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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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

Plaintiff,

vs.

WELLS FARGO & COMPANY and WELLS FARGO BANK, N.A.,

Defendants.

Case No. 15-CV-02159 VC

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

[Declaration of David H. Fry filed concurrently herewith]

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

Defendants Wells Fargo & Co. and Wells Fargo Bank, N.A. ("Defendants") submit this separate memorandum in support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement to address the limited issue of the requested injunction barring class members from pursuing duplicative litigation during the settlement approval process.

I. STATEMENT OF ISSUE TO BE DECIDED

The issue to be determined on the Motion for Preliminary Approval is whether the parties' proposed settlement should be preliminarily approved under Rule 23 of the Federal Rules of Civil Procedure. This brief is directed at the more specific question whether the Court should, consistent with the terms of the parties' Settlement Agreement, enjoin class members from initiating or continuing to litigate parallel cases during the settlement approval process in this Court.

II. STATEMENT OF FACTS:

Currently, eleven other putative class actions brought by persons asserting that Wells Fargo Bank, N.A. ("Wells Fargo") opened accounts in their name, or enrolled them in services, without their consent are pending around the country—three in state courts and the remainder in federal courts.[1] Since the settlement in principle was reached, parties in certain of these Related Actions have made clear that they are going to seek to defeat the settlement and to utilize whatever avenues are available to them.

Counsel in *Mitchell v. Wells Fargo Bank, N.A.*, No. 2:16-cv-00966 (D. Utah), told the *Los Angeles Times* that his clients "plan to formally object to the settlement *and take whatever other*

[1] *Mitchell v. Wells Fargo Bank, N.A.*, No. 2:16-cv-00966 (D. Utah); *Friedman* v. *Wells Fargo Bank, N.A.*, No. 2:16-cv-07405 (C.D. Cal.); *Blanchard v. Wells Fargo Bank, N.A.*, No. 1:16-cv-07509 (D.N.J.); *Chernavsky v. Wells Fargo Bank, N.A.*, No. 3:16-cv-06326-VC (N.D. Cal.); *Cason v. Wells Fargo Bank, N.A.*, No. 3:16-cv-07040 (N.D. Cal.); *Lessa v. Wells Fargo & Co.*, No. 16-cvs-011955 (Wake Cty. Super. Ct.); *Hodge v. Campbell*, No. SU16-cv-0771 (Clarke Cty. Super. Ct.); *Stanton v. Wells Fargo & Co.*, No. 16-cv-03318-CEH-JSS (M.D. Fla.); *Jeffries v. Wells Fargo & Co.*, No. 2:16-cv-1987 (N.D. Ala.); *Allen v. Wells Fargo & Co.*, No. 3:17-cv-00333 (S.D. Cal.); and *Morales v. Wells Fargo & Co.*, No. BC657880 (Los Angeles Cty. Super. Ct.) (collectively referred to in the Settlement Agreement as the "Related Actions").

actions they can to keep their own cases going – and perhaps reach a more lucrative deal with the bank." (Declaration of David H. Fry ("Fry Decl.") Ex. 1 at 1 (emphasis added) (James Rufus Koren, *Wells Fargo's $110-Million Settlement Is Still Not Enough, Lawyers Say*, Los Angeles Times, March 30, 2017).) One lawyer was quoted in the article as saying "Our position is we're moving forward however we can at this point." (*Id.*) Most specifically, counsel stated that the *Mitchell* plaintiffs would try to get a different ruling on legal issues already decided by this Court: "'We feel we would get a different result [regarding arbitration] in Utah or another jurisdiction,' Christensen said." (*Id.* at 2.)

On April 17, 2017, the plaintiffs in *Jeffries v. Wells Fargo & Co.*, No. 2:16-cv-1987 (N.D. Ala.) (who are represented by the same lawyers as the plaintiffs in three of the other Related Cases: *Lessa*, *Hodge*, and *Stanton*) filed an amended complaint implying that they will seek to get a ruling in another court on the legal import of the settlement. They allege that Wells Fargo has "waived or intend[s] to waive any arbitration agreement between themselves and the Plaintiffs and the Class" by entering into this settlement. (Fry Decl. Ex. 2 at 8).

On the evening of April 20, 2017 (the deadline for filing the preliminary approval motion in this case), the plaintiffs in *Jeffries* filed a "Motion to Appoint Interim Class Counsel and Memorandum in Support". (Fry Decl. Ex. 3.) In this document, the *Jeffries* plaintiffs request that their counsel be appointed as class counsel representing a class of Alabama residents before May 18, 2017 (the hearing date set by this Court for the Motion for Preliminary Approval). (*Id.* at 1.) Although there are no similar cases pending in that district and no competing law firms before that court, the *Jeffries* plaintiffs seek a pre-certification appointment in order to "forestall potential future leadership clashes and ensure that putative class members' interests are protected by capable counsel." (*Id.* at 10.) They further argue that the settlement amount is inadequate. *Id.* at 6-7.

The Settlement Agreement contemplates that, upon preliminary approval, class members would be enjoined from prosecuting those cases or from filing or prosecuting other cases premised on the same factual allegations. (Dkt. No. 100 at ¶ 4.1.8.) Specifically, the Settlement Agreement provides that the order granting preliminary approval will:

> enjoin[] all members of the Settlement Class, unless and until (i) they have been excluded from the Settlement by action of the Court, (ii) termination of this Settlement, or (iii) the Judgment or Alternative Judgment becomes Final, whichever occurs earliest, from filing, commencing, prosecuting, continuing to prosecute, supporting, intervening in, or participating as plaintiffs, claimants, or class members in the Related Actions or in any other lawsuit, or other proceeding in any jurisdiction based on, relating to, or arising out of the claims, or the facts and circumstances at issue, in this Action, the Related Actions, and/or the Released Claims.

(*Id.*)

III. ARGUMENT

In order to maintain an orderly and fair settlement approval process, the Court can and should enjoin class members from litigating parallel claims in other courts during the settlement approval process in this action. At the most basic level, an injunction is appropriate because, once the Court certifies the class, class members are parties to this action and for them to litigate the same or related claims in another forum would undercut this Court's jurisdiction over the claims pending here. *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, and Prods. Liability Litig.*, __ F. Supp. 3d __, 2017 WL 316165, at *16 (N.D. Cal. Jan. 23, 2017) ("*Volkswagen*") ("[A] state court's disposition of claims similar to or overlapping the Released Claims would implicate the same legal and evidentiary issues; thus, such action would threaten the Court's jurisdiction and hinder its ability to decide the case.").

Courts have recognized the particular potential for parallel litigation to cause mischief when a proposed class action settlement is being considered. *See Sandpiper Village Condominium Ass'n, Inc. v. Louisiana-Pacific Corp.*, 428 F.3d 831, 845 (9th Cir. 2005)

("Although *Hanlon* did not elaborate, the decision clearly recognized that a competing state class action covering a portion of the federal class posed a significant danger to the delicate and transitory process of approving a settlement agreement, and thereby threatened the district court's ability to resolve the litigation."). As the Third Circuit has noted:

> It is in the nature of complex litigation that the parties often seek complicated, comprehensive settlements to resolve as many claims as possible in one proceeding. These cases are especially vulnerable to parallel state actions that may 'frustrate the district court's efforts to craft a settlement in the multi-district litigation before it,' thereby destroying the ability to achieve the benefits of consolidation. In complex cases where certification or settlement has received conditional approval, or perhaps even where settlement is pending, the challenges facing the overseeing court are such that it is likely that almost any parallel litigation in other fora presents a genuine threat to the jurisdiction of the federal court.

In re Diet Drugs, 282 F.3d 220, 236 (3d Cir. 2002) (internal citation omitted).

The settlement approval process is "delicate" because settlements reflect the parties' assessments of the risks of continued litigation and the benefits of settlement at a point in time—the moment they agree to the settlement. Ongoing litigation by class members during the settlement approval process threatens to upset the balance of risks and benefits that justified the settlement for the parties. Among other things, it directly deprives the defendant of important benefits that are part of the settlement bargain—an end to the cost of class-wide litigation and removal of the risk of adverse rulings. If defendants are not going to receive those benefits, that constitutes a significant change to the settlement calculation. *In re HSBC Bank USA NA Debit Card Overdraft Fee Litig.*, 99 F. Supp. 3d 288, 305 (E.D.N.Y. 2015) ("Without the power to enjoin in [the pending-settlement] setting, defendants may be deterred from settling claims.") (internal quotation marks omitted). Relatedly, it is simply inequitable for class members to deprive the defendant of the peace it bargained for, but then partake in the benefits of the settlement themselves. If class members do not wish to be represented by counsel who elected to settle the case, or to take the offered settlement benefits, they can opt out. *See Volkswagen*, 2017

WL 316165, at *16. Once the class members have been determined to have properly opted out, they are not subject to the injunction.

In addition to undercutting the incentive for defendants to settle complex litigation, allowing class members to continue to litigate related claims in other fora runs the risk of interference with the settlement process. They may, for instance, request rulings from a different court on issues that are part of the settlement approval process—such as who should represent the class and whether the settlement is fair and adequate, as the *Jeffries* plaintiffs have done. Or they may seek rulings as to the meaning or consequences of the settlement, as the *Jeffries* plaintiffs also appear intent on doing. Or they may solicit decisions on substantive legal issues in the litigation in order to shift the balance of risks and benefits reflected in the settlement, as the *Mitchell* plaintiffs have said they would do.

In order to preserve its jurisdiction over the settlement approval process, the settlement court should be the one considering these issues. If class members wish to make arguments about legal issues relevant to the fairness or adequacy of the settlement or the competence of the proposed class counsel, they can file objections setting forth those arguments. Those issues should not be litigated in a forum where the plaintiffs who negotiated the settlement (and their counsel) are absent. If there is a question about the impact of the settlement and resulting judgment on class members' rights, it should be raised and decided by the court considering the settlement and issuing the judgment. *See In re Agent Orange Prod. Liability Litig.*, 996 F.2d 1425, 1431 (2d Cir. 1993) ("It is difficult to conceive of any state court properly addressing a victim's tort claim without first deciding the scope of the *Agent Orange I* class action and settlement. The court best situated to make this determination is the court that approved the settlement and entered the judgment enforcing it."), *overruled on other grounds*, *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 31 (2002). A national class action settlement should not

have different meanings for class members in Alabama or Florida than it has for class members in California or New Jersey. *See Sandpiper Village Condominium Ass'n*, 428 F.3d at 856 (Reinhardt, J., dissenting) (defending settlement court's entry of post-judgment injunction against *non*-class member's suit because the alternative "renders federal court orders and judgments vulnerable to further litigation in state courts on a state-by-state basis, litigation that can reopen what are intended to be final damage awards and undermine the orderly implementation of complex national settlement agreements").

The requested injunction is of limited duration, applies only to class members, and focuses challenges to the Settlement Agreement in this Court, where they can be assessed as part of the overall settlement approval process. This limited action is necessary to preserve this Court's jurisdiction over the issues at stake in the settlement approval process and to conduct that process in a fair and orderly fashion.

IV. CONCLUSION

For the foregoing reasons, the requested injunction should be included in the order preliminarily approving the settlement.

DATED: April 20, 2017

MUNGER, TOLLES & OLSON LLP

By: */s/ David H. Fry*
David H. Fry

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