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**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF CALIFORNIA**

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| PATRICIA CONNOR, Individually and On Behalf of All Others Similarly Situated,<br><br>Plaintiffs,<br><br>V.<br><br>JPMORGAN CHASE BANK and FEDERAL NATIONAL MORTGAGE ASSOCIATION a/k/a FANNIE MAE,<br><br>Defendants. | Case No: 10 CV 1284 GPC BGS<br><br>**CLASS ACTION**<br><br>**PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND CERTIFICATION OF SETTLEMENT CLASS FOR SETTLEMENT CLASS MEMBERS IN GROUP 2; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**<br><br>**HON. GONZALO P. CURIEL**<br><br>**COURTROOM: 2D**<br>**HEARING DATE: MARCH 28, 2014**<br>**TIME: 1:30 PM** |

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## I. INTRODUCTION

Plaintiffs Patricia Connor, ("Connor"), and Sheri L. Bywater ("Bywater")[1], (collectively "Plaintiffs"), submit this application for preliminary approval of a proposed settlement (the "Settlement") of the second phase of this action (the "Litigation"), which is unopposed by defendants JPMorgan Chase Bank ("Chase" or "Defendant") and the Federal National Mortgage Association ("Fannie Mae") (collectively referred to as "Defendants"). The original motion for Preliminary Approval for the Settlement Class Members previously identified was granted by the Court on March 12, 2012. *See* "Order Certifying Provisional Settlement Class, Preliminarily Approving Class Action Settlement and Providing for Notice to the Settlement Class", filed March 12, 2102, Dkt. No. 55 (herein "Order").

This supplemental Settlement is on behalf of the Settlement Class Members – "Group 2" Settlement Class Members herein – all members of the original Class but identified *after* the original Settlement Class Members were identified and provided notice in the Order. That new Group 2 Class totals 1,498,593 Class Members to whom notice must be mailed, consisting of all persons listed on the subject mortgage accounts for which at least one party was called on their cell phone), of which 1,303,112 are eligible to file claims (the person on the accounts that actually received cell phone calls, Subclass A in both Group 1 and Group 2). For reasons set forth below, those Group 2 members were not identified or given notice as part of the original Settlement Class that received notice – "Group 1" Settlement Class – and the prior negotiations resulting in the original proposed Settlement did not take into consideration the substantial number of then-unknown

[1] The Group 2 Settlement also settles any claims of persons in Group 2 that may be included the later-filed case of *Bywater v. JPMorgan Chase Bank, N.A. and Chase Bank USA, N.A.*, Case No. CV 11 2257 (the "Bywater Action") filed in the Northern District of California, San Francisco / Oakland Division. Because Connor and Chase had already reached a settlement in principle, and because Defendant desired a global settlement, and also because Plaintiff Bywater's complaint included essentially the same allegations on behalf of the same putative class, Bywater's counsel agreed to join this case and settle the Bywater Action by including it in the Connor settlement. Original Settlement Agreement ("1st Agreement"), § 1.02.

Group 2 Settlement Class Members. This motion is to seek approval of the subsequent Settlement reached on behalf of the Group 2 members.

The Group 2 Settlement resulted in: (1) an additional payment of up to approximately $$11,428,637 for the estimated 61,507 potential Group 2 claimants based on the same ratio of eligible claimants filing claims as previously filed by Group 1; (2) an additional $125,000 in attorneys' fees, subject to Court approval; and (3) up to $580,500 in additional incremental notice and administration costs. That additional amount obtained in the Group 2 Settlement equals an additional amount added to the Group 1 settlement by Defendant of up to $5,134,137. That Settlement is fair and reasonable to both the Group 1 and Group 2 Settlement Class Members because the Group 2 Settlement Class Members should receive approximately the same amount that each claimant in Group 1 receives, $69.97, as set forth in the Group 1 Memo of Points & Authorities filed in support of Final Approval filed on July 20, 2012 ("Final Approval Memo") (Dkt. Nos. 61-1, p. 8) but later withdrawn.

After the case originally was preliminarily approved by the Court in the Order, but prior to a Final Approval hearing scheduled originally for August 3, 2012, the Parties learned through a filed objection to the Settlement that perhaps notice was not given to all persons that should have been included in the Settlement Class. The Parties then withdrew their pending motion for Final Approval until it could be determined whether all Class Members had been properly identified through Defendant's records. After an investigation by Defendant Chase, it was determined that not all Class Members had been identified and given notice of the Settlement. Consequently, a lengthy investigation and data retrieval project conducted over more than a year's time determined that a substantial number of persons, the Group 2 Settlement Class previously not identified but consisting of 1,498,593 individuals, were also members of the defined Settlement Class and were entitled to be included in the Settlement.

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As discussed below, substantial time, effort, and expense went into making certain that all of the Settlement Class were located in Defendant's records over the past 17 months, resulting in the identification of Group 2 Settlement Class Members. Also, additional consultants were hired by Defendant to verify and confirm the accuracy of the new Group 2 Settlement Class Member list. The Parties now believe that every Group 2 Settlement Class Member has been located and identified.

After the Group 2 Settlement Class Members were finally identified, the Parties then attended an additional mediation session with Magistrate Judge Edward A. Infante, Ret., of JAMS to resolve the issue of additional compensation for the Group 2 Settlement Class. They agreed upon a settlement structure and an amount that would include the original settlement structure and terms but add a provision to give notice to and equally compensate the Group 2 Settlement Class Members. Pursuant to the Group 2 Settlement, those Class Members will receive an amount of compensation that will be approximately equal to the amounts received by the original Group 1 Settlement Class Members that filed claims, based upon the number of those previously filed claims, the estimated costs of notice and claims administration and attorneys' fees to be deducted from the amounts to be paid by Defendant, and the estimated payment each of the claimants in the Group 1 will likely receive, $69.97.

The proposed Group 2 Settlement, which resulted from settlement negotiations between the Parties and through mediation with Judge Infante, provides a substantial financial benefit to the Group 2 Class Members. The terms of the Group 2 Settlement are set forth in the Group 2 "Amendment to Settlement Agreement and Release" (hereinafter the "Agreement") filed as Exhibit 1 to the Declaration of Douglas J. Campion In Support of Preliminary Approval for Group 2 Settlement ("Campion Decl. 2").[2] For the Court's reference, the original detailed

[2] Unless otherwise specified, defined terms used in this memorandum are intended to have the meaning ascribed to those terms in the 1st Agreement.

Settlement Agreement ("1st Agreement" herein) which is supplemented and amended by the current Agreement, was filed with the Court in support of the original motion for Preliminary Approval as Exhibit A to the Declaration of Douglas J. Campion In Support of Preliminary Approval, Dkt. No. 50-1, filed on January 17, 2012.

**A. Original Settlement Fund and Terms**

The original Settlement created a Settlement Fund to be paid by Chase in a maximum amount of $9,000,000.00 and a minimum amount of $7,000,000.00. *See* 1st Agreement. That original Settlement Fund was to be used to fund the settlement payments to Class Members, any incentive payments awarded to the named Plaintiffs, any attorneys' fees and costs awarded to Class Counsel, and certain expenses, including notice and claims administration expenses. If a small number of claims were received, a *cy pres* distribution of any amounts remaining between the "floor" of $7,000,000.00 and the amounts paid to claimants, attorneys' fees and costs, or notice and claims administration would be paid to one or more charitable organizations. However, a sufficient number of claims were filed to make the *cy pres* unnecessary. For Group 1, there was a sliding scale of possible settlement claim payments depending on the number of claims made, with a maximum payment of $500.00 and a minimum payment of $25.00, unless so many claims are submitted to exceed the maximum $9,000,000.00 less settlement costs, then each claimant would receive a pro rata award. In return for the Settlement Fund, Plaintiffs, on behalf of the proposed Settlement Class (the "Class"), agreed to dismiss the Litigation and unconditionally release and discharge Defendants and other Released Parties from all claims relating to the Litigation.

As set forth in the Final Approval Memo at pp.7, 9, the claims period for the Group 1 Class Members expired on July 10, 2012. 55,872 valid claims were filed, resulting in payments to each claimant of $69.97 after deducting the actual

settlement costs of notice, claims administration and requested attorneys' fees.[3] The $7,000,000 minimum "floor" was not exceeded.

**B. Group 2 Settlement Fund**

Chase agrees to add to the original Settlement Fund in an amount that totals up to $11,428,637 by increasing the amount of the maximum amount payable to claimants from the $7,000,000 minimum "floor" it was required to pay to the Group 1 claimants. Agreement, §§ 5.05; 5.06. That Group 2 Settlement requires Chase to pay up to an additional $4,428,637 for claims filed, based upon the amount of claims received. *Id.* In addition to that amount, Chase agrees to pay up to an additional $580,500 for any additional costs of notice and claims administration (*Id*. at § 5.07),[4] and an additional $125,000 in attorneys' fees for the 17 months of additional attorneys' fees incurred. *Id*. at 6.03. That brings the total exposure to Defendant here to $12,134,137, up to $5,134,137 more than the $7,000,000 owed under the original Settlement Agreement to Group 1. The exact amount paid to Group 2 claimants depends on the number of claims made by the Group 2 Class Members. *Id*. at § 5.06.

**1. Amount to be Paid for Each Group 2 Claim**

That potential settlement payment increase is based upon the 1,303,112 newly discovered Group 2 Subclass A Class Members that may file claims multiplied by the 4.72 percent historical rate of claims submitted by the Group 1 Subclass A Class Members. Therefore, the Parties estimate a potential 61,507 additional claims will likely be submitted by Group 2 Subclass A Class Members

[3] Those amounts were: $7,000,000 Settlement Fund (minimum amount not reached by number of claims), less anticipated costs of notice and claims administration of $811,738.39, and less attorneys' fees of $2,250,000 and other costs of $23,878.58, and less incentive payments of $5,000, leaving $3,909,383.03. to divide among the 55,872 Group 1 claimants. That resulted in a payment of $69.97 to each Group 1 claimant.

[4] It was only recently learned that the actual costs of notice and claims administration will be approximately $200,000 more than the $580,500 previously negotiated, in large part due to the additional 500,000 Class Members added to Group 2 since the $580,500 was negotiated at mediation. Absent an agreement by Chase to pay the difference, the Parties will be compelled to return to mediation on this issue. Agreement, § 5.07.

and base the new settlement amount on that number. The original Group 1 claimants were entitled to receive $69.97 for each filed claim, based on a pro rata distribution after anticipated notice and claims administration costs and requested attorneys' fees are deducted. *See* Final Approval Memo at p. 9. As a result, the Parties agreed the Group 2 Settlement would also attempt to pay each Group 2 claimant $69.97 as well. However, if a sufficient number of claims are filed to exceed that $4,428,637 number, the amount of money each Group 2 claimant receives will be based on a pro rata basis. If a lower number of claims is submitted, then Defendant will only have to fund the number of claims submitted by Group 2 at $69.97.

**2. Additional Attorneys' Fees and Costs to be Paid**

The Group 2 Settlement also increased the amount of attorneys' fees and costs by $125,000, subject to Court approval. That amount is intended to compensate Plaintiffs' counsel for the additional work necessitated by the failure to identify and include the Group 2 Settlement Class Members in the original Settlement, and the substantial extra and unexpected attorney time incurred over the past 17 months. That amount is to also compensate Plaintiffs' counsel for additional litigation costs incurred, including mediation costs and confirmatory discovery.

**3. Notice and Claims Administration for Group 2**

In addition, the Parties recognize the Group 2 Settlement Class will have to receive direct mail notice comparable to the Group 1 Class Members, and they will also require claims administration. Therefore, there will be additional costs of notice and claim administration that will be incurred. As part of the Group 2 Settlement, Defendant agrees to pay up to an additional $580,500 to provide notice and to administer the Group 2 claims. If the notice costs are more than anticipated, the Parties will go back before Judge Infante to renegotiate the amount that will need to be paid under that provision. Agreement, § 5.07.

### C. The Settlement is Fair and Reasonable

As with the Group 1 settlement, Plaintiffs are confident of a favorable determination on the merits, but they have determined that the proposed Group 2 Settlement provides significant benefits to the Group 2 Class Members and is in the best interests of the Class. Plaintiffs also believe that the Settlement is appropriate because they recognize the expense and amount of time required to continue to pursue the Litigation, as well as the uncertainty, risk, and difficulties of proof inherent in prosecuting such claims.

Accordingly, relying in part on the prior Order, the Plaintiffs move the Court for an order preliminarily approving the proposed Group 2 Settlement, provisionally certifying the Group 2 Settlement Class pursuant to Federal Rule of Civil Procedure 23(b)(3) ("Rule 23(b)(3)") for settlement purposes, directing dissemination of class notice, and scheduling a final approval hearing on both the Group 1 and Group 2 Settlements, combined to constitute the Settlement of this Action. The motion is unopposed; Defendants support this motion. A proposed Preliminary Approval Order is filed as Exhibit 4 to the Campion Decl 2. The proposed Settlement satisfies all of the criteria for preliminary approval.

## II. STATEMENT OF FACTS

### A. Factual Background

In the relevant time period, June 16, 2006 through July 7, 2007, [5] Chase provided account servicing, collection, and related services for its own home mortgages, as well as those previously serviced or owned by Chase Home Finance, LLC, and accounts previously serviced or owned by Chase and Washington Mutual, certain assets of which were acquired by Chase during the relevant time period. Chase also serviced or subserviced loans for EMC Mortgage starting July 1, 2009. Chase also provides such account servicing for Fannie Mae relating to certain of its

[5] The Class Period for all Class Members is June 16, 2006 to June 15, 2011, except for former EMC Mortgage customers whose loans were serviced by Chase or Chase Home Finance LLC, and the Class Period for those borrowers is June 16, 2006 through July 7, 2011. 1st Agreement, §2.06. The TCPA's statute of limitations period runs for four years preceding the filing of the original Complaint.

home mortgages. In filing suit herein, Plaintiffs alleged that in its collection efforts Chase violated the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.,* ("TCPA").

**B. Proceedings to Date**

The proceedings to date are set forth in the prior motion for Preliminary Approval and for brevity's sake, will not be repeated here.

**C. Investigation Conducted After Prior Preliminary Approval and Results Obtained**

After the original Preliminary Approval, the Court set a Final Approval hearing for August 3, 2012, which was taken off calendar due to a problem brought to the attention of the Parties through the objection claiming a Class Member was not given notice. Campion Decl. 2. at ¶10. It was learned soon after that in fact not all Settlement Class Members had been identified and given notice. At that time an investigation was commenced by Defendant to determine whether, and to what extent, Class Members were not included in the original Settlement Class list. That investigation involved a complete review of the existing Group 1 Class List and an investigation of the reasons why not all Class Members were identified in the original Class list. *Id*. at ¶ ¶ 10-11.

Defendant has spent approximately 17 months conducting the investigation into the failure to include the Group 2 Class Members in the original list of Class Members, and to identify all those additional persons in the defined Class. The Parties are in the process of conducting confirmatory discovery to verify the methods and procedures used to identify the Group 2 Class Members, and to verify the accuracy of the final number obtained. If that confirmatory discovery raises any doubts whatsoever about the accuracy of the numbers or the sufficiency of the methods of inquiry used, this Preliminary Approval motion will be immediately withdrawn. *Id*. at ¶13.

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**D. The Settlement Class and Subclass**

**1. The Settlement Class.**

The terms "Group 2 Settlement Class" or "Group 2 Settlement Class Members" are defined in the Agreement as follows:

> The "Settlement Class" or "Settlement Class Members" means all present or former borrowers or co-borrowers as identified in JPMCB's records whose residential mortgage loan or home equity line of credit is or was serviced or subserviced by JPMCB, or Chase Home Finance LLC and either the borrower, coborrower or both, were contacted on their cellular telephone(s) by JPMCB through the use of an automated dialer system and/or an artificial or pre-recorded voice during the Class Period. Subclass A of the Settlement Class consists of those persons whose cell phones were actually called by JPMCB or Chase Home Finance LLC during the Class Period, and are thus entitled to a monetary payment. Excluded from the Settlement Class are Defendants, their parent companies, affiliates or subsidiaries, or any employees thereof, and any entities in which any of such companies has a controlling interest, the Judge or Magistrate Judge to whom the Action is assigned and any member of those Judges' staffs and immediate families, as well as all persons who validly request exclusion from the Settlement Class.

1st Agreement,§ 2.16.

**2. Subclass A Membership Determination**

Based on data prepared using the information in Chase's Group 2 records assembled after the investigation, the total number of Class Members in the Group 2 Subclass A that will be mailed personal direct mail Notice is 1,498,593. Campion Decl. 2 at ¶ 2, 11. Those are all of the persons listed on the Chase mortgage accounts that included at least one person that actually received a call to their cell phone during the Class Periods. All of those persons will receive notice but not all will be eligible to file claims for monetary relief because only the persons actually called, those 1,303,112 in Group 2 Subclass A, will qualify for payment. Thus, the Settlement Class not only includes those 1,303,112 persons called on their cell phones but also the other approximately 200,000 persons named as borrowers and

co-borrowers on the accounts containing the called cell phone numbers. This is because Chase can determine from its records all their accounts which have at least one cell phone number associated with that account that was called during the Class Periods. The records do not indicate which person listed on the account was called on their cell phone but the records do indicate the cell phone number called. That number will be used by the Claims Administrator to verify membership in Subclass A or B for Group 2 claimants. However, both persons on the account were either the borrower or co-borrower on that account. *See* 1st Agreement, §§ 2.16, 5.03, 10.01, 10.03, 11.01. Thus, all the persons associated with the accounts with cell phone numbers called – the borrowers or co-borrowers, usually spouses – are Class Members but only those persons whose cell phone numbers were actually called are in Subclass A and entitled to receive a monetary payment from the Settlement Fund. If the Claims Administrator determines that cell phone number was not called, that Class Member will not be entitled to file a claim for a monetary payment, but they will instead benefit from Chase's newly implemented procedures put in place because of this Action to ensure future compliance with the TCPA, and they will not receive future calls to their cell phone without prior express consent. *See* 1st Agreement, §§ 5.03, 5.04.

The Settlement Class members in Group 2 Subclass A are those persons with unique cell phone numbers actually called by Chase or its agents and number 1,303,112. *See* 1st Agreement, §§ 2.16, 5.03, 10.01, 10.03, 11.01. As stated above, Plaintiffs' counsel are in the process of conducting confirmatory discovery, including a Rule 30(b)(6) deposition, of the person most knowledgeable of Chase's Group 2 Class Member investigation and search process. Campion Decl. 2, at ¶ 13.

**E. Settlement Payment**

The prior Group 1 Settlement Fund had a minimum "floor" of $7,000,000, and a maximum "cap" of $9,000,000. Because the claims submitted by Group 1 did not cause the floor to be exceeded, including the costs of claims administration and attorneys' fees and costs, Defendant was going to be liable for the minimum

amount of $7,000,000 for Group 1 claims. 1st Agreement. Thus, the Group 2 settlement sought to be approved here exceeds the prior Settlement payment commitment by up to $5,134,137. That maximum settlement amount includes up to $4,428,637 for Group 2 claims, an additional $125,000 for attorneys' fees and costs over and above the benchmark 25% sought in the prior Group 1 Settlement and up to $850,500 for Group 2 notice and claims administration. Agreement, §§ 5.05-5.07; 6.03.[6]

The Group 2 claims will be paid at the rate of $69.97 for each claim submitted. However, if the number of claims filed exceeds the estimated 61,507 claims expected based upon the Group 1's actual 4.72% claims rate, and therefore exceeds the maximum cap, then the Group 2 claims are paid on a pro rata basis. That amount was negotiated in mediation with Judge Infante with the intent to attempt to provide the Group 2 Settlement Class Members with the same benefit that will be paid to the Group 1 Settlement Class Members, estimated to be $69.97 each. Because the Parties knew the actual claims rate for the Group 1 claimants (4.72%), they used that number to estimate the possible Group 2 claims rate. Based upon the number of Group 2 Subclass A Class Members, 1,303,112, it is estimated that approximately 61,507 Group 2 Subclass A Class Members will file claims. Multiplying that number by $69.97 equals $4,428,637, the maximum amount in additional funds needed to fund that estimated number of Group 2 claims. The amount of payment for Group 2 claimants is capped at $69.97 but could be reduced on a pro rata basis if more than the projected 61,507 claims are received. If an insufficient number of Group 2 claims are received to reach the maximum amount, Defendant is only required to pay for those Group 2 claims submitted at the $69.97 rate. In addition, as previously approved, Chase will pay the costs of notice and claims administration under the Group 1 Settlement, and up to an additional

[6] The Parties agreed in the 1st Agreement to permit Class Counsel to seek up to 1/3 of the $9,000,000 maximum common fund as fees. 1st Agreement at § 6.01. However, in their prior fee application accompanying the Final Approval, Class Counsel sought only 25% of that common fund amount. *See* Memo of Points & Authorities re: Attorneys' Fees and Costs, Dkt. No. 60-1 filed June 20, 2012 at p. 3.

$580,500 for notice and claims administration only for Group 2. (If additional costs are required, the Parties have agreed to return to Judge Infante if the matter cannot be resolved. Agreement, § 5.07.)

**F. Monetary Award to Subclass A Members**

All of the approximately 1,498,593 persons associated with the accounts listing cell phone numbers called – the borrowers or co-borrowers, usually spouses – are Settlement Class Members but only those Members whose cell phone numbers were actually called are in Group 2 Subclass A and entitled to receive a monetary payment from the Settlement Fund. *See* 1st Agreement, §§ 10.01, 10.02. *See* "Non-Monetary Relief" below for benefits received by Group 2 Subclass B.

Those in Subclass A are entitled to make a claim for a monetary payment. The original Settlement Agreement set up a two-tier payment system, with a minimum Settlement Fund payment of $7,000,000 and a maximum payment of $9,000,000. After the claims period was over, it was determined the Group 1 claims and related notice and claims administration costs, and attorneys' fees, together did not exceed the $7,000,000 minimum. Thus, starting with that minimum, the new Group 2 claims will be paid in addition to the $7,000,000 floor, and each Group 2 claim submitted will be paid from the newly established $4,428,637 settlement fund. If the estimated number of 61,507 claims based upon the Group 1 claims rate of 4.67 percent is reached, that entire amount will be exhausted. If more than 61,507 claims are submitted, they will be paid on a pro rata basis. If less than those 61,507 claims are submitted, Chase pays only those submitted claims at the $69.97 rate.

There was a 90 day Claims Period for Group 1 and there will be the same for Group 2. To submit a claim for monetary payment, a Group 2 Settlement Class member must simply contact the Claims Administrator to determine if Chase's records indicate the claimant's cell phone was called; if so, they are in Subclass A. That will be done by either (a) calling their toll-free number; (b) contacting the Claims Administrator online at the Settlement website; or (c) by submitting by mail

a completed Claim Form downloaded from the Settlement website, as with the prior Group 1 claims. *See* 1st Agreement, §§10.02, 11.01. In the case of a phone call or online inquiry, the Claims Administrator expects to determine whether the Class member is in Subclass A while the Class member is on the phone line or submitting the online information. If the Claims Administrator determines the cell phone number was called, a claim for payment will be submitted at that time. If an inquiry is made by mail, a claim for payment will be submitted immediately upon determining the cell phone number is on the list of called numbers, and the Class member will be notified, regardless of whether they are in Subclass A.

**G. Non-Monetary Award to Subclass B Members**

If the Claims Administrator determines that a Group 2 Class Member's cell phone number was not called because it is not on the list of 1,303,112 called cell phone numbers, that person will not be entitled to file a claim for a monetary payment. However, those persons also benefit from the Settlement because largely as a result of this Action, Chase put in place newly implemented procedures designed to prevent the calling of cell phones, unless the borrower's loan servicing record is systematically coded to reflect the borrower's prior express consent to call his/her cell phone to attempt to ensure future compliance with the TCPA. *See* 1st Agreement, §§ 2.16, 5.03, 5.04.[7]

**H. Class Notice**

Even though the expense of such notice is considerable, the Agreement provides that notice of the proposed Settlement will be mailed by the Claims Administrator, Gilardi & Co., LLC, to Class Members by direct mail post-card notice ("Direct Mail Notice") to all 1,498,593 persons in the Class, but will address that single Settlement Notice to each and every Settlement Class Member located at that address. *See* Agreement, § 9.06; Campion Decl. 2, Ex. 2 for that proposed direct mail

[7] If there is more than one Settlement Class member on the same account and they both receive the Direct Mail Notice, it is likely that they are spouses and that one of them – either the borrower or the co-borrower – on that account received a cell phone call. Therefore, at least one of them will likely be able to submit a claim and receive a monetary payment.

Notice. That Notice summarizes the Settlement, instructs how to make a claim, opt out or object, and directs the recipient to a toll-free telephone number and a Settlement Website www.connorTCPAsettlement.com to learn the details of the Settlement. That website will also contain a formal lengthy Notice in a Question & Answer format. *See Id*., Ex.3; and 1st Agreement §§ 9.01 through 9.04. In addition, the Settlement Website and Toll-Free Number will permit Class Members to determine whether they are Subclass A Class Members and also to obtain information and a copy of the Agreement. *See* 1st Agreement §§ 9.03 through 9.04; 10.01 through 10.03.

The Claims Administrator will be provided the Group 2 records from Chase listing the last known addresses for all of the 1,498,593 Class Members in order to mail the Direct Mail Notice. Agreement, §9.06. Because these accounts are all related to home mortgages or home equity loans, the addresses are believed to have a high percentage of accuracy. However, if any notices are returned by the U.S. Postal Service, the Claims Administrator will do a search for each such Notice and remail to a more current address, if one is found. 1st Agreement, § 9.02. Because there are social security numbers associated with most Class members, a search for a new address for a remail is expected to have a very high success rate.

## I. Scope of Release

The scope of the release by all Class Members, including the Group 2 Class Members (other than those who elect not to participate in the Settlement), tracks the scope of Plaintiffs' allegations in the original complaint and also in the proposed

Second Amended Complaint.[8] The release also covers known and unknown claims, including California Civil Code Section 1542 claims. *See* 1st Agreement, § 16.01.

**J. Opportunity to Opt Out and Object**

Under the terms of the proposed Settlement, Group 2 Class members will have the right to opt out of the Settlement or to object to its terms. 1st Agreement §§ 12.01, 12.02. The Direct Mail Notice and the Q & A Notice on the Settlement Website and information available by calling the Toll-Free Number, will inform Class members of these rights. *See* Campion Decl. 2, Exhibits 2 and 3.

**K. Termination of Settlement**

If more than ten percent (10% ) of the Class members submit valid Requests for Exclusion, then Chase, in its sole discretion, shall have the right to terminate the Settlement. 1st Agreement §§12.01; 17.02. If the Settlement is not finally approved by the Court or is materially modified in the course of approval proceedings, it will be void. *Id.* at § 17.01 through 17.03.

**L. Payment of Notice and Administrative Costs by Defendant**

The Agreement provides that the Defendant will pay up to $580,500 for Group 2 notice and claims administration costs. If additional notice costs are

[8] "Released Claims" means any and all claims, causes of action, suits, obligations, debts, demands, agreements, promises, liabilities, damages, losses, controversies, costs, expenses, and attorneys' fees of any nature whatsoever, whether based on any federal law, state law, common law, territorial law, foreign law, contract, rule, regulation, any regulatory promulgation (including, but not limited to, any opinion or declaratory ruling), common law or equity, whether known or unknown, suspected or unsuspected, asserted or unasserted, foreseen or unforeseen, actual or contingent, liquidated or unliquidated, punitive or compensatory as of the date of the Final Approval Order that arise out of or relate in any way to the use of an "automatic telephone dialing system" or an "artificial or prerecorded voice" (to the fullest extent that those terms are used, defined or interpreted by the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.*, relevant regulatory or administrative promulgations and case law) by any of the Released Parties to contact or attempt to contact Settlement Class Members including, but not limited to, claims under or for a violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et seq.*, and any other statutory or common law claim arising from the use of automatic telephone dialing systems and/or an artificial or prerecorded voice, including any claim under any federal or state unfair and deceptive practices statutes, violations of any federal or state debt collection practices acts (including but not limited to, the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.*), invasion of privacy, conversion, breach of contract, unjust enrichment, specific performance and/or promissory estoppels. 1st Agreement, § 16.01. Unknown claims are also released. *Id.*

required, the Parties will ask Judge Infante's assistance in adjusting that number. Agreement, § 5.07. The estimated costs of Group 2 Direct Mail Notice and establishing the Group 2 claims administration procedures are to be deposited by Chase into the Settlement Fund Account administered by the Claims Administrator Gilardi & Co., within ten days after entry of the Group 2 Preliminary Approval order. 1st Agreement §§ 8.01, 8.02. The funds necessary to fund the Settlement, including the Approved Claims and Settlement Costs, will be paid within five days of the Effective Date and the amounts not paid for in advance will be billed by itemized invoices and shall be billed and paid monthly. 1st Agreement §§ 8.02, 8.03. Order at p. 5.

**M. Class Representatives' Application for Incentive Awards**

The agreement regarding the two Class Representatives' Incentive Awards of $2,500 each are set forth in the Group 1 Settlement Agreement. The Court has preliminarily approved such requests. Order at p. 5.

**N. Class Counsel's Application for Attorneys' Fees, Costs, and Expenses**

The original Settlement contemplates that Class Counsel shall be entitled to apply to the Court for an award of attorneys' fees, costs, and expenses to be paid from the Settlement Fund, and that request has been preliminarily approved. Order at p. 5. This Group 2 Settlement contemplates the payment of an additional $125,000 for attorneys' fees and costs for the additional effort incurred over the past 17 months resulting from the failure of Defendant to identify the Group 2 Class Members, and the attorney time and effort related thereto. Agreement, § 6.03.

**O. *Cy Pres* Distribution**

No *cy pres* will be required because the amount of the minimum payment under the Group 1 Settlement has been met. 1st Agreement §§ 5.01, 5.02.

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## III. ARGUMENT

### A. Legal Standards for Preliminary Approval of a Class Action Settlement

A class action may not be dismissed, compromised or settled without the approval of the court. Fed. R. Civ. Proc. 23(e). Judicial proceedings under Rule 23 have led to a defined procedure and specific criteria for settlement approval in class action settlements, described in the *Manual for Complex Litigation* (Fourth) (Fed. Judicial Center 2004) ("*Manual*") § 21.63, *et seq.*, including preliminary approval, dissemination of notice to class members, and a fairness hearing. *Manual*, §§ 21.632, 21.633, 21.634. The purpose of the Court's preliminary evaluation of the settlement is to determine whether it is within the "range of reasonableness," and thus whether notice to the class of the terms and conditions of the settlement, and the scheduling of a formal fairness hearing, are worthwhile. *See* 4 Herbert B. Newberg, *Newberg on Class Actions* § 11.25 *et seq.*, and § 13.64 (4th ed. 2002 and Supp. 2004) ("*Newberg*"). The Court is not required to undertake an in-depth consideration of the relevant factors for final approval. Instead, the "judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing." *Manual*, § 21.632 (4th ed. 2004).

As a matter of public policy, settlement is a strongly favored method for resolving disputes. *See Utility Reform Project v. Bonneville Power Admin.*, 869 F. 2d 437, 443 (9th Cir. 1989). This is especially true in class actions such as this. *See Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615 (9th Cir. 1982). As a result, courts should exercise their discretion to approve settlements "in recognition of the policy encouraging settlement of disputed claims." *In re Prudential Sec. Inc. Ltd. Partnerships Litig.*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995).

Preliminary approval does not require the Court to make a final determination that the settlement is fair, reasonable, and adequate. Rather, that

decision is made only at the final approval stage, after notice of the settlement has been given to the class members and they have had an opportunity to voice their views of the settlement or to exclude themselves from the settlement. *See* 5 James Wm. Moore, *Moore's Federal Practice – Civil* § 23.165[3] (3d ed.). Thus, in considering a potential settlement, the Court need not reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute, *West Va. v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1086 (2d Cir. 1971), and need not engage in a trial on the merits, *Officers for Justice v. Civil Service Comm'n,* 688 F. 2d at 625. Preliminary approval is merely the prerequisite to giving notice so that "the proposed settlement . . . may be submitted to members of the prospective class for their acceptance or rejection." *Philadelphia Hous. Auth. v. Am. Radiator & Standard Sanitary Corp.*, 323 F. Supp. 364, 372 (E.D. Pa. 1970).

Preliminary approval of the settlement should be granted if there are no "reservations about the settlement, such as unduly preferential treatment of class representatives or segments of the class, inadequate compensation or harms to the classes, the need for subclasses, or excessive compensation for attorneys." *Manual for Complex Litigation* § 21.632, at 321 (4th ed. 2004).

Furthermore, the opinion of experienced counsel supporting the settlement is entitled to considerable weight. *See., e.g.*, *Kirkorian v. Borelli*, 695 F.Supp. 446 (N.D. Cal.1988) (opinion of experienced counsel carries significant weight in the court's determination of the reasonableness of the settlement).

The decision to approve or reject a proposed settlement "is committed to the sound discretion of the trial judge[.]" *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). This discretion is to be exercised "in light of the strong judicial policy that favors settlements, particularly where complex class action litigation is concerned," which minimizes substantial litigation expenses for both sides and conserves judicial resources. *See Linney v. Cellular Alaska P'ship*, 151 F. 3d 1234, 1238 (9th Cir. 1998) (quotations omitted).

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Based on these standards, Plaintiffs' counsel respectfully submit that, for the reasons detailed below, the Court should preliminarily approve the proposed Group 2 Settlement as fair, reasonable and adequate.

**B. The Proposed Settlement Is Fair, Reasonable and Adequate and Should Be Preliminarily Approved**

**1. Liability is Highly Contested and Both Sides Face Significant Challenges in Litigating this Case**

The Court has previously found the basic Group 1 Settlement is fair, reasonable and adequate. Order at p. 2. This Group 2 Settlement follows the Group 1 Settlement, and adds a substantial amount of money to pay the Group 2 claims, pay additional notice and claims administration costs, and pay for additional attorneys' fees and costs. That Order recognized that the Settlement was a compromise given the significant risks to both sides, and that because of the costs, risks to both sides, and delays of continued litigation, the Settlement presents a fair and reasonable alternative to continuing to pursue the Litigation as a class action for alleged violations of the TCPA.

**2. Defendant's Agreement to Create the Additional Benefit in the Group 2 Settlement Provides a Fair and Substantial Benefit to the Class.**

As set forth above in II. B and C, Chase has agreed to pay up to $5,134,137, including $125,000 for additional attorneys' fees and up to $580,500 for notice and claims administration costs, to settle the Group 2 claims. Based upon the Group 1 claims received, and the amounts computed based on those Group 1 claims, each Group 2 Class Member will receive approximately the same amount the Group 1 Class Members will receive, $69.97. That is the amount estimated to be paid to Group 1 after the Settlement Costs of notice, claims administration and attorneys' fees are deducted from the Settlement Fund.

The original Group 1 Settlement was preliminarily approved by the Court. Plaintiffs submit the settlement award that each Group 2 Class Member will receive is comparable to the Group 1 claimants and is therefore fair, appropriate, and reasonable given the purposes of the TCPA and in light of the anticipated risk,

expense, and uncertainty of continued litigation. *See* Campion Decl. 2 at ¶ 9; Declaration of Joshua B. Swigart in Support of Unopposed Motion for Preliminary Approval of Class Action Settlement and Certification of Settlement Class for Settlement Class Members in Group 2 ("Swigart Decl. 2") at ¶ 11; *see also,* Declaration Abbas Kazerounian in Support of Unopposed Motion for Preliminary Approval of Class Action Settlement and Certification of Settlement Class for Settlement Class Members in Group 2 ("Kazerounian Decl. 2") at ¶ 11. That is true even though the TCPA provides for statutory damages of $500 for each violation; it is well-settled that a proposed settlement may be acceptable even though it amounts to only a small percentage of the potential recovery that might be available to the class members at trial. *See e.g., National Rural Tele. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 527 (C.D. Cal. 2004) ("well settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery"). At statutory damages of $500 per violation for the 1,303,112 cell phones called, the potential damages are more than $650,000,000, an amount that is far beyond the range of a compromise settlement. Indeed, the Group 2 Settlement achieves a substantial settlement, and similar to the Group 1 Settlement already approved.

**3. <u>The Settlement Was Reached As the Result of Arms'-Length Negotiation, Without Collusion, With the Assistance of the Court.</u>**

The Court previously found that the Group 1 settlement was achieved without collusion and after arms'-length negotiations. Order at p. 2. The proposed Group 2 Settlement is the result of the same intensive arms'-length negotiation, including a mediation before Judge Infante, followed by further negotiations between the Parties on their own. The Parties have been communicating for over 17 months about the investigation and the progress in locating the Group 2 Class Members. That search took the better part of the 17 months and the Parties discussed how to best adjust the original Settlement to include the Group 2 Class Members throughout that process. Judge Infante assisted the Parties coming to a workable solution that made certain that not only Group 2 Class Members were

treated fairly, but also protected the rights of the Group 1 Class Members so all were treated in the same and fair manner. The Parties also worked with each other to adjust the numbers when it was discovered that a follow-up audit uncovered an additional group of Group 2 Class Members. Campion Decl. 2 at ¶ 12. The time and effort spent on settlement negotiations, as well the time spent with Judge Infante in the settlement process, militate in favor of preliminary approval of the proposed Group 2 Settlement, as they strongly indicate there was no collusion. *See In re Wireless Facilities, Inc. Sec. Litig. II*, 253 F.R.D. 607, 610 (S.D. Cal. 2008).

Substantial confirmatory discovery is presently being conducted to ensure that there was no repeat of the prior failure by Defendant in locating and identifying all of the Class Members. Campion Decl. 2 at ¶ 13. Written discovery and a Person Most Knowledgeable are being pursued, with the goal of having all confirmatory discovery completed prior to the scheduled Preliminary Approval hearing. *Id*. If any confirmatory discovery responses indicate a need to withdraw the motion due to insufficient efforts in identifying Group 2, that will be done immediately. *Id*.

**4. Experienced Counsel Have Determined That the Settlement Is Appropriate and Fair to the Class**

The Parties are represented by counsel experienced in complex class action litigation. Class Counsel have extensive experience in class actions, as well as particular expertise in class actions relating to consumer protection and specifically the TCPA. Order at p. 3, approving Class Counsel. Counsel for Chase similarly has extensive experience based upon a long track record in complex class actions. They have taken over for prior defense counsel and also have vigorously defended Chase. Class Counsel believe that under the circumstances, the proposed Settlement is fair, reasonable and adequate and in the best interests of the Class Members. Campion Decl. 2 at ¶ 8; Swigart Decl. 2 at ¶ 11; Kazerounian Decl. 2. at ¶ 11. Chase's counsel is not opposing this motion, so they also support this request.

### C. The Court Should Preliminarily Certify the Class for Purposes of Settlement

Courts have long acknowledged the propriety of class certification for purposes of a class action settlement. *See In re Wireless Facilities*, 253 F.R.D. at 610 ("Parties may settle a class action before class certification and stipulate that a defined class be conditionally certified for settlement purposes"). As explained below, class certification is appropriate here because the Litigation meets the requirements of Rule 23(a) and Rule 23(b)(3).

#### 1. The Proposed Class Is Numerous

Here, the Group 2 Class Members total number Notice Database that will be used to provide notice to the Class contains information relating to approximately 1,498,593 individual Group 2 Settlement Class Members. Agreement, § 1.D, and Campion Decl., at ¶ 2. Thus, the proposed Class is sufficiently numerous for purposes of certifying a settlement class.

#### 2. The Commonality Requirement Is Satisfied, Because Common Questions of Law and Fact Exist

The commonality requirement is met if there are questions of law and fact common to the class. *Hanlon*, 150 F.3d at 1019. Here, for purposes of settlement, Plaintiffs allege Chase made calls to Class Members between June 16, 2006 to June 15, 2011 (and to July 5, 2011, for the EMC Mortgage Class Members), using autodialing equipment or with a prerecorded voice message. Those claims contain questions that are common to all members of the Class for settlement purposes, including: (1) whether Chase negligently violated the TCPA; (2) whether Chase willfully or knowingly violated the TCPA; and (3) whether Chase had "prior express consent" for the calls.

#### 3. The Typicality Requirement Is Met

The typicality requirement is met if the claims of the named representatives are typical of those of the class, though "they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. This Court found the typicality requirement was met in the Group 1 Settlement. Order at p. 3. The same claims are at issue here and are

similarly typical. *See Wehner v. Syntex Corp.*, 117 F.R.D. 641, 644 (N.D. Cal. 1987).

**4. The Adequacy Requirement Is Satisfied**

Rule 23(a)(4) is satisfied if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The Court appointed the class representatives for the Settlement Class in preliminarily approving the Group 1 Settlement. Order at p. 3. That same Order found Class Counsel to be suitable to represent the Class. *Id*. Rule 23(a)(4) is therefore satisfied for Group 2.

**5. Common Questions Predominate, Sufficient to Certify a Class for Settlement Purposes Only**

The same common questions are present here with Group 2 as with Group 1. "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Hanlon*, 150 F.3d at 1022. The Court has previously found common questions in this Settlement Class predominate. Order at p.3. Thus, class certification for Group 2 under Rule 23(b)(3) is appropriate here.

**6. Class Treatment for Settlement Purposes is Superior to Individual Resolutions**

The Court previously found class treatment to be superior to individual resolutions. Order at p. 3. The Group 2 issues are exactly the same and thus, are also superior to individual resolution. "[I]f a comparable evaluation of other procedures reveals no other realistic possibilities, [the] superiority portion of Rule 23(b)(3) has been satisfied." *Valentino v. Carter-Wallace*, 97 F.3d 1227, 1235-36 (9th Cir. 1996) ("a class action is a superior method for managing litigation if no realistic alternative exists"). As the Court previously found in certifying the Settlement Class, the Rule 23(b)(3)(A), (B) and (C) factors all favor class certification. Order at p. 3.

**D. The Proposed Method of Class Notice Is Appropriate**

Rule 23(c)(2)(B) provides that, in any case certified under Rule 23(b)(3), the court must direct to class members the "best notice practicable" under the circumstances. Rule 23(c)(2)(B) notice need only be given in a manner "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). "Adequate notice is critical to court approval of a class settlement under Rule 23(e)." *Hanlon*, 150 F. 3d at 1025.[9]

The notice proposed here is the same direct mail notice and Formal Q & A Form Notice to be posted on the settlement website previously approved for Group 1 and meets all notice requirements. The Court approved the same notice procedures for Group 1 as will be used here. Order at p. 4. The notice is calculated to reach every member of the Group 2 Settlement Class identified in the Notice Database by Direct Mail Notice. It will most certainly reach more than the 70% to 80% found to be sufficient in other cases. *Hartless v. Clorox Co.*, 2011 U.S. Dist. LEXIS 5427, at *25 (S.D. Cal. Jan. 20, 2011) (final approval granted with notice estimated to reach 75-83% of the class).

**E. The Court Has Already Appointed the Class Representatives and Class Counsel.**

In the original Group 1 Settlement Preliminary Approval Order, the Court appointed Class Counsel and the Class Representatives, which applies to the Group 2 Settlement. Order at p. 3.

**F. The Court Should Confirm Gilardi & Co. Will Continue**

Plaintiffs request that the Court confirm that Gilardi & Co. will continue to serve as the Claims Administrator, as the Court previously approved. Order at pp. 4, 5.

[9] Additional Class Action Fairness Act ("CAFA") Notices pursuant to 28 U.S.C. Section 1715(b) must be sent for this Group 2 settlement and will be paid from the additional up to $580.500 costs of notice as Chase agreed. Agreement, § 5.07.

## G. A Final Approval Hearing Should Be Scheduled

The last step in the settlement approval process is the formal fairness or final approval hearing. The Parties request that the hearing be held not before 145 days after the entry of the Preliminary Approval Order to allow sufficient time for providing CAFA Notice, direct mail notice and the 90 day claims period.

## IV. CONCLUSION

For all the foregoing reasons, the Parties respectfully request that the Court enter an order preliminarily approving the proposed Group 2 Settlement.

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