UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BOBBIE JAMES, *et al.* on behalf of themselves and all others similarly situated, Plaintiffs v. GLOBAL TEL*LINK CORPORATION, INMATE TELEPHONE SERVICE, and DSI-ITI LLC, Defendants.	Civil Action No. 13-4989 (WJM)(MF)

BRIEF IN OPPOSITION TO MOTION TO COMPEL INDIVIDUAL ARBITRATION AND TO STAY

James E. Cecchi
Lindsey H. Taylor
CARELLA, BYRNE, CECCHI
OLSTEIN, BRODY & AGNELLO
5 Becker Farm Road
Roseland, New Jersey 07068
(973) 994-1700

James A. Plaisted
Lin C. Solomon
WALDER, HAYDEN & BROGAN, P.A.
5 Becker Farm Road
Roseland, New Jersey 07068
(973) 992-5300
Attorneys for Plaintiffs

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PRELIMINARY STATEMENT

Defendants Global Tel*Link and DSI-ITI LLC (together "GTL") move to compel arbitration of the claims of all Plaintiffs except Mark Skladany and Dr. Crowe, based upon the Terms of Use, which contain an arbitration clause, first posted on GTL's website on July 2, 2013.

This is yet another attempt to stall the litigation, as GTL has from the very beginning of the case. This motion comes after this litigation has been pending for nearly two years, and regardless of the outcome of the motion on the merits, GTL wins. As part of the relief GTL seeks in the motion, it asks the Court to stay the litigation as to Plaintiffs who are not subject to an arbitration agreement (and as to the Class), while any individual arbitrations that might be ordered run their course. If the Court denies GTL's motion, and it should, GTL may appeal as of right. *See* 9 U.S.C. § 16. If GTL appeals, the Court is obliged to stay the litigation unless the appeal is frivolous[1] or has been forfeited. *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207, 215, n. 6 (3d Cir. 2007). Win or lose on the merits of this motion, GTL gets what it *really* wants, for the litigation to be put on hold.

Although GTL relies upon the arbitration clause in the Terms of Use posted on its website, several of the Plaintiffs did no business whatsoever with GTL over its website. Rather, they opened their accounts and added funds to their accounts solely through GTL's IVR[2] system over the phone. GTL contends that those Plaintiffs agreed to the arbitration clause on GTL's website because, after July 2, 2013, GTL supposedly had a notice on its IVR system which

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[1] Plaintiffs believe that an appeal from denial of GTL's motion to compel arbitration *would* be frivolous, particularly as to waiver. However, that is an argument for another day.

[2] IVR stands for interactive voice response. IVR is an automated system where the caller is played a pre-recorded script and is asked select options by pressing a number, *e.g.*, press 1 to

advised customers that the use of GTL's services were governed by the Terms of Use on GTL's website, without making those Terms of Use available, and without seeking their affirmative agreement to the Terms of Use.

As is set forth below, the waiver of the right to litigate one's claims in court, which an arbitration clause is, requires explicit agreement. The procedure GTL set up for supposedly agreeing to arbitration via its IVR system falls short of that requirement. Moreover, as is also set forth below, even assuming that Plaintiffs agreed to GTL's arbitration clause, that consent was obtained under duress. GTL requires that if a customer does not agree to its terms and conditions, he or she must notify GTL of that fact and their accounts will be terminated. GTL is the only means by which families of inmates can communicate by phone with the inmates. By imposing this condition, GTL forces customers to choose between agreeing to arbitrate their claims on an individual basis or speaking with their loved ones in jail. That satisfies agreement under duress.

Even if there were valid consent to GTL's arbitration clause, GTL waived its right to insist upon arbitration by waiting until nearly two years into the litigation. As is set forth below, all of the factors enunciated by the Third Circuit in *Hoxworth v. Blinder, Robinson & Co., Inc.*, 980 F.2d 912 (3d Cir. 1992) are present here. In short, GTL has acted both in this Court and before the Judicial Panel for Multidistrict Litigation inconsistent with a desire to arbitrate Plaintiffs' claims. It has sought a ruling on the merits of Plaintiffs' claims, as well has attempting to have them adjudicated before the FCC. It has fully participated in this litigation for nearly two years and, most recently, filed a motion before the JPML to have this litigation consolidated with other litigation pending against it in other Districts. This motion is nothing

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speak with customer service, press 2 to speak to billing, etc. or enter information by pressing the numbers on the phone.

more than its latest ploy to slow down the litigation, not a legitimate desire to arbitrate Plaintiffs' claims. The arbitration ship sailed long ago. For all of these reasons, GTL's motion to compel arbitration should be denied.

LEGAL ARGUMENT

I

PORTIONS OF THE DECLARATION OF JOHN W. BAKER II SHOULD BE STRICKEN

As an initial matter, Plaintiffs seek to strike portions of the Declaration of John W. Baker II, which was submitted in support of GTL's motion to compel arbitration, under Fed.R.Civ.P. 37(c)(1) and L.Civ.R. 7.2(a). In his Declaration, Mr. Baker purports to set forth the process for opening an account with GTL. However, he appears to rely upon documents that Plaintiffs have requested in discovery, and GTL has not produced. Further, portions of the Declaration are, under the circumstances, legal argument, not statements of fact based upon Mr. Baker's personal knowledge, as required by L.Civ.R. 7.2(a).

Plaintiffs seek to strike Paragraphs 2, 7, 9, 10 and 11 of Mr. Baker's Declaration. Paragraph 2 references an IVR script that GTL has not produced in discovery. According to Mr. Baker's Declaration, the script states that the use of GTL's services are subject to the terms and conditions posted on GTL's website on July 3, 2013. Paragraph 7 references a mobile version of GTL's website that has not been produced in discovery. Paragraphs 9 and 10 reference different Plaintiffs' account activities using the IVR system and supposedly agreeing to GTL's terms of use.

a) References to GTL's Post-2013 IVR Scripts Should Be Excluded

Rule 37(c)(1) provides:

> If a party fails to provide information or identify a witness as provided by Rule 26(a) or (e), the party is not allowed to use that information or witness to

> supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.

Factors the Court should consider in deciding to exclude evidence under thus Rule are: (1) the "prejudice or surprise" of the party against whom the evidence is brought, (2) the ability of that party to cure the prejudice, (3) the extent to which including the evidence would disrupt the orderly and efficient trial of the case, (4) bad faith or willfulness in failing to produce the evidence, and (5) the importance of the evidence. *See Warner Chilcott Laboratories Ireland Ltd. v. Impax Laboratories, Inc.*, 2012 WL 161804, at *2 (D.N.J. Jan. 19, 2012) (citing *Meyers v. Pennypack Woods Home Ownership Assn.*, 559 F.2d 894, 904-05 (3d Cir. 1977)). The burden of establishing substantial justification and harmlessness is on the party that failed to make the required disclosure. *Marlowe Patent Holdings LLC v. Dice Electronics LLC*, 293 F.R.D. 688, 701 (D.N.J. 2013).

The paragraphs in Mr. Baker's Declaration supposedly quoting and relying upon the post-July 2013 IVR script should be stricken.[3] Plaintiffs served a Request for Production on December 5, 2014. (Taylor Dec., Ex. A) Among the documents requested were:

> 6. All scripts for automatic calling systems for opening accounts for customers to receive ICS calls from a Facility.
>
> 7. All scripts for automatic calling systems for adding money to or "refilling" accounts for customers to receive ICS calls from a Facility.
>
> 8. All scripts for automatic calling systems for closing accounts for customers to receive ICS calls from a Facility.

As of the filing of GTL's motion to compel arbitration, the only IVR scripts GTL produced in discovery had a copyright date of 2010, which predated the alleged arbitration agreement.[4] (*See*

[3] Plaintiffs seek only to strike those references with respect to this motion. If GTL seeks to rely upon this script in connection with some other application or at trial, the parties can revisit use of the script depending upon whether it has been produced in the meantime.

Taylor Dec., Ex. B) That set of IVR scripts makes no mention of GTL's arbitration clause. Plaintiffs have raised with the Court the issue of GTL's failure to produce documents on numerous occasions, *see* Docket Entries 51, 52, 53, 69, 74, 82, 83, 85, 87, 89, but, nevertheless, GTL never produced the IVR script upon which it relies in this motion.

Applying the *Pennypack* factors, the first factor, prejudice to the party against whom the evidence is being offered, weighs in favor of excluding the evidence. Plaintiffs make the best arguments they can based upon the information provided below. However, without having the complete scripts GTL is relying upon, Plaintiffs do not know whether the portions quoted in Mr. Baker's Declaration are complete, or may be contradicted, qualified or otherwise modified by other portions of the scripts. There may be language in the scripts that may be favorable to Plaintiffs' position, but we do not know, nor will Plaintiffs know before they have to file their opposition papers. This ties in with the second factor, the inability to cure the prejudice. Even if GTL were to produce the scripts at this point, Plaintiffs will still be unfairly prejudiced because they will have to redo their opposition papers based upon the newly produced scripts and probably incur additional delay in having this motion briefed, which is exactly GTL's intention. The third factor is not relevant, since there is no imminent trial date.

The fourth factor weighs heavily against GTL. GTL first requested permission to file a motion to compel arbitration on May 6, 2015 (Docket Entry 75). In contemplation of filing that motion, it is difficult to believe that GTL did not have the IVR scripts in hand as part of the evidence to support the motion. Notwithstanding Plaintiffs frequent complaints about GTL's document production being incomplete, GTL never produced the IVR scripts that GTL now

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[4] GTL has produced training manuals for customer service operators that appear to post-date July 2013, but none make any reference to GTL's terms and conditions, or the arbitration clause, or direct operators to make customers aware of GTL's terms and conditions or the arbitration clause.

contends bound Plaintiffs to the arbitration clause posted on GTL's website. Also, notably, Mr. Baker both quotes and attaches copies of GTL's terms of use posted on its website, but does not attach a copy of the IVR script that purportedly puts customers on notice of the terms and conditions on GTL's website. That in itself is suspicious. The entire series of events (or non-events, in this case) are evidence of an intentional plan by GTL to "hide the ball" as far as the IVR scripts are concerned.

The post-2013 IVR script would appear to be important evidence for this motion, because the IVR script is the only way that GTL has to tie Plaintiffs who signed up for and refilled their accounts only over the phone with the arbitration clause posted on GTL's website. Where evidence is "critical", exclusion of evidence is an "extreme" sanction "not normally to be imposed absent a showing of willful deception or flagrant disregard of a court order by the proponent." *Seltzer v. I.C. Optics, Ltd.*, 339 F.Supp.2d 601, 607 (D.N.J. 2004) (quoting *Astrazenica AB v. Mutual Pharmacy Co.. Ltd.*, 278 F.Supp.2d 491, 504 (E.D.Pa. 2003) quoting *Pennypack*, 559 F.2d at 905)). For the reasons set forth above, Plaintiffs believe that they satisfy that standard here. GTL has intentionally failed to produce its post-2013 IVR scripts, despite Plaintiffs demand for them and their repeated complaints to the Court about incomplete document production, knowing that it was going to have to rely upon those scripts for this motion. This is part and parcel of GTL's ongoing plan to keep evidence away from Plaintiffs. In this instance, those chickens should be able to come home to roost and references to the IVR scripts and any conclusions based upon Plaintiffs' alleged hearing of the IVR scripts should be excluded from this motion.

b) GTL's Conclusions That Plaintiffs "Agreed" To GTL's Terms And Conditions On GTL's Website Via The IVR System Should Be Excluded

In Paragraph 9 of Mr. Baker's Declaration, he states, *inter alia*, that "Plaintiff James opened up a new account on August 1, 2013, for a different phone number, and, during that process, affirmatively accepted GTL's Terms of Use." Also, in Paragraph 10, Mr. Baker states that Plaintiff Betty King opened a second account on November 15, 2014 via GTL's IVR system and "[d]uring this sign up process, King affirmatively accepted GTL's Terms of Use, including the arbitration provision."

L.Civ.R. 7.2(a) provides:

> Affidavits, declarations, certifications, and other documents of the type referenced in 28 U.S.C. § 1746 shall be restricted to statements of fact within the personal knowledge of the signatory.[5] Arguments of the facts and the law shall not be contained in such documents. Legal arguments and summations in such documents will be disregarded by the Court and may subject the signatory to appropriate censure, sanctions, or both.

Given the evidence in the record and the other information in Mr. Baker's Declaration, his statements that Ms. James and Ms. King "agreed" to the GTL's Terms of Use are legal conclusions and/or argument, not facts within his personal knowledge (or even facts reflected in books and records kept in the ordinary course of GTL's business.)

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[5] Given the introductory paragraph of Mr. Baker's Declaration, the Declaration appears to be in the nature of a Rule 30(b)(6) declaration. It does not appear that the matters set forth in Mr. Baker's Declaration fall within his normal job duties, but, instead, he gathered information about the subject matter from others and relied upon documents provided by others. *See* Baker Dec., at ¶ 1. That is, of course, entirely appropriate, if not obligatory, for a Rule 30(b)(6) deposition. "As specified in the rule [30(b)(6)], this preparation is not limited to matters of which the witness has personal knowledge, but extends to all information reasonably available to the responding organization." 8A Wright, Miller & Marcus, Federal Practice and Procedure, Civil, § 2103, at 457. It does not, however, satisfy the personal knowledge requirements for affidavits under the Local Rules. Plaintiffs take no issues with the portions of the Declaration attaching documents. That is the ordinary procedure for putting documents before the Court and, concededly, Mr. Baker would have personal knowledge that the exhibits are what Mr. Baker says they are. The contents of remainder of Mr. Baker's Declaration, however, are questionable.

According to Mr. Baker's Declaration, the IVR prompt states:

> Please note that your account, and any transactions you complete, with GTL, PSC, DSI-ITI, or VAC are governed by the terms of use and the privacy statement posted at www.offenderconnect.com. The terms of use and privacy statement were most recently revised on July 3, 2013.

There is nothing in this prompt which asks a customer to agree to the terms of use, advises them that they are agreeing to the terms of use by using GTL's services, nor is there any mechanism for them to affirmatively indicate their acceptance of the terms of use. GTL has neither produced in discovery, nor did it attach to the motion any sort of document indicating that either Ms. James or Ms. King (or any of the other plaintiffs who only dealt with GTL exclusively over the IVR system) had affirmatively agreed to GTL's terms of use. GTL is, of course, free to make a legal argument that this constitutes acceptance[6], but it is contrary to the Local Rules for Mr. Baker to state as a fact, based upon his personal knowledge, that they had agreed to GTL's terms of use, and the arbitration clause therein, simply because they supposedly heard this prompt on GTL's IVR system. He did not personally converse with the Plaintiffs, nor are there any admissible business records before the Court indicating that they had agreed to the terms of use. As a result, Mr. Baker's statements that Ms. James and Ms. King agreed to GTL's terms of use should be disregarded.

II

PLAINTIFFS DID NOT AGREE TO ARBITRATE THEIR CLAIMS

GTL claims that Plaintiffs agreed to arbitrate their claims and waived participation in a class action by continuing to use their GTL accounts after they were supposedly notified via a voice prompt that the GTL's terms of service had changed as of June 2013, without advising

[6] For the reasons set forth below, it does not.

them that there was an arbitration clause in the revised terms of service. Under the circumstances, that is insufficient for Plaintiffs using GTL's IVR system to have agreed to arbitrate their claims.

a) Motions To Compel Arbitration Are Decided Under A Summary Judgment Standard

Where the issue of arbitrability is apparent on the face of the complaint, a motion to compel arbitration may be decided under the standards of Fed.R.Civ.P. 12(b)(6). On the other hand, if the issue of arbitration is not clear from the face of the complaint, or the plaintiff comes forward with evidence that puts the issue of arbitrability in issue, then the motion to compel arbitration is decided in accordance with Fed.R.Civ.P. 56. *Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, 716 F.3d 764, 773-76 (3d Cir. 2013).

In the instant case, the issue of arbitrability is not apparent from the face of the Complaint. Indeed, GTL does not address the allegations in the Complaint, or any documents referenced therein, but, instead, relies upon the Declaration of John W. Baker III, a GTL senior vice president, and GTL documents annexed as exhibits.[7] As a result, GTL's motion to compel arbitration should be decided under Rule 56, *i.e.*, that the evidence is construed in favor of the non-moving party and, if there are genuine issues of material fact as to the issue of whether there is a valid arbitration agreement, then the Court should deny the motion and, if appropriate, allow the non-moving party to take discovery as to the issue of arbitrability. *Guidotti*, 716 F.3d at 774-75. If genuine issues of material fact remain after discovery, the Court should have an

[7] For purposes of this argument, Plaintiffs address the contents of Mr. Baker's Declaration. If it is stricken, then there is no evidence in the record to support GTL's contention that Plaintiffs using only the IVR system somehow agreed to GTL's arbitration clause, since the only link between the IVR system and the arbitration provision on GTL's website is the alleged IVR prompt identified in Mr. Baker's Declaration.

evidentiary hearing (with a jury if a party has demanded one) as to whether there is a valid arbitration clause. *Id.* at 780.[8]

b) Plaintiffs Who Used GTL's Phone System Did Not Agree To Arbitration

As a beginning point, an agreement to arbitrate, like any other agreement, must be the product of mutual assent, determined under customary principles of contract law. *Atalese v. U.S. Legal Services Group, L.P.*, 219 N.J. 430, 442 (2014). A legally enforceable agreement requires a meeting of the minds. *Id.*

> Parties are not required to arbitrate when they have not agreed to do so. Mutual assent requires that the parties have an understanding of the terms to which they have agreed. An effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights. By its very nature, an agreement to arbitrate involves a waiver of a party's right to have her claims and defenses litigated in court. But an average member of the public may not know—without some explanatory comment—that arbitration is a substitute for the right to have one's claim adjudicated in a court of law.

Id. (internal quotes and citations omitted). Thus, "[b]efore a party to a lawsuit can be ordered to arbitrate and thus be deprived of a day in court, there should be an express, unequivocal agreement to that effect." *Guidotti*, 716 F.3d at 773.

> In respect of specific contractual language, "[a] clause depriving a citizen of access to the courts should clearly state its purpose. The point is to assure that the parties know that in electing arbitration as the exclusive remedy, they are waiving their time-honored right to sue." As we have stressed in other contexts, a party's waiver of statutory rights "must be clearly and unmistakably established, and contractual language alleged to constitute a waiver will not be read expansively."

Garfinkel v. Morristown Obstetrics & Gynecology Associates, P.A., 168 N.J. 124, 132 (2001) (internal quotes and citations omitted). Questions of arbitrability, including the validity of an arbitration agreement, are questions for judicial determination. *Guidotti, id.*

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[8] There are no arguable genuine issues of material fact with respect to the issues that, assuming Plaintiffs agreed to the arbitration clause, it was under duress, and that GTL waived arbitration. The waiver argument is based solely upon documents on the docket here and before the JPML.

With respect to those Plaintiffs who opened their accounts via GTL's IVR phone system, GTL attempts to create Plaintiffs' agreement to arbitrate their claims through a three-part process. GTL concedes that Plaintiffs Bobbie James, Barbara Skladany and Milan Skladany signed up for GTL accounts before GTL posted terms and conditions including an arbitration clause and class action waiver on its website on July 2, 2013, but contends that they are bound by the arbitration clause because they used their accounts after that date. (GTL Brief at 11-12).

According to GTL, Plaintiffs supposedly agreed to GTL's arbitration clause by continuing to use GTL's service after July 2, 2013, when the arbitration clause was posted on GTL's website. According to GTL, persons who recharged their accounts after July 2, 2013 were advised that their accounts were governed by the terms and conditions on GTL's website, which were revised as of July 3, 2013. (GTL Brief at 13; Baker Dec., ¶ 2) That alleged notice, however, made no reference whatsoever to an arbitration clause. (*Id.*; *see also* Decs. of Barbara Skladany, Bobbie James, Betty King and Crystal Gibson) Rather, the arbitration clause is contained in the terms and conditions posted on GTL's website.

New Jersey recognizes construing separate documents together as one. *Albert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn*, 410 N.J.Super. 510, 533 (App.Div. 2009).

> So long as the contract makes clear reference to the document and describes it in such terms that its identity may be ascertained beyond doubt, the parties to a contract may incorporate contractual terms by reference to a separate, non-contemporaneous document, including a separate agreement to which they are not parties, and including a separate document which is unsigned.... And, in order to uphold the validity of terms incorporated by reference, it must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms.

Id. (quoting *Williston on Contracts*, § 30:25). However, "it is axiomatic that an agreement cannot be found properly incorporated, if the provisions of such agreement are not known by the party to be bound at the time of acknowledgment." *Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, 74 F.Supp.3d 699, 710 (D.N.J. 2014).

Here, Plaintiffs are not bound by GTL's arbitration clause because it was not available to them at the time they supposedly heard the notice that their accounts were governed by GTL's terms and conditions. That notice was, allegedly, a verbal notice on the phone, and a customer could not proceed with any transactions until they heard this notice. (GTL Brief at 13; Baker Dec., ¶ 2). However, it is virtually impossible for the terms and conditions including the arbitration clause to be available to a customer on the phone. Those terms and conditions are on GTL's website. In order to access the terms and conditions, they would have to pause or disconnect their phone call, go onto a computer, search down the terms and conditions, then resume their call or call GTL back to transact whatever business they intended in the first instance. No reasonable consumer is going to do that. A normal consumer is going to continue with whatever business they called to do. The arbitration clause is simply not known to the customer at the time that this notice is given, so it cannot be somehow incorporated by reference by this notice.

Guidotti is instructive. There, while signing up for Legal Helpers' debt adjustment services, plaintiff signed and returned a Special Purpose Account Application ("SPAA") to Legal Helpers. The SPAA incorporated another document by reference, an Account Agreement and Disclosure Statement ("AADS"), which contained an arbitration clause. *Guidotti*, 74 F.Supp.2d at 701-02. However, the AADS was not provided to the plaintiff at the time she signed the SPAA. *Id.* and 74 F.Supp.2d at 704-06. Judge Simandle found that the AADS was not validly incorporated by reference by the SPAA because the AADS was not available to the plaintiff at the time she signed the SPAA. *Id.* at 710.

An additional problem is that there is nothing in GTL's voice prompts which either affirmatively requires the customer to agree to the terms and conditions or puts the customer on notice that continued use of GTL's services constitutes agreement to GTL's terms and

conditions. All that the notice says is that the customer's account and any transactions are governed by the terms and conditions on the website. GTL's failure to require an IVR customer to affirmatively agree to the arbitration clause, or to put them on notice that continued use of GTL's services constitutes agreement to the arbitration clause fails to satisfy the requirement that "a party to have full knowledge of his legal rights and intent to surrender those rights." *Atalese*, 219 N.J. at 442. Rather, it is arbitration by gotcha.

"In the internet era, when agreements are often maintained, delivered and signed in electronic form, a separate document may be incorporated through a hyperlink, but the traditional standard nonetheless applies: the party to be bound must have had reasonable notice of and manifested assent to the additional terms." *Holdbrook Pediatric Dental, LLC v. Pro Computer Service, LLC*, 2015 WL 4476017, at *4 (D.N.J. July 21, 2015). In *Holdbrook Pediatric*, Judge Hillman examined a number of cases relating to customers agreeing to "clickwrap" and "browsewrap" agreements.[9] The common thread for there being a binding agreement is making the operative agreement available to the customer at the time they purchase the goods or services, and some affirmative action by the customer acknowledging agreement to the terms of that agreement. *Holdbrook Pediatric*, 2015 WL 4476017, at *5. The Court found that the arbitration agreement in *Holdbrook Pediatric* was not binding because it did not have these features.

> Unlike the above-cited cases, there is no statement that signing the agreement indicated acceptance of the "Terms and Conditions," nor is there an instruction to sign the contract only if Holdbrook agreed to the additional terms. The Court finds that the existence of the hyperlink in the document, without any statement to

[9] In a "clickwrap" agreement, all of the terms of an agreement are collected in a dialog box and a user must click on an icon that affirmatively demonstrates assent to be bound by the terms and conditions. In a "browsewrap" agreement, by contrast, the terms of use are contained in a hyperlink, but the user can utilize a provider's services without ever knowing that such services are being provided subject to the terms and conditions. *Holdbrook Pediatric*, 2015 WL 4476017, at *5.

> draw attention to the link, is insufficient to demonstrate that Holdbrook had "reasonable notice" that the "Terms and Conditions" were part of the contract.

Id.

That reasoning is equally applicable here. The voice prompt supposedly in GTL's IVR system stating that the use of GTL's services was governed by the terms and conditions on GTL's website does not provide those terms to the customer, does not give reasonable notice that the terms and conditions are part of the contract, nor does it give the customer the opportunity to agree or not agree to the terms and conditions. As a result, they are not binding, and there is no enforceable arbitration clause.

This is entirely consistent with *Coiro v. Wachovia Bank, N.A.*, 2012 WL 628514 (D.N.J. Feb. 27, 2014), which is relied upon by GTL. In *Coiro*, the customer agreed to arbitration in her initial deposit agreement with the bank in 1999. *Id.* at *1. In 2010, the bank mailed to customer additional documents, which included a new Deposit Agreement. The new Deposit Agreement included both an arbitration clause and a class action waiver. *Id.* at *2. The Court concluded that the customer was bound by the arbitration clause in the 2010 Deposit Agreement because the 1999 deposit agreement provided that it could be modified on 30 days' notice and if the customer did not agree to the change, she could close her account. *Id.* at *3. In addition, the Court noted that the 2010 arbitration clause was not materially different from the 1999 arbitration clause. *Id.*

Thus, *Coiro* is distinguishable from the facts here. First, Plaintiffs had never agreed to GTL's terms and conditions when they signed up for an account. Further, the customer in *Coiro* actually received the new Deposit Agreement and was on notice that if she did not agree to those terms, she should close her account. In that instance, it was reasonable to construe silence as acceptance of the terms of the new Deposit Agreement. Here, by contrast, Plaintiffs were not

made aware that if they failed to act, they would be deemed to have agreed to an arbitration agreement that was never provided to them. Indeed, the phone prompt, assuming it actually existed, failed to put Plaintiffs on notice that the arbitration agreement even existed. Silence does not ordinarily manifest assent, *Weichert Co. Realtors v. Ryan*, 128 N.J. 426, 436 (1992)[10], and this is not an instance "where the particular circumstances reasonably impose on the offeree a duty to speak if the offer is rejected." *Johnson & Johnson v. Charmley Drug Co.*, 11 N.J. 526, 539 (1953). Nothing that was provided to customers who opened and/or accessed their accounts via GTL's IVR system put them on notice that they were agreeing to give up their right to sue in court by using GTL's services, required them to affirmatively indicate their agreement or, if they did not agree, advise them they should close their accounts.

[10] *Weichert* also holds that "courts have held that when an offeree accepts the offeror's services without expressing any objection to the offer's essential terms, the offeree has manifested assent to those terms." *Weichert*, 128 N.J. at 436. The key word there is *essential* terms. Obviously, by using GTL's services, Plaintiffs implicitly agreed to pay for them. Those are the *essential* terms of the contract between GTL and its customers. The arbitration clause is not an *essential* term, nor, in fact, was it "offered" to IVR customers to accept. Had it been an essential term, GTL would or should have explicitly said so in its IVR script. The law is well settled that a contract does not have to contain every possible term in order to be binding. Open issues can be addressed by operation of law, be governed by a subsequent agreement, or the contract may be silent on those issues. *E.g.*, *Berg Agency v. Sleepworld-Willingsboro, Inc.*, 136 N.J.Super. 369, 376-77 (App.Div. 1975); *Volk v. Atlantic Acceptance & Realty Co.*, 139 N.J.Eq. 171, 173 (Ch. 1947) ("where the negotiations are in fact concluded and the contract is complete in all its essential and material terms and the parties intend that it shall be obligatory, then it is enforceable, although it is deficient in the statement of those casual and incidental provisions commonly present in a formal and conventional agreement which the parties contemplate shall in due course be prepared and executed.") The issue is not whether there was a contract between Plaintiffs and GTL, but what were the terms of that contract. The arbitration clause was not among those terms.

III

IF PLAINTIFFS AGREED TO GTL'S ARBITRATION CLAUSE, IT WAS UNDER DURESS

Assuming *arguendo* that all of the Plaintiffs agreed to GTL's arbitration clause, they agreed to it under duress.[11] The nature of GTL's business placed Plaintiffs in the untenable position of either allegedly agreeing to GTL's arbitration clause or foregoing speaking with their family members and loved ones while they were incarcerated. As a result, to the extent it even occurred, Plaintiffs' "acceptance" of GTL's arbitration clause is inoperative.

There are two elements to duress under New Jersey law: 1) the party alleging duress that he was the victim of a wrongful or unlawful act or threat, and 2) the act or threat must be one which deprives the victim of his unfettered will. *Recchia v. Kellog Co.*, 951 F.Supp.2d 676, 683 (D.N.J. 2013) (quoting *Continental Bank of Pa. v. Barclay Riding Academy*, 93 N.J. 153, (1983)). "The key factor in determining whether duress exists is the wrongfulness of the pressure exerted. It is enough that an act be contrary to moral or equitable standards to constitute a wrongful act." *Id.*

Here, to the extent that Plaintiffs agreed to GTL's arbitration clause, that agreement was under duress. As the Court is aware, subscribing to GTL's phone services is not an ordinary consumer transaction. GTL has a monopoly on inmate calling services from correctional institutions in New Jersey. A customer cannot use their own existing phone service or obtain such phone service from another vendor, in the same way that he or she could get a credit card

[11] Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, allows an arbitration agreement to be voided "upon such grounds as exist at law or in equity for the revocation of any contract." This provides that an arbitration agreements may be invalided based upon "generally applicable contract defenses, such as fraud, duress or unconscioniability." *E.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1746 (2011).

from another bank or get cellular phone service from another provider. GTL is the only game in town.

More importantly, GTL is the only way for family members and loved ones of persons incarcerated in New Jersey to communicate with them, other than an in person visit. As is detailed in the Complaint, GTL is already taking advantage of its monopoly by charging extortionate rates and charges for their services. To add insult to injury, GTL is insisting upon its customers agreeing to an arbitration clause and class action waiver, which is, as a practical matter, an exculpatory clause. *See Muhammad v. County Bank of Rehoboth Beach, Delaware*, 198 N.J. 1, 19-22 (2006).

If a customer does not wish to agree to the arbitration clause and class action waiver, and customers doing business with GTL over its IVR system are not given a choice not to agree, the customer cannot telephone their incarcerated family member or loved one until they get out of jail.[12] (*See* Decs. of Barbara Skladany, Bobbie James, Betty King and Crystal Gibson) Such pressure may not be unlawful, but it is certainly "contrary to moral and equitable standards" to condition speaking with an incarcerated family member or loved one upon agreeing to an arbitration clause that, as a practical matter[13], prevents the customer from obtaining any remedy for the extortionate rates GTL charges because of its monopoly position in providing its services. This is most certainly a situation where GTL's conditioning fulfilling the desire, if not need, to

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[12] In many instances, GTL's services are the *only* practical method for family members to communicate with an inmate. As the FCC noted in its factual findings supporting its ratemaking rules for ICS calls, "Familial contact is made all the more difficult because mothers are incarcerated an average of 160 miles from their last home, so in-person visits are difficult for family members on the outside to manage.'' 78 Fed.Reg. 67961, at ¶42 (Nov. 13, 2013) (internal quotes omitted).

[13] *Cf. Carnegie v. Household International, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30." (emphasis in original)).

speak with the incarcerated loved one to agreeing to its arbitration clause would overcome a customer's unfettered will. GTL's demand places the customer in situation where the lesser of two evils is to agree to its arbitration clause rather than not speaking with their incarcerated loved one.

In addition, GTL places the customer in the position of agreeing to its arbitration clause and reducing the chances the inmate will return to jail. Regular phone contact with inmates decreases recidivism and, as a result, reduced costs of prison for the taxpayer.

> Just, reasonable, and fair ICS rates provide benefits to society by helping to reduce recidivism. The Congressional Black Caucus cites ''a powerful correlation between regular communication between inmates and their families and measurable decreases in prisoner recidivism rates.'' In addition, NARUC formally endorsed ''lower prison phone rates as a step to reduce recidivism and thereby lower the taxpayer cost of prisons.'' As the Center on the Administration of Criminal Law explains, ''a reliable way of decreasing the likelihood that prisoners will re-offend is to foster the growth of a family support structure that gives inmates a stake in the community to which they return and can provide them with the tools and incentives they need to succeed upon release.'' Further, reducing recidivism would provide significant cost savings, as the annual cost to incarcerate one person is estimated at over $31,000 per year or between $60 and $70 billion per year nationwide. Indeed, one study indicates that a one percent reduction in recidivism rates would translate to more than $250 million in annual cost savings across the United States.

78 Fed.Reg. 67961, at ¶43 (Nov. 13, 2013). It is "contrary to moral or equitable standards" to force a family member, loved one or friend to make a choice between agreeing to an arbitration/exculpatory clause and increasing the chances the inmate will be imprisoned again.

IV

GTL WAIVED ITS RIGHT TO ARBITRATE

Separate and apart from the issue of whether there is a valid arbitration agreement between Plaintiffs and GTL, GTL's motion to compel arbitration should be denied because it has waived its right to insist upon arbitration. GTL's actions in this Court and elsewhere are

inconsistent with a desire to arbitrate its claims. Further, while there may be genuine issues of material fact as to whether there was a meeting of the minds relating to GTL's arbitration agreement, there are no genuine issues of material fact as to the proceedings before this Court and before the Judicial Panel for Multidistrict Litigation. For the reasons set forth below, GTL has waived its right to arbitrate and its motion to compel arbitration should be denied.

a) <u>This Court Has The Authority To Determine If GTL Waived Arbitration</u>

As a threshold matter, this Court has authority to determine whether GTL waived any right to seek to compel arbitration in the first instance. The issue of whether a party has waived arbitration as a result of its conduct before the court is an issue for the judge, not the arbitrator. *Ehleiter*, 482 F.3d at 217-19 (following *Marie v. Allied Home Mort. Corp.*, 402 F.3d 1, 13-14 (1st Cir. 2005)). "Where the alleged waiver arises out of conduct within the very same litigation in which the party attempts to compel arbitration or stay proceedings, then the district court has power to control the course of proceedings before it and to correct abuses of those proceedings. . . . Judges are well-trained to recognize abusive forum shopping." *Marie*, 403 F.3d at 13. Moreover, having the arbitrator decide waiver issues would be "exceptionally inefficient". *Marie*, *id.* "If the arbitrator were to find that the defendant had waived its right to arbitrate, then the case would inevitably end up back before the district court with the plaintiff against pressing his claims. The case would have bounced back and forth between tribunals without making any progress." *Marie*, *id.* at 13-14. Based upon the foregoing, whether GTL waived its alleged right to arbitrate is an issue to be decided by the Court.

b) <u>The Controlling Legal Standard Governing Waiver</u>

While the FAA permits a district court to send to arbitration all matters that may be found to be controlled by a valid arbitration clause, *see* 9 U.S.C. § 4, the right of a party to compel such arbitration is limited. Section 3 of the FAA states that a court is only required to stay an action

pending a referral to arbitration if "the applicant for the stay is not in default in proceeding with such arbitration." 9 U.S.C. § 3. Such "default" includes waiver as a result of a party's actions in court.[14] *E.g., Ehleiter*, 482 F.3d at 218; *Marie* 402 F.3d at 13. Waiver occurs when a party seeking arbitration substantially participates in the litigation to a point inconsistent with an intent to arbitrate. *In re Pharmacy Benefit Managers Antitrust Litigation*, 700 F.3d 109, 117 (3d Cir. 2012).

"Prejudice is the touchstone for determining whether the right to arbitration has been waived by litigation conduct." *Pharmacy Benefit*, *id.* (quoting *Zimmer v. CooperNeff Advisors, Inc.*, 523 F.3d 224, 231 (3d Cir. 2008)).

> [W]here a party fails to demand arbitration during pretrial proceedings, and, in the meantime, engages in pretrial activity inconsistent with an intent to arbitrate, the party later opposing ... arbitration may more easily show that its position has been compromised, *i.e.,* prejudiced, because under these circumstances we can readily infer that the party claiming waiver has already invested considerable time and expense in litigating the case in court, and would be required to duplicate its efforts, to at least some degree, if the case were now to proceed in the arbitral forum. Prejudice of this sort is not mitigated by the absence of substantive prejudice to the legal position of the party claiming waiver.

Pharmacy Benefit, 700 F.3d at 121 (quoting *Ehleiter*, 482 F.3d at 224 (internal quotes omitted)). Among the factors which may be considered to assess whether the party opposing arbitration has suffered prejudice are: (1) timeliness or lack thereof of the motion to arbitrate; (2) extent to which the party seeking arbitration has contested the merits of the opposing party's claims; (3) whether the party seeking arbitration informed its adversary of its intent to pursue arbitration prior to seeking to enjoin the court proceedings; (4) the extent to which a party seeking arbitration engaged in non-merits motion practice; (5) the party's acquiescence to the court's

[14] Waiver is also a defense arising "upon such grounds as exist at law or in equity for the revocation of any contract" under 9 U.S.C. § 2. *See generally Doctor's Assoc., Inc. v. Casrotto*, 517 U.S. 681, 687 (1996); *Ehleiter*, 482 F.3d at 217-18. However, in federal court, waiver is

pretrial orders; and (6) the extent to which the parties have engaged in discovery. *Pharmacy Benefit*, *id.* (citing *Hoxworth*, 980 F.2d at 926-27)). The *Hoxworth* factors are indicative of whether a party opposing litigation would suffer prejudice as a result of the other party's delay in seeking arbitration. *Pharmacy Benefit*, *id.* However, these factors are nonexclusive and not all of the factors need be present to justify a finding of waiver. *Pharmacy Benefit*, 700 F.3d at 118. "Rather, the waiver determination must be based on the circumstances and context of the particular case." *Id.*

c) GTL Waived Its Purported Right To Arbitrate

GTL addresses waiver in a backhanded way in its moving papers, arguing that it did not move to compel arbitration immediately because it did not have complete account information for Plaintiffs. (GTL Brief at 7) As a result, it served interrogatories on Plaintiffs requesting certain information relating to their accounts in February 2015 and, after it received answers to those interrogatories, it requested permission to move to compel arbitration. (GTL Brief at 8).

This nonsense explanation ignores all of the other proceedings in the case, including GTL's motion practice directed to the merits of the case and its other actions seeking to litigate the issues presented here somehow other than via arbitration. All of the *Hoxworth* factors weigh in favor of a finding that GTL waived arbitration.

1) Timeliness Or Lack Thereof Of The Motion To Arbitrate

This action was filed on August 20, 2013. (*See* Docket Entry 1). On May 6, 2015, GTL filed a letter requesting permission to file a motion to compel arbitration. (Docket Entry 75). By way of consent order dated August 3, 2015, GTL was to file its motion to compel arbitration by August 4, 2015. (Docket Entry 93) That deadline was extended to August 7, 2015, (Docket

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generally decided as a matter of federal law under Section 3 rather than under general contract rules.

Entry 94), and GTL filed its motion to compel on that date, over 23 months after the Complaint was filed.[15]

While there is no bright-line rule as to how long a delay in seeking to compel arbitration is too long, a delay of 10 months is generally the cutoff. *See e.g.*, *Pharmacy Benefit*, 700 F.3d at 118 (waiver after 10 month delay); *Gray Holdco, Inc. v. Cassady*, 654 F.3d 444, 454 (3d Cir. 2011) (waiver after 10 month delay); *Hoxworth*, 980 F.2d at 925 (waiver after 11 month delay); *Nino v. Jewelry Exchange, Inc.*, 609 F.3d 191, 210 (3d Cir. 2007) (waiver after 15 month delay); *Ehleiter*, 482 F.3d at 223 (waiver after 4 year delay). GTL's delay in seeking to compel arbitration is double the lower end of periods where the Third Circuit has found the delay to be too long. Moreover, GTL has no reasonable excuse for the delay. Assuming it is true that GTL needed discovery from Plaintiffs to verify their account information in order to move to compel arbitration, it offers no reasonable excuse as to why it waited until February 2015, 17 months after the Complaint was filed, to seek that information.[16] The first factor weighs in favor of waiver.

2) Extent To Which The Party Seeking Arbitration Has Contested The Merits Of The Opposing Party's Claims

This factor also weighs in favor of waiver. On November 22, 2013, GTL moved to stay or dismiss Plaintiffs claims. (Docket Entry 20) That motion sought to dismiss Plaintiffs' Federal

[15] GTL's first letter request to for permission to move to compel arbitration was filed over 20 months after the Complaint was filed. Whether the Court uses the date for when GTL first sought permission to file a motion to compel arbitration or the date the motion was actually filed, the result is the same.

[16] The answer, of course, is that GTL wanted to first litigate Plaintiffs' claims on the merits in court or try to send Plaintiffs into the black hole of an FCC petition, both of which are inconsistent with arbitration.

Communications Act claims under the doctrine and refer them the FCC[17], and addressed Plaintiffs' § 1983, Consumer Fraud Act, Public Utilities Act, and Federal Communications Act claims on the merits. (*See* Docket Entry 20-1). This motion was ultimately successful in that the Court stayed the entire action and directed Plaintiffs to file an administrative complaint with the FCC within 90 days. (Docket Entry 35) The stay was lifted after Plaintiffs dismissed their Federal Communications Act claims. (Docket Entry 41) In addition, GTL sought permission to file a motion for judgment on the pleadings, against addressed to the merits of Plaintiffs' claims, that Plaintiffs' Consumer Fraud Act claims are preempted because the New Jersey Board of Public Utilities has exclusive jurisdiction over GTL's calling services.[18] (Docket Entry 75)

GTL's litigation of Plaintiffs' claims on the merits is consistent with other cases where the Third Circuit has found waiver of arbitration. *Compare, e.g., Pharmacy Benefit*¸700 F.3d at 818 (waiver after two motions to dismiss); *Nino*, 609 F.3d at 210-11 (waiver despite no motions to dismiss); *Hoxworth*, 980 F.2d at 925-26 (waiver after motion to dismiss and opposition to class certification); *Gray Holdco*, 654 F.3d at 456 (waiver after motion for preliminary injunction and opposition to motion to dismiss).

3) Whether The Party Seeking Arbitration Informed Its Adversary Of Its Intent To Pursue Arbitration Prior To Seeking To Enjoin The Court Proceedings

This factor also weighs in favor of waiver. GTL first raised the issue of arbitration in its Amended Answer, filed on March 9, 2015. (*See* Docket Entry 67, at 17, Thirty-Third Affirmative Defense) However, simply asserting arbitration as an affirmative defense in an

[17] GTL's position that Plaintiffs' claims belonged in the FCC is, by itself, an action inconsistent with arbitration. GTL's position seems to be that Plaintiffs' (and the Class's) claims should be litigated anywhere other than in this Court, where they can obtain timely and complete relief for GTL's overcharges.

[18] Judge Falk denied permission to file this motion.

answer is insufficient to preserve arbitration if no further action is taken. *Cole v. Jersey City Medical Center*, 215 N.J. 265, 281 (2013).[19]

GTL first raised the issue of arbitration only two months before its letter requesting permission to move to compel arbitration.[20] However, despite the relatively short time between when GTL first asserted arbitration in its Amended Answer and when it sought permission to move to compel arbitration, this factor does not weigh in GTL's favor. GTL did not raise arbitration as an issue until the litigation had been ongoing for 18 months. It did not raise arbitrability in its motion to dismiss, nor in its first Answer, filed on November 26, 2014. Importantly, GTL did not mention arbitration at all in the Joint Discovery Plan (*see* Docket Entry 45-1) *Compare Wood v. Prudential Insurance Co. of America*, 207 F.3d 674, 681 (3d Cir. 1999) (no waiver where defendant reserved right to move to compel arbitration in joint discovery plan and moved six weeks later); *Nino*, 609 F.3d at 211-12 (waiver despite the fact defendant raised arbitration in answer)[21]. As the Third Circuit noted in *Nino*, a party's approach to discovery will differ depending upon whether the case is to be litigated or arbitrated. *Nino*, *id.* That is certainly the case here, since Plaintiffs have been proceeding as thought the case would be litigated from the beginning.

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[19] New Jersey follows the same test as the Third Circuit for determining whether a party has waived its right to arbitrate. *Cole*, 215 N.J. at 278-81.

[20] The time lag between GTL's May 6, 2015 letter requesting permission to move to compel arbitration and the filing of the motion to compel arbitration should not be considered for purposes of this factor. The Scheduling Order required either party to seek Court permission before filing *any* motion. (Docket Entry 61, at ¶ 18) GTL should not gain some advantage because the Court did not immediately rule upon its request.

[21] Defendant asserted arbitration as an affirmative defense in its answer, which was filed a month and a half after it was served, but did not move to compel arbitration until 13 months later. *Nino v. Jewelry Exchange*, 2008 WL 5424071, at *7 (D.V.I. Dec. 29, 2008).

4) The Extent To Which A Party Seeking Arbitration Engaged In Non-Merits Motion Practice

The fourth factor likewise weighs in favor of waiver. As the Court is aware, there is very little formal motion practice with respect to non-merits issues in this District. Rather, case management and discovery disputes are almost exclusively brought to the Court's attention and resolved by letters. *See* L.Civ.R. 16.1(f)(1); 37.1(a)(1). The fact that there have been no formal non-merits motions does not let GTL off the hook on this factor, because GTL has participated in litigating numerous non-merits disputes before the Court. Those disputes include:

- GTL's request to bifurcate discovery (Docket Entries 47, 48, 49, 50);
- Plaintiffs' requests to compel discovery (Docket Entries 51, 52, 53, 69, 74, 82, 83, 85, 87, 89, 96, 98)
- The terms of the Discovery Confidentiality Order (Docket Entries 62, 64, 68)

These actions, taken together, are contrary an intent to arbitrate Plaintiffs' claims. *Compare Pharmacy Benefit*, 700 F.3d at 119 (waiver where defendant filed, in addition to uncontested administrative motions, motion for reconsideration and certification for interlocutory appeal); *Ehleiter*, 482 F.3d at 223 (waiver where defendant filed motion to implead third party); *Nino*, 609 F.3d at 212 (defendant opposed three motions to compel discovery); *Hoxworth*, 980 F.2d at 925-26 (defendant filed motions to disqualify counsel and stay discovery and opposed motions to compel discovery).

In addition to non-merits motion practice in this Court, on June 16, 2015, GTL filed a motion with the Judicial Panel for Multidistrict Litigation seeking to consolidate this action with other actions pending against GTL in the Western District of Arkansas and the Eastern District

of Pennsylvania.[22] *See In re Global Tel*Link Corporation ICS Litigation*, MDL No. 2651. The motion before the JPML to consolidate all of the lawsuits against it in one forum so they can be litigated together is certainly inconsistent with an intent to arbitrate.[23] Indeed, the application before the JPML is indicative that GTL wishes to litigate all of the class actions filed against it in court, not to arbitrate those claims on an individual basis.

5) The Party's Acquiescence To The Court's Pretrial Orders

This factor also weights in favor of waiver. Cases where the Third Circuit has found no waiver generally were not litigated long enough to feature any acquiescence in pretrial orders. *Pharmacy Benefit*, 700 F.3d at 119. GTL has abided by all of the Court's pretrial orders without objection. GTL participated in the drafting and submission of a Joint Discovery Plan, in accordance with the Court's October 21, 2014 letter order and court conferences relating to the entry of a Scheduling Order. (*See* Docket Entries 42, 45, Minute Entry 11/14/2014, Minute Entry 2/3/2015) That schedule included dates for completion of fact discovery, expert discovery and filing a motion for class certification. (*See* Docket Entry 61) It participated in negotiating a Discovery Confidentiality Order in accordance with the Court's February 17, 2015 Scheduling Order. (*See* Docket Entry 61, ¶ 9; Docket Entries 62, 64, 68, 97). It participated in case management conferences scheduled by the Court on May 5, 2015 (Minute Entry 5/5/15), May 26, 2015 (Minute Entry 5/26/15) on July 14, 2015 (Minute Entry 7/14/2015) and on August 19, 2015. GTL negotiated and agreed to a revised scheduling order as directed by the Court at the

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[22] The Arkansas and Pennsylvania suits explicitly exclude the claims asserted here.

[23] It is, however, consistent with an intent to stall. GTL's motion before the JPML seeks to consolidate all of the cases against it in the *least* advanced case, so that this matter and the Arkansas case would essentially have to start over from the beginning, or at least be put on hold until the Pennsylvania case catches up.

July 14, 2015 conference. (*See* Docket Entry 91) In short, other than producing discovery[24], GTL has abided by every pretrial order the Court has entered and participated, without objection, in all of these proceedings. *Compare Pharmacy Benefit, id.* (waiver where defendant attended hearings for motion to dismiss and motion for reconsideration and made no objection to orders setting dates for submission of discovery plan and case management order); *Gray Holdco*, 654 F.3d at 459-60 (waiver where defendant attended three status conferences and court-ordered mediation, and filed Rule 26(f) report); *Hoxworth*, 980 F.2d at 925 (waiver where defendant participated in "numerous" pretrial proceedings); *Nino*, 609 F.3d at 212 (waiver where defendant participated in 10 pretrial conferences).

6) <u>The Extent To Which The Parties Have Engaged In Discovery</u>

Notwithstanding GTL's foot dragging with discovery, this factor also weighs in favor of waiver. The discovery taken thus far is sufficiently significant to weigh in favor of waiver. The parties have exchanged Rule 26 disclosures, requests for production of documents, and interrogatories. Thus far, GTL has produced nearly 2,300 pages of documents and responded to interrogatories. Although discovery has not been as extensive as some of the cases in which waiver was found, *compare Pharmacy Benefit*, 700 F.3d at 120, it is more than a *de minimis* amount. *See Nino*, 609 F.3d at 213.

Moreover, GTL has never raised its alleged desire to arbitrate as an explanation for the glacial pace at which it is producing documents, or providing dates for depositions. Rather, its foot-dragging with discovery is, along with this motion to compel arbitration, part and parcel of

[24] Other than insisting upon not responding to Plaintiffs' discovery requests until after the Court decided whether to bifurcate discovery, *see* Docket Entries 47, 48, 51, 52, 53, GTL has not objected to discovery because of its alleged arbitration clause. Rather, it has simply not produced discovery, not by dates it has promised or by dates imposed by the Court. (*See* Docket Entries 69, 82, 87) *Cf.* "I love deadlines. I like the whooshing sound they make as they fly by" – Douglas Adams

its intent to stall this litigation as long as possible to postpone having to face the merits of Plaintiffs' and the Class' claims. This factor should not weigh in GTL's favor because of its passive aggressive approach to discovery. This is not an instance where the case has not progressed far enough so that only minimal discovery has taken place. Rather, to the extent that discovery has been limited, it is because GTL has simply refused to participate in good faith with the discovery process.

7) Taken Together, The *Hoxworth* Factors Demonstrate Actions Inconsistent With An Intent To Arbitrate

Considering all of the *Hoxworth* factors together, Plaintiffs have plainly been prejudiced by GTL's activities in this action and before the JPML in litigating Plaintiffs' claims, rather than seeking arbitration. Its actions have unquestionably been contrary to an intent to arbitrate Plaintiffs' claims on an individual basis. Most strongly weighing against GTL are the 20-month time frame between the filing of Plaintiffs' complaint and seeking to compel arbitration, the fact that prior to moving to compel arbitration, it moved to dismiss Plaintiffs' claims and/or to refer them to the FCC, rather than arbitrating them, the 17-month time period before GTL even asserted arbitration as a defense, GTL's participation in pretrial proceedings without objection and participating in non-merits motion practice, including moving before the JPML to consolidate this case with other class actions pending in other Districts. GTL's motion to compel arbitration is, at best, an afterthought because the litigation was not proceeding to its satisfaction and, at worst, a bad-faith ploy to stall the litigation.

V

GTL'S REQUEST FOR A STAY SHOULD BE DENIED

GTL requests a stay pursuant to 9 U.S.C. § 3 both as to claims asserted by Plaintiffs who agreed to GTL's arbitration clause and those who did not, because, it argues, the issues to be

decided in the litigation with respect to parties who did not agree to arbitration would be the same as those decided in arbitration with parties who agreed to GTL's arbitration clause. (GTL Brief at 17-18). First, GTL ignores the condition in § 3 of the Arbitration Act that provides the Court should issue a stay of litigation "providing the applicant for the stay is not in default in proceeding with such arbitration." As is discussed in the previous section, waiver of arbitration by proceeding with litigation rather than arbitration qualifies as being "in default in proceeding with such arbitration." Thus, since GTL has waived its own arbitration clause, it is not entitled to a stay under § 3.

Moreover, even if certain of the Plaintiffs agreed to arbitrate their claims and GTL did not waive arbitration, the Third Circuit in *Mendez v. Puerto Rican International Companies, Inc.*, 553 F.3d 709 (3d Cir. 2009) rejected the argument that GTL advances here, that the claims of plaintiffs who have not agreed to arbitrate should be stayed while the claims of other plaintiffs are being arbitrated. "[T]the issue for resolution is whether a defendant who is entitled to arbitrate an issue which it has with one plaintiff in a suit can insist on a mandatory stay of litigation of issues it has with other plaintiffs who are not committed to arbitrate those issues. We conclude that Section 3 was not intended to mandate curtailment of the litigation rights of anyone who has not agreed to arbitrate any of the issues before the court." *Id.* at 711. The court noted that, while §3 could be read literally to confer a right of mandatory stay where some plaintiffs had agreed to arbitration and some had not, as GTL argues here, "Section 3 is an integral part of a statutory scheme, however, and reading it in the context of the FAA as a whole, we decline to attribute that intent to Congress." *Id.*

> While Section 3, as appellants read it, would postpone rather than eliminate a party's right to litigate its claims against another, it would nevertheless defer that right for the duration of a proceeding over which the constrained party has no control and would deprive the Court of any discretion to consider the impact of

> that delay on that party. We find no persuasive evidence in the FAA for sanctioning such a burden.

Id. at 711-12. Thus, the Third Circuit determined that where some parties have agreed to arbitrate their claims and others have not, whether to grant a stay pending resolution of arbitration was discretionary, not mandatory. *Id.* at 712.

Under the circumstances, if there are any Plaintiffs who 1) agreed to arbitrate their claims and 2) where GTL has not waived arbitration, and there inevitably will be because GTL is not moving to compel arbitration as to Mark Skladany and Dr. Crowe, the Court should not stay this litigation as to the other Plaintiffs pending the outcome of any individual arbitrations. This motion is plainly another stalling tactic by GTL. It was unsuccessful in its attempt to stall the litigation by referral to the FCC, so now, after litigating the case, it is attempting to put the litigation "on hold" by referring some of the Plaintiffs' claims to arbitration. Not only is GTL attempting to delay recovery by Plaintiffs, it is also seeking to delay recovery on behalf of Class members. GTL's calling rates and charges for inmate calling are unconscionable and it is seeking an unconscionable stay of the proceedings to forestall any recovery by the Class. As a result, GTL's request for a stay pending arbitration should be denied.

CONCLUSION

For the reasons set forth above, GTL's motion to compel arbitration should be denied.

CARELLA, BYRNE, CECCHI,
OLSTEIN, BRODY & AGNELLO
Co-Lead Counsel for Plaintiffs and the Class

By: /s/ James E. Cecchi
JAMES E. CECCHI

Dated: August 25, 2015

WALDER, HAYDEN & BROGAN, P.A.
Co-Lead Counsel for Plaintiffs and the Class

By: /s/ James A. Plaisted
JAMES A. PLAISTED

Dated: August 25, 2015

James E. Cecchi
Lindsey H. Taylor
CARELLA, BYRNE, CECCHI,
OLSTEIN, BRODY & AGNELLO
5 Becker Farm Road
Roseland, New Jersey 07068
(973) 994-1700
Attorneys for Plaintiffs

James A. Plaisted
Lin C. Solomon
WALDER, HAYDEN & BROGAN, P.A.
5 Becker Farm Road
Roseland, New Jersey 07068
(973) 992-5300
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BOBBIE JAMES, CRYSTAL GIBSON, BETTY KING, MARK SKLADANY, MILAN SKLADANY, BARBARA SKLADANY and DR. JOHN F. CROW, Plaintiffs v. GLOBAL TEL*LINK CORPORATION, INMATE TELEPHONE SERVICE, and DSI-ITI LLC, Defendants.	Civil Action No.:13-4989(WJM)(MF) **DECLARATION OF BARBARA SKLADANY**

I, Barbara Skladany, of full age, do hereby certify as follows:

1. I live in New York, New York and am a named Plaintiff Class Representative in this case. I am fully familiar with the facts contained herein based upon my personal knowledge.

2. I used the Defendant company's services to speak with my son, Mark. I began using Defendants' services with the account I set up to prepay to receive calls from my son long before this lawsuit was filed in August 2013. My son could not speak to me by telephone unless we used Defendants' services.

3. My son was in a jail facility at Somerset County and then moved to a New Jersey State Correctional Facility close to Trenton, New Jersey.

4. I would use credit cards to make deposits with the Defendants to prepay to keep

an account open so my son would be able to call me. I never went on the Defendants' website.

5. I was never made aware of the rates the phone company was charging, the commissions they were charging, the transaction fees they were charging, or any of the other fees they were charging while I was using their system. I did come to learn that their costs were incredibly expensive, but they were the only way my son, Mark, could reach out to talk to me.

6. I have never seen any arbitration clause written by the Defendants. No arbitration clause was referenced or in any materials Defendants sent me or in the recorded messages on the Defendants' system. I certainly did not consent or agree to arbitration in any fashion.

7. I did use Defendants' phone system to speak with my son after July 3, 2013, but was never informed of an arbitration clause nor was there any voice prompt telling me that new terms of service applied to my use of the system and that I was somehow agreeing to arbitration if I used the system. I did not and do not agree to arbitrate with Defendants.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Barbara Skladany

BARBARA SKLADANY

Dated: August 12, 2015

James E. Cecchi
Lindsey H. Taylor
CARELLA, BYRNE, CECCHI,
OLSTEIN, BRODY & AGNELLO
5 Becker Farm Road
Roseland, New Jersey 07068
(973) 994-1700
Attorneys for Plaintiffs

James A. Plaisted
Lin C. Solomon
WALDER, HAYDEN & BROGAN, P.A.
5 Becker Farm Road
Roseland, New Jersey 07068
(973) 992-5300
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BOBBIE JAMES, CRYSTAL GIBSON, BETTY KING, MARK SKLADANY, MILAN SKLADANY, BARBARA SKLADANY and DR. JOHN F. CROW, Plaintiffs v. GLOBAL TEL*LINK CORPORATION, INMATE TELEPHONE SERVICE, and DSI-ITI LLC, Defendants.	Civil Action No.:13-4989(WJM)(MF) **DECLARATION OF BOBBIE JAMES**

I, Bobbie James, of full age, do hereby certify as follows:

1. I live in Newark, New Jersey and am a named Plaintiff Class Representative in this case. I am fully familiar with the facts contained herein based upon my personal knowledge.

2. I used the Defendant company's services to speak with my grandson who I spent a substantial amount of time raising. I began using Defendants' services with the account I set up to prepay to receive calls from my grandson in and around April 2011 years before their lawsuit was filed in August 2013. My grandson could not speak to me by telephone unless we used Defendants' services.

3. My grandson was at the Essex County Correctional Center Youth Facility at Yardville, and at Delaney Hall in Essex County Correctional Facility at different times.

4. I would use credit cards to make deposits with the Defendants to prepay to keep an account open so my grandson would be able to call me. I never went on the Defendants' website nor did I have internet or a computer to do so at that time.

5. I was never made aware of the rates the phone company was charging, the commissions they were charging, the transaction fees they were charging, or any of the other fees they were charging while I was using their system. I did come to learn that their costs were incredibly expensive, but they were the only way my grandson could reach out to talk to me.

6. I have never seen any arbitration clause written by the Defendants. No arbitration clause was referenced or in any materials Defendants sent me or in the recorded messages on the Defendants' system. I did not know what an arbitration clause was until my lawyer explained it to me, but I certainly did not consent or agree to arbitration in any fashion.

7. I did use Defendants' phone system to speak with my grandson after July 3, 2013, but was never informed of an arbitration clause nor was there any voice prompt telling me that new terms of service applied to my use of the system and that I was somehow agreeing to arbitration if I used the system. I did not and do not agree to arbitrate with Defendants.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Bobbie James
BOBBIE JAMES

Dated: August 11, 2015

James E. Cecchi
Lindsey H. Taylor
CARELLA, BYRNE, CECCHI,
OLSTEIN, BRODY & AGNELLO
5 Becker Farm Road
Roseland, New Jersey 07068
(973) 994-1700
Attorneys for Plaintiffs

James A. Plaisted
Lin C. Solomon
WALDER, HAYDEN & BROGAN, P.A.
5 Becker Farm Road
Roseland, New Jersey 07068
(973) 992-5300
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BOBBIE JAMES, CRYSTAL GIBSON, BETTY KING, MARK SKLADANY, MILAN SKLADANY, BARBARA SKLADANY and DR. JOHN F. CROW, Plaintiffs v. GLOBAL TEL*LINK CORPORATION, INMATE TELEPHONE SERVICE, and DSI-ITI LLC, Defendants.	Civil Action No.:13-4989(WJM)(MF) **DECLARATION OF BETTY KING**

I, Betty King, of full age, do hereby certify as follows:

1. I live in East Orange, New Jersey and am a named Plaintiff Class Representative in this case. I am fully familiar with the facts contained herein based upon my personal knowledge.

2. I used the Defendant company's services to speak with Charles King and others who were incarcerated in New Jersey. I began using Defendants' services with the account I set up to prepay to receive calls long before this lawsuit was filed in August 2013. I could not speak to anyone who was incarcerated by telephone unless we used Defendants' services.

3. I would use credit cards to make deposits with the Defendants to prepay to keep an account open so my son would be able to call me. I never went on the Defendants' website.

4. I was never made aware of the rates the phone company was charging, the commissions they were charging, the transaction fees they were charging, or any of the other fees they were charging while I was using their system. I did come to learn that their costs were incredibly expensive, but they were the only way my loved ones could reach out to talk to me.

5. I have never seen any arbitration clause written by the Defendants. No arbitration clause was referenced or in any materials Defendants sent me or in the recorded messages on the Defendants' system. I certainly did not consent or agree to arbitration in any fashion. Until my lawyers explained arbitration, I did not understand the precise meaning of the word.

6. I have used the Defendants' phone system after July 3, 2013, but was never informed of an arbitration clause nor was there any voice prompt telling me that new terms of service applied to my use of the system and that I was somehow agreeing to arbitration if I used the phone system. I did not and do not agree to arbitrate with Defendants. The phone prompt system never mentioned arbitration at all.

7. I ask the Court not to stay this action.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Betty King
BETTY KING

Dated: August 20, 2015

James E. Cecchi
Lindsey H. Taylor
CARELLA, BYRNE, CECCHI,
OLSTEIN, BRODY & AGNELLO
5 Becker Farm Road
Roseland, New Jersey 07068
(973) 994-1700
Attorneys for Plaintiffs

James A. Plaisted
Lin C. Solomon
WALDER, HAYDEN & BROGAN, P.A.
5 Becker Farm Road
Roseland, New Jersey 07068
(973) 992-5300
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BOBBIE JAMES, CRYSTAL GIBSON, BETTY KING, MARK SKLADANY, MILAN SKLADANY, BARBARA SKLADANY and DR. JOHN F. CROW, Plaintiffs v. GLOBAL TEL*LINK CORPORATION, INMATE TELEPHONE SERVICE, and DSI-ITI LLC, Defendants.	Civil Action No.:13-4989(WJM)(MF) **DECLARATION OF CRYSTAL GIBSON**

I, Crystal Gibson, of full age, do hereby certify as follows:

1. I live in Newark, New Jersey and am a named Plaintiff Class Representative in this case. I am fully familiar with the facts contained herein based upon my personal knowledge.

2. In and around April 2011, I began using Defendants' services with a prepay account I set up over the phone to receive calls from Omar Cook, my significant other at the time. This was years before this lawsuit was filed in August 2013.

3. Omar Cook was at the Essex County Correctional Center, Bayside State Prison and elsewhere in New Jersey at different times. I could not speak to him by telephone unless we used Defendants' services.

4. I would use credit cards and/or debit cards to make deposits with the Defendants

to prepay to keep an account open so Mr. Cook would be able to call me.

5. I was never made aware of the rates the phone company was charging, the commissions they were charging, the transaction fees they were charging, or any of the other fees they were charging while I was using their system. I did come to learn that their costs were incredibly expensive, but they were the only way Mr. Cook could reach out to talk to me.

6. I had never seen any arbitration clause written by the Defendants. No arbitration clause was referenced in any materials Defendants sent me or in the recorded messages on the Defendants' system. I did not know what an arbitration clause was until my lawyer explained it to me, but I certainly did not consent or agree to arbitration in any fashion.

7. I used Defendants' phone system more recently and set up a separate and second account over the internet in and around the summer of 2014 in order to speak to Hajeem Sumler with whom I now live and who had become my significant other after Mr. Cook and I ended our relationship. I was never specifically informed of an arbitration clause at that time. I did check off the box for the terms of service when I went on the website in 2014. I could not deposit funds or continue on the website unless I checked off that box indicating I agreed to the terms and conditions. I checked that box because I could not receive telephone calls and could not continue on the website nor could I deposit money to receive telephone calls until I made that check off. I did not agree to arbitration when I used the system again in 2014. I did not and do not agree to arbitrate with Defendants.

8. More importantly, I did not intend to agree to arbitrate my prior accounts opened before August 2013 which were used to receive calls from Mr. Cook. Those earlier separate accounts where unreasonable phone charges were made by Defendants without disclosures should not be impacted because I opened a later account after this lawsuit was filed and being

actively litigated and had to check off the box next to terms of service to use the phones to talk to Mr. Sumler in the middle of 2014. This lawsuit had already been filed and was proceeding when I needed to use Defendants' phones again if I wished to communicate with my significant other, Mr. Sumler.

I hereby declare under penalty of perjury that the foregoing is true and correct.

CRYSTAL GIBSON

Dated: August 19, 2015

James E. Cecchi
Lindsey H. Taylor
CARELLA, BYRNE, CECCHI,
OLSTEIN, BRODY & AGNELLO
5 Becker Farm Road
Roseland, New Jersey 07068
(973) 994-1700
Attorneys for Plaintiffs

James A. Plaisted
Lin C. Solomon
WALDER, HAYDEN & BROGAN, P.A.
5 Becker Farm Road
Roseland, New Jersey 07068
(973) 992-5300
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BOBBIE JAMES, CRYSTAL GIBSON, BETTY KING, MARK SKLADANY, MILAN SKLADANY, BARBARA SKLADANY and DR. JOHN F. CROW, Plaintiffs v. GLOBAL TEL*LINK CORPORATION, INMATE TELEPHONE SERVICE, and DSI-ITI LLC, Defendants.	Civil Action No.:13-4989(WJM)(MF) **DECLARATION OF MARK SKLADANY**

I, Mark Skladany, of full age, do hereby certify as follows:

1. I am presently living in Jersey City, New Jersey and am a named Plaintiff Class Representative in this case. I am fully familiar with the facts contained herein based upon my personal knowledge.

2. I was previously incarcerated at the Garden State Prison, Albert S. Wagner Youth Correctional Facility and then later at South Woods State Prison during the period on and around late 2012 to June 2015.

3. In each of these prison institutions I could only make calls using the Defendants' phone systems. They were the only systems available to me to make an outgoing call. I had to prepay to be able to use the phones unless you could call collect to another authorized use with

an outside account with Defendants.

4. I learned about how to use their system from a prison form that was provided that explained how to set up an account by dedicating money from your prison financial account to the phone company. I filled out "Phone Remit" forms or "Business Remit" forms at these institutions to transfer money to the Defendants' accounts from my financial account. Then, and only then, would the Defendants assign you a PIN number and allow you to make calls. At the outset of each call you were provided a choice to choose to make a collect call or make a call charged to your account with Defendants.

5. There was no Global Tel information disclosures provided. The Defendants were the only system and we were only provided with the methodology to pay them and nothing more. There were no disclosures of the Defendants' rates, commission, transaction fees, forfeiture fees, or closure fees. Our money gave us precious few minutes of time to be able to talk. It was remarkable how fast the prepaid accounts emptied and how much per minute we were charged.

6. I have never seen an arbitration clause from the Defendants. I never went on their website. I did not agree to arbitrate any claims against the Defendants.

7. I ask this Court not to stay this action.

I hereby declare under penalty of perjury that the foregoing is true and correct.

MARK SKLADANY

Dated: August 25, 2015

James E. Cecchi
Lindsey H. Taylor
CARELLA, BYRNE, CECCHI
OLSTEIN, BRODY & AGNELLO
5 Becker Farm Road
Roseland, New Jersey 07068
(973) 994-1700

James A. Plaisted
Lin C. Solomon
WALDER, HAYDEN & BROGAN, P.A.
5 Becker Farm Road
Roseland, New Jersey 07068
(973) 992-5300

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BOBBIE JAMES, *et al.* on behalf of themselves and all others similarly situated, Plaintiffs v. GLOBAL TEL*LINK CORPORATION, INMATE TELEPHONE SERVICE, and DSI-ITI LLC, Defendants.	Civil Action No. 13-4989 (WJM)(MF) **DECLARATON OF LINDSEY H. TAYLOR**

LINDSEY H. TAYLOR, ESQ., of full age, hereby declares under penalty of perjury as follows:

1. I am an attorney licensed to practice in New Jersey and am a member of Carella, Byrne, Cecchi, Olstein, Brody & Agnello, co-counsel for Plaintiffs in the above matter. In such capacity, I am fully familiar with the facts contained herein.

2. Annexed hereto as Exhibit A is a copy of Plaintiffs' Request for Production served on December 5, 2014.

3. Annexed hereto as Exhibit B is a copy of all of the scripts for IVR phone prompts produced by GTL in response to Plaintiffs' Requests for Production as of the date of the filing of this Declaration.

I hereby declare under penalty of perjury that the foregoing is true and correct.

/s/ Lindsey H. Taylor
LINDSEY H. TAYLOR

Dated: August 25, 2015

Exhibit A

James E. Cecchi
Lindsey H. Taylor
CARELLA, BYRNE, CECCHI
OLSTEIN, BRODY & AGNELLO
5 Becker Farm Road
Roseland, New Jersey 07068
(973) 994-1700

James A. Plaisted
Lin C. Solomon
WALDER, HAYDEN & BROGAN, P.A.
5 Becker Farm Road
Roseland, New Jersey 07068
(973) 992-5300

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

BOBBIE JAMES, *et al.* on behalf of themselves and all others similarly situated, Plaintiffs v. GLOBAL TEL*LINK CORPORATION, INMATE TELEPHONE SERVICE, and DSI-ITI LLC, Defendants.	Civil Action No. 13-4989 (WJM)(MF) **PLAINTIFFS' REQUEST FOR PRODUCTION**

TO: Philip R. Sellinger
Aaron Van Nostrand
GREENBERG TRAURIG LLP
200 Park Avenue
Florham Park, New Jersey 07932

Attorneys for Defendant

COUNSEL:

PLEASE TAKE NOTICE that Plaintiffs hereby request that Defendants produce the following documents and things in accordance with Fed. R. Civ. P. 34 and Local Civil Rule 34.1.

CARELLA, BYRNE, CECCHI,
OLSTEIN, BRODY & AGNELLO
Attorneys for Plaintiffs

By: /s/ Lindsey H. Taylor
LINDSEY H. TAYLOR

DATED: December 5, 2014

DEFINITIONS

As used herein, the words and phrases set forth below shall have the following meanings prescribed for them:

1. "Advertisement" means any promotion, promotional campaign, contest, advertisement or any method used to promote Defendants' ICS services.

2. "And" and "or" are to be construed either disjunctively or conjunctively as necessary to bring within the scope of this request all documents that might otherwise be construed to be outside the scope.

3. The terms "document" or "documents" are defined to have the same meaning and be equal in scope to the usage of these terms in Federal Rule of Civil Procedure 34(a), as well as "writings" defined by Rule 1001(1) of the Federal Rules of Evidence, and shall include, without limitation, electronic or computerized data complications (such as e-mail), whether or not printed or displayed, and any preliminary versions, drafts or revisions thereof. A draft or non-identical copy is a separate document within the meaning of this term. Documents include, by way of example only, any memorandum, letter, envelope, correspondence, electronic mail, report, note, Post-It, message, telephone message, telephone log, diary, journal, appointment calendar, desk calendar, pocket calendar, Palm Pilot calendar or other similar handheld device or personal organizer, group schedule calendar, drawing, painting, accounting paper, minutes, working paper, financial report, accounting report, work papers, drafts, facsimile, report, contract, invoice, record or purchase or sale, chart, graph, index, directory, computer directory, computer disk, computer tape, or any other written, printed, typed, taped, filmed or graphic matter however produced or reproduced. Documents also include the file, folder tabs and labels appending to or containing any documents, as well as any metadata applicable to any documents.

4. "Person" shall mean any individual, partnership, joint venture, firm, association, corporation, or business or any governmental or legal entity.

5. "GTL," "You," or "Your" means Defendants Global Tel*Link Corporation, and DSI-ITI LLC, as well as their employees, agents, representatives, affiliates, predecessors and/or successors in interest attorneys and accountants, or any other person or business entity acting under the party's direction or control.

6. "ICS" means Inmate Calling Services, *i.e.*, telephone service offered to or for the benefit of persons incarcerated in any Facility.

7. "Facility" means any jail, prison or other secure facility used for holding and/or housing prisoners within the State of New Jersey.

8. "Ancillary Charges" means any charge, fee, or other deduction taken from an account of Your customer other than a per-minute calling charge, such as, by way of example and not limitation, per-call charges, charges related to opening or adding money to an account, and/or charges relating to closing an account.

9. The use of the singular form of any word includes the plural and vice versa.

INSTRUCTIONS

1. These discovery requests are continuing in nature so as to require supplemental responses, as specified in Federal Rule of Civil Procedure 26(e), if You or any person acting on Your behalf obtains additional documents called for by this request between the time of the original response and the time set for trial. Each supplemental response shall be served on Plaintiffs within five (5) business days of the discovery or creation of such additional documents.

2. You are required to produce all documents that are in Your possession, custody or control, or in the possession, custody or control of Your predecessors, successors, parents,

subsidiaries, partners, directors, officers, employees, attorneys, accountants, financial advisors, representatives or agents, and any Person that is subject to Your custody or control.

3. If any portion of any document is responsive to any request, then the entire document must be produced. If any requested document cannot be produced in full, please produce the document to the extent possible, specifying each reason for Your inability to produce the remainder of the document.

4. Pursuant to Rule 34(b) of the Federal Rules of Civil Procedure, documents shall be produced as they are kept in the usual course of business or the documents shall be organized and labeled to correspond to the categories in these requests.

5. All documents must be produced in their entirety, including all attachments and enclosures, and in their original folder, binder, or other cover or container unless that is not possible. Whenever a document or group of documents is removed from a file folder, binder, file drawer, file box, notebook, or other cover or container, a copy of the label of such cover or other container must be attached to the document.

6. Documents shall be produced in the order in which they appear in Your files or shall be organized and labeled to correspond to the categories of this request. Documents shall not be shuffled or otherwise rearranged. Documents that were stapled, clipped, or otherwise fastened together in their original condition shall be produced in such form as to indicate the original grouping.

7. Documents shall be produced in such fashion as to identify the department, branch or office in whose possession the documents were located and, when applicable, the person in whose possession the documents were found and the business address of each document custodian. A source list, identifying documents by bates number or range and the

corresponding source information (including person, department, branch and office) shall also be produced at the time of production.

8. In producing documents, You shall produce the original of each document requested together with all non-identical copies and drafts of the document. If the original of any document cannot be located, a copy shall be produced in lieu thereof, and shall be legible and bound or stapled in the same manner as the original.

9. If any responsive document was, but is no longer, in the possession or subject to the control of the responding party, please state, in writing, whether the document: (a) is missing or lost; (b) has been destroyed; (c) has been transferred voluntarily or involuntarily to another person or entity, the name and address of such person or entity, and at whose request such transfer or delivery was made; or (d) has been otherwise disposed of. For each instance, please state the date or approximate date of such disposition and explain the circumstances surrounding such disposition.

10. If any responsive document is withheld, in whole or in part, for any reason, including but not limited to, any claim of privilege, confidentiality or trade secret, please set forth separately with respect to each such document: (a) the nature of the privilege or other rule relied upon in withholding production of the document; (b) the type of document (e.g., letter, memorandum, etc.); (c) the general subject matter of the document; (d) the date of the document; and (e) such other information as is sufficient to identify the document for a *subpoena duces tecum*, including, where appropriate, the author of the document, the addressees of the document, and any other recipients shown in the document, and, where not apparent, the relationship of the author, addressees, and recipients to each other.

11. If a portion of any responsive document is protected from disclosure by privilege, work product or any other reason, such document must be produced with redaction of the portion claimed to be protected, provided that the document (i) is marked with the legend "Redacted" on the document at each place where information has been redacted; and (ii) each redaction is separately entered in a privilege log.

12. If a claim of privilege is asserted in responding to or objecting to any of these document requests, You are instructed to follow the provisions of Local Civil Rule 34.1.

DOCUMENTS REQUESTED

1. All contracts regarding Your providing ICS at any Facility.

2. All documents relating to the bidding for, negotiation and/or renewal of all of the contracts responsive to Request 1.

3. To the extent not produced in response to Requests 1 or 2, all documents setting forth the per-minute calling rate for ICS calls made from each Facility at which You provide ICS.

4. To the extent not produced in response to Requests 1 or 2, all documents setting forth all Ancillary Charges applicable to customers receiving ICS calls made from each Facility at which You provide ICS.

5. Documents sufficient to show all categories of personal identifying information that You maintain relating to Your ICS customers, *e.g.,* name, address, phone number, credit card number, etc., and the period of time that such records are maintained by You.

6. All scripts for automatic calling systems for opening accounts for customers to receive ICS calls from a Facility.

7. All scripts for automatic calling systems for adding money to or "refilling" accounts for customers to receive ICS calls from a Facility.

8. All scripts for automatic calling systems for closing accounts for customers to receive ICS calls from a Facility.

9. All training materials, including, without limitation, scripts and training manuals, provided to telephone operators who speak with Your customers or potential customers via telephone with respect to their accounts.

10. All pages from any internet website You operate through which a customer could subscribe for an account to receive ICS calls from any Facility.

11. All pages from any internet website You operate through which a customer could add money to or "refill" an account to receive ICS calls from any Facility.

12. Documents sufficient to identify the procedure a customer would follow in order to open and account and/or add money to or "refill" an account to receive ICS calls from any Facility by payment of cash or a Western Union or similar wire transfer.

13. All pages from any internet website You operate or operated which set forth any per-minute calling rates and/or Ancillary Charges applicable to customers receiving ICS calls made from any Facility at which You provide ICS.

14. All other documents distributed to or available to the public which set forth any per-minute calling rates and/or Ancillary Charges applicable to customers receiving ICS calls made from any Facility at which You provide ICS.

15. All documents which set forth or discuss how any documents responsive to Request 9 are distributed to or made available to members of the public.

16. All documents setting forth or reflecting revenue generated by You, on a monthly and yearly basis, pursuant to the contracts responsive to Request 1.

17. All documents setting forth any and all out-of-pocket expenses (as opposed to general overhead) associated with opening, "refilling" and/or closing any customer account who wishes to pay by credit card or who has paid by credit card.

18. All documents relating to, reflecting or memorializing communications between You and the New Jersey Board of Public Utilities relating to the ICS provided by You at any Facility.

19. All documents relating to, reflecting or memorializing any rulings or findings by the New Jersey Board of Public Utilities as to the reasonableness of Your per-minute calling rates and Ancillary Charges relating to the ICS provided by You at any Facility.

20. All documents relating to Your purchase of telephone calling time that You, in turn, resell to customers making or receiving ICS calls from any Facility.