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4 IN THE UNITED STATES DISTRICT COURT
5 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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7 TINA WALTER, CHRISTOPHER BAYLESS,) Case No. 09-2136 SC
8 and ERIC SCHUMACHER, individually)
9 and on behalf of all others) ORDER DENYING PLAINTIFFS'
10 similarly situated,) MOTION FOR CLASS
11 Plaintiffs,) CERTIFICATION AND
12) PRELIMINARY APPROVAL OF
13) SETTLEMENT
14 v.)
15)
16 HUGHES COMMUNICATIONS, INC., and)
17 HUGHES NETWORK SYSTEMS, LLC,)
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19 Defendants.)
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16 **I. INTRODUCTION**
17 On February 3, 2011, the Court denied the Motion for
18 Preliminary Approval of Settlement and Conditional Class
19 Certification that was filed by Plaintiffs Tina Walter ("Walter"),
20 Christopher Bayless ("Bayless"), and Eric Schumacher ("Schumacher")
21 (collectively, "Named Plaintiffs" or "Plaintiffs") and joined by
22 Defendants Hughes Communications, Inc. and Hughes Network Systems,
23 LLC (collectively, "Hughes"). ECF Nos. 60 ("Motion"), 69 ("Feb. 3,
24 2011 Order"). Plaintiffs have since renoticed their motion and
25 Plaintiffs and Hughes have filed additional briefs in support of
26 it. ECF Nos. 72 ("Pls.' Supp. Br."), 73 ("Defs.' Joinder"). The
27 Court has reviewed the documents submitted, and for the following
28 reasons, it DENIES the Motion.

1 **II. BACKGROUND**

2 **A. Factual Background**

3 Hughes is a satellite broadband Internet technology and
4 service provider ("ISP") that sells Internet access via satellite
5 to consumers in rural areas where Internet service is not available
6 through digital subscriber lines ("DSL") or cable. ECF No. 44
7 ("SAC") ¶ 2. Hughes advertises a variety of service plans which
8 offer different download and upload speeds at different prices:

9 For example, HughesNet offers the following
10 "Home" plans: The Home Plan, for a monthly fee
11 of \$59.99, is advertised with download speeds
12 at 1.0 Mbps; the Pro Plan, for a monthly fee of
13 \$69.99, is advertised with download speeds at
14 1.2 Mbps; the ProPlus Plan, for a monthly fee
15 of \$79.99, is advertised with download speeds
16 at 1.6 Mbps; the Elite Plan, for a monthly fee
17 of \$119.99, is advertised with download speeds
18 at 2.0 Mbps; the ElitePlus Plan, for a monthly
19 fee of \$189.99, is advertised with download
20 speeds at 3.0 Mbps; and the ElitePlus Plan, for
21 a monthly fee of \$349.99, is advertised with
22 download speeds at 5.0 Mbps.

23 Id. ¶ 27. Regardless of the plan selected, Hughes requires a two-
24 year commitment from its subscribers; those who cancel their
25 service are obligated to pay an early termination fee ("ETF"). Id.

26 ¶ 52. Until September 1, 2008, Hughes charged a \$300 ETF;
27 subscriptions activated after September 1, 2008 were subject to a
28 \$400 ETF. Id. ¶ 28.

29 Hughes also maintains what it calls a "Fair Access Policy"
30 ("FAP"). Under the FAP, Hughes caps the amount of data its
31 subscribers may download in a day. Id. ¶ 46. Hughes advertises
32 that "[a] small percentage of subscribers who exceed this limit
33 will experience a temporary reduction of speed." Id. This
34 reduction in download speed continues for approximately twenty-four

1 hours, and serves to discourage subscribers from bandwidth-
2 intensive Internet activity. Id. ¶ 47.

3 In this action, Plaintiffs claim to be current and former
4 subscribers and allege that Hughes falsely advertised Internet
5 service speeds; oversold and/or capped the speed of its Internet
6 service; failed to properly disclose its policy of limiting the
7 amount of data users can upload or download; and imposed a \$400
8 early cancellation fee that was "unconscionable and unenforceable
9 under California law." See id. ¶¶ 2, 26-55.

10 Plaintiff Bayless claims that as a Hughes subscriber, he
11 frequently experienced slow Internet service and had difficulty
12 connecting to the Internet numerous times. Id. ¶ 60. Bayless
13 alleges that even after upgrading to Hughes's ElitePlus Internet
14 service, his Internet speed was "approximately half" of the
15 advertised speed. Id. ¶ 61. Bayless claims that when he cancelled
16 his subscription in November 2008, he paid a \$300 early termination
17 fee. Id. ¶ 62.

18 Plaintiff Schumacher claims that he upgraded his Hughes
19 Internet subscription to the Pro plan due to Hughes's advertising
20 of a maximum speed of "up to 1.2 Mbps" and "typical speeds about
21 700 Kbps to 800 Kbps during peak times." Id. ¶ 66. Schumacher
22 alleges that the average speed of his Internet service during both
23 peak and non-peak times was "651 Kbps, approximately half of the
24 advertised speed." Id. ¶ 68. Schumacher then upgraded to Hughes's
25 Small Office plan, which he claims also did not perform at
26 advertised speeds. Id. ¶¶ 69-71. Schumacher terminated his
27 subscription in or around January 2009. Id. ¶ 71.

28 Walter subscribed to Hughes's Home plan. Walter alleges that

1 she experienced "significantly slow, and at times non-existent,
2 upload and download speeds," which she attributes to both "the
3 speed of the service" and "because the FAP was implemented more
4 stringently than the disclosures to her had represented." Id. ¶
5 73.

6 Plaintiffs initially sought to represent a class of "all
7 citizens of the State of California who are or were subscribers to
8 HughesNet's satellite broadband and Internet equipment services
9 during the four years preceding the filing of the complaint" and a
10 subclass of "all citizens of the State of California who are
11 consumers under Civil Code section 1761(d) and are or were
12 subscribers of HughesNet's satellite broadband and internet
13 equipment services during the three years preceding the filing of
14 the complaint." Id. ¶¶ 13-14. In the Third Amended Complaint
15 filed with the Motion, Plaintiffs seek to expand this class to all
16 Hughes subscribers throughout the United States. ECF No. 63
17 ("TAC").

18 **B. Procedural Background**

19 Walter and Bayless filed their initial complaint on May 15,
20 2009. ECF No. 1 ("Initial Compl."). Schumacher filed a complaint
21 against Hughes with similar claims in California state court on
22 June 9, 2009; this action was subsequently removed to federal court
23 and consolidated with the earlier-filed action. ECF No. 17. The
24 parties stipulated to multiple extensions of Hughes's deadline to
25 respond to the complaint. ECF Nos. 5, 13. On September 3, 2009,
26 Plaintiffs amended their complaint. See ECF No. 18 ("FAC"). On
27 October 5, 2009, Hughes moved to dismiss the FAC. ECF No. 20. On
28 January 26, 2010, the Court granted in part and denied in part

1 Hughes's motion to dismiss, dismissing two claims with prejudice
2 and two claims without prejudice, and granting Plaintiffs leave to
3 amend their complaint. ECF No. 40. On February 26, 2010,
4 Plaintiffs filed their Second Amended Complaint. See SAC. On
5 March 18, 2010, Hughes filed a second motion to dismiss. ECF No.
6 45. Shortly thereafter, the parties began mediation and Hughes
7 withdrew its motion to dismiss. ECF No. 55. On January 7, 2011,
8 after several additional continuances, Plaintiffs filed an
9 unopposed motion for preliminary approval of a class action
10 settlement. ECF No 60.

11 Plaintiffs concurrently filed their Third Amended Complaint.
12 In it, Plaintiffs bring four causes of action: (1) violation of
13 California's Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code
14 §§ 1750, et seq., as well as "similar applicable consumer
15 protection law of other states", TAC ¶¶ 73-84; (2) violation of
16 California's Unfair Competition Law ("UCL"), Cal. Civ. Code §
17 17200, as well as "similar applicable unfair competition law of
18 other states"; TAC ¶¶ 85-98; (3) negligent misrepresentation, id.
19 ¶¶ 99-109; and (4) intentional misrepresentation and omission, id.
20 ¶¶ 110-119. Whereas in the first three complaints, Plaintiffs
21 sought to represent a class of Hughes's California customers,
22 Plaintiffs now seek to represent "[a]ll residents of the United
23 States of America who are or were subscribers to Hughes' satellite
24 broadband and internet equipment services during the four years
25 preceding the filing of the original complaint" and a subclass of
26 "[a]ll residents of the United States of America who are consumers
27 under Civil Code section 1761(d) and are or were subscribers of
28 Hughes' satellite broadband and internet equipment services during

1 the three years preceding the original filing of the complaint."
2 Id. ¶¶ 13-14.

3 The Court denied the Motion, finding that the papers submitted
4 failed to provide basic information about the proposed class. See
5 Feb. 3, 2011 Order. The Court granted the parties leave to renew
6 their motion and advised the parties include to information such as
7 estimates of the size of the class, the total gross amount to be
8 recovered, and the cost of administration and notice. Id. The
9 Court also ordered briefing and evidence supporting "Plaintiffs'
10 threadbare assertion that the requirements of Federal Rules 23(a)
11 and (b)(3) are satisfied," and ordered additional briefing on the
12 proposed form of notice to the class. Id.

13 The parties have since renewed their motion for preliminary
14 approval of the settlement. The terms of the settlement have not
15 changed, but the parties have revised the notice documents in
16 response to the Court's February 3, 2011 Order. See Rosenberg
17 Supp. Decl. Ex. 1 ("Settlement"), id. Ex. A ("Claim Form"); Ezrin
18 Decl. Exs. D ("Long Form"), E ("Postcard"), F ("Summary Notice").¹
19 Plaintiffs also submit firm resumes of Plaintiffs' three counsel,
20 Bramson, Plutzik, Mahler & Birkhaeuser LLP ("Bramson Plutzik"),
21 Audet & Partners LLP ("Audet"), and Pogust, Braslow & Millrood, LLC
22 ("Pogust") as evidence that they are adequate class counsel. Ezrin
23 Decl. Exs. A, B, C.

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26 ¹ Jennifer Rosenberg ("Rosenberg"), counsel for Plaintiffs filed a
27 declaration in support of the Motion, ECF No. 61, which she later
28 corrected in a supplemental declaration, ECF No. 66. Joshua C.
Ezrin ("Ezrin"), counsel for Plaintiffs, filed a declaration in
support of the Settlement, which Plaintiffs attached to their
Supplemental Brief.

1 **C. The Proposed Settlement**

2 1. Class Structure

3 Under the settlement, the class that would be certified and
4 subject to the settlement's release of liability is defined as:

5 All persons and entities residing in the United
6 States of America who, during any time between
7 May 15, 2005 and the Preliminary Approval Date,
8 were subscribers to any of the Hughes' Consumer
9 Service Plans.

10 Excluded from this definition are Hughes
11 Communications, Inc. and Hughes Network
12 Systems, LLC, and their respective
13 subsidiaries, affiliates, dealers, employees,
14 directors, and the legal representatives,
15 heirs, successors and assigns of the
16 individuals and entities previously referenced
17 in this sentence, and any government entities.

18 Settlement § 1.27.

19 2. Injunctive Relief

20 Under the proposed settlement, Hughes would alter its practice
21 of charging a \$400 flat ETF and instead pro-rate its ETF such that
22 it would vary between \$85 and \$400 depending on the number of
23 months left on the subscriber's 24-month contract. Pls.' Supp. Br.
24 at 6. Hughes would be required to maintain this rate schedule for
25 at least "18 months after the effectiveness of the new schedule,"
26 and not return to a flat ETF for a period of three years. Id.
27 Plaintiffs provide a chart which they claim shows that the
28 "estimated minimum value of the changes to the ETF policy is
approximately \$4,472,662." Id. at 7.

Hughes would alter its FAP to provide subscribers with what it
calls "FAP Tokens." Id. These "tokens" would allow subscribers to
reset their download allowances once per month if they reached
their maximum download allowance under the FAP for that month. Id.

1 Plaintiffs estimate the value of this portion of the injunctive
2 relief at \$10,099,388. Id. at 8.

3 Hughes would also alter its advertising such that "[w]hen
4 advertising upload or download speeds measured in MBPS or KBPS for
5 its consumer plans, Hughes will include a disclosure in reasonable
6 proximity to the advertised speeds that states that advertised
7 upload and download speeds are not guaranteed and may be slower
8 than the maximum advertised speeds, particularly during peak
9 times." Id. at 7. The parties do not attempt to estimate the
10 value of this relief to the class.

11 Plaintiffs estimate that the injunctive relief contemplated
12 under the settlement will confer a total benefit of roughly \$14
13 million on the class.

14 3. Economic Relief

15 Under the proposed settlement, former subscribers who paid an
16 ETF prior to December 6, 2010 would receive a \$40 cash payment, and
17 former subscribers who did not pay an ETF would receive a \$5 cash
18 payment. Settlement § 2.6. Current subscribers as of the date of
19 preliminary approval would receive no cash compensation.

20 Receipt of the cash payment would be conditioned on each class
21 member's submission of a valid and timely claim form in which he or
22 she affirm the above facts, as well as the fact that he or she
23 returned "all equipment leased from or provided by Hughes" within
24 ninety days of cancelling his or her Hughes service. Id.; see
25 Claim Form. Plaintiffs estimate that approximately 73,837 of the
26 class members paid an ETF during the class period and would
27 therefore be potentially eligible for the \$40 cash payment. Pls.'
28 Supp. Br. at 9. Plaintiffs estimate that approximately 465,706

1 former subscribers did not pay an ETF and would therefore be
2 eligible for the \$5 cash payment. Id. Plaintiffs multiply the
3 size of the cash payments by the number of class members eligible
4 to receive them to calculate "the total amount of cash compensation
5 available to the Class under the Settlement" at approximately
6 \$5,282,010. Id.

7 4. Fee Awards

8 Hughes agrees to pay Plaintiffs' counsel up to \$980,000 in
9 attorney fees and expenses once the settlement becomes final,
10 subject to Court approval. Settlement § 2.9. This fee amount is
11 in addition to the relief Hughes will provide to the settlement
12 class -- it would not be paid out of a common fund. Id. The
13 parties also intend to seek a cash payment of \$5,000 to compensate
14 each of the three Named Plaintiffs. Id. § 2.11.

15 5. Notice

16 The parties propose providing notice of the settlement to the
17 class via a Postcard sent via direct mail, a Long Form sent via e-
18 mail, and a Summary Notice published in USA Today. Id. § 3.2. The
19 parties agree that a "professional claims administrator" will
20 administer the claims resolution process, issuing class notice and
21 claim forms, determining and issuing settlement payments, and
22 responding to class member inquiries. Id. §§ 2.7, 3.2. Hughes
23 would pay all costs of notice. Id. § 2.9.

24 The Postcard would be sent via First Class U.S. Mail to each
25 class member for whom Hughes has a valid mailing address. Pls.'
26 Supp. Br. at 10. Plaintiffs allege that "because installation of
27 Hughes equipment requires a physical address, Hughes customer
28 account records necessarily include a mailing address for 100% of

1 the approximately 1.1 million class members," id. at 10, and that
2 Hughes has already determined that two percent of these addresses
3 are no longer valid "e.g., based on a returned mailing." Mathur
4 Decl. ¶ 3.² Hughes admits that in addition to this two percent, "a
5 certain percentage" of class members "will have moved their
6 residences since providing an address to Hughes." Id. Hughes does
7 not attempt to estimate this "certain percentage," but they propose
8 updating their address list using the National Change of Address
9 System ("NCOA"). Pls.' Supp. Br. at 10. The parties do not
10 attempt to determine a "reach calculation" -- that is, an estimate
11 of the number of class members to receive notice -- for notice via
12 the Postcard.

13 The Postcard states: "you may be entitled to cash or non-cash
14 benefits." See Postcard. It provides no information on the size
15 of the cash awards available under the settlement. It also states
16 that "any legal claim you may have against Hughes related to this
17 lawsuit will be settled" if the class member does not exclude him
18 or herself and if the Court approves the settlement. Id. It
19 directs the recipient to a yet-unidentified Web site to read the
20 Long Form and access the Claim Form. Id.

21 The Long Form would be sent via e-mail and would also be
22 available on the settlement Web site. Hughes claims to have e-mail
23 addresses for approximately 79 percent of the class members, but
24 concedes that only approximately 40 percent of these addresses are
25 still valid. Marthur Decl. ¶ 4. As such, by Hughes's estimates,
26 Hughes only has valid and current e-mail addresses for 31 percent

27 _____
28 ² Alok Mathur ("Mathur"), director of business processes for
Hughes, filed a declaration in support of the settlement, which
Plaintiffs attached to their Supplemental Brief.

1 of the class.

2 The Summary Notice would be published as a one-eighth-page
3 advertisement in USA Today on two consecutive days. Pls.' Supp.
4 Br. at 11. It is a simple text-only advertisement, and it provides
5 basic information about the proposed settlement.

6 The parties estimate that the cost of the above-mentioned
7 forms of notice will be \$365,300; the parties estimate the
8 administration costs for administering the settlement to "range
9 from approximately \$69,000 to \$84,000," depending on how many
10 claims are submitted. Id.

11 6. Releases of Liability

12 Under the settlement, all of the class members who do not
13 affirmatively opt out of the class by providing the claims
14 administrator with timely notice of intention to opt out would be
15 subject to the following release of liability:

16 [The class members] [s]hall release and forever
17 discharge, and shall be forever barred from
18 instituting, maintaining or prosecuting against
19 any or all of the Released Persons, any and all
20 claims, liens, demands, actions, causes of
21 action, obligations, damages or liabilities of
22 any nature whatsoever, whether legal, equitable
23 or otherwise, arising from or relating to the
24 subject matter of this Litigation, including,
25 without limitation, the charging of ETFs, the
26 HughesNet Fair Access Policy, the actual or
27 advertised download, upload or other internet
28 speeds, any advertising or other public
statement relating to the foregoing and/or any
other matter alleged in the Complaint
(collectively, the "Claims"), insofar as such
Claims were asserted or could have been
asserted in this Litigation or in any other
lawsuit or arbitration proceeding in any venue
or forum on or before the date of the Final
Order Date, or based on Hughes implementation
of this Settlement Agreement in accordance with
its terms.

1 Settlement § 4.1. The class would also waive any claims not known
2 at the time of the release under California Civil Code § 1542. Id.

3
4 **III. LEGAL STANDARD**

5 No class action may be settled without court approval. Fed.
6 R. Civ. P. 23(e). When the parties to a putative class action
7 reach a settlement agreement prior to class certification, "courts
8 must peruse the proposed compromise to ratify both the propriety of
9 the certification and the fairness of the settlement." Staton v.
10 Boeing Co., 327 F.3d 938, 952 (9th Cir. 2003). First, the Court
11 must assess whether a class exists. Id. (citing Amchem Prods. Inc.
12 v. Windsor, 521 U.S. 591, 620 (1997)). Second, the court must
13 determine whether the proposed settlement "is fundamentally fair,
14 adequate, and reasonable." Hanlon v. Chrysler Corp., 150 F.3d
15 1011, 1026 (9th Cir. 1998).

16
17 **IV. DISCUSSION**

18 **A. Class Certification**

19 Federal Rule of Civil Procedure 23(a) provides four
20 requirements for class certification: (1) numerosity ("the class is
21 so numerous that joinder of all members is impracticable"); (2)
22 commonality ("there are questions of law or fact common to the
23 class"); (3) typicality ("the claims or defenses of the
24 representative parties are typical of the claims or defenses of the
25 class"); and (4) adequacy of representation ("the representative
26 parties will fairly and adequately protect the interests of the
27 class"). Fed. R. Civ. P. 23(a)(1)-(4). In addition, the court
28 must also find that the requirements of Rule 23(b)(1), (b)(2), or

1 (b)(3) are satisfied. Wal-Mart Stores, Inc. v. Dukes, ___ U.S. ___,
2 2011 WL 2437013, at *5 (2011). Rule 23(b)(3) requires a finding by
3 the court "that questions of law or fact common to class members
4 predominate over any questions affecting only individual members,
5 and that a class action is superior to other available methods for
6 fairly and efficiently adjudicating the controversy." Fed. R. Civ.
7 P. 23(b)(3). Courts refer to the requirements of Rule 23(b)(3) as
8 its "predominance" and "superiority" requirements. Amchem Prods.,
9 Inc. v. Windsor, 521 U.S. 591, 615 (1997).

10 More than a pleading standard, Rule 23 requires the party
11 seeking class certification to "affirmatively demonstrate . . .
12 compliance with the rule -- that is, he must be prepared to prove
13 that there are in fact sufficiently numerous parties, common
14 questions of law or fact, etc." Wal-Mart, 2011 WL 2437013, at *10
15 (emphasis in original). This requires a "rigorous analysis" which
16 frequently "will entail some overlap with the merits of the
17 plaintiff's underlying claim." Id.

18 Plaintiffs no longer seek certification of a class and a
19 subclass -- they seek certification of a single class of "[a]ll
20 persons and entities residing in the United States of America who,
21 during any time between May 15, 2005 and the Preliminary Approval
22 Date, were subscribers to any of the Hughes' Consumer Service
23 Plans." Settlement § 1.27.

24 1. Numerosity

25 Rule 23(a)(1) provides that a class action may be maintained
26 only if "the class is so numerous that joinder of all parties is
27 impracticable." Fed. R. Civ. P. 23(a)(1). However,
28 "impracticable" does not mean impossible; it refers only to the

1 difficulty or inconvenience of joining all members of the class.
2 Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909, 913-14
3 (9th Cir. 1964).

4 Plaintiffs allege that the class consists of approximately 1.1
5 million individuals. Pls.' Supp. Br. at 12. In support of this
6 estimate, they attach the declaration of Michael J. Bass ("Bass"),
7 a senior systems analyst for Hughes.³ Bass declares that he
8 reviewed Hughes's subscription data and alleges that it shows that
9 there were 200,875 Hughes subscribers in May 2005, and that 885,719
10 new subscribers have joined in the intervening period. Id. ¶ 3.
11 Bass declares that because approximately 539,543 of this total
12 class are no longer Hughes customers, Hughes has roughly 549,051
13 current subscribers. Id. Bass also states that as of December 31,
14 2010, a total of 73,837 former subscribers were charged ETFs, and
15 he estimates that the "vast majority" of these subscribers were
16 charged prior to December 6, 2010. Id. ¶ 6.

17 In light of the above, the Court finds the numerosity
18 requirement to be satisfied.

19 2. Commonality

20 Rule 23(a)(2) requires that there be "questions of law or fact
21 common to the class." Fed. R. Civ. P. 23(a)(2). Wal-Mart, decided
22 after the parties filed their papers in support of settlement,
23 represents a significant restatement of the commonality
24 requirement. "Commonality requires the plaintiff to demonstrate
25 that the class members 'have suffered the same injury.'" Wal-Mart,
26 2011 WL 2437013, at *9 (quoting Gen. Tel. Co. of the Southwest v.
27 Falcon, 457 U.S. 147, 157 (1982)). The class members' "claims must

28 ³ ECF No. 72-1.

1 depend on a common contention," and that common contention must be
2 "of such a nature that it is capable of classwide resolution --
3 which means that determination of its truth or falsity will resolve
4 an issue that is central to the validity of each one of the claims
5 in one stroke." Id.

6 Plaintiffs offer a list of nine "common questions" as proof
7 that the commonality requirement is satisfied:

8 (a) Whether Hughes was unjustly enriched by
9 unfairly charging flat rate early termination
10 fees without taking into consideration its
actual damages. (See Third Amended Complaint
(TAC at ¶ 17(h));

11 (b) Whether Hughes was unjustly enriched in
12 selling Plaintiffs and the Settlement Class
defective broadband and satellite service (TAC
at ¶ 17(i));

13 (c) Whether Hughes falsely advertised to
14 Settlement Class members by marketing and
15 advertising its services as reliable,
consistent high speed broadband satellite
16 service (TAC at ¶ 17(a));

17 (d) Whether Hughes, through false advertising
18 and otherwise, misrepresented to Settlement
Class members the maximum upload and download
19 speeds of its various Hughes service plans (TAC
at ¶ 17(b));

20 (e) Whether Hughes, through false advertising
21 and otherwise, misrepresented to Settlement
Class members the volume of data that can be
22 downloaded continuously through its Hughes
service plans (TAC at ¶ 17(c));

23 (f) Whether Hughes, through false advertising
24 and otherwise, misrepresented to Settlement
Class members the maximum upload and download
25 capability of its Hughes satellite and
broadband service subscriber equipment and
hardware (TAC at ¶ 17(d));

26 (g) Whether Hughes oversold its bandwidth,
27 thereby adversely affecting Settlement Class
members' satellite broadband service;

28

1 (h) Whether Hughes fraudulently induced
2 Settlement Class members to upgrade their
3 service and incur additional fees by
4 misrepresenting the benefits of upgrading in
5 terms of speed, accessibility, functionality
6 and connectivity of its Hughes broadband
7 satellite services (TAC at ¶ 17(g)); and

8 (i) Whether Hughes unfairly imposed early
9 termination fees upon Settlement
10 Class members (TAC at ¶ 17(h)).

11 Pls.' Supp. Br. at 13.

12 Plaintiffs do not attempt to explain how these questions are
13 common to any of the four claims pleaded in their TAC. This
14 failure is troubling, given Plaintiffs' eleventh-hour attempt to
15 certify a nationwide class. Plaintiffs bring four state-law causes
16 of action and no federal causes of action. Plaintiffs do not argue
17 that California law would apply to the claims of class members
18 outside of California; nor do they attempt to argue that a cause of
19 action would be supported by the law of other states. Whereas
20 Plaintiffs' first cause of action was formerly violation of
21 California's Consumer Legal Remedies Act, now Plaintiffs claim
22 violation of "[t]he Consumer Legal Remedies Act and similar
23 applicable consumer protection law of other states." TAC ¶ 74
24 (emphasis added). Because Plaintiffs have not even identified the
25 law to be applied in this action, the Court cannot find that there
26 are questions of law or fact common to the class. Accordingly, the
27 Court finds the commonality requirement to be unsatisfied.

28 3. Typicality

Rule 23(a)(3) requires that the representative parties' claims
be "typical of the claims . . . of the class." Fed. R. Civ. P.
23(a)(3). "Under the rule's permissive standards, representative
claims are 'typical' if they are reasonably co-extensive with those

1 of absent class members; they need not be substantially identical."
2 Hanlon, 150 F.3d at 1020. Rule 23 "does not require the named
3 plaintiffs to be identically situated with all other class members.
4 It is enough if their situations share a common issue of law or
5 fact and are sufficiently parallel to insure a vigorous and full
6 presentation of all claims for relief." Cal. Rural Legal Assist.,
7 Inc. v. Legal Servs. Corp., 917 F.2d 1171, 1175 (9th Cir. 1990).
8 In practice, "[t]he commonality and typicality requirements of Rule
9 23(a) tend to merge." Falcon, 457 U.S. at 157 n.13.

10 Plaintiffs argue that the named Plaintiffs "have precisely
11 the same claims as the Settlement Class," and allege that each
12 Plaintiff "truly represents a sector of the claims being addressed
13 by the settlement." Pls.' Supp. Br. at 14. Walter claims to have
14 "experienced numerous service disruptions due to reaching her
15 download threshold;" Bayless "terminated his service due to
16 dissatisfaction with speed and service and paid an ETF;" and
17 Schumacher "terminated his service but did not pay an ETF." Id. at
18 14-15.

19 As with the commonality requirement, the Court finds the
20 typicality requirement unsatisfied. It is true that the injuries
21 claimed by the three named Plaintiffs mirror the injuries alleged
22 to have been experienced by the class as a whole -- they are caused
23 by Hughes's allegedly unfair or illegal FAP and ETF and misleading
24 advertising of Internet speed. But while Plaintiffs draw parallels
25 between the alleged injuries to named Plaintiffs and the class as a
26 whole, they fail to draw parallels between named Plaintiffs' legal
27 claims and the legal claims of the class as a whole. Named
28 Plaintiffs are California residents, and it appears that California

1 law would apply to their claims. Plaintiffs do not argue that
2 California law would apply to the claims of non-California resident
3 class members. As such, the Court finds this requirement
4 unsatisfied.

5 4. Adequacy of Representation

6 Rule 23(a)(4) requires a showing that "the representative
7 parties will fairly and adequately protect the interests of the
8 class." Fed. R. Civ. P. 23(a)(4). This factor requires: (1) that
9 Plaintiffs are represented by qualified and competent counsel and
10 (2) that the proposed representative Plaintiffs do not have
11 conflicts of interest with the proposed class. Hanlon, 150 F.3d at
12 1020, 603 F.3d at 614.

13 Plaintiffs allege that "Plaintiffs and putative class members
14 are represented by extremely qualified counsel with extensive
15 collective experience prosecuting complex consumer class actions
16 cases of this nature." Pls.' Supp. Br. at 16. The Court has
17 reviewed the curriculum vitae submitted and sees no issue with the
18 qualification and experience of Plaintiffs' counsel. However, the
19 Court finds that Plaintiffs' counsel's work on this Motion speaks
20 volumes, and the Court is not convinced by this work that
21 Plaintiffs' counsel would adequately represent the class.

22 As to the second requirement, Plaintiffs state that their
23 claims are co-extensive with the settlement because

24 (1) Plaintiffs and each Settlement Class Member
25 have been injured in the same manner by Hughes
26 by being forced to comply with an unlawful ETF
27 policy and for entering into their respective
28 service contracts on the basis of false
information regarding the speeds of service
obtainable under each respective internet
service plan, (2) Plaintiffs and each
Settlement Class Member have an identical

1 interest in establishing Hughes' liability for
2 imposing an unlawful ETF and falsely
3 advertising the speeds of service available
4 under each respective internet service plan,
5 (3) Plaintiffs assert the same legal claims and
6 theories as would all other Settlement Class
7 Members under the factual and legal theories
8 enumerated above, and (4) Plaintiffs seek the
9 identical relief that would be sought by all
10 members of the Settlement Class.

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Pls.' Supp. Br. at 16.

Plaintiffs' argument is flawed. Plaintiffs' contention that the named Plaintiffs "assert the same legal claims and theories as would all Settlement Class Members" is not true given that class members outside California would likely bring claims under the laws of their states. It is possible that the remedies provided under the laws of the fifty states are so similar as to render the Named Plaintiffs adequate class representatives, but Plaintiffs have not argued this in their papers.

5. Predominance and Superiority

Rule 23(b)(3) requires the court to find that "the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). While evaluation of Rule 23's predominance requirement on a settlement motion does not require an analysis of potential trial management problems, "other specifications of the Rule -- those designed to protect absentees by blocking unwarranted or overbroad class definitions -- demand undiluted, even heightened, attention in the settlement context." Amchem, 521 U.S. at 20. The terms of a proposed settlement are "relevant to a class certification." Id. Rule 23(b)(3) also requires that the class action be "superior to other available methods for fairly and

1 efficiently adjudicating the controversy." Fed. R. Civ. P.
2 23(b)(3). The factors relevant to assessing superiority include:
3 (A) the class members' interests in
4 individually controlling the prosecution or
5 defense of separate actions; (B) the extent and
6 nature of any litigation concerning the
7 controversy already begun by or against class
8 members; (C) the desirability or undesirability
9 of concentrating the litigation of the claims
10 in the particular forum; and (D) the likely
11 difficulties in managing a class action.

12 Fed. R. Civ. P. 23(b)(3).

13 Plaintiffs identify eight legal questions which they claim
14 predominate, such as "Whether HughesNet's conduct violates the
15 unfair competition law, such as California Business and Professions
16 Code § 17200 et seq. and similar laws of other states." Pls.'
17 Supp. Br. at 19. As the Court noted above, Plaintiffs have not
18 satisfied the commonality requirement, and because they have not
19 identified a single common question of law or fact, the Court
20 cannot find that common questions predominate.

21 Plaintiffs state that the superiority requirement is satisfied
22 because "this case involves multiple claims for relatively small
23 sums," making class treatment superior to "alternative methods."
24 Pls.' Supp. Br. at 20. While it is true that the settlement
25 contemplates awards of \$5 and \$40 to class members who return a
26 claim form, the named Plaintiffs seek \$5,000, a considerably higher
27 amount. If this \$5,000 figure represents a potential recovery at
28 trial, then the class's claims may be large enough to justify
individual actions.

For these reasons, the Court finds that Plaintiffs have failed
to satisfy Rule 23's requirements. The Court notes that all of the
flaws it has identified are curable through amended pleadings or

1 alteration of the terms of the settlement, and so it grants parties
2 leave to file an amended motion for settlement. In the interest of
3 judicial economy, it also evaluates the fairness of the settlement
4 and the adequacy of the proposed notice.

5 **B. Fairness of the Settlement**

6 The Ninth Circuit has warned that "there are real dangers in
7 the negotiation of class action settlements of compromising the
8 interests of class members," because "[i]ncentives inherent in
9 class-action settlements" can "result in a decree in which the
10 rights of [class members, including the named plaintiffs] may not
11 [be] given due regard by the negotiating parties." Staton, 327
12 F.3d at 959 (internal quotation marks omitted). These incentives
13 stem from the fact that "[t]he class members are not at the table;
14 class counsel and counsel for the defendants are." Id. This can
15 "influence the result of the negotiations without any explicit
16 expression or secret cabals," and is why "district court review of
17 class action settlements includes not only consideration of whether
18 there was actual fraud, overreaching or collusion but, as well,
19 substantive consideration of whether the terms of the decree are
20 'fair, reasonable and adequate to all concerned.'" Id. at 950
21 (citing Officers for Justice v. Civ. Serv. Comm'n of San Francisco,
22 688 F.2d 615, 625 (9th Cir. 1982)). Due in part to these dangers
23 of "collusion between class counsel and the defendant," the Ninth
24 Circuit has adopted the rule of other circuits that "settlement
25 approval that takes place prior to formal class certification
26 requires a higher standard of fairness," leading to "a more probing
27 inquiry than may normally be required under Rule 23(e)." Hanlon,
28 150 F.3d at 1026.

1 Not all proposed class action settlements require the same
2 level of court scrutiny -- if the class had the opportunity to
3 participate in settlement negotiations, the Court need not assume
4 the role of class advocate. Similarly, a settlement that is
5 structured such that the interests of the class are tied to the
6 interests of the named plaintiffs, their counsel, or the defendant
7 demands less scrutiny. For example, a settlement that ties the
8 size of the class counsel's attorney fee award to the number of
9 claim forms submitted or the amount disbursed to the class gives
10 class counsel motivation to ensure that notice to the class is as
11 effective as possible. Similarly, because a defendant benefits
12 from the largest possible release of liability, a settlement in
13 which only class members who submit a claim form release their
14 claims against a defendant aligns the interests of the defendant
15 and the class members.

16 No such alignments are present here: all parties present
17 during negotiation of the settlement stand to benefit regardless of
18 whether the class members receive a benefit. The three Named
19 Plaintiffs would receive up to \$5,000 in incentive payments,
20 subject to Court approval, regardless of the size of the award to
21 the class. The settlement contemplates \$980,000 in attorneys' fees
22 paid to Plaintiffs' counsel; this proposed award is not tied to the
23 total amount recovered by the class. And Hughes would receive a
24 considerable benefit -- a release of every related claim that could
25 be brought by its 1.1 million subscriber base -- even if no claim
26 forms were submitted and no funds were distributed to the class.
27 As such, the parties have designed a settlement containing no
28 structural protections of the interests of the class as a whole.

1 Hence, the parties force the Court into the role of class
2 advocate.

3 1. Substantive Issues

4 Under the settlement, around 40 percent of the class -- former
5 subscribers who did not pay an ETF -- would be eligible to receive
6 a \$5 cash payment. Around seven percent of the class -- former
7 subscribers who did pay an ETF -- would be eligible to receive the
8 \$40 cash payment. The remaining class members -- Hughes's current
9 subscriber base -- would receive no benefit except the proposed
10 injunctive relief. Obviously, Hughes's former subscribers would
11 derive no benefit from the proposed injunctive relief.

12 In exchange for this relief, every class member who does not
13 affirmatively opt out of the settlement would be subject to the
14 settlement's release of liability:

15 [Class members] [s]hall release and forever
16 discharge, and shall be forever barred from
17 instituting, maintaining or prosecuting against
18 any or all of the Released Persons, any and all
19 claims, liens, demands, actions, causes of
20 action, obligations, damages or liabilities of
21 any nature whatsoever, whether legal, equitable
22 or otherwise, arising from or relating to the
23 subject matter of this Litigation, including,
24 without limitation, the charging of ETFs, the
25 HughesNet Fair Access Policy, the actual or
26 advertised download, upload or other internet
speeds, any advertising or other public
statement relating to the foregoing and/or any
other matter alleged in the Complaint
(collectively, the "Claims"), insofar as such
Claims were asserted or could have been
asserted in this Litigation or in any other
lawsuit or arbitration proceeding in any venue
or forum on or before the date of the Final
Order Date, or based on Hughes implementation
of this Settlement Agreement in accordance with
its terms.

27 Settlement § 4.1. The Long Form summarizes this release as one
28 freeing Hughes and affiliated persons "from all claims of liability

1 that were asserted or that could have been asserted in the lawsuit,
2 or in other legal proceedings or forums, arising from or relating
3 to the subject matter of the lawsuit." Long Form at 5. The
4 Postcard summarizes this release as one of "claims related to the
5 matters alleged in the lawsuit that you may have against Hughes and
6 others." See Postcard.

7 This release is obtusely written. Notice of the terms of the
8 settlement must be provided to the class "in plain, easily
9 understood language." Fed. R. Civ. P 23(c)(2)(B). If one accepts
10 the accuracy of the Long Form's summary of the release, all claims
11 relating to Hughes's charging of ETFs, its FAP, its advertising,
12 and the speed of its service would be released. This is a
13 particularly broad release, and while it does not render the
14 settlement unfair, its breadth should be considered in evaluating
15 the fairness of the settlement.

16 The amount to be paid to the class is, of course, an important
17 factor in determining the fairness of a settlement. The Court
18 instructed the parties to estimate the "total gross amount to be
19 recovered by the class, supported by appropriate evidence." Feb.
20 3, 2011 Order. Instead of doing this, Plaintiffs provide "the
21 total amount of cash compensation available to the Class under the
22 Settlement," (emphasis added) which they estimate to be
23 approximately \$5,282,010. This represents the total amount Hughes
24 would pay if every single class member who was eligible to receive
25 a cash benefit received notice of the settlement and submitted a
26 timely and valid claim form.

27 Plaintiffs' offer of the total compensation available in lieu
28 of total compensation paid is disingenuous. Plaintiffs' counsel

1 claim to be "extremely qualified counsel with extensive experience
2 prosecuting complex consumer class actions cases of this nature."
3 Pls.' Supp. Br. at 16. As such, they certainly should have the
4 means to estimate class participation in a settlement such as this
5 one. They are no doubt aware that average claims submission rates
6 in similar class actions are typically ten percent or less. See,
7 e.g., In re Compact Disc Minimum Advertised Price Antitrust Litig.,
8 370 F. Supp. 2d 320, 321 (D. Me. 2005) (two percent submission
9 rate); Buchet v. ITT Consumer Fin. Corp., 845 F. Supp. 684, 695 (D.
10 Minn. 1994), as amended 858 F. Supp. 944 (rejecting settlement
11 where similar settlement had only a three percent redemption rate);
12 Strong v. Bellsouth Telecomm., Inc., 173 F.R.D. 167, 169 (W.D. La.
13 1997) (4.3 percent claims rate); Burch v. United Cable TV of
14 Baltimore Ltd. P'ship, 732 A.2d 88 7 (Md. 1999) (9.7 percent
15 response rate to claims process); Union Life Fid. Ins. Co. v.
16 McCurdy, 781 So. 2d 1 86, 188 (Ala. 2000) (observing that only 113
17 of 104,000 class members submitted claims, for a rate of 0.1
18 percent). Assuming a rather generous ten percent response rate,
19 the Court estimates that roughly \$500,000 will be paid to the
20 class. This amount is dwarfed by Plaintiffs' counsel's anticipated
21 motion for \$980,000 in attorney's fees.

22 Plaintiffs also provide unrealistic estimates of the value of
23 the injunctive relief available under the settlement. Plaintiffs
24 claim that Hughes's revised FAP and its pro-rated early termination
25 fee confer a benefit of \$14 million upon the class. Having
26 reviewed the declarations submitted in support of this figure, the
27 Court is extremely skeptical of the accuracy of this estimate.
28 Setting aside its accuracy, however, Plaintiffs fail to state that

1 this injunctive relief provides no benefit to the roughly half of
2 the class who are no longer Hughes subscribers. Also, part of the
3 benefit of the injunctive relief would be conferred upon future
4 Hughes subscribers, and these individuals are not part of the
5 settlement class and would not be bound by the release of
6 liability.

7 Despite serious concerns with the confusing wording of the
8 release and considerable skepticism as to Plaintiffs' estimate of
9 the settlement's value to the class, the Court does not find the
10 substantive terms of the settlement to be inherently unfair at this
11 time. The Court finds the question of substantive fairness to be
12 more appropriate for objecting class members to raise if and when
13 this settlement reaches the final approval stage.

14 2. Procedural Issues

15 While Rule 23(e)(5) gives class members the opportunity to
16 object to the substance of the settlement at the final fairness
17 hearing, this often occurs too late in the proceedings to address
18 procedural issues, such as flaws in the claims submission process.
19 As such, the Court reviews the design of the claims process
20 closely.

21 Under the settlement, class members can receive \$5 if they
22 returned their Hughes equipment and \$40 if they also paid an ETF
23 during the stated period. Many hurdles stand between a class
24 member and the receipt of such a payment, however, and such
25 additional steps tend to lower class participation. See Tiffany
26 Allen, "Anticipating Claims Filing Rates in Class Action
27 Settlements" (Nov. 2008) ("A settlement that requires claimants
28 simply to sign a form will likely have a higher claims-filing rate

1 than one requiring claimants to provide narrative responses to
2 questions and attach documentation, all other things being equal.")
3 First, the class member must receive notice of the settlement.
4 Class members will not be sent claim forms. Assuming a class
5 member receives the Postcard, he or she must comb through the small
6 type on the Postcard to find the Web site he or she must access for
7 more information about the settlement. The class member would then
8 have to use a computer to access the settlement Web site, follow
9 the links on the settlement Web site to locate the Claim Form,
10 download the Claim Form, print out the Claim Form, fill out the
11 Claim Form with the required personal information, and mail the
12 Claim Form to the claims administrator during the claims period.
13 The class members would bear the cost of the forty-four cent
14 postage stamp required to submit the Claim Form.

15 The design of the Claim Form presents problems of its own. It
16 states that to receive a cash payment of \$40, the claimant must
17 affirm that during the period, the claimant (1) subscribed to a
18 Hughes satellite broadband consumer Internet service plan; (2) was
19 no longer a Hughes subscriber as of the preliminary approval date;
20 (3) paid an ETF between May 15, 2005 and December 5, 2010; and (4)
21 returned "all equipment leased from or provided by Hughes within
22 ninety (90) days" of termination of the subscription. To receive a
23 cash payment of \$5, the claimant must affirm that the claimant (1)
24 was a Hughes subscriber, (2) was no longer a Hughes subscriber as
25 of the date by which Hughes must complete notice; (3) did not pay
26 an early termination fee, or paid an ETF on or after December 6,
27 2010, and (4) returned all equipment leased from or provided by
28 Hughes within ninety days of termination. The claimant must

1 provide his or her name, address, "email address(es) used in
2 corresponding with Hughes," and his or her "current email address,"
3 and sign and date the claim form under penalty of perjury. The
4 claimant must mail this form to the settlement administrator before
5 the stated deadline.

6 The Claim Form suffers from several problems. First, it
7 includes a limitation that is not provided in the Long Form or the
8 Summary Notice -- namely, the requirement that the claimant
9 returned all equipment "leased from or provided by Hughes" within
10 ninety days of termination. Second, this limitation is so vague as
11 to likely discourage some class members from filing a claim --
12 while it may be clear to class members what constitutes "equipment
13 leased" from Hughes, it is less clear what is required by the
14 provision mandating the return of equipment "provided by" Hughes.
15 Third, the Claim Form is unnecessarily complex. It is two pages
16 long, it contains unnecessary language, and it is confusingly
17 arranged. Like a poorly drafted verdict form, it invites user
18 error. Finally, the Claim Form creates an infinite feedback loop;
19 it reflexively cites to the Class Notice and Settlement Agreement
20 "for eligibility and claims rules," while the Class Notice refers
21 class members to the Claim Form for additional eligibility
22 requirements.

23 It would be rational for a class member to invest the time and
24 effort to perform the above steps and scrutinize the claim form if
25 the economic incentive for so doing was great enough. But the vast
26 majority of class members who would receive any cash payment under
27 the settlement would receive a mere \$5. Many class members will
28 likely find that given the size of the cash benefit and the amount

1 of time required to submit a claim, it simply is not worth the time
2 and effort to submit a claim.

3 There are many ways the parties could improve the claim
4 submission procedure, such as by allowing class members to make
5 claims using an online form or by mailing settlement checks to each
6 class member who, according to Hughes's records, satisfies the
7 requirements for such a claim. For unknown reasons, the parties
8 have opted for an unnecessarily taxing claims procedure over these
9 alternatives. The Court finds that in light of the small cash
10 benefits contemplated, the proposed claim procedure is
11 unreasonable.

12 **C. Adequacy of Proposed Notice**

13 Notice to the class must provide:

14 the best notice practicable under the
15 circumstances, including individual notice to
16 all members who can be identified through
17 reasonable effort. The notice must concisely
18 and clearly state in plain, easily understood
19 language: the nature of the action; the
20 definition of the class certified; the class
21 claims, issues, or defenses; that a class
22 member may enter an appearance through counsel
23 if the member so desires; that the court will
24 exclude from the class any member who requests
25 exclusion, stating when and how members may
26 elect to be excluded; and the binding effect of
27 a class judgment on class members under Rule
28 23(c)(3).

22 Fed. R. Civ. P. 23(c)(2)(B).

23 The Federal Judicial Center's "Judges' Class Action Notice and
24 Claims Process Checklist and Plain Language Guide" ("FJC Class
25 Action Checklist"), available through the FJC Web site, provides
26 guidance for judges and counsel in determining whether a notice
27 plan is adequate. Among other things, this guide instructs parties
28 and reviewing courts to ask, "Will the notices come to the

1 attention of the class?" and "Are the notices informative and easy
2 to understand?" Id.

3 The Postcard, which would be sent via U.S. mail, is postcard-
4 sized. It provides the case name and is titled, "NOTICE OF
5 PROPOSED CLASS ACTION SETTLEMENT." It does not state the size of
6 the awards to class members; it merely informs its recipient that
7 the settlement, if approved, "may entitle you to cash or non-cash
8 benefits." It directs class members to read the Long Form, found
9 online, for a description of "all eligibility requirements to
10 receive a cash benefit." Other than the deadlines for submitting
11 claim forms and exclusion from the settlement, it provides no other
12 pertinent information to the class. It does not include
13 information about how to object to the settlement, nor does it
14 state that Plaintiffs' counsel seeks a \$980,000 award of attorneys'
15 fees. It is written in small type and aside from a provision in
16 capital letters stating, "YOUR LEGAL RIGHTS MIGHT BE AFFECTED BY
17 THIS SETTLEMENT. PLEASE READ THIS NOTICE CAREFULLY," it is devoid
18 of text treatment or graphic elements to command class members'
19 attention. Direct mail companies have developed a number of
20 innovative techniques to ensure their mailings stand out. The
21 Postcard uses none of these techniques.

22 The Long Form, which would be e-mailed to the class members
23 for whom Hughes has a valid e-mail address and posted on the
24 settlement Web site, is a seven-page document. See Long Form. It
25 does not command the attention of the class. It appears to be a
26 court document, complete with a case caption. While it accurately
27 reflects most of the terms of the Settlement Agreement, it does not
28 state every requirement for receiving a cash payment, but rather

1 directs class members to the "conditions described on the Claim
2 Form." Id. § 4(a).

3 The Summary Notice would be published as a one-eighth-page
4 advertisement in USA Today on two consecutive days. This document
5 contains much of the information contained in the Long Form,
6 including the size of the cash benefits available, and directs
7 readers to visit the settlement Web site for more information.
8 However, like the Long Form, it is merely a collection of small-
9 print text, and does not appear designed to command the attention
10 of USA Today's readers.

11 In sum, the Court is not convinced that the proposed notice
12 plan would provide the class with "the best notice practicable
13 under the circumstances" as Rule 23 requires. It appears as though
14 very little effort was expended by the parties to ensure the
15 largest possible number of class members received notice.

16 In light of the above, the Court DENIES Plaintiffs' Motion.
17 The Court finds that Plaintiffs have failed to establish that Rule
18 23's class certification requirements of commonality, typicality,
19 predominance, and adequacy of representation are satisfied for a
20 nationwide class of Hughes's current and former subscribers. The
21 Court finds the claims procedure contemplated in the settlement to
22 be unreasonable given the small size of the cash payments available
23 to class members. Finally, the Court finds that Plaintiffs have
24 failed to establish that the proposed notice plan would provide the
25 class with the best notice practicable under the circumstances.

26 The Court recognizes that a fair settlement is considerably
27 preferable to all parties than protracted litigation. While the
28 proposed settlement is unfair, it is not beyond salvage through

1 amendment. Furthermore, the Court is convinced that a fair
2 settlement could be reached without increasing the cost or burden
3 on Hughes -- the parties value this settlement at roughly \$20
4 million, which should be enough to effect a fair settlement. As
5 such, the Court has labored to provide the parties with guidance
6 should they decide to file an amended motion for preliminary
7 approval. The parties must establish that a nationwide class
8 exists and that the Named Plaintiffs are proper representatives of
9 that class. The parties must provide a claims procedure that is
10 simple and easy enough to encourage, rather than inhibit,
11 participation by class members despite the small size of the cash
12 awards. The parties must clearly and explicitly communicate the
13 scope of the release of liability to the class members. The
14 parties must design the best notice plan practicable under the
15 circumstances, and provide the Court with a realistic reach
16 calculation for the plan. Furthermore, if the parties alter the
17 settlement such that the interests of either Plaintiffs' counsel or
18 Hughes is aligned with the interests of the class, the Court will
19 apply considerably less scrutiny in reviewing it. The Court puts
20 the parties on notice that if the Court does ultimately
21 preliminarily approve the settlement, it may delay ruling on an
22 attorneys' fees motion until after all settlement proceeds have
23 been disbursed to the class in order to determine the fairness of
24 the amount sought in attorneys' fees in light of the total benefit
25 conferred on the class.

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1 **V. CONCLUSION**

2 For the foregoing reasons, the Court DENIES the Motion for
3 Preliminary Approval of Settlement filed by Plaintiffs Tina Walter,
4 Christopher Bayless, and Eric Schumacher. The parties are granted
5 leave to file an amended motion. A status conference is set for
6 Friday, August 26, 2011, at 10:00 a.m., in Courtroom 1, 450 Golden
7 Gate Avenue, San Francisco, California. The parties shall meet and
8 confer and file a joint case management statement no less than
9 seven (7) days before the status conference.

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11 IT IS SO ORDERED.

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13 Dated: July 6, 2011

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UNITED STATES DISTRICT JUDGE

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