



1 administration of the class was ongoing and they were not yet able to provide the Court with any  
2 concrete estimates regarding the awards for the “convenience” and “actual damages” categories  
3 based on responses to the class notice. As the Court required these numbers for its final fairness  
4 determination, the Court continued the hearing on the motion for final approval and requested a  
5 status report from the Settling Parties prior to the next hearing. The Settling Plaintiffs filed an  
6 Interim Report and the Supplemental Report on Settlement Administration. The Court then held  
7 a second hearing on the final fairness determination on May 20, 2010.

8 The Supplemental Report stated, *inter alia*, that 744,809 timely and signed claim forms  
9 for both actual and convenience awards were received, and, after a first-level analysis, that  
10 345,268 actual damage award claims were remaining as of May 7, 2010. Pursuant to the  
11 monetary settlement, there are three categories of actual damage awards: employment claims,  
12 mortgage/housing claims; and other credit claims. The Settlement Administrator exercised its  
13 discretion pursuant to the settlement agreement to conduct an audit of 1,000 of the actual  
14 damage award claimants’ files. The Supplemental Report stated that, while the audit was still in  
15 progress, of the employment claims evaluated in the audit, 34% had already been invalidated; of  
16 the mortgage/housing claims, 24% had been invalidated; and of the other credit claims, 22% had  
17 been invalidated.

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

1           Sending a secondary notice form is within the power of the court. *See Zimmer Paper*  
2 *Products, Inc. v. Berger & Montague, P.C.*, 758 F.2d 86, 93 (3d Cir.1985) (explaining that  
3 “[b]efore approving any distribution of settlement proceeds to class members,” if the district  
4 court finds cause for concern in the provision of notice, the court may “order[ ] further notice  
5 procedures”). Settling Plaintiffs provided a proposed secondary notice to the Court at the May  
6 hearing on the final settlement approval. The Court approves sending out a secondary notice for  
7 the purpose of requiring additional information from the actual damage claimants. Such a notice  
8 will effectuate the ultimate purpose of providing different awards to persons who suffered  
9 different types of damage from errors in their credit report.

10           Additionally, the Court agrees with the *White* Plaintiffs that this secondary notice should  
11 be sent out to the entire class, not solely the actual damage award claimants. By requiring  
12 additional information to be provided by actual damage award claimants for verification of their  
13 claims, there will naturally be a number of actual damage award claimants who are unable to  
14 provide this information or provide information that does not correspond to a query, and as a  
15 result, they will be shifted to the convenience damage award claimant category. As such, it  
16 changes the evaluation by the convenience award claimants in addition to the actual damage  
17 award claimants about whether they want to assert a claim or opt out of the process.

18           The Court separately considers the somewhat low response rate to the notice, an issue  
19 raised at the final fairness hearing. There were 744,809 timely claim forms<sup>1</sup> out of a class of 15  
20 million, which is a five percent response rate. Roughly 14.25 million class members did not  
21 respond. A low response rate may, in some situations, be indicative of a defect in the class  
22 notice. *See In re TJX Companies Retail Sec. Breach Litigation*, 584 F.Supp.2d 395, 404-5 (D.  
23 Mass. 2008). Therefore, while the Court originally approved the form of the Notice sent out to  
24 the class, since it has already determined that the secondary notice needs to be sent to the entire  
25 class, the Court reexamines the Notice at this time.

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28           <sup>1</sup> This number does not account for opt-outs and objectors.

1           The *White* Plaintiffs have strongly objected to the class notice's requirement that class  
2 members were required to sign a response form attesting, "I believe that there have been one or  
3 more errors in my credit reports regarding debt discharged in bankruptcy." They object on the  
4 basis that the notices were already sent to everyone who had errors in their credit report, and  
5 therefore there was no justification for requiring class members to attest to their personal belief  
6 as to this fact. Furthermore, they contend that many debtors would not know that there was an  
7 error and that it would be very difficult for them to now investigate and confirm whether there  
8 was an error.

9           Settling Plaintiffs argue that this phrasing is appropriate because it is possible that  
10 someone could fall within the class definition but still be excluded from the class because, for  
11 example, they previously released all of their claims against the defendant. S. Pl.'s Responses to  
12 Obj. to Final Approval, at 19. However, the Court finds that the original attestation did not  
13 accomplish the limited objectives now purported by Settling Plaintiffs—to ensure that none of the  
14 class exclusions applied to the claimant—and a rephrasing of the attestation for convenience  
15 award claimants should be used in the revised notice. Instead of the previously-required  
16 attestation, convenience award claimants should only be required to attest that they believe that  
17 none of the listed exclusions are applicable.

18           At oral argument, it became clear that the need for a secondary notice was at least  
19 partially due to the parties' underestimation of the number of actual damage award claims that  
20 would be received. Perhaps as an acknowledgment of that fact, Settling Plaintiffs agreed to pay  
21 for the cost of the re-notice to all actual damage claimants out of any attorneys' fees award. In  
22 other words, the administrative fees of the notice would not diminish the claimant award fund.  
23 While the possibility of sending the secondary notice to the entire class was discussed, the costs  
24 and payment of those costs were not settled at the hearing.

25           As such, Plaintiff SHALL submit to the Court with seven (7) days:

- 26           1.     A proposed revised secondary notice incorporating the Court's ruling.
- 27           2.     A statement regarding the estimated administrative cost of the secondary  
28           notice directed by the Court and the effect that cost would have upon the

1 settlement fund, including what segment of the fund would bear the  
2 administrative cost.

3 The *White* Plaintiffs, or any other objectors, may file an objection to the submitted revised  
4 secondary notice that extends solely to the wording of the notice, not its scope, as the Court has  
5 ruled upon that issue here. Any objection must be filed within seven (7) days of the filing of the  
6 revised notice by Settling Plaintiffs.

7 Should the Court be satisfied with the additional submissions provided by Settling  
8 Plaintiffs, the Court shall provide further direction regarding secondary notice at that time.

9 IT IS SO ORDERED.

10 DATED: June 30, 2010

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13 DAVID O. CARTER  
14 United States District Judge  
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