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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Patricia Connor, Shari L. Bywater, individually, and on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

JPMorgan Chase Bank and Federal National Mortgage Association a/k/a Fannie Mae,

Defendants.

Case No. 3:10-cv-1284 GPC BGS

OBJECTION TO PROPOSED ORDER AND NOTICE OF INTENT TO OBJECT TO PRELIMINARY AND FINAL APPROVAL

Date: April 18, 2014
Time: 1:30 p.m.
Courtroom: 2D
Judge: Hon. Gonzalo P. Curiel

Objector John W. Davis, who appeared in this case on July 20, 2012 (Dkt. No. 63), hereby objects to the Proposed Order served April 15, 2014, to the extent it could be construed to prevent his filing a further objection to the amended settlement of this case. Davis is a member of the new Group 2 of class members the amended settlement is intended to benefit. But the Proposed Order appears to foreclose not only objections by the originally-identified class members (Group 1), but also Mr. Davis because he objected to the original settlement.

This Court has not conferred final approval on the first version of this settlement. And now there are substantial valid objections to the revised settlement. The foremost of these is the settlement's inexplicably disparate treatment of the two class "groups" such that Group 2 class members could receive a lower financial benefit than Group 1 class members. This disparate treatment creates serious impediments to a finding of adequacy, both as to the settlement and the representation that led to it. Davis therefore further advises the Court that it appears the amended settlement cannot be finally approved.

Davis' counsel intends to appear at the hearing presently scheduled for Friday, April 18, 2014 at 1:30 p.m, should the Court have any questions regarding this matter.

I. THE PROPOSED ORDER DEFENDANT SERVED IS OBJECTIONABLE BECAUSE OBJECTOR DAVIS IS A GROUP 2 CLASS MEMBER UNIQUELY QUALIFIED TO OBJECT TO THE RENEWED SETTLEMENT

This settlement is a continuation of a prior attempt to settle. Mr. Davis objected to the earlier settlement in part because he came within the class definition, but was not given notice or identified as a class member entitled to relief. Dkt. 63 at

9-11 (ECF p. 13-15). In response, the parties took the final approval motion off-calendar, and Defendant admitted it had failed to identify and notify a majority of the class described in the class definition. Memorandum of Points and Authorities in Support of Preliminary Approval ("Plaintiffs' Memorandum") Dkt. 100-1 at p. 2 (ECF page 8).

The parties have now renegotiated the settlement, determining to provide additional funds to provide benefits for the newly-identified class members. Thus the class members previously identified are now denominated as Group 1, while the newfound class members earlier left out have been denominated as Group 2. Under the new settlement, only Group 2 individuals are to receive notice and an opportunity to claim, opt-out, or object.

Nevertheless, the Proposed Order defendant has submitted purports to preclude objections (or opt-outs) by anyone who (1) received notice and (2) had an opportunity to object previously. See Proposed Order at ¶9(d) at page 9 ("Settlement Class Members previously provided notice and an opportunity to object shall not be permitted to submit additional objections."). It is not clear why the proposed order uses this language, instead of simply foreclosing "members of Group 1" from objecting or opting out. Davis believes that these provisions of the proposed order, as written, might be cited to prevent him from lodging further objections to the settlement. Although Mr. Davis did not have notice directed to him, he nonetheless had actual notice (because he clearly became aware of the settlement) and clearly had an opportunity to file an objection (because he did file an objection, which resulted in the new settlement).

Mr. Davis is a Group 2 class member; he is in fact the "patient zero" of Group 2. He should clearly be entitled to object to the "Group 2" settlement and, as mentioned below, there are serious objections that should be made. Further, Mr. Davis and his counsel are uniquely suited to pointing out the weaknesses in the revised settlement, as they are familiar with the case, the applicable law, and the additional settlement negotiations that led to the present revised settlement. Davis therefore requests that, if the Court is inclined to grant preliminary approval, the Court amend the Order to clarify that Mr. Davis will be entitled to file an objection to the settlement.

II. THE SETTLEMENT'S DISPARATE TREATMENT OF CLASS MEMBERS PRESENTS SERIOUS ISSUES OF ADEQUACY AND DUE PROCESS

The additional settlement fund made available for Group 2 class members has been set by reference to the claims rate from the Group 1 class members, which led to a per-capita award of $69.97 for Group 1 class members. The settling parties have decided to keep that amount constant for Group 1 in the revised settlement.[1] However, as the parties explain in their motion papers, if the Group 2 claims rate is at all higher than the Group 1 claims rate, the individual benefit due to members of Group 2 will be different from (i.e., less than) the individual benefit being granted to individuals in Group 1. Plaintiffs' Memorandum, Dkt. 100-1 at 5 (ECF page 11). ("The exact amount paid to Group 2 claimants depends on the number of claims made by the Group 2 Class Members.") citing Settlement Agreement at § 5.06. Thus for Group 2 class members, it is a "heads I win, tails you lose" proposition:

[1]This, presumably, to avoid the need to re-notice the Group 1 class members.

individual Group 2 payment cannot be higher than the $69.97 Group 1 payments, even if the Group 2 claims rate is low, but it could be lower if the Group 2 claims rate is high. *See* Plaintiffs' Memorandum, Dkt. 100-1 at 6 (ECF page 12).

What accounts for the fact that individuals in the two groups could end up getting different payments? Nothing. There is no relevant difference between the two groups apparent on the record, other than the fact that defendant failed to identify or notify the members of Group 2 in the original settlement. That is the sole unifying characteristic of Group 2.

Davis expects that the parties will be unable to offer a viable explanation for this disparate treatment of the benefits between the two groups,[2] and that it will ultimately present an insurmountable barrier to final approval. The problem is exacerbated by the fact that not one of the existing class representatives appears to be typical of, or otherwise adequately represent, the members of Group 2. Thus the question is not just whether the existing plaintiffs recommending this settlement are adequately representing the interests of Group 2, but whether as a matter of law they can be appointed to do so at all.

Davis believes that this settlement will be met with this and other valid objections,[3] such that this Court might well consider withholding approval to spare

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[2] Mr. Davis' attorney has conferred with Plaintiffs' counsel, Mr. Campion, on this and other problems facing the settlement. See Declaration of C. Benjamin Nutley filed herewith, at ¶2. Nevertheless, the parties are determined to go through with the settlement as written.

[3] Another question is the relative applicability of the "consent" defense among the class members, which might also present a schism cutting across both Group 1 and Group 2. *See, e.g.*, Order Denying Amended Unopposed Motion for Preliminary Approval of Class Action Settlement, *Newman v. Americredit Financial Services*,

the delay and expense of noticing a settlement that, in the end, is unlikely to survive scrutiny. In any event, the Court should not indulge the parties' instincts to insulate any part of this settlement from critical review and comment by affected class members.

Date: April 16, 2014

Respectfully submitted,

s/ C. Benjamin Nutley

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Inc., USDC SDCA No. 11-cv-03041 (Sabraw, J.) at pages 5-6 (ECF p. 6-7) attached to the Nutley Declaration as Exhibit A.

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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Patricia Connor, Shari L. Bywater, individually, and on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

JPMorgan Chase Bank and Federal National Mortgage Association a/k/a Fannie Mae,

Defendants.

Case No. 3:10-cv-1284 GPC BGS

DECLARATION OF C. BENJAMIN NUTLEY IN SUPPORT OF OBJECTION TO PROPOSED ORDER AND NOTICE OF INTENT TO OBJECT TO PRELIMINARY AND FINAL APPROVAL

Date: April 18, 2014
Time: 1:30 p.m.
Courtroom: 2D
Judge: Hon. Gonzalo P. Curiel

I, C. Benjamin Nutley, hereby affirm:

1. I am an attorney licensed to practice in the State of California and a member of the Bar of this Court. I represent Objector John W. Davis in the above-captioned case. I make the following statements on the basis of my personal knowledge and the files and records in this case, and if called to testify regarding the matters asserted herein could do so competently.
2. Shortly after the filing of the motion for preliminary approval, I spoke by telephone with Doug Campion regarding the issue of disparate treatment between Group 1 and Group 2, as set forth in the accompanying filing. We were unable to agree on a solution to the problem.
3. Attached hereto as Exhibit A is a true and correct copy of the Order Denying Amended Unopposed Motion for Preliminary Approval of Class Action Settlement, *Newman v. Americredit Financial Services, Inc.*, USDC SDCA No. 11-cv-03041, dated February 3, 2014.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this Declaration was executed this 16th day of April, 2014, in Los Angeles, California.

s/ C. Benjamin Nutley

C. Benjamin Nutley

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

NICOLE NEWMAN, Plaintiff, vs. AMERICREDIT FINANCIAL SERVICES, INC., Defendant.	Case No. 11cv3041 DMS (BLM) **ORDER DENYING AMENDED UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT**

Pending before the Court in this action for violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"), is Plaintiff's amended motion for class certification and preliminary approval of class action settlement.[1] Defendant filed a notice of non-opposition. Plaintiff's initial motion was denied on April 15, 2013. For the reasons which follow, the amended motion is denied.

Background

Defendant administers automobile loan accounts. Plaintiff and the proposed nation-wide class are individuals who allegedly received calls to their mobile phones from Defendant or Defendant's agents using autodialing equipment or a prerecorded voice message in violation of the TCPA. In her complaint, Plaintiff alleges claims for negligent, knowing and willful TCPA violations. Plaintiff

[1] This action was consolidated with *Mack v. General Motors Financial Corp., Inc.*, 12cv 3038-DMS (BLM) for purposes of class action settlement. After Ms. Mack passed away on May 17, 2013, her daughter, Julie Schultz, for herself and on behalf of the estate, settled Ms. Mack's individual claims. Accordingly, on November 14, 2013, the *Mack* action was dismissed with prejudice as to Plaintiff's individual claims. The putative class members' claims were dismissed without prejudice.

requests $500 in statutory damages for each negligent violation, and treble statutory damages of up to $1,500 for each knowing or willful violation, as well as injunctive relief against future violations.

The action settled without any substantive motion practice after two conferences with Magistrate Judge Barbara Lynn Major and a two-day mediation with Magistrate Judge Leo S. Papas (ret.). Although only informal discovery was conducted in the present case, Plaintiff benefitted from formal discovery in *Mack v. General Motors Financial Corp., Inc.*,12cv3038-DMS (BLM), a related action which has since been dismissed.

In general, the amended settlement agreement provides for certification of a class action for settlement purposes and Defendant's payment of up to $8.5 million[2] in exchange for a release from class members without admission of fault. (Kazerounian Decl." Ex. 1 (Settlement Agreement dated Oct. 25, 2013) ("Settlement").[3])

Plaintiff proposes to certify a class defined as:

> all persons who were (a) called on a cellular telephone by Defendant ... or a third party dialing company on behalf of Defendant, using an automated dialer or by prerecorded voice message between December 30, 2007 through the date of Preliminary Approval ..., or (b) current and former customers of Defendant whose name or account was associated with a cellular telephone number in Defendant's records between December 30, 2007 through the date of Preliminary Approval ... .

(*Id*. at 2.) Accordingly, the class includes Defendant's customers who had an account with Defendant and provided Defendant with one or more mobile phone numbers (subsection (b) above), and all other persons who did not have an account but who were called by Defendant on a mobile phone (subsection (a)). For example, Plaintiff Nicole Newman's brother had an auto loan account, but the calls were made to Plaintiff's mobile phone, even though she did not have an account.

According to the Settlement, Defendant's payment is allocated as follows: (1) notice and settlement administration costs, estimated at $1,001,721 to $1,238,399, depending on the number of

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[2] Defendant is obligated to pay a minimum of $6.5 million. If $6.5 million is insufficient for class member awards of at least thirty dollars ($30) each, Defendant is obligated to pay an additional sum necessary to increase the awards to thirty dollars ($30) each. However, Defendant is not obligated to pay more than a total of $8.5 million. (Settlement at 3-4.)

[3] The Settlement appears to lack paragraph numbers for the provisions listed under the heading "Definitions." (Settlement at 2-5.) Accordingly, it is not possible to precisely correlate the citations in Plaintiff's memorandum of points and authorities with the Settlement.

claims filed (Passarella Decl. at 2); (2) attorneys' fees and costs of class counsel of up to $2,065,000, subject to an appropriate motion (Kazerounian Decl. at 7); (3) class representative's incentive award of up to $1,500, subject to an appropriate motion (Newman Decl. at 3); and (4) a pro rata distribution to class members who submit valid claims. (Settlement at 3-4.) A special definition applies to the proposed pro rata distribution: (1) a class member with more than one mobile number associated with Defendant's account may receive one recovery per number; (2) if more than one class member was listed on the account with a mobile number, each may recover;[4] and (3) a class member without an account may receive one recovery per mobile phone number called. (*Id*. at 2.)

The parties established that as of December 21, 2012, Defendant had 1,477,909 accounts, wherein 1,762,716 individuals were listed and 2,805,051 unique mobile phone numbers were identified.[5] (Settlement at 1; Mot. at 8 & n.6.)[6] According to Plaintiff's motion, "a significant percentage of the Class Members are not alleged debtors" and Defendant does not have identifying information for them. (Mot. at 9.) No support is offered for the assertion that the percentage is "significant" and it is unclear whether the mobile phone numbers of class members without an account are included in the 2,805,051 unique mobile phone numbers identified by Defendant. Assuming that (1) each of the known 1,762,716 individuals associated with Defendant's accounts makes one valid claim, (2) none of the class members who are not associated with an account makes a claim, (3) the notice and settlement administration costs amount to the high end of the estimated range, or $1,238,399, and (4) the class counsel and representative are awarded their entire requests, totaling

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[4] It is unclear whether each class member may recover for only one mobile phone number or for as many mobile phone numbers as were called. (Settlement at 2 ("Where a class member has more than one cellular telephone number associated with a Loan, the class member may receive one recovery per telephone number. Where more than one person is or was obligated on a Loan or is or was listed on a joint account, each of those persons shall be allowed to make a claim, if their cellular telephone number was called. Where a Class Member does not have an account with AmeriCredit, but is a member of the Class, he or she may receive one recovery for each cellular telephone number called").)

[5] The information provided is over a year old. The parties should either update the numbers so that the settlement can be more accurately evaluated, or certify that the numbers are still the same.

[6] Contrary to the representations in Plaintiff's motion (Mot. at 8 n.6), Defendant has not filed a declaration supporting this information.

$2,066,500, the pro rata class member award will approximate $2.95, even if Defendant pays the maximum sum of $8.5 million.

Settlement Class Certification

Before approving a class action settlement agreement, the Court must make a finding that a class may be certified. *See, e.g., Molski v. Gleich*, 318 F.3d 937, 943, 946-50 (9th Cir. 2003), *rev'd on other grounds by Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010). "When a district court, as here, certifies for class action settlement only, the moment of certification requires heightened attention." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 848-49 (1999) (internal quotation marks and citation omitted). "The court must look to the class certification factors 'designed to protect absentees.'" *Molski*, 318 F.3d at 953, quoting *Amchem Prods, Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, ___U.S.___, 131 S.Ct. 2541, 2550 (2011). "A party seeking class certification must satisfy the requirements of Federal Rule of Civil Procedure 23(a) and the requirements of at least one of the categories under Rule 23(b)." *Wang v. Chinese Daily News, Inc.*, 709 F.3d 829, 832 (9th Cir. 2013); *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union v. ConocoPhillips Co.*, 593 F.3d 802, 806-07 (9th Cir. 2010) ("*United Steel*") (burden is on the moving party). Plaintiff seeks certification under Rule 23(a) and (b)(3).

"Rule 23(a) ensures that the named plaintiff is an appropriate representative of the class whose claims she wishes to litigate. The Rule's four requirements – numerosity, commonality, typicality, and adequate representation – effectively limit the class claims to those fairly encompassed by the named plaintiff's claims." *Dukes*, 131 S.Ct. at 2550-51 (internal quotation marks and citations omitted). "A party seeking class certification must affirmatively demonstrate his compliance with the Rule – that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Id*. at 2551 (emphasis in original). Furthermore, certification under Rule 23(b)(3) is proper only when "the questions of law or fact common to class members predominate over any questions affecting only individual members, and ... a class action is superior to other available

methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. Proc. 23(b)(3). This inquiry "requires the court to determine whether maintenance of this litigation as a class action is efficient and whether it is fair," such that the proposed class is superior to other methods for adjudicating the controversy. *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175-76 (9th Cir. 2010).

Plaintiff's motion does not adequately address the requirements of commonality, predominance and typicality. Rule 23(a) requires the existence of "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). This means that the putative class members' claims depend on a common contention, which

> must be of such nature that it is capable of classwide resolution -- which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. [¶] What matters to class certification ... is not the raising of common "questions" – even in droves – but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.

Dukes, 131 S.Ct. at 2551 (internal quotation marks and citation omitted). "The predominance inquiry [under Rule 23(b)(3)] focuses on the relationship between the common and individual issues and tests whether the proposed class [is] sufficiently cohesive to warrant adjudication by representation." *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 944 (9th Cir. 2009) (internal quotation marks, footnote and citation omitted). The typicality requirement of Rule 23(a)(3) focuses on the relationship of facts and issues between the class and its representatives:

> the commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.

Dukes, 131 S.Ct. at 2551 n.5 (internal quotation marks and citation omitted). Although representative claims need not be substantially identical, *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998), the action must be based on conduct which is not unique to the named plaintiffs, *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992).

Plaintiff's proposed class is composed of two distinct groups – those with accounts and those without accounts. The difference between these two groups is significant for class certification

because class members with accounts may have consented to Defendant's calls to their mobile phones when they opened their accounts (Def.'s Statement of Non-Opp'n. at 5), thus potentially negating liability, *see* 47 U.S.C. § 277(b)(1)(A) (excepting calls "made with prior express consent"), which is not the case for class members without accounts.

The motion fails to adequately address whether Plaintiff, who does not have an account with Defendant, is typical of the entire class, and whether, in light of the consent issue, the proposed class meets the commonality and predominance requirements. *See Molski*, 318 F.3d at 946 (the district court decision on certification of settlement class "must be supported by sufficient findings to be afforded 'the traditional deference given to such determination'"), quoting *Local Joint Executive Bd. Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1161 (9th Cir.2001). Accordingly, Plaintiff's request for certification of a settlement class is denied.

Settlement Fairness

Rule 23(e) requires court approval of class action settlements. A class action settlement may be approved only based on a finding that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. Proc. 23(e)(2). The settlement proponents ultimately bear the burden to show that the proposed settlement meets this standard. *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003); *see also Officers for Justice v. Civil Svc. Comm'n. of the City and County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982).

The consent issue, which potentially negates liability to class members with accounts, raises the issue of fairness, as such class members are proposed to be compensated the same as class members without accounts who have not consented. Relevant to evaluating settlement fairness are the amounts offered in settlement, *In re Bluetooth Headset Prods. Liability Litig.*, 654 F.3d 935, 946 (9th Cir. 2011), and "the fairness and reasonableness of the procedures for processing individual claims under the settlement," Fed. Jud. Ctr., Manual for Complex Litig., Fourth at 316 (2004). The latter two factors cannot be adequately evaluated because of ambiguities in the Settlement and Plaintiff's motion.

For example, it is unclear whether the mobile phone numbers of class members without accounts are included in the 2,805,051 unique mobile phone numbers identified by Defendant. This

makes it difficult to accurately evaluate class member recovery, particularly because Plaintiff asserts that a "significant" percentage of the class includes members without accounts. (*See* Mot. at 9.) It also raises questions about claim administration (more fully discussed below). In addition, it is unknown whether the 2,805,051 unique mobile phone numbers were actually called by an automated dialer or a prerecorded voice (*see* Kazerounian Decl. at 5 ("were called"); *id*. at 6 ("may have been called); Mot. at 8 (were called); *id*. at 5-6 ("may have been called").) An answer to this question is necessary to understand the proposed claim processing and to give class members satisfactory notice.

To submit a claim, a class member must turn in a claim form identifying a mobile phone number, and certify, among other things, that the number was called by Defendant by an automatic dialing system or a prerecorded voice without consent. (Settlement at 4 & Ex. C (Proposed Claim Form).[7]) Under the Settlement, Defendant must provide a list to the settlement administrator for purposes of claim processing. (Settlement ¶ 2.02; Kazerounian Decl. at 6.) It is unclear whether the list will include mobile numbers of class members who were *actually* called, *potentially* called, or both. (Mot. at 7-8 ("potentially dialed"); *id*. at 13-14 ("may have been called"); *id*. at 30 ("cell phone numbers called"); *see also* Kazerounian Decl. at 4-5 ("the number called"), *id.* at 6 ("may have been called"); *id*. at 9 ("actually called").) The Settlement is not specific with respect to determining claim validity and therefore does not help resolve this ambiguity. It states that only class members who submit valid claim forms will be paid.[8] (Settlement at 4.) According to Plaintiff's motion, the claim will be paid if, among other things, the mobile number on the claim form matches a mobile number on the settlement administrator's list. (Mot. at 8, 14.) Claims may be denied if the mobile number on the claim form does not match a number "actually called." (Kazerounian Decl. at 9; Mot. at 14;

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[7] The proposed claim form includes an inconsistency which would alone preclude the use of the form as proposed. It first includes an instruction to "provide the cellular phone number called ... by the automatic telephone dialing system ... ." However, the class member's certification states, "I affirm that I received a telephone call ... on my cellular phone by an automatic telephone dialing system *or prerecorded voice ... .*" (Settlement Ex. C at 1 (emphasis added).) This creates an ambiguity whether a claim is valid if the call was made by a prerecorded voice and not by an automatic telephone dialing system. Furthermore, class members are not informed how one would know that the call was made by an automatic telephone dialing system.

[8] To be valid, a claim form must, in pertinent part, be "correct," and "shall be treated as incorrect if the statements contained thereon are false, or if the Class Member otherwise is not entitled to be treated as claimed." (Settlement at 4.)

id. at 12 (not on the list of "called numbers").) Claims of members without an account may be paid if, among other things, their forms list a "valid cell phone number that was called." (Mot. at 9.) It is not apparent how the settlement administrator is to verify claims because it is unclear whether (1) the list will include any information about the members without accounts; and (2) the numbers on the list were the numbers actually called or potentially called.[9]

An additional area of concern is that class members may not opt out as a group. (Settlement ¶ 2.04 ("In no event shall persons who purport to opt out of the settlement as a group, aggregate, or class involving more than one Class Member be considered valid opt outs.").) The Court is not inclined to approve limitations on the members' right to opt out, so long as there are sufficient assurances that each member exercising the right has consented. Further, the Court is not inclined to approve a settlement which makes it unnecessarily burdensome to submit a claim or opt out. The class members are required to submit claim forms and opt out requests by mail (Mot. at 14 (claims); Pl.'s Ex. 1.B. (Proposed Class Notice) ¶ 10 (opt out requests)), although the settlement administrator is obligated to provide a phone number and a website (Passarella Decl. at 2-3). The only justification offered for the mailing requirement is that the claim forms require an affirmation. (Mot. at 14.) Plaintiff does not explain why an affirmation could not be provided through an online form or by phone with adequate identification of the class member. Similarly, the requirement that the settlement administrator maintain a toll-free number only during the 90-day claims period (Mot. at 30) appears insufficient to address inquiries about status of submitted claims or final approval of the settlement.

Next, the Settlement provides that any motion for attorneys' fees and costs is to be filed concurrently with the motion for final settlement approval. (Settlement ¶ 2.10.) Because a motion for final settlement approval typically addresses objections to the settlement, the current provision does not provide class members an opportunity to object to the fee motion itself, as opposed to only the notice that a fee motion for a certain amount will be filed at a later time. "[A] schedule that requires objections to be filed before the fee motion itself is filed denies the class the full and fair

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[9] A complete list of mobile numbers which were potentially called makes it possible to eliminate claims for numbers which are not listed; however, it is not sufficient to verify the claims for listed numbers. Only a list of actually called numbers would suffice to verify claims consistent with Plaintiff's representations about claim processing.

opportunity to examine and oppose the motion that Rule 23(h) contemplates." *See In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 995 (9th Cir. 2009).

Furthermore, the termination provisions in the Settlement raise additional fairness issues. One of the possible grounds for termination by Defendant is if the number of class members to be paid exceeds 2,070,000. (Settlement ¶ 6.03(b).) No reason is given for this provision, which appears to work contrary to the purpose of the notice and claims process to result in the maximum number of valid claims being submitted. Without qualification, the Settlement is also "terminable upon the mutual agreement of the Representative Plaintiff and Defendant." (*Id.* ¶ 6.03 (last sentence).) The Court is not inclined to approve a settlement which is terminable merely by agreement of the named parties after notice of settlement has been given to the class.

Finally, Plaintiff's motion does not include any showing that the parties have complied with the notice requirements of 28 U.S.C. Section 1715. In any further motion seeking preliminary approval of class action settlement, the parties must either certify compliance with 28 U.S.C. Section 1715 or demonstrate that compliance is not required. Should the parties receive any communication from the relevant government official in response to the notice, they must promptly inform the Court.

Notice of Settlement

The notice of settlement must explain in easily understood language the nature of the action, definition of the class, class claims, issues and defenses, ability to appear through individual counsel, procedure to request exclusion, and the binding nature of a class judgment. Fed. R. Civ. P. 23(c)(2)(B). The proposed notice does not meet this requirement.

As an initial matter, the notice is confusing for the reasons discussed above with respect to claim administration, and provides insufficient information for class members to determine whether to opt out. This is particularly important given the broad release that will bind class members who do not opt out. (*See* Settlement ¶¶ 4.01 & 4.02.)

The requisite information is presented throughout the notice according to a question and answer format; however, the same topics are covered multiple times in a different manner in each instance (for example, the notice lists some requirements for a valid claim in one section, but not in another section discussing the same topic), thus creating unnecessary confusion. Furthermore, the

notice as a whole appears to be directed to the class members with accounts, who Defendant was able to identify and who are to receive summary notice and a claim form by mail. This makes the notice confusing for the allegedly significant percentage of class members who did not have an account and received notice by publication. The confusion makes it difficult for them to determine whether they are included in the class and whether they should submit a claim or opt out.[10]

Next, the notice does not adequately discuss the pros and cons of each side's case or disclose the damages and attorneys' fees a prevailing plaintiff could recover if the case were fully litigated. It also does not adequately or accurately summarize important terms of the Settlement, including what is required to make a valid claim, the meaning of pro rata distribution in the context of this settlement, or the broad release provisions.[11] The instructions about how to opt out are lacking, and no form is provided to opt out. The claim form does not adequately provide for making a claim based on more than one mobile phone number, which class members are allowed to do. Finally, the notice does not include the Court's correct address.

Conclusion

For the foregoing reasons, Plaintiff's motion for settlement class certification and preliminary approval of class action settlement is denied without prejudice to refiling. This order is not intended to provide a comprehensive list of reasons for denying the motion. Should Plaintiff choose to file another motion for settlement class certification and preliminary approval of class action settlement, she must address the issues noted above as well as all other issues necessary for the Court to make appropriate findings in support of class certification and preliminary approval of settlement, including the claim processing procedure, and approval of the proposed notice and related forms. Prior to filing

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[10] Paragraph 1 of the notice is titled "Why did I get a postcard with a Notice?" Perhaps this paragraph should be followed by one entitled "What if I did not get a postcard with a Notice?," to address class members who received notice by publication or other proposed means.

[11] Although the entire release is attached to the long form notice, the provision in the body of the notice does not describe the wide reach of the release (Notice ¶ 9), thus discouraging the reader from referring to the attachment. Furthermore, the discussion of the releases is neither included nor referenced in the relevant sections, which discuss the consequences of not opting out. (*Cf.* Notice ¶¶ 9, 10 & 21.)

another such motion, Plaintiff is encouraged to make a through review of the settlement agreement and related notices and forms to make the changes necessary for approval.

IT IS SO ORDERED.

DATED: February 3, 2014

HON. DANA M. SABRAW
United States District Judge

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Counsel for Objector John W. Davis

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Patricia Connor, Shari L. Bywater, individually, and on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

JPMorgan Chase Bank and Federal National Mortgage Association a/k/a Fannie Mae,

Defendants.

Case No. 3:10-cv-1284 GPC BGS

CERTIFICATE OF SERVICE

Date: April 18, 2014
Time: 1:30 p.m.
Courtroom: 2D
Judge: Hon. Gonzalo P. Curiel

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2014, I filed the following documents on behalf of class member John W. Davis: (1) OBJECTION TO PROPOSED ORDER AND NOTICE OF INTENT TO OBJECT TO PRELIMINARY AND FINAL APPROVAL and; (2) DECLARATION OF C. BENJAMIN NUTLEY IN SUPPORT OF OBJECTION TO PROPOSED ORDER AND NOTICE OF INTENT TO OBJECT TO PRELIMINARY AND FINAL APPROVAL. This document was served on all counsel who are deemed to have consented to electronic service. Local Rule CV-5.4. Pursuant to Federal Rule of Civil Procedure 5, all other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of this document via U.S. First Class Mail. However, the undersigned is not aware of anyone who has not consented to electronic service.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this Certificate was executed this 16th day of April, 2014, in Los Angeles, California.

s/ C. Benjamin Nutley

C. Benjamin Nutley