

**UNITED STATES DISTRICT COURT**

**EASTERN DISTRICT OF NEW YORK**

ADAM BERKSON, et al. individually and on  
behalf of all others similarly situated,

Plaintiffs,

v.

GOGO LLC and GOGO INC.,

Defendants.

Case No. 1:14-cv-01199-JBW-LB

**ORDER GRANTING MOTION FOR  
PRELIMINARY APPROVAL OF CLASS  
ACTION SETTLEMENT, GRANTING  
LEAVE TO FILE A SECOND  
AMENDED COMPLAINT,  
PROVISIONALLY CERTIFYING THE  
CLASSES, AND DIRECTING  
DISSEMINATION OF CLASS NOTICE**

Plaintiffs Adam Berkson and Kerry Welsh, plaintiffs in the above-captioned action, and Kathy LePenske (another user of Gogo service), have submitted an unopposed Motion for entry of an Order Granting Preliminary Approval of the Class Action Settlement, Granting Leave to File a Second Amended Complaint, Provisionally Certifying the Classes, and Directing Dissemination of Class Notice, determining certain matters in connection with the proposed Settlement of this class action, pursuant to the terms of the Settlement Agreement that the Parties reached and presented to the Court for approval. After consideration of the Settlement Agreement and the exhibits annexed thereto, and after due deliberation and consideration of the totality of the circumstances and the record, and for good cause shown, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

1. **Defined Terms:** This Court adopts all defined terms set forth in the Settlement Agreement, including but not limited to all defined terms set out in Section 1 of the Settlement Agreement, for purposes of this Preliminary Approval Order, unless otherwise specified herein.
2. **Preliminary Approval of Settlement:** The Court hereby preliminarily approves the terms of the Settlement Agreement, subject to further consideration at the Fairness Hearing as provided below. The Court concludes that the proposed Settlement is sufficiently within the range of reasonableness to warrant conditional certification of both the Initial Class and the Supplemental Class, the scheduling of the Fairness Hearing, and the circulation of the “Notice Package”<sup>1</sup> to both the Initial Class and the Supplemental Class, each as provided for in this Preliminary Approval Order.

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<sup>1</sup> For purposes of this Preliminary Approval Order, “Notice Package” shall mean: (1) the Long-Form Notice; (2) the Summary Notice; and (3) the Claim form, which are attached as Exhibits D, C and A respectively, to the Parties’ Settlement Agreement.

3. **Granting Leave to File a Second Amended Complaint:** Pursuant to Federal Civil Procedure Rule 15(a)(2), the Court hereby grants leave to file a Second Amended Complaint to add plaintiff Kathy LePenske to the above-captioned action. The Second Amended Complaint, which is attached as Exhibit 2 to the Amended Notice of Motion (Dkt. 104), is hereby deemed as filed and counsel for Plaintiffs is ordered hereby to submit it via ECF.

4. **Conditional Certification for Settlement Purposes:** For purposes of Settlement only, pursuant to Federal Rule of Civil Procedure 23, the Court hereby certifies the following Initial Class:

All Gogo Customers who, during the Initial Class Period, subscribed to a Monthly Pass but only used the Gogo Service during the first month of their Subscription Period.

Furthermore, for purposes of Settlement only, pursuant to Federal Rule of Civil Procedure 23, the Court hereby certifies the following Supplemental Class:

All Gogo Customers who, during the Supplemental Class Period, subscribed to a Monthly Pass but only used the Gogo Service during the first month of their subscription.

The Court hereby conditionally certifies Adam Berkson, Kerry Welsh as representatives of the Initial Class as defined above and Kathy LePenske as representative of the Supplemental Class as defined above (together, Berkson, Welsh and LePenske are referred to herein as the “Class Representatives”), and the Court hereby appoints Michael R. Reese of Reese LLP as Class Counsel. This conditional certification of the Initial Class, the Supplemental Class, and the Class Representatives, and this appointment of Class Counsel, are solely for purposes of effectuating the proposed Settlement. If the Settlement Agreement is terminated or is not consummated for any reason, the foregoing conditional certification of the Initial Class, the Supplemental Class, and the Class Representatives, as well as the foregoing appointment of Class Counsel, shall be

void and of no further effect, and the Parties to the proposed Settlement shall be returned to the status each occupied before entry of this Preliminary Approval Order, without prejudice to any legal argument that any of the Parties to the Settlement Agreement might have asserted but for the Settlement Agreement.

Based on the Court's review of the unopposed Motion for Preliminary Approval of the Proposed Class Settlement and supporting materials, the Court conditionally finds that both the proposed Initial Class and the proposed Supplemental Class satisfy Rule 23 of the Federal Rules of Civil Procedure in that:

a. Both the Initial Class and the Supplemental Class consist of thousands of individuals. Consequently, both the Initial Class and the Supplemental Class are so numerous that joinder of all persons who fall within the Initial Class definition, and/or within the Supplemental Class definition, is impracticable;

b. The commonality requirement is satisfied where members of the Initial Class and the Supplemental Class share at least one common legal or factual issue. Here, there are questions of law and fact common to the Initial Class and the Supplemental Class, including but not limited to allegations related to one or more of the following:

- (i) whether Gogo's acts and practices of charging users of its in-flight Internet service on a recurring monthly basis after the user signed up for it monthly service constituted deceptive acts and practices;
- (ii) whether Gogo's acts and practices of charging users of its in-flight Internet service on a recurring monthly basis after the user signed up for monthly service breached the implied covenant of good faith and fair dealing;
- (iii) whether Gogo's actions at issue unjustly enriched Gogo; and
- (iv) whether Gogo properly disclosed that the monthly charges would be recurring for the Gogo in-flight Internet service.

c. The claims of the Class Representatives are typical of the claims of both the Initial Class and the Supplemental Class; and

d. The Class Representatives will fairly and adequately protect the interests of both the Initial Class and the Supplemental Class, and Class Counsel are both qualified and competent to represent both the Initial Class and the Supplemental Class.

The Court further conditionally finds that both the proposed Initial Class and the proposed Supplemental Class satisfy Rule 23(b)(3) of the Federal Rules of Civil Procedure, which requires that common issues predominate and that a class action is superior to other available methods for the fair and efficient resolution of this controversy. The Court notes that because the litigation is being settled, rather than litigated, the Court need not consider the manageability issues that litigation would present. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

5. **Fairness Hearing:** A Fairness Hearing shall take place before the undersigned, the Honorable Jack B. Weinstein, at 11:00 a.m. on April 5, 2016, to determine:

a. whether the Court should finally certify both the Initial Class and the Supplemental Class and whether the Class Representatives and Class Counsel have adequately represented both the Initial Class and the Supplemental Class;

b. whether the Court should finally approve the proposed Settlement, on the terms and conditions for which the Settlement Agreement provides, as fair, reasonable, and adequate;

c. whether the Court should dismiss the Released Claims of the Settlement Class Members in this action with prejudice;

d. whether the Court should approve the application that Class Counsel will

submit for attorneys' fees, costs, expenses, and incentive awards for the Class Representatives;  
and

e. such other matters as the Court may deem necessary or appropriate.

6. **Right to Appear and Object:** Any putative Settlement Class Member who has not timely and properly provided notice of an election to opt out of the Initial Class and the proposed Settlement, or to opt out of the Supplemental Class and the proposed Settlement, in the manner set forth below may appear at the Fairness Hearing in person or by counsel and be heard, to the extent the Court allows, either in support of, or in opposition to, the matters that the Court will consider at the Fairness Hearing, provided, however, that no putative Settlement Class Member who has elected to opt out from the Settlement shall be entitled to object, and provided further that no person shall be heard, and the Court shall not consider any papers, briefs, or other submissions in connection with its consideration of those matters, unless such person files the objection with the Court, with a copy delivered to Class Counsel and Gogo's Counsel at the addresses set out in the Notice, no later than March 4, 2016. Settlement Class Members may object either on their own or through an attorney hired at their own expense.

7. **Notice.** The Court hereby approves the Notices substantially in the form of Exhibits D and E to the Settlement Agreement. In particular, the Court approves the Parties' proposal that the Summary Notice, which directs Settlement Class Members to the easily accessible Long-Form Notice, be provided to all Settlement Class Members via email to the email address currently associated with each Settlement Class Member's Gogo account. The Court also finds that posting the Long-Form Notice on the Class Settlement Website constitutes appropriate and sufficient notice of the terms of the Long-Form Notice, since the Summary Notice directs the Settlement Class Members to the Class Settlement Website. The Court further

finds that the form and method of providing notice is the best practicable under the circumstances and, if carried out, shall constitute due and sufficient notice of the Settlement under Federal Rule of Civil Procedure 23 and the Due Process Clauses of the Fifth Amendment and the Fourteenth Amendment to the United States Constitution. The Court also approves the Claim form attached as Exhibit A to the Settlement Agreement.

The Court approves the Parties' joint selection of Analytics LLC to administer the notice program. As set forth in the Settlement Agreement, Gogo shall pay the cost of the Notice Plan. Further, as set forth in the Settlement Agreement, within 15 calendar days after entry of this Preliminary Approval Order, Gogo shall provide the Claims Administrator with the email address associated with each Settlement Class Member's Gogo account, and the Claims Administrator shall transmit the Summary Notice to each Settlement Class Member's email address that Gogo provided within 15 calendar days after receiving the aforesaid email addresses from Gogo.

8. **Ability of Class Members to Opt Out.** All putative Settlement Class Members who wish to opt out of the Initial Class or the Supplemental Class, as appropriate, must do so by sending a letter, postcard, or other written document requesting exclusion to the Claims Administrator as outlined in the Notice Plan, signed by the putative Settlement Class Member and providing all required information. To be considered timely and thereby effectively exclude a person from the Initial Class or the Supplemental Class, as appropriate, the Opt-Out/Exclusion Request must be postmarked on or before 60 days from the date that the Claims Administrator emails the Notice to the Settlement Class Members (the "Opt Out Deadline"). On or before 10 calendar days after the Opt Out Deadline, the Claims Administrator shall provide Gogo's Counsel and Class Counsel with a list of Settlement Class Members who have timely and validly

excluded themselves from the Initial Class or the Supplemental Class. The Parties will file with the Court a complete list of all Settlement Class Members who validly and timely excluded themselves from the Class.

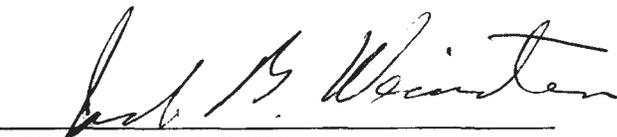
Any putative Settlement Class Member who does not properly and timely request exclusion from the Initial Class or the Supplemental Class, as appropriate, shall be included in the Initial Class or the Supplemental Class, as appropriate, and, if the Court approves the proposed Settlement and it becomes effective, they shall be bound by all the terms and provision of the Settlement Agreement, including but not limited to the releases, waivers, and covenants not to sue described therein, whether or not such person shall have objected to the Settlement.

9. **Appearance by Settlement Class Member.** Any Settlement Class Member may enter an appearance in the Action at his, her, or its own expense, individually or through counsel of his, her, or its own choice. Class Counsel will represent any Settlement Class Member who does not enter an appearance.

10. **Discovery and Other Litigation Activity.** All discovery and other litigation activity in this Action is hereby stayed pending a decision on Final Approval of the Settlement Agreement.

**IT IS SO ORDERED.**

Date: 12/4/15

  
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The Honorable Jack B. Weinstein  
UNITED STATES DISTRICT JUDGE