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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

T. PETER TAGUE, DC, individually and on )  
behalf of all others similarly situated, )  
 )  
Plaintiff, )  
v. )  
HEALTHFUSION, INC., )  
 )  
Defendants. )

Civil No.08cv2123 AJB  
**FINAL JUDGMENT AND ORDER**  
[Doc. Nos. 54 and 55]

On February 10, 2010, this Court entered an order granting preliminary approval (the "Preliminary Approval Order") of the Settlement Agreement and conditionally certified, for settlement purposes only, a Settlement Class.

On May 21, 2010, the Court held a fairness hearing (the "Final Approval Hearing"), for which members of the Settlement Class had been given appropriate notice. The Final Settlement Hearing was held in Courtroom A at the District Court for the Southern District of California in San Diego, California. An opportunity to be heard was given to all persons requesting to be heard in accordance with the Preliminary Approval Order.

Having considered all papers filed in connection with the Final Approval Hearing, including the Motion for Final Approval of Class Action Settlement and Motions for Award of Attorneys' Fees and Reimbursement of Litigation Expenses and for Incentive Award, and statements made on the record and observing that no objections have been filed and served in connection with any of these Motions,

1 **THE COURT HEREBY FINDS AND ORDERS:**

2 1. This Court has jurisdiction over plaintiff T. Peter Tague DC ("Plaintiff"), defendant  
3 HealthFusion, Inc. ("HF") and members of the Settlement Class, the claims asserted in this  
4 lawsuit, the claims made by Settlement Class members (including the determination of any  
5 disputes thereto), and the claims and causes of action released in paragraph 13 of the  
6 Settlement Agreement.

7  
8 2. This Court finds that the Settlement Agreement has been entered into in good faith  
9 following arm's length negotiations and is non-collusive.

10  
11 3. This Court grants final approval of the Settlement Agreement and finds that the settle-  
12 ment is in all respects fair, reasonable, adequate, and in the best interests of the Settlement  
13 Class. All members of the Settlement Class who have not validly requested exclusion from  
14 the Settlement Class (as identified on Exhibit "A" to the Supplemental Declaration of Rachel  
15 Christman) are bound by this Final Judgment and Order.

16  
17 **CLASS CERTIFICATION**

18 4. The Court finds and concludes, with respect to the Settlement Class, that it meets the  
19 requirements of F.R.Civ.P. 23 as follows: (a) the members of the proposed Settlement Class  
20 are so numerous that joinder of all Settlement Class members is impracticable; (b) there are  
21 questions of law and fact common to the proposed Settlement Class; (c) the claims of the  
22 proposed representative plaintiff are typical of the claims of the proposed Settlement Class;  
23 (d) the proposed representative plaintiff and proposed Settlement Class Counsel have and will  
24 fairly and adequately protect the interests of the proposed Settlement Class; (e) the prosecu-  
25 tion of separate actions by individual class members could create a risk of inconsistent or  
26 varying adjudications or, as a practical matter, be dispositive of the interests of other class  
27 members not parties to the individual adjudications; (f) HF has acted on grounds the apply  
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1 generally to the class, so that final injunctive relief is appropriate respecting the class as a  
2 whole; and (g) the questions of law and fact common to members of the proposed Settlement  
3 Class predominate over questions affecting only individual members; and (h) a class action is  
4 superior to other available methods of fairly and efficiently adjudicating the controversy.  
5

6 5. The provisionally certified Settlement Class is now finally certified, for purposes of  
7 effectuating the settlement, pursuant to Federal Rules of Civil Procedure 23(b)(2) and  
8 23(b)(3), as follows:  
9

10 All subscribers of telephone facsimile numbers between February 12,  
11 2008 and September 9, 2008, inclusive, to which one or more of the forms  
12 of facsimile templates attached as Exhibit "A" to the Settlement Agree-  
ment (the "Faxes") were successfully transmitted, according the transmis-  
sion report of HealthFusion, Inc. ("Transmission Report").

13 6. The certification of the Settlement Class is non-precedential and without prejudice to  
14 HF's and Plaintiff's rights under the Settlement Agreement if the Settlement Agreement and  
15 this Final Judgment and Order do not become effective, as provided in paragraphs 3 and 20 of  
16 the Settlement Agreement.  
17

18 7. In its Preliminary Approval Order, the Court designated T. Peter Tague DC as represen-  
19 tative of the Settlement Class. The Court hereby affirms that designation.  
20

21 8. In its Preliminary Approval Order, the Court appointed Scott Z. Zimmermann, Of  
22 Counsel, Connolly, Finkel & Gosselin LLP and Ann M. Caldwell of Caldwell Law Office  
23 LLC as Settlement Class Counsel. The Court hereby affirms that appointment.  
24

### 25 CLASS NOTICE

26 9. The Declaration of Rachel Christman shows that Class Notice was given in accordance  
27 with the Court's Preliminary Approval Order and its April 8, 2010 order. The Class Notice  
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1 (as described and defined in paragraph 14 of the Settlement Agreement and in the Declaration  
2 of Ms. Christman) complies with the requirements of Federal Rule of Procedure 23 and due  
3 process, constitutes the best notice practicable under the circumstances, and is due and  
4 sufficient notice to all persons entitled to notice of the settlement of this lawsuit.

5  
6 **OPT-OUTS**

7 10. A total of 42 persons or entities have validly requested exclusion from the Settlement  
8 Class. A list of the persons or entities that have validly requested exclusion from the  
9 Settlement Class are identified on Exhibit "A" to the Supplemental Declaration of Rachel  
10 Christman.

11  
12 **CLASS RELIEF**

13  
14 11. HF shall ensure that the Claims Administrator distributes the Payments (as defined and  
15 calculated in paragraph 4.A of the Settlement Agreement) and HF shall provide the Credits  
16 (as defined and calculated in paragraphs 4.B and 4.C of the Settlement Agreement) in  
17 accordance with the Settlement Agreement, including paragraphs 4.A, 4.B, 4.C, 8, 10, 11.C,  
18 11.D and 12 thereof.

19  
20 **JFPA INJUNCTION AGAINST HF**

21 12. HF is hereby enjoined as follows:

22 A. HF, its employees, agents, representatives, contractors, affiliates, and all other  
23 persons and entities acting in concert with HF shall not send or cause to be sent, directly  
24 or indirectly, by any telephone facsimile machine, computer or other electronic device, to  
25 any telephone facsimile machine any "Advertisement" unless it is done in compliance  
26 with the Junk Fax Prevention Act of 2005, 47 U.S.C. § 227, and any regulations or orders  
27 promulgated by the Federal Communications Commission thereunder (collectively  
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1 "JFPA"). As used in this Injunction, the term "Advertisement" shall be defined as having  
2 the same meaning as provided in 47 U.S.C. §227, subsection (a)(5), which states:

3 ". . .any material advertising the commercial availability or quantity of any property,  
4 goods, or services . . ."

5  
6 B. HF, its employees, agents, representatives, contractors, affiliates, and all other  
7 persons and entities acting in concert with HF shall not send or cause to be sent, directly  
8 or indirectly, by any telephone facsimile machine, computer or other electronic device, to  
9 any telephone facsimile machine any "Advertisement" unless it contains (i) the following  
10 opt-notice clearly and conspicuously placed on the first page thereof: "You have the  
11 right to request not to receive future faxes from HealthFusion, by calling [insert domestic  
12 telephone number] or sending a fax to [insert domestic fax number] at any time. Your  
13 opt-out request must include the telephone number(s) not to be sent future faxes.  
14 HealthFusion's failure to comply with a valid opt-out request within 30 days is unlawful;"  
15 and (ii) HF permits opt-out requests to be made at any time on any day of the week.

16  
17 C. HF shall maintain, during the term of this Injunction, and for one year thereafter, the  
18 following records (including any records and data in any electronic format) for each  
19 Advertisement sent or caused to be sent, directly or indirectly, by HF, its employees,  
20 agents, representatives, contractors, affiliates, and all other persons and entities acting in  
21 concert with HF, by any telephone facsimile machine, computer or other electronic  
22 device to any telephone facsimile machine: (i) the Advertisement; (ii) the date and time  
23 the Advertisement was sent; and (iii) the fax number to which the Advertisement was  
24 transmitted. Plaintiff or his representatives shall have the right to inspect and copy any of  
25 the Records upon reasonable notice, not to exceed five (5) business days, in the event  
26 Plaintiff shall have a good faith belief that HF, its employees, agents, representatives,  
27 contractors, affiliates, and all other persons and entities acting in concert with HF have  
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1 not complied with this Injunction.

2  
3 D. This Injunction is expressly intended and designed to ensure that HF complies with  
4 the current provisions of the JFPA. Should either the JFPA subsequently be appealed,  
5 modified, amended, or invalidated by subsequent legislative action, in whole or in part,  
6 then the Injunction embodied herein shall be deemed to have been similarly repealed,  
7 modified, amended or invalidated. HF shall be entitled to apply to the Court, upon 20  
8 days' notice to Plaintiff, to have the Injunction embodied herein to be repealed, amended,  
9 construed or invalidated in accordance with any subsequent judicial decisions.

10  
11 E. This Injunction shall take effect immediately. Disobedience of the Injunction shall  
12 be punished as contempt by this Court. This Injunction shall expire, without the need for  
13 any action by HF, eighteen (18) months after this Order is entered by the Court.

14  
15 **RELEASE OF CLAIMS**

16 13. Except for the rights and obligations contained in or arising out of the Settlement  
17 Agreement, and provided that the Settlement Agreement is not cancelled or otherwise  
18 terminated in accordance with the provisions set forth therein, Settlement Class members  
19 (except those persons and entities listed in Exhibit "A" to the Supplemental Declaration of  
20 Rachel Christman); and to the extent the Settlement Class member is a business, all of its  
21 present, former, and future direct and indirect parent companies, affiliates, subsidiaries,  
22 divisions, agents, franchisees, successors, and predecessors-in-interest, and all of the  
23 aforementioned's respective present, former, and future officers, directors, employees,  
24 shareholders, attorneys, agents, independent contractors, and assigns; and to the extent the  
25 Settlement Class member is an individual, any present, former, and future spouses, as well as  
26 the present, former, and future heirs, executors, administrators, representatives, agents,  
27 attorneys, partners, successors, predecessors-in-interest, and assigns of each Settlement Class  
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1 member, by operation of this Order shall have and have remised, released, and forever  
2 discharged any and all claims, demands and causes of action, whether currently known or  
3 unknown, arising from or relating in any way to the facsimile transmission of the Faxes  
4 which any of the foregoing have, may have, or may hereafter have against HF, its parent,  
5 subsidiary or affiliated companies, officers, directors, shareholders, owners, members,  
6 managers, employees, agents, attorneys, insurers and successors, assigns of each of them.  
7 Each Settlement Class member (except those persons and entities listed on Exhibit "A" to the  
8 Supplemental Declaration of Rachel Christman) also waives, as those claims, matters and  
9 things released in this paragraph, the rights and benefits, if any, conferred by section 1542 of  
10 the California Civil Code, which provides:

11 "A general release does not extend to claims which the creditor does not  
12 know or suspect to exist in his or her favor at the time of executing the  
13 release, which if known by him or her must have materially affected his or  
14 her settlement with the debtor."  
15

16 **AWARD OF ATTORNEYS' FEES, COSTS, AND INCENTIVE AWARD**

17 14. Settlement Class Counsel shall be paid the amount of \$210,000 accordance with  
18 paragraph 7.A of the Settlement Agreement, within 10 business days after the Effective Date  
19 (as defined in paragraph 28 of the Settlement Agreement). The Court finds this amount to be  
20 fair and reasonable, and sufficiently supported by the record.  
21

22 15. Plaintiff shall be paid an incentive award in the amount of \$5,000 in accordance with  
23 paragraphs 7.B of the Settlement Agreement within 10 business days after the Effective Date  
24 (as defined in paragraph 28 of the Settlement Agreement). The Court finds that this payment  
25 is justified by Plaintiff's service to the Settlement Class.  
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1 **OTHER PROVISIONS**

2 16. HF has filed documents with this Court to show compliance with 28 U.S.C. § 1715(b),  
3 which requires notification to the Attorney General of the United States and the Attorney  
4 General of each state where a Settlement Class Member resides. The Court finds that HF has  
5 complied with this statute.

6  
7 17. HF shall, in consultation with Settlement Class Counsel and HF's Counsel, ensure that  
8 the Claims Administrator administers the settlement in good faith and in accordance with the  
9 terms of the Settlement Agreement.

10  
11 18. This Court retains continuing jurisdiction over this action, Plaintiff, HF, and all Settle-  
12 ment Class members to determine all matters relating in any way to this Final Judgment and  
13 Order, the Preliminary Approval Order, or the Settlement Agreement, including but not  
14 limited to their administration, implementation, interpretation, or enforcement of the  
15 Settlement Agreement and the resolution of claim disputes.

16  
17 19. The parties to the Settlement Agreement shall carry out their respective obligations  
18 thereunder.


19  
20 20. If the Settlement Agreement and the Final Judgment and Order do not receive full and  
21 final judicial approval in all material respects, or are reversed, vacated, or modified in any  
22 material respect, or Plaintiff exercises its right to cancel the Settlement Agreement as  
23 provided in paragraph 9 thereof, then neither the Settlement Agreement nor this Final  
24 Judgment or Order have any force or effect, the Parties shall be restored, without prejudice, to  
25 their respective positions prior to December 3, 2009, any certification of the Settlement Class  
26 shall be vacated, the Lawsuit shall proceed as though the Settlement Class had never been  
27 certified (with the statute of limitations relating back to the original filing date of the  
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1 Lawsuit), and the parties shall have the right to seek or oppose the certification of any  
2 plaintiff class; provided, however, that the obligations of paragraphs 6.C, 6.D, 9 and 31 of the  
3 Settlement Agreement shall survive and remain enforceable.

4 **IT IS SO ORDERED.**

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6 DATED: May 21, 2010

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8 Hon. Anthony J. Battaglia  
9 U.S. Magistrate Judge  
10 United States District Court  
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