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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

SHAHRIARI JABBARI, KAYLEE HEFFELFINGER, ON BEHALF OF THEMSLVES AND ALL OTHERS SIMILARLY SITUATED, Plaintiffs, vs. WELLS FARGO & COMPANY AND WELLS FARGO BANK, N.A., Defendants	No:15-cv-02159 – VC OBJECTION JOHNSTON OBJECTION TO FINAL FAIRNESS HEARING AND STIPULATION AND PROPOSED ORDER OF MAY 10, 2018

INTRODUCTION

On May 10, 2018, Attorneys for Wells Fargo and the *Jabarri* Plaintiffs filed a Stipulation and Proposed Order discussing a proposed email notice to be sent out to current class members. This Stipulation requests that the Lead Counsel have until June 22, 2018 to send another email

regarding convoluted, unclear information to prospective class members. Objector Scott Johnston hereby objects to the proposed settlement for the foregoing reasons:

I. The Proposed Email Fails to Address Problems Already Raised By Scott Johnston, The Court, and Attorneys General

A. Lead Counsel Does Not Know The Number or State of Wells Fargo's Victims

It is apparent from pleadings, that Lead Counsel does not know who, or where the victims are located. As noted in affidavits by both Lead Counsel and Wells Fargo, no one knows the true number of victims. Instead of contacting victims directly, this email is purportedly, being sent to everybody who ever had a Wells Fargo account. Yet the proposed settlement is not compelling the parties to ascertain the number of damaged individuals, other than send repeat emails to addresses which have been closed, changed, or which were fraudulently produced and are directed to a fake Wells Fargo address.

Wells Fargo's record keeping has been demonstrated as less than clear, and without discovery, vital information on individuals will never be made. On occasion, when they want to dismiss an action, for example, they allege the records are meticulously maintained, and constitute sufficient evidence to force a helpless customer/victim into arbitration that victim was unaware. In the next breath, the CEO of the company publicly announced that many of the bank's records were not reliable due to age and storage reasons.

It is unjust to force victims, such as Scott Johnston, to be bound by a settlement agreement when Wells Fargo contends that it was surprised to learn that there were multiple accounts created for Mr. Johnston's minor children. Which records, parenthetically, local Wells Fargo representatives indicated had been "purged" from the Wells Fargo records systems, along with addresses, email addresses, account numbers, *etc*. Undoubtedly, there are thousands, or possibly hundreds of thousands of victims just like Mr. Johnston, who never even knew their identities, or

their family members' identities, had been stolen for Wells Fargo. If Lead Counsel does not know, and has not even bothered to attempt to find all of these victims, it is unjust to force these victims to remain in the class, and the case should not be certified as a national class action.

B. Victims May Not Even Know They Were Victims

Lead Counsel has made it clear that they are not willing to pursue Wells Fargo into disclosing this critical information. In fact, Lead Counsel has made it clear in affidavits and other pleadings, that on behalf of Plaintiffs they have not engaged in discovery, but rather taken Wells Fargo's word that Wells Fargo has produced the totality of the evidence they are required to produce. This opinion is not shared by certain of the state Attorneys General, along with FED (who have bluntly prohibited Wells Fargo from expanding their business until they clean up their wrongdoings)[1]. Other than Lead Counsel, almost everyone in the country believes Wells Fargo continues to hide information, and refuses to produce documentation to establish the number of victims.

In the parties' filing titled "First Stipulation and Administrative Motion" (ECF 176), Lead Counsel notes:

"First, the Parties request that the Final Approval Hearing be continued to March 20, 2018, from the current hearing date, January 4, 2018. This would allow the Final Approval Hearing to occur after the February 3, 2018 Deadline to Submit Claim Form *so that parties will not need to speculate, and, instead, will know how many Unauthorized Accounts are identified by Settlement Class Members in the claims process*."

Now, Lead Counsel is requesting exactly the opposite result. Lead Counsel and Wells Fargo want final Court approval of the settlement, knowing full well, after at least two additional

[1] https://www.federalreserve.gov/newsevents/pressreleases/enforcement20180202a.htm. Responding to widespread consumer abuses and compliance breakdowns by Wells Fargo, Federal Reserve restricts Wells' growth until firm improves governance and controls. Concurrent with Fed action, Wells to replace three directors by April, one by year end.

releases by Wells Fargo of increased numbers of victims, that not only are the victims not known, but the parties are seeking final approval while leaving open filing deadlines.

The lack of transparency in the settlement is further highlighted in the most recent filing relative to the pressure applied by several of the state Attorneys General who "have expressed concern that it may be difficult for some to fill out the online claim form ***if they are uncertain whether Wells Fargo opened accounts without their consent or, if so, how many such accounts***" (*emphasis added.*) (ECF 234, p.2). Nobody can truly know the extent of Wells Fargo's illegal conduct, until the victims have an advocate willing to force discovery. Without an advocate willing to fight for the victim's rights, Wells Fargo will be able to walk away from fifteen years of identity theft with paying their victims next to nothing.

C. The Proposed Email is Insufficient

The proposed email agreed upon between Lead Counsel and Wells Fargo would ostensibly be sent to the same email addresses that were previously undeliverable. Sending a third email to the same email addresses and expecting different results from the first two emails will do nothing more than delay this case for another month. For individuals (like Objector Scott Johnston) who did not receive either of the first two emails, another email to the same email address will not address the problem. The problem is that the emails are not going to the right people.

The underlying problem of sending information to victims is exacerbated by Wells Fargo's documented practice of entering dummy/phony addresses, phone numbers, and emails for fraudulent accounts for the precise reason of preventing victims from learning about the fake accounts. Wells Fargo also engaged in cutting and pasting valid signatures to open fraudulent accounts, without the consent, or knowledge of the victim. These fraudulent accounts never

came to the knowledge of the victims. How many of the victims are going to be unreachable because Wells Fargo intentionally created untraceable account information? Wells Fargo sending an email explaining rights to a dummy email address it specifically created to prevent the owner from ever learning about the account is absurd. How many people had fake accounts opened, that had the entire file shredded in an all-night shredding party? How many people are like Scott Johnston, and would have never have found out about the fake accounts without the offending banker's direct confession? How many people, like Scott Johnston, have the time or money to fight for three hours with Wells Fargo to get Wells Fargo to actually admit they opened the false accounts (even after Wells Fargo is supposed to be notifying its victims)? How many people's records, such as the account information regarding his children's accounts were purged from Wells Fargo files so Wells Fargo "cannot find them" now? These are all problems that are not theoretical, but are actually happening to victims like Objector Scott Johnston. The proposed email will address

II. The Email fails to inform Customers about the Underlying Settlement Problems

The email fails to adequately inform victims the basic information regarding the settlement. The email does not tell victims that the settlement is discounted settlement because of the arbitration agreement found in the account agreements. The email does not tell victims that since the settlement negotiations, Wells Fargo has waived the right to arbitrate before Congress and in another concurrent case in Utah.

As noted in Objector Scott Johnston's initial objection to the proposed final fairness hearing, Wells Fargo has failed to divulge an accurate number of individuals and entities affected by Wells Fargo's illegal actions. (*See*, Johnston Objection, ECF 118) After agreeing to an initial settlement of $110 million dollars for the fraudulent activity during the period 2009 to 2017,

which ostensibly covered 1.5 million customers, the Wells Fargo Independent Board Investigation was released. Thereafter, Wells Fargo agreed to extend the time period covered for the fraudulent account openings back to 2002, and the number of victims was increased to 2.1 million. The settlement was modified from $110 million to $142 million dollars based upon the acquisition of this "new" information. The additional information regarding the number of individuals harmed by Wells Fargo actions was not obtained through settlement negotiations, nor was it uncovered by a thorough investigation by Lead Counsel plaintiffs counsel, but was the result of the report on the fraudulent sales practices released by the Wells Fargo Independent Board Investigation.

The failure to engage in discovery regarding the number of victims harmed by Wells Fargo is alarming. However, as noted in the Johnston Objection, the number of victims continues to grow. (See, ECF 118 - on August 31, 2017 Wells Fargo issued a press release which indicated that another additional 1.4 million fraudulent accounts had been identified.) Notwithstanding the fact that the number of victims had increased over 70% of Wells Fargo's initial disclosure, the parties have taken no action to re-evaluate the actual number of victims, or adequate settlement based upon new information.

It is impossible for victims to make an informed decision without knowing the basis of the settlement, the reasons for the settlement amount, and the substantial changes that have occurred since the settlement negotiations. The proposed email keeps the victims in the dark as to the who, what, why, and how to their settlement.

III. The Email fails to inform victims about inadequacies of representation

Class members cannot make an informed decision without being notified of major flaws in the representation of their interests. Class counsel's' own motion for final approval fails to provide a choice of law analysis, as required by *In re Hyundai & Kia Fuel Economy Litigation*, No. 15-56014, 2018 WL 505343 (9th Cir. Jan. 2018). Furthermore, as demonstrated by the Stipulation and Administrative Motion for Approval of Further email Notice, the parties have failed to engage in any meaningful discovery to determine who was harmed by Wells Fargo's actions.

Currently before this Court, class counsel seeks approval of a settlement that was arrived at in a significantly discounted fashion, out of fear of having to confront an argument on arbitrability. As the court held in *Hyundai*, the district court abused its discretion by failing to analyze whether common questions of law and fact predominated under Rule 23(b)(3) with regard to the settlement class. Specifically, the Ninth Circuit found that the district court failed to analyze potential differences in state consumer protection laws and whether class members who purchased used cars were exposed to (and therefore could have relied on) the defendants' allegedly misleading statements. These failures, according to the Ninth Circuit, amounted to an abuse of discretion. The Ninth Circuit's opinion relied heavily on its prior opinion in *Mazza v. American Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012), which decertified a nationwide class based on differences in various state consumer laws. The *Mazza* court held that a nationwide class could not be certified for litigation purposes, reasoning that each of the 44 states involved had "a strong interest in applying its own consumer protection laws." (*See also, Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1977) The Rule 23(b)(3) predominance inquiry is far more demanding than Rule 23(a)'s commonality requirement.)

The multiple extensions in this case, with overlapping dates, create an additional problems. The Court is trusting the parties to conduct proper investigations, and discovery to ascertain the number of victims, and the damages sustained by the victims. With the current Fairness and Final Approval set for May 30, 2018, the new, revised email notifications are not even due to be sent prior to June 22, 2018, with final claims due July 7, 2018. Under this Court's own website it provides guidance on what is necessary to have a class certified. The current Fairness Hearing and Final Approval cannot be approved, according to the Courts' own guidelines. Moreover, as noted in prior filings Class counsel has acknowledged classwide proof of whether accounts were unauthorized, necessary for class certification, would be difficult…. (ECF 180, p 2) variations among state laws could impede certification of a nationwide class. (EDF 180, p 12).

IV. The Dates Must be Changed

The Parties' stipulation is inadequate because it fails to adjust other dates. Putative Class Members cannot be expected to opt out before they find out if they were actually harmed. The stipulation does not extend the opt-out deadlines. Further, the stipulation does not provide adequate time for Class Members to get the email, find out if they actually were harmed, consult an attorney, and decide if opting out is appropriate.

Perhaps most importantly, the final fairness hearing is not possible before the right notice is sent out. As this Court's own website explains:

CLASS MEMBERS' RESPONSE—The motion for final approval should include information about the number of undeliverable class notices and claim packets, the number of class members who submitted valid claims, the number of class members who elected to opt out

of the class and the number of class members who objected to the settlement. In addition, the motion for final approval should respond to any objections.

The Court cannot have the number of class members who submitted valid claims by the Final Approval date, as the deadline to file claims has been extended to July 7, 2018, more than a month after the Final Fairness Hearing. There will be no way for the Court to analyze for fairness on May 30 with incomplete information. This is more than a full month of time for individuals to file claims and dilute the recovery amount for putative class members.

Lead Counsel's own expert opined that Lead Counsel had an ethical duty not to dilute the settlement,[2] and thus two settlement funds were created. The "first settlement" referenced by Lead counsel's expert was premised upon March 27, 2017 settlement for 2 million customers for $110 million. After the Wells Fargo Board report was released in April, Wells Fargo acknowledged that the more accurate number was closer to 2.5 million victims, and raised the settlement to $142 million, and extended the time to 2002. Interestingly, after the August 31, release of an additional 1.6 million identified victims (none of which were identified by Lead Counsel's efforts) there was no adjustment to the settlement. Mr. Baker, was aware of the ethical responsibility of Lead Counsel and noted in paragraph 23 of his declaration, "[s]econd,

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[2] Lynn A. Baker Declaration in Support of Plaintiffs' Notice of Motion, Motion, and Memorandum in Support of Motion for Final Approval of Class Action Settlement, dated March 22, 2018

19. By negotiating and reaching a class action settlement with Wells Fargo covering a Class Period running from January 1, 2009 through May 20, 2017, Class Counsel assumed certain ethical duties to the Class covered by that Period. One of those duties was not to diminish that Class's recovery by negotiating for a longer Class Period.
20. Thus, when Class Counsel began to negotiate for a longer Class Period—a Class Period that eventually would extend back to May 1, 2002—they had an ethical obligation not to reach a new Settlement that diminished in any way the per-account compensation that the group covered by the 2009-2017 Class Period would have received under the initial, "unextended" Settlement.

the Settlement ensures that the extension of the Class Period back to 2002 will not in any way harm, and may ultimately benefit, those persons already covered by the initial Settlement."

Even the parties own experts acknowledge that dilution of the settlement is improper.

Conclusion

Objector requests that this Court deny class counsel's request for certification, of the settlement class based upon inadequate representation, inadequate settlement, inadequate sub-class representation, inadequate discovery, inadequate representation, and failure to meet the standards enunciated by the Ninth Circuit Court in the *Hyundai* decision.

DATED MAY 14, 2018.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I Certify that the foregoing Objection was served via ECF filing, upon counsel of record this 14th day of May, 2018:

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