

MILDRED SMITH,	:	SUPERIOR COURT OF NEW JERSEY
Plaintiff,	:	LAW DIVISION CAMDEN COUNTY
	:	
v.	:	
	:	DOCKET NO. L-9159-99
SBC COMMUNICATIONS, INC.,	:	CIVIL ACTION
SOUTHERN NEW ENGLAND TELEPHONE	:	
CO. d/b/a SNET,	:	
	:	
and	:	
	:	
BJ'S WHOLESALE CLUB, INC.	:	
Defendants.	:	

**SETTLEMENT AGREEMENT**

Plaintiff, by and through her counsel, and Defendant BJ's Wholesale Club, Inc. ("Defendant BJ's"), by and through its counsel, hereby enter into this Settlement Agreement providing, subject to the approval of the Court, for settlement of the claims herein described against Defendant.

**WHEREAS**, Plaintiff Mildred Smith filed a class action against SBC Communications, Inc., Southern New England Telephone Co. d/b/a SNET and B.J.'s Wholesale Club, Inc., alleging that *inter alia*, Defendants' actions violated the New Jersey Consumer Fraud Act, N.J.S.A. § 56:8-1, *et seq.*, and constituted breach of contract, by selling pre-paid telephone calling cards without appropriate billing disclosures;

**WHEREAS**, Defendant SBC Communications, Inc., Southern New England Telephone Co. d/b/a SNET was dismissed from this action on appeal following extended trial and appellate proceedings on grounds relating to federal preemption of state law claims;

**WHEREAS**, Defendant BJ's has vigorously denied and continues to deny Plaintiff's claims, and Defendant BJ's denies any wrongdoing or liability to Plaintiff of any kind;

**WHEREAS**, the parties to this Settlement Agreement have conducted a thorough examination and investigation of the facts and law relating to the matters in this Litigation;

**WHEREAS**, Defendant BJ's has concluded that settlement is desirable in order to avoid the time, expense, and inherent uncertainties of defending protracted litigation and to resolve finally and completely all pending and potential claims of the Plaintiff and all Settlement Class Members relating to the sale of pre-paid telephone calling cards involved in this Litigation;

**WHEREAS**, Plaintiff recognizes the costs and risks of prosecution of this Litigation, and believes that it is in her interest, and the interest of all Settlement Class Members, to resolve this Litigation, and any and all claims against Defendant BJ's in this Settlement Agreement;

**WHEREAS**, substantial settlement negotiations have taken place between the parties and, as a result, this Settlement Agreement has been reached, subject to the Court approval process set forth herein;

**WHEREAS**, the undersigned parties believe that this Settlement Agreement offers significant benefits to Settlement Class Members and is fair, reasonable, adequate and in the best interest of Settlement Class Members; and

**WHEREAS**, this Settlement Agreement is made and entered into by and among Defendant BJ's and Plaintiff Mildred Smith, individually and on behalf of a national class of similarly situated persons defined as:

All persons who purchased pre-paid telephone calling cards offered by Communication Design Group, Inc. from vending machines located on the premises of a BJ's club between February 1, 1998 and June 12, 2001, excluding Defendants and their officers.

NOW, THEREFORE, it is hereby stipulated and agreed, by and between the undersigned as follows.

**I. DEFINITIONS**

As used in this Settlement Agreement, the following terms shall have the meaning set forth below. Where appropriate, terms used in the singular shall be deemed to include the plural and vice versa.

A. **Claim Form.** “Claim Form” shall mean a form in substantially the same form as that attached hereto as Exhibit C.

B. **Class Counsel.** “Class Counsel” shall mean James C. Shah, Esquire, of the law firm Shepherd, Finkelman, Miller & Shah, LLC located at 35 East State Street, Media, Pennsylvania 19063 and Donald P. Alexander, Esquire, of the Law Offices of DP Alexander, LLC, 817 Castlefinn Lane, Bryn Mawr, Pennsylvania 19010.

C. **Class Notice.** “Class Notice” shall mean the Court-approved form of notice to Putative Settlement Class Members of (i) conditional certification of the Settlement Class and (ii) scheduling of the Final Approval Hearing, in substantially the same form as Exhibit D.

D. **Class Settlement.** “Class Settlement” shall mean the terms provided in this Settlement Agreement.

E. **Court.** “Court” shall mean the Superior Court of New Jersey, Camden County, The Honorable Charles W. Dortch, Jr., J.S.C., presiding, or his duly appointed successor.

F. **Defendant BJ's.** "Defendant BJ's" shall mean BJ's Wholesale Club, Inc., any corporation, or entity trading under that name, its divisions and subsidiaries, its successors and assigns, and its directors, officers, agents, representatives and employees.

G. **Defendant's Counsel.** "Defendant's Counsel" shall mean William H. Roberts, Esquire, of the law firm Blank, Rome, LLP, located at One Logan Square, 130 N. 18<sup>th</sup> Street, Philadelphia, PA 19103.

H. **Effective Date.** "Effective Date" shall mean the date on which this Settlement Agreement and the Final Judgment (as defined below) have become "final" in that all of the following conditions have been satisfied: (1) the Final Judgment has been entered; and (2)(a) if an appeal or review is not sought from the Final Judgment, the thirty-first day after entry of the Final Judgment, or (b) if an appeal or review is sought from the Final Judgment the day after the Final Judgment is affirmed and no longer subject to judicial review or the day after the appeal or review is dismissed or denied and the Final Judgment is no longer subject to review.

I. **Final Approval Hearing.** "Final Approval Hearing" shall mean the hearing at which the Court will consider and finally decide whether to enter the Final Judgment.

J. **Final Judgment.** "Final Judgment" shall mean the Court order that confirms conditional certification of the Settlement Class, approves this Settlement Agreement, approves payment of fees and expenses, and makes such other final rulings as are contemplated by this Settlement Agreement, in substantially the same form as Exhibit B.

K. **Litigation.** “Litigation” shall mean the action that was commenced on or about December 29, 1999 in the Superior Court of New Jersey, Camden County, Docket No. L-9159-99.

L. **Notice Program.** “Notice Program” shall mean the program for disseminating the Class Notice to Settlement Class Members in accordance with the terms herein.

M. **Objection Date.** “Objection Date” shall mean the date agreed upon by the parties or otherwise ordered by the Court for Settlement Class Members to object to the Settlement Agreement’s terms or provisions and submit any required statements, proof, or other materials and/or argument, as more thoroughly described in Section VI herein.

N. **Opt-Out Deadline.** “Opt-Out Deadline” shall mean the date agreed upon by the parties or otherwise ordered by the Court, by which any Settlement Class Members who do not wish to be included in the Settlement Class and receive the benefits provided for by the Settlement Agreement must complete the acts necessary to properly effect such election.

O. **Pre-Paid Telephone Calling Card.** “Pre-Paid Telephone Calling Card” shall mean any telephone calling card offered by Communications Design Group, Inc. carrying a specified amount of value purchased by a Settlement Class member from a vending machine located on the premises of a BJ’s club between February 1, 1998 and June 12, 2001.

P. **Preliminary Approval Order.** “Preliminary Approval Order” shall mean the order of the Court conditionally certifying a Settlement Class, in substantially the same form as Exhibit A.

Q. **Release.** “Release” shall mean the release described in Section VII herein.

R. **Released Claims.** “Released Claims” shall mean any and all claims or causes of action arising in any way whatsoever, out of or related to, in whole or in part, the sale or distribution of Communications Design Group, Inc. pre-paid telephone calling cards from vending machines located on the premises of a BJ’s club, which are released by the Release described in Section VII herein.

S. **Released Parties.** “Released Parties” shall mean all those who are subject to the Release described in Section VII herein.

T. **Settlement Agreement.** “Settlement Agreement” shall mean this Settlement Agreement and all the exhibits attached hereto.

U. **Settlement Class.** “Settlement Class” shall mean:

All persons who purchased pre-paid telephone calling cards offered by Communications Design Group, Inc. from vending machines located on the premises of a BJ’s club between February 1, 1998 and June 12, 2001, excluding Defendants and their officers.

V. **Settlement Class Members.** “Settlement Class Members” shall mean all persons in the Settlement Class who do not opt out.

## II. **REQUIRED EVENTS**

A. Promptly after the execution of this Settlement Agreement:

1. Class Counsel and Defendant BJ’s counsel shall take all necessary steps to obtain the Preliminary Approval Order and the Final Judgment, in substantially the forms attached hereto as Exhibits A and B, respectively.

2. Class Counsel, on behalf of the parties to this Settlement Agreement, shall submit the Settlement Agreement to the Court for preliminary approval, and the parties shall jointly move for entry of a Preliminary Approval Order in substantially the same form as Exhibit A, which by its terms shall:

- a. Preliminarily approve the terms of the Settlement Agreement for purposes of issuing notice;
- b. Approve the contents of the Class Notice and methods of dissemination as set forth herein; and
- c. Schedule a Final Approval Hearing to review comments regarding the proposed Class Settlement and to consider the fairness, reasonableness, and adequacy of the proposed Class Settlement and the application for an award of attorneys' fees and reimbursement of expenses, and to consider whether the Court should issue a Final Approval Order (in substantially the same form as Exhibit B) approving the Class Settlement, granting Class Counsel's application for fees and expenses, approving the incentive award, and dismissing the Litigation with prejudice.

3. Class Counsel and Defendant BJ's counsel will cooperate and undertake all reasonable actions in order to accomplish the above. In the event that the Court fails to issue the Preliminary Approval Order or fails to issue the Final Judgment, Class Counsel and Defendant BJ's Counsel agree to use their best efforts, consistent with this Settlement Agreement, to cure any defect identified by the Court.

4. The parties acknowledge that prompt approval, consummation, and implementation of the settlement set forth in this Settlement Agreement is essential. The parties shall cooperate with each other in good faith to carry out the purposes of and effectuate this Settlement Agreement, shall promptly perform their respective obligations hereunder, and shall promptly take any and all actions and execute and deliver any and all additional documents and all other materials and/or information reasonably necessary or appropriate to carry out the terms of this Settlement Agreement and the transactions contemplated hereby.

### **III. SETTLEMENT TERMS**

A. Defendant BJ's shall provide pre-paid telephone calling cards with a total number of minutes not to exceed 4,233,000 minutes to be distributed among Settlement Class Members. These pre-paid telephone calling cards shall be provided by Communications Design Group, Inc. with uniform art work on each card. The cards will be subject to all applicable local, state and federal surcharges.

B. All Settlement Class Members, subject to Section III.C. below, shall receive a pre-paid telephone calling card with not more than 150 minutes of pre-paid phone time. These pre-paid telephone calling cards will be for personal use and not for resale. To receive this benefit, Settlement Class Members need only submit a claim form in substantially the same form as that attached as Exhibit C, which can be obtained from Class Counsel or at [www.classactioncounsel.com](http://www.classactioncounsel.com). Each card received by a Settlement Class Member as part of this settlement will be active for 12 months from the date Defendant BJ's receives the cards from



Communications Design Group, Inc. Within that 12 month period, Settlement Class Members will have up to six months from the date of first use in which to use the pre-paid telephone calling card received as part of this settlement. Defendant BJ's will use its best efforts to distribute the pre-paid telephone calling cards in a timely manner.

C. In the event that the 4,233,000 minutes provided for by the Settlement is insufficient to provide full redress to Settlement Class Members, the minutes shall be distributed to the Settlement Class Members on a pro rata basis.

D. In the event that, after all valid Claim Forms have been processed and honored, less than 4,233,000 minutes have been distributed to Settlement Class Members, Communications Design Group, Inc. shall be entitled to retain 30% of the unclaimed minutes for its own use. The remaining 70% of the unclaimed minutes will be distributed to a charitable organization, subject to Court approval, selected by BJ's Charitable Foundation that promotes the safety and well-being of children and their families. These pre-paid telephone calling cards will each contain 60 minutes of pre-paid phone time, and will be active for three months from the date of first use. These 60 minute pre-paid phone cards will be for personal use and not for resale and subject to all applicable local, state and federal surcharges.

#### **IV. NOTICE PROGRAM**

A. Defendant BJ's shall be responsible for all costs associated with, and the implementation of, Class Notice.

B. No later than thirteen (13) days after entry of the Preliminary Approval Order, Defendant BJ's shall cause the Class Notice to be published to Settlement Class Members nationwide through the publication thereof in regional editions of USA Today sufficient to cover all states in which BJ's has stores.

C. Class Counsel is granted the unfettered right to monitor the administration of the Notice Program and administration of the settlement including, but not limited to, the right to review all documents and processes used and/or implemented by Defendant BJ's in the course of said administration.

D. Defendant BJ's shall, prior to the Final Approval Hearing, certify to the Court that Class Notice was disseminated consistent with the terms herein.

E. Settlement Class Members shall have one hundred and twenty (120) days from the date of publication of Class Notice to submit a claim.

**V. REQUESTS FOR EXCLUSION BY SETTLEMENT CLASS MEMBERS**

A. Settlement Class Members may exclude themselves from the Settlement Class by mailing a written request for exclusion in accordance with the procedures set forth in the Preliminary Approval Order and Class Notice. All opt-out requests must be in writing and must be sent to both Class Counsel and Defendant BJ's Counsel. The opt-out request must state: (1) the person's full name, current address, telephone number; (2) a statement that the person wishes to be excluded from the Settlement Class; and (3) a statement that the person understands that they will not be eligible for any of the rights or remedies set forth herein. All requests for exclusion must be post-marked on or before the Opt-Out Deadline. Such a timely request for

exclusion will preclude such Settlement Class Member from participating in the Settlement Agreement and that Settlement Class Member will be unaffected by this Settlement Agreement and Release if the Court enters the Final Judgment. Any Settlement Class Member who does not submit a timely written request for exclusion shall be bound by all proceedings, orders, releases, and judgments in this Litigation.

B. Within twenty (20) days after the date set by the Court for Settlement Class Members to exclude themselves, the Defendant may, if it so elects, withdraw from this Settlement if more than 675 of the known Settlement Class Members have specifically and expressly excluded themselves from this settlement in the manner and the time prescribed by law and the Court.

#### **VI. OBJECTIONS BY SETTLEMENT CLASS MEMBERS**

A. Any Settlement Class Member who wishes to be heard orally at the Final Approval Hearing, or who wishes for any objection to be considered must file a written notice of objection by the Objection Date and must include with said objection: (1) the person's full name, current address, telephone number, the date of purchase of the pre-paid telephone calling card and either BJ's membership number or the BJ's Wholesale Club location at which the card was purchased; (2) a statement of each objection asserted; (3) a detailed description of the facts and legal authorities, if any, underlying each objection; (4) a statement of whether the objector intends to appear and argue at the Final Approval Hearing and, if so, how long the objector anticipates needing to present the objection; and (5) a list of the exhibits which the objector may offer during the Final Approval Hearing, along with copies of such exhibits.

B. The agreed-upon procedures and requirements for filing objections in connection with the Final Approval Hearing are intended to ensure the efficient administration of justice and the orderly presentation of Settlement Class Members' right to object to the Settlement Agreement, in accordance with such Settlement Class Members' Due Process rights. The Preliminary Approval Order and Class Notice will require all Settlement Class Member objectors to file such notice of objection or request to be heard with the Clerk of Court, and serve by mail or hand delivery such notice of objection or request to be heard upon Class Counsel and Defendant BJ's Counsel, at the addresses set forth in the Class Notice, no later than the Objection Date. The Preliminary Approval Order will further provide that objectors who fail to properly or timely file their objections, along with the required information and documentation set forth above, shall not be heard during the Final Approval Hearing, nor shall their objections be considered by the Court. Only Settlement Class Members may object to the Settlement Agreement. Persons who elect to opt out of the Settlement Class may not object to the Settlement Agreement.

**VII. RELEASE, DISMISSAL OF ACTION, AND JURISDICTION OF COURT**

A. By this Settlement Agreement and Release, Defendant BJ's, and its respective parent, subsidiaries, affiliates, predecessors, successors and assigns, directors, officers, agents, representatives and employees and Communications Design Group, Inc., and its respective parent, subsidiaries, affiliates, predecessors, successors and assigns, directors, officers, agents, representatives and employees, shall be released from any and all claims or causes of action, known or unknown, that were, could have been or should have been asserted by the Plaintiff or any member of the Settlement Class against the Released Parties based upon or related to the sale, advertising, marketing or distribution of pre-paid telephone calling cards offered by Communications Design Group, Inc. purchased from vending machines located on the premises of a BJ's club.

B. The administration and consummation of the settlement as embodied in this Settlement Agreement shall be under the authority of the Court. The Court shall retain jurisdiction to protect, preserve, and implement the Settlement Agreement, including but not limited to the Release entered into by the parties. The Court expressly retains jurisdiction in order to enter such further orders as may be necessary or appropriate in administering and implementing the terms and provisions of the Settlement Agreement, including but not limited to orders enjoining Settlement Class Members from prosecuting claims that are released pursuant to the Settlement Agreement.

C. Upon issuance of the Final Judgment: (i) the Settlement Agreement shall be the exclusive remedy for any and all Released Claims of Settlement Class Members; (ii) no Released

Party shall be subject to liability or expense of any kind to any Settlement Class Members; and (iii) Settlement Class Members shall be permanently barred from initiating, asserting, or prosecuting any and all Released Claims against any Released Party in any federal or state court in the United States or any other tribunal.

**VIII. ADMINISTRATIVE EXPENSES/COUNSEL FEES**

A. All expenses incurred in administering this Settlement Agreement, including without limitation the cost of the Notice Program, cost of producing and distributing Claim Forms, and cost of distributing and administering the benefits of the Settlement Agreement, shall be paid by Defendant BJ's.

B. Class Counsel will represent to the Court that Defendant BJ's has agreed to pay attorneys' fees and expenses of \$375,000 collectively and in addition, Donald P. Alexander will be compensated at or below his customary hourly rate, up to a maximum of \$10,000.00, for legal services rendered by him in connection with finalizing and administering this settlement. Class Counsel will petition the Court for attorneys' fees and costs to be awarded by the Court. Defendant BJ's will not object to the petition for fees and costs as described in this paragraph. The payment of such attorneys' fees and costs will not, in any capacity, diminish the benefits to which Class Members are entitled under the Settlement Agreement.

C. Class Counsel will represent to the Court that Defendant has agreed to pay an incentive award in the amount of \$5,000.00 and Class Counsel will petition the Court for an incentive award for Plaintiff to be awarded by the Court. Defendant will not object to, or in any way undermine, Class Counsel's application for an incentive award for Plaintiff up to \$5,000.00,

subject to Court approval. The payment of an incentive award will not, in any capacity, diminish the benefits to which Class Members are entitled under the Settlement Agreement.

D. The award of attorneys' fees and expenses shall be transmitted by wire transfer from Defendant BJ's to Shepherd, Finkelman, Miller & Shah, LLC, acting on behalf of all Class Counsel no later than five (5) business days after the Effective Date.

**IX. REPRESENTATIONS, WARRANTIES AND COVENANTS**

A. Class Counsel who are signatories hereof represent and warrant that they have the authority, on behalf of Plaintiff, to execute, deliver, and perform this Settlement Agreement and to consummate all of the transactions contemplated hereby. This Settlement Agreement has been duly and validly executed and delivered by Class Counsel and Plaintiff and constitutes their legally valid and binding obligation.

B. Defendant BJ's, through its undersigned counsel, represents and warrants that it has authority to execute, deliver, and perform this Settlement Agreement and to consummate the transactions contemplated hereby. The execution, delivery and performance by Defendant BJ's of this Settlement Agreement and the consummation by it of the actions contemplated hereby have been duly authorized by all necessary corporate action on the part of Defendant BJ's. This Settlement Agreement has been duly and validly executed and delivered by Defendant BJ's and constitutes its legal, valid, and binding obligation.

C. Plaintiff, through her undersigned counsel, and Defendant BJ's, through its undersigned counsel, represent that they are aware of no other pending litigation involving the subject matter of this Litigation.

**X. MISCELLANEOUS PROVISIONS**

A. This Settlement Agreement, and the exhibits and related documents hereto, are not, and shall not at any time be construed or deemed to be, evidence of an admission against or concession by Defendant BJ's with respect to any wrongdoing, fault, or omission of any kind whatsoever, regardless of whether or not this Settlement Agreement achieves entry of a Final Judgment as contemplated herein. This provision shall survive the expiration or voiding of the Settlement Agreement.

B. In the event that the Settlement Agreement does not achieve a Final Judgment as contemplated herein, Defendant BJ's reserves its right to challenge class certification, whether on a state or national basis, and any and all allegations set forth in this Litigation or any future actions that may be filed. Likewise, Plaintiff retains all of her rights to proceed with the litigation. This provision shall survive the expiration or voiding of the Settlement Agreement.

C. The headings of the sections and paragraphs of this Settlement Agreement are included for convenience only and shall not be deemed to constitute part of this Settlement Agreement or to affect its construction.

D. This Settlement Agreement, including all exhibits attached hereto, may not be modified or amended except in writing signed by all parties hereto.

E. This Settlement Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.



F. This Settlement Agreement shall be governed by and construed in accordance with the substantive laws of the State of New Jersey, without giving effect to any choice or conflict of law, provision, or rule that would cause the application of the laws of any other jurisdiction.

G. Except as otherwise provided in this Settlement Agreement, each party to this Settlement Agreement shall bear his or its own costs of the Litigation.

H. The parties to this Settlement Agreement reserve the right, by agreement and subject to the Court's approval, to make any reasonable extensions of time that might be necessary to carry out any of the provisions of this Settlement Agreement.

I. All applications for Court approval or Court orders required under this Settlement Agreement shall be made on notice to Plaintiff and Defendant BJ's.

J. The determination of the terms of, and the drafting of, this Settlement Agreement, including its exhibits, has been by mutual agreement after negotiation, with consideration by and participation of all parties and their counsel. Because this Settlement Agreement was drafted with the participation of all parties and their counsel, the presumption that ambiguities shall be construed against the drafter does not apply. Each of the parties was represented by competent and effective counsel throughout the course of settlement negotiations and in the drafting and execution of this Settlement Agreement, and there was no disparity in bargaining power among the parties to this Settlement Agreement.

IN WITNESS WHEREOF, Plaintiff and Defendant BJ's and their respective counsel

have executed this Settlement Agreement as of the date(s) indicated on the lines below.

James Shah / s/s with permission Date: 10/29/05  
James C. Shah  
SHEPHERD, FINKELMAN, MILLER & SHAH, LLC

Ronald Alexander / s/s with permission Date: 10/20/05  
Donald P. Alexander  
LAW OFFICES OF DP ALEXANDER, LLC  
**For And On Behalf of Plaintiff and All Counsel for Plaintiff**

\_\_\_\_\_ Date: \_\_\_\_\_  
William H. Roberts  
BLANK ROME, LLP

\_\_\_\_\_ Date: \_\_\_\_\_  
Michael T. Wedge  
President and Chief Executive Officer  
BJ's WHOLESALE CLUB, INC.

**For And On Behalf of Defendant BJ's and All Counsel for Defendant BJ's**

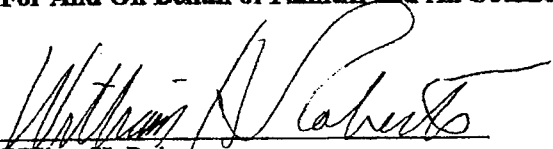
IN WITNESS WHEREOF, Plaintiff and Defendant BJ's and their respective counsel  
have executed this Settlement Agreement as of the date(s) indicated on the lines below.

Date:

\_\_\_\_\_  
James C. Shah  
SHEPHERD, FINKELMAN, MILLER & SHAH,  
LLC

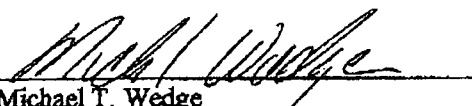
Date:

\_\_\_\_\_  
Donald P. Alexander  
LAW OFFICES OF DP ALEXANDER, LLC  
For And On Behalf of Plaintiff and All Counsel for Plaintiff

  
\_\_\_\_\_  
William H. Roberts  
BLANK ROME, LLP  
Counsel for Defendant BJ's

Date:

10.20.05

  
\_\_\_\_\_  
Michael T. Wedge  
President and Chief Executive Officer  
BJ's WHOLESALE CLUB, INC.

Date:

10.20.05