UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SACV 05-1070 DOC (MLGx) Date: December 14, 2010

Title: TERRI N. WHITE et. al. v. EXPERIAN INFORMATION SOLUTIONS INC., and related cases

PRESENT:

THE HONORABLE DAVID O. CARTER, JUDGE

Kathy Peterson	Not Present
Courtroom Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS:
NONE PRESENT	NONE PRESENT

PROCEEDING (IN CHAMBERS): GRANTING SETTLING PLAINTIFFS' MOTION FOR RECONSIDERATION

Before the Court is Settling Plaintiffs' Motion for Reconsideration of the Court's Order Conditionally Granting Request for Secondary Notice in the above-captioned case ("Motion") (Docket 704 by 713). In addition to Settling Plaintiffs' Motion, the Court also received an Opposition filed by the White Plaintiffs (Docket 715), a Reply filed by Settling Plaintiffs (Docket 720), and a Joint Response filed by Defendants (Docket 721). In order to settle a factual dispute that arose from the above-listed submissions, the Court requested and received supplemental briefs from all parties. After considering each of these submissions, and for the reasons set forth below, the Court hereby GRANTS Settling Plaintiffs' Motion for Reconsideration.

I. BACKGROUND

On April 24, 2009, the parties presented to the Court a motion for preliminary approval of a settlement of monetary relief. On May 7, 2009, the Court granted that motion for preliminary approval and conditionally certified the class. The first hearing regarding final approval for the settlement was held January 11, 2010. At that time, the Settling Parties indicated that the administration of the class was ongoing and they were not yet able to provide the Court with any concrete estimates regarding the awards for the "convenience" and "actual damages" categories based on responses to the class notice. As the Court required these numbers for its final fairness determination, the Court continued the hearing on the motion for final approval and requested a status

report from the Settling Parties prior to the next hearing. The Settling Plaintiffs filed an Interim Report and the Supplemental Report on Settlement Administration ("Supplemental Report"). The Court then held a second hearing on the final fairness determination on May 20, 2010.

The Supplemental Report stated, *inter alia*, that 744,809 timely and signed claim forms for both actual and convenience awards were received, and, after a first-level analysis, that 345,268 actual damage award claims were remaining as of May 7, 2010. Pursuant to the monetary settlement, there are three categories of actual damage awards: employment claims, mortgage/housing claims; and other credit claims. The Settlement Administrator exercised its discretion pursuant to the settlement agreement to conduct an audit of 1,000 of the actual damage award claimants' files. The Supplemental Report stated that, while the audit was still in progress, of the employment claims evaluated in the audit, 34% had already been invalidated; of the mortgage/housing claims, 24% had been invalidated; and of the other credit claims, 22% had been invalidated.

Settling Plaintiffs argued that given these audit results, there were likely to be many invalid claims in the remaining 345,268 actual damage claims, and that paying out these invalid claims would "result in potentially millions of dollars being paid out for invalid . . . claims," which would "not [be] tenable for the Class," largely because it would substantially diminish the payout to those with valid claims. Supp. Report at 7. As a remedy for this high percentage of purportedly invalid claims, Settling Plaintiffs proposed a secondary validation process requiring claimants to provide additional information. Supp. Report at 8. Whereas the first notice required only that the class member certify to a belief that he had been damaged through a denial of employment, mortgage loan, or credit, the proposed second notice would require the class member to list the date of the denial, the prospective employer/lender/or creditor, and to provide corroborating documentation.

The Court agreed with Settling Plaintiffs' proposal and ordered that secondary notice be sent to all actual damage award claimants informing them of the new documentation requirement. Order Conditionally Granting Request for Secondary Notice, June 30, 2010 ("Secondary Notice Order") (Docket 703). The Court further mandated that secondary notice be sent to convenience award claimants, finding that the possibility of actual damage claimants being shifted to the convenience class "changes the evaluation by the convenience award claimants in addition to the actual damages claimants about whether they want to assert a claim or opt out of the process." Secondary Notice Order at 3. The Court then examined the content of the initial notice disseminated to all people appearing on the notice list. The Court focused on the attestation requirement contained in the notice, which asked notice recipients to determine if they qualified as a class member before submitting a claim by attesting to their "belie[f] that there have been one or more errors in [their] credit reports regarding debt discharged in bankruptcy."

In the Secondary Notice Order, the Court ultimately ordered that the attestation requirement be removed from the class notice on the grounds that it was burdensome and misleading. The Court mandated that a revised notice of settlement, free of this provision, be sent to the entire

notice list. Following this ruling, Settling Plaintiffs were asked to submit a revised proposed class notice along with information on the estimated costs of re-noticing the entire initial list.

In response, Settling Plaintiffs filed the instant Motion for Reconsideration (Docket 704), accepting the Court's decision to re-notice both convenience claimants and actual damage claimants but contesting the Court's decision to re-notice the entire initial notice list.[1] Settling Plaintiffs agreed to bear the costs of secondary notice to convenience and actual damage claimants, but not the costs of renoticing the entire initial list – a cost that Settling Plaintiffs estimated at approximately $5 million.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 60(b) "provides for reconsideration only upon a showing of (1) mistake, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) a void judgment; (5) a satisfied or discharged judgment; or (6) 'extraordinary circumstances' which would justify relief." *School Dist. No. 1J, Multnomah County v. Acands, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993) (quoting *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1442 (9th Cir. 1991)). These grounds are further limited by the Local Rules. Local Rule 7-18 provides that a motion for reconsideration of a decision on any motion may be made only on the following grounds: "(a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision." L.R. 7-18.

A district court, however, has inherent discretionary power to revisit previously issued orders and to reopen any part of a case still pending before the court. *See Marconi Wireless Tel. Co. v. United States*, 320 U.S. 1, 47-48 (1943); *Natural Resources Defense Council v. Evans*, 243 F. Supp. 2d 1046, 1048 (N.D. Cal. 2003); *Kapco Mfg. Co. v. C & O Enterprises, Inc.*, 773 F.2d 151, 154 (7th Cir. 1985).

III. DISCUSSION

The Court finds that when Settling Plaintiffs submitted their Motion for Reconsideration, they believed in good faith that the Court had manifestly failed to consider material facts and/or had relied on erroneous facts, as required for the filing of a motion for reconsideration under the Local Rules. Settl. Pl.'s Mot. at 4 ("The Court's concern ... appears rooted in an oft-repeated false

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[1]Settling Plaintiffs titled their submission a "Response" to the Court's Secondary Notice Order. The Court, however, construed this submission as a Motion for Reconsideration and set a briefing schedule on the matter. Order Setting Briefing Schedule, Aug. 6, 2010 (Docket 713).

premise..”). As such, Settling Plaintiffs believed that extraordinary circumstances justified reconsideration. *See* Fed. R. Civ. P. 60(b).

After review, the Court finds that its decision in the Secondary Notice Order arose from a misunderstanding of the relevant facts. The Court exercises its discretionary power to modify the Secondary Notice Order.

A. The Entire Notice List Need Not Receive Secondary Notice

For a variety of reasons, the Court reconsiders its position on the propriety of re-noticing the entire initial notice list. As explained in more detail below, secondary notice to the entire list would prove both unnecessary and unwise. The Court thus GRANTS Settling Plaintiffs’ Motion for Reconsideration with respect to this portion of the Secondary Notice Order.

1. Attestation Requirement

The Court’s decision to re-notice the entire notice list arose from concerns over the attestation requirement included in the current class notice. Specifically, at the time of issuing the Secondary Notice Order, the Court was persuaded by the White Plaintiffs’ argument that instructing notice recipients to “first determine if [they were] a class member,” Notice of Final Forms of Notice of Class Action Settlement, Ex. C at 4, Aug. 18, 2009 (Docket 458), before submitting a claim amounted to an affirmative misrepresentation of the notice recipient’s class status. The Court reached this conclusion in reliance on the White Plaintiffs’ factual contention that the notice list had been screened to include only people who presumptively met the definition of a settlement class member. If this were the case, instructing notice recipients to first “determine” whether they qualified as presumptive class members before filing a claim constituted an affirmative misrepresentation, as it implied that notice was received by people who did not presumptively qualify for relief.

The Court worried about the chilling effect that this seeming misrepresentation might have had on class members’ responses. Although the attestation requirement is minimal – it merely asks notice recipients to declare a “belief” that they qualify as a class members – the Court was unwilling to allow affirmative misstatements to influence class members’ decisions, even in a de minimis manner.

The Court’s position changed when it received Settling Plaintiffs’ Motion for Reconsideration. There, Settling Plaintiffs challenged the Court’s view of the facts. In so doing, Settling Plaintiffs necessarily challenged the conclusions reached in reliance on those “facts.” Contrary to the White Plaintiffs’ assertions, Settling Plaintiffs urged that many people other than qualifying class members received the initial settlement notice and that the attestation requirement was thus necessary to ensure that non-qualified individuals did not drain the recovery pool for rightful class members. The supplemental briefing and accompanying affidavits submitted by Settling Plaintiffs and Defendants –

the party with the greatest first-hand knowledge of the composition of the original notice list – support Settling Plaintiffs' view of the facts.

The 23(b)(3) Settlement Class in this case includes "all Consumers who have received an order of discharge pursuant to Chapter 7 of the United States Bankruptcy Code and who, at any time between and including March 15, 2002, and May 11, 2009 (or, for California residents in the case of TransUnion, any time between and including May 12, 2001 and May 11, 2009) have been the subject of a Post-bankruptcy Credit Report issued by a Defendant that contained possible errors regarding debts discharged in bankruptcy." Order, *inter alia*, Granting Preliminary Approval To Proposed Class Action Settlement at 5, May 7, 2009 ("Preliminary Approval Order") (Docket 423). According to Defendants' affidavits, the nature of Defendants' record-keeping made it impossible to generate a list limited to people who met the above criteria without also excluding people who met the criteria. In other words, any list generated by Defendants would be either overinclusive or underinclusive. In order to ensure that all qualified class members received notice of the action, Defendants and Settling Plaintiffs rightfully erred on the side of overinclusiveness.

The specific problem, according to Defendants, is as follows. Defendants do not maintain records of how consumers credit files look at every moment, Decl. of A. Granger, at ¶ 3, nor of the content of reports issued in response to credit inquiries by third parties. Decl. of Morgan, Exh. 1 (Decl. of P. Finneran) at ¶¶ 5-6. Rather, Defendants maintain only a list of the dates on which a credit report is issued as well as a series of periodic snapshots indicating how a consumer's credit file appears on that particular day. Granger Decl. at ¶ 3. The parties generated the notice list in this case by selecting all consumers whose credit file showed (i) the entry of a Chapter 7 discharge (ii) a qualifying tradeline, collection or judgment; and (3) a hard inquiry within the archival period. Granger Decl. at ¶¶ 10-15. These screening criteria, left purposely broad in order to ensure that no rightful class members were excluded from the notice list, were not strict enough to ensure that every person who received notice met the definition of a presumptive class member.

For example, the screening criteria did not filter out consumers whose qualifying tradelines or collections were added to their credit file only ***after*** the credit report was issued (meaning that the credit report itself did not contain an error). People whose file met this description would have received the notice of settlement – but they would not qualify as a class member.

In addition, Defendants and Settling Plaintiffs point to the practice of "riding through" revolving debt to indicate the overinclusiveness of the notice list. A consumer "rides through" a revolving debt account when, for instance, a consumer continues to use a credit card for purchases subsequent to the bankruptcy filing. Morgan Decl., Exh. 16. Any debt that the consumer incurs post-bankruptcy would not be subject to a bankruptcy discharge. *Id.* A showing of delinquency on this post-bankruptcy debt would not qualify a consumer for membership in this class action – but it would qualify the consumer for a position on the notice list, given the limitations of Defendants' records.

A similar scenario arises when creditors use generic account-type codes in order to describe non-dischargeable debts, i.e. student loans. Defendants report that Wells Fargo, for example, reported 100,000 student loans to Equifax as generic unsecured loans rather than as student loans. Decl. of L. Komanski, at ¶ 4. Any derogatory reporting of generically-listed non-dischargeable debts would qualify a consumer for the notice list, but not for true class membership.

Defendants offer additional examples of such situations, but the Court need not belabor the point. The above-listed examples suffice to change the Court's position on the need for secondary notice to every initial notice recipient. In light of Defendants' limited records, it is entirely likely that the parties disseminated notice to an overinclusive group of individuals. At the very least, there is no way to ensure that this did not occur. In instructing class members to "first determine if [they were] a class member," before submitting a claim, the initial class notice contained no affirmative misstatement. Rather, the attestation requirement served the vital and legitimate goal of screening out individuals who did not qualify for settlement relief.

White Plaintiffs argue that, even if the attestation requirement was not affirmatively misleading, the chilling effect that this requirement may have exerted on legitimate claimants cannot be justified, given that the large majority of notice recipients were rightful class members. The Court, however, must balance the possible disincentivizing effect of the attestation requirement against the provision's benefits. *See Churchill Village, L.L.C. v. General Electric*, 361 F. 3d 556, 575 (9th Cir. 2004) ("Fed. R. Civ. P. 23(c)(2) prescribes the "best notice ***practicable under the circumstances***.") (emphasis added). Given that each class member's recovery depends on the number of other class members who submit a claim, some stringency in the claims process is only fair. On the other hand, unnecessary burdens discourage legitimate class members from participating in the settlement. The attestation requirement – which requires only a stated "belief" that a class members fits the class definition and no documentary evidence – strikes a balance between these competing concerns. The original notice, with the attestation requirement included, constituted the fairest possible notice under the circumstances. Redrafting the notice to eliminate the attestation provision would prove both unnecessary and unwise.

2. Reevaluation Rationale

The White Plaintiffs contend that the attestation requirement was not the only factor motivating the Court's decision in the Secondary Notice Order. Rather, the White Plaintiffs submit that the Court also ordered wholesale re-noticing in order to give the notice recipients who previously did not respond to the settlement a chance to reevaluate their decision in light of the newly imposed documentation requirement to become a damages class member. The Court clarifies that it did not base its decision to re-notice the entire notice list on this theory. Nor does the Court finds this theory persuasive now.

As presented by the White Plaintiffs, the "reevaluation rationale" is based on two distinct

arguments. First, the White Plaintiffs contend that people who previously took no action at all in response to the settlement – choosing neither to opt in, exclude themselves, nor object – will be motivated to file an objection to the perceived unfairness of the documentation requirement. The motivation for this action would have to be purely altruistic; these hypothetical new objectors have shown no personal interest in the settlement thus far, electing neither to claim benefits under it, exclude themselves from it nor object to it. The Court is not inclined to believe that people who once evinced totally apathy towards the settlement would find themselves suddenly motivated to lodge an altruistic objection. The remote possibility that this might occur does not justify spending approximately $5 million on secondary notice.

The alternative basis of the White Plaintiffs' theory speculates that notice recipients who previously did nothing in response to the notice of settlement might, for self-interested reasons, reconsider their decision to file a claim in light of the documentation requirement for actual damage claims. Specifically, the White Plaintiffs surmise that potential actual damage claimants with documents to support their claims might have remarked on the lack of documentation requirement in the initial notice and decided not to file a claim, assuming that any payout would be minimal because of the ease of claiming actual damages. White Plaintiffs contend that this same person – who previously took no action in order to secure compensation or to preserve his or her right to bring a separate suit – might now decide to file an claim on the assumption that the documentation requirement will make the pro rata recovery of each actual damages claimant higher.

The Court finds this scenario as far-fetched as the last. White Plaintiffs' hypothetical asks the Court to believe that class members with the most supported, and thus arguably the strongest, claims for actual damages previously would have elected to receive nothing under the settlement (and to relinquish their right to sue at a later time) but would now prove motivated to file a claim solely because of the documentation requirement. The Court cannot imagine that many notice recipients would behave in accordance with the White Plaintiffs' theory – certainly not enough to justify a $5 million re-noticing effort.

3. Response Rate Concerns

Finally, the White Plaintiffs remind the Court of its stated concerns regarding the fact that only five percent of absent class members responded to the notice of settlement. The Court continues to believe that a five percent response rate to a notice disseminated by direct mail is low. *See Zimmer Paper Products, Inc. v. Berger & Montague, P.C.*, 758 F.2d 86, 93 (3d Cir. 1985) (finding that even though a response rate of 12% "appears low ... [i]t is in line with response rates in similar situations") (citing *Newberg on Class Actions* § 2695, Feb. 1984). A low response rate alone, however, does not necessarily require re-noticing. *Cf. Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (accepting a settlement where only $3,300 was claimed out of a $4.5 million class fund and holding that attorneys fees should have been calculated as a percentage of the $4.5 million fund). Nor is there any guarantee that resending notice would generate a significantly higher response rate,

especially given the Court's decision to retain the attestation requirement as part of the notice. In addition, given the likely overinclusiveness of the notice list, the current response rate statistics may be skewed.

In any event, the Court must balance the possible benefits of secondary notice against the costs. Here, secondary notice would cost approximately $5 million, removing $5 million from the settlement fund and decreasing the compensation of each participating class member. Although White Plaintiffs contend that the cost of resending notice could be borne by Settling Plaintiffs counsel or Defendants, neither Settling Plaintiffs nor Defendants have offered to bear this cost. The Court finds it unfair to impose this cost on them. As set forth above, aside from the later-discovered need to require documentation for participation in the actual damages class, the Court finds that the original notice was proper. The $5 million cost of secondary notice would impact the class. The costs of this notice outweigh the benefits. *See Churchill Village*, 361 F.3d at 575 (upholding the district court's decision not to renotice the class, citing Fed. R. Civ. P. 23(c)(2)'s mandate of the "best notice practicable under the circumstances.")

Accordingly, the Court hereby GRANTS Settling Plaintiffs' Motion for Reconsideration with respect to the re-noticing of the entire notice list. Secondary notice need not be sent to the entire initial notice list.

B. Opt-Outs and Objectors Must Be Renoticed

The "reevaluation rationale" that the Court rejected as applied to notice recipients who previously ignored the notice of settlement applies with much greater force to individuals who previously objected to, or opted out of, the settlement. Far from exhibiting apathy to the proposed settlement, opt-outs and objectors evinced strong reactions to it. Fairness dictates that these individuals be provided an opportunity to reevaluate their position in light of the changes to the settlement – namely, the newly-added documentation requirement for actual damages claims.

The Court therefore finds that secondary notice should be sent to any notice recipients who previously objected to, or opted out of, the settlement. Given that the rationale for re-noticing both convenience claimants and actual damage claimants applies with equal force to the re-noticing of opt-outs and objectors, it stands to reason that Settling Plaintiffs' willingness to bear the costs of re-noticing convenience claimants and actual damage claimants extends to the costs of re-noticing opt-outs and objectors.

The Court ORDERS that Settling Plaintiffs' file a submission confirming or denying their willingness to bear these costs by noon on December 22, 2010. In this submission, Settling Plaintiffs shall also provide the Court with the estimated costs of such re-noticing. Finally, this submission must include a proposed draft of the secondary notice to opt-outs and objectors.

IV. DISPOSITION

For the reasons stated above, the Court GRANTS Settling Plaintiffs' Motion for Reconsideration with respect to the re-noticing of the entire notice list. Secondary notice need not be sent to the entire initial notice list. However, secondary notice should be sent to individuals who previously opted out of, or objected to, the settlement.

The Court ORDERS Settling Plaintiffs to file a submission confirming or denying their willingness to bear the costs of re-noticing opt outs and objectors by noon on December 22, 2010. In this submission, Settling Plaintiffs shall also provide the Court with the estimated costs of such re-noticing. Finally, this submission must include a proposed draft of the secondary notice to opt-outs and objectors.

Other parties, including the White Plaintiffs, shall have until 5pm on Monday January 10, 2011 to object to the ***content*** of the proposed secondary notice to opt outs and objectors. Submissions objecting to the content of the proposed secondary notice to opt outs and objectors shall not exceed ten pages.

The Clerk shall serve this minute order on all parties to the action.