IN THE CIRCUIT COURT FOR THE 17th JUDICIAL DISTRICT
IN AND FOR BROWARD COUNTY, FLORIDA

GOLF CLUBS AWAY LLC, Individually and On Behalf of a Class of Persons Similarly Situated, Plaintiff, vs. HOSTWAY CORPORATION, HOSTWAY SERVICES, INC. and VALUEWEB, Defendants.	Case No. 09-29596-13

PLAINTIFF'S UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

SAXENA WHITE P.A.
Adam D. Warden #873691
7777 Glades Road, Suite 300
Boca Raton, FL 33434
Telephone: (561) 394-3399
Facsimile: (561) 394-3382
awarden@saxenawhite.com

WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP
Mark C. Rifkin
Benjamin Y. Kaufman
Patrick Donovan
270 Madison Avenue
New York, NY 10016
Telephone: (212) 545-4600
rifkin@whafh.com
kaufman@whafh.com
donovan@whafh.com

Attorneys for Plaintiff Golf Clubs Away LLC

I. INTRODUCTION

In support of the parties' Settlement Agreement and Release dated April 28, 2020 (the "Agreement"), which is being filed contemporaneously herewith, Plaintiff Golf Clubs Away LLC ("Plaintiff") hereby submits Plaintiff's Unopposed Motion for Preliminary Approval of Class Action Settlement.

Pursuant to the Agreement, Plaintiff requests that the Court enter an order: (1) preliminarily approving the terms of the Settlement as set forth in the Agreement[1]; (2) approving the form and method for providing notice of the Settlement to the Class; and (3) scheduling a settlement hearing for the Court to consider: (a) final approval of the proposed Settlement and for entry of the Final Judgment, and (b) Plaintiff's Counsel's application for an award of attorneys' fees, reimbursement of expenses, and Plaintiff's service award to be paid by Hostway Services, Inc. (or its successor and/or its insurer(s)).

II. FACTUAL BACKGROUND

The above-captioned class action (the "Action") was filed on May 26, 2009 in the Circuit Court for the Seventeenth Judicial District in and for Broward County, Florida (the "Court") alleging violations of Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA"), breach of contract, breach of the covenant of good faith and fair dealing, and unjust enrichment. The Complaint alleged that fraudulent spam e-mail accounts had inundated Defendants Hostway Services Inc. and Hostway Corporation (collectively "Hostway" or "Defendants") e-mail servers. Due to the alleged prevalence of spam, ISPs were "blacklisting" Hostway e-mail servers, causing periodic non-delivery and non-receipt of e-mail from and to the Class (defined below).

[1] Unless otherwise indicated herein, defined terms shall have the same meaning as set forth in the Agreement.

On July 27, 2009, Defendants filed and served their Answer to the Complaint, and subsequently amended their Answer of August 13, 2009 and August 4, 2011.

Following commencement of the action through the latter half of 2011, the Parties engaged in bifurcated discovery at the direction of the Court, which was limited solely to class certification issues. The discovery included interrogatories and responses, a limited production of documents, and targeted depositions. The deponents during this timeframe included: Hostway lead systems administrator Steven Shepherd on June 17 and August 21, 2011; Hostway Senior Vice President of Operations Arnold Choi on July 21, 2011; and Plaintiff's Chief Executive Officer, founder and managing member Gary Miller on October 11, 2011.

On October 28, 2011, Defendants filed a Notice of Removal, and later, on November 4, 2011, an Amended Notice of Removal in the U.S. District Court for the Southern District of Florida seeking to remove this Action to federal court pursuant to 28 U.S.C. §§ 1332(d), 1441, and 1453.

On April 19, 2012, pursuant to Plaintiff's motion, U.S. District Judge Robert N. Scola, Jr. remanded the Action back to the Circuit Court for the Seventh Judicial Circuit in and for Broward County, Florida.

On June 28, 2012, after a status conference with the Parties, the Honorable Robert A. Rosenberg entered an Order setting an August 27, 2012 deadline for the completion of class certification discovery.

On October 31, 2012, Plaintiff filed its Motion for Class Certification. On December 17, 2012, Defendants filed their memorandum of law in opposition to the Motion for Class Certification. Then, on August 20, 2013, an evidentiary hearing on the Motion for Class Certification was held before the Honorable William W. Haury, Jr., which included live

testimony from Mr. Miller for Plaintiff and Mr. Shepherd for Defendants.

On January 30, 2013, Defendants filed their Motion for Summary Judgment. On October 24, 2013, Plaintiff filed its memorandum of law in opposition to Defendants' Motion for Summary Judgment. On October 30, 2013, the Parties participated in oral argument regarding Defendants' Motion for Summary Judgment before Judge Haury. Pursuant to Judge Haury's directive following oral argument, the Parties submitted supplemental briefing on November 13 and November 20, 2013.

On December 8, 2014, Judge Haury's case manager informed counsel for the parties that Hostway's motion for summary judgment was denied, in part, and that Plaintiff's motion for class certification was granted. The case manager requested that Plaintiff prepare a proposed class certification order for the Court to review. With these motions resolved, the parties then jointly requested an extension of time to allow them to participate in settlement discussions.

On March 18, 2015, the Parties engaged in a settlement mediation in New York at JAMS before retired U.S. District Judge John C. Lifland, which was unsuccessful.

On May 14, 2015, Judge Haury entered an Order granting partial summary judgment for Defendants on the Plaintiff's breach of contract claim, but denying the motion with respect to all remaining claims.

On July 7, 2015, Judge Haury entered an Order granting class certification (the "Class Certification Order") appointing the Plaintiff's counsel as class counsel ("Class Counsel") and certifying the following class (the "Class")[2]:

> All customers who directly or indirectly subscribed to Defendants' email services, including email services provided by Defendants' predecessors,

[2] Plaintiffs originally sought to certify a class comprised of all ValueMail or ValueWeb email subscribers at any time after November 1, 2008. However, the Court's Order granting class certification ended the Class Period on March 31, 2009.

> affiliates, subsidiaries and/or parents, and whose email accounts utilized Hostway's shared servers located in Florida that were "blacklisted" at any time from November 1, 2008, through and including March 31, 2009.

On July 22, 2015, Defendants appealed the Class Certification Order. On October 20, 2015, the appeal was fully briefed and submitted to the Fourth District Court of Appeal. On April 6, 2016, the Fourth District Court of Appeal denied Defendants' appeal of the Class Certification Order.

On February 4, 2016, Judge Haury issued an Order that amended the Class Certification Order, which required Defendants to disseminate a Notice of Pendency of Class Action to Class Members. Pursuant to this Order, Defendants disseminated the Notice of Pendency of Class Action to 17,299 potential Class Members. Thereafter, the Parties engaged in merits discovery including document discovery and depositions.

On March 6, 2018, during the course of such discovery, Class Counsel took the deposition of Defendants' Director of Support Operations Joshua Valouche.

On May 18, 2018, Defendants notified the Court that they had determined that "apparently due to a vendor processing error or a vendor platform error, the vendor may not have sent, in February 2016, the Notice of Pendency of Class Action to as many as 3,829 Hostway customers." Following this revelation, the Parties continued to engage in discovery and discussion concerning the composition of the Class.

On November 1, 2018 and after additional investigation, Defendants filed a Motion for Issuance of a Supplemental Class Notice, requesting authorization to send a Supplemental Notice of Pendency of Class Action to 11,792 potential Class members who were not sent the original Notice and to 1,938 additional e-mail addresses located by Defendants for potential Class Members who were sent the original Notice.

On November 6, 2018, the Honorable Michael A. Robinson entered an Agreed Order granting the Motion for Issuance of Supplemental Class Notice, and on December 6, 2018, Defendants filed a Notice of Compliance with the Agreed Order.

On December 18, 2018, the Parties engaged in a mediation before retired Circuit Court Judge Jeffrey E. Streitfeld and thereafter, continued to negotiate the terms of the Settlement with the aid and input of Judge Streitfeld. After the Parties reached an agreement in principle to settle this Action, they prepared and executed the settlement Agreement.

As more fully set forth in the Agreement, the Settlement provides that Settlement Class Members, who were Paid Users and submit a claim will have the option of receiving either a one-time payment via check of $9.95 or a "Voucher" for waiver of a $15.00 set-up fee for up to five (5) e-mail addresses for one account, if the Paid User elects to upgrade to or subscribe to Hostway's "Microsoft 365 Business Basic" plan. Settlement Class Members who were Unpaid Users and submit a claim will receive a Voucher. The Vouchers will be valid for a period of ninety (90) days from the Effective Date of the Settlement.

In addition to this compensation for the Settlement Class Members, Hostway will implement changes to its business practices, which are aimed at preventing a recurrence of the issues underlying this lawsuit. The changes contemplated by the Settlement include maintenance of a help desk for at least two years committed to aiding customers with their e-mail services including, but not limited to non-receipt of incoming e-mail and non-delivery of outgoing e-mail. Additionally, Hostway will make available online to all its customers for a period of two years a password tutorial to educate customers on the importance of password strength and the recommendation that customers change their passwords at regular intervals.

III. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT

A. Standards for Preliminary Approval

Although the Florida Rules of Civil Procedure require final judicial approval of class action settlements pursuant to Florida Rule of Civil Procedure 1.220(e), there is neither an express requirement nor express criteria for granting preliminary settlement approval. Florida Rule of Civil Procedure 1.220 is based on Federal Rule of Civil Procedure 23 and accordingly, Florida courts are guided by federal cases as persuasive authority in the interpretation of Rule 1.220. *See, e.g., Broin v. Philip Morris Cos.*, 641 So. 2d 888, 889 (Fla. 3d DCA 1994); *City of Pompano Beach v. Florida Dep't of Agric.*, 2002 WL 1558217, at *2 (Fla. 17th Cir. Ct. Jan. 24, 2002); *Estate of Bobinger v. Deltona Corp.*, 563 So. 2d 739, 745 (Fla. 2d DCA 1990); *Powell v. River Ranch Property Owners Association, Inc.*, 522 So. 2d 69, 70 (Fla. 2d DCA 1988), *rev. denied*, 531 So. 2d 1354 (Fla. 1988).

Preliminary approval is the first in the three-step approval procedure for settlements of class actions. The second step is the dissemination of notice of the settlement to all class members. The third step is a final settlement approval hearing, at which the court considers the fairness, adequacy, and reasonableness of the settlement and class members may be heard regarding the settlement. *See Manual for Complex Litigation* § 13.14 (4th ed. 2004).

Preliminary approval is merely the prerequisite to giving notice so that "the proposed settlement . . . may be submitted to members of the prospective class for their acceptance or rejection." *Philadelphia Hous. Auth. v. Am. Radiator & Standard Sanitary Corp.*, 323 F. Supp. 364, 372 (E.D. Pa. 1970). The ultimate question of whether the proposed settlement is fair, reasonable and adequate will be made after notice of the settlement is given to the Class Members and a final settlement hearing is held by the Court.

B. The Settlement Meets the Criteria Necessary for This Court to Grant Preliminary Approval

The approval of a proposed settlement of a class action suit is a matter left to the sound discretion of the trial court. *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984); *Fung v. Fla. Joint Underwriters Ass'n*, 840 So. 2d 1101, 1103 (Fla. 3d DCA 2003) ("[W]e reiterate that the trial court has the authority to conduct whatever inquiry the court feels appropriate regarding the fairness of a proposed class action settlement."). At the preliminary approval stage, the trial court need not answer the ultimate question of whether a proposed settlement is fair, reasonable and adequate. Rather, that determination is made only after notice of the settlement has been given to the members of the settlement class and given the opportunity to voice their views of the settlement. *See* 5 James Wm. Moore, *Moore's Federal Practice* § 23.85[4], at 23-354 (3d ed. 2002).[3]

Although Plaintiff is not, by this Motion, asking the Court for final approval of the settlement, the settlement is, in all respects, fair, reasonable and adequate to the Plaintiff, the Class and each of the Class Members, in light of the complexity, expense and possible duration of further litigation, the discovery and investigation conducted, and the risk and difficulty of establishing liability. The consideration contemplated in the Settlement provides Paid Users with an option to receive either $9.95 in cash or a waiver of a $15.00 set-up fee for up to five e-mail addresses for one account, if the customer elects to upgrade its e-mail service to Hostway's "Microsoft 365 Business Basic" plan, and to then pay the standard subscription fee for that plan and any professional services fees. Unpaid Users are also provided with the opportunity to claim

[3] In considering a potential settlement the trial court need not reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute (*Detroit v. Grinnell Corp.*, 495 F.2d 448, 456 (2d Cir. 1974)), and need not engage in a trial on the merits (*Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982)).

a Voucher. In addition to this compensation, Class Counsel has secured a benefit for all Hostway customers with Hostway taking steps to educate its customer base regarding the importance of password strength and separately, provide additional customer assistance with respect to non-delivery and non-receipt of e-mail. The certainty of such considerable relief and meaningful therapeutics is patently fair, reasonable and adequate to the Settlement Class Members considering the substantial risk that further litigation carries, including trial, appeals and the passage of time.

The question whether a proposed settlement is fair, reasonable and adequate necessarily requires a judgment and evaluation by the attorneys for the parties based upon a comparison of "'the terms of the compromise with the likely rewards of litigation.'" *Weinberger v. Kendrick,* 698 F.2d 61, 73 (2d Cir. 1982) (quoting *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry v. Anderson*, 390 U.S. 414, 424-25 (1968)). Therefore, most courts recognize that the opinion of experienced counsel supporting the settlement is entitled to considerable weight. *Reed v. GMC,* 703 F.2d 170, 175 (5th Cir. 1983). For example, in *Andrews v. Ocean Reef Club, Inc.*, No. 91-20-575-CA-18, 1993 WL 563622, at *3 (Fla. Cir. Ct. Jan. 22, 1993), the court noted that the trial court "can rely upon the judgment of experienced counsel and, absent fraud, should 'be hesitant to substitute its judgment for that of counsel.'" (citation omitted).

Here, counsel for both Plaintiff and Defendants have extensive experience in class action litigation. Counsel for Plaintiff believes this settlement is fair, reasonable and adequate in light of the circumstances of this case. This conclusion should be afforded considerable weight by the Court, particularly since the settlement was reached after extensive arm's-length settlement negotiations aided by a seasoned mediator, who is also a former Circuit Court Judge, where all parties had a firm understanding of the factual and legal issues presented and the relative

strengths and weaknesses of their respective claims and defenses. In sum, the proposed settlement is clearly within a range of reasonableness. *Manual for Complex Litigation*, *supra*, § 21.632, at 320 n.976.

IV. NOTICE TO CLASS MEMBERS

Under Fla. R. Civ. P. 1.220(e), a court approving a class action settlement must direct notice to members of the class (the "Notice"). The draft Notice is attached to the Settlement as Exhibit C. The Notice is drafted in plain and easily understood language, clearly and concisely describes the nature of the Action, the claims alleged in the Action, the definition of the Class, the terms of the proposed Settlement, and the reasons for the Settlement. *See* Settlement, Ex. C. In addition, the Notice explains that any Class member who so desires may enter an appearance through an attorney and explains the process by which the Class member may object to the proposed Settlement. *Id.*

The [Proposed] Order Preliminarily Approving Settlement and Providing for Notice to the Class (the "Preliminary Order"), which is attached to the Settlement as Exhibit A, provides that, within 45 calendar days after the entry of the Preliminary Order, the Settlement Administrator shall e-mail a copy of the Notice to all members of the Settlement Class who can be identified with reasonable effort at their last known e-mail address appearing in records maintained by or on behalf of Hostway.[4] Further, the Notice will be published online via *PRNewsWire*, a leading publisher of online press releases. The parties believe that this method of notice is reasonable and satisfies both Fla. R. Civ. P. 1.220 standards and constitutional due process standards. *See Fla. Dep't of Agric. and Consumer Servs. v. Cox*, 947 So. 2d 561 (Fla.

[4] In the event that the Settlement Administrator receives a bounce-back e-mail from a Settlement Class Member's e-mail address, the Settlement Administrator will use reasonable efforts to locate the Settlement Class Members' updated e-mail address and/or last known mailing address and deliver the Notice.

4th DCA 2006) (mentioning mailing to class members as appropriate notice under Fla. R. Civ. P. 1.220).

V. PROPOSED SCHEDULE OF EVENTS

Plaintiff proposes the following schedule of events leading to the Final Approval Hearing:

Notice mailed to Class	No later than 45 calendar days after Order Preliminarily Approving Settlement and Providing for Notice is signed
Date by which to file papers in support of settlement, and request for attorneys' fees and expenses	80 days after the Notice Date
Last Day for Class Members to object to the settlement	90 days after the Notice Date
Final Approval Hearing	At least 135 calendar days after Order Preliminarily Approving Settlement and Providing for Notice is signed, at the convenience of the Court

VI. CONCLUSION

Counsel for the parties have reached this Settlement following extensive discussions and arm's-length negotiations overseen and mediated by a retired Circuit Court Judge. The Court need not answer the ultimate question at this juncture: Whether the Settlement is fair, reasonable and adequate. The Court is being asked to preliminarily approve the Settlement, permit the Class to be notified regarding the terms of the Settlement and to schedule a hearing to consider any views by Class Members, concerning the fairness of the Settlement and Plaintiff's Counsel's request for an award of fees and expenses.[5]

[5] The parties have agreed that Class Counsel may seek an award of attorneys' fees, costs and expenses to be paid by Defendants separate and apart from the Settlement in a total amount not to exceed three hundred fifty thousand dollars ($350,000) exclusive of the Administrative

Dated: April 29, 2020

SAXENA WHITE P.A.

/s/ Adam Warden
Adam D. Warden #873691
7777 Glades Road, Suite 300
Boca Raton, FL 33434
Telephone: (561) 394-3399
Facsimile: (561) 394-3382
awarden@saxenawhite.com

WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP
Mark C. Rifkin
Benjamin Y. Kaufman
Patrick Donovan
270 Madison Avenue
New York, NY 10016
Telephone: (212) 545-4600
rifkin@whafh.com
kaufman@whafh.com
donovan@whafh.com

Attorneys for Plaintiff Golf Clubs Away LLC

Expenses. *See* Agreement §11.1. Additionally, all reasonable Administrative Expenses will be borne and paid separately by Hostway, and the total amount of Administrative Expenses shall not exceed $75,000. *See* Agreement §9.3.

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2020, I electronically filed the foregoing with the Clerk of the Court using the Florida E-Filing Portal System, which will send a notice of electronic filing to all counsel of record.

SERVICE LIST:

By: */s/ Adam Warden*
Adam Warden

Fredric A. Cohen, Esq.
fredric.cohen@chengcohen.com
CHENG COHEN LLC
311 N. Aberdeen St., Suite 400
Chicago, Illinois 60607
T (312) 243-1701
F (312) 277-3961

Richard Davis
rdavis@foley.com
FOLEY & LARDNER LLP
One Biscayne Tower
2 South Biscayne Boulevard
Suite 1900
Miami, FL 33131
T (305) 482-8414

Attorneys for Defendants Hostway Corporation and Hostway Services, Inc. d/b/a ValueWeb