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

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

Plaintiffs,

v.

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

Defendants.

Case No. 15-cv-02159

MOTION AND MEMORANDUM AND POINTS OF AUTHORITY IN SUPPORT OF INTERVENTION AND OPPOSITION TO THE MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT AND FOR CERTIFICATION OF A SETTLEMENT CLASS

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

Action Filed: May 13, 2015

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NOTICE OF MOTION

TO: HON. VINCE CHHABRIA, THE CLERK OF COURT, AND COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT that on June 8, 2017, at 10:00am, or as soon thereafter as this Motion may be heard, in the courtroom of the Honorable Vince Chhabria, located at the San Francisco Courthouse, Courtroom 4 - 17th Floor, 450 Golden Gate Avenue, San Francisco, CA 94102. Movants move to intervene in this action pursuant to Fed. R. Civ. P. 23(d)(1)(B)(iii), Rule 24(a), and Rule 24(b) on the grounds that they have an interest in this action that will not be adequately represented by the named parties and that this interest is sufficient to warrant intervention as a matter of right under Rule 24 (a) or alternatively, by permissive intervention under Rule 24(b). By way of this Motion, movants also oppose the Motion for Preliminary Approval.

CONCISE STATEMENT OF RELIEF SOUGHT

Intervenors seek an Order allowing them to intervene pursuant to Rules 23 and 24 of the Federal Rules of Civil Procedure and an Order denying the Motion for Preliminary Approval.

MEMORANDUM OF POINTS AND AUTHORITIES

The undersigned are counsel of record for intervenors in the following cases listed as "Related Actions" in the "Stipulation and Agreement of Class Action Settlement and Release": *Hodge v. Campbell*, No. SU16-cv-0771 (Clarke Co. Ga. Superior Ct); *Lessa v. Wells Fargo & Co.*, No. 16-cvs-01195 (Wake Co N.C. Super. Ct); *Jeffries v. Wells Fargo & Co.*, No. 2:16-cv-1987 (N.D. Ala.); and *Stanton v. Wells Fargo & Co.*, No. 16-cv-03318-CEH-JSS(M.D. Fla.). *See* Dkt. No. 100, par. 2.46 (listing the cases for plaintiffs Aaron Hodge, Douglas and Joann Jeffries, Ashley Lessa, and Nadine Stanton, hereinafter, the "Intervenors")

I. INTRODUCTION

On April 20, 2017, a settlement agreement was executed by counsel for the *Jabbari* Plaintiffs and Wells Fargo, and Plaintiffs have filed a motion asking this Honorable Court "for an order granting preliminary approval of the Class Action Settlement, conditionally certifying the Class, appointing Named Plaintiffs as Settlement Class Representatives, and their counsel as Class Counsel, directing Class notice, scheduling a fairness hearing, and for other relief explained in the

accompanying Memorandum." Dkt. No. 101, p. 1 (the "Motion for Preliminary Approval"). Intervenors intervene in this action to oppose the Motion for Preliminary Approval. Plaintiffs have failed to demonstrate that the proposed settlement is "fundamentally fair, adequate, and reasonable." Accordingly, for the reasons set forth below, this Court should deny Plaintiffs motion to preliminarily approve the settlement. *Cotter v. Lyft, Inc.*, 179 F. Supp. 3d 930 (N.D. Ca. 2016.).

Before proceeding to the merits of the Intervenors' opposition to the settlement, undersigned is compelled to state the following: The Keller Rohrback firm is well known and respected by the undersigned counsel. Indeed, twenty or so years ago, the undersigned counsel jointly prosecuted several class actions with the Keller firm, primarily with one of the partners, John Bright, who regrettably has passed away. Despite how this motion may be viewed in the eyes of the Keller Rohrback attorneys who purport to represent the settlement class, Intervenors do not intend this motion to slight them or to otherwise be a "shot across the bow" at their qualifications. Nevertheless, after reviewing the Settlement, and as counsel of record in four putative class actions in the states of Florida, Georgia, North Carolina, and Alabama, the Intervenors cannot sit idly by and do nothing.[1] To the contrary, we are obliged to point out the glaring flaws in the proposed settlement which, taken as a whole, prevent the Court from determining that it is fair and adequate.

In order for the Court to find that a class action meets the preliminary approval standards, the court must have a complete picture of the entirety of the plaintiffs' claims in order to determine "…the plaintiffs' expected recovery balanced against the value of the settlement offer." *Cotter*, 179 F. Supp. 3d at 935. Indeed, for the Court to determine if a settlement falls within "the range of reasonableness," the Court must have the ability to review the strengths and weaknesses of the Plaintiffs' claims. But it can only do so if it has been presented with the full panoply of claims asserted against the defendant. Only then can the Court make the necessary determination of the strengths of the plaintiffs' case, which is a vital factor in determining whether the settlement is fair and adequate for the class.

The strongest and most powerful claims confronting Wells Fargo in any court arising out

[1] It is notable that counsel for Intervenors has never sought to intervene or even object to a class action settlement at any time in their career, which is to say this settlement is exceptional.

Wells Fargo's decision to use the personal data of its customers to open unauthorized accounts are the identity theft statutes of every state in which Wells Fargo transacts business. These claims should have been part of the equation presented by the *Jabbari* Plaintiffs in their preliminary approval papers, but regrettably, no mention whatsoever is made of these claims. This is difficult to understand since the four Intervenor cases noticed as "Related Cases" all seek to certify a state class of Wells Fargo victims of identity theft in North Carolina, Florida, Georgia, and Alabama. Moreover, while the *Jabbari* Plaintiffs seek an order from this Court enjoining the four cases, the Court has not been informed of the identity theft claims present in each of these cases, which, as the Court will see below, provide significant relief to aggrieved victims.

For whatever reason, the *Jabbari* Plaintiffs' counsel chose to ignore the identity theft claims despite suggesting to the Court that it had presented it with the complete landscape of claims being asserted against Wells Fargo: "In reaching this conclusion about the Settlement, Class Counsel assessed the value of the claims asserted in the Complaint. It also weighed the value of other potential claims that were *not* included in the operative Complaint, but were asserted in subsequently filed actions." Dkt. No. 101. p. 13. Intervenors below provide the Court with an analysis of the claims under state identity theft statutes. Unquestionably, Wells Fargo and its employees are guilty of identity theft by using the personal data of its customers to open unauthorized accounts.

In their moving papers, the *Jabbari* Plaintiffs also fall short of giving the Court a complete picture of the "weaknesses" of the Plaintiffs case. As this Court pointed out in *Cotter*, "it may be reasonable to settle a weak claim for relatively little, while it is not reasonable to settle a strong claim for the same amount." 179 F. Supp. 3d at 935, at 935. If a "weakness" of the *Jabbari* Plaintiffs' case has been exaggerated or overstated, the proposed settlement cannot be in balance. Putting too much credence into a defense tilts the scales in favor of the defendant, providing the false sense that a smaller settlement amount is fair and adequate. That is precisely what has happened here.

In their papers, the Plaintiffs again have not presented the Court with a full and complete picture of the "weakness" of the case against Wells Fargo as it pertains to arbitration. Plaintiffs have not explained to the Court that a significant percentage of the members of the class may be a party

to an arbitration agreement that expressly excludes "unauthorized accounts" from the web of the arbitration agreement. As will be demonstrated below, the arbitration clause that Mr. Jabbari executed is hardly the only form of agreement that ostensibly covers the millions of prospective class members. When Wells acquired Wachovia Bank, in 2008, it took over an operation roughly equal in size and accounts. Wachovia had its own arbitration agreements, and Intervenors Hodge and Stanton both have one of these agreements being asserted against them in their cases, and these agreements specifically excluded unauthorized accounts from binding arbitration and further was limited in scope and authority to delegate disputes to an arbitrator.

Wells Fargo's argument that all class members will be forced into arbitration is riddled with exceptions and documents that prove otherwise. Additionally, one of the most powerful arguments against arbitration with respect to the later signed agreement—fraud/fraudulent inducement as to the arbitration provision due to Wells Fargo's knowledge of the fraudulent practices and failure to disclose to customers—was not even made before this Court, and due to this waiver it certainly cannot now be made before the Ninth Circuit. Again, none of this was presented to the Court.

All this taken together reveals that the "[*Jabbari* Plaintiffs'] expected recovery balanced against the value of the [S]ettlement offer" is completely out of whack. *C.f.*, *Cotter*, 179 F. Supp. 3d at 935, at 935. Using the damages provided under state identity theft statutes, Intervenors estimate that the expected recovery is almost ***$2 billion*** compared to the *Jabbari* Plaintiffs estimation of $600 million. This is a massive difference, and it is based on remedies for identity theft that were not even considered by the *Jabbari* Plaintiffs. And if that was not enough, that even ignores the fact that between March 28, 2017 (when Plaintiffs and Wells Fargo announced a $110 million settlement fund) and April 20, 2017 (when the Settlement agreement was filed), the time period covered by the Settlement expanded from the present-January 1, 2009, to the present-May 1, 2002. Despite the time period almost doubling, the settlement amount was only increased by $32 million (or 29%) without any explanation as to why.

In sum, the moving papers filed by the *Jabbari* Plaintiffs undervalues the strength of the Intervenors and class members claims by ignoring identity theft, and overstates the weaknesses of

the Intervenors and class members defenses against arbitration by assuming that everyone will get sent to arbitration like they did. All that together led to a settlement that is not balanced with the expected recovery. The settlement presented to the Court should not be preliminarily approved.

II. STATEMENT OF RELEVANT FACTS

A. THE EXISTING IDENTITY THEFT CLAIMS OF THE INTERVENORS DIFFER FROM THOSE OF THE PLAINTIFFS IN THIS ACTION

Unlike the FRCA claims and some of the other causes of action that the *Jabbari* Plaintiffs focus on in valuing the case,[2] the identity theft statutes on which Intervenors rely neatly fit the facts of this case. Although each is slightly different, the basal elements of proof are the same: Plaintiffs have to show that the defendant used identifying information without consent and with intent to defraud for his or her own benefit or that of a third party. *See, e.g.*, Ala. Code §13A-8-192-199(a)(1); Colo. Rev. Stat. §13-21-109.5, § 13-21-122; N.C. Gen. Stat. §14-113.20 *et seq*; N.C. Gen. Stat. §1-539.2C; *see also*, "State Statutes And Computation of Damages," at Statutes column, attached as Appendix A. This is exactly what Wells Fargo and its employees did each time they opened an unauthorized account. And that is why these claims are pled by Intervenors. Also, the statutory damages (when available) are substantial, running from $500 per violation to $10,000 per violation, depending on the state, and most states allow for recovery of attorney fees and costs. *Id.*

B. THE INTERVENORS' CASES DEMONSTRATE THAT THE DEFENSE OF ARBITRATION WAS OVERSTATED IN THE PLAINTIFFS MOTION FOR PRELIMINARY APPROVAL

The *Jabbari* Plaintiffs recognize that the arbitration provision is susceptible to rescission for fraud or fraudulent inducement. *See* Dkt. No. 100, p. 8. That is to say, they realize there is a strong argument that Wells Fargo knew it had a practice of opening unauthorized accounts and failed to disclose it to new customers at the time any agreements were signed thus voiding any arbitration provision. For whatever reason, the *Jabbari* Plaintiffs did not argue this in their Opposition to Defendants' Motion to Compel Arbitration. *See, generally*, Dkt. No. 101. Although the *Jabbari* Plaintiffs claim that they would make this argument at the Ninth Circuit in their appeal, *see* Dkt. No.

[2] The *Jabbari* Plaintiffs focus only on FRCA for computation of the expected recovery. Dkt. No. 101, pp. 12-15. The Table of Representative Claims on the last page of *Jabbari* Plaintiffs' Motion for Preliminary Approval summarize the other claims contemplated by them. Dkt. No. 101.

100, p. 8, they cannot because they waived it.

Even setting that aside, the *Jabbari* Plaintiffs practically concede that arbitration binds the class. They even get their expert to say that. *See* Dkt. No. 108. But the entire analysis of the arbitration issue, including the expert analysis, is an echo chamber of what happened in this case under the agreements applicable to the *Jabbari* Plaintiffs—these agreements were the ones assumed to bind all class members. *Id.*, at ¶20. Indeed, the *Jabbari* Plaintiffs were already compelled to arbitration, which is not debatable. But there is an entire universe of agreements depending on when the class members became Wells Fargo (or Wachovia) customers, and many, such as that asserted by Wells Fargo against certain Intervenors, are much less broad in scope and authority to delegate.

C. The Four Cases Filed By The Intervenors

The claims and issues in the Intervenors' lawsuits demonstrate why the proposed settlement does not stand up to heightened scrutiny.[3] Resolution of the arbitration issues in the four lawsuits would shed accurate and valuable light on the class members' assessment of the compromise value of class relief. The current settlement assesses that value poorly due to the *Jabbari* Plaintiffs arbitration loss. Intervenors provide evidence and arguments for a fairer assessment below.

1. The Federal Cases: *Stanton*

Intervenor Stanton, for herself and a class of Floridians, seeks damages from Wells Fargo for identity theft, among other state law causes of action. Exhibit 1-A, *Stanton* Compl. at ¶¶ 61-69.[4] The bank removed the suit to federal court last December. The arbitration issues in it differ from those here, and the differences favor Intervenor Stanton and persons similarly situated to her. The differences arise from the signed agreement held out by Wells Fargo in *Stanton* to support arbitration, versus the arbitration documents and argument here.

The signed agreement Wells Fargo relies on for arbitration in *Stanton* is Exhibit 1-B. It contends that the signed agreement links Intervenor Stanton to another document, specifically an

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[3] Heightened scrutiny is required given the absence from this case of discovery, related early-case litigation, and class discovery and certification. *E.g.*, *Staton v. Boeing Co.*, 327 F.3d 938, 952–53 (9th Cir. 2003).

[4] References to Exhibit 1-X herein shall be a reference to that exhibit as referenced in the declaration of James F. McDonough, III, dated May 4, 2017, attached as Exhibit 1 to this Motion.

unsigned agreement to arbitrate. *Stanton*, Dkt. No. 12 at ECF pp. 3-4. But the signed agreement ***positively excludes*** her dispute from arbitration. In that signed contract, as follows, she agreed that the contract does not apply to accounts on which her name appears but for which she is not the authorized signer: "I understand this agreement does not apply to accounts on which my name may appear ***and I am not the authorized signer***." Exhibit 1-B at p. 3 (third paragraph of "Customer Access Agreement") (emphasis added)). That is the chief fact of the wrongdoing she alleges, namely that accounts opened in her name were not authorized by her. Exhibit 1-A, at ¶ 18 ("Defendants' employees boosted sales figures by covertly opening accounts in the names of Wells Fargo customers, including Plaintiff and the Class, without the knowledge or consent of said customers.").

Intervenor Stanton's filed opposition to arbitration is Exhibit 1-C. It shows, *inter alia*, that the bank does not disclaim the signed agreement stating the exclusion—just the opposite. Wells Fargo asserts it for arbitration but fails to account for the exclusion, and Wells Fargo does not say (much less explain) that documents it holds out as subsequent agreements (but are unsigned by the Intervenor Stanton and contain no verification of receipt by her) extinguish the signed agreement. Its invocation of the signed agreement is recognition that any subsequent documents which may operate do not extinguish it.

No such exclusionary language appears in the agreement Wells Fargo invoked in *Jabbari*, not according to the *Jabbari* Plaintiffs' argument against arbitration. There is a reason for that. Intervenor Stanton entered her agreement in 2010, before Wells Fargo converted Wachovia Bank accounts to its own name. She signed a Wachovia agreement, and became a Wells Fargo customer afterward, as did an untold number of the customers whose claims are proposed to be settled here. The *Jabbari* Plaintiffs, in contrast, signed Wells Fargo agreements. They, unlike Intervenor Stanton, are not similarly situated to the Wachovia-legacy customers victimized by the identity theft. The number of such legacy customers in the proposed class could be as much as fifty percent of the class. That is because Wachovia was as large as or larger nationally than Wells Fargo when Wells Fargo acquired Wachovia and thereafter converted its customer accounts to Wells Fargo customer accounts. Exhibit 1-D (excerpt pages 4-5 of 10/3/2008 Form 8-K of Wachovia Corporation,

describing each bank's numbers of customers, households, and branches).

Each legacy customer victimized would have the same valuable argument against arbitration as Intervenor Stanton, a fact borne out by the Intervenors' *Hodge* suit, in which the Intervenor Hodge also signed the same Wachovia agreement containing the exclusion. That agreement, as exhibited in *Hodge* in opposition to arbitration, is Exhibit 1-E. Critically for the class, Intervenor Stanton pleads for, most or many Floridians victimized by the identity theft should benefit from the exclusion, given that Wells Fargo's enormous presence in Florida (and consequently the enormous number of customers victimized there) is due solely to the acquisition and conversion of Wachovia accounts. The same almost certainly is true for many other states.

Stanton has been stayed pending disposition of the MDL motion in this matter (and only for that reason). Exhibit 1-F. The instant order allows either party to move to re-open the case after the disposition. *Id.* Intervenor Stanton intends to do that promptly and recently completed her required pre-motion discussion for that purpose with opposing counsel. Upon re-opening, also as permitted by the same order, *see id.*, she will renew her motion to amend her complaint, specifically to assert (as true in *Jeffries*, which has been amended for the same purpose) the new facts which support a "*Rent-A-Center*" challenge to arbitration,[5] assuming there is an arbitration agreement which otherwise operates against her.

There are other telling differences in *Stanton*. For instance, the "*Spokeo*" infirmity (lack of Article III justiciability) which the *Jabbari* Plaintiffs say diminishes the settlement value of their FCRA claim for a national class, *see* Dkt. No. 101 at 16, does not similarly diminish Ms. Stanton's identity-theft claim under Florida law. That conclusion follows from apposite case law.[6]

2. The Federal Cases: *Jeffries*

[5] The *Rent-A-Center* challenge refers to fraud which invalidates a specific agreement to arbitrate, which may include an agreement to delegate questions of fraud to an arbitrator. *See Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 71 (2010). The challenge is mentioned in the proposed settlement. *See* Dkt. No. 101, p. 8 ("[A] court may hear and decide only those arguments that attack the validity of the delegation provision." (*citing Rent-A-Center*).

[6] *See Burrows v. Purchasing Power, LLC*, 2012 WL 9391827, at *2 (S.D. Fla. Oct. 18, 2012) ("Defendants' argument fails because by alleging actual identity theft Burrows has standing independent of the economic damages that he claims to have suffered and that Defendants characterize as speculative); *Reilly v. Pluemarcher*, 664 F.3d 38, 46 (3d Cir. 2011) (the misuse of private information or identity theft represents an actual injury).

Jeffries is positioned slightly ahead of *Stanton*. The Jeffries Intervenors amended their pleading immediately upon expiration of the stay after the MDL motion was denied, and the bank this week renewed its motion to compel arbitration or for dismissal. Exhibit 1-G. The Jeffries Intervenors' response is due in two weeks (by May 17th), at which time they will assert the *Rent-A-Center* challenge using facts they allege support it. Wells Fargo's response to the motion for interim class counsel, exhibited by the *Jabbari* Plaintiffs, *see* Dkt. No. 106-1, Ex. 3, is due today (May 4th).

The Jeffries Intervenors sue for relief under Alabama's identity theft law, among other causes of action. As true of Florida, many victims in Alabama are Wachovia-legacy customers and due for that reason to benefit from the same exclusion of unauthorized accounts in *Stanton* (even if the Jeffries Intervenors, who opened their accounts a few years after conversion to Wells Fargo, may not). *See generally, Wells Fargo Bank, N.A. v. Chapman*, 90 So. 3d 774, 777 (Ala. Civ. App. 2012) (noting that SouthTrust "merged with Wachovia Bank" and Wachovia thereafter "merged" with Wells Fargo), *disagreed with on other grounds by Diversicare Leasing Corp. v. Hubbard,* 189 So. 3d 24 (Ala. 2015). SouthTrust was a very large bank statewide in Alabama, and its acquisition by Wells Fargo (*see* Wachovia), *id.*, explains the large numbers of legacy customers in the state. The victims include them and comprise the Alabama class the Jeffries Intervenors plead for.

The Jeffries Intervenors also have a waiver argument against arbitration. This argument is based on the contract the bank says the Jeffries Intervenors entered with it. Intervenor Lessa has the same argument, based on the same contract and in fact argued it. *See* Exhibit 1-H, pp. 14-17 (Intervenor Lessa's opposition to arbitration); Exhibit 1-I (Wells Fargo agreement with Intervenor Lessa exhibited by the bank). Intervenor Stanton did not enter the same contract as the Jeffries Intervenors and Intervenor Lessa (Stanton signed the earlier, exclusionary Wachovia agreement), but like them, she has a waiver argument based on the contract Wells Fargo says binds her. *See* Exhibit 1-C, pp. 13-15. In each instance, Intervenors Jeffries, Lessa, Stanton contend that Wells Fargo contracted to waive arbitration the same as any right it possesses under the agreements (via language in those contract that permit waiver of any provision).[7] Wells Fargo opposes the Jeffries

[7] Intervenor Hodge makes a similar argument, although the arbitration motion in his case is brought by an ex-employee of Wells Fargo, not by Wells Fargo, which is not a defendant.

Intervenors' waiver argument by invoking its agreement with the *Jabbari* Plaintiffs that the proposed settlement is not a waiver.[8] *See* Exhibit 1-G, p. 34 (renewed motion in *Jeffries* to compel arbitration).

3. The State Cases: *Hodge and Lessa*

The foregoing points make a compelling demonstration that, to defeat arbitration, the Intervenors have advanced valuable evidence and argument not advanced by the *Jabbari* Plaintiffs when they opposed arbitration. That also is true of the Intervenors' two state cases. The proposed settlement takes no account of these significant differences. The differences make the claims of victimized customers more valuable than those assessed by the *Jabbari* Plaintiffs, who were overwhelmed by the *Jabbari* arbitration loss. The proposed settlement proves that. It considers only that loss, not the evidence and argument of the Intervenors.

The *Lessa* case, pending in the Superior Court of Wake County, North Carolina, is for class relief under state law for alleged identity theft, among other state causes of action. Exhibit 1-J. It is similar to *Jeffries* in that Intervenor Lessa signed an agreement with Wells Fargo a few years after conversion from Wachovia. She is not a Wachovia-legacy customer, but most or many of the North Carolinians she pleads for are legacy customers, situated similarly to Ms. Stanton and Mr. Hodge. Wachovia started in North Carolina and was headquartered in Charlotte when Wells Fargo acquired it in 2008. *See* Exhibit 1-D (Form 8-K dating the acquisition in 2008).

Intervenor Lessa, based on the latest disclosures, challenges the validity of the arbitration agreement on the ground of fraud, specifically because Wells Fargo knew it subjected her and other customers to pervasive and systematic risks of identity theft (or "misuse" of identities to use the word the bank prefers). The challenge is made under North Carolina law (Exhibit 1-H) and is similar to the *Rent-A-Center* challenge to be made by Intervenor Stanton and the Jeffries Intervenors. Wells Fargo replied in support of arbitration on May 1, 2017, and a hearing is due to be set.

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[8] Intervenors contend that agreement is prejudicial and unfair. It is a bid by Wells Fargo to unilaterally re-write the same contracts it invokes against the Intervenors to compel arbitration. If the settlement is approved, the disclaimer of waiver could deprive the Intervenors and those similarly situated to them of a right and benefit under the contracts. That is the purpose of the disclaimer, which is reason enough not to approve the settlement. *Compare In re Auction Houses Antitrust Litig.*, 42 F. App'x 511, 518 (2d Cir. 2002) (explaining why settlement originally proposed was unfair and unapproved).

The *Hodge* case, pending in the Circuit Court of Clarke County, Georgia, is a suit for class relief under Georgia law against the employees of Wells Fargo who committed the alleged identity theft. Like *Lessa* and the two federal cases, *Hodge* is for a state class only. Like the other cases, it is headed to a decision on arbitration. The arbitration motion is under submission, having been heard on February 27, 2017. The agreement Intervenor Hodge signed purportedly requiring him to arbitrate is Exhibit 1-E, and it is the same Wachovia agreement at issue in *Stanton*. That fact begs the question of the number of Georgia victims due to benefit from the exclusion in the agreement.

4. Wells Fargo and The Jabbari Plaintiffs Seek to Enjoin Intervenors

The *Lessa* and *Hodge* cases should not (and cannot) be enjoined, contrary to the putative Wells Fargo's and the *Jabbari* Plaintiffs' demand. If the goal is to accurately assess the value of victims' claims, these two cases further it, the same as the two federal cases. The demand to enjoin them may mean Wells Fargo wishes an inaccurate assessment—the proposed settlement does that.

Intervenors Hodge and Lessa seek first to defeat arbitration so they can obtain discovery on the merits, class discovery, and class relief. No discovery, no decisions on the merits, and no class discovery and certification litigation has occurred here. Thus, halting them is not necessary to preserve anything in *Jabbari*. That is more than enough reason to deny the injunction requested. *See e.g., Del Rio v. CreditAnswers*, 2010 WL 1337700, at *1 (S.D. Cal. Apr. 1, 2010) ("The [Anti–Injunction] Act creates a presumption in favor of permitting parallel actions in state and federal court. . . . Rooted firmly in constitutional principles, the Act is designed to prevent friction between federal and state courts by barring federal intervention in all but the narrowest of circumstances. . . . [A]ny doubts as to the propriety of a federal injunction against state court proceedings will be resolved in favor of permitting the state courts to proceed, which means that we will uphold an injunction only on a strong and unequivocal showing that such relief is necessary" (citations omitted)). Wells Fargo does not make "a strong and unequivocal showing," *id.*, to the contrary.[9]

[9] The jurisdictional authority it relies on, *See* Dkt. No. 106, p. 5-6, is distinguishable. The decision is *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998), and it does not support enjoining *Lessa* and *Hodge*. In *Hanlon*, the Ninth Circuit upheld an injunction barring a disaffected member of a certified class from defying an order against commencing a competing and parallel state class action. *Sandpiper Vill. Condo. Ass'n., Inc. v. Louisiana-Pac. Corp.*, 428 F.3d 831, 845 (9th Cir. 2005)

No order vacating the *Jabbari* dismissal has been entered (not to the Intervenors' knowledge). Confirming that, Wells Fargo continues to hold out *Jabbari* as dismissed in favor of arbitration—even today. It cites the dismissal as persuasive authority why it should prevail against the Intervenors on the question of arbitration in their cases. *See* Exhibit 1-G, at p. 26 ("In fact, the *Jabbari* court has already rejected the same arguments about the scope of the arbitration agreement that Plaintiffs assert here, finding that similar claims were within the scope of similar arbitration provisions.") (*citing* the *Jabbari* dismissal)).[10]

D. THE SETTLEMENT IS UNBALANCED AND INADEQUATE AS COMPARED TO THE EXPECTED RECOVERY AGAINST WELLS FARGO.

As noted above, the identity theft claims brought in the Intervenors' cases are substantially different from those brought in the *Jabbari* Plaintiffs' cases. The threat of arbitration is also overstated due to the fact that the Jabbari Plaintiffs lost that battle. Due to these facts, the settlement amount is out of balance with the expected recovery. The damages available under the relevant identify theft statutes highlight this point. Using (1) these statutory damages where available, (2) assuming attorney fees of only $500, (3) using actual damages only where those are the only remedy, and (4) excluding any punitives,[11] the total damages for the identity theft claim is approximately ***$2***

(explaining *Hanlon*). Different from the disgruntled *Hanlon* plaintiff, Intervenors Lessa and Hodge filed their suits long before this settlement was proposed, and certainly not in defiance of any order. They certainly did not defy any order of this Court regarding class certification. They hardly could: class discovery and certification litigation *never* has taken place here. They hardly could defy any order in this case *of any kind*. When they filed their suits, the one order in effect here (still true today according to the bank) was the order dismissing the amended *Jabbari* complaint *and the claim in it for class relief*. There was no class action, much less any order, to defy.

[10] Given the *Jabbari* dismissal, the Court is confronted with an issue very different from the one depicted by Wells Fargo. The circumstances here, opposite from those in *Hanlon*, are akin to those in *Smith v. Bayer Corp.*, 564 U.S. 299 (2011), in which it was held that a district court "exceeded its jurisdiction in enjoining a related state court class action from proceeding." *Manual for Complex Litigation* (4th) § 20.32 (Author's Comments, p. 354) (explaining *Smith*). "The [district] court specifically sought to prevent the West Virginia state court from considering class certification after the MDL court had denied certification." *Id.* (same). *Smith* and *Jabbari* are the same in that the class relief has been denied in both—here by dismissal of the pleading asserting the relief and in *Smith* by denial of class certification. No injunction should restrain the Intervenors, accordingly. These points also apply to *Stanton* and *Jeffries*, undermining the putative settlors' insistence that the Court enjoin those two cases as well.

[11] Punitives are also available under a substantial number of the relevant state statutes, but they are not used for calculations here. *See* Appendix A, at "Remedy" column.

billion.[12] *See* Appendix A, at "Total" column. But even using only the states where statutory damages are available, and excluding the recovery of any attorney fees or costs, the total damages are approximately ***$1.2 billion***. *Id.* at "Civil Statue." That is double the *Jabbari* Plaintiffs best calculation of $600 million. *See* Dkt. 101, p. 15. And these are damages separate and apart from any claims pled by the *Jabbari* Plaintiffs, so it can be strongly argued that these damages do not displace but instead supplement the *Jabbari* Plaintiffs' best expected recovery number.[13] Finally, many of the identity theft statues provide credit repair as remedy for a violation. *Id.* at "Civil Statue." This remedy has inherent value to class members and was not provided in the settlement.

Finally, the Intervenors would also be remiss to ignore the fact that the proposed settlement agreement filed on April 20, 2017, revealed an expanded class period (2002-present as compared to the previously announced 2009-present). *Compare* Dkt. Nos. 100-112 *to* Dkt. No. 96. Despite almost doubling in scope, the settlement amount was only increased by $32 million (or 29%) without explanation. The total alleged accounts affected is also the same number of accounts that has been publicly available since at least September of 2016. *Compare* Dkt. No. 100, p. 5 ("as many as two million accounts") *to* "2 Million Accounts Wrongly Opened at Wells Fargo," dated September 9, 2016, available at https://www.fool.com/investing/2016/09/09/2-million-accounts-wrongly-opened-at-wells-fargo.aspx (last accessed May 2, 2017) (same).

III. ARGUMENT

"A class member who claims that his 'representative' does not adequately represent him, and is able to establish that proposition with sufficient probability, . . . should, as a general rule, be entitled to intervene in the action." Advisory Committee Notes, 1966 Amendment to Fed. R. Civ. P. 24(a)(2). The review of this proposed class action settlement is governed by Rule 23(e). That rule generally requires the Court "to determine whether a proposed settlement is fundamentally fair, adequate, and reasonable." *Cotter,* 176 F.Supp.3d at 935 (*quoting Hanlon v. Chrysler Corp.*, 150

[12] Where no civil damages are explicitly allowed, Intervenors assumed actual damages of $25 per account. This $25 per account figure is the number used by Wells Fargo as the average refund amount to customers in their Statement on Agreements Related to Sales Practices, available at https://www.wellsfargo.com/about/press/2016/sales-practices-agreements_0908/

[13] An explanation of the methodology used to reach the numbers provided here are included in the preamble to Appendix A.

F.3d 1011, 1026 (9th Cir.1998)). "It is the settlement taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Id.* "District courts have interpreted Rule 23(e) to require a two-step process for the approval of class action settlements: 'the Court first determines whether a proposed class action settlement deserves preliminary approval and then, after notice is given to class members, whether final approval is warranted.' " *Cotter*, 176 F.Supp.3d at 935 (*quoting In re High–Tech Emp. Antitrust Litig.*, No. 11–CV–02509–LHK, 2014 WL 3917126, at *3 (N.D.Cal. Aug. 8, 2014).

In reviewing a proposed settlement at the preliminary approval stage, "the relevant inquiry is whether the settlement 'falls within the range of possible approval' or 'within the range of reasonableness.'" *Cotter*, 176 F.Supp.3d at 935.

> In determining whether the proposed settlement falls within the range of reasonableness, perhaps the most important factor to consider is "***plaintiffs' expected recovery balanced against the value of the settlement offer.***" *Id.* (quoting *In re Nat'l Football League Players' Concussion Injury Litig.*, 961 F.Supp.2d 708, 714 (E.D.Pa.2014)); *see also Nielson v. Sports Auth.*, No. C–11–4724–SBA, 2012 WL 5941614, at *6 (N.D.Cal. Nov. 27, 2012). Determining whether the settlement falls in the range of reasonableness also requires evaluating the relative strengths and weaknesses of the plaintiffs' case; it may be reasonable to settle a weak claim for relatively little, while it is not reasonable to settle a strong claim for the same amount. *See In re High–Tech Emp. Antitrust Litig.*, 2014 WL 3917126, at *4.
>
> ***Where, as here, the parties reach a settlement before class certification, the district court must apply a "higher standard of fairness."*** *Hanlon*, 150 F.3d at 1026. This additional scrutiny is needed to ensure that the interests of the class are adequately protected, because the agreement has "not [been] negotiated by a ***936** court-designated class representative." *Id.*

Cotter, 176 F.Supp.3d at 935-36.

The terms of the proposed settlement establish that the *Jabbari* plaintiffs are inadequate to represent Intervenors and class members they seek to represent because the settlement is not fundamentally fair, adequate, and reasonable for them. The Settlement offers inadequate relief to the class by (1) failing to identify and plea some of the strongest claims available to them, including identity theft, despite having knowledge of those available claims, (2) being in the position of having lost their arbitration fight and having waived their ability to argue fraudulent inducement on appeal, which is one of their strongest defenses to arbitration, and also not having the benefit of a broad universe of earlier forms of the arbitration provisions used by Wachovia and Wells Fargo, and as a

result, (3) the settlement provides inadequate recovery to class members compared to the total damages available and thus out of balance.

A. THE PROPOSED INTERVENORS SATISFY THE REQUIREMENT OF RULE 24(A) AND SHOULD BE ALLOWED TO INTERVENE AS A MATTER OF RIGHT

Federal Rule of Civil Procedure 24(a)(2) requires that a court grant leave to intervene to anyone who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." The Ninth Circuit has identified four elements that a putative intervenor must show are met in order to establish her entitlement to intervention as of right:

> (1) the applicant's motion must be timely; (2) the applicant must assert an interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that without intervention the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the other parties.

United States v. Oregon, 839 F.2d 635, 637 (9th Cir. 1988).

At the outset, it must be noted that Plaintiffs have already agreed to allow Intervenors to intervene. *See* Exhibit 1-K, *In re: Wells Fargo Fraudulent Account Opening Litigation*, March 30, 2017, Hearing Transcript, at 18:12-15 (JUDGE VANCE: "So would all these other parties be able to intervene in the Northern District of California to be heard on the settlement? MR. LOESER: Absolutely, Your Honor." The Order denying the request for transfer and centralization by the JPML panel acknowledges the same. *See* Exhibit 1-L, Dkt. No. 55, MDL No. 2766, p. 1 ("At oral argument, counsel for the Jabbari plaintiffs represented that all interested parties will have the opportunity to object to or otherwise raise issues as to the adequacy of the proposed settlement in the Northern District of California.").

1. The Application to Intervene is Timely and Would Not Result in Prejudice

Timeliness is "the threshold requirement" for intervention as of right. *Oregon*, 913 F.2d at 588. In determining whether a motion is timely, a court considers three factors: "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the

reason for and length of the delay." *Orange County v. Air California*, 799 F.2d 535, 537 (9th Cir. 1986). Although Plaintiffs will likely argue their case is far along in this class action, in truth, no motion for class certification was filed and this case was in fact dismissed on September 23, 2015, as a result of Wells Fargo's motion to compel arbitration. Dkt. No. 69.

Over a year later, on October 3, 2016, and only after the true scale of the scandal that is the subject of this lawsuit was uncovered, the case was reopened. Dkt. No. 73. Plaintiffs and Wells Fargo threatened to file a motion for preliminary approval starting in November of 2016 (Dkt. No. 75), but it was not until March 28, 2017, that Plaintiffs and Wells Fargo gave the public any sense of the settlement to which they had agreed. Dkt. No. 96, p. 2 (proposed settlement covering January 1, 2009 through the present with $110M settlement fund). Notably, this was six months after the *Jabbari* Plaintiffs' and Wells Fargo's first notice to the Court regarding settlement and announcing they reached "an agreement in principal," Dkt. No. 100, p. 4, and conspicuously timed mere weeks before the JPML would decide whether cases filed around the country would be centralized. On April 20, 2017, Plaintiffs and Wells Fargo unveiled their proposed settlement agreement—revealing sweeping claim releases, a doubled class period (2002-present), and a description of the allocation of funds to class members. Dkt. Nos. 100-112.[14]

For intervention in a proposed settlement, the acceptable stage of the proceeding at which intervention is to be permitted is later than in other matters because "timeliness generally is measured from the date the proposed intervenor received notice that the proposed settlement was contrary to its interest." *Glass v. UBS Fin. Servs.*, Inc., No. 06-4068, 2007 WL 474936, at *3 (N.D.Cal. Jan. 17, 2007), *aff'd* 331 F. App'x. 452 (9th Cir. 2009). A proposed intervenor is not untimely "merely because the motion to intervene is filed after a significant amount of time and effort has been expended in accomplishing a settlement." *Id.* at *3. Where settlement negotiations have been conducted confidentially, a potential intervenor does not have notice that the settlement does not protect his or her interests until the settlement terms are made public. *See U.S. v. Carpenter*,

[14] This expanded class period almost doubled the time period during which unauthorized accounts were being opened by Wells Fargo. Despite this, the total accounts affected as referenced in the Motion for Approval is the same number of accounts that has been publicly available since at least September of 2016. *See, supra,* Section II.C.

298 F.3d 1122, 1125 (9th Cir. 2002).

Such is the case here, where the settlement negotiations conducted with respect to this litigation were confidential, secret, and involved no notice or participation among the class members or representatives other than named plaintiffs. Indeed, they occurred prior to class certification and the usual notices involved, and they even excluded Related Plaintiffs Cason and Chernavsky, whose cases are related before this Court. Dkt. Nos. 79, 87. The Plaintiffs and Wells Fargo apparently engaged at least two formal, in-person mediation sessions with Ann Julius and the Honorable Layn Phillips (Ret.) beginning as early as September of 2016.[15] The Plaintiffs reached an agreement in principle as to the resolution of the case on September 6, 2016. Dkt. No. 100, p. 4. They announced a further agreement on March 25, 2017, and a final agreement on April 20, 2017.[16] *Id.* at p. 5.

It was only following filing of approval papers on or around April 20, 2017, and it being reported in media sources that day, that the proposed intervenors became aware of the settlement and its inadequate terms, including the broad claim releases, expanded class period, and description of the allocation of funds to class members. The timing of this motion to intervene is specific to the Intervenors' purpose in opposing preliminary approval. *See United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394 (1977) (holding prior to the intervention request, the intervenor reasonably relied on the named class representatives to protect her interests); *Fleming v. Citizens for Albemarle*, 577 F.2d 236 (4th Cir. 1978), *cert. denied* 439 U.S. 1071 (1979) (finding an abuse of discretion of the lower court's denial of intervention because the lower court should have considered timeliness relative to the point at which it became clear that their interests were not being adequately represented). In light of the law on this issue and representations by the *Jabbari* Plaintiffs at the March 30, 2017, JPML Hearing that Intervenors could intervene here, timeliness is no basis to deny this Motion.

The second timeliness consideration, prejudice to other parties, occurs when intervention

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[15] It appears that these meetings began substantially earlier, but there is insufficient information in the Motion for Preliminary Approval to have an estimate of how early that was.

[16] Sometime during these settlement negotiations, Plaintiffs added other class member plaintiff for purposes of settlement. *See, e.g.*, Dkt. No. 105 (Jose Rodriquez from Georgia).

would expose a negotiated settlement to the risk of intervening contrary authority,[17] "relief from long-standing inequities is delayed,[18]" or settlements or remedies that are the result of lengthy litigation or negotiations are compromised.[19] But importantly, when potential intervenors act as soon as they have notice that a proposed settlement is contrary to their interests, as is the case here, there is no prejudice. *United States v. Carpenter*, 298 F.3d 1122, 1124-25 (9th Cir. 2002). Even setting that aside, the only risk of intervening and contrary authority is the potential that the motions to compel arbitration that are pending in the Intervenors cases are ***denied***, *see, supra,* Section II.B, and that would actually ***strengthen*** Plaintiffs' position and arguments as to why arbitration should not apply. Also, because the current proposed settlement is does not provide for identity theft claims, the repairing of credit history, intervention will not leave in place or delay the resolution of any longstanding inequity. *See, supra,* Section II.A, C. In fact, the settlement leaves in place an inequity that Intervenors believe can be addressed by the settlement—unauthorized hard credit inquiries and related reported account information that negatively affect credit scores. Finally, the settlement negotiations and two in person mediation sessions (that are ascertainable from the settlement papers) over several months can hardly be considered lengthy, especially considering the size of the class, significance of the issues, and the massive fraud perpetrated by Wells Fargo here.

Also, neither the Intervenors, the other related action plaintiffs, nor the class members were notified of or invited to participate in the mediation process or the settlement negotiations. Although there appears to have been several mediation sessions that led to the settlement, the settlement process was not a public, multi-year process present in other cases that would resulted in clear prejudice if intervention were allowed. *See e.g. Orange County v. Air California*, 799 F.2d 535, 538 (9th Cir. 1986. Regardless, the Ninth Circuit has held that confidential settlement discussions do not put others on notice that their interests may not adequately be represented. *See U.S. v. Carpenter*, 298 at 1125.

The third and final timeliness factor examines the "reason for and length of" the potential

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[17] *Glass*, 2007 WL 474936, at *4-5.

[18] *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657, 659 (9th Cir. 1978).

[19] *U.S. v. Alisal Water Corp.*, 370 F.3d 915, 922-23 (9th Cir. 2004).

intervenors' delay. As described above, there has been no delay here. Rather, Intervenors have acted quickly to marshal the effort required to submit these papers in an expedient and timely manner. Accordingly, the proposed various proposed intervenors has each satisfied the requirement to act "as soon as he [or she] knows or has reason to know that his [or her] interests might be adversely affected by the outcome of the litigation." *Cal. Dept. of Toxic Substances Control v. Comm. Realty Projects, Inc.*, 309 F.3d 1113, 1120 (9th Cir. 2002) (emphasis in original). Thus, the Intervenors' motion is timely and does not result in prejudice.

2. Proposed Intervenors Have the Requisite Interest in the Subject of This Case

To intervene as a matter of right, "it is generally enough that the interest [asserted] is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue" *Sierra Club v. USEPA*, 995 F.2d 1478, 1484 (9th Cir. 1993); *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004); *Arakaki v. Cayetano*, 324 F.3d 1078, 1084 (9th Cir. 2003), *cert. denied sub nom. Hoohuli v. Lingle*, 540 U.S. 1017 (2003) "(The requirement of a significantly protectable interest is generally satisfied when 'the interest is protectable under some law, and that there is a relationship between the legally protected interest and the claims at issue.'"). An applicant generally satisfies the 'relationship' requirement only if the resolution of the plaintiff's claims actually will affect the applicant. *Id.* A "practical impairment" of a potential intervenor's interests is a sufficient interest for intervention purposes. *California ex rel. Lockyer v. United States,* 450 F.3d 436, 441 (9th Cir. 2006). Each of the Intervenors has a continuing interest in the subject of this case, *i.e.*, the unauthorized exploitation of Intervenors personal information by Wells Fargo and its employees for profit.

Important here is that the *Jabbari* Plaintiffs seek to enjoin Intervenors cases through the settlement. *See, supra,* Section II.B. The proposed settlement provides for enjoinment and eventually a complete release of and Intervenors' claims. *Id.* But even if that were not the case, Intervenors are Wells Fargo customers that have had their personal information stolen and used in order to open unauthorized checking accounts and credit cards so that Wells Fargo and their employees could financially benefit. As such, they are members of the currently proposed settlement

class for which settlement class certification is being sought, and they possess a significant, protectable interest in the resolution of the issue presented in this matter. *See, e.g.*, *Koike v. Starbucks Corp.*, 602 F. Supp. 2d 1158, 1161 (N.D. Cal. 2002) ("Because FRCP 23 provides Nguyen with a procedure for pursuing his claims, the court finds Nguyen's interest in the procedural vehicle of a class action to be significantly protectable."). Moreover, as putative class members, Intervenors share a common question of law or fact with the Plaintiffs. The *Jabbari* Plaintiffs and Wells Fargo have also identified each of the Intervenors' cases as "Related Cases" in Section 2.46 of the Stipulation and Agreement of Class Action Settlement and Release. *See* Dkt. No. 100, p. 13. There is little question that resolution of the *Jabbari* action will affect Intervenors.

3. Disposition of the Case Will Substantially Impair or Impede Proposed Intervenors' Interest

A proposed intervenor's interests are impaired "[i]f an absentee would be substantially affected in a practical sense by the determination made in an action." *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001) (citing Fed. R. Civ. P. advisory committee's notes). The Intervenors meet this standard. As detailed above, the Intervenors are Wells Fargo customers that have had their personal information stolen and used in order to open unauthorized checking accounts and credit cards so that Wells Fargo and their employees could financially benefit. The proposed settlement agreement here seeks to enjoin Intervenors cases and purports to provide a national settlement and gives a total release for any and all claims. Intervenors believe that this proposed settlement is wholly inadequate because it releases all claims that the class members and Intervenors may have against the Defendant, including their identity theft claims, while providing an unbalanced settlement amount as compared to the expected recovery in exchange. *See, supra,* Section II.A-C.

For instance, the total expected damages of $600 million as computed by the *Jabbari* Plaintiffs is far below even the most conservative computation of expected damages by Intervenors for just the identity theft claims, which is $1.2 billion (and as high as $2 billion, excluding punitives). *See, supra,* Section II.C. Thus the settlement far undervalues the class member claims. The purported settlement also does not provide effective relief for the damage done to class members'

credit (fixing it), which is provided for by statue in many of the identity theft statutes around the country.[20] Accordingly, the interests of Intervenors are clearly related to the subject matter of the above-captioned action and would be impaired by the disposition of the action. *See Sw. Ctr. For Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001) (noting that the court "follow[s] the guidance of [the] Rule 24 advisory committee notes that state that 'if an absentee would be substantially affected in a practical sense by the determination made in an action, he should as a general rule, be entitled to intervene'" (quoting advisory committee notes to Fed. R. Civ. P. 24)).

4. The Proposed Intervenors Are Inadequately Represented

To determine adequacy of representation, the court considers (1) whether a party before the court will make the same arguments the prospective intervenor would; (2) whether the present party is capable and willing to make those same arguments; and (3) whether the intervenor would offer necessary elements to the proceedings that other parties would neglect. *California v. Tahoe Reg'l Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986). Although the burden is on the proposed intervenors to show that representation is inadequate, this burden is minimal and may be satisfied by a showing that representation of their interests by parties presently before the court "may be" inadequate. *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972).

First, Plaintiffs have made it clear that they will not make the same arguments that Intervenors would. For instance, nowhere in the settlement papers or in the operative *Jabbari* complaint do the *Jabbari* Plaintiffs even mention the state identity theft claims that are pled in each of the Intervenors complaints. *See, supra,* Section II.A. The Intervenors have and would argue violations of each of the state laws that exist pertaining to identity fraud, which are stronger than the claims pled in the operative *Jabbari* complaint. *Id.* Also, although the *Jabbari* Plaintiffs recognize that the arbitration provision is susceptible to rescission for fraud or fraudulent inducement—*i.e.*, Wells Fargo knew it had a practice of opening unauthorized accounts and failed to disclose it to new

[20] While Wells Fargo may complain that removing the hard inquiries and related information as costly or difficult, "the standard [under Rule 23] is not how much money a company spends on purported benefits, but the value of those benefits to the class." *In re Bluetooth Headset Products Liab. Litig.*,654 F.3d 935, 944 (9th Cir. 2011) (quoting *In re TD Ameritrade Accountholder Litig.*, 266 F.R.D. 418, 423 (N.D. Cal. 2009)).

customers at the time any agreements were signed. *See* Dkt. No. 100, p. 8. The *Jabbari* Plaintiffs did not argue this defense to the alleged agreement to arbitrate in their Opposition to Defendants' Motion to Compel Arbitration, and although the *Jabbari* Plaintiffs claim that they would make this argument at the Ninth Circuit in their appeal, they cannot—they waived it by not arguing it at the lower court. *Id.* In any event, the arbitration provisions applied against the *Jabbari* Plaintiffs are not representative of those asserted against class members—Intervenor Hodge and Stanton being good examples of the difference. *See, supra*, Section II.B.

These points naturally flow into the second consideration of whether the Jabbari Plaintiffs are capable and willing to make these arguments. Again, the operative *Jabbari* complaint does not allege violations of state identity theft statutes, and the settlement papers do not even identify these as potential claims, so the *Jabbari* Plaintiffs are unwilling to make those arguments. *See, supra*, Section II.A. And as mentioned before, they cannot make the strongest argument they have for defeating arbitration—recession for fraud—because they waived their ability to argue it before the Ninth Circuit, and the universe of arbitration provisions signed (or unsigned as may be the case) by class members is not represented by the *Jabbari* Plaintiffs. *See, supra,* Section II.B

The third and final consideration is whether the Intervenors would offer necessary elements to the proceedings that others do not offer. The answer here is "yes." To begin, all of the Intervenors have also pled violations of state identity theft statutes, which were not pled or apparently even contemplated by the *Jabbari* Plaintiffs. *See, supra*, Section I.A. Also, none of the Intervenors have been compelled to arbitration. *See, supra,* Section I.B. At the same time, Intervenors have made all arguments available to them in order to defeat any motion to compel arbitration, including the argument that any arbitration provision should be rescinded for fraud/were fraudulently induced. *Id.* The Hodge and Lessa Intervenors have fully briefed the motions to compel arbitration in their respective cases and those are ripe for a decision. *Id.* Moreover, for several of the Intervenors, Wells Fargo has alleged that very early forms of an arbitration provision apply to them, including Intervenors Hodge and Stanton who were customers of Wachovia and subject to agreements with dating as far back to 2006. These arbitration provisions, if applicable, are far less onerous than any

of the provisions that are alleged to apply to the *Jabbari* Plaintiffs. *See, supra,* Section I.B.

B. ALTERNATIVELY, THE PROPOSED INTERVENORS SATISFY THE REQUIREMENT OF RULE 24(B) AND SHOULD BE ALLOWED PERMISSIVE INTERVENTION

Intervenors have also satisfied the criteria for permissive intervention under Rule 24(b), which provides that "[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1). Permissive intervention of additional named plaintiffs is encouraged where intervention would strengthen the adequacy of class representation and would not cause significant delay or other prejudice. *Kootenai Tribe of Idaho v. Veneman,* 313 F.3d 1094, 1108-09 (9th Cir. 2002) (in applying its discretion after finding grounds for intervention, the court considered the magnitude of the case and recognized that the "presence of intervenors would assist the court in its orderly procedures leading to the resolution of this case"). Here, Intervenors seek to intervene to strengthen the adequacy of representation through their identity theft claims and ability to freely argue against arbitration and to argue any arguments on appeal should any of the relevant motions to compel be granted, which will strengthen class representation.

IV. CONCLUSION

For the aforementioned reasons, Intervenors' Motion to Intervene should be granted and the Motion for Preliminary Approval denied because it is not "fundamentally fair, adequate, and reasonable." *Cotter*, 176 F.Supp.3d at 935

DATED: May 4, 2017.

Respectfully submitted,

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ATTESTATION PURSUANT TO LOCAL RULE 5.1

I, S. Clinton Woods, am the ECF User whose ID and password are being used to file this document. In compliance with Local Rule 5.1(i)(3), I hereby attest that the signatory to this document, W. Lewis Garrison, has concurred in this filing.

DATED: May 4, 2017

/s/ S. Clinton Woods
S. Clinton Woods
AUDET & PARTNERS, LLP

CERTIFICATE OF SERVICE

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

Dated: May 4, 2017

/s/ S. Clinton Woods
S. Clinton Woods
AUDET & PARTNERS, LLP

APPENDIX A

Every state has an identity theft statute in one form or the other. There are three general categories: (1) explicit civil statute penalty, *e.g.* Alabama's $5,000 per incident; (2) restitution based on identity theft criminal statute, *e.g.* California's actual damages plus costs of credit repair and attorneys' fees; and (3) no specific restitution/compensation statute, *e.g.* Arizona.

For the 12 states in Category 1, the number of potentially unauthorized accounts was multiplied by the liquidated damages amount per account. Not all statutes are explicit on per incident versus totality distinction, but most law on it states that it is to be calculated per incident. Attorneys' fees were included if provided for in the statute. The attorney fee calculated for each account was $500.

For the 26 states and District of Columbia in Category 2, the average measure of actual damages was $25 based numbers reported by Wells Fargo. See "Wells Fargo Issues Statement on Agreements Related to Sales Practices" at https://www.wellsfargo.com/about/press/2016/sales-practices-agreements_0908/ ("As a result of this review, $2.6 million has been refunded to customers for any fees associated with products customers received that they may not have requested. Accounts refunded represented a fraction of one percent of the accounts reviewed, and refunds averaged $25.") Attorneys' fees were included where statutorily provided for and calculated at $500 per account. A value for lost wages, punitive damages, credit repair costs, and court costs was not calculated.

For the 12 states in Category 3, only actual damages were calculated (*e.g.* 178,972 accounts in Arizona multiplied by $25 equals $4,474,300).

The potentially unauthorized accounts opened numbers used below are from the California Senate's "An Examination of Wells Fargo's Sales Practices And Mangagement and Board Oversight, Background Paper (pp. 1-2), available http://sbnk.senate.ca.gov/sites/sbnk.senate.ca.gov/files/Well%20Fargo%20Agenda.PDF (information was provided by Wells Fargo to the Committee)

State	Statute(s)	Remedy	Potentially Unauthorized Accounts Opened	Civil Statute	Actual Damages	Attorneys' Fees
Alabama	Ala Code §13A-8-199(a)(1)	$5,000 for each incident, or three times the actual damages, whichever is greater.	22,795	$113,975,000		
Alaska	Alaska Stat. §11.46.100 et seq. §11.46.180	Actual economic damages, court costs, and full reasonable attorneys' fees.	5,970		$149,250	$2,985,000
Arizona	Ariz. Rev. Stat. Ann. §§13-2008-10	Not specifically addressed.	178,972		$4,474,300	
Arkansas	Ark. Stat. Ann. §5-37-227; Civil statute: 5-37-227(h)(2)	"[D]amages relating to [] identify fraud . . . ."	1,310		$32,750	

State	Statute(s)	Remedy	Potentially Unauthorized Accounts Opened	Civil Statute	Actual Damages	Attorneys' Fees
California	Cal. Penal Code §530.5 to 530.8; Cal. Penal Code §1202.4	Restitution is to be ordered by a judge following conviction, including credit repair measures and attorney fees.	897,972		$22,449,300	$448,986,000
Colorado	Colo. Rev. Stat. §18-5-113; Colo. Rev. Stat. §18-5-901 et seq. Civil statute: C.R.S. § 13-21-122; Colo. Rev. Stat. §13-21-109.5	Victims of identity theft can file a private civil right of action against the perpetrator who committed the crime, regardless of whether the perpetrator was convicted of the crime. The victim is entitled to actual damages, including but not limited to damage to reputation or credit rating, punitive damages, and attorneys' fees and costs. Alternatively, the greater of actual damages or liquidated damages up to $10,000 plus attorneys' fees and costs.	64,481	$644,810,000		$32,240,500
Connecticut	CGS § 52-571h	Greater of $1,000 or treble damages; costs and reasonable attorney fees if plaintiff prevails.	11,497	$11,497,000		$5,748,500
Delaware	Del. Code Ann. tit. 11, §854	Civil remedies not specifically addressed. When a person is convicted of or pleads guilty to identity theft, the sentencing judge must order full restitution for monetary loss, including documented loss of wages and reasonable attorney fees, suffered by the victim	4,255		$106,375	$2,127,500
Florida	Fla. Stat. § 817.568(15); Fla. Stat §772.11	Restitution is to be ordered by a judge following conviction. Includes credit repair measures and attorney fees. Alternatively, threefold the actual damages sustained and is entitled to minimum damages in the amount of $200, and reasonable attorney's fees and court costs.	117,752	$23,550,400		$2,127,500

State	Statute(s)	Remedy	Potentially Unauthorized Accounts Opened	Civil Statute	Actual Damages	Attorneys' Fees
Georgia	Ga. Code §16-9-130	Actual damages, punitive damages, costs (including attorneys' fees)	55,579		$1,389,475	$27,789,500
Hawaii	Hawaii Rev. Stat. §708-839.6	Not specifically addressed.	805		$20,125	
Idaho	Idaho Code §18-3126	Not specifically addressed.	14,316		$357,900	
Illinois	Ill. Rev. Stat. ch. 720, §5/16-20 *et seq.*; Ill. Rev. Stat. ch. 720, §5/17-2	May recover court costs, attorneys' fees, lost wages, and actual damages.	4,890		$122,250	$2,445,000
Indiana	Ind. Code §35-43-5-.01 *et seq.*; Ind. Code §35-43-5-3.5; Ind. Code §35-50-5-3	The court may order a person convicted of identity deception to make restitution to the victim. The restitution amount will be based upon consideration of the amount of fraud or harm caused by the convicted person and any reasonable expenses, including lost wages, incurred by the victim in correcting his/her credit report and addressing any other issues caused by the commission of the offense.	5,222		$130,550	
Iowa	Iowa Code §715A-8 *et seq*; Iowa Code §714.16B	A victim who suffers a pecuniary loss as a result of identity theft may bring an action against the perpetrator to recover $5000 or three times the actual damages, whichever is greater, and costs for repairing the victim's credit history or credit rating, costs incurred for bringing a civil or administrative proceeding to satisfy a debt, lien, judgment, or other obligation of the victim, and punitive damages, attorney fees, and court costs.	12,630	$63,150,000		

State	Statute(s)	Remedy	Potentially Unauthorized Accounts Opened	Civil Statute	Actual Damages	Attorneys' Fees
Kansas	Kan. Stat. Ann. §21-5918 ;Kan. Stat. Ann. §21-6107; Kan. Stat. Ann. §21-6604; Kan. Stat. Ann. §60-4104; Kan. Stat. Ann. §21-4603d(9)(b1)	Restitution is to be ordered by a judge following conviction. Includes credit repair measures and attorney fees.	1,296		$32,400	$648,000
Kentucky	Ky. Rev. Stat. §434.870 et seq.; §434.872; Ky. Rev. Stat. §532.034; Ky. Rev. Stat. §411.210; Ky. Rev. Stat. Ann. §514.160	State law allows victims of identity theft crimes to pursue a civil suit against the violator for compensatory and punitive damages, and if successful, reasonable costs and attorneys' fees.	629		$15,725	$314,500
Louisiana	La. Rev. Stat. Ann. §14:67.16	Restitution is to be ordered by a judge following conviction.	862		$21,550	
Maine	Me. Rev. Stat. Ann. tit. 17-A, §905-A	Not specifically addressed.	217		$5,425	
Maryland	Md. Criminal Law Code Ann. §8-301 et seq.	Restitution is to be ordered by a judge following conviction. Includes credit repair measures and attorney fees.	15,391		$384,775	$7,695,500
Massachusetts	Mass. Gen. Laws. Ann. ch. 266, §37E	Restitution is to be ordered by a judge following conviction. Includes credit repair measures and attorney fees.	1,142		$28,550	$571,000
Michigan	Mich. Comp. Laws §445.61 et seq.	Not specifically addressed.	2,891		$72,275	
Minnesota	Minn. Stat. §609.527	Minimum restitution of $1,000 to each victim.	31,238	$31,238,000		
Mississippi	Miss. Code Ann. §97-19-85; Miss. Code Ann. §97-45-1 et seq.	Restitution is to be ordered by a judge following conviction.	2,355		$58,875	

State	Statute(s)	Remedy	Potentially Unauthorized Accounts Opened	Civil Statute	Actual Damages	Attorneys' Fees
Missouri	Mo. Rev. Stat. §570.223.1	Yes. Plaintiff may claim up to $5,000 in damages per incident or three times the amount of actual damages, whichever is greater. Plaintiff also may recover reasonable attorney's fees and costs for clearing credit history of plaintiff.	1,191	$5,955,000		$595,500
Montana	Mont. Code Ann. §45-6-332	Yes. Restitution is to be ordered by a judge following conviction. Includes credit repair measures and attorney fees.	8,352		$208,800	$4,176,000
Nebraska	Neb. Rev. Stat. §28-636 et seq.; Neb. Rev. Stat. §28-640; Neb. Rev. Stat. § 29-2280 to 29-2289	Victim may seek damages, enjoin/restrain perpetrator from future acts of theft; prevailing party may recover court costs and attorney fees	12,348		$308,700	$6,174,000
Nevada	Nev. Rev. Stat. §205.455; Nev. Rev. Stat. §205.461 et seq.; Nev. Rev. Stat. §§41.1345	A person who has suffered injury as the proximate result of an identity theft violation may commence an action for the recovery of his actual damages, costs and reasonable attorney's fees and for any punitive damages that the facts may warrant.	53,675		$1,341,875	$26,837,500
New Hampshire	N.H. Rev. Stat. Ann. §638:25 et seq.; N.H. Rev. Stat. Ann. §359-I:3 (2015)	Plaintiff may recover $5,000 for each incident, or three times the actual damages, whichever is greater, and reasonable attorney's fees and court costs.	217	$1,085,000		$108,500

State	Statute(s)	Remedy	Potentially Unauthorized Accounts Opened	Civil Statute	Actual Damages	Attorneys' Fees
New Jersey	N.J. Rev. Stat. §2C:21-17 et seq.; N.J. Rev. Stat. §2C:21-17.4	Plaintiff may recover damages in an amount three times the value of all costs incurred by the victim as a result of the person's criminal activity. These costs may include, but are not limited to, those incurred by the victim in clearing his credit history or credit rating. The victim may also recover those costs incurred for attorneys' fees, court costs and any out-of-pocket losses.	95,921		$2,398,025	$47,960,500
New Mexico	N.M. Stat. Ann. §30-16-24.1	Yes. Restitution is to be ordered by a judge following conviction. Includes credit repair measures and attorney fees.	17,847		$446,175	$8,923,500
New York	N.Y. Penal Law §190.23; N.Y. Penal Law §190.77 et seq.; N.Y. Penal Law §60.27; N.Y. GBL § 380-s, 380-l	State law allows for a court to order restitution to a person who has suffered out-of-pocket losses as a result of an identity theft crime, including losses that a person incurs when his credit rating is affected, and allows a consumer to bring a civil action against the perpetrator of the crime to recover for the damages done to his credit ratings. Restitution includes the actual loss incurred by the victim, including an amount equal to the value of the time reasonably spent by the victim attempting to remediate the harm incurred by the victim from the offense, and the consequential financial losses. Alternatively, actual damages, punitive damages, attorneys' fees and costs.	24,048		$601,200	$12,024,000

State	Statute(s)	Remedy	Potentially Unauthorized Accounts Opened	Civil Statute	Actual Damages	Attorneys' Fees
North Carolina	N.C. Gen. Stat. §14-113.20 *et seq*; N.C. Gen. Stat. §1-539.2C	Identity theft victims may sue the offender for damages, even if the person has not been charged criminally, up to triple the actual damages or $5,000, whichever is greater.	38,722	$193,610,000		
North Dakota	N.D. Cent. Code 32-03-52 (1999); and 12.1-23-11	Victim may recover any equitable relief court deems appropriate and the greater of actual damages or liquidated damages of up to $10,000; court may award victim attorney fees, other litigation costs	1,939	$19,390,000		
Ohio	Ohio Rev. Code Ann. §2913.49	Payment of restitution is required if victim suffered actual financial losses as a result of the crime.	1,579		$39,475	
Oklahoma	Okla. Stat. tit. 21, §1532; Okla. Stat. tit. 21, §1533.1 et seq.	Restitution to the victim may be ordered in addition to any criminal penalty imposed by the court. The victim of identity theft may bring a civil action for damages against any person participating in furthering the crime or attempted crime of identity theft.	761		$19,025	
Oregon	Or. Rev. Stat. §165.800; 137.717	Not specifically addressed.	35,202		$880,050	
Pennsylvania	Pa. Cons. Stat. tit. 18, §4120; Pa. Cons. Stat. tit. 42 § 8315	Victims of identity theft may file a civil action to obtain actual damages arising from the incident or $500, whichever is greater, to cover loss of money, reputation or property, whether real or personal. The court may award up to three times the actual damages sustained, but not less than $500. Victims may also seek reasonable attorney fees and court costs and any additional relief that court deems necessary and proper.	79,918	$39,959,000		$39,959,000

State	Statute(s)	Remedy	Potentially Unauthorized Accounts Opened	Civil Statute	Actual Damages	Attorneys' Fees
Rhode Island	R.I. Gen. Laws §11-41-4; R.I. Gen. Laws §§11-49.1-1 (2000) et seq.	Not specifically addressed.	192		$4,800	
South Carolina	S.C. Code Ann. §16-13-510 et seq.; S.C. Code Ann. §16-13-525	Yes. Restitution is to be ordered by a judge following conviction.	23,327		$583,175	
South Dakota	S.D. Codified Laws Ann. §22-40-8	Not specifically addressed.	4,803		$120,075	
Tennessee	Identity Theft Defined Tenn. Code Ann. §39-14-150 (1999) 'Identity Theft Deterrence Act' Tenn. Code Ann. §§47-18-2104 (1999) et seq.	The court must order restitution be made to the person or persons whose identity was stolen for any identifiable losses resulting from the offense. If the private party establishes that identity theft was engaged in willfully or knowingly, the court may award three (3) times the actual damages and may provide such other relief as it considers necessary and proper.	3,534		$88,350	
Texas	Tex. Penal Code Ann. §31.17; Tex. Penal Code Ann. §32.51	Not specifically addressed.	149,857		$3,746,425	

State	Statute(s)	Remedy	Potentially Unauthorized Accounts Opened	Civil Statute	Actual Damages	Attorneys' Fees
Utah	Utah Code Ann. §76-6-1101 et seq.; Utah Code Ann. §76-6-1105	State law requires judges to order defendants convicted of identity theft to make restitution to the victim(s) of the offense or state on the record the reason why the court does not find ordering of restitution to be appropriate. Restitution may include payment for any costs incurred, including attorneys' fees, lost wages, and replacement of checks; and the value of the victim's time incurred due to the offense in clearing his/her credit record or credit record.	41,686		$1,042,150	$20,843,000
Vermont	Vt. Stat. Ann. tit. 13, §2001; Vt. Stat. Ann. tit. 13, §2030	Not specifically addressed.	144		$3,600	
Virginia	Va. Code §18.2-152.5:1; Va. Code §18.2-186.3 et seq.	Yes. Restitution is to be ordered by a judge following conviction. Includes credit repair measures and attorney fees.	41,703		$1,042,575	$20,851,500
Washington	Wash. Rev. Code §9.35.001 et seq.; Wash. Rev. Code §9.35.020	People convicted of identity theft are responsible for civil damages to the victim of $1000 or actual damages, whichever is greater, including costs to repair the victim's credit record and reasonable attorneys' fees.	38,861	$38,361,000		$19,430,500
Washing DC	D.C. Code Ann. §22-3227.01 et seq.; D.C. Code Ann. §22-3227.03; D.C. Code Ann. §22-3227.04	When a person is convicted of identity theft, the court may, in addition to any other applicable penalty, order restitution for the full amount of financial injury.	2,433		$60,825	
West Virginia	W. Va. Code §61-3-54	Not specifically addressed.	341		$8,525	
Wisconsin	Wis. Stat. §943.201; Wis. Stat. §943.203	Not specifically addressed.	8,922		$223,050	

State	Statute(s)	Remedy	Potentially Unauthorized Accounts Opened	Civil Statute	Actual Damages	Attorneys' Fees
Wyoming	Wyo. Stat. Ann. §6-3-901; §1-1-128	Victim may enjoin/restrain perpetrator from further violations of identity theft law; victim may recover damages subject to set off against judgment ordered under criminal law; prevailing party may recover court costs and attorneys' fees	2,317		$57,925	$1,158,500
		Subtotal	**2,111,307**	**$1,186,580,400**	**$43,076,650**	**$742,720,500**
			TOTAL	**$ 1,972,377,550**		