

1 Hallen D. Rosner (SBN 109740)
Alan M. Mansfield (SBN 125998)
2 ROSNER LAW & MANSFIELD, LLP
10085 Carroll Canyon Road, Suite 100
3 San Diego CA 92131
Tel: (858) 348-1005
4 Fax: (858) 348-1150

5 Attorneys for Plaintiff

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7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 SCOTT NELSON, Individually and on Behalf of
12 All Others Similarly Situated,

13 Plaintiff,

14 vs.

15 VIRGIN MOBILE USA, L.L.C., and
16 VIRGIN MOBILE USA, INC.,

17 Defendants.
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Case No.: 05CV159 (AJB)

CLASS ACTION

PLAINTIFF'S APPLICATION FOR ENTRY OF
[PROPOSED] ORDER PRELIMINARILY
APPROVING SETTLEMENT AND CLASS
NOTICE PROGRAM

Date: N/A

Time: N/A

Courtroom: The Hon. Anthony J. Battaglia

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1 **I. APPLICATION FOR PRELIMINARY SETTLEMENT APPROVAL**

2 As counsel for the parties previously advised the Court on February 21, 2006, the terms of a
3 class-wide settlement have been agreed upon between the parties. Counsel for the parties have been
4 engaged in final revision of the settlement papers and supporting documents, as well as these moving
5 papers. After further negotiations, the settlement papers have now been approved by all party
6 representatives. As detailed below, good cause exists to grant this Application and enter the proposed
7 Preliminary Approval Order. The proposed settlement meets the criteria for granting both
8 preliminary and final settlement approval, as it is well within the range of what should be approved as
9 fair, reasonable, and adequate. Plaintiff submits this Application for Preliminary Approval of Class
10 Action Settlement pursuant to Fed. R. Civ. P. 23(e). Defendant Virgin Mobile joins in this request.

11 The settlement described in the Settlement Agreement dated March 15, 2006 ("Agreement"),
12 submitted as Exhibit A to the [Proposed] Order Preliminarily Approving Settlement and Class Notice
13 Program, is subject to this Court's approval after notice to the members of the Class and a final
14 approval hearing. As detailed below, the terms described in the Agreement provide for virtually
15 complete relief for many class members, as well as agreed-to practice changes that will stop the
16 conduct challenged in the Complaint going forward. The terms of this settlement were negotiated at
17 arms'-length by experienced counsel after significant information had been exchanged between the
18 parties. Declaration of Alan M. Mansfield In Support of Plaintiffs' Application for Preliminary
19 Settlement Approval ("Mansfield Decl.") at ¶¶4-5. As a result, plaintiff (joined by defendant)
20 requests that the Court preliminarily approve the settlement and approve the form of notice to be sent
21 to the Class in the form attached to the proposed Order and the Agreement, and that the Court enter
22 an Order:

- 23 A. preliminarily approving plaintiff's proposed settlement with defendants;
24 B. provisionally certifying the class for settlement purposes and approving the form
25 and program of class notice described in the Agreement; and
26 C. scheduling various deadlines (set forth below) leading up to a hearing before the
27 Court to determine whether the proposed settlement should be approved.

1 **II. MEMORANDUM OF POINTS AND AUTHORITIES**

2 **A. Standards for Preliminary Approval**

3 "Preliminary approval of a proposed settlement is the first step in a two-step process required
4 before a class action may be settled." *In re NASDAQ Market-Makers Antitrust Litig.*, 1997-2 Trade
5 Cas. (CCH) ¶71, 981, at 80, 817 (S.D.N.Y. Oct. 16, 1997). First, the Court reviews the settlement
6 preliminarily to determine whether it is sufficient to warrant public notice and a hearing. *Manual for*
7 *Complex Litigation, Fourth* §23.14 (West Ed. 2004) ("MCL"). This initial assessment is generally
8 made on the basis of information already known to the Court based on its discussion with the parties
9 that, if necessary, may be supplemented by briefs, motions, or an informal presentation from the
10 settling parties, if requested. *In re NASDAQ Market-Makers Antitrust Litig., supra*. Preliminary
11 approval permits notice to be given to the class members of a hearing on final settlement approval, at
12 which hearing class members and the settling parties may be heard regarding whether the Court
13 should enter an order finally approving the settlement.

14 Settlements of class actions are favored by the courts. *Officers for Justice v. Civil Serv.*
15 *Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983) ("voluntary
16 conciliation and settlement are the preferred means of dispute resolution."). Thus, in determining
17 whether preliminary approval is warranted, the issue is whether the proposed settlement is within the
18 range of what might in a broad sense be found to be fair, reasonable, and adequate such that notice of
19 the proposed settlement should be given to class members and a hearing scheduled to consider final
20 settlement approval. The MCL defines the Court's duty in this regard as follows:

21 If the preliminary evaluation of the proposed settlement does not disclose grounds to
22 doubt its fairness or other obvious deficiencies, such as unduly preferential treatment
23 of class representatives or of segments of the class, or excessive compensation for
24 attorneys, and appears to fall within the rang members of a formal fairness hearing, at
25 which arguments and evidence may be presented in support of and in opposition to the
26 settlement.

26 MCL 4th at § 30.41.

27 Where the proposed settlement appears to be the product of serious, informed, non-collusive
28 negotiations overseen in part by a well-respected mediator, has no obvious deficiencies, does not

1 improperly grant preferential treatment to class representatives or segments of the class and falls
2 within the range of possible approval, preliminary approval is appropriate. *NASDAQ, supra*, at 80,
3 817. The Court should then direct that notice be given to the Class pursuant to Fed. R. Civ. P. 23(e)
4 to solicit their views on the settlement.

5 There is an initial presumption that a proposed settlement is fair and reasonable when it is the
6 result of arms'-length negotiations. *See Newberg on Class Actions* §11.41 at 11-88 (3d ed. 1992). As
7 the Court is aware based upon the negotiations it helped oversee, the proposed settlement here is the
8 result of negotiations that were non-collusive and entered into after extensive negotiations and the
9 disclosure of significant factual information by Virgin Mobile. Mansfield Decl., ¶¶4-5. Counsel on
10 both sides are experienced in class action litigation and were both thoroughly familiar with the factual
11 and legal issues raised by this litigation, engaged in substantial negotiations over the Agreement
12 before agreeing to the final settlement terms, and considered numerous relevant factors in agreeing to
13 this settlement. *Id.* at ¶¶6-8, 10. Courts recognize that the opinions of experienced and informed
14 counsel supporting a settlement are entitled to considerable weight in granting such approval. *In re*
15 *Salomon Inc. Sec. Litig.*, 1994 U.S. Dist. LEXIS 8038, at *42 (S.D.N.Y. June 15, 1994).

16 **B. Description of Settlement**

17 As detailed in both the Settlement Agreement and the Class Notice, under the terms of
18 the settlement, if either current or former Virgin Mobile customers fall within the definition of the
19 class and timely submit either an electronic Claim Form through www.vwclasssettlement.com or by
20 contacting a toll-free telephone number, as applicable to their situation, they are entitled to the relief
21 described below.

22 If they are a current customer of Virgin Mobile as of March 15, 2006 and were billed for
23 *VM charges, they will promptly receive an automatic credit of all *VM charges previously billed. It
24 is estimated this will take place prior to May 15, 2006. While the final amount of this credit has yet to
25 be determined, Defendant conservatively estimates this will result in automatic refunds totaling close
26 to \$560,000. These class members do not need to submit a claim form to receive this credit.

27 If class members are former Virgin Mobile customers as of the time claims are paid and either
28 were billed for *VM calls or purchased one of handsets described in the class definition and did not

1 receive the \$10.00 airtime credit described on the handset packaging, such class members will
2 receive, at their option, either a credit for \$20.00 if they reactivate their Virgin Mobile service (Virgin
3 Mobile will waive any reactivation fees) or a \$5.00 credit off items sold through
4 www.virginmobileusa.com. They will be able to submit their claims over the telephone and will not
5 need to complete a Claim Form to do so.

6 For those class members who are current Virgin Mobile customers as of the date claims are
7 paid, purchased one of handsets listed in the class definition and did not receive the \$10.00 airtime
8 credit described on the handset packaging, Virgin Mobile is establishing a Settlement Fund of \$2.7
9 million. For all such class members who electronically submit a Claim Form, each class member will
10 receive a credit for \$7.50 (unless such claims are prorated, as set forth below). This amount reflects
11 the parties' estimate of the average dollar amount of the uncredited charges at issue based on the
12 average credits Virgin Mobile provided to its customers who purchased the handsets in question.
13 Mansfield Decl., ¶6.

14 Virgin Mobile has also agreed to make certain practice changes in terms of how it will
15 disclose free airtime promotions, the minimum free airtime amount it will agree to provide, not to
16 charge for *VM calls for approximately two years from the date of preliminary settlement approval
17 and then only after certain agreed-to disclosures, and other requirements that will be in effect for up
18 to five years.

19 This settlement is within the range of possible approval as it reflects a reasonable estimate of
20 the average unreimbursed out-of-pocket losses class members may have paid as a result of the
21 imposition of the charges challenged in the Complaint, as well as stops the practices in question.
22 Mansfield Decl., ¶¶6-7.

23 In addition to the consideration set forth above, and subject to the Court's approval, Class
24 Counsel will also request the Court approve reimbursement of their attorneys' fees and expenses for
25 prosecuting this Action, as well as payment to Mr. Nelson as the class representative, in a total
26 amount not to exceed 20% of the \$2.7 million Settlement Fund. These amounts will not reduce the
27 benefits being provided to the former customer Class members, and will only reduce the amount of
28 the current customer Class member credits if the total claims by these Class members against this

1 Settlement Fund exceed approximately \$2 million. As the Court is aware, these latter provisions were
2 negotiated and agreed to after the Court agreed the parties had reached agreement in principle on the
3 other non-fee terms of the settlement and thus could engage in such negotiations to ensure there was
4 no issue of conflict, and reflects Class Counsel's work on both the prosecution and resolution of this
5 case. Although this will be set forth in greater detail in connection with the Fairness Hearing, the
6 fees fall within the range of reasonable fees based on both a percentage of recovery and as cross-
7 checked against a lodestar/multiplier approach. Mansfield Decl., ¶¶5, 11. Virgin Mobile has also
8 agreed to separately pay the third party costs for notice and settlement administration, with up to
9 \$175,000 of these costs also reducing the amount available for credits from the Settlement Fund.

10 In return for these benefits, the claims of all members of the Class against defendants will be
11 dismissed with prejudice and all members of the Class will release and be permanently barred from
12 thereafter pursuing any claims arising out of the claims asserted in the Complaint. All released
13 parties shall also be deemed to release any claims that may be asserted against plaintiff or plaintiff's
14 counsel arising out of the initiation, prosecution, or resolution of this action.

15 **C. Certification of the Class for Settlement Purposes and the Form of Class Notice is**
16 **Appropriate**

17 As part of the Preliminary Approval Order, the parties jointly request this Court enter an
18 Order conditionally certifying a class for settlement purposes, defined as follows:

19 The settlement "Class A" is defined as (i) all current Virgin Mobile customers who are the
20 original purchasers of one or more "Relevant Handsets" (The Super Model, The Party Animal, Vox
21 8500, the K-7 Rave, Slider V5, K9, Flasher V7 and Vox 8610) that advertised on its packaging that
22 the purchaser was entitled to ten dollars (\$10) of free starter airtime, who activated service for one or
23 more of the Relevant Handsets on or after April 5, 2005 and who did not receive from VMU \$10.00
24 in free starter airtime for such activations.

25 The settlement "Class B" is defined as (i) all former VMU customers who otherwise fall into
26 the definition of Class A and (ii) all VM customers (whether current or former) who were billed for
27 calls to VMU's *VM Customer Care service after May 12, 2005.

28 Settlement Class A and Class B are collectively referred to as the "Class".

1 Approval of the above class definition is appropriate for settlement purposes based upon the
2 allegations of the Complaint, the stipulation of the parties and the Declaration of counsel, which
3 collectively is sufficient to allow the Court to make an informed judgment on each of the Fed. R. Civ.
4 P. Rule 23 requirements. *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975). As set forth in the
5 Mansfield Decl. at ¶10, all of the requirements for settlement class certification as set forth in Fed. R.
6 Civ. P 23 (b)(3) – numerosity, predominance of common questions, adequacy of representation,
7 typicality of the class representative’s claims, and superiority of proceeding with a settlement on a
8 class-wide basis – are all satisfied.

9 **1. The Court Can Properly Certify A 50-State Settlement Class**

10 Certification of multi-state classes for settlement purposes are appropriate where the case
11 otherwise meets the requirements for class certification without regard to trial manageability issues,
12 since no trial is anticipated. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997). There is
13 no barrier to approving a multi-state settlement without a formal certification hearing. *Hanlon v.*
14 *Chrysler*, 150 F.3d 1011 (9th Cir. 1998) (finding proper for court to certify a nationwide class for
15 settlement purposes).

16 Here, plaintiff alleges that since April 2005, Virgin Mobile did not provide an activation
17 credit of \$10.00 for the following types of headsets, even though either some or all of the packaging
18 on the headsets advertised such a credit: The Super Model, The Party Animal, Vox 8500, the K-7
19 Rave, Slider V5, K9, Flasher V7 and Vox 8610. In addition, plaintiff alleges that Virgin Mobile
20 billed customers for making calls to *VM, even though these were to be charge-free calls. As the
21 class is defined, these charges would not vary significantly on a per-class member basis. Thus, the
22 primary factual issues, *i.e.*, whether the charges in question were legally imposed or properly
23 described, whether such fees should be refunded and whether this settlement is a fair compromise of
24 such claims, are common to all of the multi-state class members and do not create any manageability
25 issues for settlement purposes. Mansfield Decl., ¶10.

26 This Court may validly apply California’s consumer protection laws to all multi-state class
27 member claims, as there is no material variance in the state consumer protection laws for settlement
28 purposes. *Hanlon*, 150 F.3d at 1023 (“the idiosyncratic differences between state consumer

1 protection laws are not sufficiently substantive to predominate over the shared claims”). Moreover,
2 Virgin Mobile’s Terms and Conditions of Service provided that California law would govern the
3 claims of consumers based in California, and New York law would govern the claims of class
4 members located elsewhere. Mansfield Decl., ¶10. Thus, there are only two relevant laws to apply –
5 California and New York . If the Court compares the two sets of laws, N.Y. G.B.L. Sections 349 and
6 350 do not materially differ from Cal. Civ. Code Section 1750 *et seq.* and Cal. Bus. & Prof. Code
7 Section 17200 *et seq.* As a result, for settlement purposes the Court need not consider whether there
8 are material variances in two individual state laws in conditionally certifying the settlement class. As
9 there is no material conflict between the laws of these two relevant states, nationwide class
10 certification is appropriate without having to engage in a substantive state-by-state analysis of
11 applicable state laws. *Phillips Petroleum v Shutts*, 472 U.S. 797, 816 (1983) (no injury in applying
12 state law if that state law is not in conflict with other laws connected to suit).

13 Certifying the Class as defined above for settlement purposes will benefit all parties by
14 resolving the maximum number of claims in one action and extending the settlement’s
15 reimbursement rights to the maximum number of affected Class members, who might not otherwise
16 be represented and able to participate in such a recovery. Thus, it is appropriate for the Court to
17 conditionally certify the Class for settlement purposes.

18 2. The Form of The Class Notice Program Is Appropriate

19 The purpose of settlement class notice is to give class members sufficient information about
20 the case to decide whether to accept the benefits offered, opt out and pursue their own remedies, or
21 object to the settlement. *Torrise v. Tuscon Electric Power Co.*, 8 F.3d 1370, 1374-75 (9th Cir. 1993).

22 The Class Notice, Summary Class Notice, text message, postcard message and website links
23 attached to the Agreement as Exs. 2 and 3 or as referenced in the Agreement at Paragraph 31, will be
24 sent to present Virgin Mobile customers who fall within the class definition, as well as former
25 customers who fall within the class definition and for whom Virgin Mobile has an email or
26 residential address on file in its records. Counsel believes based on their analysis that this program
27 will provide direct notice to the vast majority of Class members. In addition, to fill in any coverage
28 gaps the Summary Notice will be published two times in *USA Today*. Links to the class settlement

1 website will also be provided on Virgin Mobile's home page as well as each current customer's
2 personal account information page.

3 The Class Notice (which will be available on the class website and linked to in the email
4 notices) describes in simple language the details of the settlement consideration and the relative
5 positions of the parties, the timing of the settlement, the claims at issue, the Class members' options,
6 the implications of remaining in the Class, and information on how to contact Class Counsel or learn
7 more information about the settlement. This Class Notice is modeled after the form full class notice
8 available on the Federal Judicial Center's website.

9 This class notice program is designed to reach the maximum number of Class members by
10 using the most direct and cost-effective communications methods available and the methods Virgin
11 Mobile typically uses to contact its customers, including a direct text message to all Class members
12 who currently have a Virgin Mobile phone, website links on Virgin Mobile's home page and specific
13 current customer pages, and emails and postcards to all former customers of Virgin Mobile who fall
14 within the Class definition and for which address information is available to Virgin Mobile (which it
15 estimates is for the vast majority of Class members who are former customers). Mansfield Decl., ¶ 9.
16 That website, as well as a toll-free telephone number set up by Virgin Mobile, will provide Class
17 members relevant information about the settlement, as well as allow certain members of the Class to
18 submit claims electronically without having to complete or mail a document to Virgin Mobile.

19 "Creativity is often needed in devising an effective means of notifying class members." MCL 4th at
20 Section 30.211; *Wershba v. Apple Computers, Inc.*, 89 Cal. App .4th 324, 351 (2001) (approving
21 class notice program that was a combination of e-mail notification, regular mail, website notification
22 and published notice in *USA Today*). See also Note: "'Best Notice Practicable' in the Twenty-First
23 Century", 2003 UCLA J.L. Tech 4 (discussing advantages of using Internet notice in consumer class
24 actions to provide class notice pursuant to Rule 23).

25 The notice program described above and in the Agreement was designed based on how Virgin
26 Mobile interacts with its customers and to provide the best practicable notice in light of the
27 information available to Virgin Mobile. It is thus "reasonably calculated, under all the circumstances,
28 to apprise interested parties of the pendency of the action and afford them an opportunity to present

1 their objections." *Mullane v. Central Hanover Bank & Trust Co*, 339 U.S. 306, 314 (1950). The
2 form of the notice to be sent to the Class members and the notice program is thus appropriate under
3 Fed. R. Civ. P. 23(c)(2) and due process, and therefore should be approved by this Court.

4 **D. Dates for the Preliminary Approval Order**

5 Under the schedule proposed to the Court by the parties, the final approval date will occur in
6 the latter part of June 2006. Such a schedule is appropriate and consistent with the law on this
7 subject. *See, e.g., Torrissi*, 8 F.3d at 1375 (direct notice given to class members 31 days before
8 deadline to object and 45 days before final approval hearing; court had "no difficulty concluding
9 notice was timely"); *In re BankAmerica Corp. Securities Litigation*, 210 F.R.D. 694, 708 (E.D. Mo.
10 2002) (holding 28 days notice period adequate for objections in nationwide securities class action);
11 *Miller v. Republic Nat'l Life Ins. Co.*, 559 F.2d 426, 430 (5th Cir. 1977) (nationwide class action case,
12 holding a period of "almost four weeks between the mailing of the notices and the settlement
13 hearing" was adequate time); *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 120-121 (8th
14 Cir.1975) (nineteen days notice was enough time to object); *United Founders Life Ins. Co. v.*
15 *Consumers Nat'l Life Ins. Co.*, 447 F.2d 647, 652 (7th Cir.1971) (nationwide class action, holding
16 adequate timing was provided when notice was mailed on May 28 and fairness hearing was held on
17 June 22). It is also consistent with the requirements of 28 U.S.C. Section 1715, which requires the
18 Attorney General and state Attorneys General to be given 90 days' notice of any final approval
19 hearing (which notification will be mailed no later than March 21, 2006).

20 Based on the parties' analysis of how long it will take to create the Class list and disseminate
21 the Class notice, the following dates are included in the Preliminary Approval Order:

22	Completion of Mailing Notice	May 8, 2006
23	Completion of Publication Notice:	May 8, 2006
24	Submit Papers in Support of the Settlement:	May 15, 2006
25	Deadline for filing Objections and Notices of	
26	Intention to Appear/Submitting Requests for Exclusion:	June 12, 2006
27	Reply to any Objections:	June 19, 2006
28	Final Approval Hearing:	June 26, 2006 at 10:00 a.m.

1 Deadline for Submission of Proofs of Claim:

August 15, 2006

2 **E. Conclusion**

3 Based on the foregoing, plaintiff requests the Court enter a schedule consistent with the above
4 by executing the Preliminary Approval Order, submitted herewith.

5
6 DATED: March 15th, 2006

Respectfully submitted,

7 ROSNER, LAW & MANSFIELD LLP

8 
9 ALAN M. MANSFIELD

10 Counsel for Plaintiff

1 **VIRGIN MOBILE'S SUPPORT FOR APPLICATION**

2 Counsel for Virgin Mobile supports this Application and requests the Court enter the
3 Preliminary Approval Order.
4

5 DATED: March __, 2006

SKADDEN ARPS SLATE MEAGHER &
FLOM LLP

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8 _____
9 RAOUL KENNEDY
10 KENNETH A. PLEVAN
11 Counsel for Defendants
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VIRGIN MOBILE'S SUPPORT FOR APPLICATION

Counsel for Virgin Mobile supports this Application and requests the Court enter the Preliminary Approval Order.

DATED: March 15, 2006

SKADDEN ARPS SLATE MEAGHER &
FLOM LLP



RAOUL KENNEDY
KENNETH A. PLEVAN
Counsel for Defendants