



CIRCUIT COURT OF THE STATE OF OREGON

FOURTH JUDICIAL DISTRICT  
MULTNOMAH COUNTY COURTHOUSE  
1021 S.W. FOURTH AVENUE  
PORTLAND, OR 97204-1123  
December 9, 2009

PHONE (503) 988-3052  
FAX (503) 276-0983

RICHARD C. BALDWIN  
JUDGE

David F. Sugerman  
Paul & Sugerman  
520 SW 6<sup>th</sup> Avenue, Suite 920  
Portland, OR 97204

Jaime Bianchi  
Sheldon Philip  
White & Case  
200 South Biscayne Blvd., Suite 4900  
Miami, FL 33131-2352

Duane A. Bosworth  
Kevin H. Kono  
Davis Wright Tremaine  
1300 SW 5<sup>th</sup> Avenue, Suite 2300  
Portland OR 97201

Re: Martin, Et Al v. Comcast, Et Al  
Case 0407-07245  
Opinion And Order Allowing Plaintiffs' Motion For Leave To File  
Third amended Complaint And to Amend Class Certification Order

Dear Counsel:

Enclosed is a copy of the court's Opinion and Order in the above matter. Plaintiff's counsel should submit an appropriate form of order amending the earlier Class Certification Order entered in this case.

Sincerely,

A handwritten signature in black ink, appearing to be 'R.C. Baldwin', written over a horizontal line.

RICHARD C. BALDWIN  
Circuit Court Judge

enclosure

IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF MULTNOMAH

MICHELLE MARTIN, MICHELLE	)	
HOCHSTELLER, and ROBIN CAHILL	)	
individually and on behalf of all other	)	
similarly situated persons,	)	CASE NO. 0407-07245
	)	
Plaintiffs,	)	<b>OPINION AND ORDER ALLOWING</b>
v.	)	<b>PLAINTIFFS' MOTION FOR LEAVE</b>
	)	<b>TO FILE THIRD AMENDED</b>
COMCAST OF CALIFORNIA/	)	<b>COMPLAINT AND TO AMEND</b>
COLORADO/FLORIDA/OREGON,	)	<b>CLASS CERTIFICATION ORDER</b>
INC., a foreign corporation, et al	)	
	)	
Defendants.	)	

By letter decision dated December 17, 2008, this court certified Plaintiff's Unlawful Trade Practices Act (UTPA) claim limited to the potential recovery of actual damages for alleged violations of statutory requirements governing assessments of cable television late fees. See ORS 646.649. The Class Certification Order in this matter was approved on March 17, 2009. At the time of class certification, the potential recovery of statutory damages for such violations in a class action were expressly prohibited by ORCP 32K. Based on a subsequent change in law, plaintiff now moves to file a Third Amended Complaint and amend the Class Certification Order to seek statutory damages.

During the pendency of this proceeding, the Oregon Legislative Assembly repealed the prohibition on the recovery of statutory damages in class actions and amended the UTPA (ORS

646.608, et seq) to allow such recovery in class actions “only if the plaintiffs in the action establish that the members have sustained an ascertainable loss of money or property as a result of a reckless or knowing use or employment by the defendant of a method, act or practice declared unlawful by ORS646.608 . . .”. HB2585. By its express terms, the legislation took effect upon passage and applies “to all causes of action, whether arising before, on or after the effective date of this 2009 Act”. HB2585 sec. 7 (1). An exception was made only for “a cause of action for which a judgment was entered before the effective date of this 2009 Act.” HB2585, sec. 7 (2). Plaintiff’s requested amendments fall squarely within the above parameters of HB2585.

Defendant’s opposition to Plaintiff’s proposed amendments is predicated on a contention that the “proposed UTPA claim for aggregated statutory damages introduces the potential for damages grossly disproportionate to any alleged harm.” Defendants Opposition Memo at p.4. In support of this contention, defendants cite federal cases where particular class actions did not constitute a superior method for prosecuting claims because the potential recovery against defendants were clearly excessive in proportion to the harm actually suffered by class members. See, e.g., *Kline v. Coldwell Banker & Co.*, 508 F2d 226 (9<sup>th</sup> Cir. 1974). The federal cases cited by defendants all construe requirements for class actions under FRCP23, a rule which differs in substance from state law requirements under ORCP32. Because of the substantive difference in requirements, federal cases construing FRCP23 are not persuasive in determining whether class action requirements have been met under ORCP32. See *Strawn v. Farmers Ins.*, 228Or App 454, 471 (2009) and *Shea v. Chicago Pneumatic Tool Co.*, 164 Or App 198 (1999), rev. den., 330 Or 252 (2000).

2 – OPINION AND ORDER ALLOWING PLAINTIFF’S MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT AND TO AMEND CLASS CERTIFICTION ORDER.

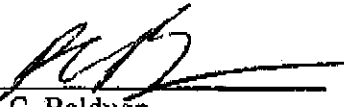
Here, the legislature has crafted legislation which allows for the recovery of statutory damages in UTPA class actions under particularized circumstances. Absent a constitutional infirmity, such legislation should be enforced by the courts without modification. See ORS 174.010; see also *State v. Gaines*, 346 Or 160 (2009) and *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993).

Defendants have also argued that the potential for a damage award grossly disproportionate to damages actually sustained by class members implicates federal due process concerns. See Defendants Opposition Memo at p.9 and cases cited therein. However, the court concludes that an award of \$200 in statutory damages for each class member will not necessarily result in a total award of damages against defendants grossly disproportionate to the alleged violations of law. Moreover, at this stage, the exact number of class members who may recover statutory damages has not been determined. In the event statutory damages are awarded, defendants may revisit this constitutional issue if they wish to do so.

**ORDER**

Plaintiff's Motion For Leave To File Third Amended Compliant And To Amend Class Certification Order is allowed.

Dated this 9<sup>th</sup> day of December, 2009.

  
Richard C. Baldwin  
Circuit Court Judge