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8
9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**

11 PATRICIA CONNOR AND SHERI L.) Case No. 3:10-cv-01284-GPC-BGS
12 BYWATER, individually and on behalf)
of all others similarly situated,) **DEFENDANT JPMORGAN CHASE**
13) **BANK, N.A.’S OPPOSITION TO**
Plaintiffs,) **OBJECTIONS TO FINAL**
14) **APPROVAL OF SETTLEMENT**
v.)
15)
16 JPMORGAN CHASE BANK, N.A.,) Date: December 4, 2014
CHASE BANK USA, N.A., AND) Time: 1:30 p.m.
17 FEDERAL NATIONAL MORTGAGE) Place: Courtroom 2D
ASSOCIATION a/k/a/ FANNIE MAE,)
18) [Request for Judicial Notice and
Defendants.) Declaration of Julieta Stepanyan filed
19) concurrently]
20)

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1 **I. INTRODUCTION**

2 Defendant JPMorgan Chase Bank, N.A. (“Chase”) respectfully submits that
3 the Court should overrule the Objections to the Settlement Agreement¹ filed in
4 connection with the pending Motion for Final Approval of Class Action Settlement
5 (“First Motion for Final Approval”). (See Dkt. No. 122.) Despite the fact that direct
6 mailed notice (“Postcard Notice”) was delivered to 95.7% of the over 3 million class
7 members identified through Chase’s available records, only 56 persons timely opted
8 out of the Settlement and only three substantive Objections² remain outstanding.³
9 (See Declaration of Kenneth Jue, Dkt. No. 122-8 at ¶ 12.) In addition, 112,467
10 claims were submitted by Settlement Class Members for payments of \$69.97,

11 _____
12 ¹ Capitalized terms are defined in the Settlement Agreement and Release and the
13 Amendment to Settlement Agreement and Release (together, the “Settlement
14 Agreement”), unless otherwise indicated.

15 ² The three substantive objections were filed by Thomas Berry (“Berry”), a Group 1
16 Settlement Class Member; Stephen A. Kron (“Kron” and together with Berry, the
17 “Objectors”), a Group 2 Settlement Class Member; and Robert J. Michener, a Group
18 2 Settlement Class Member. This Opposition responds only to the objections of
19 Berry and Kron, as Plaintiffs’ Opposition to Objections to Final Approval of
20 Settlement sufficiently responds to Mr. Michener’s Objection. Six additional Group
21 1 “objections” and one Group 2 “objection” were sent to the Claims Administrator,
22 but were not filed with the Court, and one additional Group 2 “objection” was filed
23 with the Court, but none of them state any coherent grounds for denying final
24 approval. Specifically: (1) Ivory M. Jenkins-Blaney (Group 1), Jose Herrera (Group
25 1), Adriana Herrera (Group 1), Carmen Vara (Group 1), Debbie S. Shabina (Group
26 1), James Norman (Group 2) and Glenda Smith Norman (Group 2) state only that
27 they are objecting to the Settlement, without providing any grounds; and (2) Curtis
28 Williams (Group 1) and Tammy Renee Rodriguez (Group 2) appear to be dissatisfied
with Chase in matters unrelated to the subject matter of this litigation and
additionally appear to be dissatisfied with the amount of recovery by each Settlement
Class Member. To the extent that objections relate to the recovery by Settlement
Class Members, this point is addressed in Section III.B.2., below. Mr. Williams also
appears to be dissatisfied with any cy pres distribution, which is addressed in Section
III.B.4, below. Plaintiffs’ Opposition to Objections to Final Approval of Settlement
addresses all objections to Class Counsel’s fee awards.

³ Cheryl Kron (See Dkt. No. 125) and Glenice May and Janiley Lynne Camarista
(See Dkt. No. 127) have withdrawn their Objections. Additionally, Class Counsel
has informed Chase that John W. Davis (See Dkt. No. 63) will be withdrawing his
Objection, and therefore Chase does not provide a response here.

1 showing further support for the Settlement. As amply demonstrated below, the
2 Objections present no serious basis for disrupting this Settlement.

3 Initially, Berry’s objection, which is over two years late and violates this
4 Court’s May 30, 2014 Order preliminarily approving the Group 2 Settlement, should
5 be disregarded as untimely. Moreover, on the merits, Objectors’ challenges to the
6 Settlement all fail. Contrary to these Objectors’ contentions, the Postcard Notice
7 specifically sets forth the process for opting out of or objecting to the Settlement and
8 directs Settlement Class Members to the settlement website for more detailed
9 information regarding what claims are released, including a detailed long form notice
10 (the “Website Notice”). The notice program, which this Court previously found to
11 be “the best practicable under the circumstances,” and the contents of the Postcard
12 Notice and Website Notice are reasonably calculated to apprise all Settlement Class
13 Members of the terms of the Settlement, consistent with Due Process requirements.
14 Additionally, the Settlement, including the Release, is fair, adequate and reasonable,
15 and provides substantial value to Settlement Class Members in resolution of their
16 uncertain claims.

17 Accordingly, Chase respectfully requests the Court to overrule the Objections
18 and grant final approval to the Settlement.

19 **II. RELEVANT PROCEDURAL BACKGROUND**

20 **A. Group 1 Settlement And Preliminary Approval.**

21 Plaintiff Patricia Connor filed this action in June 2010.⁴ After six settlement
22 conferences with Magistrate Judge Bernard Skomal and preliminary discovery, in
23 January 2012, the parties entered into the Settlement. On March 12, 2012, the
24 Honorable Dana Sabraw preliminarily approved the Settlement (“Group 1
25

26 ⁴ On May 15, 2015, the Court ordered that the Second Amended Complaint, the
27 operative complaint on behalf of Patricia Connor and Sheri L. Bywater, be filed nunc
28 pro tunc to March 12, 2012.

1 Preliminary Approval Order”). (See Dkt. No. 55.) In approving the Settlement,
2 Judge Sabraw reviewed the terms of the notice program as well as the draft proposed
3 notices and held “that the foregoing program of Class Notice and the manner of its
4 dissemination is the best practicable notice under the circumstances and is reasonably
5 calculated to apprise Settlement Class Members of the pendency of this Action and
6 their right to object to or exclude themselves from the Settlement Class.” (Id. at ¶ 8.)

7 With respect to opt out requests, Judge Sabraw ordered any person who
8 wished to be excluded from the Settlement to send “a written request to a designated
9 address within ninety (90) days after entry of this Order.” (Id. at ¶ 10(a).) Judge
10 Sabraw further ordered that any Settlement Class Member who failed to comply with
11 the Order “will be bound by all determinations and judgments in the Action.” (Id.)
12 As to objections, Judge Sabraw ordered that a Settlement Class Member “must make
13 any objection in writing and file it with the Court not later than ten (10) [days] after
14 the end of the Claims Period.” (Id. at ¶ 11(b).) Again, Judge Sabraw ordered that
15 “[a]ny Class Member who fails to comply with these provisions shall waive and
16 forfeit any and all rights the Class Member may have to appear separately and/or to
17 object, and shall be bound by all the terms of this Stipulation of Settlement and the
18 Settlement, and by all proceedings, orders, and judgments in the Litigation.” (Id.)

19 **B. Group 1 Notice And Notice To Berry.**

20 Pursuant to the terms of the Group 1 Preliminary Approval Order, direct mail
21 notice to Group 1 was sent on April 11, 2012. (See Dkt. No. 66 at ¶ 7.) Direct mail
22 notice was provided to Berry to his address of record in Tampa, Florida. (See
23 Request for Judicial Notice (“RJN”), Ex. A.) Pursuant to the express terms of the
24 Group 1 Preliminary Approval Order, the opt out deadline for Group 1 was July 10,
25 2012 and the objection deadline was July 20, 2012. (See Dkt. No. 66 at ¶¶ 19, 21.)
26 These deadlines were included in the Group 1 Postcard Notices mailed to each

1 Settlement Class Member, including Berry, on April 11, 2012. (See Dkt. No. 66 at
2 ¶¶ 5, 7.)

3 **C. Group 2 Settlement.**

4 The First Motion for Final Approval of the Settlement was filed on July 20,
5 2012 and the hearing was scheduled for August 3, 2012. While that Motion was
6 pending, the Parties learned that the class list may be incomplete. On the Parties’
7 joint motion, the final approval hearing was therefore continued.

8 Thereafter, Chase determined that the Group 1 class list in fact did not include
9 all persons who met the Settlement Class definition. Chase thoroughly reviewed its
10 processes to ensure that it identified each Settlement Class Member. Through this
11 review, additional Settlement Class Members were identified, as addressed in the
12 Amendment to Settlement Agreement and Release, collectively referred to as the
13 “Group 2 Settlement Class Members.” Substantial time, effort and expense went
14 into the identification of all Settlement Class Members, including working with a
15 third party consultant to validate Chase’s methodology.

16 On July 31, 2013, the Parties participated in another mediation and ongoing
17 negotiations with a private mediator (Judge Edward A. Infante (Ret.) of JAMS) to
18 address inclusion of Group 2 Settlement Class Members in the Settlement. As a
19 result of these negotiations, the Parties agreed upon a settlement structure that built
20 upon the initial Settlement Agreement and Release, which culminated in the Parties’
21 signing the Amendment to the Settlement Agreement and Release in or about March
22 2014. Specifically, the Parties agreed that Group 2 Settlement Class Members would
23 be entitled to make a claim on the same bases as set forth in the Settlement
24 Agreement and Release, and each Group 2 claimant would recover \$69.97 per claim,
25 which was the amount estimated to be recovered by Group 1 Settlement Class
26 Members based upon the number of previously submitted claims for Group 1. (See
27 Dkt. No. 100-5, at ¶ 5.06.)

1 Additionally, the Parties agreed that the Claims Administrator would send
2 Postcard Notices to all Group 2 Settlement Class Members (i.e., only to persons who
3 did not previously receive notice of the Settlement) using the same methods
4 described in the Settlement Agreement and Release for Group 1 as well as update
5 and maintain the settlement website. (Id. at ¶ 9.06.) Put simply, the Parties agreed
6 that Group 2 Settlement Class Members would be treated exactly the same way as
7 Group 1 Settlement Class Members.

8 **D. Group 2 Preliminary Approval.**

9 On March 20, 2014, Plaintiffs filed their Unopposed Motion for Preliminary
10 Approval of Class Action Settlement and Certification of Settlement Class for
11 Settlement Class Members in Group 2. (See Dkt. No. 100.) On May 30, 2014, this
12 Court entered its Order granting that Motion (“Group 2 Preliminary Approval
13 Order”). (See Dkt. No. 113.) Importantly, with respect to opt out requests, this
14 Court ordered that “Settlement Class Members previously provided notice as part of
15 the Group 1 Settlement Class Member Notice program and an opportunity to opt out
16 shall not be provided an additional opportunity to opt out.” (Id. at ¶ 10(d).) This
17 Court set the hearing for Final Approval of the Settlement for November 14, 2014.
18 (See Dkt. No. 113.) That date, as well as the continued December 4, 2014 hearing
19 date, were promptly posted to the settlement website.

20 On September 30, 2014, after Postcard Notices had been disseminated to all
21 Group 1 and Group 2 Settlement Class Members pursuant to the Court’s Orders and
22 each of them had been given an opportunity to opt out of or object to the Settlement,
23 Plaintiffs filed their Motion in Support of Final Approval of Class Action Settlement
24 (“Second Motion for Final Approval”), seeking approval of the Settlement. (See
25 Dkt. No. 122, 122-8.)
26
27
28

1 **III. ARGUMENT**

2 **A. Berry’s Objection Is Untimely And Should Be Stricken.⁵**

3 First, and fatally, Berry’s objection and attempt to opt out are untimely – by
4 more than two years – as he is a Group 1 Settlement Class Member. Courts within
5 the Ninth Circuit routinely overrule objections on the sole basis that they are
6 untimely. See, e.g., In re TFT-LCD (Flat Panel) Antitrust Litig., No. MDL 3:07-
7 MD-1827 SI, 2011 WL 7575004, at *3 (N.D. Cal. Dec. 27, 2011) (overruling
8 objection that was late by only a few days, and notwithstanding that the objection
9 was mailed on the due date, solely on the basis of being untimely); Moore v. Verizon
10 Commc’ns Inc., No. C 09-1823 SBA, 2013 WL 4610764, at *12 (N.D. Cal. Aug. 28,
11 2013) (overruling objections solely on the basis of untimeliness); Cohorst v. BRE
12 Props, Inc., No. 10CV2666 JM BGS, 2012 WL 153754, at *2 (S.D. Cal. Jan. 18,
13 2012) (adopting report and recommendation’s finding that objection was untimely
14 when filed two months after the objection deadline); In re Heritage Bond Litig., No.
15 CV 02-382 DT, 2005 U.S. Dist. LEXIS 13555, at *8-9 (C.D. Cal. June 10, 2005)
16 (“This Court received an untimely objection via mail by K. Martin on May 25, 2005,
17 ten days after the filing deadline for oppositions. [. . .] [T]he Court does not
18 consider K. Martin’s letter in its analysis.”).

19 Here, Berry concedes that he is a member of Group 1 and does not contest that
20 he received direct mail notice to his address of record in April 2012, over two years
21 prior to submitting his opt out request on June 30, 2014 and filing his objection on
22 October 7, 2014. (See Dkt. No. 124-1 at 17:9-12.) As a result, pursuant to the Group
23 1 Preliminary Approval Order, Berry’s deadline to opt out was July 10, 2012 and his
24 deadline to object was July 20, 2012. (See Dkt. No. 55 at ¶¶ 10, 11.) Berry’s June
25 30, 2014 opt out and October 7, 2014 objection are plainly untimely. Moreover,
26

27 ⁵ Berry’s untimely opt out is specifically addressed below in Section III.C.

1 Berry's request directly violates this Court's May 30, 2014 Order which explicitly
2 prevents Group 1 Settlement Class Members from opting out or objecting to the
3 Settlement after the dates specified by Judge Sabraw. (See Dkt. No. 113 at ¶ 10(d).)

4 Berry tellingly cites no authority supporting his position that his extreme delay
5 should be excused. Instead, the sole case cited by Berry, Laguna v. Coverall N. Am.,
6 Inc., 753 F. 3d 918 (9th Cir. 2014), supports only the general proposition that a
7 district court may exercise discretion in considering an objection and/or opt out
8 request filed shortly after the deadline.⁶ Notably, the objection in Laguna was filed
9 only three weeks after the court mandated deadline. See Laguna, 753 F. 3d at 921.
10 Berry does not cite, and Chase has not located, any opinion wherein an objection
11 filed over two years past the deadline was considered.

12 The doctrine of laches further confirms that this Court must reject Berry's
13 objection. "The fundamental premise of laches is that those who sleep on their rights
14 surrender them; if you snooze, you lose." Am. Int'l. Grp., Inc. v. Am. Int'l. Bank,
15 926 F.2d 829, 835 (9th Cir. 1991). Laches applies under the following
16 circumstances, both present here: "(1) lack of diligence by the party against whom
17 the defense is asserted, and (2) prejudice to the party asserting the defense." Bratton
18 v. Bethlehem Steel Corp., 649 F.2d 658, 666 (9th Cir. 1980) (quoting Costello v.
19 United States, 365 U.S. 265, 282 (1961)). As the Ninth Circuit has held, "one who
20 seeks the help of a court of equity must not sleep on his rights." Jarrow Formulas,
21 Inc. v. Nutrition Now, Inc., 304 F.3d 829, 835 (9th Cir. 2002) (internal citations and
22 quotation marks omitted). Berry's lack of diligence, and the prejudice to Chase from
23 not achieving the finality for which it bargained, defeat Berry's belated submissions.
24 The prejudice to Chase is underscored by the fact that the changes to the Settlement

25 _____
26 ⁶ Berry states that a review of proposed notice is subject to de novo appellate review.
27 While such a broad statement is correct as a matter of law, it does not address the
28 issue here, which is whether Berry's untimely request to opt out and/or object should
be considered.

1 proposed by Berry would require re-notice to the Settlement Class at substantial
2 expense. To raise these issues after the expense of notice to Group 2 Settlement
3 Class Members, when his objections were due long before the Group 2 Settlement
4 was even before this Court, should not be indulged.

5 For all these reasons, Chase respectfully requests that the Court strike and/or
6 deny Berry’s belated objection and opt out request.

7 **B. The Objections Each Fail On The Merits.**

8 **1. The Settlement Is Fair, Adequate and Reasonable.**

9 As a matter of public policy, settlement of litigation short of trial is strongly
10 favored, particularly where complex class actions are concerned. See, e.g., Class
11 Plaintiffs v. Seattle, 955 F.2d 1268, 1276 (9th Cir. 1992). With respect to a class
12 action settlement, the court’s task is to “reach a reasoned judgment that the
13 agreement is not the product of fraud or overreaching by, or collusion between, the
14 negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and
15 adequate to all concerned.” Officers for Justice v. Civil Serv. Comm’n, 688 F.2d
16 615, 625 (9th Cir. 1982) cert. denied, 459 U.S. 1217 (1983) (emphasis added). A
17 trial court has broad discretion in making its “reasoned judgment” as to whether a
18 settlement is fair, adequate and reasonable. Hanlon v. Chrysler Corp., 150 F.3d
19 1011, 1026-27 (9th Cir. 1998). In this regard, the Ninth Circuit has enumerated a
20 number of factors that the Court must balance in evaluating a proposed settlement
21 under Fed. R. Civ. Proc. 23(e) (the “Churchill factors”), including: (1) the strength of
22 the plaintiff’s case; (2) the risk, expense, complexity, and likely duration of further
23 litigation; (3) the risk of maintaining class action status throughout trial; (4) the
24 amount offered in settlement; (5) the extent of discovery completed; (6) the
25 experience and views of counsel; (7) the presence of a governmental participant; and
26 (8) the reaction of the class members to the proposed settlement. Churchill Vill.,
27 LLC v. Gen. Elec., 361 F.3d 566, 575 (9th Cir. 2004); see also Officers for Justice,

1 688 F.2d at 625; Rose v. Bank of Am. Corp., No. 5:11-CV-02390-EJD, 2014 WL
2 4273358, at *4 (N.D. Cal. Aug. 29, 2014). The Objections here, which relate to
3 certain (but not all) of these factors, are flawed in their analysis, as shown below.

4
5 **a) This Case Is Complex And Litigation Would Be Risky
And Expensive.**

6 Berry erroneously (and belatedly) states that his “claims are strong and would
7 not require much evidence because the elements of a TCPA claim are few and
8 readily provable.” Contrary to Berry’s unsubstantiated assertions, the claims here are
9 not strong and, if litigated, there is a significant likelihood that Chase would defeat
10 class certification and/or prevail on the merits.

11 The TCPA prohibits a call placed to a cellular telephone through the use of an
12 automatic telephone dialing system (“ATDS”) or a prerecorded and/or artificial
13 voice, unless the call is made for an emergency purpose or with the prior express
14 consent of the called party. See 47 U.S.C. § 227 (b)(1)(A). The definition of an
15 ATDS is far from settled. See Lambert v. Buth-Na-Bodhaige, Inc., No. 2:14-cv-
16 00514-MCE-KJN, 2014 U.S. Dist. LEXIS 116817, at *7-8 (E.D. Cal. Aug. 20, 2014)
17 (staying case pending petitions to the FCC, including petitions regarding clarification
18 of the definition of an ATDS). Equally important, the burden of establishing whether
19 the call was made with prior express consent is in dispute in the Ninth Circuit.
20 Compare Smith v. Microsoft Corp., 297 F.R.D. 464, 471 (S.D. Cal. 2014) (“The
21 absence of express prior consent, however, is one of the three elements of a TCPA
22 claim, which Plaintiff bears the burden of satisfactorily establishing for the Court.”),
23 with Robbins v. Coca-Cola-Co., No. 13-CV-132-IEG NLS, 2013 WL 2252646, at *2
24 (S.D. Cal. May 22, 2013) (“Whether Plaintiffs gave the required prior express
25 consent is an affirmative defense to be raised and proved by a TCPA defendant,
26 however, and is not an element of Plaintiffs’ TCPA claim.”). As a result, proving a
27 TCPA claim is not “readily provable” as Berry would have the Court believe. To the

1 contrary, courts have repeatedly found that TCPA claims are complex. See, e.g.,
2 Rose, 2014 WL 4273358, at *4 (finding that TCPA claims and interpretations of
3 “prior express consent” under the TCPA are complex); Arthur v. Sallie Mae, Inc.,
4 No. 10-CV-00198-JLR, 2012 WL 4075238, at *1 (W.D. Wash. Sept. 17, 2012)
5 (finding that “the relevant Churchill factors [including complexity of the litigation]
6 weigh in favor of approving the [TCPA] Settlement”). Moreover, the issue of
7 consent routinely is found to defeat class certification in TCPA cases, as relevant to
8 the third Churchill factor (maintenance of class action status). See, e.g., Fields v.
9 Mobile Messengers Am., Inc., No. C 12-05160 WHA, 2013 WL 6073426, at *4
10 (N.D. Cal. Nov. 18, 2013) (denying certification because plaintiff could not establish
11 that consent issue was appropriate for class treatment); Jamison v. First Credit Servs.,
12 Inc., 290 F.R.D. 92, 102-09 (N.D. Ill. 2013) (denying certification because the issue
13 of consent was not appropriate for class treatment).

14 A review of Berry’s own claims confirms the complexity and individual issues
15 here. To recover, Berry must establish both that the calls were made by an ATDS
16 and not made with consent. As noted above, the issue of what constitutes an ATDS
17 is open. Moreover, wholly failing to address the issue of consent, Berry simply
18 asserts that all calls allegedly made to him by Chase violated the TCPA and thus
19 would permit him to recover nearly \$8,000,000.⁷ (See Dkt. No. 124-1 at ¶ 15.) If
20 Berry provided his telephone number to Chase or otherwise consented to be called,
21 he could not prove a TCPA claim. See, e.g., Emanuel v. L.A. Lakers, Inc., No. CV
22 12-9936-GW (SHx), 2013 WL 1719035, at *3 (C.D. Cal. Apr. 18, 2013) (“[T]he
23 authorities are almost unanimous that voluntarily furnishing a cellphone number to a
24 vendor or other contractual counterparty constitutes express consent.”) (quoting

25 _____
26 ⁷ Berry’s assertion that he was called over 5,000 times is unsupported by any facts.
27 Even if such calls were placed by Chase, which Chase denies, they would only be
28 actionable if placed without the requisite consent, which they were not.

1 Saunders v. NCO Fin. Sys., No. 12-CV-1750, 2012 WL 6644278, at *3 (E.D.N.Y.
2 Dec. 19, 2012)); Pinkard v. Wal-Mart Stores, Inc., No. 3:12-cv-02902-CLS, 2012
3 WL 5511039, at *5 (N.D. Ala. Nov. 9, 2012) (“[D]istributing one’s telephone
4 number is an invitation to be called, especially when the number is given at another’s
5 request.”).

6 The recent decision in Rose, finally approving a TCPA settlement with Bank
7 of America, is instructive. Just two months ago, the Northern District of California
8 considered the complexity of the very same issues as those before the Court here.
9 Granting final approval, Judge Davila explained: “[h]aving reviewed the parties’
10 statements regarding their dispute and the relevant authorities, the Court [found] that
11 both parties have legitimate and material positions.” Rose, 2014 WL 4273358, at *4.
12 The Court further reasoned that “even if Plaintiffs prevailed at trial, the sheer size of
13 the award against Defendants, who could be liable for \$500 or \$1,500 per violation
14 for potentially millions of violations, would likely raise significant post-trial
15 concerns. Such an award would almost certainly be appealed, potentially reversed,
16 and litigation would not be resolved for a significant amount of time.” Id.
17 Consequently, the Court found that the first and second Churchill factors (the
18 strength of plaintiff’s case and the complexity of the action) weighed in favor of
19 settlement. These same factors also favor the Settlement here.

20 **b) The Settlement Amount Is The Result Of Compromise**
21 **By The Parties And Is Appropriate For This Case.**

22 The fourth Churchill factor (the settlement amount) also supports final
23 approval of the Settlement. The recovery of \$69.97 by each Settlement Class
24 Member who submitted a claim is fair, as confirmed by the low number of opt out
25 requests and large number of claiming Settlement Class Members. “It is well-settled
26 law that a cash settlement amounting to only a fraction of the potential recovery will
27 not per se render the settlement inadequate or unfair.” Officers for Justice, 688 F.2d
28

1 at 628. “This is particularly true in cases . . . where monetary relief is but one form
2 of the relief requested by the plaintiffs. It is the complete package taken as a whole,
3 rather than the individual component parts, that must be examined for overall
4 fairness.” Id. (emphasis added). Additionally, “Courts . . . [should] tread cautiously
5 when comparing the amount of a settlement to speculative figures regarding ‘what
6 damages ‘might have been won’ had [plaintiffs] prevailed at trial.” White v.
7 Experian Info., Inc., No. SACV-05-1070 DOC (MLGx), 2011 WL 2972054, at *8
8 (C.D. Cal. July 15, 2011).

9 Other district courts, including those within the Ninth Circuit, have granted
10 final approval of TCPA settlements with similar, or even lesser, recoveries for each
11 class member. See, e.g., Rose (granting final approval of TCPA settlement where
12 each claimant was expected to recover \$20-40); Adams v. AllianceOne Receivables
13 Mgmt., Inc., S.D. Cal., Case No. 08-cv-0248-JAH-WVG, Dkt. No. 137 (Sept. 8,
14 2012) (granting final approval of TCPA settlement with a maximum recovery
15 amount of \$40 per person); Steinfeld, et al. v. Discover Fin. Servs., N.D. Cal., Case
16 No. 3:12-cv-1118, Dkt. No. 97 (March 31, 2013) (same); Maria Agne v. Papa John’s
17 Int’l, Inc., W.D. Wash., Case No. 2:10-cv-01139, Dkt. No. 389 (Oct. 22, 2013)
18 (granting final approval of TCPA settlement where each class member would
19 automatically receive a merchandise certificate enabling him/her to order a free Papa
20 John’s pizza and each claimant would receive a \$50 payment); Sarabi v. Weltman,
21 Weinberg & Reis Co., L.P.A., S.D. Cal., Case No. 3:10-cv-01777-AJB-NLS, Dkt.
22 No. 42 (Feb. 15, 2013) (granting final approval of TCPA settlement where each class
23 member would receive \$70 or pro rata share of amount remaining in the settlement
24 fund); Kevin Lemiux v. Global Credit & Collection Corp., S.D. Cal., Case No.
25 3:08-cv-01012-IEG-POR, Dkt. No. 46 (Sept. 20, 2011) (same); Desai v. ADT Sec.
26 Servs., Inc., N.D. Ill., Case No. 1:11-cv-1925, Dkt. No. 243 (June 21, 2013)
27 (granting final approval of TCPA settlement where each claimant was expected to

1 recover between \$50 and \$100). Thus, the compensation to be received by each
2 validly claiming Settlement Class Member is fair.

3 In addition to the monetary recovery, there is also a non-monetary benefit
4 conferred on the Settlement Class. As an additional benefit to all Settlement Class
5 Members, Chase developed enhancements to its servicing system designed to
6 prohibit calling a cell phone unless the Settlement Class Member's mortgage loan
7 servicing record is systematically coded to reflect the borrower's prior express
8 consent to call his/her cell phone. These procedures were largely developed and
9 implemented after this action was filed in June 2010.

10 **2. The Notice Program Was Adequate And The Best Practicable**
11 **Under The Circumstances.**

12 The notice program for Group 2 was the same as for Group 1: the Claims
13 Administrator mailed to each Group 2 Settlement Class Member a Postcard Notice,
14 explaining his/her rights to submit a claim, opt out or object to the Settlement, and
15 including the deadlines for each option. (See Dkt. No. 100-5 at ¶ 9.06, 122-9 at ¶ 7.)
16 The Postcard Notice also provided clear directions for submitting a claim online, by
17 calling a toll-free number or by mail, and directed Settlement Class Members to the
18 settlement website for additional information. (See Dkt. No. 122-10.)

19 The Objectors incorrectly assert that the notice program and Claims
20 procedures were inadequate. Kron essentially argues that, notwithstanding that
21 Group 1 Settlement Class Members already had notice and an opportunity to submit
22 a claim, opt out or object, they should have been provided additional notice and a
23 second opportunity to submit a claim, opt out or object to the Settlement. Not
24 surprisingly, he fails to cite any case law to support re-notice to Group 1 Settlement
25 Class Members.⁸ Kron further challenges the claims rate. However, when asked at

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27 ⁸ There also is a substantial question as to whether Kron has standing to advance this
28 argument since he is not a Group 1 Settlement Class Member.

1 deposition what kind of notice he would have liked and what he believed the claims
2 rate should be, Kron’s responses made little sense:

3 Q [Mr. Kazerounian]: [. . .] I have your objection, but you
4 don’t have a remedy. So in order as Class counsel for me
5 to take what you are telling me onboard, I want to know
6 what you would have preferred.

[Objection]

[A]: That would be up to my attorney to decide.

7 Q: Not you?

A: Answered -- I answered your question.

8 Q: So it’s not up to you. It's up to your attorney? Is that
9 what you are suggesting?

A: That's what I said.

[...]

10 Q: Okay. So you think [the claims rate is] not satisfactory;
11 correct?

A: That’s correct.

12 Q: What would you have preferred it to be for it to be
13 satisfactory?

A: 100 percent.

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15
16 (Declaration of J. Stepanyan in Support of Defendant JPMorgan Chase Bank, N.A.’s
17 Opposition to Objections to Final Approval of Settlement (“Stepanyan Decl.”), Ex. A
18 [Deposition of Stephen A. Kron 82:5-18, 83:4-9, Oct. 27, 2014]). Kron’s objection
19 has no basis and should be overruled.⁹

20 Berry also asserts (again belatedly) that the Website Notice was inadequate.
21 Berry claims principally that “the notice gives no indication of the scope of the
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23
24 ⁹ Kron’s lack of understanding of the Settlement is also highlighted by his recent
25 filing of a Motion for Leave to File a Claim, as he is under the impression that he had
26 to “opt-in in order to object.” (See Dkt. No. 137-1.) Additionally, Kron directly
27 contradicts himself. He states, in his declaration signed under penalty of perjury, that
28 “[a]fter filing [his] objections, [he] learned that [he] needed to have submitted a
claim as well[,]” yet his Objection actually states that he “will be filing a Motion for
Leave to File a Late Claim.” (Cf. Dkt. No. 137-2 with Dkt. No. 125.)

1 Release.” Simply put, a review of the Website Notice reveals that Berry is wrong.
2 The Website Notice clearly states:

3 By staying in the Settlement Class, you agree to release the
4 “Released Claims,” including claims known and unknown.
5 The full text of the Release of Claims sections, including
6 descriptions of the “Released Claims” and “Released
7 Parties,” of the Settlement Agreement that applies to both
8 Group 1 and Group 2 is available at
9 www.connorTCPAsettlement.com and is set forth in the
10 Appendix at the end of this notice.

11 (See Dkt. No. 100-7) (emphases added). The referenced Appendix (included with
12 the Website Notice) sets forth the full text of the Release, which clearly defines
13 “Released Claims” as “any and all claims, causes of action, suits, [. . .] as of the date
14 of the Final Approval Order that arise out of or relate in any way to the use of an
15 ‘automatic telephone dialing system’ or an ‘artificial or prerecorded voice’ [. . .].”
16 The Settlement Agreement and Release further explains that “‘Final Approval Order’
17 means the Court’s Order entered in connection with the Final Approval Hearing” and
18 explains that “‘Final Approval Hearing’ means the hearing held by the Court to
19 determine whether to approve the Settlement [. . .].” The Settlement Website clearly
20 identified the date of the Final Approval Hearing first as August 3, 2012 and then as
21 November 14, 2014 (and continued to December 4, 2014). There could be no
22 question regarding the end date of the Release Period.

23 Neither of the cases cited by Berry supports his argument. First, while the
24 Court in Kaufman v. Am. Express Travel Related Svcs., No. 07 C 1707, 2010 WL
25 3365921, at *2 (N.D. Ill. Aug. 19, 2010), ordered that “a clear, concise summary of
26 no more than one paragraph of the release should be included in the notice,” what
27 Berry fails to disclose is that the final form of class notice in that case, which was
28

1 approved by a Court-appointed notice expert and disseminated to the class, reads
2 almost identically to the Website Notice here:¹⁰

3 What rights am I giving up?

4 If the settlement is approved and becomes effective, all the
5 Court's orders will apply to and legally bind all Class
6 Members, including gift card purchasers, recipients, users
7 and holders. Basically, you will give up any and all claims
8 against American Express that are similar to those in the
9 lawsuit. The specific rights which Class Members are
10 giving up are called Released Claims. The Released Claims
are described in detail in the Settlement Agreement
available at www.KaufmanClassActionSettlement.com.

11 (See id., Dkt. No. 449, approving proposed order filed at Dkt. No. 440-9 (emphasis
12 added)). Moreover, while the Kaufman class notice directs class members to the
13 settlement agreement for a description of "Released Claims," the Website Notice in
14 this case actually includes the relevant Release provision from the Settlement
15 Agreement.

16 The second case cited by Berry is equally unpersuasive. In Walter v. Hughes
17 Comms., Inc., No. 09-2136 SC, 2011 WL 2650711, at *12 (N.D. Cal. July 6, 2011),
18 the Court denied the proposed notice because it was "obtusely written." However,
19 the Court's issue with the release language was that it was too broad in including
20 certain types of claims not covered by the settlement:
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27 ¹⁰ A motion for final approval of the settlement is currently pending.
28

1 If one accepts the accuracy of the Long Form’s summary of
2 the release, all claims relating to [defendant’s] charging of
3 ETFs, its FAP, its advertising, and the speed of its service
4 would be released. This is a particularly broad release, and
5 while it does not render the settlement unfair, its breadth
6 should be considered in evaluating the fairness of the
7 settlement.

8 Id. (emphasis added). What Berry fails to mention is that the release in Walter, like
9 the Release here, extended to claims through the date of the Final Approval, and the
10 Court there found no issue with that aspect of the release or notice. See Walter v.
11 Hughes Comms., Inc., N.D. Cal., Case No. 09–2136 SC, Dkt. No. 132 (Nov. 16,
12 2012).

13 3. The Scope Of The Release Is Appropriate.

14 The Objectors’ assertion that the Release extends for too long a time also
15 should be rejected. The following exchange during Kron’s recent deposition –
16 wherein he states that his objection would not be resolved even with a “finite” end –
17 demonstrates that his objection is frivolous:

18 Q [by Mr. Kazerounian]: Okay. Now, in your objection in
19 Exhibit 3, you -- I think you stated earlier you believe the
20 release is too broad; is that correct?

21 A [By Mr. Kron]: That's correct.

22 Q: And your main issue with it is it has no time period?

23 A: That's correct.

24 Q: Okay. If I told you it had a definite end period, would
25 that change your mind --

26 A: No.

27 Q: -- on your objection?

28 A: No.

Q: So even if it had a finite time period on the release, your
objection still -- would still stand; correct?

1 A: Correct.

2 (Kron Dep. 93:18-25, 94:1-8, Oct. 27, 2014).

3 No doubt recognizing that defendants seek finality as to issues they have
4 bargained to settle, courts routinely approve settlements where the release period
5 extends through the date of entry of final approval of the settlement. See, e.g.,
6 Arthur, 2012 WL 4075238, at *1 (approving TCPA settlement where the end of the
7 release period, which extended through date of final approval of the settlement,
8 notwithstanding that it was two years after the end of the class period); Franco v.
9 Ruiz Food Prods., Inc., No. 1:10-CV-02354-SKO, 2012 WL 5941801, at *3 (E.D.
10 Cal. Nov. 27, 2012) (granting final approval of settlement with a class comprised of
11 all current or former employees of the defendant between December 15, 2006, and
12 the date of the preliminary approval, but releasing claims through the date of the final
13 approval order); Dent v. ITC Serv. Grp., Inc., No. 2:12-CV-00009-JCM, 2013 WL
14 5437331, at*2 (D. Nev. Sept. 27, 2013) (granting final approval to settlement
15 including claims arising through the date of entry of final approval order).

16 Berry’s argument (again belated) that the “scope of the Release does not track
17 the Complaint” incorrectly confuses the definition of the Class Period and the
18 definition of the Release Period. Neither the Federal Rules of Civil Procedure nor
19 case law require that these two definitions be identical, and it is unclear what point
20 Berry is making. As explained above, the release period of a class action settlement
21 frequently extends long after the class period, since the class period must be limited
22 in order to provide notice to class members of the pending class action settlement.
23 Berry’s argument fails.

24 **4. Any Objections Regarding Future Cy Pres Distribution Are**
25 **Premature.**

26 There currently is no cy pres recipient and no need to designate a cy pres
27 recipient, as the total Approved Claims and Settlement Costs exceed \$7,000,000.

1 (See Settlement Agreement and Release, ¶ 5.01.) Should a cy pres payment be
2 necessary as a result of returned or un-cashed checks, any such payment must be
3 approved by the Court.¹¹ Kron’s objection cites no authority wherein the Court
4 denied final approval of a class action settlement because a cy pres recipient had not
5 been determined. Courts plainly have “the discretion to approve cy pres provisions
6 of the Settlement [. . .] in the interests of facilitating a settlement in a hard-fought,
7 complex class action.” In re Checking Account Overdraft Litig., 830 F. Supp. 2d
8 1330, 1355 (S.D. Fla. 2011).

9 **C. Berry’s Opt Out Request Also Is Untimely And Should Be Rejected.**

10 Finally, Berry asks this Court to permit him to opt out of the Settlement two
11 years after the deadline. As explained by the Ninth Circuit, “to hold that due process
12 requires a second opportunity to opt out after the terms of the settlement have been
13 disclosed to the class would impede the settlement process so favored in the law.”
14 Officers For Justice, 688 F.2d at 634-35; see also Wright, Miller & Kane, Federal
15 Practice and Procedure: Civil 2d, § 1797 at p. 376 (“Since plaintiff was given notice
16 and an opportunity to opt out at an earlier stage due process does not require that a
17 second opportunity be given after the settlement terms are disclosed. At that point
18 the parties’ interests are protected by the Rule 23(e) requirements of court approval
19 of the settlement with notice and a fairness hearing at which dissenters can voice
20 their objections”).

21 The Court’s “discretion to extend a class member’s time to opt out” should
22 only be exercised where the class member makes a showing of “‘excusable neglect’
23 or good cause for the belated request.” Silber v. Mabon, 18 F.3d 1449, 1454-55 (9th
24 Cir. 1994). The Supreme Court has outlined four factors in determining whether a

25 _____
26 ¹¹ The Settlement Agreement and Release clearly states that “if [the Parties] cannot
27 agree [regarding the cy pres], the Court shall decide the recipient(s). If the Parties
28 are able to agree, the Court shall approve of such recipients prior to any cy pres
payments.” (See id. at ¶ 5.02.)

1 movant has shown excusable neglect in submitting an untimely opt out request: (1)
2 the danger of prejudice to the nonmoving parties, (2) the length of delay, (3) the
3 reason for the delay, and (4) whether the movant acted in good faith (the “Pioneer
4 factors”). Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship., 507 U.S. 380,
5 395 (1993). Application of these four factors confirms that Berry’s request should be
6 denied.

7 The second and third Pioneer factors require little discussion, since there is no
8 doubt that Berry’s attempted opt out is untimely, as discussed above. (See also RJN,
9 Ex. B.) Fatally, Berry provides no explanation for his two-year delay. Accordingly,
10 these two factors conclusively support a finding that Berry’s neglect is not excusable.

11 The first Pioneer factor (prejudice to Chase) also favors denying Berry’s
12 belated request. Chase will be greatly prejudiced if Berry is allowed to opt out, since
13 it will be forced to defend a litigation initiated long after the opt out period closed
14 and when Chase reasonably should have been able to rely on the certainty of
15 settlement. The decision in Bowman v. UBS Fin. Servs., Inc., No. C 04 3525 MMC,
16 2007 WL 1456037, at *3 (N.D. Cal. May 17, 2007) is instructive here. In that case,
17 the Northern District of California denied movants’ untimely request to opt out of a
18 class action settlement, concluding:

19 Although there is no showing that [the movants] acted in
20 bad faith by failing to file an exclusion form, and no
21 suggestion that the class settlement would be affected if
22 [the movants] were permitted to opt out, defendants
23 nonetheless would be prejudiced were the Court to permit
24 [the movants] to opt out at this late date, because [the
25 defendant] will have to expend resources defending against
26 claims that it reasonably understood were foreclosed.

25 (emphases added); see also In re Prudential Secs. Inc. Ltd. P’ships Litig., 164 F.R.D.
26 362, 370-71 (S.D.N.Y. 1996) (denying leave for extension of time to opt out of class
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1 settlement, rejecting contention that class notice did not adequately inform movants
2 that their claims were released by settlement and finding defendant would suffer
3 “severe prejudice” if extension were granted); Georgine v. Amchem Prods., Inc.,
4 1995 WL 251402 at *7-8 (E.D.Pa.1995) (denying motion to extend opt out deadline
5 where movants timely received notice of opt out deadline and defendants would be
6 prejudiced because “financial certainty” they sought to achieve by entering into
7 settlement would be undermined by having to litigate additional claims).

8 The fourth and final Pioneer factor (whether Berry acted in good faith) also
9 defeats Berry’s request. The undisputed facts are that Berry received direct mail
10 notice in April 2012 and failed to timely file his objection or request to be excluded
11 by the deadlines set by Judge Sabraw. (See also RJN, Ex. B.) Almost two years
12 later, on May 27, 2014, Berry filed a complaint against Chase in the Middle District
13 of Florida for alleged TCPA violations beginning in May 2010. (See Dkt. No. 124-1
14 at ¶ 15.) Because he cannot dispute that he received direct notice, Berry now tries
15 instead to argue that the Website Notice was somehow misleading, as it would lead
16 an average reader to believe that only calls placed through June/July 2011 were
17 included in the scope of the Release (Id. at 7:6-10; 8:23-24). Yet Berry himself
18 sought relief in his newly-filed complaint for calls beginning in 2010, confirming
19 that he simply did not act timely (i.e., if Berry was somehow confused by the
20 Postcard Notice or the Website Notice and thought only his calls through mid-2011
21 were included in the scope of this Settlement, he would not have sought relief for
22 calls made in 2010). Very simply, Berry slept on his rights. Ninth Circuit authority
23 compels that Berry’s request be denied. See also Speiser, Krause & Madole P.C. v.
24 Ortiz, 271 F.3d 884, 886-87 (9th Cir. 2001) (holding failure to comprehend clear
25 court order not excusable neglect); In re Gypsum Antitrust Cases, 565 F.2d 1123,
26 1126 and n. 1 (9th Cir.1977) (finding failure to submit timely claim not excusable
27 where class notice was clear).

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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2014, a copy of the foregoing **DEFENDANT JPMORGAN CHASE BANK, N.A.’S OPPOSITION TO OBJECTIONS TO FINAL APPROVAL OF SETTLEMENT** was filed electronically and served by U.S. Mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court’s electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court’s EM/ECF System.

/s/ Julia B. Strickland

Julia B. Strickland