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11 UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13 SHAHRIAR JABBARI and KAYLEE
HEFFELFINGER, on behalf of themselves
14 and all others similarly situated,

15 Plaintiffs,

16 v.

17 WELLS FARGO & COMPANY AND
WELLS FARGO BANK, N.A.,

18 Defendants.

Case No. 15-cv-02159

**INTERVENORS' REPLY TO
PLAINTIFFS' SUPPLEMENTAL
BRIEFING IN RESPONSE TO COURT
INQUIRIES (DKT. NO. 145) AND
DEFENDANTS' SUPPLEMENTAL
MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT (DKT.
NO. 146)**

**Judge: Hon. Vince Chhabria
Ctrm: 4
Date: May 18, 2017
Time: 10:00 a.m.**

Action Filed: May 13, 2015

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1 The undersigned are counsel of record for intervenors Hodge, Jeffries, Lessa, and Stanton
2 (the “Intervenors”) in the “Related Actions.” *See* Dkt. No. 100, par. 2.46. Intervenors hereby reply
3 to Plaintiffs’ Supplemental Briefing in Response to Court Inquiries (Dkt. No. 145, “Plaintiffs’
4 Response”) and Defendants’ Supplemental Memorandum in Support of Plaintiffs’ Motion for
5 Preliminary Approval of Class Action Settlement (Dkt. No. 146, “Defendants’ Response”).

6 1. ***First***, in late November of 2016, Wells Fargo counsel told Intervenor’s Counsel that
7 there were ***three million class members***. Given the ascertainability problem that overwhelms this
8 settlement, as well as the admitted frailties in the PWC analysis, the Court needs to be advised of
9 the following: On November 29, 2016, counsel for Intervenors was contacted by Wells Fargo’s
10 counsel. Wells Fargo’s counsel sought an urgent national class settlement demand—to be delivered
11 the next day—and advised the Intervenors’ counsel that the size of the class was “three million
12 people.” The next day, the undersigned complied with the urgent request, which was met with
13 silence from Wells Fargo. If the Court wishes to see a copy of the settlement demand, undersigned
14 is happy to file same under seal. We bring this matter before the Court to refocus its attention on
15 the fact that the size of the class is a moving target. Wells Fargo’s request for a settlement demand
16 on November 29, 2016, obviously also calls into question the authenticity of the alleged “settlement
17 in principle” that was announced in September of 2016. Before a settlement can be approved, these
18 discrepancies must be scrutinized.

19 Defendants’ Response portrays the “approximately 2 million accounts” as an “intentionally
20 over-inclusive population of potentially unauthorized accounts identified by
21 PricewaterhouseCoopers (“PWC”)” and “the 3.5 million figure” as “Plaintiffs’ own estimate
22 covering a broader timeframe.” Defendants Response, p. 1. They also proceed to walk-back that
23 “intentionally over-inclusive” number of two million accounts to “hundreds of thousands of
24 unauthorized deposit accounts” and only “tens of thousands of credit cards,” providing self-
25 serving internal surveys to substantiate that walk-back. *Id.*, at pp. 1-9, and fn. 2. Plaintiffs’ Response
26 describes their competing disclosures of 2 million accounts, on the one hand, and 3.5 million
27 accounts, on the other hand, as an oversight, indicating they “realized that the additional information
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1 would assist the Court in evaluating the fairness of the Settlement.” Plaintiffs’ Response, at p. 2.

2 These rival characterizations are at odds with what Intervenors were told by Wells Fargo on
3 November 29, 2016, which is that there were 3 million class members. That is people, not accounts.
4 And that number conflicts with Defendants’ statement that “[t]he PWC analysis identified
5 approximately 2.2 million accounts (the number of customers is somewhat lower) for the period
6 May 2011 to mid-2015,” and their claim that “[t]he analysis period is being refined and expanded,”
7 so “[t]he number will therefore likely increase.” Defendants’ Response, at p. 9. On November 29,
8 2016, Wells Fargo already knew the number was higher.

9 Simply put, the Court does not know the size of this class. The 3.5 million accounts
10 represented to the Court is (apparently) the *Jabbari* Plaintiffs’ counsel’s best estimate of the number
11 of accounts. But the *Jabbari* Plaintiffs should not have to rely on their own analysis. The
12 information needed to settle this case is in the sole control of Wells Fargo and is known (or should
13 be known). In its answer to the Court’s questions, Wells Fargo claims that the PWC analysis has
14 shortcomings, but it believes these shortcomings relate to the class being “over-inclusive.”
15 Defendants’ Response, at p. 1. This is unlikely given their disclosure to Intervenors’ counsel in late
16 November. Given their own alleged issues with this number, perhaps the PWC analysis is not the
17 best methodology to ascertain the identities of the class members. After all, Wells Fargo admitted
18 to firing a staggering 5,300 people due to this scandal, so presumably there are other options to
19 identify class members that is based on the accounts handled by these former employees. In the
20 end, the Responses raise even more questions concerning ascertainability of the class, and these
21 questions preclude settlement at the preliminary approval stage. These questions include:

- 22 • ***Where did this “3 Million Class Member” number come from?***
- 23 • ***Why was this number kept from counsel for the *Jabbari* Plaintiffs?***
- 24 • ***If there was an agreement “in principle” between the parties, why was Wells Fargo***
25 ***urgently seeking a national class settlement demand from Intervenors’ counsel on***
26 ***November 29, 2016?***
- 26 • ***If the PWC survey was so defective, why was it used as a basis for settling the class?***
- 27 • ***What methodology was used to terminate the 5300 employees?***

1 To answer these questions, and to properly ascertain the class, **Intervenors suggest appointment**
2 **of a special master** to address issues of ascertainability and to explore and work with **all plaintiffs**
3 before this Court to identify an approvable settlement that can withstand further review. As it
4 stands, it appears that the only information used to support the settlement has been provided by
5 Wells Fargo, and even they claim that this information is defective.

6 2. **Second**, state identity-theft claims are not coextensive with recovery under the
7 FCRA. This is pertinent to the Court's understanding and announcement at the hearing that the
8 damages here are minimal, which Intervenors believe is incorrect due to the fact that it is based on
9 information conveyed to it solely by Wells Fargo. At the outset, there is no preemption of the
10 identify theft claims by the FCRA. The FCRA does not preempt identity theft claims to the extent
11 there is a state law providing a remedy for identity theft that is separate and apart from remedies
12 provided by the FCRA for wrongful or erroneous actions by a defendant in providing credit reporting
13 information to consumer reporting agencies. For instance, the Second Circuit recently held that the
14 FCRA does not preempt the New York identity theft statute. *See Galper v. JP Morgan Chase Bank,*
15 *N.A.*, 802 F.3d 437, 441 (2d Cir. 2015). Notably, that opinion pointed to the similarities between
16 the NY law and the identity theft laws of other states, citing to the Alabama, Georgia, and NC
17 statutes under which Intervenors Jeffries, Hodge, and Lessa brought their claims. *See Galper v. JP*
18 *Morgan Chase Bank, N.A.*, 802 F.3d 437, 441, fn. 1 (2d Cir. 2015).¹ Moreover, actual damages for
19 FCRA do not reach unauthorized products or services other than lines of credit. The FCRA only
20 applies to accounts involving the misreporting or misuse of credit information by Defendants. In
21 other words, FCRA claims do not cover those situations where checking or savings accounts were
22 open because those do not require a credit inquiry or reporting to credit agencies, so there is no
23 duplication of recovery there.

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26 ¹ "For examples of other state laws allowing victims of identity theft to sue an identity thief for
27 damages, *see Ala.Code § 13A-8-199 (2015)*; Conn. Gen.Stat. § 52-571h (2015); *Ga.Code Ann. §*
28 *16-9-130 (West 2015)*; Iowa Code § 714.16B (2015); Mo.Rev.Stat. § 570.223 (2015); *N.C.*
Gen.Stat. § 1-539.2C (West 2015); 42 Pa. Cons.Stat. § 8315 (2015); Tenn.Code Ann. § 47-18-
2104 (West 2015); Wash. Rev.Code § 9.35.020(7) (2015)." *Id.*

1 3. **Third**, the current settlement provides for no deterrence of future wrongdoing by
2 Defendants. *Compare Villaman v. Schee*, Nos. 92-15490, 92-15562, 1994 WL 6661, at *4 (9th Cir.
3 Jan. 10, 1994) (stating that “tort law is designed in part to deter negligent conduct within its
4 borders”). Instead, Defendants simply have to return the money they took from class members, and
5 even then, class members have to make a claim—a claim they may not even know they have due to
6 the methods employed by Defendants. An accounting of identity theft claims in the settlement, and
7 the statutory damages assessed thereunder, will provide for the deterrence necessary in this
8 situation—where Wells Fargo’ business was built on this fraudulent practice, and even paying actual
9 damages back to class members ends up in a windfall and award to Wells Fargo for their conduct.
10 *L.A. News Serv. v. Reuters Television Int’l., Ltd.*, 149 F.3d 987, 996 (9th Cir.1998) (noting that
11 awards of statutory damages can serve compensatory, punitive and/or deterrent purposes).

12 As noted before, counsel for *Jabbari* Plaintiffs are well aware of the value of identity theft
13 claims, and they have used their strength and statutory damages provisions—and specifically those
14 of the Colorado statute—to measure damages and provide the only compensation to class members
15 in the *Sony* class action, which is the case they cited to highlight their experience with these statutes.
16 *See* Dkt. No. 138, at pp. 3-4. On the other hand, discounting identity theft statutes will cause the
17 release of valuable, non-duplicative claims without compensation. And in light of the fact that
18 Defendants say “it is not possible to guarantee that no claimant will recover less than his or her
19 actual harm,” Defendants’ Response, at p. 13, the settlement does not deter but instead creates an
20 incentive for bad conduct in the future because the bad acts were actually profitable for Defendants.

21 4. **Fourth**, and finally, the settlement fails to provide for the future impact of credit
22 damage from Defendants’ fraudulent conduct, and accordingly, the settlement does not fully
23 compensate for actual damages.² The compensation for past injury related to credit damage that is
24 included in the settlement does not compensate for those that will inevitably incur future harm from
25 the credit damage, and this must be considered in the settlement. *See, e.g. In re Target Corp.*

26 _____
27 ² Even absent this issue regarding future damages, even Wells Fargo acknowledges that “it is not
28 possible to guarantee that no claimant will recover less than his or her actual harm.” Defendants’
Response, at p. 13.

1 *Customer Data Sec. Breach Litig.*, 847 F.3d 608, 611 (8th Cir. 2017), *amended*, No. 15-3909, 2017
2 WL 1573829 (8th Cir. May 2, 2017) (remanding to conduct rigorous Rule 23(a) analysis because
3 objector's future injury released without compensation). Fixing credit reports and removing
4 negative credit information is the only thing that will address this issue, and leveraging identity theft
5 claims can provide a basis for requiring Wells Fargo to do that. *See* Dkt. No. 117, pp. 20-21.
6 Without this, the opt-out period will expire before many people can make a claim for actual damages
7 because class members may not have taken a new loan or credit line by then. These class members
8 are thereby excluded from compensation under the settlement agreement while releasing their
9 claims.

10 DATED: May 23, 2017.

11 Respectfully submitted,

12 **HENINGER GARRISON DAVIS, LLC**

13 By: */s/ W. Lewis Garrison, Jr.*

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CERTIFICATE OF SERVICE

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This is to certify that I have this day electronically filed the foregoing using the CM/ECF system.

Dated: May 23, 2017

/s/W. Lewis Garrison, Jr.
W. Lewis Garrison
HENINGER GARRISON DAVIS, LLC