No. 18-16317

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellees,

SCOTT JOHNSTON,

Objector-Appellant.

v.

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

Defendants-Appellees.

On Appeal for the United States District Court for the Northern District of California

The Honorable Vince Chhabria Presiding

No. 15-cv-02159-VC

OBJECTOR SCOTT JOHNSTON'S OPENING BRIEF

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Jurisdictional Statement

1. District Court Jurisdiction

The case was brought before the district court pursuant to 28 U.S.C. §§ 1332 (a) and (d) because the amount in controversy for the class exceeds $5,000,000, there are 100 or more Class members nationwide, and Plaintiffs-Appellees and other putative class members are citizens of a different state from Defendants-Appellees. The complaint filed additionally alleged violations of the Fair Credit Reporting Act, a federal statute, as well as violations of California and Arizona statutes and common law state claims.

2. Appellate Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. § 1291. On June 14, 2018, the district court issued orders granting final approval of the settlement. Objector-Appellant Johnston filed a Notice of Appeal on July 15, 2018.

3. Pertinent Dates

1. On April 20, 2017, class counsel and counsel for Wells Fargo submitted a Motion for Settlement. ECF No. 101.

2. On May 5, 2017, Plaintiff Cason filed an Opposition to the Motion for Settlement. ECF No. 114. This was followed by an Oppositions filed by *Mitchell, et al*. ECF No. 116, attached as Exhibit A.

3. On May 11, both Wells Fargo and Jabbari counsel filed Reply Motions. ECF Nos 131, 133 on May 11, 2017.

4. On May 16, 2017, Judge Chhabria Ordered Further Briefing by Jabbari and Wells Fargo. ECF No. 141, attached as Exhibit B.

5. On May 17, 2017, Wells Fargo and Jabbari submitted Supplemental Briefs. ECF Nos. 142, 143, 145, 146, ECF No. 145 attached as Exhibit C, ECF No. 146 attached as Exhibit D.

6. On May 17, 2017, the district court signed the Preliminary Approval of Settlement. ECF No. 144.

7. On February 20, 2018, Objector Scott Johnston filed an Objection to the Preliminary Approval of the Settlement. ECF No. 196.

8. On May 14, 2018, Objector Scott Johnston filed an Objection to the Final Fairness Hearing. ECF No. 237.

9. On June 14, 2018, the district court filed its order approving the settlement. ECF No. 271.

10. On July 15, 2018, Objector Scott Johnston filed a notice of intent to appeal. ECF No. 308.

4. Assertion of Appeal

This appeal stems from a final order granting approval of a class action settlement which, if upheld, would dispose of all parties' claims.

ISSUES PRESENTED

1. Did the district court abuse its discretion by failing to have subclasses where groups included in the settlement have directly conflicting interests?
2. Did the district court abuse its discretion by precluding state law claims from ever being heard in a nationwide class action that deals with potential violations of individual state laws?
3. Did the district court abuse its discretion by allowing a class representative to represent every subclass that has conflicting interests?
4. Did the district court abuse its discretion by allowing a settlement that was reached before either side knew the essential facts of the case?
5. Did the district court fail to meet its fiduciary duty by failing to require additional negotiations after major case developments?
6. Did the district court abuse its discretion by failing to require a settlement meet the standards of Rules 23(a), 23(b) and 23(e) prior to approving the settlement?
7. Did the district court abuse its discretion by allowing a settlement to proceed without requiring proper and adequate notice to class members?

CONCISE STATEMENT OF FACTS

Appellant Scott Johnston is a resident of Herriman, Utah. He never had a bank account with Wells Fargo. Unbeknownst to Scott Johnston, his sister-in-

law, a former Wells Fargo employee, opened numerous accounts at Wells Fargo for his minor children, under pressure from Wells Fargo and without his, or his wife's consent or knowledge. Wells Fargo has refused to disclose any information regarding the accounts, even after repeated requests from his counsel.

Appellant did not discover the existence of the fraudulent accounts until after the time set forth by the district court for notice and opting out of the settlement. After the February notice period, Mr. Johnston's sister-in-law informed him that he should consider closing his children's Wells Fargo accounts. Mr. Johnston was shocked and angered that his minor children were victims. When he approached the local Wells Fargo bank, he was informed that no such accounts existed. After hours of heated discussion, the Wells Fargo branch manager finally admitted these accounts had in fact been opened, but claimed they had since been purged from their system. Wells Fargo has consistently refused to provide Mr. Johnston with any additional information.

Mr. and Mrs. Johnston never received any notice of the litigation, of the settlement, or the nature, or number of fraudulent accounts opened on behalf of his children. Despite having filed an objection to the settlement with the district court, Mr. Johnston has not received any information, including notices of

deadlines to file claims on behalf of his children, from class counsel, Wells Fargo, or the Class Administrator regarding the settlement.

A. How We Got Here - Wells Fargo's Long History of Illegal Activity

During the past twenty years, Wells Fargo has used a plethora of illegal, unethical, and morally corrupt practices to grow into one of the largest banks in the United States. In consent orders, admissions against interest, statements from Wells Fargo CEO's, and investigations conducted by Wells Fargo's Board of Directors, Wells Fargo has acknowledged that it engaged in fraudulent Sales Practice violations. These fraudulent activities began prior to 2002, when almost an entire branch in Colorado was terminated for fraudulently opening unauthorized customer accounts and credit cards.

In 2008, the United States Office of Comptroller of the Currency ("OCC") acknowledged having received over 700 whistleblower complaints by Wells Fargo "employee/salespeople" relating to active "gaming," "sandbagging," "pinning," issuance of unwanted credit cards, "forged signatures." These complaints also included instances of Wells Fargo engaging in opening unwanted savings accounts, life insurance policies, checking accounts, and other accounts without the customers' knowledge or consent. Unfortunately, the OCC took no action to investigate these 700 complaints.

In 2013, Scott Reckard published an article in the Los Angeles Times exposing Wells Fargo's fraudulent activities. In the article, Wells Fargo employees admitted to opening unneeded, and unwanted checking, savings and credit card accounts without customers' permission, and forging customer signatures in order to meet sales quotas set by Wells Fargo. Article attached as Exhibit E.

On May 4, 2015, the Los Angeles City Attorney's office filed a civil lawsuit against Wells Fargo for their fraudulent sales activities and unfair, and fraudulent business practices in violation of the California Unfair Competition Law (Cal. Bus. & Prof. Code § 17200, *et seq*.).

In 2015, The Consumer Financial Protection Bureau ("CFPB"), and the OCC initiated investigations, finding that from 2011 to 2015 Wells Fargo bank fired up to 5,300 employees for creating up to 1,534,280 unauthorized deposit accounts and over 565,443 unauthorized credit card accounts.

On May 13, 2015, Attorneys for Jabbari filed their complaint. ECF No. 1. On September 23, 2015, the case was dismissed due to the arbitration clause in account documents. ECF No. 69. On October 20, 2015, Jabbari filed a Notice of Appeal to the Ninth Circuit Court of Appeals. ECF No. 70. On September 8, 2016, Defendant Wells Fargo publicly acknowledged to having fired 5,300 employees from 2011 through 2016, for opening the above noted fraudulent,

unauthorized accounts, according to a PricewaterhouseCoopers investigation. On this exact same date, Plaintiffs and Wells Fargo announced that they had reached a settlement and stipulated that the appeal be dismissed. Also on this exact same date, Wells Fargo announced that it had reached settlements with the CFPB, the OCC, and the Los Angeles City Attorney.[1]

On September 13, 2016, the U.S. Court of Appeals for the Ninth Circuit granted the Parties' stipulated motion to dismiss the appeal without prejudice.

On September 14, 2016, the FBI and federal prosecutors in New York and California announced investigations into Wells Fargo's misconduct, opening the possibility of criminal charges.

On September 16, 2016, a proposed class action complaint was in the U.S. District Court in Utah, accusing the bank of invasion of privacy, fraud, negligence, breach of contract and other causes of action. This case challenged the validity of the arbitration agreement, and Wells Fargo waived the right to pursue arbitration in this case.

On September 27, 2016, six former Wells Fargo employees filed a class action lawsuit in federal court, seeking $7.2 billion for those individuals who were fired, or demoted, after refusing to open fraudulent accounts or meet unrealistic "sales quotas." Wells Fargo's Board of Independent Director's,

[1] Patrick Rucker & Dan Freed, *Wells Fargo will pay $190 million to settle customer fraud case*, REUTERS (Sep. 8, 2016) https://www.reuters.com/article/us-wells-fargo-settlement-idUSKCN11E2CJ .

announced opening an independent investigation of Wells Fargo's fraudulent sales activities.

In reviewing the extent of the fraudulent banking activities, on February 21, 2017, the Board of Directors announced the firing of an additional four former managers for their extensive participation in the unauthorized sales practices. The Board further announced claw backs of stock options, incentive compensation, and other sums from top executives ranging from CEO John Stumpf, Carrie Tolstedt, COO Timothy Sloan, and others, totaling over $180 million, or more than $70 million dollars more than the initial *Jabbari* settlement.[2]

On March 28, 2017, two days prior to an MDL hearing, and approximately 200 days after notifying the Ninth Circuit Court of Appeals that a settlement had been reached, Wells Fargo announced a $110 million-dollar settlement in the *Jabbari v. Wells Fargo* litigation. This settlement was based upon 1.5 million customers which Wells Fargo executives noted "may have been" affected from 2011-2017.[3]

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[2] Renae Merle, *Wells Fargo fires 4 executives as investigation continues into sham accounts*, WASHINGTON POST (Feb. 21, 2017) https://www.washingtonpost.com/news/business/wp/2017/02/21/wells-fargo-fires-4-executives-as-sham-accounts-scandal-investigations-continue/?noredirect=on&utm_term=.406f6a668c3e.

[3] Matt Egan, *Wells Fargo customers in $110 million settlement over fake accounts*, CNN (Mar. 29, 2017) https://money.cnn.com/2017/03/29/investing/wells-fargo-settles-fake-account-lawsuit-110-million/index.html.

Upon the April 10, 2017 release of the *Independent Directors of the Board of Wells Fargo & Company, Sales Practices Investigation Report*, the parties resumed negotiations to expand the Class Period back to 2002 and increased the number of suspected victims to 2.1 million. The settlement amount was increased by $32 million to $142 million.[4]

Subsequent to the settlement being submitted to the Court in May 2017 for Class Certification, and being lauded as a "*fair and adequate*" resolution of the claims, Wells Fargo miraculously "uncovered" an additional 500,000 to 600,000 customers who were victims of the fraudulent sales practices. This revelation was not based upon discovery by *Jabbari* counsel, but rather was based upon the release of the Wells Fargo Independent Board of Directors' report. This critical independent information resulted in renewed negotiations for a revised settlement, based upon the new number of 2,100,000 customers who were victims of the fraudulent activities. This new settlement went from $110 million to $142 million dollars. Modified Settlement Agreement, attached as Exhibit F. Once again, this revised settlement purported to disclose all nefarious activities by Wells Fargo, including the total number of victims, dating from 2002-2017.

The revised settlement additionally cited, and contemplated inclusion of the mandatory federal duties imposed by the 2016 OCC and CFPB settlement, *to wit*:

[4] Matt Egan, *Wells Fargo victims get closer to payback in $142 million settlement*, CNN (July 10, 2017) https://money.cnn.com/2017/07/10/investing/wells-fargo-fake-account-settlement/index.html.

establishing an enterprise-wide sales oversight program to prevent and detect unsafe or unsound sales practices, and mitigation of risks associated therewith; and establishment of a comprehensive customer complaint monitoring process which accesses customer complaint activity across the bank, adequately monitoring, managing and accurately reporting customer complaints.

Once again, after submitting verified statements, affidavits and expert reports on the fairness and adequacy of the settlement, on August 31, 2017 Wells Fargo announced that they had conveniently uncovered an additional *1.4 million fraudulent accounts*.[5] This new disclosure brought the number of "acknowledged" fraudulent accounts to 3.5 million. At this juncture, there was no indication that this was a definitive, final number. In fact, Wells Fargo couched its numbers to those who had been *thus far identified*. Suggesting that since no discovery has been engaged in, and there was potentially a lack of adequate notice to potentially aggrieved individuals, the number could substantially skyrocket even higher.

No additional negotiations were engaged in between Wells Fargo and *Jabbari* counsel to modify the settlement after revelation of an additional 1.4 million victims, and which constituted approximately 60% more victims than the

[5] Renae Merle, *Wells Fargo finds an additional 1.4 million potentially fake accounts*, WASHINGTON POST (Aug. 31, 2017) https://www.washingtonpost.com/news/business/wp/2017/08/31/wells-fargo-finds-an-additional-1-4-million-fake-accounts/?utm_term=.ce66bd94adc1("Wells Fargo on Thursday said it had potentially opened an additional 1.4 million sham accounts customers didn't want, 67 percent more than it initially estimated….").

original settlement agreement, and which significantly diluted the value of the settlement for the original victims.

During and after these disclosures, Wells Fargo continued to stonewall implementation of the mandatory requirements imposed by the September 2016 Consent Order entered into with the OCC and the CFPB. Finally, in February of 2018, (after the district court's preliminary approval of the settlement being fair, and adequate) the Federal Reserve entered into a new consent order which capped Wells Fargo's asset growth at $1.95 trillion dollars, and prohibited Wells Fargo from additional expansion until they adhered to safeguards for the public. The consent order stated:

> "We cannot tolerate pervasive and persistent misconduct at any bank and the consumers harmed by Wells Fargo expect that robust and comprehensive reforms will be put in place to make certain that the abuses do not occur again. The enforcement action we are taking today will ensure that Wells Fargo will not expand until it is able to do so safely and with the protections needed to manage all of its risks and protect its customers." Consent Order, attached as Exhibit G.

Following the action by the Federal Reserve in February 2018, the OCC and CFPB fined Wells Fargo one billion ($1,000,000,000.00) dollars for fraudulent auto loan practices.[6] Even after receiving a one billion dollar fine, Wells Fargo's continued *laissez faire* attitude toward compliance with regulatory consent

[6] *OCC Assesses $500 Million Penalty Against Wells Fargo, Orders Restitution for Unsafe or Unsound Practices*, OFFICE OF THE COMPTROLLER OF THE CURRENCY (Apr. 20, 2018) (https://www.occ.gov/news-issuances/news-releases/2018/nr-occ-2018-41.html.

agreements resulted in new details being disclosed in June 2018 concerning Wells Fargo employees continuing unabated, fraudulent altering of documents of corporate customers in the wholesale banking division.[7] The Wells Fargo illegal behavior constitutes a consistent and perpetual demonstration of its attitude of being too big to fail and too big to be regulated. Timeline of Events, attached as Exhibit H.

Given the continuous fraudulent activities engaged in by Wells Fargo, Appellant objected to the final approval of the *Jabbari* settlement (ECF Nos. 237, 254), citing the failure to receive notice of the settlement, failure to have separate representation for class members, inadequate representation, inadequate settlement, and unfair, unreasonable settlement. Nevertheless, the district court held that the settlement was "fair, reasonable and adequate" and met Rule 23 (a) requirements. The district court noted that the settlement was proper and adequate notice had been given, in spite of information available to the Court that notice to many of Wells Fargo customers was via email, and thousands of these emails were ones fraudulently produced by Wells Fargo employees, and would never be received by the customer. Any purported email notifications were suspect, and should have been fully vetted by counsel and the Court. Mr. Johnston is far from being the only one not to receive notice of Wells Fargo's fraudulent activity

[7] Emily Glazer, *Justice Department Probing Wells Fargo's Wholesale Banking Unit*, WALL ST. J. (Sep. 6, 2018)https://www.wsj.com/articles/justice-department-probing-wells-fargos-wholesale-banking-unit-1536244490

having an impact on their lives. In fact, the District Court noted that it was receiving numerous requests from individuals seeking to find out what was going on. ECF No. 334, attached as Exhibit I; ECF No. 318, attached as Exhibit J.

When Wells Fargo was requested to provide a number of the customers they had defrauded, they had a plethora of excuses on why they could not come up with a definitive number. In fact, the original number identified by PricewaterhouseCoopers ("PwC") was increased by nearly 70% over the original estimate. When asked by the Court for an explanation of how the estimated number of false accounts rose from 2.1 million to 3.5 million (*See* Order, ECF No. 141) the parties had completely different responses.

According to counsel for *Jabbari*, Mr. Derek Loeser, "Plaintiffs *estimated* the number of unauthorized accounts from 2002 to present to be 3.5 million." ECF No. 145 at p. 4 (emphasis added). According to Mr. Loser, this "guess" was based on PwC report, along with the CFPB report. However, according to Wells Fargo, the *2 million account figure contained in Plaintiff's' initial brief* was based upon "the over-inclusive population of potentially unauthorized accounts identified by PricewaterhouseCoopers ("PWC") in its analysis . . .while the 3.5 million figure is Plaintiff's' *own estimate covering a broader timeframe*. ECF No. 146 at p. 5 (emphasis added).

Amazingly, three and one-half months after submitting the two million account number estimate upon which the parties asserted that the settlement was fair and adequate for 1.4 million fewer members, there was no modification of the agreement. In fact, once more Wells Fargo once again released "new information" which indicated the "actual number" of fraudulent accounts was the 3.5 million number indicated by the Plaintiffs. Either Plaintiffs' counsel was extremely good at guessing, or the parties decided to agree to a number, which Wells Fargo insisted could not be arrived at, short of interviewing every banker and customer. These figures used to construe a settlement amount were based upon **no discovery** between the parties, just information supplied by the Defendant who has every reason not to disclose correct or accurate information. Wells Fargo admitted the PwC number did not identify unauthorized accounts.

Standard of Review

A district court's final approval of a class action settlement is reviewed for abuse of discretion. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1046 (9th Cir. 2002). A district court abuses its discretion when it makes an error of law or when its "application of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc) (internal quotations omitted). An error of law is an abuse of discretion. *See, e.g., Knight v.*

Kenai Peninsula Borough Sch. Dist., 131 F.3d 807, 816-17 (9th Cir.1997) ("We review a district court's denial of class certification for abuse of discretion," and "a district court abuses its discretion when it makes an error of law."); *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1237 (9th Cir. 2001) ("A district court's decision regarding class certification is reviewed for abuse of discretion" and "[a] court abuses its discretion if its certification order is premised on legal error.") (internal citations omitted); *Molski v. Gleich*, 318 F.3d 937, 946 (9th Cir.2003) (same, citing *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1237 (9th Cir. 2001)).

When an appellant raises the argument that the district court premised a class certification determination on an error of law, the Court of Appeals' first task is to evaluate whether such legal error occurred. *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1091 (9th Cir. 2010). An error of law is a per se abuse of discretion. *Id*. If there was error of law, the Court of Appeals will then "proceed to review the district court's class certification decision for abuse of discretion[.] *Id*.

Further, the Court of Appeals is compelled to reverse the approval of a class action settlement when the terms of the decree are unjust. *Molski v. Gleich*, 318 F.3d 937, 956 (9th Cir. 2003).

Argument

I. The Settlement Fails to Meet Rule 23(a) Requirements

Rule 23(a) sets forth mandatory prerequisites to a class action suit. These include requirements of commonality, typicality, and adequacy. Fed. R. Civ. P. R. 23(a).

The district court abused its discretion by certifying a class action settlement that fails to meet the three mentioned mandatory requirements of Rule 23(a). Any of these failures is sufficient grounds to overturn the district court's ruling, but when taken as a whole, the number and gravity of the shortcomings of the settlement proves that the settlement must be overturned.

The district court apparently was aware of the Rule 23 requirements, as it requested further briefing from the parties due to major issues in the proposed settlement. ECF No. 141. The very nature of the questions implicitly imply that the district court realized that there should have been sub-classes of class members. ECF No. 145, attached as Exhibit C.

A. The Settlement Violates the Commonality Requirement of Rule 23(a)

Rule 23(a)(2) of the Federal Rules of Civil Procedure requires that "there are questions of law or fact common to the class." Commonality "requires the plaintiff to demonstrate that the class members have suffered the same injury." This does not mean merely that they have all suffered a violation of the same provision of

law. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-350, 131 S. Ct. 2541, 2551 (2011) (internal citations omitted).

The Supreme Court explained in *Wal-Mart* that the Title VII injury in that case would have to show a "common contention," giving the example of discrimination by the same supervisor. The common contention "must be of such a nature that it is capable of classwide resolution--which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id. at 389-90.*

Here, there are countless scenarios where the millions of accounts could have been opened. Some accounts may have been opened in connection with a valid account. These accounts may have been opened by the same salesman at the time of opening or after the customer left. Other accounts may have been opened by other salesmen, or by branch managers. Some accounts, like those opposed by Objector Scott Johnston, were opened for minors without any valid account. Some accounts were opened during job interviews. Some personal accounts were opened for individuals who acted for established non-profit organizations. Further, the harm suffered by individuals have numerous ways it could have happened.

The mere claim by victims of the same company that they have suffered fraudulent account openings, gives no cause to believe that all their claims can and should be litigated at once. Plaintiffs' claims would have to depend upon a

common contention--for example, the assertion of fraudulent activity on the part of the same branch supervisor. That common contention would have to be of such a nature that it is capable of classwide resolution--which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke. *See id*. at 389-90.

Like the plaintiffs in the failed class in *Wal-Mart*, the Plaintiffs in this case were all generally negatively affected by a mega-company's poor policies. Similar to *Wal-Mart*, Wells Fargo's actions in this case were not directed by the same supervisor, but spread over thousands of Wells Fargo employees in hundreds of branches, in countless different ways. Therefore, district court's approval of the class action settlement must be overturned.

B. The Settlement Violates the Typicality requirement of Rule 23(a)

Rule 23(a)(3) requires "the claims or defenses of the representative parties are typical of the claims or defenses of the class." This typicality requirement "attempts to ensure that the representative parties' (named plaintiffs') interests are substantially aligned with those of absent class members. Thus, any potential conflict or antagonism between the class representatives and the interests of the absent class members will preclude certification of the class. 5 Moore's Federal Practice - Civil § 23.24 (2018).

Conflict between the class representatives and other class members unquestionably existed in this case. The district court defined the class as: "All Persons for whom Wells Fargo or Wells Fargo's current or former subsidiaries, affiliates, principals, officers, directors, or employees opened an Unauthorized Account or submitted an Unauthorized Application, or who obtained Identity Theft Protection Services from Wells Fargo during the period from May 1, 2002 to April 20, 2017." ECF No. 271 at p. 6.

This definition clearly indicates that the settlement should be broken down into subclasses of (1) Unauthorized Accounts (2) Unauthorized Applications, and (3) Identity Theft Protections Services. The Settlement Approval further breaks down different groups who will receive different types of funds: "The Settlement provides for three types of payment: (1) Fee Damages and (2) Credit Impact Damages, both of which together compose "Compensatory Damages"; and (3) and a "residual" payment, which is termed "Non-Compensatory Damages" under the Settlement. The Plan of Allocation provides that Authorized Claimants will be reimbursed from the Net Settlement Amount for Compensatory Damages, and will also be allocated Non-Compensatory Damages. *Id*. at p. 6.

The Settlement implicitly creates sub-classes, provides for different types of damages to the class members, and provides for different methodology of how the class members will be paid based on their specific situation. The Settlement

functions like there should be sub-classes, but fails to include any. It further fails to mandate that these competing groups have separate representation to protect their interests. Individuals for Compensatory Damages are permitted recovery and then to participate in the pro-rata recovery for Non-Compensatory Damages. Individuals who only receive Non-Compensatory Damages get to watch their recovery dwindle while Compensatory Damages are taken out first. Many of the objections raised at the preliminary approval hearing dealt with economic damages and need for sub-class designation and separate representation.

Plaintiffs from a lawsuit in the U.S. District Court in the District of Utah filed an objection to oppose a class with no sub-classes. ECF No. 118, at pp. 1, 3-7, attached as Exhibit D. Objector Johnston spent twelve pages of briefing to object to the final class settlement based on the settlement's lack of subclasses with adequate representation. ECF No. 196, at pp. 11-22, attached as Exhibit E. The court was also made aware of lack of subclasses and representation by the objection to final approval from Objector Darbyshire (ECF No. 262) as well as the Plaintiffs in the related *Cason* case (ECF No. 114). The district court was repeatedly made aware of the conflicting classes. However, despite this knowledge, the district court failed to require separate sub-classes and counsel to conform to the requirements of Rule 23(a)(3).

C. The Settlement Fails to Meet the Adequate Representation Requirement of Rule 23(a)

Rule 23(a)(4) requires "the representative parties will fairly and adequately protect the interests of the class." Due to "its constitutional underpinnings, the adequacy-of-representation requirement is of critical importance in determining whether a class should be certified." 5 Moore's Federal Practice - Civil § 23.25 (2018). The Ninth Circuit Court of Appeals explained this requirement:

> "Class members who are not parties to a class action suit nevertheless are bound by the judgment in the suit, and due process is satisfied, *if* the absent members' interests are adequately represented by the class members who are present. Adequate representation depends on the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive." *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1994)(internal citations omitted).

With the existence of separate classes with competing interests, the district court had a duty to ensure each subclass was represented. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 827 F.3d 223 (2d Cir. 2016) ("Divergent interests require separate counsel when it impacts the essential allocation decisions of plaintiffs' compensation and defendants' liability.").

1. The need for subclasses

Objector Johnston explained that without subclasses with adequate representation, the requirements of Rule 23(a) are not met. ECF No. 196, at pp. 11-

15. Numerous other objectors also brought up the lack of subclass representation. These objections were disregarded by the district court.

In the present case, there is actual conflict between Compensatory Damages Claimants and Non-Compensatory Claimants. Compensatory Claimants already get one bite at the apple prior to participating in a pro-rata distribution amongst Non-Compensatory Claimants. It is illogical that individuals who receive Compensatory Damages have the same interest in maximizing the recovery for the Non-Compensatory Claimants. Non Compensatory Claimants only get pro-rata distribution. These claimants are not represented by any of the class representatives.

2. Evidence of collusion

The timing of several events within this case raises serious questions of collusion. First the CFPB announced its settlement with Wells Fargo and the Parties advised the Ninth Circuit Court of Appeals that they had reached a settlement on the exact same day. Second, both parties somehow agreed to exactly 3.5 million customers believed to be harmed despite a complete absence of discovery. Third, no additional compensation was added to the settlement when an additional 1.4 million accounts were announced by Wells Fargo, showing that the bad acts of Wells Fargo were not weighed by the Parties. Fourth, no additional

compensation was added to the settlement when Wells Fargo publicly waived arbitration.

II. The District Court Failed to Ensure the Settlement Adhered to the Requirements of Rule 23(b)

A district court abuses its discretion by failing to analyze whether common questions of law and fact predominated under Rule 23(b)(3) with regard to the settlement class. *See In Re Hyundai and Kia Fuel Economy Litigation*, 881 F.3d 679 (9th Cir. 2018). The Rule 23(b)(3) predominance inquiry is far more demanding than Rule 23(a)'s commonality requirement. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997). The predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. *Id.* at 623.

One key duty of a district court is to analyze if common questions of law and fact predominated. The Ninth Circuit Court of Appeals has repeatedly made it clear that when a potential class action affects class members from different states, the District Court must do a choice of law analysis. *See, e.g., Mazza v. American Honda Motor Co.*, 666 F.3d 581 (9th Cir. 2012)(each of the 44 states involved in the case had "a strong interest in applying its own consumer protection laws."); *In Re Hyundai*, 881 F.3d 679(the district court abused its discretion when the court failed to analyze potential differences in state consumer protection laws and

whether class members who purchased used cars were exposed to (and therefore could have relied on) the defendants' allegedly misleading statements.).

A district court's failure to do a choice of law analysis when such analysis is needed is an abuse of discretion. *See In Re Hyundai and Kia Fuel Economy Litigation*, 881 F.3d 679; *Mazza*, 666 F.3d 581. Here, the district court was made aware that there were conflicting laws, and that no choice of law analysis had been performed. This was brought to the Court's attention in court documents and objections from numerous individuals.

In the Amended Complaint (ECF No. 37), the first (unfair competition), and second (California Customer Record Act), causes of action are California statutory law claims. The sixth cause of action (unjust enrichment), and seventh (conversion) are apparently California common-law claims. The third cause of action (Arizona Fraud Act) is an Arizona statutory claim. The court was made aware of the variances in state laws that would affect the rights and remedies of the potential class. *See, e.g.*, ECF No. 118 a p. 9.

The district court disregarded these state law rights in the Order Granting Final Approval: "Differences among state laws do not bar certification of the class here, as Plaintiffs have asserted a claim under a federal statute (the Fair Credit Reporting Act) that is equally applicable in all states." ECF No. 271, at p. 11.

While the Fair Credit Reporting Act does apply in all states, the California Customer Record Act does not.

This case involves victims in almost every state in the country. In addition to violating Federal and California law, Wells Fargo's actions violate numerous state laws in dozens of states. The underlying actions by Wells Fargo involve violations of data privacy, identity protection, consumer protection, banking regulations, fraud and other applicable laws in each state. In each of these issues, the laws vary considerably from state to state. The *mens rea* and *actus reus* vary considerably from state to state. The remedies vary considerably from state to state. Even the existence of laws varies from state to state.

Laws that apply in California to protect California residents were not available to class members in any other state. Each state has certain laws that would apply to its residents, and none of the states have the exact same statutory law, legislative history, and case law. California state law does not predominate. Arizona law does not predominate. No state law predominates over others. To meet the Rule 23(b) requirements, each state should have a separate class action that applies that state's law. Each individual state has an interest in applying its own laws it tailored to protect its own citizens.

Rather than conducting the required analysis, the district court disregarded every state law claim from every state, and then seeks to preclude any of these

claims from being brought in the future. This failure constitutes an abuse of discretion and a misapplication of law. A multidistrict litigation proceeding would have been a superior manner in which to resolve Wells Fargo's fraudulent sales practices.

Numerous MDL actions have allowed for swift and competent settlements, and trials, while allowing injured victims to argue damages based upon fraud, Unfair and Unlawful Business, and Deceptive Business Practice statutes in various jurisdictions. Here, Judge Chabbria expressed surprise that Wells Fargo had engaged in overnight shredding parties, where branches where notified that auditors would be present the next day, and managers and employees literally spent the night shredding and destroying evidence of their fraudulent sales activities. Volume 1, Excerpt of Records, (V 1, ER pgs. 7-8).

This is precisely what Judge Chabbria argued against in the May 30, 2018 Fairness Hearing and Motion for Final Approval of Class Action Settlement, "[a]nd, therefore, what? Each individual should pursue his or her own lawsuit against Wells Fargo?...You think every individual who was wronged by Wells Fargo in this case should be filing an individual lawsuit in federal court and that all of those individual lawsuits should be consolidate in front of one judge and each of the cases should be adjudicated individually." (V1 ER p. 9) Therefore, the district court's Final Approval of the Settlement should be overruled.

III. The District Court Failed to Ensure the Settlement Adhered to the Requirements of Rule 23(e)

In cases of settlement-only class actions, the "district court has a fiduciary duty to look after the interests of those absent class members." *Allen v. Bedolla*, 787 F.3d 1218, 1223 (9th Cir. 2015) (collecting cases). Specifically, courts must "determine whether a proposed settlement is fundamentally fair, adequate, and reasonable." *Hanlon*, 150 F.3d at 1026; *see* Fed. R. Civ. P. 23(e)(2). In particular, where "the parties reach a settlement agreement prior to class certification, courts must peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement." *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003).

A. The Court Failed to Ensure the Notice Requirements of Rule 23(e)(1) were met.

Adequate notice is critical to court approval of a class settlement under Rule 23(e). Rule 23(c)(2)(B) requires: "[f]or any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). "[T]he express language and intent of Rule 23(c)(2) leave no doubt that individual notice must be provided to those class members who are identifiable through reasonable effort." *In re*

Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig., 229 F. Supp. 3d 1052, 1063 (N.D. Cal 2017) (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175, 94 S. Ct. 2140 (1974)). Individual notice to identifiable class members is not a discretionary consideration, but is an unambiguous requirement of Rule 23. *Eisen*, 417 U.S. at 176. Each class member who can be identified through reasonable effort must be notified to preserve his/her right to pursue the claim separately, or remain in the class to participate in the action. *Id*. There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of the parties. *See id.*

Settlement class actions present unique due process concerns for absent class members. As such, the district court has a fiduciary duty to look after the interests of those absent class members. Specifically, courts must determine whether a proposed settlement is fundamentally fair, adequate, and reasonable. In particular, where the parties reach a settlement agreement prior to class certification, courts must peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement. *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Liti*g., 229 F. Supp. 3d 1052, 1061-1062 (9th Cir. 2017)(citations omitted).

In a settlement-only certification context, Rule 23(e) is "designed to protect absentees by blocking unwarranted or overbroad class definitions . . . demand

undiluted, even heightened, attention[.]" *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620, 117 S. Ct. 2231 (1997). "Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold." *Id.*

1. Many Affected Individuals Were not Given Notice because they were not known to Court, Plaintiffs or Defendants

Rule 23 and CAFA both require that notice be given to potential class members. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998); 28 U.S.C. § 1715(b). If identifiable class members are not made aware of the class action, adequate notice is not given. The order granting the class settlement completely disregarded this mandate, stating that all class members would be bound by the settlement "regardless of whether they have received actual notice of the proposed Settlement." ECF No. 271, at p. 11.

Wells Fargo has not shared all of the information they have regarding the actual number of unauthorized accounts opened. No discovery request has compelled Wells Fargo to provide an accurate figure of the number of individuals and small businesses damaged by Wells Fargo's actions. This inability and refusal to quantify the size of the "class" was demonstrated before the Court. Counsel from both sides opposed answering the Court's question number 2, (ECF 141, at p.

2) prior to the preliminary approval of the proposed $142 million-dollar settlement.

Mr. Derek Loeser, in his supporting affidavit, noted:

> "Pursuant to Federal Rule of Evidence 408 and the California Mediation Privilege, in addition to the informal discovery described above, through the multiple mediations and as part of the settlement agreement, Wells Fargo provided confidential information and confirmatory discovery to Keller Rohrback concerning the nature and extent of the unauthorized account scandal and resulting losses and damages that we carefully evaluated and reviewed." ECF No. 102, at p. 3.

Wells Fargo answered this same question on determining the number of class members as follows:

> "It is possible to provide a reasonable ballpark for some of these numbers, but others are not possible to estimate other than in very broad terms at this juncture. Contrary to the characterizations some proposed intervenors give to the PWC analysis, that analysis does not identify unauthorized accounts. And, as outlined below, the nature of the inquiry and the relevant evidence do not lend themselves to a large-scale data analysis. . . Contrary to the characterizations it has repeatedly received in this case and elsewhere, the PWC analysis did not identify unauthorized accounts." ECF No.146, at p. 5.

Again, completely contradictory to Plaintiff's counsel's response, Wells Fargo admitted that the actual number of class members could not be identified "at this juncture. . . [c]ontrary to the characterizations it has repeatedly received in this case and elsewhere, the PWC analysis did not identify unauthorized accounts." *Id.* This is highlighted by the fact that three and one-half months (3 ½) months after submission of the affidavits and briefs in support of the Motion for Preliminary Approval, Wells Fargo confirmed for the first time that after further review of its

records an additional 1.4 million accounts were verified as "unauthorized accounts." Thus, the preliminary approval in this case was based on inaccurate, incomplete, and speculative information. This lack of information was never rectified.

It is apparent that no one, including the counsel for this case, can accurately state how many accounts there were, or how that number was calculated. It is impossible to fashion a fair settlement when the parties, the class members, and the public do not know basic information such as how many people were affected and who these people are. Because the settlement was reached before this information was known, the settlement cannot be fair or adequate and should be denied.

In the present case, there are thousands, and possibly millions of potential class members who were not given notice because the Court and parties did not know the identities of these individuals. The Court was aware of this deficiency. *See generally* ECF No. 196. Despite knowing the parties did not even try to identify portions of the class, and that the class had examples of people who received zero notification, the court stated "Because the Court finds that the Notice complied with due process and the requirements of Rule 23, it overrules objections to the Notice." ECF No. 271 at p. 11.

2. **The Notice Provided was Insufficient to Meet the Requirements of Rule 23.**

Two examples highlight the inadequacies of the notice provided. First, Counsel for Plaintiff *admits* that not every affected individual was known. Jabbari's counsel and Wells Fargo counsel gave conflicting responses when the Court asked about the increase in the number of unauthorized accounts opened by Wells Fargo from the 2.1 million accounts initially noted in the Motion to Settle, to the 3.5 million accounts identified in Jabbari's Reply Brief. Plaintiff's Counsel Mr. Derek Loeser in the supplemental briefing stated "Plaintiffs **estimated** the number of unauthorized account from 2002 to present to be 3.5 million." ECF No. 145, at p. 4 (emphasis added). Mr. Loeser's estimate was based on the PwC report, along with the CFPB report. However, Wells Fargo's counsel stated that the 2 million account figure contained in Plaintiff's' initial brief was based upon "the over-inclusive population of potentially unauthorized accounts identified by PricewaterhouseCoopers ("PWC") in its analysis . . .while the 3.5 million figure is Plaintiffs' own estimate covering a broader timeframe." ECF No. 146, at p. 5.

It was not until August 31, 2017, some three and one-half (3 ½) months later, that Wells Fargo happened to discover another 1.4 million accounts, to bring the number of fake accounts to 3.5 million fake accounts, precisely and conveniently the same number as Plaintiffs. Only a few months prior, Wells Fargo

responded the number of false accounts, was by their account, based upon over inflated guesses by Plaintiffs. Parenthetically, Wells Fargo has not divulged how it came up with the additional figure. Without discovery there exists a real possibility that the actual number of victims could be double, or triple the number disclosed by Wells Fargo.

The settlement was reached in complete ignorance, disregard, or non-disclosure of 1.4 million Wells Fargo accounts. The information was available to Wells Fargo. If it had desired, Wells Fargo could have done research into its databases to determine the depth and breadth of the accounts. In effort to sweep this scandal under the rug as quickly as possible, Wells Fargo resorted to guesses and "ballpark" figures. Wells Fargo admits:

> "In short, the PWC methodology did not identify unauthorized accounts. Some of the accounts identified by PWC are unauthorized and others are not, but the PWC analysis does not provide a means to distinguish the two. Not only did the PWC analysis not identify unauthorized accounts; it could not identify unauthorized accounts with any precision. In many instances, questions of consent cannot be resolved without looking at a range of evidence and making subjective judgments about it. The circumstances of the named plaintiffs in this case vividly illustrate these challenges. ECF 146, at p. 9.

Second, there are reports of Wells Fargo employees holding overnight shredding parties to destroy the physical evidence of the fraudulent accounts opened in a given branch prior to an audit. These fraudulent accounts may have included regular customers, but also may have included tens of thousands of

noncustomers, job applicants, and others. In any case, the parties and district court did not provide any accounting for this group of people. These accounts presumptively were entered into computer systems, and could have been accounted for if Wells Fargo had desired. However, these accounts were not addressed in any significant manner during the settlement.

3. The Court Disregarded the Evidence of Potentially Tens of Thousands of Individuals Who Were Not Notified.

The district court knew that there were individuals who were never given notice. Objector Scott Johnson provided firsthand evidence to the court that he had several minor children who had fraudulent accounts opened in their names and were not provided any notice that they were victims. It was not until a Wells Fargo employee with a heavy conscience confessed her misdeeds to Objector Scott Johnson that he learned that his children were victims of Wells Fargo's schemes. *See* ECF No.196-8. Johnston's experience where Wells Fargo refused to provide any information for hours underscores the problem that people who did not receive notice may actively be blocked by Wells Fargo from receiving notice at all. *Id.* To present, Wells Fargo has withheld the account types, who was on the accounts, how many accounts were opened for each minor, etc. How can Wells Fargo be trusted to give information to class members who seek information when it has

already exhibited a pattern of obstructing that information it promises it will provide?

The class action settlement further wrongly assumed that everybody could be notified because all individuals had a valid Wells Fargo account in the first place. This is an invalid assumption. The district court was aware that there were job applicants, contacts of Wells Fargo employees, minors, customers from other companies, and dozens of other kinds of people who had their identifying information stolen by Wells Fargo. The district court approved settlement despite knowing there were many individuals who were never notified.

4. The Notice Relied on Missing or Faulty Information

The notice in this case was sent to the information Wells Fargo had on file. Wells Fargo has admitted to the practice of opening dummy accounts in which they filled in fake contact information so as to avoid notice being sent to their victims. *See* Exhibit K, CFPB Consent Order, at p. 8, □ 30. How can notice be given when the contact information for the notice was intentionally entered by Wells Fargo employees to prevent notice from ever making it to the victims?

Notice was provided by Wells Fargo sending emails and/or mailed to the information it had on file. Wells Fargo admits to inputting false information primarily to prevent its victims from being notified. Notice in this case was inadequate because the contact information where Wells Fargo was supposed to

send information was intentionally input incorrectly to prevent the victims from ever finding out. It does not matter how many emails Wells Fargo sends giving notice to a fake email address it created- the victim is not going to get the information. Wells Fargo told Johnston that the records for the fraudulent accounts of his minor children were "purged" from the system, and Wells Fargo would not provide information. *See* ECF No. 196-8, at 119. The district court was made aware of the notice deficiencies. *Id*.

5. Notice Was Practicable.

Wells Fargo's actions show that notice was practical. Wells Fargo's eagerness to move beyond this scandal quickly is no excuse for it failing to find or notify its victims. "Ballpark" guesses are insufficient. Wells Fargo explained to the district court that it was possible, but difficult to do:

> "Wells Fargo opened tens of millions of accounts during the relevant time period, the vast majority of which were authorized. Determining which ones were not authorized requires drawing inferences from individualized evidence such as signatures, recorded telephone calls, account activity, and the testimony of the customer and banker involved." ECF No.141 at p. 12.

While it may have been expensive, or time intensive to complete these tasks, it is the least Wells Fargo should have done to try to make its victims whole.

Further, Wells Fargo could have launched national ad campaigns regarding this issue. Wells Fargo has launched several campaigns claiming it was "Reestablished 2018." This includes advertisements during the NBA finals, several

other sporting events, etc. Wells Fargo appears to have expended more effort and money on trying to rehabilitate its image than it did trying to discover and notify its victims. Wells Fargo easily could have spent the millions in advertising dollars it has spent trying to reach as many individuals as possible to rehabilitate its image on commercials informing the general public about the risks associated with having had any interaction with Wells Fargo.

B. The Court Failed to Ensure the Settlement is Fair, Reasonable, and Adequate.

Rule 23(e)(2) requires the settlement be fair, reasonable, and adequate. The Ninth Circuit Court of Appeals explained:

> "To determine whether a settlement agreement meets these standards, a district court must consider a number of factors, including: the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement." *Staton v. Boeing Co.*, 327 F.3d 938, 959, (9th Cir. 2003)(citations omitted).

These factors are not exhaustive. *Id*. The district court abused its discretion by failing to properly apply the factors set forth by *Staton*.

1. The Settlement is unfair because of inadequate representation and intraclass conflicts.

As previously discussed in context of Rule 23(a)(4)'s adequacy requirement, this settlement is inadequate because there are interclass conflicts between class members. The requirement for adequate representation also extends into an analysis of Rule 23(e). *See Staton v. Boeing Co., 327* F.3d 938, 961 (9th Cir. 2003)("In this case, we are somewhat uneasy, reading the settlement as a whole, about whether in reaching the settlement, class counsel adequately pursued the interests of the class as a whole.").

Additionally, as the Seventh Circuit Court of Appeals noted in *Kent Eubank, et al., v. Pella Corporation, and Pella Windows and Doors*:

> "Fortunately the settlement, including the amount of attorneys' fees to award to class counsel, must be approved by the district judge presiding over the case; unfortunately American judges are accustomed to presiding over adversary proceedings. They expect the clash of the adversaries to generate the information that the judge needs to decide the case. And so when a judge is being urged by both adversaries to approve the class-action settlement that they've negotiated, he's at a disadvantage in evaluating the fairness of the settlement to the class." 753 F3d. 718, 720 (7th Cir. 2014).

The *Eubank* Court further explained:

> "In this case, despite the presence of objectors, the district court approved a class action settlement that is inequitable — even scandalous. The case underscores the importance both of objectors (for they are the appellants in this case — without them there would have been no appellate challenge to the settlement) and of intense judicial scrutiny of proposed class action settlements." *Id* at 721.

As with the *Eubank* decision, the Jabbari case settlement was, and is nothing short of scandalous. The victims of Wells Fargo's fraudulent activities received

approximately one third of the amount that Wells Fargo shareholders reaped, and they are the ones whose identities were stolen, whose credit was damaged, and who spent literally between 50 and 60 hours trying to reach Wells Fargo operators to assist them with their accounts. At least in the *Eubank* case, the court certified two separate classes, in the *Jabbari* case, in spite of repeated requests for appointment of subclass counsel and separate classes, the Court refused to certify separate classes or appoint sub-class counsel. The *Eubank* Court additionally noted: "the adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups." *Id. quoting In re Joint Eastern & Southern District Asbestos Litigation,* 982 F.2d 721, 743 (2d Cir. 1992), and *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 627–28 (1997).

In order for due process to be met, claimants that fall into one specific subgroup must be represented by someone who only fits in that same subgroup. The Seventh Circuit Court of Appeals explained:

> "Not only did the settlement agreement not quantify the benefits to the class members, but the *judge approved it before the deadline for filing claims. He made no attempt to estimate how many claims were likely to be filed, though without such an estimate no responsible prediction of the value of the settlement to the members of the class could be made.* Furthermore, the judge's approval of the settlement (over the objection of the former class representatives and other class members) is squeezed into two two-page orders (the second addressed to the

> attorneys' fee award) *that ignore virtually all the objections to the settlement*. Unheeded was our warning that "because class actions are rife with potential conflicts of interest between class counsel and class members, district judges presiding over such actions are expected to give careful scrutiny to the terms of proposed settlements in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole." *Mirfasihi v. Fleet Mortgage Corp*., 356 F.3d 781, 785 (7th Cir. 2004) (citations omitted).

In the present case, there are conflicts between class members who are eligible for compensation under credit score damages, class members who are to receive a pro-rata share who did not experience credit score damages and class members who were part of an unrepresented class of 1.4 million members (who were not even identified until over three months after the Court had provided preliminary approval of the settlement agreement).

Without subclasses that have sufficient representation fighting for their rights, this settlement is unfair, unreasonable, and inadequate.

2. The Settlement Fails to meet the requirements of Rule 23(e) because it Failed to Take into Account Major Case Developments.

The district court had a fiduciary duty to look after the interests of those absent class members and determine if the settlement was fair, adequate, and reasonable. *Allen*, 787 F.3d at 1223; *Hanlon*, 150 F.3d at 1026. The district court failed to uphold its fiduciary duty in three primary ways: (1) the court allowed for the number of accounts to increase after the initial settlement discussions, (2) the

failure to take into account major case developments, (3) allowing for the case to be based on a complete lack of information,

a. Additional accounts were not considered by the court

The original settlement was based on estimates by Wells Fargo and Plaintiffs for the time period of 2009-2016. The original settlement amount was $110 million dollars. Since that original settlement number, it has come to light that the fraud extends all the way back to 2002. This garnered further settlement talks and the amount was increased to $142 million. After the disclosure of the additional fraudulent accounts, and settling on $142 million dollars, there was still no discovery regarding the approximately 1.4 million accounts which were fraudulently opened. Plaintiffs had already received preliminary approval and no longer were fighting for the rights of those affected. When the initial settlement was negotiated, the scope of Wells Fargo's wrongdoing ostensibly was a major factor in the discussions, as it would have affected the number of accounts in the settlement, likelihood of punitive damages, and the relative position of the parties.

When the 1.4 million additional accounts were "discovered," the amount of the settlement was not increased at all. This second portion was proportionally less per account than the original section. While conjecture is always speculative, one can only wonder what would have happened if the parties' initial negotiation was framed based on the whole picture.

b. The court failed to consider Wells Fargo's waiver of the arbitration agreement.

The district court failed to take into consideration that Wells Fargo waived, on at least two occasions, the applicability of the arbitration agreement. The parties admit that the arbitration agreement was a primary factor in the settlement:

> "[p]laintiffs achieved all this despite the substantial barriers to classwide relief they might have encountered in further litigation. In its customer contracts, Wells places broad arbitration clauses, which contain an equally broad delegation provision, plus a bar to classwide arbitration. The arbitration clause—and particularly its delegation provision—may very well have ended up barring classwide relief." ECF No. 101, at p.12.

Objector Scott Johnston explained that class members could not be held to an arbitration agreement to which they did not agree, and that failing to consider this was a defect in representation of counsel. ECF No. 196, at pp. 7-8. He further pointed out that the arbitration agreement had been waived multiple times by Wells Fargo. *Id.* at p. 8.

Among other things, the arbitration agreement prohibited a class action and precluded compensatory and punitive damages. The bargaining power of the parties changes dramatically based on the existence and validity of an arbitration agreement. Without a valid arbitration agreement, there is a possibility of a class action lawsuit, cases being public record instead of in a confidential arbitration, punitive damages, minimized costs of bringing suit, and a dozen other factors.

Each of these factors would substantially change any party's position and posturing in settlement discussions. The negotiating position "we will have a public class action with the possibility of a media circus and billions in punitive damages" is significantly different than "if people can afford to get into arbitration to recover a minimal amount, each individual will have a costly, confidential arbitration where punitive damages are off the table."

The district court had a fiduciary duty to the settlement class to ensure the settlement was fair, reasonable, and adequate. By not requiring a second round of negotiations after a major case development, the district court abused its discretion and failed to meet its fiduciary obligations.

3. The Settlement is Unfair Under Rule 23(e) Because it Seeks to Preclude State Law Claims When Those Claims Were Ignored by the District Court.

Although the district court recognized there were differences in state laws, the court stated: "Differences among state laws do not bar certification of the class here, as Plaintiffs have asserted a claim under a federal statute (the Fair Credit Reporting Act) that is equally applicable in all states." ECF No. 271, at p. 11. The district court then stated that, despite the entire class never being able to bring state-law claims, they would be barred from ever bringing such claims:

> "As of the Effective Date, the Class Representatives, and all Settlement Class members who have not been excluded from the

> Settlement Class . . . regardless of whether they have received actual notice of the proposed Settlement or have executed and delivered a Claim Form, s**hall have conclusively compromised, settled, discharged, and released any and all Released Claims against any Released Party, and shall be bound by the provisions of the Settlement Agreement and this Order**. Furthermore, as of the Effective Date, the Class Representatives, and all Settlement Class members shall by operation of the final judgment **have expressly waived, to the fullest extent permitted by law, any and all provisions, rights and benefits conferred by California Civil Code section 1542, and any law of any state or territory of the United States, or principle of common law, or the law of any foreign jurisdiction, that is similar, comparable, or equivalent to California Civil Code section 1542**. *Id*. (emphasis added).

In addition to violating basic due process, the settlement clearly violates the requirements of Rule 23(e). The district court failed to consider the state law or common law claims before it. The district court failed to consider the differences in state law or common law claims across the country. The district court failed to allow any class member from any state to bring any state law or common law claims. Then the district court stated *all* these claims were waived, despite never being heard and regardless if the notice was ever given to the class members.

4. The Settlement Fails to meet the adequacy requirements of Rule 23(e) because it is inadequate to compensate victims, punish the perpetrator, or provide future deterrence.

The Settlement is inadequate to compensate the victims of Wells Fargo's behavior. These individuals had their identities stolen and exploited for years so

Wells Fargo could boost its stock prices. At this point there is no clue as to how much individuals will receive. As individuals with Compensatory Damages get to take out their damages first, and then get included in the pro-rata distribution. Pro rata claimants have no knowledge as to value of their claim but are expected to waive their rights. This creates a situation where the individual victims may receive a paltry sum in restitution for Wells Fargo using their identities for years. If the current guess of 3.5 million accounts is accurate, each victim would receive about $40 if the settlement was disbursed equally.

The settlement is inadequate because Wells Fargo stands to make a profit from its two-decade-long fraudulent activity. Wells Fargo received over $180 million from its top executives in clawbacks and returned incentive bonuses. The settlement currently sits at $142 million. Wells Fargo stands to make a profit of over $38 million by committing decades of identity theft and fraud. This is on top of the millions Wells Fargo received in higher stock prices, an appearance of growth/success, and other benefits it received by exploiting its millions of victims. As a matter of law, justice, and equity, district courts should discourage everyone, including "too big to fail" banks like Wells Fargo, from making profit from criminal activity.

Further, the settlement is inadequate when compared to the Wells Fargo's overall profits. Even without the $38 million Wells Fargo stand to make in profit

from clawbacks, the settlement represents about 54 hours of its 22.18 billion dollar *net* profit for 2017. Wells Fargo spent nearly two decades actively engaged in fraudulent activity, and is being punished with a fine representing about 54 hours of the net profit it made last year. If any of Wells Fargo's victims engaged in a single incident of identity theft and fraud, they would spend more than 54 hours waiting for their arraignment on their way to prison. Simply put, it is manifestly unjust for Wells Fargo to commit illegal activity for decades, and escape by paying victims a few dollars. The restitution is inadequate for the victims. The punishment is inadequate for the perpetrator.

Finally, it is clear that Wells Fargo is not deterred by these relatively small fines in comparison to their enormous net profits each year.

5. The Settlement is a fraction of settlements in other cases for this same behavior by Wells Fargo.

In April 2018, Wells Fargo settled a class action shareholder lawsuit based upon the exact allegations which were before the 9th Circuit District Court in the *Jabbari* matter. In *Hefler, et al. v. Wells Fargo Company, et al.*, 3:16-cv-05479 (N.D. Cal), the parties agreed that Wells Fargo would pay shareholders a four hundred eighty million-dollar ($480,000,000.00) settlement. The settlement was based upon the fraudulent sales practices engaged in by Wells Fargo harming Wells Fargo's stock prices, and thereby injuring the shareholders. This settlement

was three hundred thirty eight million ($338,000,000.00) more than the settlement for those individuals who were the actual victims of the fraudulent activities. The shareholders received over three times more money than the victims. Even when trying to make restitution for its illegal actions, Wells Fargo is more concerned about money going to its shareholders instead of taking care of innocent victims.

6. The Settlement Fails to meet the threshold requirements of Rule 23(e) because the Settlement was Based on a Lack of Information.

The district court failed to ensure there was enough information for the settlement to meet the adequacy requirements. The negotiations for the Plaintiffs in the settlement was inadequate and unfair. Negotiations in this case could not be fair if there was no knowledge of the length, breadth, and expanse of Wells Fargo's wrongdoings.

The fact that no official discovery was engaged in prior to entering into settlement negotiations, coupled with the fact that the settlement was deeply discounted, not only on the basis of the "nearly impossible hurdle" of the arbitration clause (which has since been waived in other litigation related to the fraudulent account openings and before Congress), but also the failure to even minimally account for punitive damages, renders the settlement unfair, unreasonable and inadequate within the meaning of Rule 23 of the Federal Rules of Civil Procedure.

Conclusion

Wherefore, Objector Johnston respectfully requests that this Court to make a finding that the settlement failed to comply with Rule 23 requirements and to declare the settlement void.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 5, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Steven A. Christensen
Steven A. Christensen

Appeal No. 18-16317

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with F.R.A.P. 32(a)(7)(B), in that I contains less than 14,000 words as determined by the word- count tool of the Microsoft Word 2010 word processing system, and that it is proportionally spaced in 14 point type.

/s/ Steven A. Christensen
Steven A. Christensen

STATEMENT OF RELATED CASES

The following appeals are companion or related appeals:

18-16223
18-16224
18-16236
18-16268
18-16269
18-16284