

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

In re:	§	
	§	
CHRISTOPHER DEE COTTON	§	Case No. 14-30287
ALLISON HEDRICK COTTON	§	Chapter 13
	§	
Debtors	§	
<hr style="border: 0.5px solid black;"/>		
	§	
CHRISTOPHER DEE COTTON,	§	
ALLISON HEDRICK COTTON,	§	Adv. Proceeding No. 17-03056
IGNACIO PEREZ, and	§	
GABRIELA PEREZ,	§	District Court Case No. 18-00499
<i>on behalf of themselves and all</i>	§	
<i>others similarly-situated,</i>	§	
	§	
Plaintiffs,	§	
	§	
v.	§	
	§	
WELLS FARGO & CO. and	§	
WELLS FARGO BANK, N.A.	§	
	§	
Defendants.	§	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR FINAL
CERTIFICATION OF SETTLEMENT CLASS AND FINAL APPROVAL OF CLASS
ACTION SETTLEMENT PURSUANT TO FED. R. CIV. P. 23 AND FED. R. BANKR. P.
7023

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Plaintiffs Christopher Dee Cotton and Allison Hedrick Cotton (the “Cottons”) and Plaintiffs Ignacio Perez and Gabriela Perez (the “Perezes”)(together, “Plaintiffs”) file this memorandum in support of their motion seeking final certification of the settlement class and final approval of the class settlement that Plaintiffs have reached with Defendants in this case. The settlement provides that Wells Fargo will pay \$13,460,000.00 to establish a settlement fund for class members, in addition to \$366,376.39 in remediation and substantial injunctive relief provided as a result of Plaintiffs’ efforts. As shown in this memorandum, the settlement provides exceptional relief to the class members, and is more than fair, reasonable, and adequate pursuant to the standards of Fed. R. Civ. P. 23(e). Not one of the class members obligated on 5,975 mortgage loans objected to the proposed settlement, and not one of the Chapter 13 Trustees in the country objected to the proposed settlement. Plaintiffs request that the Court approve the settlement.

I. INTRODUCTION

The Plaintiffs sued Wells Fargo on June 7, 2017 to put an end to and provide remedies for the harms created by its practice of soliciting Chapter 13 debtors for pre-approved “trial” loan modifications of their existing mortgage loans, which already were being addressed in the debtors’ Chapter 13 bankruptcy plans. Wells Fargo calls these loan modifications “no-application modifications” (“NAMs”). In many class members’ Chapter 13 cases, Wells Fargo also filed Fed. R. Bankr. P. 3002.1 payment change notices (“PCNs”) in the class members’ bankruptcy proceedings at or near the same time it sent out the no-application modification solicitations, using an official bankruptcy form. These payment change notices falsely asserted that the debtors’ mortgage payments had changed to the amount of the proposed trial no-application modification payment, even though the borrowers had not requested or accepted the proposed no-application

modification, and even though the bankruptcy courts had not approved the modified payments. In many cases, these payment change notices caused debtors and debtors' Chapter 13 trustees to make distributions for debtors' monthly mortgage payments in the (typically reduced) no-application modification trial payment amount instead of the amount of their full contractual mortgage payments, without the debtors' or the bankruptcy courts' prior consent. Wells Fargo's no-application modification program and the payment change notices Wells Fargo filed in class members' Chapter 13 cases created havoc in the class members' bankruptcies and caused class members' mortgage loans to go into contractual default. Wells Fargo's no-application modification solicitations and other communications also contained false and/or misleading statements, which Plaintiffs allege are in violation of bankruptcy and other consumer protection laws.¹

In the proposed settlement, Wells Fargo will pay \$13,460,000.00 to establish a settlement fund for the benefit of class members, who are the borrowers on 5,975 mortgage loan accounts that Wells Fargo subjected to its no-application modification program without their prior knowledge or consent. Borrowers on 1,028 of these mortgage loan accounts will receive \$3,800.00 in cash per account, and borrowers on 2,090 of these mortgage loan accounts will receive an estimated \$2,300.00 in cash per account. All participating class members will receive at least \$100.00 in cash per account under this settlement.² Wells Fargo has also provided an additional \$366,376.39 in

¹ Plaintiffs have attached eleven (11) declarations to this memorandum in support of their motion for approval of the settlement. See Exhibit 1, Kellett Declaration, p. 2, ¶ 2-3; p. 3, ¶ 5, p. 4, ¶ 9-10; Exhibit 4, Henderson Declaration, p. 2-3, ¶ 6-8; Exhibit 5, Limon Declaration, p. 2-3, ¶ 6-8; Exhibit 11, Rao Declaration p. 5-7, ¶ 19-23; p. 8, ¶ 27; p. 9, ¶ 29-30. See also Docket No. 88 in Adversary Proceeding No. 17-03056 ("Cotton AP")(Second Amended Complaint), p. 1-7, ¶ 1-14; p. 12-36, ¶ 34-132.

² Exhibit 10, Parks Declaration, p. 4, ¶ 7; p. 6, ¶ 15; Exhibit 1.A, Settlement Agreement, p. 26, ¶ 5.1.1.a, 5.1.1.b, 5.1.2.

account remediation with respect to class members as a result of Plaintiffs' pre-suit objections and related investigation into Wells Fargo's "stealth" no-application modification solicitation practices.³

In addition, as a direct result of Plaintiffs' efforts, Wells Fargo ended its practice of unilaterally imposing unsolicited trial modifications on Chapter 13 debtors.⁴ Also because of Plaintiffs' efforts, Wells Fargo agreed to refrain from pursuing relief from the Bankruptcy Code's automatic stay and from foreclosing on the homes of borrowers who filed a Chapter 13 bankruptcy who were subjected to Wells Fargo's solicitations for no-application modifications and Rule 3002.1 payment change notices based on trial payments for unsolicited no-application modifications. This moratorium has been in place unofficially since at least June 16, 2017, and officially since September 25, 2017, and Wells Fargo has agreed to leave it in place until after the settlement funds have been distributed to the class members so that the class members will have a reasonable amount of time to deposit and apply their share of the settlement funds to cure, in whole or in part, whatever accumulated arrearages they may owe.⁵ Since Wells Fargo's no-application modification solicitations and Bankruptcy Rule 3002.1 payment change notices often created arrearages, this moratorium has been and is especially crucial for many class members.⁶

These achievements are the product of vigorously contested, often contentious litigation

³ *Id.* at p. 13, ¶ 1.38; Exhibit 1, Kellett Declaration, p. 8, ¶ 25, n.4.

⁴ *See* Cotton AP Docket No. 38-2 (Mitchell Declaration), p. 6, ¶ 20.

⁵ Cotton AP Docket No. 38-1 (Menon Declaration) p. 3, ¶ 11; Cotton AP Docket No. 38-3 (Chapman Declaration), p. 6, ¶ 21; Cotton AP Docket No. 38-5 (Gugino Declaration), p. 2-3, ¶ 9; Cotton AP Docket No. 58 (Consent Order); Exhibit 1A, Settlement Agreement, p. 22, ¶ 3.2.3.

⁶ Exhibit 1, Kellett Declaration, p. 14, ¶ 41; Exhibit 11, Rao Declaration, p. 9, ¶ 29-30.

and multiple days of hard-fought arm's length mediated negotiations. Before filing suit, the Cottons and their counsel conducted an extensive pre-suit investigation. Before mediated settlement negotiations began, they insisted on receiving and extensively analyzed Wells Fargo's voluminous confidential pre-mediation discovery. This discovery included granular account-level information for all putative class members, as well as other Wells Fargo internal records and documents related to its no-application modification program for borrowers in Chapter 13 bankruptcy. Meanwhile, Plaintiffs obtained critical discovery in the separately pending Perez case in Texas, including deposition testimony of Wells Fargo employees that proved instrumental in developing Plaintiffs' theories of liability, revealing the mechanics of Wells Fargo's no-application modification program for Chapter 13 debtors, and informing Plaintiffs' counsel of appropriate relief for class members.⁷

Indeed, discovery in this case confirmed that Wells Fargo used the post-petition contractual delinquencies it created by applying payments in the reduced amount of its unsolicited trial modification payments as a basis for filing motions for relief from the automatic stay with the bankruptcy courts to foreclose on affected borrowers' homes.⁸ Without Plaintiffs' intervention and the settlement of this case, Wells Fargo almost certainly would still be engaging in these practices.

⁷ See, e.g., Exhibit 1, Kellett Declaration, p. 2, ¶ 4, p. 3-4, ¶ 6-9; Exhibit 2, Bartholow Declaration, p. 2-10, ¶ 2-34; Exhibit 3, Gardner Declaration, p. 7-9, ¶ 18-25; Exhibit 4, Henderson Declaration, p. 2-5, ¶ 6-13; Exhibit 5, Limon Declaration, p. 3-4, ¶ 7-14. See also Exhibit 11, Rao Declaration, p. 6-7, ¶ 22-23.

⁸ Exhibit 1, Kellett Declaration, p. 12, ¶ 37.

II. CLASS DEFINITION

Plaintiffs seek certification for settlement purposes of the following class:⁹

The collective group of those individual borrowers who (i) maintained a home mortgage loan owned or serviced by Wells Fargo Bank, (ii) are currently or were formerly in a Chapter 13 bankruptcy case, and (iii) were solicited by Wells Fargo Bank for a No-Application Modification within 120 days prior to or any date after the filing of the petition for the Chapter 13 bankruptcy or the date of conversion of a Chapter 7, 11, or 12 bankruptcy to a Chapter 13 bankruptcy, and prior to final dismissal or discharge of such Chapter 13 bankruptcy case. Exhibit 1.A, Settlement Agreement, p. 6, ¶ 1.5.

Plaintiffs seek certification for settlement purposes of the following subclasses:

Subclass 1 - The collective group of all of the Settlement Class Members who (a) were solicited by Wells Fargo Bank for a No-Application Modification during the 120 days prior to the Settlement Class Member's filing of their bankruptcy cases, or (b) entered into a permanent loan modification as a result of Wells Fargo Bank's No-Application Modification solicitation, or (c) for whom no payments were made on their residential mortgage loans after Wells Fargo Bank's No-Application Modification solicitation. *Id.* at p. 14, ¶ 1.48.

Subclass 2 - The collective group of Settlement Class Members, not including Subclass 1 members, who also are not members of Subclass 3. *Id.* at ¶ 1.50.

Subclass 3 - The collective group of all of the Settlement Class Members, not including Subclass 1 members or Subclass 2 members, who, as of January 1, 2018, (a) had reinstated or paid their loan in full, or (b) were in an active chapter 13 bankruptcy and whose mortgage loan was post-petition current as of that date, or (c) had received a discharge or whose bankruptcy case had been dismissed, and as to whom Wells Fargo had not filed a motion for relief from stay after sending such Settlement Class Member a No-Application Modification solicitation. *Id.* at p. 15, ¶ 1.52.

III. TERMS OF SETTLEMENT

The key features of the settlement are:

1. Wells Fargo will pay \$13,460,000.00 into a Settlement Fund for payment for each of the

⁹ Capitalized terms have the meaning ascribed to them in the Settlement Agreement.

nearly 6,000 accounts of the Settlement Class Members, payments of settlement administration costs, service awards to the Class Representatives, and Class Counsels' attorneys' fees and expenses. *Id.* at p. 23, ¶ 3.3.

2. Wells Fargo provided remediation in the amount of \$366,376.39 with respect to 393 Class Members' accounts. *Id.* at p. 13, ¶ 1.38.¹⁰

The total direct financial benefit is thus \$13,826,376.39 ("Total Settlement Benefits"). *Id.* at p. 15, ¶ 1.53.

3. The Settlement Administrator will automatically send a settlement check to any Class Member that does not opt-out of the settlement. *Id.* at p. 26-27, ¶ 5.1, 5.2. This is not a claims-made settlement.
4. Joint obligors on mortgage loans will be treated as one class member and receive one check. *Id.* at p. 26, ¶ 5.1.1.
5. The Members of Subclass 1 will receive a check in the amount of \$100.00. *Id.* at ¶ 5.1.1.a.
6. The Members of Subclass 2 will receive a check in the amount of \$3,800.00. *Id.* at ¶ 5.1.1.b.
7. The Settlement Administrator will mail checks to the Subclass 1 and Subclass 2 Class Members before distributing any other payments, and will do so within 5 business days of receipt of the Settlement Funds from Wells Fargo after the Effective Date. *Id.* at ¶ 5.1.1.
8. The Members of Subclass 3 include borrowers on the remaining 2,090 accounts not included in Subclass 1 or Subclass 2. After payment first to Subclass 1 and Subclass 2 Class Members, and then payment of settlement administration costs, services awards to the Class Representatives, and Class Counsel's attorneys' fees and expenses, the remaining Net Settlement Fund will be divided by the 2,090 Subclass 3 mortgage loan accounts. *Id.* at ¶ 5.1.2. The current estimated payment with respect to each Subclass 3 mortgage loan account is a little over \$2,300.00.¹¹
9. Settlement Class Members will receive payment even if Wells Fargo previously provided remediation with respect to their mortgage accounts.
10. Class Counsel has performed and will continue to perform additional confirmatory discovery with respect to the remediation provided by Wells Fargo.¹²

¹⁰ The average amount of remediation was \$932.26. Exhibit 1, Kellett Declaration, p. 7-8, ¶ 25, n.4.

¹¹ Exhibit 1, Kellett Declaration, p. 13, ¶ 38.

¹² Exhibit 1, Kellett Declaration, p. 16, ¶ 47.

11. Wells Fargo will receive a limited release from the Class Members under this settlement. Exhibit 1.A, Settlement Agreement, p. 11-13, ¶ 1.35-1.37; p. 15, ¶ 1.54; p. 33-34, ¶ 10.1-10.5.
12. Each of the Class Representatives is seeking allowance of a service award for such class representatives' participation in litigation against Defendants that has resulted in and is resolved by this settlement, which Wells Fargo does not oppose. *Id.* at p. 40, ¶ 15.2.
13. The administrative costs of administering the settlement will be paid out of the Settlement Fund. *Id.* at p. 9, ¶ 1.24; p. 26, ¶ 5.1.2. Currently, the administrative costs are estimated at \$87,045.00.¹³
14. Wells Fargo does not oppose a request for (a) attorneys' fees by Class Counsel for 33% of the Total Settlement Benefits, and (b) expenses in the amount of \$54,466.76. Exhibit 1.A, p. 40-42, ¶ 15.

Class Counsel has determined into which subclass each class member belongs, using information regarding each of the class members' mortgage accounts and the class members' bankruptcy cases compiled by Wells Fargo.¹⁴ The class members were assigned different subclasses based on a broad array of factors, including the different statuses of their mortgage loan accounts in Wells Fargo's loan servicing system, events in the class members' bankruptcy cases, actions taken by Wells Fargo in the class members' bankruptcy cases, the status of the class members' post-petition mortgage payments as of January 1, 2018, Class Counsel's assessment of the harm or risk of harm to the class members caused by Wells Fargo's actions, and Class Counsel's assessment of the strength of the potential claims common to the members of each subclass, among other considerations.¹⁵

Subclass 1 consists of class members as to whom Wells Fargo sent a no-application

¹³ Exhibit 10, Parks Declaration, p. 7, ¶ 19.

¹⁴ Exhibit 1, Kellett Declaration, p. 9-13, ¶ 29-38.

¹⁵ *Id.*

modification solicitation within the 120 days prior to the class member filing for a Chapter 13 bankruptcy case, as well as every class member who signed a final loan modification agreement, and class members who made no payments whatsoever on their mortgage loan account after Wells Fargo sent a no-application modification solicitation to them. Exhibit 1.A, Settlement Agreement, p. 14, ¶ 1.48. Class Counsel placed a comparatively low valuation on the claims of Subclass 1 class members.¹⁶

Members of Subclasses 2 and 3 consist only of class members who filed a Chapter 13 bankruptcy case or converted to a Chapter 13 bankruptcy case *before* being solicited by Wells Fargo for a no-application modification. The primary metrics Class Counsel used for determining whether a class member fell into Subclass 2 or 3 are set out in Ms. Kellett's declaration.¹⁷

Subclass 2 consists of class members who were, in Class Counsel's assessment, potentially harmed the most or were the most at risk of harm due to the actions of Wells Fargo complained about in this lawsuit. Subclass 2 class members are thus receiving the highest compensation.¹⁸

Subclass 2 contains class members, not in Subclass 1 or 3, as to whom Wells Fargo had foreclosed as of January 1, 2018. It also includes every class member in whose bankruptcy case Wells Fargo filed a motion for relief from stay after sending a no-application modification solicitation, with the exception of class members who were in an Active Chapter 13 bankruptcy case and were post-petition current on their mortgage loan on January 1, 2018. Subclass 2 also includes class members in whose bankruptcy case Wells Fargo did *not* file a motion for relief from

¹⁶ *Id.* at p. 9-11, ¶ 30-33.

¹⁷ *Id.* at p. 11-13, ¶ 34-38.

¹⁸ *Id.* at p. 12, ¶ 36.

stay after sending a no-application modification solicitation, with the exception of class members who were in an Active Chapter 13 bankruptcy and were post-petition current on their mortgage loans on January 1, 2018, or whose bankruptcy case had been dismissed, or who had received a Chapter 13 discharge.^{19 20}

Subclass 3 class members are viewed by Class Counsel as being less at risk than members of Subclass 2 with respect to motions for relief from stay, foreclosure, or other harmful outcomes of Wells Fargo's practices. Subclass 3 class members include those excepted out of Subclass 2, as described above, as well as borrowers who had fully reinstated their mortgage loan or had paid it in full as of January 1, 2018. Subclass 3 class members still are receiving a substantial payment as part of this settlement, estimated to be in excess of \$2,300.00 per mortgage loan account.²¹

IV. THE SETTLEMENT MEETS THE REQUIREMENTS FOR APPROVAL

A. The bankruptcy court granted preliminary approval of the settlement.

The bankruptcy court held a hearing on preliminary approval of the settlement on October 24, 2018, after Class Counsel submitted extensive materials in support, including briefing on the requirements of final class certification and final approval of the settlement, and numerous declarations in support. *See* Cotton AP Docket Nos. 89-90, 97- 106. After a thorough hearing, the bankruptcy court issued its order preliminarily approving the settlement and setting out the procedures for notice and other matters. Exhibit 1.B.

¹⁹ *Id.* at p. 12, ¶ 37.

²⁰ Such class members excepted out of Subclass 2 are in Subclass 3.

²¹ Exhibit 1, Kellett Declaration, p. 13, ¶ 38. *See also* Exhibit 11, Rao Declaration, p. 6, ¶ 22, p. 7-8, ¶ 24-27, p. 9, ¶ 31.

B. The class meets the requirements of Fed. R. Civ. P. 23(a) and 23(b)(3).

In this case, the class meets the requirements of Fed. R. Civ. P. 23(a), and the class falls within and meets the requirements of Fed. R. Civ. P. 23(b)(3). Except for manageability, the requirements for certifying Rule 23(b) trial classes and settlement classes are the same. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614, 620 (1997).

1. The class meets the Fed. R. Civ. P. 23(a) requirements for certification.

Fed. R. Civ. P. 23(a) imposes four threshold requirements applicable to all class actions. *Ortiz v. Fibreboard*, 527 U.S. 815, 828 n.6 (1999).

a. Numerosity. Here, the class is so large that joinder of all members is impracticable. Fed. R. Civ. P. 23(a)(1). The proposed representative need only show that joining all class members would be extremely difficult or inconvenient. 7A Wright, Miller, & Kane, *Federal Practice & Procedure 2d* § 1762 & n. 7 (1986 & Supp. 2004). The class members here have 5,975 mortgage loan accounts with Wells Fargo.²² The number of class members is so large that joinder of all members is impracticable and thus the class is sufficiently numerous.

b. Commonality. There must be questions of law or fact common to the class. Fed. R. Civ. P. 23(a)(2). Under the commonality requirement, at least one common question of law or fact must exist among class members. *EQT Prod. Co. v. Adair*, 764 F.3d 347, 360 (4th Cir. 2014). Commonality requires that a proposed class action have “the capacity ... to generate common answers” that “resolve an issue that is central to the validity of each one of the claims in one stroke.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Minor factual variances will not preclude commonality, so long as the claims arise from the same general set of facts and the

²² Exhibit 10, Parks Declaration, p. 4, ¶ 7.

class members share the same legal theory. *Brown v. Transurban U.S.A., Inc.*, 318 F.R.D. 560, 567 (E.D. Va. 2016). See, e.g., *Parker v. Asbestos Processing, LLC*, No. 0:11-CV-01800-JFA, 2015 WL 127930, at * 7 (D.S.C. Jan. 8, 2015)(“Where the injuries complained of by named plaintiffs allegedly result from the same unlawful pattern, practice, or policy of the defendants, the commonality requirement is usually satisfied.”); *In re TD Bank, N.A. Debit Card Overdraft Fee Litig.*, 325 F.R.D. 136, 153 (D.S.C. 2018).

Common issues in this case include, but are not limited to, whether Wells Fargo engaged in the no-application modification solicitation program as alleged by Plaintiffs, whether Wells Fargo’s no-application modification solicitation program and the payment change notices it filed in bankruptcy cases in connection with that program violated the laws alleged by Plaintiffs, whether the program caused the harmful outcomes alleged by Plaintiffs, whether the program constituted abuse of process, fraud on the bankruptcy court and contempt for which the bankruptcy court could provide relief pursuant to 11 U.S.C. § 105(a), and whether the no-application modification solicitations themselves violated the laws as alleged by Plaintiffs.

c. **Typicality.** The Class Representatives have claims that are typical of the class. Fed. R. Civ. P. 23(a)(3). Like the commonality requirement, the test for typicality is not demanding. As for the second and third Rule 23(a) factors, “the requirements for typicality and commonality often merge.” *In re Outer Banks Power Outage Litigation*, No. 4:17-CV-141, 2018 WL 2050141, * 4 (E.D.N.C. May 2, 2018)(citing *Romero v. Mountaire Farms, Inc.*, 796 F. Supp. 2d 700, 714 (E.D.N.C. 2011); *Kidwell v. Transp. Commc’ns Int’l Union*, 946 F.2d 283, 305 (4th Cir. 1991)). The typicality requirement is met if, “the claims of the representative parties [are] typical of the claims of the class.” *Outer Banks Power Outage Litigation*, 2018 WL 2050141 at * 4 (citing

Haywood v. Barnes, 109 F.R.D. 568, 578 (E.D.N.C. 1986); *Deiter v. Microsoft Corp.*, 436 F.3d 461, 466 (4th Cir. 2006)). A claim is typical if “it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.” *Id.* (citing *Romero*, 796 F. Supp. 2d at 714). The typicality requirement is “captured by the notion that as goes the claim of the named plaintiff, so go the claims of the class.” *Deiter*, 436 F.3d at 466; *Soutter v. Equifax Information Services, LLC*, 498 Fed.Appx. 260, 264–65 (4th Cir. 2012); *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 340 (4th Cir. 1998). Here, the Class Representatives and class members share common questions of law and fact, their claims arise from the same practices of Wells Fargo, and their claims are based on the same legal theories.²³

d. Adequacy of representation. The Class Representatives have and will fairly represent and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4). The Class Representatives hold no conflicts of interest with the members of the class they seek to represent, and the Class Representatives’ interests are aligned with those of the class.²⁴

In addition to fairly and adequately representing the interests of the class, the Class Representatives have competent counsel that have and will fairly and adequately represent the class. Kellett & Bartholow PLLC, Sigmon & Henderson, PLLC, and Limon Law Firm seek that the Court confirm the bankruptcy court’s appointment of their attorneys as Class Counsel pursuant to Fed. R. Civ. P. 23(g)(1) and (2). As set forth in the attached declarations supplied in

²³ See Cotton AP Docket No. 88 (Second Amended Complaint).

²⁴ See Exhibits 6–9, Declarations of Class Representatives; Exhibit 4, Henderson Declaration, p. 5-6, ¶ 14-17; Exhibit 5, Limon Declaration, p. 4-5, ¶ 15-17.

connection with this memorandum, such attorneys have extensive experience in consumer bankruptcy proceedings, consumer bankruptcy claims of this type, consumer rights litigation and, with respect to Kellett & Bartholow PLLC, extensive experience in bankruptcy class actions involving mortgage servicing-related issues unique to the bankruptcy process. In addition, counsel for plaintiffs has extensive experience in complex litigation generally. Class Counsel also has extensive knowledge of all the legal issues that have arisen in this class action, and have vigorously prosecuted this action against the resources brought to bear in its defense by Wells Fargo.²⁵ Finally, Class Counsel has no conflicts of interest with respect to the members of the class.²⁶

2. The class meets the Fed. R. Civ. P. 23(b)(3) requirements.

The Class Representatives seek certification under Fed. R. Civ. P. 23(b)(3), which is permitted if two criteria are met: (1) common questions of law or fact predominate over individual issues, and (2) a class action is superior to other available methods for the fair and efficient adjudication of the case. Fed. R. Civ. P. 23(b) sets out four non-exhaustive factors for the court to consider when determining whether a case meets these criteria.²⁷ *Amchem*, 521 U.S. at 615-616. However, the Court need not consider Fed. R. Civ. P. 23(b)(3)(D) manageability when the case is being settled. *Id.* at 521 U.S. at 620.

²⁵ Exhibit 1, Kellett Declaration, p. 18-22, ¶ 53-70, and attached *curriculum vitae* (“CV”); Exhibit 2, Bartholow Declaration, p. 11-15, ¶ 39-55, and attached CV; Exhibit 3, Gardner Declaration, p. 1-9, ¶ 1-26, 32; Exhibit 4, Henderson Declaration, p. 2-6, ¶ 2-20, and attached CV; Exhibit 5, Limon Declaration, p. 2, ¶ 2-5; p. 3-5, ¶ 10-15, p. 6, ¶ 19, and attached CV; Exhibit 11, Rao Declaration, p. 7-10, ¶ 23-31, 33. *See also* n. 7, *supra*.

²⁶ Exhibit 1, Kellett Declaration, p. 22, ¶ 71; Exhibit 3, Gardner Declaration, p. 9-10, ¶ 33; Exhibit 4, Henderson Declaration, p. 6, ¶ 20; Exhibit 5, Limon Declaration, p. 6, ¶ 20.

²⁷ (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions, (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class, (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum, and (D) the difficulties likely to be encountered in the management of a class action.

a. **Predominance.** In this case, there are common questions regarding liability with respect to Wells Fargo's no-application modification solicitation program, and its filing of PCNs with respect to them, which predominate over individual issues. If "common questions predominate over individual questions as to liability, courts generally find the predominance standard of Rule 23(b)(3) to be satisfied." *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 427-428 (4th Cir. 2003) ("[R]ule 23 contains no suggestion that the necessity for individual damage destroys commonality, typicality, or predominance, or otherwise forecloses class certification."). Here, the common issues discussed on p. 10-11, *supra*, including those of liability, outweigh individual issues.

b. **Superiority.** With respect to superiority, "The policy at the very core of class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem*, 521 U.S. at 617. Here, the class consists of debtors in or formerly in a chapter 13 bankruptcy proceeding, and thus by definition are unable financially to pursue a case like this on an individual basis, and, other than the Perez case which will be dismissed per the settlement, Class Counsel is not aware of any other pending litigation against Wells Fargo on the issues raised in this suit.²⁸ Thus, class members do not have an interest in controlling their own cases. *Pitt v. City of Portsmouth, Va.*, 221 F.R.D. 438, 446 (E.D. Va. 2004)("[T]he absence of other litigation suggests that this is a negative value suit and, therefore, a class action is the superior method of adjudicating these issues.").

The third factor in Rule 23(b)(3) consists of basically two considerations, both of which point to the superior nature of determining and resolving the issues presented in this class action:

²⁸ Exhibit 1, Kellett Declaration, p. 8, ¶ 26.

“whether allowing a Rule 23(b)(3) action to proceed will prevent the duplication of effort and the possibility of inconsistent results [and] ... whether the forum chosen for the class action represents an appropriate place to settle the controversy.” *Id.* (citing 7A Wright & Miller, Federal Practice and Procedure § 1780 (2d ed.)). If the case proceeded, it would satisfy the first inquiry. As to the second, the bankruptcy court already determined that Charlotte, North Carolina is the proper place to proceed with this class action as the Cottons live here and Wells Fargo has a large presence here. Charlotte federal courts have presided over the entire case through the final approval of the settlement.

C. The settlement is fair, reasonable, and adequate pursuant to the requirements of Fed. R. Civ. P. 23(e).

The Court’s analysis of the settlement should be performed in a manner that is consistent with “the strong judicial policy in favor of settlements, particularly in the class action context.” *West v. Cont’l Auto., Inc.*, 3:16-cv-00502-FDW-DSC, 2018 WL 1146642, at * 3 (W.D.N.C. Feb. 5, 2018); *Scott v. Family Dollar Stores, Inc.*, 3:08-cv-00540-MOC-DSC, 2018 WL 1321048, at * 3 (W.D.N.C. Mar. 14, 2018)(same); *US Airline Pilots Ass’n v. Velez*, 2016 WL 4698540, at * 3 (W.D.N.C. Sep. 7, 2016). *See also Gould v. Alleco, Inc.*, 3:14-cv-0077-RJC-DCK, 883 F.2d 281, 284 (4th Cir. 1989), *cert. denied*, 493 U.S. 1058 (1990)(the analysis begins with “the unassailable premise that settlements are to be encouraged”).

For final approval, courts in the Fourth Circuit have in the past applied a two-part test to determine whether a proposed settlement conforms to the requirements of the Federal Rules by considering (1) fairness, which focuses on whether the proposed settlement was negotiated at arm’s length; and (2) adequacy, which focuses on whether the consideration provided to the class members is sufficient. *In re Red Hat, Inc. Sec. Litig.*, No. 5:04-CV-473-BR(3), 2010 WL 2710517,

at * 1 (E.D.N.C. June 11, 2010), report and recommendation adopted, No. 5:04-CV-473-BR, 2010 WL 2710446 (E.D.N.C. July 8, 2010); *In re Jiffy Lube Securities Litigation*, 927 F.2d 155, 158–59 (4th Cir. 1991); *Beaulieu v. EQ Indus. Services, Inc.*, No. 5:06-cv-00400-BR, 2009 WL 2208131, at * 23 (E.D.N.C. 2009). The amendments to Fed. R. Civ. P. 23(e)(2) became effective on December 1, 2018 and specifically list out factors the Court is to consider.²⁹

Here, the settlement is fair, reasonable and adequate considering the factors of Rule 23(e)(2), and the Court should approve it. The benefits provided under the settlement are rationally related to Plaintiffs' claims and are substantial in light of the risks of prolonged, contested litigation. This settlement will provide significant monetary relief to settlement class members, has prevented Wells Fargo from continuing to file payment change notices for unauthorized no-application modifications, and it will relieve the parties and the Court of the risks and burden of litigation. As explained in Section III, *supra*, payment to the class members is automatic under this agreement – the Settlement Administrator will automatically mail settlement checks to all of the class members who do not opt out, without the necessity of class members completing and filing a claim form.

²⁹ **Fed. R. Civ. P. 23(e)(2) Approval of the Proposal.** If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

- (A) the class representatives and class counsel have adequately represented the class;
- (B) the proposal was negotiated at arm's length;
- (C) the relief provided for the class is adequate, taking into account:
 - (i) the costs, risks, and delay of trial and appeal;
 - (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
 - (iii) the terms of any proposed award of attorney's fees, including the timing of payment; and
 - (iv) any agreement required to be identified under Rule 23(e)(3); and
- (D) the proposal treats class members equitably relative to each other.

1. The settlement meets the fairness standard for final approval pursuant to Fed. R. Civ. P. 23(e)(2)(A) and (B).

Factors relating to the fairness of a proposed settlement include: (1) the posture of the case at the time the proposed settlement was reached, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the settlement negotiations, and (4) counsel's experience in the type of case at issue. *Beaulieu*, 2009 WL 2208131, at * 24 (citing *Jiffy Lube*, 927 F.2d at 158–59; *Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 855 F.Supp. 825, 828 (E.D.N.C. 1994)). *See also* Fed. R. Civ. P. 23(e)(2)(A) and (B).

a. The posture of the case at the time of settlement favors final approval of the settlement.

The posture of this case when the parties decided to pursue settlement confirms that negotiations were arm's length, as the issues in this case were heavily contested, making conditions favorable for achieving a good settlement on behalf of the class members. First, shortly after it was filed, this case received a significant amount of national media coverage. Second, the parties had litigated Plaintiffs' hotly-contested motion for a nationwide preliminary injunction against Wells Fargo. Third, settlement negotiations commenced just as the bankruptcy court was poised to issue a ruling on Plaintiffs' motion for that injunction, which, if issued, may have generated additional media coverage, and would have further enhanced Plaintiffs' leverage in the case.³⁰ As for Plaintiffs, any adverse ruling by the bankruptcy court on Plaintiffs' motion for preliminary injunction would inure to Wells Fargo's benefit, which also encouraged settlement prior to the ruling. In addition, Plaintiffs had added a RICO count to their amended complaint, and Wells

³⁰ *See, e.g., Exhibit 2*, Bartholow Declaration, p. 7, ¶ 23; p. 8, ¶ 25-28; *Exhibit 4*, Henderson Declaration, p. 5, ¶ 15; *Exhibit 5*, Limon Declaration, p. 4-5, ¶ 15-16.

Fargo's deadline to respond to the amended complaint was rapidly approaching.³¹

Meanwhile, in the Perezes' case, Plaintiffs' counsel was pursuing discovery aggressively and obtained documents and deposition testimony from Wells Fargo employees regarding Wells Fargo's no-application modification and payment change notice practices, which bolstered Plaintiffs' position in the case.

b. The significant amount of discovery Plaintiffs obtained favors approval of the settlement.

Plaintiffs obtained significant discovery in the Perez case, in the Cottons' bankruptcy case prior to filing the class complaint, and in connection with the Cottons' class case. As a result, Plaintiffs' attorneys were appropriately well-informed about the facts, such that they were able to properly develop their settlement strategy and evaluate settlement options. In the Perez case, Plaintiffs learned additional, valuable information about Wells Fargo's policies and procedures with respect to its no-application modification solicitation program, its filing of payment change notices in bankruptcy court with respect to sending no-application modifications, Wells Fargo's solicitations and communications with debtors and their counsel regarding the no-application modification solicitations and payment change notices, as well as how Wells Fargo treated debtors' mortgage loan accounts after Wells Fargo sent a no-application modification solicitation. This information greatly informed Class Counsel of the merits of Plaintiffs' position on these issues. As part of the mediated settlement process, Plaintiffs demanded and obtained extensive, granular loan-level detail about each class member's loan, which allowed Class Counsel to also assess Plaintiffs' case, settlement value, and appropriate damages for the class members.³²

³¹ See Cotton AP Docket No. 49.

³² See notes 7 and 14-21, *supra*.

c. The settlement was negotiated at arm's length by experienced counsel with the assistance of a reputable mediator.

The parties reached the Settlement Agreement after hard-fought negotiations with the assistance of highly-reputable and experienced mediator, Chris Nolland, throughout the entire eleven-month negotiation and mediation process.³³ The negotiations took place via numerous telephone conferences, written correspondence, and in person. Plaintiffs also submitted two settlement demands to Wells Fargo, as well as a mediation statement with extensive materials to the mediator. The parties attended a two-day mediation session and then another one-day mediation session with Mr. Nolland. Indeed, Mr. Nolland assisted the parties from the beginning of the process, through pre-mediation discovery, through the days of mediation, and through the extensive additional negotiations to come to the settlement agreement's final terms.³⁴

d. Class Counsel's experience in the type of case at issue favors final approval of the settlement.

As illustrated by the attached declarations filed in support of final approval, Class Counsel's combined experience in complex litigation, consumer class actions, and bankruptcy law informed the settlement negotiations and is reflected in the final settlement terms.³⁵ The benefits to the class, discussed in Section III, *infra*, are substantial and are rationally related to their claims for Wells Fargo's alleged violations of bankruptcy law. The hard-fought litigation, followed by highly contested settlement negotiations, the excellent result for the class in spite of the significant

³³ Attorney Nolland has been a mediator since 1993 and has conducted over 1,300 mediations, primarily in complex business and commercial matters. American College of Civil Trial Mediators, Member Directory, *available at* <http://www.acctm.org/cnolland/> (last visited February 17, 2019).

³⁴ Exhibit 1, Kellett Declaration, p. 6-9, ¶ 17-28; Exhibit 2, Bartholow Declaration, p. 8-11, ¶ 27-38; Exhibit 3, Gardner Declaration, p. 8, ¶ 25; Exhibit 4, Henderson Declaration, p. 5, ¶ 16; Exhibit 5, Limon Declaration, p. 5-6, ¶ 17, 19.

³⁵ See note 25, *supra*.

procedural and substantive hurdles Plaintiffs faced, and the participation of Mr. Nolland, an experienced mediator, are all testaments to the non-collusive nature of the settlement. *US Airline Pilots Ass’n*, 2016 WL 4698540 at *4 (extensive formal and informal discovery, negotiations with mediator and skilled counsel well-versed in issues meant settlement met the fairness factor); *West*, 2018 WL 1146642, at * 4 (same).

2. The settlement meets the adequacy standard for final approval pursuant to Fed. R. Civ. P. 23(e)(2)(C) and (D).

In analyzing the adequacy of the settlement terms, relevant factors in the Fourth Circuit have included: (1) the relative strength of the plaintiffs’ case on the merits, (2) any difficulties of proof or strong defenses the plaintiffs would likely encounter if the case were to go to trial, (3) the expected duration and expense of additional litigation,³⁶ (4) the solvency of the defendants and the probability of recovery on a litigated judgment,³⁷ and (5) the degree of opposition to the proposed settlement. *Beaulieu*, 2009 WL 2208131, at * 26 (citing *Jiffy Lube*, 927 F.2d at 158; *Horton*, 855 F. Supp. at 829–30). “The Court’s role is not to engage in a claim-by-claim, dollar-by-dollar evaluation, but to evaluate the proposed settlement in its totality.” *Scott*, 2018 WL 1321048, at * 3 (quoting *Borcea v. Carnival Corp.*, 238 F.R.D. 664, 673 (S.D. Fla. 2006)).

a. The first three factors favor a finding that the settlement is adequate.

Plaintiffs believe they have a strong case on the merits. However, Wells Fargo’s position has been throughout that the remediation it provided to class members provided full redress, that

³⁶ Similarly, new Fed. R. Civ P. 23(e)(2)(C)(i) requires that the Court consider the costs, risks, and delay of trial and appeal.

³⁷ Defendants’ solvency is not really a relevant factor in this case.

the class members were entitled to nothing else, and that Wells Fargo was not liable in any event.³⁸ Nevertheless, Plaintiffs were able to negotiate an additional \$13,460,000.00 for the settlement fund, in addition to stopping Wells Fargo's no-application modification and payment change notice practices for debtors in Chapter 13 bankruptcies, and stopping motions for relief and foreclosure activity with respect to class members as to whom it sent no-application modifications pursuant to the Consent Order. Indeed, John Rao, an expert on Bankruptcy Rule 3002.1 payment-change notices and mortgage modifications, states that Plaintiffs obtained "exceptional relief" in this case.³⁹

Plaintiffs faced significant additional litigation that could go on for years if the case did not settle. If the settlement is not approved, and the case moves forward in litigation, and if the Court were to grant Plaintiffs' motion for a preliminary injunction, Defendants could appeal both the injunction and the bankruptcy court's jurisdiction over a nationwide class. Defendants also were prepared to file a motion to dismiss, including Plaintiffs' RICO count.⁴⁰

Even if Plaintiffs survived those challenges, Defendants would likely strenuously contest class certification, and it is a significant challenge to certify a class action over a defendant's objection. Certainly, here Wells Fargo would argue that issues of causation and damages would make a trial unmanageable.⁴¹ As noted by the Advisory Committee, "if the class has not yet been certified for trial, the court may consider whether certification for litigation would be granted were

³⁸ Exhibit 1, Kellett Declaration, p. 16-17, ¶ 49.

³⁹ Exhibit 11, Rao Declaration, p. 9-10, ¶ 29-31. *See also* notes 2-5, *supra*.

⁴⁰ Exhibit 1, Kellett Declaration, p. 16, ¶ 49.

⁴¹ Exhibit 1, Kellett Declaration, p. 17-18, ¶ 50-52.

the settlement not approved.” Fed. R. Civ. P. 23 2018 Advisory Committee Note ¶ 26. Even if the bankruptcy court certified the class over Wells Fargo’s objections, it could seek a direct appeal of any certification to the Fourth Circuit. All of this additional litigation would cost millions of dollars more in legal expenses and take years.⁴²

The settlement provides many debtors and former debtors with benefits that they would otherwise have been unlikely to obtain. The value of the benefits class members will receive under this settlement is enhanced by the fact that the benefits will be provided now, without the delay, burden, and risks of further litigation. This factor is especially important in this case. The class members are in dynamic situations. Many still are in Chapter 13 bankruptcies, and most still are paying on their mortgage loans.⁴³ Delaying payment in exchange for years of extremely risky litigation makes no sense. The settlement achieved now is a far better outcome than the uncertainty of further litigation.

b. The fact that no class member objected to the settlement indicates that the settlement is favorable.

“It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members.” *West*, 2018 WL 1146642, at *6 (citing *Nat’l Rural Telecom. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004)) (“The absence of a single objection to the Proposed Settlement provides further support for final approval of the Proposed Settlement.”)(collecting cases)):

⁴² See *id.* See also Exhibit 11, Rao Declaration, p. 8, ¶ 26; p. 9, ¶ 28; p. 10, ¶ 32-33.

⁴³ Exhibit 11, Kellett Declaration, p. 14-15, ¶ 42; Exhibit 11, Rao Declaration, p. 8, ¶ 26; p. 9, ¶ 31.

The complete absence of Class Member objections to the Proposed Settlement speaks volumes with respect to the overwhelming degree of support for the Proposed Settlement among the Class Members. That unanimous, positive reaction to the Proposed Settlement is compelling evidence that the Proposed Settlement is fair, just, reasonable, and adequate.

Nat'l Rural Telecom, 221 F.R.D. at 529. This is especially true in this case. Unlike most other class actions, in this case, class members were represented by consumer bankruptcy attorneys or previously were represented by consumer bankruptcy attorneys. Yet not one filed an objection to the settlement of this case concerning Chapter 13 bankruptcy issues. In addition, a copy of all three notice forms was sent by the Settlement Administrator to every Chapter 13 Trustee in the country, and none of them raised any objection to the proposed settlement.⁴⁴

c. The settlement meets the remaining factors of Fed. R. Civ. P. 23(e)(2)(C) and (D).

Rule 23(e)(2)(C) now provides that the Court also is to consider (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including the timing of payment; (iv) any agreement required to be identified under Rule 23(e)(3), and whether the proposal treats class members equitably relative to each other, Fed. R. Civ. P. 23(e)(2)(D).

With respect to the latter factors set out in the new amendments to Fed. R. Civ. P. 23(e), there is no claim process: the Settlement Administrator will mail checks directly to the class members after approval of the settlement, the terms and timing of payment of attorneys' fees is discussed on page 6, *supra*, and the only Rule 23(e)(2)(C) agreements are the Settlement Agreement, Exhibit 1.B, attached, and the agreements signed in connection with the settlement

⁴⁴ Exhibit 1, Kellett Declaration, p. 16, § 48.

provisions that the Perezes become Class Representatives and that Mr. Limon become Class Counsel, filed at Docket No. 5-1, p. 141-152. With respect to the Rule 23(e)(2)(D) factor, as noted, Class Counsel obtained extensive information about the class members' mortgage loan account and their bankruptcy statuses, and sorted and analyzed that information to rationally separate the class members into subclasses and provide appropriate relief based on the strength of their claims and the harm or risk of harm Wells Fargo caused to class members by its actions. *See* Section III, *supra*; Exhibit 1, Kellett Declaration, p. 9-13; ¶ 29-39; Exhibit 11, Rao Declaration, p. 9-10, ¶ 31.

D. The form of notice and method of notice met the requirements of Fed. R. Civ. P. 23(c).

The notice approved by the bankruptcy court and mailed to the class members by the Settlement Administrator was clear and straightforward, providing putative class members with enough information to evaluate whether to participate in the settlement, as well as directions on how to seek further information, and met all of the requirements of Fed. R. Civ. P. 23(c)(2). The manner of providing notice also met the standards of Fed. R. Civ. P. 23 (c)(2).⁴⁵

The Settlement Administrator also set up and maintained a website in English and Spanish with information about the settlement and the progress of the settlement process, as well as a toll-free number with recorded standard answers to frequently asked questions (“FAQs”) in English and Spanish. The Settlement Administrator also provided the notice required by 28 U.S.C. § 1715 of the pending settlement.⁴⁶

V. PRAYER

WHEREFORE, Plaintiffs request that the Court find that the class and the settlement meet

⁴⁵ Exhibit 1.B, Preliminary Approval Order, p. 4 ¶ 8-9, and Exhibits 1-A, 1-B, and 1-C thereto (approved notices).

⁴⁶ *See, e.g.*, Exhibit 10, Parks Declaration, p. 3-6, ¶ 5-14, and Exhibits B-D thereto (notice forms sent to class members).

all the requirements of Fed. R. Civ. P. 23 and enter the Final Approval Order and Judgment in substantially the form attached as Exhibit 1 to Cotton AP Docket No. 89-1, p. 106-112.

Dated: February 18, 2019

Respectfully submitted,

/s/ Karen L. Kellett

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on the parties listed below via ECF notification and electronic mail on February 18, 2019.

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