MEALEY'S™ LITIGATION REPORT

Class Actions

October 1, 2009 Volume 9, Issue #15

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LOS ANGELES — A company representing itself as the "leading forum for consumer arbitrations" was sued Sept. 1 as part of a class action lawsuit that accused the company of bias and misleading consumers on its impartiality. **SEE PAGE 15.**

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Racial Discrimination Class Certified In Part Against Home Mortgage Lender

LOS ANGELES — A class action lawsuit accusing a home mortgage lender of discriminating against minorities on the basis of race was certified Aug. 27 by a Los Angeles County Superior Court judge (Opal Jones, et al. v. Wells Fargo Bank N.A., et al., No. BC337821, Calif. Super., Los Angeles Co.).

(**Order certifying class in Section B.** Document #43-091001-007R.)

Judge Anthony J. Mohr certified a class of all borrowers who obtained a first trust deed-secured home loan from Wells Fargo Bank and/or Wells Fargo Home Mortgage in an amount in excess of $150,000 and who applied for their loan through a Wells Fargo branch and/or office within one mile of an area comprising 50 percent or more minority population.

The term "minority population" is defined as the total population of that geographic area less the population of non-Hispanic whites of that geographic area as established by the 2000 Census data. The class period is defined as all loans that were funded between May 1, 2002, and December 2005.

Judge Mohr certified the class only for the plaintiffs' claims for violations of the Unruh Civil Rights Act under Sections 51 and 52 of the California Civil Code. The judge denied class certification as to plaintiffs' remaining claims.

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Class Claims

Opal Jones, Claudia Caldwell, Kalina Thomas, Vincent Jones and C. Renae Walker Jones sued Wells Fargo Bank N.A. and Wells Fargo Home Mortgage Inc. on Aug. 5, 2005.

(**Complaint available.** Document #43-091001-008C.)

The plaintiffs claim that the defendants engaged in unlawful discrimination in mortgage lending practices. The plaintiffs claim that the defendants systematically discriminated against home loan applicants from predominantly black and Hispanic neighborhoods by charging them more for their home loans than they charged similarly situated applicants from adjacent, nonminority neighborhoods.

The plaintiffs maintain that the defendants discriminated against minority applicants by denying them access to its "loan economics" program. The program enables loan officers to provide a lower-priced home loan for the customer.

Damages Sought

The plaintiffs seek damages for violations of the Unruh Civil Rights Act, violations of the California Fair Employment in Housing Act, violations of the California Consumer Legal Remedies Act, breach of contract and violations of Section 17200 of the California Business and Professions Code.

Judge Mohr concluded that common questions do not predominate over individual questions of law and fact for all but the Unruh Civil Rights Act claim.

"[I]n the absence of concrete evidence of damage formulae, the court has difficulty visualizing how a standard formula will be employed at trial, which means the court has trouble determining whether it can manage the damage aspect of this case if it receives class status," Judge Mohr noted. "The issue of damages requires individual inquiries that will swamp any issues that are common to the class, at least with respect to those causes of action requiring a showing of actual damages."

Unruh Act Claims

The judge said he was "impressed" with the evidence produced by the plaintiffs that suggested classwide discrimination in violation of the Unruh Civil Rights Act. The judge held that the most significant issue regarding whether Wells Fargo had a policy to deny access to the Loan Economics program is common to all class members.

Judge Mohr found that the issue of damages did not defeat class certification as to the Unruh Act claims because statutory penalties of at least $4,000 are mandatory under the law once liability is established.

"Because statutory penalties of at least $4,000 are mandatory under Section 52 once liability is established, there is no need to wade into individual issues surrounding actual damages. This is only true, however, if plaintiffs restrict the class-wide relief to statutory damages and in their notice inform class members that participation in the class waives any further rights to actual damages," Judge Mohr said.

A. Barry Cappello and Steven H. Shlens of Cappello & Noel in Santa Barbara, Calif., and Jeffrey Fleitman of Beverly Hills, Calif., represent the plaintiffs. The firm of Skadden Arps Slate Meagher & Flom in Los Angeles represents the defendants. ■

(**Opinion available.** Document #43-091001-017Z.)

Wage-And-Hour Class Against Shoe Retailer Granted Certification

PHILADELPHIA — A class action accusing an athletic shoe retail chain of violating federal employment law by failing to properly compensate workers for overtime hours worked was conditionally certified by a federal judge on Sept. 15 (Francisco Pereira v. Foot Locker Inc., No. 07-cv-2157, E.D. Pa.; 2009 U.S. Dist. LEXIS 84022).

U.S. Judge J. Curtis Joyner of the Eastern District of Pennsylvania conditionally certified a collection action under 29 U.S. Code Section 216(b) on behalf of all persons who were or are employed by Foot Locker Inc. throughout the United States as nonexempt employees, including sales associates, stock persons and cashiers, but excluding assistant managers, at any time from the date three years before the mailing date of the class notice to the present.

Judge Joyner found that a potential conflict exists over the certification of plaintiff Francisco Pereira's state law claims. The judge held that it is incompatible for the certification of simultaneous state and federal parallel wage-and-hour class actions. The judge ruled that the state law claims cannot proceed because they overlap with federal claims under the Fair Labor Standards Act (FLSA).

Judge Joyner ruled that it would be premature to separate the plaintiff's claims and dismiss the state law claims as incompatible because there may be state law claims that are distinct from the FLSA claims. The judge said he would revisit the state law claims at the motion to dismiss stage to allow sufficient investigation and briefing as to distinct state law claims that could proceed.

Class Claims

On May 25, 2007, Pereira filed a class action lawsuit against Foot Locker Inc. in federal court.

Pereira claims that time spent before opening the store and after the store is closed and performing maintenance work on the store is not compensate by Foot Locker. The plaintiff claims that Foot Locker requires employees to work off the clock during this time or have the time shaved from their time records. The plaintiff claims that Foot Locker enforced the policy by directly tying the compensation of store managers to meeting an unrealistic labor budget and punishing store managers if they exceeded the budget.

Pereira claims that the shoe retailer violated the FLSA, the Pennsylvania Minimum Wage Act and the Pennsylvania Wage Payment and Collection Act by failing to compensate workers for hours worked and not compensating them for overtime.

Certification Appropriate

Judge Joyner rejected Foot Locker's argument that class certification is not appropriate because the putative class members have a variety of job descriptions and work in various capacities under different managers at locations across the country.

"While the hours budget for each store is different depending on its' location and sales volume, the time keeping system is uniform throughout the stores, corporate headquarters sets the hourly budget for each store and monitors any overages and communicates with managers in this regard," Judge Joyner wrote. "Based on these components, plaintiff has alleged a general policy that would have affected all non-exempt employees, regardless of their location or exact title."

Judge Joyner also denied Foot Locker's argument that the inquiry into off-the-clock overtime payments would be too individualized for class treatment. The judge found that although individual concerns may at some point be effectively raised, Pereira has alleged and offered support for a cohesive policy and demonstrated its consequences nationwide.

Counsel

Gerald D. Wells III, Katherine B. Bornstein, Robert W. Biela, James A. Maro Jr. and Robert J. Gray of Barroway Topaz Kessler Meltzer & Check in Radnor, Pa., and Richard B. Sigmond of Jennings Sigmond in Philadelphia represent the plaintiff.

Katherine Sinatra, Kevin Smith and Kristen A. Page of Shook Hardy & Bacon in Kansas City, Mo., and Shelley R. Smith and Lucretia C. Clemons of Ballard Spahr Andrews & Ingersoll in Philadelphia represent Foot Locker. ■

Age-Bias Action Allowed To Proceed Under Pattern-Or-Practice Framework

DENVER — The pattern-or-practice framework adopted by the U.S. Supreme Court in International Brotherhood of Teamsters v. United States (431 U.S. 324 [1977]) may be applied in Age Discrimination in Employment Act (ADEA) cases, a 10th Circuit U.S. Court of Appeals panel ruled Aug. 26 (Larry Thompson, et al. v. The Weyerhaeuser Company, No. 07-7090, 10th Cir.; 2009 U.S. App. LEXIS 20767).

(**Opinion available.** Document #43-091001-011Z.)

A unanimous panel affirmed an order denying The Weyerhaeuser Co.'s motion to strike the plaintiffs' request to apply the pattern-or-practice framework issued by U.S. Judge James H. Payne of the Eastern District of Oklahoma.

Chief Judge Robert H. Henry wrote the opinion on behalf of the panel and was joined by Circuit Judges Michael R. Murphy and Timothy M. Tymkovich.

Class Claims

In 2002, Weyerhaeuser's Valiant, Okla., plant implemented a reduction in force. As a result, 16 employees at the plant were discharged. A 17th employee, Larry Thompson, was discharged in 2003.

In 2003, the employees filed a class action lawsuit against Weyerhaeuser in federal court. The plaintiffs asserted claims for wrongful discharge in violation of the ADEA and Oklahoma law.

Framework Applicable

The panel rejected Weyerhaeuser's argument that the pattern-or-practice framework should be employed only in employment discrimination cases filed under Title VII of the Civil Rights Act of 1964.

The panel said it agreed with Judge Payne's finding that Thiessen v. General Electric Capital Corp. (267 F.3d 1095 [10th Cir. 2001]) establishes that the pattern-or-practice framework may be applied in ADEA cases. The panel found that Thiessen holds that when a plaintiff alleges that age discrimination was an employer's "standard operating procedure" and presents sufficient evidence to support the allegation, the District Court must apply the pattern-or-practice framework.

"The gist of Weyerhaeuser's arguments is that, in applying the pattern-or-practice framework to ADEA claims, Thiessen and [EEOC v. Sandia Corp., 639 F.2d 600 (10th Cir. 1980)], were wrongly decided. Absent an intervening Supreme Court or *en banc* decision justifying such action, we lack the power to overrule our own precedent," the panel said. "In our view, Weyerhaeuser's expansive view of what constitutes dicta is founded upon an untenable theory of *stare decisis*."

Counsel

J. Vince Hightower of Tulsa, Okla., and Jim T. Priest of Whitten Burrage Priest Fulmer Anderson & Eisel in Oklahoma City represent the plaintiffs.

Kristen L. Brightmire, William S. Leach and Michael F. Smith of Eldridge Cooper Steichen & Leach in Tulsa represent the defendant. ■

Yogurt Company Settles False Advertising Class Action For $35 Million

CLEVELAND — Yogurt manufacturer The Dannon Co. Inc. on Sept. 17 reached a $35 million settlement agreement that would resolve claims that it misrepresented the health benefits of some of its products (James Gemelas v. The Dannon Company Inc., No. 08-cv-0236, N.D. Ohio).

(**Stipulation of settlement available.** Document #43-091001-009X.)

Dannon and class counsel for plaintiff James Gemelas entered a stipulation of settlement in the U.S. District Court for the Northern District of Ohio. Judge Dan A. Polster still must approve the proposed agreement.

The proposed agreement would settle seven class action lawsuit filed in various federal courts across the country.

Class Claims

In January 2008, Gemelas sued Dannon in the District Court, alleging that Dannon misrepresented the health benefits of its Activia and DanActive yogurts.

(**Complaint available.** Document #43-091001-012C.)

Gemelas sought damages for violations of the Ohio Sales Practices Act, violation of the Ohio Deceptive Trade Practices Act and breach of express warranty.

Settlement Terms

Under the terms of the agreement, Dannon agreed to make changes to the labeling and advertising of Activia and DanActive by increasing the visibility of the scientific names of the "probiotic" cultures in the yogurts. Dannon also agreed to remove the term "immunity" from its DanActive products. In addition, yogurt labels formerly stating that the yogurt has "a positive effect on your digestive tract's immune system" will be reworded to say the yogurt will "interact with your digestive tract's immune system."

The settlement class is defined as all persons who purchased in the United States food products marketed and distributed by Dannon under the brand names of Activia or DanActive, including variations, formats or line extensions thereof at any time up to date notice is provided to the class.

The proposed agreement establishes a settlement fund of $35 million. Class members may receive a maximum of $100 depending on how much yogurt they purchased. If the total amount of payouts is less than $35 million, Dannon will donate products having a total value equal to the difference between the actual payout amount and $35 million to various charities that help feed the poor.

The settlement awards class counsel a maximum of $10 million in attorneys' fees and is to be paid from the settlement fund. Plaintiffs who were deposed as part of the litigation would receive a maximum incentive payment of $5,000, while plaintiffs who were not deposed would receive a maximum incentive payment of $1,000.

Counsel

Timothy G. Blood, John J. Stoia Jr., Leslie E. Hurst and Thomas J. O'Reardon II of Coughlin Stoia Geller Rudman & Robbins in San Diego; Jonathan M. Stein and Cullin A. O'Brien of Coughlin Stoia Geller Rudman & Robbins in Boca Raton, Fla.; John R. Climaco, Scott D. Simpkins, David M. Cuppage and Jennifer L. Gardner of The Climaco Law Firm in Cleveland; D. Scott Kalish of Cleveland; Frank Piscitelli of Cleveland; Jayne A. Goldstein of Shepherd Finkelman Miller & Shah in

Weston, Fla.; David Pastor of Gilman & Pastor of Boston; and Jonathan W. Cuneo and Pamela Gilbert of Cuneo Gilbert & LaDuca in Washington, D.C., represent the class.

Bruce A. Friedman and Gina M. Simas of Bingham McCutchen in Santa Monica, Calif., Angel A. Garganta, Trenton H. Norris and Beth H. Parker of Arnold & Porter in San Francisco and Mark P. Pifko and Christopher Tarbell of Arnold & Porter in Los Angeles represent the defendant. ■

Settlement Of Property Damage Claims Against Steel Company Affirmed On Appeal

CINCINNATI — A Sixth Circuit U.S. Court of Appeals panel on Sept. 22 affirmed the approval of a $4.45 million class action settlement that resolved claims that the operator of a Detroit-area steel plant damaged surrounding residents' property through the discharge of metal-like dust and flakes (Malcolm Moulton, et al. v. United States Steel Corp., Nos. 08-2311, 08-2312, 6th Cir.; 2009 U.S. App. LEXIS 20896).

(**Opinion available.** Document #43-091001-013Z.)

The unanimous panel affirmed an order granting final settlement approval of a class action filed against United States Steel Corp. (U.S. Steel) issue by U.S. Judge Avern Cohn of the Eastern District of Michigan.

The panel affirmed Judge Cohn's order with the exception of the portion that awarded attorney fees to class counsel. The panel vacated the fee award and remanded the suit, seeking further explanation.

Circuit Judge Jeffrey S. Sutton wrote the opinion on behalf of the panel and was joined by Circuit Judge Eric L. Clay and U.S. Judge Amul R. Thapar of the Eastern District of Kentucky, sitting by designation.

Class Claims

In 2003, U.S. Steel purchased a steel mill bordering Ecorse and River Rouge, Mich. At the time, the mill's pollution control equipment was in disrepair. After purchasing the mill, the company spent $65 million to upgrade the old pollution control equipment and to purchase new equipment.

On Nov. 30, 2004, a group of surrounding residents filed a class action lawsuit against U.S. Steel in federal court. The plaintiffs claim that the mill caused surrounding residents injury by wrongfully discharging harmful "metal-like dust and flakes" that settled on their real and personal property.

In March 2006, Judge Cohn certified a class of all people owning property or residing in River Rouge and Ecorse at any point after U.S. Steel purchased the mill. The certification order designated Jason Thompson and Peter Macuga II as class counsel.

Letter

Several weeks after the certification order, attorney Donald W. Hadden sent a letter to all "River Rouge and Ecorse clients" regarding the suit against U.S. Steel. The letter advised that Hadden had been meeting with residents of the two cities about the litigation and encouraged recipients to exclude themselves from the class. Hadden advised residents that exclusion would be the "best choice for everyone" because "people who opt out always get a much higher settlement than the general population."

To remain in the class, Hadden instructed, recipients had to complete an attached form and return it to Hadden's office by April 10, 2006. Hadden pledged to "opt out" any recipient who did not return the form.

U.S. Steel and class counsel maintain they did not learn of Hadden's initiative until April 14, 2006, when U.S. Steel received a letter from Hadden listing the people he claimed to represent and purporting to place an attorney's lien on any settlement proceeds.

As the opt-out deadline approached, Hadden moved to enter an appearance as counsel for 171 class members who purportedly had signed retainer agreements with him. Two days before the deadline, Hadden filed a motion on behalf of still more class members. Claiming that "583 members of the class" had retained him and told him "they want to be excluded from the class," Hadden asked for leave to file a collective, attorney-signed opt-out form.

Judge Cohn denied Hadden's motions on the grounds that they were procedurally improper since Hadden was not the counsel of record.

Settlement

In June 2008, class counsel and U.S. Steel filed a joint motion for preliminary approval of a $4.45 million settlement agreement. Several class representatives objected to the proposed agreement on the grounds that the release of class claims was too broad. The parties eventually narrowed the scope of the release.

Following the alterations to the proposed agreement, class representatives Karen Ward and Malcolm Moulton again objected to the proposed agreement. Hadden also filed an objection on the grounds that 34 class members had not been included in the final opt-out report because of a clerical error.

Judge Cohn rejected all objections and approved the proposed settlement. Hadden, Ward and Moulton filed an appeal of the final settlement order with the Sixth Circuit.

Fair Settlement

The panel rejected the objectors' argument that the settlement was not fair, reasonable and adequate. The objectors argued the settlement disserves the public interest due to the broad scope of the release, that collusion between class counsel and U.S. Steel tarnished the agreement and that the agreement improperly prioritizes the distribution of the settlement proceeds.

The panel held they do not read the release as broadly as the objectors because the bar on continuing nuisance claims applies only to claims arising out of conditions that existed prior to the settlement and it does not preclude future continuing nuisance claims based on emissions from new equipment installed after the date of the settlement.

"The district court did not abuse its discretion in approving this release. The release is not as far-reaching as the objectors perceive, and it is not unfair, unreasonable or inadequate. The settlement process depends on compromise, and the objectors cannot expect U.S. Steel to give up $4.45 million dollars, based on conduct since 2003, while leaving class members free to turn around and sue the next day for the same conduct. The release reasonably balances U.S. Steel's interest in resolving the claims and the public interest in protecting River Rouge and Ecorse residents from future harmful emissions," the panel wrote.

Counsel

James P. Murphy and Richard R. Zmijewski of Berry Moorman in Detroit represent the plaintiffs. J. Van Carson, Lianne Mantione and John D. Lazzaretti of Squire Sanders & Dempsey in Cleveland; Jason J. Thompson of Sommers Schwartz in Southfield, Mich.; William J. McKim of the United States Steel Law Department in Pittsburgh; Jack O. Kalmink of Clark Hill in Detroit; and Peter W. Macuga II of Macuga Liddle & Dubin in Detroit represent U.S. Steel. Donald W. Hadden of Donnelly & Hadden in Ann Arbor, Mich., represents the objectors. ■

Online Dating Site Seeks Approval Of $1.5 Million Settlement

DALLAS — A putative consumer class filed a motion in a Texas federal court on Sept. 14 seeking final approval of a $1.5 million settlement agreement that would resolve claims that the owner and operator of an online dating site unlawfully charged consumers fees after they canceled their subscriptions (Thomas Wong v. TrueBeginnings LLC, No. 3:07-cv-1244, N.D. Texas).

(**Memorandum in support of motion for final approval of settlement available.** Document #43-091001-019B.)

Class representative Thomas Wong filed in the U.S. District Court for the Northern District of Texas a memorandum in support of a motion seeking final approval of a settlement agreement that would end claims against TrueBeginnings LLC.

Class Claims

On June 12, 2007, Wong sued TrueBeginnings in the Dallas County District Court. On July 12, 2007, the defendant removed the case to federal court.

The plaintiff claims that TrueBeginnings engages in a pattern and practice of imposing unauthorized charges on the credit or debit cards of subscribers who had previously canceled their subscription. Discovery in the suit revealed that the defendant had in place a system whereby former subscribers could automatically resubscribe by clicking on certain hyperlinks. Wong claims that TrueBeginnings did not adequately inform the former subscribers of the existence of the renewal system or the fact that they would be resubscribing by clicking on the hyperlinks.

The plaintiff sought damages for unjust enrichment, breach of contract and violations of the Texas Deceptive Trade Practices and Consumer Protection Act.

Settlement Terms

Under the terms of the settlement, the defendant will pay $1.5 million into a settlement fund.

The settlement defines the class as all TrueBeginnings subscribers who at any time from March 10, 2005, through Dec. 31, 2008, canceled their subscription; were subsequently resubscribed to the service as a result of clicking on an auto-subscription link; and from whom TrueBeginnings collected subscription fees after the class member clicked on the auto-subscription link.

Class members who resubscribed as a result of clicking on an auto-subscription link are eligible to receive a $35 refund if they were charged a single month's subscription or $50 if they were charged for more than one month. Class members who were charged subscription fees after canceling but did not resubscribe by clicking on an auto-subscription link are eligible for 45 days of free subscription service on the defendant's Web site.

The agreement also provides that the defendant will implement an intervening affirmative step to its auto-subscription system to require the subscriber to consent to resubscription.

Jon G. Shepherd of Alston & Bird in Dallas and Jonathan K. Tycko and Anna Hsia of Tycko & Zavareei in Washington, D.C., represent the plaintiff. Gary D. Eisenstat and Keith Verges of Figari & Davenport in Dallas represent the defendant. ■

Preliminary Approval Granted To $41.5 Million Vytorin, Zetia Consumer Class Action

NEWARK, N.J. — On Sept. 21, a New Jersey federal judge granted preliminary approval to a $41.5 million settlement of the federal Vytorin/Zetia multidistrict litigation and granted conditional certification to a master class and two subclasses (<u>In Re: Vytorin/Zetia Marketing, Sales Practices and Products Liability Litigation</u>, No. 08-cv-00285, MDL No. 1938, D. N.J.).

(**Preliminary approval order available.** Document #52-091015-002R.)

An estimated 100 federal lawsuits for sales and marketing practices and product liability claims involving the Vytorin and Zetia anti-cholesterol drugs were centralized April 8, 2008, in the U.S. District Court for the District of New Jersey under Judge Dennis M. Cavanaugh.

ENHANCE

On Jan. 14, 2008, Schering-Plough Corp. and Merck & Co. Inc. released the ENHANCE (Effect of Combination Ezetimibe and High-Dose Simvastatin vs. Simvastatin Alone on the Atherosclerotic Process in Patients with Heterozygous Familial Hypercholesterolemia) study, which found that Vytorin, a combination of Zetia and Zocor anti-cholesterol drugs made by the respective companies, was not more effective than less-costly generic Zocor.

The plaintiffs allege that the defendants engaged in unfair, unlawful or fraudulent business practices by failing to disclose the ENHANCE results for nearly two years.

Lead counsel for the plaintiffs filed a letter with Judge Cavanaugh on Aug. 5, informing him of the settlement as well as a case settlement agreement and release and proposed plan of allocation.

2 Subclasses

Judge Cavanaugh said in his order granting preliminary approval to the settlement that all requirements of Federal Rules of Civil Procedure 23(a) and 23(b)(3) have been satisfied.

The settlement includes a master class of all people and entities that purchased Vytorin or Zetia from Nov. 1, 2002, to Sept. 17, 2009. The master class is separated into consumer and third-party payer subclasses.

A final approval hearing will be held Feb. 8 to consider the issues of certification, whether the settlement is fair, reasonable and adequate and attorney fees and costs for class counsel.

James E. Cecchi of Carella, Byrne, Bain, Gilfillan, Cecchi, Stewart & Olstein in Roseland, N.J., and Christopher Seeger and Stephen Weiss of Seeger Weiss in Newark are co-lead counsel for the plaintiffs. Ezra D. Rosenberg of Dechert in Princeton, N.J., represents Merck, Schering-Plough and Merck-Schering Pharmaceuticals. ■

Settlement Of Consumer Fraud Action Remanded To Require Proper Notice

SAN FRANCISCO — The settlement of a class action lawsuit involving claims that a software manufacturer defrauded consumers was remanded by a California appeals court on Sept. 15 (Sara Cho v. Seagate Technology Holdings Inc., No. A121623, Calif. App.; 1st Dist.; 2009 Cal. App. LEXIS 1520).

(**Opinion available.** Document #43-091001-002Z.)

A unanimous panel of the First District Court of Appeal remanded a lawsuit against Seagate Technology Holdings Inc. to the San Francisco County Superior Court to require notice to the class that accurately reflects class membership as agreed upon by the parties. The panel held that the trial court did not abuse its discretion by approving the settlement agreement and that there are no facts to show the parties engaged in collusion or improper conduct.

Justice Peter J. Siggins wrote the opinion on behalf of the panel and was joined by Justices Stuart R. Pollak and Martin J. Jenkins.

Class Claims

In August 2005, Sara Cho sued Seagate Technology Holdings Inc. in the Superior Court, alleging that Seagate overstated the storage capacity of its computer hard drives in advertising and product labeling by approximately 7 percent.

Cho claimed that the overstatement was caused by Seagate using a decimal definition of gigabyte that differed from the binary definition that was used by computer operating systems.

Cho asserted claims for violations of Section 17200 of the California Business and Professions Code and the California Consumer Legal Remedies Act.

Settlement Reached

The parties reached a settlement agreement that was preliminarily approved by the trial court in September 2007. Under the terms of the agreement, the settlement class was defined as all people and entities that purchased in the United States a retail hard drive at any time between March 22, 2001, and the date of preliminary approval.

A "retail hard drive" was defined as "a new Seagate brand hard disc drive that was purchased from an authorized Seagate retailer or distributor, separately as a Seagate product, that was not pre-installed into and sold bundled with a personal computer or other electronic device." Seagate estimated that there were more than 6 million qualifying purchases during the relevant period.

Seagate agreed to more precisely disclose the capacity of its hard drives on its packaging and its Web site.

In addition, for disc drives purchased before Jan. 1, 2006, class members could choose a cash payment equal to 5 percent of the net purchase price or the Seagate Software Suite that would allow users to perform enhanced computer and disc management functions. The estimated average cash benefit payable per hard drive was $7, and the software had an estimated retail value of $40. For disc drives purchased after Jan. 1, 2006, class members were entitled to receive the software. The settlement provided an award of $1.75 million in attorney fees and $35,500 in costs to class counsel and a $5,000 incentive fee to Cho.

Class member David Klausner objected to the settlement and appealed the trial court's approval of the agreement to the Court of Appeal.

Improper Notice

On appeal, Klausner argued the definition of the settlement class was unduly restrictive, the scope of the plaintiff class described in the complaint had been abandoned and those who bought disc drives from independent retailers were unfairly excluded.

"We have no impression that there are large numbers of claimants who will come forward if the class definition and notice are corrected, but the problem with this notice creates more than a remote theoretical possibility that the claims of unsuspecting class members will be brushed aside," the panel said. "It was error for the trial court to approve this settlement without correcting the ambiguous definition of the plaintiff class. Although we disapprove the class definition and notice, the error we identify is not fatal to this settlement."

It ordered the trial court to clarify the scope of the plaintiff class and issue a new settlement notice.

Brian R. Strange and Gretchen Carpenter of Strange & Carpenter in Los Angeles and Adam J. Gutride and Seth A. Safier of Gutride Safier in San Francisco represent the plaintiff. Peter S. Hecker, Dylan I. Ballard and Neil A.F. Popovic of Sheppard Mullin Richter & Hampton in San Francisco represent Seagate. Charles D. Chalmers of Fairfax, Calif., represents Klausner. ■

Judge Preliminarily Approves $19.92 Million Settlement For RESPA Class Action

NEW YORK — A federal judge on Sept. 24 preliminarily approved a settlement agreement in which J.P. Morgan Chase Bank would provide a maximum of $19.92 million in cash refunds to members of a class of individuals who allege that the lender violated the Real Estate Settlement Procedures Act (RESPA) when it charged them a post-closing fee with the origination of their residential mortgage loans (Sylvia Cohen v. J.P. Morgan Chase & Co., et al., No. 04-CV-4098, E.D. N.Y.; 2009 U.S. Dist. LEXIS 88241).

(**Opinion available.** Document #85-091023-007Z.)

U.S. Judge Charles P. Sifton of the Eastern District of New York also conditionally approved certification of the class, which is comprised of all borrowers who were charged a post-closing fee by J.P. Morgan Chase & Co. and J.P. Morgan Chase bank in connection with residential mortgage loans obtained between Sept. 22, 2001, and Dec. 31, 2008.

Sylvia Cohen sued Chase and J.P. Morgan Chase & Co. (collectively, Chase) in September 2004, alleging that the lender violated Section 8(b) of RESPA when it charged an unearned post-closing fee of $225 for a loan she and her husband obtained in September 2003 to refinance the loan on their Brooklyn, N.Y., apartment. Approximately 50,000 people were charged a post-closing fee ranging from $125 to $325 for reviewing documents received from the settlement agent to ensure that the agent followed Chase's closing instructions, correcting any mistakes in the documents, retrieving any documents that were missing from the file, combining the existing closing documents with the existing underwriting documents in a particular order and sending the combined documents to the National Post Closing (NPC) center and forwarding any late-arriving documents to NPC. According to the ruling, the post-closing fee was charged primarily in the New York area until 2007, when Chase shifted to a fee structure that did not include a post-closing fee.

Fees Reimbursed, Costs Paid

In March 2005, Judge Sifton granted Chase's motion to dismiss the case and denied Cohen's request for reconsideration. The Second Circuit U.S. Court of Appeals reversed and remanded the ruling on Aug. 6, 2007. Cohen filed a first amended complaint on Oct. 12, 2007, and Chase moved for summary judgment on July 18, 2008, but Judge Sifton denied the motion on Jan. 28. The parties moved for preliminary approval of the settlement on Aug. 21.

Under the settlement agreement, each class member will receive 100 percent reimbursement of the post-closing fee paid, plus interest at 5 percent per annum. In addition to the refunds, Chase has agreed to pay attorneys' fees and counsel expenses for Cohen and the class as well as the costs of notice and settlement administration. Cohen will receive $15,000 in recognition of her contributions as class representative and as compensation for her post-closing fee.

A final fairness hearing will be held Dec. 22.

The plaintiffs are represented by Catherine Elizabeth Anderson of Giskan, Solotaroff & Anderson and Oren Gisken of Gisken & Solotaroff. David Sapir Lesser and Noah Adam Levine of Wilmer Cutler Pickering Hale & Dorr represent Chase. All are in New York.

(Additional documents available. **First amended complaint.** Document #85-091023-008C. **Motion for settlement.** Document #85-091023-009M.) ■

Judge Approves Settlement Involving Bowling Centers' Alleged Unlawful Tip Retention

NEW YORK — A New York federal judge on Sept. 18 granted preliminary approval of a settlement agreement that would resolve claims that a nationwide bowling center chain unlawfully retained gratuities that were meant for service employees (Robert O'Dell, et al. v. AMF Bowling Centers Inc., No. 09 cv 759, S.D. N.Y.; 2009 U.S. Dist. LEXIS 85954).

(**Opinion available.** Document #43-091001-015Z.)

U.S. Judge Denise L. Cote of the Southern District of New York approved a proposed agreement that defines the settlement class as all persons who are or were employed by AMF Bowling Centers Inc. and have worked at least 10 months as lane captains, lane servers, lane attendants, lounge attendants, food and beverage attendants, runners and/or bartenders at traditional AMF Bowling Centers locations at any time between Jan. 27, 2003, and June 12, 2009, and all persons who have worked at least one month in any of the aforementioned positions at AMF's 300 Centers in the Chelsea Piers section of New York or in Melville, N.Y., operated by the defendants during the same class period.

A final fairness hearing has been scheduled for Nov. 6.

Class Claims

On Jan. 27, 2009, Robert O'Dell, Francisco Diaz, Anabel Diaz and Alicia Perez filed a class action lawsuit in federal court against AMF.

(**Complaint available.** Document #43-091001-014C.)

The plaintiffs claim that AMF misappropriated mandatory gratuities and other tips paid by customers. The workers claim that AMF leads customers to believe that the gratuities go to the workers that provide food and drinks to the customers; however, the plaintiffs claim that AMF uses a portion of the gratuities to supplement the compensation of nonservice employees.

The plaintiffs sought damages for violations of New York Labor Law Article 6 regarding unlawful tip retention.

Settlement Terms

Under the terms of the proposed agreement, AMF will establish a settlement fund of $670,000. Class members will receive cash payments from the fund based on the number of weeks they were employed by AMF and at which location they worked.

The agreement provides $233,000 in attorney fees and an additional $20,000 in expenses to class counsel. In addition, the agreement provides a $5,000 incentive payment for O'Dell and $2,500 incentive payments for the remaining three named plaintiffs.

Counsel

James J. Griffin of KU & Mussman in Bardonia, N.Y., Brian S. Schaffer of Fitapelli & Schaffer in New York and Justin M. Swartz, Linda A. Neilan and Rachel M. Bien of Outten & Golden in New York represent the plaintiffs.

Ivan D. Smith and Peter T. Shapiro of Lewis Brisbois Bisgaard & Smith and Sabrina M. Tann of the New York City Law Department represent AMF. All are in New York. ■

Approval Of $9.5 Million Settlement With Facebook Over Advertising Program Sought

SAN JOSE, Calif. — The plaintiffs in a class action lawsuit against social networking site Facebook Inc. over its advertising program moved Sept. 18 for preliminary approval of a $9.5 million settlement agreement (Sean Lane, et al. v. Facebook, Inc, et al., No. 08-03845, N.D. Calif.; See 8/21/08, Page 12).

(**Motion for preliminary approval of settlement agreement available.** Document #74-090925-008M.)

Under the terms of the agreement, "Facebook with establish and administer a cash settlement fund of nine million, five hundred thousand dollars ($9,500,000), which will be used to establish and operate a privacy foundation devoted to funding and sponsoring programs designed to educate users, regulators, and enterprises regarding critical issues relating to protection of identity and personal information online through user control, and to protect users from online threats." Although individual class members receive no direct compensation from the fund, all attorney fees and costs, as well as any enhanced awards to the named plaintiffs, will be paid out of the fund.

In addition, Facebook has agreed to terminate its controversial "Beacon" advertising program within 60 days of the preliminary approval date.

Users' Activities

A group of consumers sued Facebook and several companies that participated in its Beacon advertising service in the U.S. District Court for the Northern District of California in August 2008. The plaintiffs claimed that Facebook shared information about users' activities with advertisers without their permission. Facebook was accused of collecting and sharing personal data about its users without users' permission to enhance the company's profitability and revenue through advertising. The plaintiffs also claimed that when consumers made a purchase on a Facebook advertiser's Web site, the consumers' personal information was shared with Facebook regardless of whether that person was a Facebook user.

In addition to Facebook, Blockbuster Inc., Fandango Inc., Hotwire Inc., STA Travel Inc., Overstock.com Inc., Zappos.com Inc. and Gamefly Inc. were named as defendants.

The plaintiffs sought damages for violations of the Electronic Communications Privacy Act, violations of the Video Privacy Protection Act, civil conspiracy, violations of the California Consumer Legal Remedies Act, violations of California's computer crime law under Section 502 of the California Penal Code, violations of the Computer Fraud and Abuse Act and unjust enrichment.

Scott Kamber and David Stampley of KamberEdelson in New York, Joseph H. Malley of the Law Office of Joseph H. Malley in Dallas and David C. Parisi and Suzanne H. Beckman of Parisi & Havens in Sherman Oaks, Calif., represent the plaintiffs. Maria Ostrovsky in Boston and Michael G. Rhodes, Emily F. Burns and Melina K. Patterson in Palo Alto, Calif., all of Cooley Godward Kornish, represent Facebook. ■

Texas Landowners Sue Developer For Fraud, RICO Violations

DALLAS — Two Lake Whitney, Texas, property owners filed a class action lawsuit in federal court on Sept. 22, accusing the developer of their property of unlawfully pocketing payments intended to benefit property owners (Betty Bridgewater, et al. v. Double Diamond-Delaware Inc., et al., No. 3:09-cv-1758, N.D. Texas).

(**Complaint available.** Document #43-091001-020C.)

Betty Bridgewater and Jerry Williams sued Double Diamond-Delaware Inc., Double Diamond Inc., R. Mike Ward, Fred Curran, White Bluff Club Corp., White Bluff Golf Inc., The Inn at White Bluff Inc., White Bluff Marina Inc., The Lighthouse Dining Co. and The White Bluff 19th Hole Inc. in the U.S. District Court for the Northern District of Texas.

Class Claims

The plaintiffs are among the approximately 6,000 lot owners who have purchased property at the White Bluff Resort in Lake Whitney. The resort features two 18-hole golf courses, a restaurant and lake views. The resort was developed by Double Diamond-Delaware Inc.

The plaintiffs claim that only about 10 percent of the lots at the resort have homes built on them. The plaintiffs claim that instead of developing the resort further, the defendants are gaining revenue by assessing the landowners annual fees that must be made payable to the White Bluff Property Owners Association (WBPOA). The plaintiffs maintain that the WBPOA is a nonprofit organization controlled by the defendants.

The plaintiffs maintain that each year, the mandatory fees for food and beverages, golf course maintenance and other expenses earn the defendants more than $4 million. The plaintiffs maintain that the WBPOA fees are unlawfully transferred to the White Bluff Club Corp., which is also a Double Diamond company.

The plaintiffs maintain that property owners who have questioned the association fees or attempted to change the makeup of the WBPOA board have been sued by Double Diamond for defamation.

In June, the Dallas County District Court found in favor of one landowner and the court entered a judgment upon finding that the food and beverage fees violated the WBPOA's bylaws and state law. The plaintiffs maintain that despite the court ruling, the defendants continue to send property owners bills for the fees. The plaintiffs claim that property owners who fail to pay the fees are reported to credit agencies that their accounts are delinquent.

Putative Class

The plaintiffs seek to represent a class of all current and former White Bluff Resort property owners who from January 2004 to the date the class is certified paid assessments to the WBPOA. The class is estimated to include at least 6,000 members.

The plaintiffs seek damages for violations of the Racketeer Influenced and Corrupt Organizations Act, offensive collateral estoppels, breach of fiduciary duty, misapplication of fiduciary property, constructive trust, unjust enrichment and conspiracy.

Martin E. Rose, Michael D. Richardson and Lynda L. Weaver of Rose-Walker in Dallas and Barbara T. Hale, Nellie G. Hooper and Jeffrey D. Smith of Blanscet Sutherland Hooper & Hale in Addison, Texas, represent the plaintiffs. ■

Arbitration Service Provider Accused Of Bias, Fraud And Conflict Of Interest

LOS ANGELES — A company representing itself as the "leading forum for consumer arbitrations" was sued Sept. 1 as part of a class action lawsuit that accused the company of bias and misleading consumers on its impartiality (Anthony Magnone, et al. v. Accretive LLC, et al., No. CV09-6375, C.D. Calif.).

(**Complaint in Section A.** Document #43-091001-006C.)

Anthony Magnone and Randal Kinnunen sued Accretive LLC, Agora Fund I GP LLC, Axiant LLC, Mann Bracken LLP, National Arbitration Forum Inc. (NAF), National Arbitration Forum LLC and Dispute Management Services LLC in the U.S. District Court for the Central District of California. NAF and Mann Bracken are owned by Accretive and its related entities, according to the plaintiffs.

Class Claims

The plaintiffs claim that an arbitration forum must be impartial so that consumers can be confident that their disputes with creditors will be heard fairly. The plaintiffs maintain that NAF has misled consumers as to its impartiality based on the fact that it is owned and is beholden to a debt collection agency and debt collection law firm, such that in reality NAF was a debt collector in its own right.

The plaintiffs claim that NAF is not a neutral forum for resolving disputes by the debt collection industry against consumers. The plaintiffs claim that the defendants falsely held NAF out to be independent and unaffiliated with any people or entities within or outside the collections industry and falsely presented NAF's arbitration services as neutral. The result of the alliances constituted a near perfect success rate by debt collectors against consumers in NAF arbitrations, the plaintiffs allege.

NAF is accused of establishing incentives for arbitrators to favor debt collectors over consumers; disregarding consumers' evidence and/or arguments; overlooking and violating its own procedure to benefit debt collectors; disregarding creditors' lack of evidence; and failing to provide legitimate arbitration services to consumers.

Putative Class

The plaintiffs seek to represent a class of all people in the United States who had an arbitration award entered against them by NAF and in favor of Axiant, Mann Bracken or any of their predecessors and/or clients between June 1, 2006, and the present.

The plaintiffs seek damages for violations of the California Consumer Legal Remedies Act, breach of contract, violations of the Fair Debt Collection Practices Act, violation of the Rosenthal Fair Debt Collection Practices Act and violations of Sections 17200 and 17500 of the California Business and Professions Code.

Jeff S. Westerman and Sabrina S. Kim of Milberg in Los Angeles, Ian D. Chowdhury of Winnetka, Calif., and Peter Safirstein, Andrei Rado and Roland Riggs of Milberg in New York represent the plaintiffs. ■

FEMA Trailer Litigation Jury Renders Defense Verdict In Louisiana Bellwether Trial

NEW ORLEANS — Defendants Gulf Stream Coach Inc. and Fluor Enterprises Inc. prevailed Sept. 24 in the first bellwether trial in litigation consolidated in the U.S. District Court for the Eastern District of Louisiana that alleges that mobile homes and trailers provided by the Federal Emergency Management Agency to hurricane refugees exposed the plaintiffs to dangerous levels of formaldehyde (In Re: FEMA Trailer Formaldehyde Products Liability Litigation, No. 07-1873, MDL 1873; Charlie Age, et al. v. Gulf Stream Coach, Inc., et al., No. 09-2892, E.D. La.; See 9/25/09, Page 31).

Alana Alexander and her 12-year-old son, Christopher Cooper, were chosen for the first trial from among the thousands of people provided emergency housing units after Hurricane Katrina struck the Gulf Coast in August 2005. They pursued claims against Gulf Stream, the manufacturer of the trailer, and Fluor Enterprises, the contractor that installed the trailer. Alexander and Cooper dismissed their claims against FEMA before the trial. Alexander alleges that the formaldehyde aggravated Cooper's asthma and exposed them to an increased risk of cancer.

The trial began Sept. 14.

Mikal C. Watts of Watts Law Firm in Corpus Christi, Texas, a member of the Plaintiffs' Steering Committee, said the verdict will be appealed on procedural grounds.

"We are disappointed in, but respect, the jury's verdict," he said. "We intend to appeal this judgment on the basis that the defense lawyers improperly used all five of their peremptory challenges on the basis of race — striking five African-Americans with their five strikes, violating *Batson v. Kentucky* [476 U.S. 79; 106 S. Ct. 1712; 90 L. Ed. 2d 69; 1986 U.S. LEXIS 150] and *Miller-El v. Dtreke* [545 U.S. 231; 125 S. Ct. 2317; 162 L. Ed. 2d 196; 2005 U.S. LEXIS 4658]. Our position is the Court should have never allowed the trial to go forward after the defendants used race to achieve a jury profile it preferred."

Counsel for the defendants did not respond to a request for comment.

Counsel

Andrew D. Weinstock and Joseph G. Glass of Duplass, Zwain, Bourgeois, Pfister & Weinstock in Metairie, La., are liaison counsel for the defendants. Gerald E. Meunier and Justin I. Woods of Gainsburgh, Benjamin, David, Meunier & Warshauer in New Orleans are co-liaison counsel for the plaintiffs. Anthony Buzbee of Buzbee Law Firm in Galveston, Texas; Robert M. Becnel of the Law Offices of Robert M. Becnel in LaPlace, La.; Raul Bencomo of Bencomo & Associates in New Orleans; Frank D'Amico Jr. of the Law Offices of Frank D'Amico Jr. in New Orleans; Matt Moreland of The Becnel Law Firm in Reserve, La.; Linda Nelson of Lambert & Nelson in New Orleans; Dennis Reich of Reich & Binstock in Houston; and Watts comprise the Plaintiffs' Steering Committee.

Charles R. Penot Jr. of Middleberg, Riddle & Gianna in Dallas, Dominic J. Gianna and Sarah A. Lowman of Middleberg, Riddle & Gianna in New Orleans and Richard A. Sherburne of Middleberg, Riddle & Gianna in Baton Rouge, La., represent Fluor.

Weinstock and Glass of Duplass, Zwain, Bourgeois, Pfister & Weinstock in Metairie and Timothy Scandurro and Dewey Scandurro of Scandurro & Layrisson in New Orleans represent Gulf Stream. ■

Dismissal Of Privacy Class Action Against Retailer Reversed On Appeal

SAN DIEGO — A California appeals court on Sept. 21 reversed a San Diego judge's order dismissing a class action lawsuit that accused retailer Pottery Barn Inc. of violating state privacy laws (Susan Catherine Powers v. Pottery Barn Inc., No. D054336, Calif. App., 4th Dist., Div. 1; 2009 Cal. App. LEXIS 1555).

(**Opinion available.** Document #43-091001-016Z.)

A unanimous panel of the Fourth District Court of Appeal, Division One, issued a reversal of San Diego County Superior Court Judge Jeffrey B. Barton's dismissal order on the grounds that the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM) preempted a plaintiff's claims under the Song-Beverly Credit Card Act of 1971.

Justice Patricia D. Benke wrote the opinion on behalf of the panel and was joined by Justices Richard D. Huffman and James A. McIntyre.

Class Claims

On March 12, 2008, Susan Catherine Powers filed a class action lawsuit against Pottery Barn Inc. in the Superior Court, alleging that she visited a Pottery Barn store, selected an item to purchase and, when she used her credit card, was asked to provide an e-mail address. Powers provided the sales clerk with her e-mail address, and the clerk entered it into the store's computer system.

Powers claims that Pottery Barn made a practice of asking for personal identification information. Powers sought damages for violations of the Song-Beverly Act, violations of Section 17200 of the California Business and Professions Code and invasion of privacy. The Song-Beverly Act limits the information that may be requested of a consumer when a consumer uses a credit card to transact business.

Judge Barton entered a judgment of dismissal based on his finding that CAN-SPAM preempted Powers' claims under the Song-Beverly Act.

Preemption

The panel found that Judge Barton erred in his finding that CAN-SPAM preempts the plaintiff's claims because the federal law does not preempt state laws that are not specific to electronic mail.

"Because Song-Beverly's regulation of what may be asked of credit card customers is not a regulation of what can be sent in commercial e-mails and is not in any manner specific to e-mail, we conclude Song-Beverly is not pre-empted by CAN-SPAM," the panel said.

The panel found that Congress expressly provided that CAN-SPAM preempts state anti-SPAM laws; however, Congress specifically limited the preemptive impact of CAN-SPAM.

"CAN-SPAM cannot be interpreted as pre-empting application of Song-Beverly to Pottery Barn's collection of e-mail from its credit card customers. Song-Beverly does not expressly regulate any Internet activity, let alone use of 'electronic mail to send commercial messages.' Rather, as we have discussed, Song-Beverly only governs the information businesses may collect in the course of transacting business with credit card users. Thus Song-Beverly does not fall within the scope of CAN-SPAM's express pre-emption provisions," the panel held.

Counsel

James R. Patterson, Harry W. Harrison and Cary A. Kinkhead of Harrison Patterson O'Connor & Kinkhead in San Diego and Gene J. Stonebarger, James M. Lindsay and Richard D. Lambert of Folsom, Calif., represent the plaintiff.

Phillip C. Cardon and Elizabeth S. Berman of Sheppard Mullin Richter & Hampton in Los Angeles represent the defendant. ■

6th Circuit Panel Affirms Dismissal Of State Law Securities-Related Claims

CINCINNATI — A federal appellate panel on Sept. 17 affirmed an Ohio federal judge's dismissal of a class action lawsuit that accused an Ohio bank of mismanaging investors' portfolios (Daniel J. Segal v. Fifth Third Bank N.A., et al., No. 08-3576, 6th Cir.; 2009 U.S. App. LEXIS 20629).

(**Opinion available.** Document #43-091001-010Z.)

A unanimous panel of the Sixth Circuit U.S. Court of Appeals affirmed a dismissal order issued by U.S. Judge Sandra S. Beckwith of the Southern District of Ohio, who held that the Securities Litigation Uniform Standards Act of 1998 (SLUSA) prohibits individuals from filing class actions involving 50 or more people seeking to vindicate state law securities-related claims.

Circuit Judge Jeffrey S. Sutton wrote the opinion on behalf of the panel and was joined by Circuit Judge Richard A. Griffin and U.S. Judge Sara Lioi of the Northern District of Ohio, sitting by designation.

Class Claims

Daniel J. Segal is a beneficiary of trust accounts formerly administered by Fifth Third Bank N.A.

In 2007, Segal sued the bank in the District Court on behalf of himself, his children and all beneficiaries of trust, estate or other fiduciary accounts for which the bank acted as a corporate fiduciary at any time from March 1, 2001, to the present.

Segal claimed that the bank breached its fiduciary and contractual duties to the putative class by investing fiduciary assets in proprietary Fifth Third mutual funds rather than superior funds operated by the bank's competitors; by promising trust beneficiaries that their fiduciary accounts would receive individualized management and instead provided standardized and largely automated management; and by investing too many of the funds' assets in low-yielding investments to cover the accounts' near-term tax liabilities.

Claims Prohibited

The panel found that SLUSA clearly prohibits the plaintiff's claims as presented.

"All of Segal's counts — breach of fiduciary duty, unjust enrichment, breach of contract — revolve around Fifth Third's decision to buy mutual fund shares. Segal's allegations do not merely 'coincide' with securities transactions; they depend on them," the panel wrote. "Under these circumstances, the district court properly concluded that SLUSA requires the dismissal of this complaint."

The panel rejected Segal's argument that the disclaimer included in his complaint stating that none of his claims is based upon any misrepresentation of failure to disclose material facts to the plaintiff allowed him to avoid the application of SLUSA to his claims. To allow this interpretation would frustrate the objectives of SLUSA and reopen the "federal flight" loophole that SLUSA sought to close, the panel wrote.

"Courts may look to — they must look to — the substance of a complaint's allegations in applying SLUSA. Otherwise, SLUSA enforcement would reduce to a formalistic search through the pages of the complaint for magic words — 'untrue statement,' 'material omission,' 'manipulative or deceptive device' — and nothing more. But a claimant can no more elude SLUSA's prohibitions by editing out covered words from the complaint than by disclaiming their presence. For the same reason a claimant does not have the broader authority to disclaim the applicability of SLUSA to a complaint, he cannot avoid its application through artful pleading that removes the covered words from the complaint but leaves in the covered concepts," the panel wrote.

David A.P. Bower of New York represents the plaintiff. Patrick F. Fischer, Joseph M. Callow Jr., Rachael A. Rowe and Brian P. Muething of Keating Muething & Klekamp in Cincinnati represent the defendants. ■

Off-Label Use Of LASIK Isn't Experimentation Under Calif. Laws, Judge Says

SAN DIEGO — Off-label use of the Nidek LASIK device does not support a claim of unlawful human experimentation, a California federal judge ruled Aug. 31 in dismissing a class action with leave to amend (Robert Perez, et al. v. Nidek Co. Ltd., et al., No. 08-1261, S.D. Calif., San Diego Div.; 2009 U.S. Dist. LEXIS 78214).

(**Opinion available.** Document #28-090917-015Z.)

Robert Perez and Nancy Art filed a class action against Nidek Inc. and six eye doctors in the U.S. District Court for the Southern District of California, alleging that Nidek and the doctors used the Nidek EC-5000 Excimer Laser System to perform hyperopic laser *in situ* keratomilesis (LASIK) surgery while the device was not approved for that use and without obtaining informed consent.

The plaintiffs allege that in 2002, the Food and Drug Administration warned Nidek about replacing electronic chips to enable the device to perform hyperopic vision correction. They also said that in 2001, the FDA warned doctors who were using Nidek lasers that contained software that was not approved for commercial distribution.

Later in 2001, the plaintiffs continue, the FDA warned doctors that lasers needed to be certified as being in compliance with federal regulation.

State, Noninjury Claims

The plaintiffs allege violation of the Human Subjects in Medical Experimentation Act, unfair or deceptive acts, violations of the California Consumer Legal Remedies Act and violation of the California Unfair Competition Law Section 17200. They seek statutory damages, restitution, disgorgement and punitive damages, but do not claim personal injuries.

Nidek and doctors Gary M. Kawesch, Farzad Yaghouti and John Kownacki moved to dismiss.

Judge Barry Ted Moskowitz said the California Health and Safety Code definition of medical experiment and informed consent requires that the research not be intended to improve the health of a subject. "Herein," he said, "the use of the Laser to correct farsightedness was reasonably related to improving the health of the subject" and does not qualify as medical experiments under law.

In addition, Judge Moskowitz said the plaintiffs do not allege that the laser was used for investigational purposed within California statutory definitions. Nidek, he said, was not required to obtain informed consent.

Can't Enforce FDCA

The plaintiffs' claims under the Consumer Legal Remedies Act and Unfair Competition Law, the judge said, "impermissibly seek private enforcement of the FDCA [Food, Drug and Cosmetic Act]."

The plaintiffs' allegations of violations of the FDCA, Judge Moskowitz said, require determinations that "should be decided by the FDA in the first instance." An FDA warning letter about the marketing of the lasers does not constitute a final decision by the FDA, the judge said.

Finally, he said that the plaintiffs' claims are time-barred and that the discovery rule does not apply to unfair competition actions. He said that the plaintiffs' surgeries took place in 2000 and 2002 and that the unfair competition statute of limitations expired in 2008, before the case was filed.

Can Refile

Judge Moskowitz gave the plaintiffs 20 days to file an amended complaint.

The plaintiffs are represented by Duane A. Admire of Admire & Associates in Del Mar, Calif., Gene J. Stonebarger of Lindsay & Stonebarger in Folsom, Calif., and Harry W. Harrison and James R. Patterson of Harrison, Patterson & O'Connor in San Diego. Nidek is represented by Alan H. Fairley and Thomas M. Robins III of Frandzel, Robins, Bloom & Csato in Los Angeles.

Kawesch is represented by Rita R. Kanno of Lewis, Brisbois, Bisgaard & Smith in San Diego. Yaghouti is represented by Gabriel M. Benrubi of Belsky & Associates in San Diego.

Kowncki is represented by Gregory M. Hulbert of Gonzalez & Hulbert in Glendale, Calif. ■

Panel Affirms Denial Of Motion To Compel Arbitration Of Consumer Fraud Action

SAN FRANCISCO — A unanimous panel of the Ninth Circuit U.S. Court of Appeals on Sept. 23 affirmed a California federal judge's denial of a motion to compel arbitration of a consumer fraud class action filed against a cellular phone provider (Jonathan Kaltwasser v. Cingular Wireless LLC, No. 08-15962, 9th Cir.; 2009 U.S. App. LEXIS 21091).

(**Opinion available.** Document #43-091001-018Z.)

The panel affirmed an order issued by U.S. Judge Jeremy Fogel of the Northern District of California, who found that an arbitration clause contained in AT&T Mobile LLC's consumer service contract was unconscionable under California law.

The panel comprised Circuit Court Judges Carlos T. Bea, Mary M. Schroeder and Stephen R. Reinhardt.

Class Claims

On Jan. 22, 2007, Jonathan Kaltwasser filed a class action lawsuit against Cingular Wireless in federal court, asserting a claim for breach of contract and claims for violations of Section 17200 of the California Business and Professions Code and the California Consumer Legal Remedies Act.

Cingular subsequently became AT&T Mobile LLC.

AT&T filed a motion to compel arbitration under the Federal Arbitration Act pursuant to the terms of its contract with Kaltwasser.

Judge Fogel denied AT&T's motion to compel arbitration on the ground that the provision in AT&T's consumer cell phone contract requiring consumers to waive the right to bring a class action and consent to arbitration is unconscionable under California law.

Unconscionable Clause

The panel found that California has more of an interest in the enforcement of the service contract than Virginia. The panel held although Virginia is where Kaltwasser currently receives his wireless bills, it is neither where the contract was formed nor the state whose laws Kaltwasser alleges AT&T violated in its advertising that enticed him to enter into the contract.

The panel held that Virginia law disfavors class action lawsuits and, as a result, is in conflict with California law, which generally finds class action waivers to be unconscionable. The panel found that the choice-of-law provision within the contract is ambiguous and, as a result, must be construed against AT&T because the cellular phone provider drafted the ambiguous language.

The fact that both the original and revised arbitration provisions include a waiver of the right to bring a class action renders the provisions unconscionable under California law, the panel held.

Counsel

Michael D. Braun of Los Angeles; Joseph N. Kravec Jr. and Wyatt A. Lison of Specter Evans & Manogue in Pittsburgh; Janet L. Spielberg of Los Angeles; and Ira Spiro of Spiro Moss Barness in Los Angeles represent the plaintiff.

David L. Balser and Nathan L. Garroway of McKenna Long & Aldridge in Atlanta; Donald M. Falk of Mayer Brown in Palo Alto, Calif.; Felicia Yi-Wen Feng of McKenna Long & Aldridge in San Francisco; and Evan M. Tager of Mayer Brown in Washington, D.C., represent AT & T. ■

3rd Circuit Vacates Arbitration Order In PBM Antitrust Case

PHILADELPHIA — A panel of the Third Circuit U.S. Court of Appeals on Sept. 24 vacated a multidistrict litigation judge's order vacating an arbitration order issued by the transferor judge in an antitrust case, finding that a transferee judge has no authority to vacate an order of a transferor court (In re: Pharmacy Benefit Managers Antitrust Litigation, Bellevue Drug Co., et al. v. Caremark, No. 07-1151, 3rd Cir.; 2009 U.S. App. LEXIS 21125).

(**Opinion available.** Document #31-091007-019Z.)

Arbitration Ordered

In August 2003, retail pharmacies Bellevue Drug Co. Inc., Robert Schreiber Inc. d/b/a Burns Pharmacy and Rehn-Heurbinger Drug Co. d/b/a Parkway Drugs #4 and pharmacy associations The Pharmacy Freedom Fund and National Community Pharmacists Associations filed a class action lawsuit against AdvancePCS, a pharmacy benefit manager (PBM), in the U.S. District Court for the Eastern District of Pennsylvania.

The plaintiffs alleged that AdvancePCS used the combined economic power of its plan sponsors to reduce the contractual amount it pays to retail pharmacies below the levels that would prevail in a competitive marketplace and that its pharmacy agreements impose limitations on drug refills and co-payment charges to plan members. The plaintiffs contend that AdvancePCS's actions constituted an unlawful conspiracy between it and its plan sponsors in violation of the Sherman Act.

In August 2004, Judge Eduardo C. Robreno granted AdvancePCS's motion to compel arbitration and to stay the action in the District Court.

Before arbitration began, the case, in 2006, was transferred as one of six cases for coordination of pretrial proceedings by the Judicial Panel on Multidistrict Litigation into In re: Pharmacy Benefit Managers Antitrust Litigation, MDL 1782, in the Eastern District of Pennsylvania.

Order Vacated

In May 2006, the plaintiffs filed a motion with the MDL judge to lift the stay and dismiss the complaint so that they could pursue an appeal of the District Court's August 2004 order.

Judge John P. Fullman on Dec. 18, 2006, *sua sponte* signed an order and supporting memorandum vacating the August 2004 order and then dismissed the motion to dismiss as moot.

In issuing the order, Judge Fullman found that even though the order compelling arbitration was appropriate, the District Court judge had not actually decided whether the issues involved were arbitrable or whether the arbitration agreement was enforceable.

The actions of the JPMDL presumed that the stay of proceedings did not preclude coordinated pretrial proceedings in an MDL, so Judge Fullman said he could diverge from the District Court's orders "to the limited extent of considering whether any useful purpose would be served in submitting all preliminary determinations to the arbitrator."

Judge Fullman concluded that the parties did not intend the type of litigation at issue to be submitted to arbitration because an arbitrator would be precluded from considering the antitrust claims asserted; therefore, he found the arbitration agreement was unenforceable.

Law Of Case Doctrine

AdvancePCS appealed to the Third Circuit, contending, *inter alia*, that Judge Fullman's orders vacating the arbitration order violated the Federal Arbitration Act, that the claims of the pharmacy plaintiffs and the association plaintiffs are subject to arbitration and that the arbitration provisions in the agreements are enforceable.

In reversing Judge Fullman's order, the appeals court said it need not address the merits of any of AdvancePCS's arguments because Judge Fullman's order cannot stand under the law of case doctrine. Judge Theodore A. McKee wrote the opinion, in which Judges Thomas L. Ambro and Ruggero J. Aldisert concurred.

Judge Fullman did not rely on any of the exceptions to the law of the case doctrine in vacating the arbitration order and failed to find any extraordinary circumstances that would have justified vacating the order, the appeals court said.

No Authority

Judge Fullman also erroneously found that he had the authority to vacate the arbitration order notwithstanding the law of case doctrine, holding that "[a]s a general proposition, a transferee judge under the Multidistrict statute may vacate or modify any order of a transferor court bearing upon pretrial matters," the court said.

Nothing in the text of 28 U.S. Code Section 1407 — the MDL transfer statute — authorizes a transferee judge to vacate or modify an order of the transferor judge, the appeals court said.

If Judge Fullman's interpretation of the statute were accurate, litigation would begin a new with each MDL transfer, the appeals court said, adding that it did not believe Congress intended that a "Return to Go" card would be given to parties involved in MDL transfers.

The appeals court remanded the case with instructions to reinstate the order compelling arbitration and staying the case pending arbitration.

Steven E. Bizar and Landon Y. Jones III of Buchanan, Ingersoll & Rooney in Philadelphia, Michael Sennett and Paula W. Render of Jones Day in Chicago and Victor E. Grimm and Jason M. Marks of Bell, Boyd & Lloyd in Chicago represented the appellants. Michael J. Freed of Freed Kanner London & Millen in Bannockburn, Ill., Jean K. Janes of Much Shelist Denenberg Ament & Rubenstein in Chicago and H. Laddie Montague Jr. and Martin I. Twersky of Berger & Montague in Philadelphia represented the appellees. ■

Consumer Fraud Class Action Remanded To California State Court

SAN FRANCISCO — A California federal judge on Sept. 15 remanded to California state court a consumer fraud class action lawsuit accusing a dietary supplement manufacturer of misleading consumers (Joseph Rotenberg, et al. v. Brain Research Labs LLC, et al., No. C-09-2914, N.D. Calif.).

(**Opinion available.** Document #43-091001-001Z.)

U.S. Judge Samuel Conti of the Northern District of California granted Joseph Rotenberg's motion to remand on the grounds that the federal court lacks subject matter jurisdiction over the putative class action.

Class Claims

On May 12, Rotenberg filed a class action lawsuit in the Marin County Superior Court against Brain Research Labs LLC, 20/20 Brain Power Partners LLC, Charles Conaway, Richard Cote, Lorac Holdings LLC, Sabre Capital Management LLC, Sabre Capital Partners LP, Shrik Mehta, Brain Power Founders LLC, Joshua Reynolds, John Arnold, Medhealth Direct Inc., Arnold Bresky, Cynthia Watson, Gerry Mathews, Cheryl Sindell, Con Stough, Keith Wesnes and Andrea Zangara. On June 29, the defendants filed a notice of removal, seeking to establish jurisdiction in the U.S. District Court for the Northern District of California.

(**Notice of removal available.** Document #43-091001-003N.)

Rotenberg claims that the defendants marketed its dietary supplement Provera AVH in a false and misleading manner that deceived consumers. The plaintiff claims that the defendants sold the product without warnings despite the fact that the product may cause adverse health effects in users and may interfere with a variety of prescription drugs.

Rotenberg claims that the defendants market Provera as a product than can protect the brain from a head injury or stroke, protect the liver from the harmful byproducts of alcohol, reduce depression, address the adverse effects of Alzheimer's disease and increase the circulation of blood to the brain.

Rotenberg seeks to represent a class of all purchasers of Provera AVH in the State of California. The plaintiff seeks damages for violations of Sections 17200 and 17500 of the California Business and Professions Code and violations of Section 1750 of the California Civil Code.

Remand Granted

Judge Conti held that the defendants failed to meet their burden of establishing that the amount in controversy satisfies the $5 million minimum requirement under the Class Action Fairness Act (CAFA). Judge Conti also found that the plaintiff satisfied the local controversy exception under CAFA by bringing the action only on behalf of California residents and several key defendants are citizens of California for the purposes of jurisdiction.

Likewise, Judge Conti found that the plaintiff has not stated a federal cause of action that would provide a basis for establishing federal jurisdiction. The judge ruled that the plaintiff's complaint does not include allegations of federal law that are essential to the establishment of his claim.

"The complaint unabashedly invokes federal law to support five of its six causes of action. However, none of these claims necessarily turns on a federal question," Judge Conti said. "Plaintiff is not treading upon an area of law that is peculiarly federal in character. . . . Nor is this an area of law that has been assigned to the exclusive jurisdiction of federal courts."

Judge Conti ruled that the area of drug labeling is enforced by state and federal law and that Congress has not conferred on federal courts the authority to enforce drug labeling requirements on which the plaintiff relies. The fact that California law serves to regulate drug labeling causes the court to find that Rotenberg's complaint does not implicate a federal question, Judge Conti said.

Thomas H. Clarke Jr. and Timothy A. Dolan of Ropers Majeski Kohn & Bentley represent the plaintiffs. Bruce B. Kelson and Barry W. Lee of Manatt Phelps & Phillips represent the defendants. All are in San Francisco. ■

Federal Judge Delays Fairness Hearing In Google Library Project Case

NEW YORK — A federal judge on Sept. 24 agreed to adjourn the final fairness hearing on a settlement regarding Google Inc.'s plan to digitize books and make them available online free of charge, known as Google Library Project (GLP), so that the parties can work with the U.S. Department of Justice to address the DOJ's concerns that the proposed settlement does not comply with antitrust, copyright and class action law (The Authors Guild Inc., et al. v. Google Inc., No. 1:05-cv-08136-JES, S.D. N.Y.; See 11/3/08, Page 6).

(**Order available.** Document #81-091022-002R.)

On Sept. 18, the DOJ filed a statement of interest in the U.S. District Court for the Southern District of New York, cautioning that the proposed settlement raises antitrust and copyright concerns. On Sept. 22, the plaintiff author groups moved to adjourn the final fairness hearing. Google did not oppose the motion.

Current Proposed Settlement

In December 2004, Google announced its partnership with several prominent university libraries to create the GLP plan. The Authors Guild, which represents more than 8,000 writers, sued Google for copyright infringement in the District Court in September 2005, protesting the search engine's plans to reproduce the authors' works without permission. A group of publishers, headed by McGraw-Hill Cos. Inc., filed a similar action a month later.

After more than two years of negotiations, the parties proposed a $125 million settlement, which included $45 million compensation from Google for class members whose works have already been published in the project and an allotment of $34.5 million to establish a "Books Rights Registry" (BRR). The BRR would track the project, administer future revenues and oversee an opt-out plan that gives copyright holders the ability to determine the extent to which their works will be included in the project. The settlement proposes to settle all parties' disputes with Google and dispose of the McGraw-Hill action. In response to the rights holders' criticism about inclusion in the GLP without their consent, the settlement proposes to establish "a rights clearance mechanism" that will allow copyright holders to retain control over their works.

Operative Agreement

In agreeing to delay the fairness hearing, Judge Denny Chin said "it makes no sense to conduct a hearing on the fairness and reasonableness of the current settlement agreement, as it does not appear that the current settlement will be the operative one."

Judge Chin noted that the plaintiff author groups said that their ongoing negotiations with the DOJ will result in significant changes to the current settlement and that they do not plan to seek approval of the current settlement.

The government is represented by Deputy Assistant Attorney General William F. Cavanaugh of the DOJ's Antitrust Division in Washington, D.C., and U.S. Attorney Prett Bharara and Assistant U.S. Attorney John D. Clopper of the Southern District of New York U.S. Attorney's Office in New York.

Michael J. Boni, Joanne Zack and Joshua Snyder of Boni & Zack in Bala Cynwyd, Pa., Robert J. LaRocca of Kohn Swift & Graf in Philadelphia and Sanford P. Dumain of Milberg in New York represent the Authors Guild, individual authors and the author subclass. Bruce P. Keller, Jeffrey P. Cunard and James J. Pastore Jr. of Debevoise & Plimpton in New York represent the Association of American Publishers Inc., individual publishers and the publishers' subclass.

Ronald Lee Raider, Alex Seth Fonoroff and Joseph M. Beck of Kilpatrick Stockton in Atlanta, Adam Howard Charnes of Kilpatrick Stockton in Winston-Salem, N.C., and Jeffrey A. Conciatori of Quinn Emanuel Urquhart Oliver & Hedges in New York represent Google.

(Additional documents available: **Unopposed motion to adjourn final fairness hearing.** Document #81-090923-043B. **DOJ's statement of interest.** Document #24-091015-009B. **Motion for preliminary settlement approval.** Document #43-081103-008M. **Order granting preliminary settlement.** Document #24-081125-101R. **Settlement agreement.** Document #24-081125-003P. **Second amended complaint.** Document #24-081125-002C.) ■

PFOA Medical Monitoring Survives Summary Judgment; Torts Fail As Matter Of Law

PARKERSBURG, W.Va. — Negligence, nuisance and intentional torts claims alleged by putative class representatives seeking damages for perfluorooctanoic acid contamination of the Parkersburg public water system are unsustainable as a matter of law, a federal judge said Sept. 28, but he grudgingly determined that the class can pursue a medical monitoring claim against DuPont under the West Virginia Supreme Court of Appeals decision in Wanda S. Bower v. Westinghouse Electric Corp. (522 S.E.2d 424 [W.Va. 1999]) (William R. Rhodes, et al. v. E.I. du Pont de Nemours & Co., No. 06-530, S.D. W.Va.; See 1/8/09, Page 12).

(**Memorandum order available.** Document #15-091006-001R.)

William R. Rhodes, Russell H. Miller and Valori A. Mace allege that perfluorooctanoic acid released from the DuPont Washington Works refinery near Parkersburg increases their risk of disease. They seek to represent a class of the residents of Parkersburg who consumed Parkersburg Water District water.

The plaintiffs assert seven claims against DuPont in the second amended complaint filed after Chief U.S. Judge Joseph R. Goodwin of the Southern District of West Virginia denied class certification in September 2008. The plaintiffs seek to recover under theories of negligence; gross negligence, reckless, willful and wanton conduct; private nuisance; public nuisance; past and continuing trespass; past and continuing battery; and medical monitoring.

DuPont filed a motion for summary judgment in March in which it alleged that the claims are barred by the statute of limitations. It filed a second motion for summary judgment in June in which it argued that the plaintiffs failed to meet their causation burden.

Statute Of Limitations

"Because there are questions of fact as to what level of PFOA released from the Washington Works Plant constitutes tortious conduct, it cannot be determined when such tortious conduct began or ended," Judge Goodwin said. "Under such circumstances, dismissal on statute-of-limitations grounds would be inappropriate."

Addressing the motion for summary judgment on the merits, Judge Goodwin said the plaintiffs provided sufficient causation evidence to support negligence and gross negligence. But, he said, the claims fail as a matter of law.

"To recover under a negligence theory, a plaintiff must show injury. Generally, the injury can be either present injury or 'reasonably certain' future injury," Judge Goodwin said.

Quoting a defense memorandum, Judge Goodwin said plaintiffs admit they are not claiming an injury either latent or manifest as a result of exposure to PFOA.

"The plaintiffs have also failed to assert — and, based on the current evidence, they cannot successfully assert — that they will be subject to 'reasonably certain' future injuries," he said. "In short, under traditional tort law, the plaintiffs have shown no compensable injury to sustain their negligence causes of action."

Similarly, the private nuisance, public nuisance, trespass and battery claims fail as a matter of law, he said.

Private Nuisance

"A private nuisance does not exist where water pollution affects only a municipal water supply. In order to effect a private nuisance, the contaminated water must reach the groundwater below the plaintiff's property or affect a direct supply of water on an individual's property," he said.

To sustain a public nuisance claim, plaintiffs must demonstrate a special injury, he said. "The only injuries alleged by the plaintiffs as 'special injuries' are the 'PFOA contamination of their properties and bodies' and their 'increased risk of disease.' (Mem. Opp'n Mot. Summ. J. 11.) These injuries, however, are not special injuries with which the plaintiffs have standing to bring a public nuisance claim. First, the alleged PFOA contamination alone, without any evidence of physical harm, is not an injury at all and certainly not one upon which the plaintiffs could base their public nuisance claim. Second, though a significantly increased risk of disease could perhaps qualify as a special injury, it cannot in this case because the plaintiffs have alleged that all individuals who have consumed PWD water for at least one year have suffered a significantly increased risk of disease."

The battery and trespass claims are likewise deficient as a matter law, Judge Goodwin said. "The injuries the plaintiffs allege — the presence of PFOA in their bodies and drinking water and their significantly increased risk of disease justifying medical monitoring — do not effect the tangible interference with bodily integrity and property to sustain trespass and battery claims," he said.

"As discussed above, the plaintiffs have not alleged sufficient injury to support their traditional tort claims and cannot independently recover under those claims. Yet I reluctantly conclude that the plaintiffs need not show an existing injury or a reasonably certain future injury for their negligence claims to support their medical monitoring claim," Judge Goodwin said.

Medical Monitoring

"*Bower* [1999 W.Va. LEXIS 118] frames its requirement for a preexisting tort as 'tortious *conduct*.' *Id.* At 433 (emphasis added). Thus, the emphasis is on whether the defendant has breached a duty that could cause harm — *not* on whether the conduct actually results in present or 'reasonably certain' future harm."

"DuPont had a duty to avoid unreasonable harm; plaintiffs' pleadings sufficiently allege a breach of that duty; and, as discussed above, I find the evidence of causation sufficient to withstand summary judgment. The plaintiffs cannot recover under their negligence cause of action because they have shown no tangible injury. But the plaintiffs' negligence claims survive to the extent that they may support a medical monitoring claim," he said.

Judge Goodwin signed an order on July 31 scheduling a Nov. 3 trial. He entered an order on Sept. 22 staying the scheduling order pending a ruling on the instant summary judgment motions. In addition to issuing the order dismissing the tort claims and allowing the class to pursue the medical monitoring claim, Judge Goodwin lifted the stay on Sept. 28.

The Rhodes plaintiffs were originally parties in Jack Leach v. E.I. du Pont de Nemours & Co. (No. 01-608, W.Va. Cir., Wood Co.), but the Leach class was limited to parties with contaminated water. DuPont settled with some 80,000 plaintiffs in the Parkersburg area and neighboring Ohio communities for PFOA contamination of public water systems in Leach. The Rhodes parties subsequently discovered PFOA contamination in their Parkersburg municipal water.

DuPont agreed to pay the Leach class $85 million cash and nearly $30 million in legal costs in exchange for settling the dispute. DuPont agreed to an initial cash payment of $70 million, of which $20 million is for health and education projects.

Counsel

Clifford F. Kinney Jr., Nathan B. Atkinson and Niall A. Paul of Spilman Thomas Battle in Charleston, W.Va., Laurence F. Janssen of Steptoe & Johnson in Los Angeles and Jennifer Quinn-Barabanov, Mark P. Fitzsimmons, Douglas G. Green, Libretta Porte Stennes and Anthony F. Cavanaugh of Steptoe & Johnson in Washington, D.C., represent DuPont.

Harry G. Dietzler and R. Edison Hill of Hill, Peterson, Carper, Bee & Deitzler in Charleston; Robert A. Bilott and Gerald R. Rapien of Taft, Stettinius & Hollister in Cincinnati; Larry A. Winter of Winter, Johnson & Hill in Charleston; and J. Steven Justice of Taft, Stettinius & Hollister in Dayton, Ohio, represent the plaintiffs. ■

Federal Judge Again Denies Request For Higher Fees In Price-Fixing Case

NEW YORK — Following a second remand from the Second Circuit U.S. Court of Appeals, a federal judge in New York again denied a request for an increase in attorney fees related to the settlement of an antitrust case involving claims that modeling agencies conspired to fix commissions, finding that the judge failed to adequately explain his reasoning (Carolyn Fears, et al. v. Wilhelmina Model Agency, et al., No. 02CV4911[HB], S.D. N.Y.; 2009 U.S. Dist. LEXIS 85252; See 8/2/07, Page 29).

(**Opinion and order available.** Document #81-090923-030Z.)

Previous Remand Order

Current and former models sued New York modeling agencies, alleging that the agencies conspired to fix commissions charged to the models in violation of Section 1 of the Sherman Act.

U.S. Judge Harold Baer Jr. of the Southern District of New York approved a $21.85 million settlement between the models and Boss Models Inc., Click Model Management Inc., DNA Model Management LLC, Ford Models Inc., Gerard Ford, Images Management, IMG Models Inc., Next Management Co., Wilhelmina International Inc. and Zoli Management Inc.

The settlement fund was to be distributed on a pro-rata basis to general class members based on the amount of commissions paid by each member in excess of 10 percent, and Judge Baer directed that any unclaimed funds were to be distributed to various New York area charities under the *cy pres* doctrine.

Judge Baer awarded attorney fees using the "percentage of the fund" method, using counsel's lodestar as a "crosscheck" and making findings on three of the six factors enunciated in Goldberger v. Integrated Res., Inc. (209 F.3d 43 [2nd Cir. 2000]). He allocated to the plaintiffs' counsel fees of $3.76 million, which represented 40 percent of the claims that had then been made on the settlement fund and 17.2 percent of the settlement fund itself.

In January 2007, the Second Circuit vacated the award of counsel fees, holding that an award of counsel fees in a class action must be based on the amount of the total settlement fund rather than claims made against the settlement fund and that Judge Baer erred in taking into account in setting the attorney fee misconduct for which counsel had already been sanctioned. The Second Circuit also directed the judge to consider the *cy pres* allocation in light of his discretion to award treble damages to the plaintiffs.

Inadequate Explanation

In July 2007, on remand, Judge Baer adhered to his initial fee award but allocated to the plaintiffs' counsel supplemental fees of $577,000, which represented the same proportion that the initial fee award bore to counsel's claimed lodestar. The supplemental award brought the total fee award to 20 percent of the settlement fund. The judge also granted the plaintiffs' counsel's request for reimbursement of $70,800 in expenses and $90,800 for additional administrative costs.

Judge Baer also directed distribution of the residual funds, approximately $1.67 million, to several charities that "address maladies that primarily affect women," noting that the majority of the class was female.

In its March 16, 2009, unpublished order vacating the July 2007 judgment, the Second Circuit commented that "[t]he district court certainly was not required on remand to increase its fee award. But it was required to explain adequately its reasons for determining that the unchanged award was reasonable, and the explanation it provided on remand was incomplete. . . . [W]e have no basis to determine whether it was an abuse of discretion for the district court to adhere to its initial award (as increased to reflect subsequent work) of fees equal to only around 20% of the fund and less than half of counsel's lodestar."

The appeals panel commented that Judge Baer permissibly exercised his discretion to make a *cy pres* distribution rather than to the plaintiffs as treble damages based on equitable grounds.

Number Of Claims Made

In the instant order, Judge Baer rejected the plaintiffs' counsel's application for 33 percent of the settlement fund, saying that "there is no doubt that a fee of 17 to 20% of the fund is squarely in the mainstream. . . and following the directive to consider the requested fee with reference to the entire fund I believe it is proper to locate a percentage award towards the center, rather than the high end, of the spectrum."

The judge commented that "the 28,000 hours expended by Plaintiffs' Counsel are not facially disproportionate or excessive" but said that a reduced percentage fee toward the middle of the range was appropriate given that some of the hours expended were the result of the plaintiffs' counsel's "undue contentiousness."

Judge Baer also said that "the small percentage of the class who made claims on the Settlement Fund suggests that Counsel's post-settlement efforts left something to be desired," adding that "an effort by [the plaintiffs'] lawyers to address and ameliorate [the fear of being blackballed] would have, in my view, resulted in more claims being made on the fund."

The judge concluded that "[i]t is undisputed that Plaintiffs' Counsel secured a substantial settlement in unchartered waters, and this achievement goes a long way to confirm the overall quality of the representation provided to the class" but that an award of 33 percent of the fund was not warranted.

Finally, Judge Baer said that "any additional funds awarded to Counsel will necessarily diminish the indirect benefits conferred upon the class by the *cy pres* distribution, a concern that is heightened by the small number of class members who made claims on the fund."

Counsel

The plaintiffs are represented by Paul R. Verkuil of Boies, Schiller & Flexner in New York; Olav A. Haazen and Melissa S. Kho of Boies Schiller in Armonk, N.Y.; Andrew W. Hayes of Hayes & Hardy in New York; and Merrill G. Davidoff and Bart D. Cohen of Berger Montague in Philadelphia.

(Additional documents available: **Second Circuit's March 2009 opinion and order.** Document #81-090422-018R. **District Court's July 2007 opinion and order.** Document #81-070725-027Z. **Second Circuit's January 2007 opinion and order.** Document #81-070131-007Z.) ■

3rd Circuit Affirms Denial Of Reimbursement Case; Exhaustion Required

PHILADELPHIA — A Third Circuit U.S. Court of Appeals panel on Sept. 8 affirmed dismissal of two class action cases brought by hospitals in a reimbursement dispute, saying that the plaintiffs were required to exhaust administrative remedies before bringing their claims (Michigan Hospitals Inc., et al. v. Health Net Federal Services LLC, No. 08-2860; Lakewood Health System, et al. v. TriWest Healthcare Alliance Corp., No. 08-2861, 3rd. Cir.; 2009 U.S. App. LEXIS 20041).

(**Opinion available.** Document #31-090916-026Z.)

Exhaustion Required

In January 2007, Northern Michigan Hospitals Inc. and Gifford Medical Center Inc. filed a class action lawsuit against Health Net Federal Services, and in February 2007, Lakewood Health System and Northwest Medical Center filed a class action lawsuit against TriWest Healthcare Alliance in the U.S. District Court for the District of Delaware.

The defendants are private contractors that underwrite health care services relating to TRICARE, the federal managed health care program for the armed services. The plaintiffs are non-network participating hospitals. In both cases, the plaintiffs allege that the defendants breached an implied-in-fact contract and were unjustly enriched when the defendants failed to reimburse the hospitals for certain charges according to TRICARE regulations.

In May 2008, Judge Gregory M. Sleet dismissed the cases, saying that the plaintiffs were required to exhaust administrative remedies before bringing their claims. Although TRICARE does not clearly require administrative exhaustion, Judge Sleet said he would exercise his discretion to require administrative exhaustion because requiring exhaustion would allow the TRICARE agency to apply its special regulatory expertise to the dispute and requiring exhaustion would aid judicial efficiency.

The hospitals appealed to the Third Circuit.

Administrative Review Appropriate

The real question in the dispute is whether the hospitals are entitled to more money because the regulations have not been properly applied to their claims for reimbursement, Judge D. Michael Fisher wrote for the court. Judge Michael A. Chagares and U.S. Judge Paul S. Diamond of the Eastern District of Pennsylvania, sitting by designation, concurred.

The issue is thus not purely a legal one but requires a factual determination as to whether expenses that qualify as facility charges were incurred, whether such charges were properly billed and how much is owed if they were incurred and properly billed, the appeals court said.

What is required by the underlying dispute is an application of the TRICARE regulations to the hospitals' specific claims for reimbursement, thus the central claim is best understood as a challenge to the denial of payment, which is an appropriate issue for administrative review, the appeals court said.

Not Futile

The hospitals argued that even if their claims were administratively appealable, exhaustion would be futile and unnecessarily burdensome.

To invoke the futility exception to exhaustion, a party must "provide a clear showing" of futility, but the hospitals did not establish such a clear showing of futility; therefore, the District Court acted within its discretion by requiring the hospitals to exhaust administrative remedies, the appeals court said.

The relief the hospitals seek is not foreclosed because they have the opportunity to present evidence to the TRICARE Management, which manages and administers TRICARE, that they incurred expenses that qualify as facility charges, that they properly billed these charges and that Health Net and TriWest did not reimburse them, the appeals court said.

Further, requiring exhaustion would not be "burdensome" because it would "help avoid unnecessary intrusion by the judiciary into Executive Branch affairs and will promote judicial economy by allowing the agency to utilize its expertise in resolving disputed factual issues, correct its own errors (if any resulted from Health Net and Triwest's refusal to provide additional reimbursement), and develop the factual record for the benefit of a reviewing court in the event that the administrative process does not resolve the dispute in its entirety," the appeals court said.

Counsel

Matt Neiderman, Gary William Lipkin, Gregory Brodek, Michael Gottfried, Patricia R. Rich, Seth Goldberg, Robert M. Palumbos and John Soroko of Duane Morris in Wilmington, Del., represent the plaintiffs.

Jennifer Gimler Brady and Richard L. Horwitz of Potter Anderson & Corroon in Wilmington and Christopher Flynn, Arthur N. Lerner, Tracy A. Roman and Kathleen Taylor Sooy of Crowell & Moring in Washington, D.C., represent Health Net. Katherine J. Neikirk of Morris James in Wilmington and Robert S. Ryland and Scott M. Abeles of Kirkland & Ellis in Washington represent TriWest.

(Additional documents available: **Appellant brief.** Document #31-090916-027B. **Appellee brief.** Document #31-090916-028B. **Reply brief.** Document #31-090916-029B. **District Court opinion.** Document #31-080618-107Z.) ■

Judge: Man Successfully Alleges Fast-Food Chain's Gift-Card Policy Is Unlawful

SAN DIEGO — A man's amended complaint successfully alleges that a fast-food chain's failure to redeem gift cards valued at less than $10 violates the unlawful prong of California's unfair competition law but not that he was deceived or misled by the declarations on the card, a federal judge held Sept. 21 (Rey Marilao, et al. v. McDonald's Corp., No. 09-01014, S.D. Calif.; 2009 U.S. Dist. LEXIS 86150).

(**Order available.** Document #58-091028-001R.)

Rey Marilao filed a putative class action suit in the San Diego County Superior Court, alleging that McDonald's Corp.'s failure to redeem his $5 gift card for cash violated the California unfair competition law (UCL), Business and Professions Code Sections 17200 and 17500. Marilao, who also alleged unjust enrichment, sought a class of all customers who have balances of less than $10 and wanted to exchange their cards for cash.

McDonald's removed the action to the U.S. District Court for the Southern District of California.

Amended Complaint

After a dismissal, Marilao filed a first amended complaint in July 2009. Marilao added claims that McDonald's cards state that they cannot be redeemed for cash "unless required by law." Marilao argued that California Civil Code Section 1749.5(b)(2) allows individuals with gift certificates with a value of less $10 to redeem them for cash. McDonalds moved to dismiss for failure to state a claim.

Judge Marilyn L. Huff noted that previously, Marilao failed to allege a violation of Section 1749.5(b)(2). Section 1749.5(b)(1) allows for cash redemption but does not require it upon presentation of a gift card, Judge Huff said. Nor did Marilao allege that his card was valued at $5 in his original complaint, she said.

Unlike Section 1749.5(b)(1), Section 1749.5(b)(2) does require cash redemption for cards containing less than $10, Judge Huff said. In his amended complaint, Marilao alleges both that his card entitled him to cash and that he attempted to redeem it, Judge Huff said. Marilao has also alleged that he does not want a McDonald's product and that its unlawful conduct forces him to keep a gift card that can be redeemed only for product he does not want, Judge Huff said.

Lost Money

"Defendant's argument that plaintiff did not in fact lose any money or property is better suited for summary judgment," Judge Huff said.

However, Judge Huff said Marilao fails to state a claim for deceptive and misleading language under Business and Professions Code Section 17500. Marilao does not allege that his reliance on the language on the back of the gift card caused him to lose money or property, Judge Huff said.

Finally, Judge Huff said Marilao has sufficiently alleged a cause of action for unjust enrichment. Judge Huff noted that Marilao alleges that McDonald's is paid in full for the gift cards it offers and unjustly enriches itself through its unlawful and unfair practice of refusing to redeem cards containing less than $10 for cash.

Stephen B. Morris of Morris & Associates in San Diego represents Marilao. Mark P. Pifko and James F. Speyer of Arnold & Porter in Los Angeles represent McDonald's.

(Additional documents available: **Notice of removal.** Document #58-091028-002B. **Memo supporting dismissal.** Document #58-091028-003B. **Opposition.** Document #58-091028-004B. **Reply.** Document #58-091028-005B. **Amended complaint.** Document #58-091028-006C.) ■

Commentary

Removal Under CAFA: The Emerging Judicial Split Over Whether A Defendant May Rely On Its Own Documents To Establish That The Amount In Controversy Exceeds The $5 Million Statutory Threshold

By
Rodney L. Lewis
and
Howard S. Suskin

[Editor's Note: Rodney L. Lewis is an Associate and Howard S. Suskin is a Partner with the law firm of Jenner & Block LLP in Chicago. Mr. Lewis is a member and Mr. Suskin is Co-Chair of the Firm's Class Action Practice Group. Copyright 2009 by Rodney L. Lewis and Howard S. Suskin.]

The Class Action Fairness Act (CAFA)[1] has provided defendants who are sued in class actions an expanded opportunity to remove those cases to federal court if CAFA jurisdictional requirements are met. Pursuant to CAFA, a defendant may remove a class action to federal court if the aggregate number of plaintiffs is 100 or greater, there is minimum diversity, and the amount in controversy exceeds $5 million.[2] The most oft-litigated prong of the test is whether the amount in controversy exceeds the statutory minimum.[3] Courts hold that the removing defendant bears the burden of establishing the amount in controversy.[4] Increasingly, disputes among the parties about whether federal jurisdiction exists focus on how the removing defendant may establish that the amount in controversy exceeds $5 million.[5]

A split is emerging among the circuit courts over whether defendants may establish the amount in controversy through documents that they themselves produce. Some circuits, including the First and Seventh, have adopted approaches that allow defendants to establish the amount in controversy through the defendants' own documentation.[6] The circuits' reasoning is based on the removing defendants bearing the burden of persuasion in establishing the amount in controversy and the removing defendants' access to potentially more useful information than the plaintiffs regarding class size and possible damages.[7]

Recently, however, the Eleventh Circuit held that moving defendants must rely on documents received from the plaintiff to establish the amount in controversy.[8] The court reasoned that a defendant generally does not have direct knowledge of the plaintiff's claims.[9] The emerging split among the circuits has important implications for a defendant's ability to remove a case to federal court under CAFA.

Congress Intended CAFA To Expand Federal Jurisdiction For Class Actions

Congress enacted CAFA in 2005 in an effort to prevent class-action lawsuit abuse by reducing forum shopping in state courts that were perceived to be too plaintiff-friendly.[10] Congress sought to make the federal courts more accessible by relaxing the requirements for federal jurisdiction for cases involving class actions.[11] CAFA provides original jurisdiction in federal court whenever the aggregate number of plaintiffs is 100 or greater, there is minimum diversity, and the amount in controversy exceeds $5 million.[12] Additionally, CAFA lifts the one-year statutory time limit for removal and provides for immediate interlocutory appeal of a federal district court's remand order.[13]

The Seventh Circuit And First Circuit Allow A Defendant To Establish The Amount In Controversy Through Defendant's Own Documentation

The Seventh Circuit has consistently allowed a defendant to establish the amount in controversy through the defendant's own documentation. *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005); *Spivey v. Vertrue, Inc.*, 528 F.3d 982 (7th Cir. 2008). In *Brill*, for example, the plaintiffs brought a purported class action under the Telephone Consumer Protection Act ("TCPA") on behalf of recipients of faxed advertisements from the defendants.[14] After the defendants removed the case under CAFA, the plaintiffs sought a remand. The district court remanded, finding that the defendants failed to carry their burden of showing that the amount in controversy exceeded CAFA's $5 million minimum amount in controversy.[15] The Seventh Circuit reversed, finding that the defendants established the amount in controversy through their own documentation.[16]

In *Brill*, the defendants alleged in the notice of removal that the amount in controversy exceeded the $5 million statutory threshold, based on the number of admitted fax transmittals at issue and the statutory remedies available under the TCPA. The TCPA provides that the court may award $500 per "junk fax."[17] The court may treble that amount if the defendants willfully and knowingly violate the statute.[18] Therefore, the court may award up to $1,500 per "junk fax." The defendants argued that the amount in controversy exceeded the $5 million threshold because, by the defendants' own admission, the defendants sent at least 3,800 advertising faxes and the award could thus reach $5.7 million.[19] If the plaintiffs could show that the defendants sent more than 3,800 faxes, the award could be higher. The Seventh Circuit agreed with the defendants.

The court did not specifically discuss whether defendants may establish the amount in controversy through documentation that they themselves produce. Nonetheless, the court permitted the defendants to rely on their own documentation to help the court determine the actual amount in controversy rather than all parties relying on the plaintiff's strategic estimation. The court also noted that the removing defendant may possess "vital knowledge that the plaintiff may lack."[20]

Similarly, the First Circuit allows defendants to establish the amount in controversy through documents that they produce. *Amoche v. Guarantee Trust Life Ins. Co.*, 556 F.3d 41 (1st Cir. 2009). In Amoche, plaintiffs brought a purported class action involving the refunding of premiums for credit insurance policies purchased in connection with loans to automobile buyers.[21] If the buyer pays off the loan early, some state consumer protection laws, and some insurance contracts, entitle the buyer to a refund of the unearned portion of the premium.[22] The initial *Amoche* complaint involved only automobile insurance policies purchased in New Hampshire, a state which has such a consumer protection statute.[23] The defendants removed to federal court and the plaintiffs sought a remand.[24] The district court remanded, ruling that the defendants failed to establish that the amount in controversy exceeded $5 million.[25] The First Circuit affirmed.[26] The district court and the First Circuit, however, allowed the defendants opportunity to introduce their own documentation in an attempt to establish the amount in controversy.

In *Amoche*, the defendants averred that since the inception of the litigation, $452,472.29 in refunds had been either made or requested in New Hampshire alone and if the totals from other states would generate similar amounts, the amount in controversy would exceed the statutory minimum.[27] The $452,472.29 figure was included in an affidavit from one of the defendants' vice presidents.[28] The affidavit was attached to the defendants' memorandum in opposition to the plaintiffs' motion to remand.[29] Both the district court and the First Circuit found that the defendants' arguments regarding the amount in controversy were insufficient to establish the amount in controversy with any certainty.[30] The defendants were allowed, however, to proffer their own documentation in an attempt to establish the amount in controversy.

Like the Seventh Circuit in *Brill*, the *Amoche* court did not directly discuss whether a defendant should be allowed to establish the amount in controversy through its own documentation. But, while discussing how the removing party bears the burden of establishing the amount in controversy, the First Circuit noted that "a federal court may consider which party has better access to the pertinent information."[31] Here, the court noted that the defendants had better information than the plaintiffs as to potential class size and potential damages but failed to provide sufficient affirmative evidence to establish the amount in controversy.[32] Though the First Circuit found that the defendants failed to meet their burden of persuasion, the court did allow the defendants to attempt to establish the amount in controversy through documentation that the defendants themselves produced.

Recent Eleventh Circuit Ruling Limits The Defendant To Establishing The Amount In Controversy Through Only Documents The Defendant Received From The Plaintiff

In a recent opinion, the Eleventh Circuit departed from the approaches adopted in other circuits. *Thomas v. Bank of America Corp.*, 570 F.3d 1280 (11th Cir. 2009). Affirming the district court's decision to remand, the Eleventh Circuit held that a defendant can not remove an action to federal court under CAFA unless documents provided by the plaintiff establish that the jurisdictional requirements are met.[33] In *Thomas*, the Eleventh Circuit quoted its own *language in Lowery v. Alabama Power Co.*, 483 F.3d 1184 (11th Cir. 2007), that "a case does not become removable as a CAFA case until a document is received by the defendant from the plaintiff-be it the initial complaint or a later received paper…that unambiguously establishes federal jurisdiction."[34]

In *Thomas*, the plaintiff filed a purported class action alleging violations of Georgia consumer protection laws and RICO in connection with the defendants' sale of bundled insurance products to ineligible individuals.[35] The action was brought on behalf of Georgia residents who enrolled in the defendants' Credit Protection Plus Plan ("Plan").[36] After the defendants removed the action to federal court, the district court remanded and the Eleventh Circuit affirmed.[37]

The defendants, in the notice of removal, had contended that during the relevant time period 77,878 customers were enrolled in the defendants' Plan and $4,825,809 in fees were collected.[38] With the plaintiffs seeking treble damages, the amount in controversy exceeded $5 million. The court found this contention to be insufficient.[39] The district court initially found that the $4.8 million figure did not furnish certainty in identifying the amount in controversy because the complaint did not allege that all of the Plan customers were entitled to a refund of their Plan fees.[40] Affirming, the Eleventh Circuit held that the defendants could not establish the amount in controversy through their own documentation, but instead must establish the amount in controversy through documentation received by the defendants from the plaintiff.[41] The court reasoned that a removing defendant generally "will have no direct knowledge of the value of the plaintiff's claims."[42] Here, the only document provided by the plaintiff to the defendants was the complaint. The court noted that the complaint did not provide information indicating the amount in controversy or the number of class members; consequently, the defendants could not establish that the amount in controversy exceeded $5 million.[43]

The *Thomas* opinion could have wide-reaching implications on defendants in class actions brought in state courts. This opinion appears to not only veer from the approaches adopted in other circuits but also from the congressional intent in enacting CAFA to make federal courts more accessible to defendants who wish to remove from state court. Under *Thomas,* a class action plaintiff could specify the amount in controversy in its pleadings to be under $5 million and avoid federal jurisdiction. Similarly, a class action plaintiff could avoid specifying the number of class members or potential damages per class member in its pleadings or "other documents" provided to the defendant, and accomplish the same goal of remaining in state court.

Conclusion

Notwithstanding CAFA's intended purpose of expanding the reach of federal jurisdiction to encompass more class actions, courts differ as to exactly how that jurisdictional basis is to be established. The Eleventh Circuit's deviation from other circuits' approach has created uncertainty on the issue and has made the opportunities to remove cases under CAFA more difficult. The issue of how defendants may meet their burden of showing jurisdiction under CAFA ultimately may require resolution either by Congress or by the U.S. Supreme Court. In the interim, plaintiffs and defendants alike must pay particular attention to how the jurisdictional amounts are framed in the pleadings and in subsequent submissions as they make strategic decisions about whether to litigate in state or federal forums.

Endnotes

1. 28 U.S.C. Section 1332 (d).

2. *Lowdermilk v. U.S. Bank Nat'l Ass'n,* 479 F.3d 994, 997, citing 28 U.S.C. §1332 (d).

3. *See e.g., Brill v. Countrywide Home Loans, Inc.,* 427 F.3d 446 (7th Cir. 2005; *Morgan v. Gay,* 471 F.3d 469 (3d. Cir. 2006); *Amoche v. Guarantee Trust Life Ins. Co.,* 556 F.3d 41 (1st Cir. 2009).

4. *See Spivey v. Vertrue, Inc.,* 528 F.3d 982 (7th Cir. 2008); *Amoche,* 556 F.3d 41 (1st Cir. 2009).

5. *See e.g., Brill,* 427 F.3d at 448-49; *Amoche,* 556 F.3d 41, at 51-52; *Thomas v. Bank of America Corp.*, 570 F.3d 1280, 1283 (11th Cir. 2009).

6. *See Brill,* 427 F.3d at 448-49; *Amoche,* 556 F.3d 41, at 51-52.

7. *See Id.*

8. *Thomas,* 570 F.3d at 1283.

9. *Thomas,* 570 F.3d at 1283.

10. *Amoche*, 556 F.3d at 47, citing CAFA, Pub.L. No. 109-2, § 2(a).

11. *Bell v. Hershey Co.*, 557 F.3d 953 (8th Cir. 2009), *citing,* CAFA, Pub.L. No. 109-2, § 2(a).

12. *Lowdermilk,* 479 F.3d at 997, *citing* 28 U.S.C. § 1332 (d).

13. *Amoche,* 556 F.3d at 47-48, *citing* 28 U.S.C. § 1332 (d)(2); *Lowdermilk*, 479 F.3d at 996, citing 28 U.S.C. § 1453 (c)(2) (specifying that the federal Court of Appeals has 60 days from the time it accepts the appeal to "complete all action on such appeal, including rendering judgment").

14. 427 F.3d at 447.

15. 427 F.3d at 447.

16. 427 F.3d at 447, 449.

17. 47 U.S.C. S 227.

18. 47 U.S.C. S 227.

19. 427 F.3d at 449.

20. 427 F.3d at 447.

21. 556 F.3d at 43.

22. 556 F.3d at 43.

23. 556 F.3d at 43.

24. 556 F.3d at 43-46.

25. 556 F.3d at 47.

26. 556 F.3d at 53.

27. 556 F.3d at 46, 51-52.

28. 556 F.3d at 46.

29. 556 F.3d at 46.

30. 556 F.3d at 53.

31. 556 F.3d at 51.

32. 556 F.3d at 52.

33. 570 F.3d at 1283.

34. 570 F.3d at 1283.

35. 570 F.3d at 1282.

36. 570 F.3d at 1282.

37. 570 F.3d at 1282-83.

38. 570 F.3d at 1282.

39. 570 F.3d at 1283.

40. 570 F.3d at 1282-83.

41. 570 F.3d at 1283.

42. 570 F.3d at 1283.

43. 570 F.3d at 1283. ■

Documents

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

ANTHONY MAGNONE and RANDAL KINNUNEN, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

v.

ACCRETIVE LLC; AGORA FUND I GP, LLC; AXIANT, LLC; MANN BRACKEN, LLP; NATIONAL ARBITRATION FORUM, INC.; NATIONAL ARBITRATION FORUM, LLC; DISPUTE MANAGEMENT SERVICES, LLC d/b/a FORTHRIGHT SOLUTIONS; DOES 1-10, inclusive;

Defendants.

CASE NO. CV09-6375 GAF (CWx)

CLASS ACTION COMPLAINT FOR:

(1) VIOLATION OF CONSUMER LEGAL REMEDIES ACT;
(2) BREACH OF CONTRACT;
(3) VIOLATION OF FAIR DEBT COLLECTION PRACTICES ACT;
(4) VIOLATION OF ROSENTHAL FAIR DEBT COLLECTION PRACTICES ACT;
(5) VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE § 17500 *et seq.*;
(6) VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE § 17200 *et seq.*

DEMAND FOR JURY TRIAL

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Plaintiffs Anthony Magnone and Randal Kinnunen, on behalf of themselves and all others similarly situated, allege the following against Accretive LLC, Agora Fund I GP, LLC, Axiant, LLC, Mann Bracken, LLP, National Arbitration Forum, Inc., National Arbitration Forum, LLC, and Forthright Solutions (collectively "Defendants"), upon personal knowledge as to their own actions and status, and upon information and belief as to all other matters.[1]

INTRODUCTION

1. Most consumer credit card agreements contain mandatory arbitration clauses, which require consumers to forfeit their rights to litigate their disputes in court and mandate that any disputes be resolved through an alternative system of binding arbitration. Many of these agreements require disputes to be resolved exclusively through Defendant National Arbitration Forum ("NAF").[2] For years, NAF falsely held itself out as an independent provider of neutral arbitration services in consumer debt matters, unaffiliated with any persons or entities within or outside the collections industry. Now, NAF is under siege by local and state prosecutors for working alongside creditors, rubber-stamping illegitimate arbitration awards against consumers, deceiving the courts and the public, and undermining the integrity of the arbitration system.

2. Defendant Mann Bracken LLP ("Mann Bracken") claims to be a law firm specializing in consumer debt collection matters, but it is a debt collector in its own right. Mann Bracken initiated thousands of so-called "arbitrations" through NAF. Most of these arbitrations were against consumers from whom Mann Bracken attempted to collect alleged credit card debts on behalf of its corporate clients, *e.g.*, major credit card companies. As a self-proclaimed "independent and

[1] Mr. Kinnunen asserts claims against all Defendants. Mr. Magnone asserts claims against all Defendants except Mann Bracken, LLP.

[2] "NAF" refers collectively to defendants National Arbitration Forum, Inc. ("NAF Inc."), National Arbitration Forum, LLC ("NAF LLC"), and Dispute Management Services, LLC, d/b/a Forthright Solutions ("Forthright").

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impartial arbitration provider," NAF was supposed to provide arbitration services devoid of conflicts of interest.

3. In reality, NAF and Mann Bracken worked in tandem for the collections industry, their interests strictly aligned with credit card companies against consumers by virtue of their common owner, Defendant Accretive, LLC ("Accretive"). Accretive owns and controls both NAF and Mann Bracken, and their related entities. NAF was thus far from an "independent and impartial arbitration provider," and instead, was a sham operation whose primary purpose was to rubber-stamp arbitration awards and confer the appearance of legitimacy upon Mann Bracken's debt collection efforts. NAF concealed its conflict of interest and provided bogus arbitration services instead of the legitimate dispute resolution services it promised and was contractually obligated to deliver to consumers.

4. The Attorney General of Minnesota recently exposed the concealed relationship between NAF and Mann Bracken, and the financial relationship with their common owner, a group of New York hedge funds known as Accretive LLC. According to the Attorney General's complaint, NAF "is financially affiliated with a New York hedge fund group that owns one of the country's major debt collection enterprises," which relationship NAF and Mann Bracken conceal from consumers.[3] Within days, NAF was forced to announce it was getting out of the consumer arbitration business.

5. The People of the State of California also sued NAF in a consumer fraud action brought by the City Attorney for the City of San Francisco. According to the City Attorney's complaint, based on NAF's own statistics from 2003 to 2007, "in each and every case where a business entity brought a claim against a consumer and the matter was disposed of by hearing, the NAF arbitrator

[3] Comp. ¶ 2, *State v. Nat'l Arbitration Forum, Inc.*, (Minn. Dist. Ct. filed July 14, 2009).

ruled in favor of the business entity – a 100% success rate." Comp. ¶22, State v. NAF, Case No. 08-473569 (Cal. Super. Ct., filed August 22, 2008). As alleged, NAF maintained its near perfect success rate for businesses by engaging in improper, deceptive and corrupt acts, including by:

(a) establishing incentives for arbitrators to favor debt collectors over consumers;

(b) disregarding consumers' evidence and/or arguments;

(c) overlooking and violating its own Code of Procedure to benefit debt collectors, and ultimately, large creditors;

(d) disregarding creditors lack of evidence; and

(e) failing to provide the bona fide arbitration services it promised to consumers.

6. NAF and Mann Bracken worked hand-in-hand to create the illusion of legitimacy and due process, with the purpose of railroading consumers into a corrupt dispute resolution process and bilking consumers out of hundreds or thousands of dollars, including NAF charges and Mann Bracken's alleged legal fees and costs. Despite revelation of their ruse, neither NAF, Mann Bracken, or any of the other Defendants, including Accretive, has returned the money consumers paid for the "arbitration" services they never received.

7. To commence debt collection, Mann Bracken submitted its claim to NAF and then mailed a "Notice of Arbitration," using a standardized form provided by NAF. The Notice falsely claimed that (a) NAF "is an independent and impartial arbitration organization, which does not give legal advice or represent parties"; and (b) "Parties have a full and equal right to present relevant and reliable direct and cross examination testimony, documents, exhibits, evidence and arguments." The Notice also provided that: "IF YOU DO NOT . . . FILE WITH THE FORUM A WRITTEN RESPONSE, AN ARBITRATION AWARD MAY BE ENTERED AGAINST YOU [AND] AN ARBITRATION AWARD

MAY BE ENFORCED IN COURT AS A CIVIL JUDGMENT." (all-caps in original).

8. The Notice of Arbitration also directed consumers to NAF's Code of Procedure (the "NAF Code") for information on filing a response. The NAF Code required, among other things, that the consumer's response "shall include" any "fees as provided in the Fee Schedule." In addition to other fees and costs that were later tacked on to bogus arbitration awards (described below), the NAF Code required consumers to make a $50.00 initial payment on the NAF "administration fee," in order to file a response to the Notice of Arbitration and avoid defaulting in the arbitration proceedings. Consumers paid such consideration to NAF for "independent and impartial arbitration" services, but did not receive the services for which they bargained. NAF and Mann Bracken knew, at the onset of arbitration, that regardless of whether consumers actively participated in the arbitration proceedings or defaulted, consumers would be deprived of due process and would not receive legitimate dispute resolution services, and that NAF would issue an award against the consumer, in favor of Mann Bracken's client.

9. After a Notice of Arbitration was mailed to a consumer, a form letter on NAF's letterhead was generated with an "Award" in favor of the debt collector claimant and against the respondent consumer, and rubber-stamped by an NAF arbitrator. Although the award amounts and respondent names differed, the basic template remained the same, including the following rote "findings" and "conclusions," among others: (a) "The Arbitrator has reviewed all evidence submitted in this case;" (b) "The Arbitrator knows of no conflict of interests that exist;" (c) "The evidence submitted supports the issuance of this Award;" and (d) "The applicable substantive law supports the issuance of the Award."

10. The "Award in favor of the Claimant" was invariably for hundreds or thousands more than the debt owed. Plaintiffs believe the sizeable gap between the amount of the alleged underlying debt and the amount awarded can be traced to the

improper inclusion of Mann Bracken's legal fees and NAF-related costs. In the end, consumers paid illegitimate fees and costs, including a $50.00 initial payment on the NAF administration fee and exorbitant legal fees and costs -- for services never rendered and for the futile exercise of having their debt disputes "decided" by the very party opposing them.

11. Defendants' conduct is particularly egregious because it compromises the legitimacy of our judicial system. Courts depend heavily upon the perceived integrity and efficiency of private arbitration. Indeed, California and other states fostered the growth of the arbitration industry by streamlining the process of converting arbitration awards into judgments, as evidenced in Defendants' Notice of Arbitration: "AN ARBITRATION AWARD MAY BE ENFORCED IN COURT AS A CIVIL JUDGMENT." Defendants exploited this public interest opportunity by perverting private arbitration into an unregulated trough for themselves and the collections industry. Creditors who took their business to Mann Bracken and NAF did not have to worry about losing, which is exactly how Defendants appealed to large creditors and dominated the consumer debt arbitration market for years. Indeed, while holding itself out to the public as independent and neutral, "[b]ehind closed doors, NAF [sold] itself to lenders as an effective tool for collecting debts."[4] BusinessWeek recently uncovered shocking examples of NAF's marketing to debt collectors, including a late 2007 "confidential" Powerpoint presentation aimed at creditors that promised, among other things, "marked increase in recovery rates over existing collection methods."[5] The process of legitimizing alternative dispute resolution as an industry can only begin by requiring Defendants to disgorge their ill-gotten gains.

[4] Robert Berner & Brian Grow, *Banks vs. Consumers (Guess Who Wins)*, BusinessWeek, June 5, 2008.

[5] *Id.*

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12. Plaintiffs bring this lawsuit against Defendants on behalf of themselves and all other similarly situated consumers, alleging claims for breach of contract and violations of the Consumer Legal Remedies Act ("CLRA"), California Civil Code § 1750, *et seq.*; the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C §1692, *et seq.*; the Rosenthal Fair Debt Collection Practices Act ("RFDCPA"), California Civil Code § 1788, *et seq.*; and California Business and Professions Code § 17200, *et seq.* and § 17500, *et seq.* for false advertising and unfair competition.

13. Plaintiffs are not aware of the true names and capacities of defendants sued as DOES 1 through 20, and therefore sue these defendants by such fictitious names. Each fictitiously named defendant is responsible in some manner for the occurrences alleged in this Complaint. Plaintiffs will amend this Complaint to add the true names of the fictitiously named defendants once they are discovered.

14. Each defendant knew or realized that the other defendants were engaging in or planned to engage in the violations of law alleged in this Complaint. Knowing or realizing that other defendants were engaging in such unlawful conduct, each defendant facilitated the commission of those unlawful acts. Each defendant intended to and did encourage, facilitate, or assist in the commission of the unlawful acts, and thereby aided and abetted the other defendants in the unlawful conduct.

15. Although each defendant purports to be a separate entity, in fact, Accretive is the alter ego of other defendants, as detailed below in the section, "Accretive Owns and Controls the Other Defendants." At all relevant times, there existed a unity of interest and ownership between Accretive and the other defendants, such that any individuality and separateness between them ceased, and Accretive exerted control over each of the other defendants. Accretive directly owns and controls defendant Axiant, LLC, and indirectly owns and controls defendants Agora Fund I GP, LLC ("Agora"), NAF Inc., NAF LLC, Forthright,

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and Mann Bracken. Adherence to the fiction of the separate existence of these defendants as entities distinct from Accretive will permit an abuse of the corporate privilege, condone deception and promote injustice.

16. Whenever reference is made in this Complaint to any act of defendants, such allegation shall mean that each defendant acted individually and jointly with the other defendants named in that cause of action.

17. Plaintiffs seek injunctive relief, actual, statutory and punitive damages, restitution, disgorgement of profits, and costs of suit, including attorneys' fees, as appropriate.

JURISDICTION AND VENUE

18. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1640(e), and pursuant to 28 U.S.C. 1332(d), since there are at least 100 class members in the proposed class, the combined claims of proposed class members exceed $5,000,000, exclusive of interest and costs, and numerous class members are citizens of states other than Defendants' states of citizenship

19. This Court has personal jurisdiction over Defendants because Defendants conduct substantial business in this District, have sufficient minimum contacts with this state, and otherwise purposely avail themselves of the markets in this state through the promotion, sale, and marketing of their services in this state, to render the exercise of jurisdiction by this Court permissible under traditional notions of fair play and substantial justice.

20. Venue is proper pursuant to 28 U.S.C. 1391(a) because one of the Plaintiffs resides here, Defendants do business in this District and receive substantial fees from customers in this District, and a substantial part of the events or omissions giving rise to the claims occurred in this District.

PARTIES

21. Plaintiff Anthony Magnone is a resident of Tarzana, California, in the County of Los Angeles. In 2008, Mann Bracken filed three arbitration claims

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against him, and in each instance, NAF issued an award against Mr. Magnone in favor of Mann Bracken's client, non-party FIA Card Services ("Bank of America"). NAF never provided arbitration services or engaged in any decision making process before issuing the awards. Mr. Magnone's claims are asserted against all Defendants except Mann Bracken.

22. Plaintiff Randal Kinnunen is a permanent resident of the state of Washington.[6] Around December 3, 2008, Mann Bracken filed an arbitration claim against Mr. Kinnunen, and NAF issued an award against Mr. Kinnunen in favor of non-party Chase Bank "care of" Mann Bracken. NAF never provided arbitration services or engaged in any decision making process before issuing the award.

23. Defendant National Arbitration Forum, Inc. ("NAF Inc.") is a Minnesota limited liability company with its registered address and principal place of operations at 6465 Wayzata Blvd., St. Louis Park, Minnesota 55426. It does business as "National Arbitration Forum" and "Forum."

24. Defendant National Arbitration Forum, LLC ("NAF LLC") is a Delaware limited liability company with its registered address and principal place of operations at 6465 Wayzata Blvd., St. Louis Park, Minnesota 55426. It also does business as "National Arbitration Forum." NAF LLC is wholly owned by NAF Inc.

25. Defendant Dispute Management Services, LLC, d/b/a Forthright Solutions ("Forthright") is a Delaware limited liability company with its registered address and principal place of operations at 6465 Wayzata Blvd., St. Louis Park, Minnesota 55426. Forthright is 58% owned by NAF Inc. and 40% owned by the Agora Funds, which, in turn, are owned by Accretive LLC. Forthright and NAF LLC have a "services agreement" with one another, as described below.

[6] At the time of the wrongdoing perpetrated on him, Mr. Kinnunen was a resident of South Carolina.

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26. Collectively, Defendants NAF Inc., NAF LLC, and Forthright are referred as "NAF" throughout this Complaint. As detailed below, NAF was organized and operated as one entity until it split itself into three entities to obscure its relationship with the other Defendants named in this Complaint.

27. Defendant Accretive LLC ("Accretive") is a Delaware limited liability company with its headquarters at 51 Madison Avenue, 31st Floor, New York, NY 10010, and its registered address at 55 East 59th Street, 22nd floor, New York, NY 10022. Accretive consists of a family of private equity funds under the control of investment manager J. Michael Cline ("Cline"). Throughout the Class Period, Accretive owned and controlled the other Defendants and aided and abetted their wrongful conduct.

28. Defendant Agora Fund I GP, LLC ("Agora") is a Delaware limited liability company with its headquarters at 55 East 59th Street, 22nd floor, New York, NY 10022. Agora is the managing partner of Agora Fund I, LP, a Delaware limited partnership, Agora Fund I Coinvestment Partners, LP, a Delaware limited partnership, and Agora Fund I Holding Partners, a Delaware general partnership (collectively, the "Agora Funds"), which hold a 40% interest in defendant Forthright. Agora is under the control of Accretive's Cline.

29. Defendant Axiant, LLC ("Axiant") is a debt collector, headquartered in Huntersville, North Carolina, which bills itself as a "leading national provider of financial services and recovery management solutions for issuers and investors in debt products." It is approximately 68% owned by non-party MB Acquisition Solutions Corp., which in turn is 100% owned by Accretive. The other 32% of Axiant is owned by the principals of what is now Mann Bracken.

30. Defendant Mann Bracken, LLP ("Mann Bracken") is a debt collector, organized as a Delaware limited liability partnership, with principal offices in Rockville, Maryland. It is the successor firm that resulted from the merger of three

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large debt-collection law firms: California-based Eskanos & Adler, Georgia-based Mann Bracken, and Maryland-based Wolpoff & Abramson.

31. Both Mann Bracken's and Axiant's websites refer to a "strategic alliance" between the two entities. For example, Axiant states that it provides "call center collections facilitated through our strategic alliance with Mann Bracken, LLP" and that it provides both "national arbitration services" and "litigation services" "through Mann Bracken, LLP."

GENERAL ALLEGATIONS

32. Arbitration is a form of alternative dispute resolution that can offer substantial benefits in judicial access and efficiency. However, arbitration also exacts a price by requiring consumers to give up their rights to litigate the dispute or appeal the arbitration awards. Arbitration awards are binding on the parties and cannot be reviewed except in narrow circumstances.

33. Only a handful of arbitration service providers exist. NAF dominated consumer arbitrations in the credit card debt collections industry. Recent public enforcement actions challenge NAF's misrepresentations to the public that it is an independent and neutral arbiter. These lawsuits allege NAF's claims are contradicted by NAF's own reported statistics which reflect astounding success rates for businesses over consumers.

34. NAF's guaranteed success rate for businesses is hardly surprising given that NAF is owned by the same hedge fund group (Accretive) that owns debt collection agencies, Axiant and Mann Bracken, which arbitrated against consumers before NAF. As reported, NAF, Axiant, and Mann Bracken are under the common control and ownership of Accretive, which financially benefits from arbitration awards obtained by Axiant and Mann Bracken, and fees collected by NAF. Thus, the same control group that owns and controls debt collectors Axiant and Mann Bracken also owns and controls the purportedly independent NAF.

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35. Defendants hid their financial affiliation for years until the Minnesota Attorney General's recent lawsuit revealed Defendants' true ownership structure, as summarized below.

Accretive Owns and Controls Defendants

36. Around June 2006, Accretive met with officers of NAF, which was then a single entity (the Forum), to discuss the possibility of Accretive acquiring a stake in the Forum. Accretive told NAF that it was "very impressed" with the Forum's arbitration business and wanted to assist the company with cash and future business. In return, Accretive sought a 40% stake in the Forum.

37. Around the same time, three large debt-collection law firms merged to form Mann Bracken, which in turn sold its assets and collections operations to Axiant -- a company created and owned by Accretive. The executives of the Forum were aware of this merger and sale.

38. As talks between Accretive and the Forum advanced, the two sides realized that any public acknowledgement of the relationship between the Forum, Accretive, and Axiant/Mann Bracken would destroy the Forum's credibility, and hence its ability to attract business and collect lucrative fees.

39. To avoid transparency, the two sides entered into multiple transactions which, among other things, involved the Forum splitting into three parts -- NAF Inc., NAF LLC, and Forthright. Thus, although NAF Inc., NAF LLC, and Forthright purport to be three separate companies, in fact, they are one and the same organization. They have key officers and directors in common, and their addresses and office spaces are identical.

40. In order to ensure Accretive received the 40% stake it bargained for, Accretive demanded that Forthright -- the only NAF company in which Accretive had a stake -- enter into a Services Agreement with NAF LLC. Around the same time, Accretive created several funds, called the Agora funds, which were

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registered to the same address as, and controlled by the same person that controlled Accretive. The Agora funds then purchased approximately 40% of Forthright.

41. As reported, the Services Agreement provided that Forthright would receive the bulk of the "arbitration services" revenue after costs, and would control much of the administrative aspects of arbitration. In return, Forthright received from NAF LLC a seven figure monthly fee plus a bonus fee calculated based on NAF LLC's revenue.

42. Through its ownership in Forthright and the Services Agreement between NAF LLC and Forthright (imposed by Accretive), Accretive achieved exactly what it sought -- a 40% stake in the National Arbitration Forum, and equally important, significant ownership and control over ***both*** the major arbitration arm (NAF) and the major debt collection arm (Mann Bracken) of the consumer debt collections industry.

43. As reported, while negotiating these transactions, Accretive explained to NAF that "[o]ur investors have entrusted us with their funds on an assumption that we maintain a high level of governance oversight over our portfolio companies." Accretive accomplished as much with NAF, exercising control over NAF in at least the following ways:

(a) Accretive directed NAF LLC and Forthright to enter into the Services Agreement to ensure itself a 40% stake in NAF;

(b) Accretive created, invested in and shared employees and offices with each of the Agora Funds, which in turn invested in and controlled NAF;

(c) Accretive provided, through its principals, resumes to NAF for NAF to consider in filling key positions, including the chief financial officer and chief operating officer;

(d) Accretive continually sought to enlarge NAF's business by introducing new customers to NAF, helping NAF bid for new contracts, and seeking out new areas for NAF expansion;

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(e) Accretive helped NAF devise public relations campaigns, including opposition to proposed federal legislation designed to weaken mandatory arbitration clauses; and

(f) Accretive required Forthright to submit detailed reports on its operations to Accretive.

44. Similarly, Accretive exercised control over Axiant and Mann Bracken, by among other things, owning 68.7% of Axiant, employing members of Axiant's Board of Directors, and requiring Mann Bracken to submit detailed reports on its operations (just as it required of Forthright).

Defendants' Scheme Deceived Consumers and the Courts

45. Many consumer credit contracts contain provisions mandating arbitration for disputes between the creditor and the consumer. NAF, as a major beneficiary of these mandatory arbitration provisions, sought to quell consumers' (well founded) fears by offering false assurances of integrity and impartiality, including the following posted on its website during the relevant time period:

> We are guided by experience, integrity and innovation. Our commitment to professional and legal standards produces clear, unbiased rules, and we accord disputing parties rights and privileges consistent with those of the judicial system. The former judges and experienced attorneys who hear and decide our cases review the facts and render decisions based on known rules and substantive law.

46. To commence debt collection, Mann Bracken submitted a claim to NAF and mailed a "Notice of Arbitration," provided by NAF, to the consumer. The Notice falsely claimed that:

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(a) NAF "is an independent and impartial arbitration organization"; and

(b) "Parties have a full and equal right to present relevant and reliable direct and cross examination testimony, documents, exhibits, evidence and arguments."

47. The Notice of Arbitration directed consumers to the NAF Code, which also reinforced the misrepresentations, including the following:

(a) "[NAF] arbitrators are neutral, independent, experienced and knowledgeable about the applicable law";

(b) "A neutral Arbitrator shall not serve if circumstances exist that create a conflict of interest or cause the Arbitrator to be unfair or biased";

(c) "This code shall be interpreted to provide all Parties with a fair and impartial arbitration and with reasonable access to civil justice"; and

(d) "Awards shall be based upon a preponderance of the evidence presented, unless an agreement of the Parties or the applicable law provides otherwise."

48. NAF's website also contained numerous misrepresentations, including the following:

(a) NAF "accord[s] disputing parties rights and privileges consistent with those of the judicial system";

(b) "Disputes are brought before a neutral third party (the arbitrator) who, after carefully reviewing all of the relevant information, issues a final decision in favor of one of the parties";

(c) NAF "is independent and neutral. It is not affiliated with any party";

(d) NAF "is an independent administrator of alternative dispute resolution services. Cases are heard and decided by unbiased legal experts";

(e) NAF's "dispute resolution processes are designed to provide both parties with an equal opportunity to prevail"; and

(f) "The Code of Procedure ensures all parties a fair, unbiased dispute resolution process."

49. NAF's alleged "Bill of Rights" contained similar misrepresentations, including the following:

(a) NAF provides a "justice system where claims are promptly resolved under the law by neutral legal experts at a cost commensurate with the matters in dispute";

(b) NAF's "Participatory Hearing provides parties with virtually the same procedures available in court trials before a judge: written claims and responses, reasonable discovery, useful motions, direct and cross examinations of witnesses, introduction of relevant and reliable exhibits, opening and closing statements, a prompt and detailed award"; and

(c) "The [NAF] Code of Procedure provides all parties with equal access to discovery and allows generally for the same discovery methods that are available in federal court."

50. The boilerplate awards rubber-stamped by NAF arbitrators, binding on consumers and relied upon by the courts, provided the following illusory "findings" and "conclusions," among others:

(a) "The Arbitrator has reviewed all evidence submitted in this case;"

(b) "The Arbitrator knows of no conflict of interests that exist;"

(c) "The evidence submitted supports the issuance of this Award;" and

(d) "The applicable substantive law supports the issuance of the Award."

51. Defendants knew or should have known these statements to be false and misleading, and thus the statements constitute a deception on the courts and consumers.

52. The results of NAF's arbitrations stand in stark contrast to Defendants' misrepresentations. According to the San Francisco City Attorney's complaint filed on August 22, 2008, in California alone, from January 1, 2003 to March 31, 2007, NAF handled over 33,948 consumer collections matters, of which 18,075 were disposed of by hearing before an arbitrator. In *all* cases where a business brought a claim against a consumer and the matter was disposed of by hearing, the NAF arbitrator ruled in favor of the business 100% of the time, assisted by the high rate of consumer defaults in these hearings. Indeed, only 30 of 18,075 cases resulted in a consumer victory and *all* of these involved the rare case where a consumer brought a claim against a business.

53. The San Francisco City Attorney's allegations regarding NAF's track record are consistent with the allegations of a former NAF employee, who herself sought to avoid mandatory arbitration due to NAF's practices and sued Forthright.[7] According to this former employee's complaint, NAF routinely:

(a) directed arbitrators to change decisions if they were adverse to certain favored clients or potential clients (known within NAF as "Famous Parties");

(b) ensured that arbitrators who ruled against Famous Parties were not hired again;

(c) drafted claim forms for Famous Parties;

(d) drafted fictitious affidavits and/or proofs of service to consumers;

[7] *Richert v. Nat'l Arbitration Forum, LLC et al.*, 0:09-cv-00763-ADM-JJK (Minn. Dist. Ct. filed April 2, 2009).

(e) failed to forward responses filed by consumers to arbitrators; and

(f) decided and issued its own rulings on procedural matters against consumers in lieu of an arbitrator's rulings.

54. The former employee also reported that NAF's arbitrators were aware of these practices. In fact, the former employee added that social gatherings were often held in which arbitrators attempted to curry favor with NAF management in order to receive more assignments. These assignments paid as much as $325/hour. Incredibly, some arbitrators even called NAF's lawyers to ask them how they should rule on a particular case.

55. Similarly, BusinessWeek recently revealed a September 2007 NAF marketing PowerPoint presentation aimed at creditors, labeled as "confidential," that not only promised a "marked increase" in collection recovery rates, but also "boasts[ed] that [a] creditor may request procedural maneuvers that can tilt arbitration in their favor. 'Stays and dismissals of action requests available without fee when request by Claimant -- allows claimant to control process and timeline.'"[8] According to an anonymous NAF arbitrator, these tactics allowed creditors to file actions even if they are not prepared, in that "[I]f there is no response [from the debtor], you're golden. If you get a problematic [debtor], then you can request a stay or dismissal."[9] Thus, in countless cases, a creditor received a default award, just because the debtor failed to respond to the notice of arbitration that was allegedly sent to him/her, and despite the creditor's failure to produce any evidence verifying the amount owed, or that the alleged debt was owed at all.

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[8] Robert Berner & Brian Grow, *Banks v. Consumers (Guess Who Wins)*, BusinessWeek, June 5, 2008.

[9] *Id.*

56. Accordingly, NAF entered arbitration awards against consumers no matter how baseless the creditor's claim, including in cases where:

(a) the consumer was obviously not the same consumer who had incurred the debt but someone with a similar name;

(b) the consumer was a victim of identity theft;

(c) the consumer never received a notice of arbitration;

(d) Mann Bracken failed to prove the existence of an arbitration agreement between the creditor and consumer;

(e) Mann Bracken failed to document that it was lawfully authorized to collect the debt, or that there was an existing debt at all;

(f) the alleged debt is past the statute of limitations;

(g) the consumer sought to submit evidence or otherwise defend him/herself in the proceedings but was denied an opportunity to do so.

57. In addition to awarding debt collectors the amount of the debt they sought, NAF consistently awarded additional sums to cover "expenses" and "attorneys fees." These expenses included fees charged by NAF itself for its part in the arbitration process. Specifically, NAF charged an "Administrative Fee" for its services, ranging from about $100 to over $1,000, and collected the first $50 of that fee at the time consumers filed their initial response to the Notice of Arbitration. Any portion of the fee that was not paid by the consumer up-front was later made part of NAF's "arbitration award."

58. As reported, NAF did not independently verify that any of the "expenses" (other than its own fees) were actually incurred by Mann Bracken or other debt collectors for their so-called debt collection services, nor did it even require Mann Bracken to account for its time spent on a matter before awarding it attorneys' fees.

59. Defendants sought to enforce these sham arbitration awards, which are virtually immune from judicial review, and included inflated amounts

exceeding the alleged debts owed, including illegitimate fees sought by Mann Bracken and NAF.

<u>Accretive Aided and Abetted the Deception Perpetrated on Consumers and the Courts</u>

60. Accretive aided and abetted the unfair and unlawful practices alleged, by, among other things:

(a) forming the Agora Funds in order to obscure the financial relationship amongst the Defendants;

(b) engaging in transactions to obscure its ownership and control relationship with the other Defendants; and

(c) advising creditors how to utilize NAF as a debt collection tool.

<u>CLASS ALLEGATIONS</u>

61. Plaintiffs brings this class action pursuant to Federal Rule of Civil Procedure 23, on behalf of themselves and others similarly situated. The "Class" is defined as follows:

> All persons in the United States who had an arbitration award entered against them by NAF and in favor of Axiant, Mann Bracken or any of their predecessors and/or clients, between June 1, 2006 and the present (the "Class Period").

62. The following persons shall be excluded from the Class: (a) Defendants and their owners, subsidiaries and affiliates; (b) all persons who make a timely election to be excluded from the proposed Class; (c) governmental entities; and (d) the judge(s) to whom this case is assigned and any immediate family members thereof.

63. Plaintiffs reserve the right to modify or amend the Class definition(s) before the Court determines whether certification is appropriate.

64. The Class is so numerous that joinder is impracticable. NAF's own publicly available records indicate that it has adjudicated hundreds of thousands of arbitrations during the Class Period.

65. This action involves common questions of law and fact, including the following:

a) Whether Defendants violated the California Consumer Legal Remedies Act, California Civil Code § 1760, *et seq.*

b) Whether Defendants violated California Business & Professions Code § 17200, *et seq.* and § 17500, *et seq.*;

c) Whether Defendants violated the Fair Debt Collection Practices Act, 15 USC § 1692, *et seq.*;

d) Whether Defendants violated the Rosenthal Fair Debt Collection Practices Act, California Civil Code § 1788, *et seq.*;

e) Whether Defendants' representations about legitimate arbitration services and awards were likely to deceive Plaintiffs and the Class;

f) Whether Defendants knew, or should have known, that their representations were false and/or misleading;

g) Whether consumers would have agreed to arbitrate consumer debt disputes before NAF had they known about Defendants' financial relationship with one another;

h) Whether NAF breached its contracts with consumers;

i) Whether Defendants were unjustly enriched as a result of Defendants' unlawful and unfair practices;

j) Whether Class members were injured as a result of Defendants' conduct; and

k) Whether Plaintiffs and the Class are entitled to relief, and the amount and nature of such relief.

66. Plaintiffs will fairly and adequately represent the interests of the Class. Plaintiffs' interest do not conflict with the interests of the Class they seek to represent; they have retained counsel experienced in class actions and in consumer credit and debt collection abuse cases; and Plaintiffs intend to prosecute this action vigorously.

67. Plaintiffs' claims are typical of the claims of the Class. Plaintiffs have no interests antagonistic to those of the Class, and Defendants have no defenses unique to Plaintiffs.

68. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Individual litigation of the claims of all class members is impracticable because the cost of litigation would be prohibitively expensive for each class member and impose an immense burden upon the courts. Individualized litigation would also present the potential for varying, inconsistent, or contradictory judgments and magnify the delay and expense to all parties and to the court system resulting from multiple trials of the same complex legal and factual issues. By contrast, the conduct of this action as a class action, with respect to some or all of the issues presented in this complaint, presents fewer management difficulties, conserves the resources of the parties and of the court system, and is the only means to protect the rights of all class members.

FIRST CAUSE OF ACTION
(Violation of Consumer Legal Remedies Act)

69. Plaintiffs incorporate the above allegations as if set forth herein.

70. The CLRA applies to Defendants' actions and conduct described herein because it extends to transactions that are intended to result, or which have resulted, in the sale or lease of goods or services to consumers.

71. Plaintiffs and the Class are "consumers" within the meaning of California Civil Code Section 1761(d).

72. NAF's arbitration services are "services" within the meaning of California Civil Code Section 1761(b).

73. Defendants violated the CLRA as follows:

a) In violation of Section 1770(a)(3), Defendants misrepresented their affiliation, connection, or association with one another;

b) In violation of Section 1770(a)(5), Defendants misrepresented that NAF arbitrations have characteristics and benefits that they do not have;

c) In violation of Section 1770(a)(9), Defendants advertised NAF arbitration services with an intent not to sell them as advertised. Defendants' advertisements were misleading to or likely to deceive the reasonable consumer; and

d) In violation of Section 1770(a)(14), Defendants represented that NAF sponsored arbitrations confer rights or remedies which they do not have or involve, or which are prohibited by law.

74. Defendants concealed material facts regarding NAF arbitrations from Plaintiffs and the Class, including that NAF is conflicted by its ownership structure and unable to fairly and impartially decide arbitrations. This type of information is relied upon by consumers in making purchase decisions, and is fundamental to the decision to enter into, agree to be bound by, or attempt to appeal an arbitration. Had Defendants disclosed this material information regarding NAF arbitrations to Plaintiffs and the other class members, they would not have agreed to arbitration before NAF. These omissions of material fact violated California Civil Code Section 1770(a) sub sections (3), (5), (9), (14), and (19).

75. As a result of Defendants' conduct, Plaintiffs and the Class are entitled to actual and statutory damages, costs of litigation, attorneys' fees and such other relief authorized under the CLRA.

SECOND CAUSE OF ACTION
(Breach of Contract Against NAF)

76. Plaintiffs incorporate the above allegations as if set forth herein.

77. Plaintiffs and the Class entered into contracts with NAF, the materials terms of which promise legitimate, bona fide arbitration services.

78. Plaintiffs and the Class gave consideration that was fair and reasonable, and performed all conditions, covenants and promises required under their contracts.

79. NAF breached its contractual obligation to provide arbitration services to consumers. Rather than engage in any legitimate decision making process, NAF used its status as an ostensible arbitrator to facilitate Mann Bracken's collection efforts by rubber-stamping improper awards against consumers.

80. As a result, Plaintiffs and the Class were subjected to illegitimate arbitration awards, fees, and costs, in excess of the alleged debts owed and without due process, and suffered damages in an amount to be proven at trial.

81. NAF directly benefited from, and was unjustly enriched by, these contractual breaches.

THIRD CAUSE OF ACTION
(Violation of the Fair Debt Collection Practices Act)

82. Plaintiffs incorporate the above allegations as if set forth herein.

83. Defendants are "debt collectors" as defined in 15 U.S.C. § 1692a(6), and in doing the acts alleged, were attempting to collect alleged consumer debts.

84. Defendants violated, at minimum, 15 U.S.C. § 1692(e) and (f), by making false or misleading representations in their unfair attempts to collect debts from Plaintiffs and the Class, by among other things: representing that NAF was a independent forum when it was not; representing that the awards issued by NAF were not subject to or the result of any conflict of interest, when they were; and

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representing that the additional fees and costs awarded against consumers were lawful when they were not.

85. As a result of Defendants' violations of the FDCPA, Plaintiffs and the Class were harmed, and are entitled to injunctive relief, and to recover actual and statutory damages and attorneys' fees and costs pursuant to 15 U.S.C. § 1692k.

FOURTH CAUSE OF ACTION
(Violation of the Rosenthal Fair Debt Collection Practices Act)

86. Plaintiffs incorporate the above allegations as if set forth herein.

87. Defendants are "debt collectors" within the meaning of California Civil Code § 1788.2(c).

88. Plaintiffs and the Class are "debtors" within the meaning of California Civil Code § 1788.2(h), and in doing the acts alleged, were attempting to collect alleged consumer debts.

89. Defendants were engaged in the attempted collection of consumer debts, and are legally bound to follow the prescriptions of the Rosenthal Fair Debt Collection Practices Act ("RFDCPA"), California Civil Code § 1788, *et seq*.

90. Defendants violated the RFDCPA, California Civil Code § 1788.17, through their violations of 15 U.S.C. §§ 1692 (e) and (f) of the FDCPA, by making false or misleading representations in their unfair attempts to collect debts from Plaintiffs and the Class.

91. Defendants' violations of the RFDCPA were intentional and/or malicious.

92. As a result of Defendants' violations of the RFDCPA, Plaintiffs and the Class were harmed and are entitled to damages under California Civil Code § 1788.30.

FIFTH CAUSE OF ACTION
(Violation of Bus. & Prof. Code Section 17500 et seq.)

93. Plaintiffs incorporate the above allegations as if set forth herein.

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94. During the Class Period, Defendants engaged in a deceptive, misleading advertising and marketing campaign to exalt NAF as a neutral arbitration forum governed by the highest legal and ethical standards, completely independent from its debt collection counterparts, like Mann Bracken and Axiant. In fact, Defendants actively concealed their financial ties to one another, and such conflict prevented NAF from providing legitimate arbitration services.

95. Defendants violated Business and Professions Code Section 17500 by making or causing untrue or misleading statements with the intent to induce consumers to buy arbitration services from them. These untrue and misleading statements included, but are not limited to, those set forth above.

96. Defendants knew or should have known that the statements were untrue or misleading at the time they were made.

97. As a result of Defendants' untrue and misleading statements, Plaintiffs and the Class lost money and suffered injury in fact, and thus are entitled to restitution, injunctive relief and such other relief authorized under Section 17535.

SIXTH CAUSE OF ACTION
(Violation of Bus. & Prof. Code Section 17200 et seq.)

98. Plaintiffs incorporate the above allegations as if set forth herein.

99. Defendants' conduct constituted unlawful, unfair, and fraudulent business acts or practices under Business and Professions Code Section 17200 *et seq*.

100. Defendants' practices were unlawful in that they violated:

(a) California Civil Code Section 1770(a) (Consumer Legal Remedies Act);

(b) 15 U.S.C. Section 1692 *et seq*. (Fair Debt Collection Practices Act);

(c) California Civil Code Section 1788 *et seq*. (Rosenthal Fair Debt Collection Practices Act);

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(d) California Business and Professions Code Section 17500 *et seq.* (False Advertising Law); and

(e) California Code of Civil Procedure, Section 1280 *et seq.* (California Arbitration Act).

101. Defendants' practices were unfair because any utility for Defendants' conduct is outweighed by the gravity of the consequences to Plaintiffs and the Class, and/or Defendants' conduct is immoral, unethical, oppressive, unscrupulous or substantially injurious to Plaintiffs and the Class.

102. Defendants' practices were fraudulent because they were likely to and did deceive Plaintiffs and the Class, and Defendants engaged in such practices knowingly.

103. Defendants' unfair and fraudulent practices include, but are not limited to, the following:

(a) promoting, marketing, and selling purportedly legitimate arbitration services, with no intent to provide them as advertised;

(b) charging and collecting improper and illegitimate fees and costs for arbitration services that were not rendered; and

(c) deceiving courts to confirm bogus arbitration awards as "judgments" falsely claiming they were issued by independent arbitrators.

104. As a result of Defendants' acts of unfair competition, Plaintiffs and the Class lost money and suffered injury in fact, and thus are entitled to restitution, injunctive relief and such other relief authorized under Section 17203.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, pray for judgment, as follows:

A. An order certifying this case as a class action and appointing Plaintiffs and his counsel to represent the Class;

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B. An order awarding Plaintiffs and the Class actual, consequential, and statutory damages to be determined at trial;

C. An order awarding exemplary damages in an amount to deter and punish;

D. An order awarding restitution and/or disgorgement and other equitable relief as the Court deems proper;

E. An injunction prohibiting Defendants from continuing to engage in unfair and unlawful business practices and false advertising, including prohibiting NAF from arbitrating disputes involving Mann Bracken or Axiant;

F. Pre- and post-judgment interest;

G. Attorneys' fees and costs of suit; and

H. Such other relief as the Court may deem just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury on all matters for which a jury trial is guaranteed.

DATED: September 1, 2009

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JONES v. WELLS FARGO

ORIGINAL FILED
AUG 27 2009
LOS ANGELES
SUPERIOR COURT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

OPAL JONES, CLAUDIA A. CALDWELL, KALINA THOMAS, VINCENT JONES, AND C. RENAE WALKER JONES, on behalf of themselves and all others similarly situated, Plaintiffs, vs. WELLS FARGO BANK, N.A., WELLS FARGO HOME MORTGAGE, INC., and DOES 1 through 20, inclusive, Defendants.	Case No.: BC 337821 **ORDER CERTIFYING A CLASS ACTION OF PLAINTIFFS' UNRUH ACT (CIVIL CODE § 51 et seq.) CAUSE OF ACTION, AND DENYING CERTIFICATION OF PLAINTIFFS' FEHA (GOVERNMENT CODE § 12900 et seq.), CLRA (CIV. CODE § 1750 et seq.), UCL (BUS. & PROF. CODE § 17200 et seq.) AND BREACH OF CONTRACT CAUSES OF ACTION**

This case came on for hearing on July 22, 2009 in Department 309 of the above-entitled court, the Honorable Anthony J. Mohr, Judge presiding. The parties submitted supplemental briefs and the court took the matter under submission on August 10, 2009. The court having considered all documents, pleadings, and oral argument in support and in opposition of the petition and in good cause appearing therefor, issues this order.

Background

Plaintiffs received a home loan from Defendant Wells Fargo. According to Plaintiffs Wells Fargo created a computer program called the "Loan Economics Program" ("the Program") and developed a policy under which its Home Mortgage Consultants ("HMCs") would use it for pricing

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ORDER CERTIFYING A CLASS ACTION OF PLAINTIFFS' UNRUH ACT (CIVIL CODE § 51 et seq.) CAUSE OF ACTION, AND DENYING CERTIFICATION OF PLAINTIFFS' FEHA (GOVERNMENT CODE § 12900 et seq.), CLRA (CIV. CODE § 1750 et seq.), UCL (BUS. & PROF. CODE § 17200 et seq.) AND BREACH OF CONTRACT CAUSES OF ACTION

loans. Plaintiffs allege that using the Program would typically produce loan terms that were more favorable to the borrower than if it had not been used.

Plaintiffs contend that HMCs who were within certain geographic locations were not permitted to use the Program to price loans. These locations purportedly consist of mostly minority residents. Plaintiffs' claim that not allowing the Program to be used in these minority communities had a disparate impact on those individuals, who ended up paying more for their loans than if the Program had been used.

Discussion

Code of Civil Procedure section 382 authorizes class actions "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court...." The party seeking certification has the burden to establish the existence of both an ascertainable class and a well-defined community of interest among class members. *Lockheed Martin Corp. v. Sup. Ct.* (2003) 29 Cal.4th 1096, 1104 (citing *Washington Mutual Bank v. Sup. Ct.* (2001) 24 Cal.4th 906, 913). The "community of interest" requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. *Lockheed,* 29 Cal.4th at 1104.

The certification question is "essentially a procedural one that does not ask whether an action is legally or factually meritorious." *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 439-40. A trial court ruling on a certification motion determines "whether ... the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants." *Collins v. Rocha* (1972) 7 Cal.3d 232, 238.

I. Whether an Ascertainable Class Exists

In determining the existence of an ascertainable class, a court examines three factors: (1) the class definition; (2) the size of the class; and (3) the means of identifying the class members. *Miller v. Woods* (1983) 148 Cal. App.3d 862, 873.

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ORDER CERTIFYING A CLASS ACTION OF PLAINTIFFS' UNRUH ACT (CIVIL CODE § 51 et seq.) CAUSE OF ACTION, AND DENYING CERTIFICATION OF PLAINTIFFS' FEHA (GOVERNMENT CODE § 12900 et seq.), CLRA (CIV. CODE § 1750 et seq.), UCL (BUS. & PROF. CODE § 17200 et seq.) AND BREACH OF CONTRACT CAUSES OF ACTION

Class Definition

The class is defined as all borrowers who:

(1) obtained a first trust deed-secured home loan ("loan") from Wells Fargo Bank and/or Wells Fargo Home Mortgage (collectively, "Wells Fargo") in an amount in excess of one hundred fifty thousand dollars ($150,000); and,

(2) who applied for his or her loan through a Wells Fargo branch and/or office which is and/or was located within the following area:

a. within Thomas Swanson's area as that area was defined by Wells Fargo in January, 2002; and

b. either within, or within one mile (1 mile) from, an area comprised of fifty percent (50%) or more minority population, where "minority population" is defined as "the total population of that geographic area less the population of non-Hispanic whites of that geographic area," as established by the 2000 Census data; and,

(3) whose loan was funded between the time period May 1, 2002 and December, 2005.

This definition consists of objective, quantifiable criteria. *Hicks v. Kaufman and Broad Home Corp.* (2001) 89 Cal.App.4th 908, 915.

The Size of the Class

Plaintiffs estimate that the class consists of roughly 10,000 members. This number is sufficient to meet the numerosity requirement.

The Means of Identifying Class Members

Plaintiffs insist that class members can be identified via Defendants' files and data base. Defendants disagree. The class is defined in terms of where an individual applied for a loan, not where it was approved or processed. Wells Fargo insists that it does not keep records of where an individual applies for a loan.

Plaintiffs respond that Defendants' reports list each loan with its originator, who is usually a branch manager. From these records Plaintiffs can locate and depose the various branch managers to identify which HMCs worked in which locations. Only about 20 branch managers are involved. This is a reasonable approach to identifying class members.

Plaintiffs have carried their burden to establish that the proposed class is ascertainable.

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ORDER CERTIFYING A CLASS ACTION OF PLAINTIFFS' UNRUH ACT (CIVIL CODE § 51 et seq.) CAUSE OF ACTION, AND DENYING CERTIFICATION OF PLAINTIFFS' FEHA (GOVERNMENT CODE § 12900 et seq.), CLRA (CIV. CODE § 1750 et seq.), UCL (BUS. & PROF. CODE § 17200 et seq.) AND BREACH OF CONTRACT CAUSES OF ACTION

II. Community of Interest

Whether Common Questions of Law or Fact Predominate

In order to establish that common questions of law or fact predominate, the plaintiff must show that "each member must not be required to individually litigate numerous and substantial questions to determine his [or her] right to recover following the class judgment." *Washington Mutual Bank FA v. Superior Court* (2001) 24 Cal.4th 906, 913. The plaintiff must also show that "the issues which may be jointly tried, when compared with those requiring separate adjudication, must be sufficiently numerous and substantial to make the class action advantageous to the judicial process and to the litigants." *Id.* at 913-14.

1. Causes of Action Other than the Unruh Act

Plaintiffs identify several common questions of law and fact, chief among which is whether Defendants had a policy of precluding certain branch managers/loan officers from pricing and closing loans with the Program. Other common questions (according to Plaintiffs) include whether the Program enabled loan officers to offer the borrower a lower-priced loan, whether Defendants' alleged selective preclusion had a disparate impact on minority borrowers, whether Defendants' conduct constituted intentional discrimination, whether the policy damaged the affected borrowers, and if so, what is the proper measure of damages.

Some of these common questions are not common at all. To determine whether the Program enabled loan officers to offer lower-priced loans requires a review of each borrower's loan and a comparison of the price at which the loan could have been priced had the Program been used. By nature, this is an individual inquiry. Whether a person qualifies for a loan turns on myriad individual factors, including the borrower's credit history, current income, liquid assets, and fixed assets. The property to be secured must be evaluated, and real property is often presumed to be unique. *See Real Estate Analytics, LLC v. Vallas* (2008) 160 Cal.App.4th 463, 466. Is the property in good condition? How old is it? Is the location good? And yet there is more. Other questions include whether an HMC would have used the program at all even if it was available to him/her, and even if an HMC used the Program, whether he/she would have quoted that price to the prospective borrower. Plaintiffs' liability

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and damages theories depend upon proof that had the Program been available to these HMCs, they would have definitively used it.

Contrary to Plaintiffs' contentions actual damages also require individual inquiry. Plaintiffs' expert states in his declaration that "all relevant individual issues are manageable by the use of standard formulae that isolate and control for such factors." John J. Donohue III Declaration ¶ 16. With all due respect, Mr. Donohue's opinion carries little weight in light of the fact that his declaration fails even to acknowledge what the individual issues are, much less how the use of standard formulae can control for them. "Plaintiffs' burden on moving for class certification … is not merely to show that some common issues exist, but, rather, to place substantial evidence in the record that common issues *predominate*." *Lockheed Martin v. Superior Court* (2003) 29 Cal.4th 1096, 1108. Moreover, in the absence of concrete evidence of damage formulae, the court has difficulty visualizing how a standard formula will be employed at trial, which means the court has trouble determining whether it can manage the damage aspect of this case if it receives class status. Mr. Donohue's declaration is tentative at best on the issue of damages calculation. It falls short of the "substantial evidence" threshold required under *Lockheed.*

The issue of actual damages requires individual inquiries that will swamp any issues that are common to the class, at least with respect to those causes of action requiring a showing of actual damages. This includes Plaintiffs' CLRA, UCL, FEHA and breach of contract causes of action. Therefore, the court DENIES Plaintiffs' motion for class certification as it pertains to these causes of action.

2. The Unruh Act Claim

The Unruh Act provides for statutory penalties, thus obviating the need for individual inquiry into actual damages. While it is true that Civil Code section 52 also permits recovery of actual damages, the court finds that so long as class members are willing to forgo claims for actual damages, the Unruh Act claims can be certified.

The Unruh Act makes it illegal to deny, aid or incite a denial, or make any discrimination or distinction on the basis of, *inter alia*, race, color, or national origin. Civ. Code §§ 51, 52. Anyone who violates these provisions "is liable for each and every offense for the actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the

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amount of actual damages but in no case less than four thousand dollars ($4,000), and any attorney's fees that may be determined by the court in addition thereto, suffered by any person denied the rights provided in Section 51."

This case is similar to *Stephens v. Montgomery Ward* (1987) 193 Cal.App.3d 411, 421, where despite the existence of many stores, plaintiff demonstrated "centralized control over employment decisions" and standardized hiring criteria. The court found that Stephens had "introduced enough facts to support a prima facic allegation that a policy of sex discrimination, emanating from Ward's central administration, exists and limits the promotional opportunities of women employees. This showing sets forth common issues of law and fact which substantially predominate over individual issues." *Id.*. *Ballard v. Equifax Check Services*, 186 FRD 589 (E.D. Cal. 1999), is also instructive. The defendant had a policy of sending uniform letters to class members demanding payment of a questionable fee. Defendant argued that individual issues regarding whether each class member authorized the fee under their contract would predominate. *Id.* at 597. The court found this argument disingenuous since Defendant had sent the demand letters out to 1.4 million customers without making any effort to establish whether each of them had expressly authorized the fee on a case by case basis. *Id.* at 598.

The court is impressed with evidence produced by Plaintiffs that could suggest class-wide discrimination. A prime example is Exhibit 8 to Leila J. Noël's declaration in support of class certification. In an e-mail, a home mortgage consultant asked:

> Does this mean I can start using loan economics? Pam stated that we have to go to training to use loan Economic, and I went to the loan Economic class two years ago. Last year I tried to use the program and I was told by Tom that we are not able to use loan Economics yet. Can you give me clarity on if I am Able or Not able to use this program.

Noël Decl., Ex. 8 (capitalization errors not corrected).

Ken Vil's answer was pithy, but revealing: "depends on if you're staying [in] my area, or going to stay with the Carson branch." *Id.* Evidence like this can be used to establish common proof that Wells Fargo violated the Unruh Act.

The court finds that issues of liability under the Unruh Act in this particular case are ripe for class treatment. The most significant issue – whether Defendant had a policy to deny access to the Loan Economics Program to HMCs in minority communities – is common to all class members.

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Because statutory penalties of at least $4,000 are mandatory under Section 52 once liability is established, there is no need to wade into individual issues surrounding actual damages. This is only true, however, if Plaintiffs restrict the class-wide relief to statutory damages and in their notice inform class members that participation in the class waives any further rights to actual damages.

Typicality

Because Plaintiffs have only established commonality for the Unruh Act claims, there is no need to examine whether the representative Plaintiffs' claims under the other causes of action typify the class. Nonetheless, it is doubtful that Plaintiffs would have been able to establish typicality for the other causes of action, since each loan transaction had its own unique circumstances.

Plaintiffs have established that their Unruh Act claims are typical. The relevant issue is whether Defendants had a policy of preventing the use of the Loan Economics Program in certain communities. Plaintiffs' claims are typical because they are members of the communities at issue and obtained home loans from Defendants during the relevant time period. Each loan was processed through Isaac Brooks, who purportedly was not able to use the Program and who worked out of offices in the relevant area. Plaintiffs' claims arise from the same alleged discriminatory conduct and proceed under the same legal theories. With respect to the defenses, the question is whether they are available. The question now is what constitutes the cause of action and the defenses, not whether a party proved them. Does the denial of the Program constitute a denial of services, advantages, or facilities under Civil Code section 51? If so, Plaintiffs have a right to prove it by common evidence. *Ticconi v. Blue Shield of California Life & Health Ins. Co.* (2008) 160 Cal.App.4th 528, 544-46.

Adequacy of Representation

To demonstrate adequacy of representation a plaintiff must show (1) that he has asserted all claims that reasonably could be expected to be raised by members of the class (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 464); (2) that he is not "simply lending his name to a suit controlled entirely by the class attorney" (*Howard Gunty Profit Sharing Plan v. Superior Court* (2001) 88 Cal.App.4th 572, 578); and (3) that "the qualifications of counsel [are such that] all interests, including those of as yet unnamed plaintiffs are adequately represented (*Cal Pak Delivery, Inc. v. United Parcel Service, Inc.* (1997) 52 Cal.App.4th 1, 12).

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There is no question that Plaintiffs have asserted all claims that reasonably could be expected to be raised by members of the class. Likewise, there is no evidence to suggest that Plaintiffs' interests are at odds with the remainder of the class. There is also no evidence suggesting that Plaintiffs are mere puppets for class counsel. All of them truly applied for home loans. Finally, class counsel have established their qualifications to represent the class.

Superiority

Courts are guided by the mandate that "because group action has the potential to create injustice, trial courts are required to carefully weigh respective benefits and burdens and to allow maintenance of the class action only where substantial benefits accrue both to litigants and the courts. [Citations]" *Linder v. Thrifty Oil* (200) 23 Cal.4th 429, 435. The class device must be "superior to, and not just a good as, other available methods for handling the controversy, and such a determination lies in an area where the trial court's discretion is paramount." *Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 668, 673 (9th Cir. 1975) (*cited approvingly in Blue Chip Stamps v. Superior Court* (1976) 18 Cal.3d 381, 394). "By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation." *Sav-on Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 340.

In *Schneider v. Vennard* (1986) 183 Cal.App.3d 1340, 1347, the court observed that "the superiority criterion is manifest in the determination that a class action brought under Code of Civil Procedure section 382 would produce 'substantial benefits' to the litigants and the judicial system." "In deciding whether a class action would be superior to individual lawsuits, 'the court will usually consider [four factors]: (1) The interest of each member in controlling his or her own case personally; (2) The difficulties, if any, that are likely to be encountered in managing a class action; (3) The nature and extent of any litigation by individual class members already in progress involving the same controversy; [and] (4) The desirability of consolidating all claims in single action before a single court." *Basurco v. 21st Century Insurance Company* (2003) 108 Cal.App.4th 110, 121.

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With respect to the FEHA, CLRA, UCL, and breach of contract causes of action, class treatment is not superior in for reasons already discussed: common questions of law and fact do not predominate. However, the court finds that class treatment is superior for the Unruh Act cause of action.

While class members may have an interest in controlling their own litigation where disparate damages are involved, there is little need for individual control where liability can be determined across the board as it can with Plaintiffs' Unruh Act cause of action. In addition, because damages are not an issue for those willing to forgo actual damages, the risk of management difficulties is reduced. There is no evidence of any litigation by individual class members already in progress involving the same controversy, which means there is little risk of inconsistent rulings. Finally, consolidating all claims in a single action before this court promotes judicial economy.

The court has read *Reese v. Wal-Mart Stores, Inc.* (1999) 73 Cal.App.4th 1225. The circumstances in this case are distinguishable.

In *Reese*, the trial court observed that "denial of class treatment would not burden potential class members since there were ... 'enough incentives built into the statute [the Unruh Civil Rights Act] that any person who truly feels aggrieved by defendant's Ladies Day practice will file suit.'" *Id.* at 1235. The appellate court held that this was a relevant consideration in assessing whether class treatment would bring substantial benefits, "[s]ince one important function of class actions is to provide 'small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation' [Citations.]" *Id.*

While the statutory penalties under the Unruh Act provide an incentive for individuals to file suit in this instance, the difference is that the absent class members in *Reese* knew they had been discriminated against. Here, absent class members were simply unaware that the Loan Economics Program existed, that it was not used in their transaction, and that its use could have allegedly resulted in a lower priced loan. Absent knowledge of the alleged discrimination, all of the money in the world would not be enough to incentivize absent class members to file individual suits.

The appellate court also took into consideration the fact that the "only lawsuit on file was based on a self-generated injury," and found that "the trial court could reasonably conclude that it would likely not have to adjudicate a multiplicity of actions if the class was not certified." *Id.* at 1236. Although no

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other law suits have appeared regarding the Loan Economics Program, one reason may be that absent class members were not aware that they had been allegedly discriminated against.

Moreover, unlike the court's recent ruling in the Bear Valley Ski Company Promotional Event Cases (JCCP 4505), the alleged discrimination does not arise from a single event, nor is imposition of statutory penalties likely to bankrupt Wells Fargo. *See* Senate Judicial Committee, Report on Assembly Bill No. 587 (2001-2002 Reg. Sess.) July 3, 2001 (The $4,000 statutory penalty "will ensure that the small business (who is usually the violator) is not put out of business by the commission of one violation.").

For these reasons the court finds that class treatment of Plaintiffs' Unruh Act cause of action is superior to hearing individual cases.

III. Conclusion

Plaintiffs' motion for class certification is DENIED with respect to the FEHA, CLRA, UCL, and Breach of Contract causes of action. The motion is GRANTED with respect to the Unruh Act cause of action. The court certifies an opt-out class for this claim. Plaintiffs are ordered to notify class members that participation in the class will preclude them from seeking actual damages in connection with their Unruh Act claims.

IT IS SO ORDERED.

DATED: August 26, 2009

Anthony J. Mohr
Judge of the Los Angeles Superior Court

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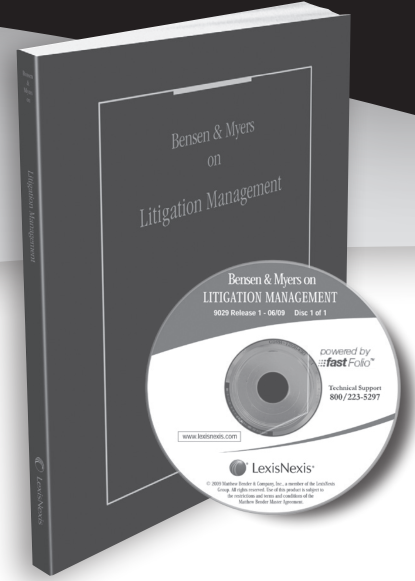

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