maximum dollar value that bears no meaningful relationship to the value of relief that is actually paid to the class.

This case illustrates the wisdom of this rule. Based on the evidence presented herein, Class Counsel's request for a fee award that is tied to the maximum possible pay-out under the Settlement Agreement is expected to result in a situation where the class members obtain less than $5 million in relief while their attorneys receive a fee award of $13 million. The parties' inability to establish any meaningful relationship between Class Counsel's fees and the actual relief obtained by the class is particularly problematic as a matter of Maryland law. In *Attorney Grievance Comm'n of Maryland v. Korotki*, 318 Md. 646 (1990), the Court of Appeals upheld the suspension of a lawyer

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[8] *See also Duhaime v. John Hancock Mutual Life Ins. Co.*, 989 F. Supp. 375, 379-80 (D. Mass. 1997) (awarding fee with up-front lodestar and provisional fund for additional award based on value of claims paid); *Bowling v. Pfizer, Inc.*, 922 F. Supp. 1261, 1283-84 (S.D. Ohio) (awarding immediate fee award of 10% of claims made to date with provision for future award equal to 10% of value of future claims paid by defendant), *aff'd*, 102 F.3d 777 (6th Cir. 1996). *See also*, *generally*, *NACA Guidelines*, 176 F.R.D. at 399 (in claims-made settlements, fee award should either be based on minimum or initial guaranteed pay-out to class by defendant or else should be deferred until court can measure value of actual payments made to class).

for violating Rule 1.5 of the State's Rules of Professional Conduct by charging a 75% contingency fee to several of his clients. In finding this fee to be unreasonable under Rule 1.5, the Court of Appeals held that, "[w]ithout passing upon whether there can ever be circumstances justifying a contingent fee in excess of fifty percent, *it is generally a violation of the rule for the attorney's stake in the result to exceed the client's stake*." *Id*. at 665 (emphasis added). In light of this general rule of Maryland law recognizing that an attorney's contingency fee should not exceed the value of relief obtained for the client, Class Counsel's proposed $13 million fee award in this case is clearly excessive where substantial evidence shows that the class is expected to recover less than $5 million in relief.

B. THE PROPOSED FEE AWARD HAS NOT BEEN JUSTIFIED BASED ON THE WORK PERFORMED IN THIS CASE.

The Court should also reject the proposed fee award because it has not been justified based on evidence of the work performed in this case. The Settlement Agreement states that the $13 million fee "constitutes approximately 20% of the maximum total consideration made available by [Bell Atlantic]," § III (B), ¶ 1, but does not discuss the relationship between this fee and the hours of work that Class Counsel performed in this case. In *United Cable Television of Baltimore Ltd. Partnership v. Burch*, 354 Md. 658 (1999), the Court of Appeals held that a circuit court has discretion both to award attorneys' fees based on a percentage of the class relief fund and to use the factors enumerated in Rule 1.5 as a check to ensure that such fees are reasonable. *Id*. at 687. Among these factors is "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly." MD. R. PROF. COND. 1.5(a). Therefore, even if the proposed fee award in this case could possibly pass muster under the percentage-of-the-fund approach (which it cannot), the Court should still require Class Counsel to

submit their actual time records as a cross-check to ensure that the fee is reasonable on that basis as well. *Cf. In re Montgomery County Real Estate Antitrust Litig.*, 83 F.R.D. 305, 322-23 (D. Md. 1979) (granting fee award based on 1.25 lodestar multiplier, cross-checked as 20-25% of class settlement's *minimum recovery value*).

Class Counsel's request for a $13 million fee award should therefore be rejected as clearly excessive in relation to the settlement's expected payment of less than $5 million in relief to the class and as not yet justified in relation to the work that was performed in this case.

IV. THE COURT SHOULD REJECT THE PROPOSED SETTLEMENT BECAUSE CLASS COUNSEL HAVE NOT ADEQUATELY REPRESENTED THE CLASS.

Finally, the proposed Settlement Agreement in this case cannot be approved unless the class meets Maryland Circuit Court Rule 2-231's certification criteria. Maryland Rule 2-231(a)(4), like FED. R. CIV. P. 23(a)(4), provides that a class action may not be maintained unless "the representative parties will fairly and adequately protect the interests of the class." This requirement for adequacy of representation has been held to constitute a minimum due process standard. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). "In the class action setting, adequate representation is among the due process ingredients that must be supplied if the judgement is to bind absent class members." *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 388 (1996) (Ginsburg, J. concurring in part and dissenting in part).

The requirement for adequacy-of-representation has not been satisfied here. When Class Counsel have agreed to a settlement wherein they will obtain more than 70% of the money that Bell Atlantic is expected to pay out, the class has not been adequately represented. As was noted above, a contingency fee of higher than 50% would violate Maryland's ethical code in most cases involving representation of individual clients. It simply cannot be that the negotiation of such a fee in a class

action settlement satisfies the adequacy-of-representation requirement of Rule 2-231(a)(4).

CONCLUSION

Because the Settlement Agreement fails to provide fair, reasonable or adequate relief for the class; because the Class Notice is inadequate both in content and form; because Class Counsel's fee request is clearly excessive and has not been justified; and because Class Counsel have failed to provide adequate representation to the class, the Court should reject the proposed Settlement Agreement in its entirety.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of April, 2003, a copy of the foregoing Objections to Stipulation of Settlement was sent by courier to:

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And a copy of the foregoing Objections to Stipulation of Settlement was sent by first-class mail to:

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