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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL PEMBERTON and SANDRA COLLINS-PEMBERTON, individually, and on behalf of the class of all others similarly situated,

Plaintiff,

vs.

NATIONSTAR MORTGAGE LLC, a Federal Savings Bank,

Defendant.

Case No. 3:14-cv-01024-BAS-MSB

PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Date: Sept. 16, 2019
Time: NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT.
Crtrm.: 4B
Judge: Hon. Cynthia Bashant

Action Filed: April 23, 2014

Now come plaintiffs Michael and Sandra Pemberton ("plaintiffs") who hereby move for the Court to preliminarily approve their settlement pursuant to Federal Rule of Civil Procedure 23, all parties to the within action who respectfully move for an order: (1) certifying a Settlement Class; (2) preliminarily approving the terms and conditions set forth in the Settlement as fair, reasonable and adequate; (3)

approving forms and a program for notice to the Settlement Class; (4) preliminarily approving their appointment as class representatives and their counsel as counsel for the class; and (5) scheduling a fairness hearing to consider final approval of the Settlement. Plaintiffs' motion is based on this notice of motion, their memorandum of points and authorities, attached, the declarations of David J. Vendler, Michael R. Brown, Thea Cross and Katherian Pippin and the attachments thereto.

This motion is made following the conference of counsel that took place on multiple dates commencing with the Mandatory Settlement Conference with Magistrate Judge Berg on May 24, 2019. Defendant Nationstar Mortgage, LLC does not oppose this motion.

Dated: August 13, 2019

Respectfully submitted,

By: /s/ David J. Vendler

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I. INTRODUCTION

A. The Importance of the Mortgage Interest Tax Deduction.

For almost all owners of real property, the mortgage interest deduction is their largest single tax deduction and can amount to hundreds, or even thousands, of dollars per year in tax savings. The amount of mortgage interest a borrower pays to his/her lender in a given year is reported to the Internal Revenue ("IRS") and the borrowers by the lender/loan servicer ("collectively "lender") on IRS Form 1098. This Form 1098 is is sent to them by the lender pursuant to 26 U.S.C. § 6050H. Section 6050H requires recipients of "interest" on "any mortgage" to report to the IRS and to the homeowner, on Form 1098, the amount of "interest" the recipient has "received" from the borrower during the "calendar year" (if that amount exceeds $600).

B. How Plaintiffs Lost Their Full Mortgage Interest Deduction Resulting From Nationstar's Conduct.

Michael Pemberton and Sandra Collins-Pemberton ("plaintiffs" or "Named Plaintiffs") filed this class action against Nationstar Mortgage, LLC ("Nationstar") on April 23, 2014, contending that they paid more in taxes than they should have had to pay because Nationstar failed to properly report on the Forms 1098 that it issued to plaintiffs all of the mortgage interest they had actually paid. Plaintiffs filed their case as a class action because they alleged that Nationstar had committed the same wrong against thousands of other borrowers.

The facts governing plaintiffs' claim were never disputed. In 2005, plaintiffs obtained an option adjustable rate mortgage (more commonly known as a "Pay Option ARM" loan) on their home in Grass Valley, California. The original principal amount of their loan was $461,500. As explicitly permitted by their mortgage, plaintiffs made payments during the first five years of their loan's term that were insufficient to cover accrued interest, resulting in negative amortization,

i.e. capitalized interest being added on to the principal balance of the loan.

In July 2013, plaintiffs' loan's servicing rights were transferred to Nationstar from Bank of America, N.A. ("BANA"). At that time, plaintiffs' loan balance was $469,075.41, or approximately $7,575.41 above the original principal amount of the loan. This $7,575.41 in interest was capitalized and added to plaintiff's principal balance.

Based on the language of their note and the general tax law rule that mortgage payments are allocable first to retiring interest, and then only to retiring principal, plaintiffs contended that the *fully amortized payments* they made after Nationstar's takeover of their loan should have been applied to retiring their current interest and capitalized interest prior to retiring any of the original principal. Plaintiffs contended the clear language of §6050H then required that both of those interest amounts should have been "aggregated" and reported on plaintiffs' Forms 1098 for each year that the interest payments were made until the capitalized interest had been paid down and only current interest and unpaid principal remained.

In fact, many years after filing plaintiffs' complaint, plaintiffs learned in discovery that Nationstar's ordinary practice was to allocate and report payments of capitalized interest on Forms 1098 ***in exactly the manner plaintiffs had contended was correct***; however, because BANA, the prior servicer of plaintiffs' particular loan, did not separately track capitalized interest, plaintiffs' capitalized interest balance was never separately conveyed to Nationstar or otherwise inputted into Nationstar's computerized payment allocation system. Indeed, Nationstar made no effort to even try to figure out if plaintiffs' Pay Option ARM loan included a capitalized interest balance when it assumed plaintiffs' loan. It made no effort even though it admitted in deposition that it knew at the time it took over the portfolio of loans, which included plaintiffs' loan, that many of the loans it was acquiring from BANA were Pay Option Arm loans with capitalized interest balances. As a result, and notwithstanding its normal interest-reporting policy, Nationstar did not include

plaintiffs' payments of capitalized interest on the Forms 1098 it issued to them.

C. Procedural History of the Case.

Plaintiffs filed this case in April of 2014 alleging claims for violation of 26 U.S.C. § 6050H, negligence, breach of contract, breach of the covenant of good faith and fair dealing, declaratory judgment, and violation of California's Unfair Competition Law. Nationstar moved to dismiss the original complaint or, in the alternative, to stay the case under the primary jurisdiction doctrine to allow the IRS to address the Pembertons' claims.

On February 2, 2015, the Court granted Nationstar's motion to dismiss plaintiffs' claim for violation of section 6050H and stayed the remainder of the case based on the primary jurisdiction doctrine. *See* Dkt. no. 17. The Court ordered Plaintiffs to initiate proceedings before the IRS and required them to file bi-annual status reports. *See* Dkt. no. 17 at *6. Plaintiffs thereafter did in fact initiate contact with the IRS as ordered and filed their status reports with the court. After several years of IRS' inaction, plaintiffs eventually requested a status conference and urged that the stay be lifted. *See, e.g.* Dkt. nos. 18, 26.

On March 2, 2017, the Court lifted the stay of the case as the IRS had not yet provided any input on the issues the Court requested it comment upon. *See* Dkt. no. 39. However, while lifting the stay, the Court raised the question whether plaintiffs had Article III standing in light of the Ninth Circuit's decision in a related case, *Smith v. Bank of America, N.A.*, — F. App'x —, 2017 WL 631696 (9th Cir. Feb. 16, 2017, and ordered plaintiffs to show cause why their case should not be dismissed.

After briefing on the issue where plaintiffs conceded that their original complaint did not meet the standing requirements established by the Ninth Circuit, the Court dismissed the case with leave to amend due to lack of standing. *See* Dkt. no. 42. Plaintiffs promptly filed a first amended complaint.

Nationstar moved to dismiss again for lack of subject matter jurisdiction, contending the complaint still did not allege facts sufficient to establish Article III

standing. After further briefing, the Court disagreed with Nationstar and issued an order denying the motion on October 20, 2017. *See* Dkt. no. 53.

Yet, while finding that plaintiffs had successfully alleged standing, the Court, on its own motion, re-raised the question of whether plaintiffs' first amended complaint alleged viable claims for relief. The Court ordered extended briefing (35 pages per side on their initial briefs) on its *sua sponte* motion to dismiss.

On June 26, 2018, the Court issued an order granting the motion to dismiss in part and denying it in part. The Court denied the motion as to plaintiffs' claims for negligence and violation of the Unfair Competition Law's "unfair" prong. The Court also granted plaintiffs leave to amend their declaratory relief claim. Plaintiffs filed a second amended complaint. Nationstar answered the second amended complaint on August 23, 2018.

Plaintiffs thereafter promptly commenced discovery. Plaintiffs served written discovery comprised of requests for production, requests for admissions, and interrogatories. Plaintiffs also took the deposition of Nationstar's employee Thea Cross pursuant to Rule 30(b)(6). Discovery revealed that Nationstar's ordinary practice was to report payments of deferred interest on Forms 1098 in exactly the manner plaintiffs contended was correct. However, on plaintiffs' loan, and others, discovery revealed that Nationstar's interest-reporting had not been consistent with its normal policy because the loan's prior servicer, BANA, did not include the amount of capitalized interest in the loan balance in the data that was transferred to Nationstar – and Nationstar had not taken any independent steps to determine whether any of the loans it was taking over from BANA had capitalized interest balances even though it knew that many of the loans it was taking over were Pay Option Arm loans.

Discovery also revealed that in 2016, after the lawsuit was filed, *and as a direct result of it*, Nationstar undertook steps to bring plaintiffs' 1098 interest reporting, as well as the interest reporting for other loans that had been transferred to

it for servicing, into line with what was its normal (and proper) reporting practice. Nationstar took these steps to mitigate the extent of the problem plaintiffs' lawsuit had identified for it. Cross Dec. at para. 4.

For each tax year since 2015, Nationstar used "control reports" that attempted to identify all of the loans on which payments of capitalized interest were made that were not identified as such in Nationstar's automated system of record. Cross Dec. at paras. 5-6. Nationstar then manually adjusted the amounts reported on those borrowers' Forms 1098 so that they would include payments of deferred interest. *Id.*

This "fix" by Nationstar effectuated the fundamental relief that plaintiffs were seeking to achieve when they initially filed their lawsuit, i.e. forcing Nationstar to report class members' capitalized interest payments on Forms 1098. This correction was only revealed to plaintiffs during Nationstar's 30(b)(6) deposition in 2018. Nationstar's "fix," however, was not ideal because Nationstar was unable to identify all loans that included deferred interest that was not tracked by the previous servicer. Also, the "fix" did nothing for borrowers whose loans were no longer being serviced by Nationstar – either because the loans were paid off or were refinanced with another lender.

Based on the revelations in Nationstar's deposition relating to its post-complaint "fix," plaintiffs sought to supplement/amend their complaint to allege additional theories of recovery including breach of contract, breach of the covenant of good faith and fair dealing and fraud. The Court denied the motion to supplement in April 2019 based primarily upon the conclusion that "[N]either § 6050H nor its implementing regulations provide explicit direction to recipients on how, whether and *when* to report capitalized interest." (Emphasis original). Dkt. no. 114.

While plaintiffs continue to disagree with the Court's conclusion about section 6050H and the "directions" it provides to recipients of mortgage interest like Nationstar, the fact of the matter is that plaintiffs' counsel was duty-bound to

realistically evaluate the effect of the Court's words for purposes of settlement. And that they did.

Earlier in the case, the parties had attended mediation before the Hon. Ronald M. Sabraw (Ret.) at JAMS in San Diego. The case did not settle at that mediation. However, after the Court's ruling on the motion to supplement their complaint, the parties continued to discuss settlement through Judge Sabraw.

The parties also had extensive meet-and-confer discussions regarding Nationstar's responses to plaintiffs' written discovery. Nationstar supplemented some of its prior responses and produced additional documents.

On May 24, 2019, the parties attended a mandatory settlement conference before Magistrate Judge Michael S. Berg. And, with Judge Berg's assistance, the parties reached an agreement to settle the case on a class wide basis. Dkt. no. 124. A copy of the parties executed settlement is attached to the Vendler Declaration as Exhibit 1.

II. SUMMARY OF THE SETTLEMENT

A. Nationstar Will Provide Amended Tax Returns And/Or Monetary Payments to Class Members Who Submit Valid Claims.

Class Members whose capitalized interest has not already been reported pursuant to Nationstar's 2016 correction, or who think that Nationstar's 2016 correction missed the mark as to them, may submit a claim form (Vendler Dec., Ex. 3) with documentation sufficient to establish that the class member paid more in taxes than was owed for one or more tax years between 2010 and 2018 based on Nationstar's reporting on Forms 1098 that did not include deferred interest. Acceptable proof may include, but is not limited to, page 1 and 2 of Form 1040 and Schedule A (social security numbers can be redacted).

For the purposes of this settlement, class membership shall be defined as follows:

All persons who, according to Nationstar's reasonably available computerized records, had or have Option ARM Loans serviced by Nationstar and made payments to Nationstar in any tax year from 2010 to 2018.

Upon receipt of a claim from a class member, Nationstar will conduct an investigation to verify from its records whether or not the class member's Form 1098 included deferred interest. In each case where Nationstar determines that the amount reported on a Form 1098 for any tax year between 2010 and 2018 did not include deferred interest which should have been included, Nationstar will provide one of two forms of relief.

For class members who paid deferred interest that was not reported on a Form 1098 for tax years 2016, 2017, or 2018, Nationstar will issue an amended IRS Form 1098 for Tax Years 2016, 2017, and/or 2018, as appropriate, that includes any payments of negative amortization that were not previously reported to the IRS. Because there is still time for these Class Members to file amended tax returns for those tax years, they can still recover the *full amount* of any deductions they were previously unable to claim.

For class members who paid deferred interest that was not reported on a Form 1098 for tax years 2010-2015, Nationstar will pay each class member $50. This relief provides monetary compensation to those Class Members who can no longer file amended returns due to the three-year statute of limitations.

Given the implications of the Court's prior ruling that section 6050H provides no requirement for even "whether" capitalized mortgage interest must be reported on Forms 1098 to the future of this case (never mind the separate questions of "how" and "when" such interest might be reportable) – and given the fact that Nationstar has already implemented its 2016 correction that assures many class members will have already deducted their capitalized interest as a result of Nationstar's correction, or will be able to amend their prior returns to deduct the full

amount of their capitalized interest as a result of this settlement, plaintiffs believe that this settlement is fair and beneficial to the class.

At this point, *because of this case*, Nationstar has already reported $50,663,194.44 in capitalized interest payments by class members *that it would not have reported without this case*. Cross Dec. at para. 8. Using the same assumption that the average marginal tax rate is 20% that was utilized by Judge Curiel in the *Horn v. Bank of America, N.A.* case, the value of the case thus far to the class is already $10,132,639. See *Horn v. Bank of America, N.A.*, 2014 WL 1455917, *supra,* at *6. And, while the additional class recovery is not anticipated to be substantial, the intention is to afford class members the opportunity to obtain amended returns if they think they should have been included in the "fix" and were not. For those few class members whose loans terminated prior to Nationstar's "fix," the limited $50.00 payment was negotiated simply based on where the case stood after the Court's ruling on the motion to supplement/amend the complaint and the prospect that these class members might receive nothing at all.

B. A Claims Administrator Shall Be Appointed And Nationstar Will Pay Costs Of Class Administration And Class Notice.

Nationstar will choose a Claims Administrator and that organization will be responsible for the administration of the settlement. The Claims Administrator shall be responsible for giving notice to all borrowers who are potential class members, set up websites and telephone lines for providing information and deliver any settlement payments to class members. The responsibilities of the Claims Administrator are detailed in the Settlement Agreement. (Vendler Dec., Ex. 1). Nationstar will be responsible for all costs associated with the Claims Administrator and the administration of the Settlement, including the cost of providing notice. Payment by Nationstar to the Claims administrator is separate and apart from any money being paid to class members and does not diminish the class recovery in any way. The value of this prong of the Settlement is estimated to be approximately

several hundred thousand dollars. Vendler Dec. para. 42.

C. Nationstar Will Pay Plaintiffs' Attorneys' Fees.

Plaintiffs' counsel will seek, and Nationstar has agreed not to oppose, an award of attorneys' fees and costs in an amount not to exceed $700,000 for all services provided by plaintiffs' counsel on behalf of the Named Plaintiffs and the Settlement Class. See Vendler and Brown declarations which summarize the work that was performed by plaintiffs' counsel in the case. Nationstar will pay this amount directly to Class Counsel if approved by the Court.

This fee was negotiated during a settlement conference before Magistrate Berg . Judge Berg and counsel discussed the attorney's fees only after all of the terms affecting the Class Members were negotiated. In short, the attorney fee does not negatively affect the relief afforded to the class.

As part of the final approval process, plaintiffs' counsel will file their motion for attorney's fees. That motion will more fully explain their position on why the requested fee is reasonable given the facts of this case. But for purposes of preliminary approval, plaintiffs offer the following.

The Ninth Circuit has repeatedly held that a "reasonable" attorney fee in a common fund class action is dependent upon "all the circumstances of the case," with the benchmark being 25% and 33% being the (apparent) maximum. *See Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048–50 (9th Cir. 2002) and *In re Pac. Enters. Secs. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995). Alternatively, a lodestar approach can be utilized. *Fischel v. Equitable Life Assurance Soc'y of the U.S.*, 307 F.3d 997, 1006 (9th Cir. 2002). *Vizcaino* further makes clear that where counsel's performance generates benefits beyond a purely cash settlement, those are entitled to be valued for purposes of establishing the legal fee. *Id*. at 1049 ("As a result of settlement, Microsoft hired roughly 3,000 Class Members as regular employees and changed its personnel classification practices resulting in a benefit of $101.48 million.")

Given this standard and the facts of this Settlement, the requested fee is plainly justified. First, plaintiffs' counsel's lodestar in what will end up being a six-year commitment greatly exceeds the amount being sought by them even without counting the time they will spend answering class member questions and dealing with administration issues if the settlement is approved. Moreover, plaintiffs' counsel achieved an extraordinary result. Prior to this case being filed, and even after, there were no others willing to take the risk of taking on a major mortgage servicing company like Nationstar in a class action based on a novel legal issue that at least this Court was skeptical about.

The complexity of the legal issues involved also supports the fee award. As noted in the Vendler and Brown declarations, the parties each cited hundreds of separate legal authorities in each of the multiple motions to dismiss that were decided in this case. The legal research required to meet Nationstar's several arguments demanded a great deal of time, as did the separate mediation and MSC briefings. Written discovery was also extensive with thousands of documents produced. The deposition of Ms. Cross required travel to Colorado, followed by numerous meet and confer sessions over the adequacy of the deposition testimony. Further, during the lengthy stay period, plaintiffs initiated and maintained contact with the IRS, opposed letters submitted by the banking industry to the IRS, filed their bi-annual reports with the Court, including keeping the Court apprised of the developments in the other mortgage interest reporting cases that were pending in other districts. In all, plaintiffs' lodestar to the present date far exceeds $1 million.

The amount of the fee is also substantially less than the benchmark 25% of settlement value that is used in the 9th Circuit for common fund settlements. As demonstrated by the Cross declaration, the readily quantifiable value of the Settlement is well above $10 million based on the value to the class of the additional mortgage interest that was reported to them by Nationstar in 2016 under an assumed 20% average marginal tax rate. *See Horn v. Bank of America, N.A.*, 2014 WL

1455917, *supra,* at *6.

Given all of these facts, Plaintiffs' counsel's request for a $700,000 fee award is well within the bounds of being reasonable and will be fully supported in the separate Application for Attorney's Fees that will be filed at the time the parties seek Final Approval of the Settlement.

D. Nationstar Will Pay Class Representative Enhancements.

The Settlement provides that Nationstar will pay plaintiffs $20,000 total (or $10,000 each) for their contributions to the case. Plaintiffs, two elderly individuals, have continuously monitored and participated in this litigation for the past five years. They have been subject to intensive scrutiny in connection with their claims, having to respond to written discovery, produce documents and prepare for deposition (although not taken). Only after all the terms of the Settlement had been agreed upon, the parties, with the assistance of Magistrate Berg, agreed upon the $10,000 individual incentive award payment to each plaintiff as a fair and reasonable amount for their role as class representatives.

III. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED.

It has long been recognized that class actions may be certified solely for the purpose of settlement. *See, e.g.*, *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019-1020 (9th Cir. 1998); *Acosta v. Trans Union, LLC*, 243 F.R.D. 383-84 (C.D. Cal. 2007) (discussing requirements of conditional class certification for settlement purposes). At this stage, a court does not delve into the merits of the plaintiff's claim: "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). A court may certify a class when the plaintiff demonstrates that the proposed class and class representatives meet Rule 23(a)'s prerequisites: (1) numerosity; (2) common questions of fact or law; (3) the claims or defense of the representative parties are typical of the class; and (4) the

representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a). After meeting these requirements, the class must satisfy one of the three subsections of Rule 23(b). *See* Fed. R. Civ. P. 23(b). Plaintiffs and their counsel submit that the Nationstar Settlement Class satisfies each of the requirements of Rule 23(a), and that the Settlement Class shares common questions of law and fact in accordance with Rule 23(b)(3).

A. The Numerosity Requirement Is Satisfied.

Rule 23(a)(1) requires that the class be "so numerous that joinder of all Class Members is impracticable." *See* Fed. R. Civ. P. 23 (a)(1). In this case, the Settlement Class is estimated to be 64,183 geographically dispersed persons based on the fact that Nationstar has identified 46,695 Option ARM loans on which it received payments between 2010 and 2018. This makes joinder of plaintiffs impracticable by any standard.

B. The Commonality Requirement is Satisfied.

Rule 23(a)(2) is satisfied where the proposed class representatives share at least one question of fact or law with the claims of the prospective class. *See* Fed. R. Civ. P. 23(a)(2). The claims against Nationstar all derive from exactly the same conduct committed by Nationstar, namely, its failure (prior to plaintiffs' lawsuit) to include a certain class of borrowers' repayments of capitalized interest on borrowers' Forms 1098.[1] The principal legal questions affecting the class are common to each other: (1) whether Class Members' repayment of capitalized interest is "mortgage interest" that should have been included on the Forms 1098 Nationstar sent to Class Members under 26 U.S.C. § 6050H; (2) whether Nationstar

[1] As explained above, Nationstar was properly reporting capitalized interest for all of its other borrowers on loans serviced by it where the transferring lender identified capitalized interest as included in the transferred balance. It is only this "class" of loans transferred from Bank of America, N.A. and one or two other lenders, where Nationstar did not have the capitalized interest amount separately identified.

has a legal duty to provide corrected Forms 1098 to its borrowers whose loan balances included capitalized interest, but to whom Nationstar failed to report their payments of that interest on the original Forms 1098 that Nationstar issued to them; and (3) whether Nationstar has a legal obligation to pay damages to persons where there no longer is an ability to amend their tax returns because Nationstar failed to report their payments of capitalized interest and where the statute of limitations has already expired for them to amend their tax returns for the years in question. Accordingly, the commonality requirement of Rule 23(a)(2) is satisfied.

C. The Typicality Requirement is Satisfied.

Rule 23(a)(3)'s typicality requirement demands that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed R. Civ. P. 23(a)(3). "'[R]epresentative claims are 'typical' if they are reasonably co-extensive with those of absent Class Members; they need not be substantially identical.'" *In re Paxil Litigation*, 212 F.R.D 539, 549 (C.D. Cal. 2003) (quoting *Hanlon*, 150 F.3d at 1020). "The class representative must be able to pursue his or her claims under the same legal or remedial theories as the represented Class Members." Citation??

Here, plaintiffs and each proposed class member were all subjected to the same conduct by Nationstar and the theory for imposing liability on Nationstar is identical for the Named Plaintiffs and across the class. The same evidence that would be used to prove the Named Plaintiffs' claims – (1) Nationstar's Form 1098 practices, (2) Class Member mortgage notes and payment histories, and (3) Forms 1098 issued by Nationstar – would be the same for the entire class. As such, the Named Plaintiffs' claims are "typical" of those of the class members.

D. The Adequacy Requirement is Satisfied.

Class representatives must also satisfy Rule 23(a)(4)'s adequacy requirement by showing that they will fairly and adequately protect the interests of the Settlement Class. *See* Fed R. Civ. P. 23(a)(4). The adequacy requirement has two

prongs: "(1) That the representative parties' attorneys are experienced and generally able to conduct the litigation; and (2) that the suit not be collusive and plaintiff's interests not be antagonistic to the class." *In re United Energy Corp. Solar Power Modules Tax Shelter Investors Securities Litig.*, 122 F.R.D. 251, 257 (C.D. Cal. 1988). Here, the Named Plaintiffs have the same interests as the proposed class; they were all harmed by the same business practice perpetrated by Nationstar. The plaintiffs have no conflict with the class and have actively monitored the progress of this litigation to see that their injuries, as shared with the proposed Settlement Class, are remedied.

Plaintiffs have retained counsel who not only have substantial class action experience, but who also have particular experience in bringing class actions against the financial services industry. See: Declarations of Vendler and Brown. Indeed, they are the only lawyers in the country to have litigated class actions in the area of wrongful informational reporting in the tax law area. *See Horn*, *supra,* at *3. The fact that plaintiffs were able to overcome this Court's own concerns about whether a case could even be pled for the type of violations plaintiffs were asserting, not to speak of the favorable ssettlement plaintiffs obtained for the class (including forcing Nationstar into its 2016 "fix") is concrete evidence that they, and their counsel, have been acting vigorously to fairly and adequately represent the Settlement Class's interests as a whole. The plaintiffs and their counsel thus clearly meet the adequacy requirement.

E. The Proposed Settlement Meets the Requirements of Rule 23(b).

"To qualify for certification under Rule 23(b)(3), a class must meet two requirements beyond the Rule 23(a) prerequisites: 'Common questions must 'predominate over any questions affecting only individual members'; and class resolution must be 'superior to other available methods for the fair and efficient adjudication of the controversy.'" *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

> In adding "predominance" and "superiority" to the qualification-for-certification list, the Advisory Committee sought to cover cases 'in which a class action would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'

Amchem, at 615 (quoting Advisory Committee's Notes on Fed. Rules Civ. Proc. 23, 28 U.S.C. App., pp. 696-697). While this test has been held to be more demanding than 23(a)'s simple commonality requirement, its thrust is equally pragmatic: "[T]he Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'" *Amchem*, 521 U.S. at 617. Here, the individual claims are relatively small and the theory being advanced by plaintiffs is novel. See *Horn v. Bank of America, N.A.*, 2014 WL 1455917 *3 (S.D.Cal. 2014) ("Plaintiffs' claims are derived from the novel legal position that Plaintiffs may sue BANA under state law theories for its alleged failure to comply with the Internal Revenue Code, to wit, 26 U.S.C. § 6050H.") Further, no other case has been filed challenging this aspect of Nationstar's Form 1098 reporting.

F. Common Questions of Law and Fact Predominate.

"Rule 23 (b)(3) does not require that all members of the class be identically situated[.]" *Kristianson v. John Mullins & Sons, Inc.*, 59 F.R.D. 99, 106 (E.D.N.Y. 1973). The predominance prong calls for class "'cohesion [such that] prosecution of the action through representatives would be quite unobjectionable[.]'" *Amchem*, 521 U.S. at 616. Here, as already discussed, the proposed Settlement Class is defined by common factual predicates. Members of the proposed class and the Named Plaintiffs: (1) repaid interest which they had previously deferred and (2) Nationstar did not include those amounts on the Forms 1098 it issued to them for tax years 2013 and 2014. As to the Named Plaintiffs and each member of the class, the central legal issue is the same – (1) whether their repayments constituted payments of "mortgage interest" under 26 U.S.C. § 6050H that should have been reported by

Nationstar. *Gonzales v. Arrow Financial Services*, 233 F.R.D. 577, 582 (S.D. Cal. 2006) (granting motion for class certification where, among other factors, common questions of law and fact predominate because of the standardized nature of defendant's conduct); *see also, Gunnells v. Healthplan Servs.*, 348 F.3d 417, 428 (4th Cir. 2003) ("[I]f 'common questions predominate over individual questions as to liability, courts generally find the predominance standard of Rule 23 (b)(3) to be satisfied,'" quoting 5 Moore's Federal Practice § 23.46[2][a] (1997).

Indeed, the only real distinction between the claims of the various Class Members is the amount of capitalized interest that they paid; "but such differences do not defeat class action treatment." *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975) (conditional certification was appropriate where damage amounts varied amongst proposed Class Members). It is Nationstar's conduct of failing to report payments of capitalized interest, irrespective of the amount per borrower, that is the focal point for determining liability. Thus, common questions of law and fact necessarily predominate and warrant class treatment. *Fischer v. Kletz*, 41 F.R.D. 377, 381-82 (9th Cir. 1966) (common reliance on Defendant's misrepresentations warranted class action suit**).**

G. Class Treatment Is Superior.

There can be no question that class resolution is "superior" in this case. *See Amchem*, 521 U.S. at 615 ("Rule 23 (b)(3) permits certification where class suit 'may . . . be convenient and desirable.'" (internal citations omitted)). Rule 23(b)(3) incorporates a non-exhaustive list of factors to consider when determining a class action's "superiority":

> (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; (D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23(b)(3). The Supreme Court has emphasized individual accessibility to the judiciary when evaluating Rule 23(b)(3)'s superiority requirement: "'The interest [in individual control] can be high where the stake of each member bulks large and his will and ability to take care of himself are strong; the interest may be no more than theoretic where the individual stake is so small as to make a separate action impracticable.'" *Amchem*, 521 U.S. at 616; *see also Local Joint Executive Board of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001) ("When common issues present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is a clear justification for handling the dispute on a representative rather than an individual basis." "The policy at the very core of the 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. A class action solves this problem[.]" *Amchem*, 521 U.S. at 617 (quoting *Mace v. Van Ru Credit Corp*., 109 F.3d 338, 344 (7th Cir. 1997)).

Here, most Class Members still do not even know they have been wronged. This is because members of the public generally trust the accuracy of the Forms 1098 they receive from the issuers and do not go back to try to independently verify the amounts of interest they paid during a given year. But even if Class Members did know of their claims, the individual claims, consisting of any additional tax deduction to which they may be entitled, are relatively small and were, for many class members, cured by the 2016 "fix." Nor, given the amounts at issue, would any of the Class Members have a substantial interest in controlling this litigation. Indeed, given the complexity of the briefing that this case has engendered, it is clear that no lawyer would take on such a case on an individual basis. In short, the alternative to this class action would be no recovery at all. Class treatment is thus "superior" because it expedites resolution of Class Members' claims.

IV. THE COURT SHOULD PRELIMINARILY APPROVE THE PROPOSED SETTLEMENT.

Review of a proposed class action settlement requires a well-established two-step process. The first step is the preliminary approval hearing where the Court determines whether the settlement is "within the range of possible approval." *See*, e.g., *In re Tableware Antitrust Litig*., 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007). This inquiry takes place with a strong presumption favoring settlement. *Alberto v. GMRI, Inc*., 252 F.R.D. 652, 658 (E.D. Cal. 2008) (citing *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992)); *see also Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976) ("overriding public interest in settling and quieting litigation," especially in class actions); *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 595 (3d Cir. 2010) ("This presumption [in favor of settlement] is especially strong in 'class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation.'").

The issue of whether a proposed settlement should be granted approval is a matter within the sound discretion of the district court, and should be exercised with reference to overriding policy considerations. *See, e.g*., *Murillo v. Pac. Gas & Elec. Co*., 266 F.R.D. 468, 474 (E.D. Cal. 2010); *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 951 (9th Cir. 1976).

> [The] preliminary determination establishes an initial presumption of fairness[;]' . . . '[i]f the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, then the court should direct that the notice be given to the Class Members of a formal fairness hearing[.]'

In re Tableware Antitrust Litig., 484 F. Supp. 2d at 1079 (internal citations omitted); *see also Hanlon*, 150 F.3d at 1027 (The court should give "proper deference to the private consensual decision of the parties*."); Bellows v. NCO Financial Systems, Inc.*, 2008 WL 5458986 at 7 (S.D.Cal. 2008) (presumption of fairness when a

settlement is negotiated at arms' length by experienced counsel).

There is no question that the proposed Settlement is at least "within the range of possible approval." This is especially true since this Court essentially gutted plaintiffs' claims when it determined that section 6050H provided no rule for "how, whether, and when" capitalized interest needed to be reported on Forms 1098. While, as stated, plaintiffs disagree completely and emphatically with the Court's conclusion, the only reasonable alternatives open to them after that ruling were to appeal or settle. Plaintiffs and their counsel deemed that settlement on the terms presented here was the best result for the class. After all, plaintiffs had already achieved the lion's share of the relief that they set out to achieve when they filed their complaint by virtue of forcing Nationstar into its "fix" to try to blunt the amount of any potential damages that might be awarded in this case. Further, the chances of obtaining a more favorable result on appeal on plaintiffs' theories were not by any means guaranteed, and the length of time that an appeal would take in a case that was already 5 years old and with a statute of limitations for amending tax returns expiring yearly would be detrimental to class members.

Only after extended negotiations with the aid of an experienced mediator (Hon. Ronald Sabraw, Ret.), followed by extensive settlement briefing and exchange of information and then, during a face to face settlement conference conducted by Magistrate Judge Berg, were the parties able to reach the Agreement. *See S.C. Nat'l Bank v. Stone*, 139 F.R.D. 335, 339 (D.S.C. 1991) ("giv[ing] significant weight to the judgment of Class Counsel" where settlement negotiations were found to be "hard fought and always adversarial" and there was "no indication of any collusion.")

The Settlement offers very real and substantial benefits for the class and eliminates the very real risk, given the Court's rulings, of losing the case at or before trial. Because of this Settlement, class Members who submit valid claim forms will now either receive the entire deduction they may not have taken in 2016, 2017, or

2018 via amended Forms 1098 or, for class members who are unable to amend their tax returns because the three-year statute of limitations imposed by 26 U.S.C. 6511(a) has expired, they will receive at least some monetary compensation.

A. The Circumstances Surrounding Negotiations and the Experience of Counsel.

Prior to entering the proposed Settlement, the parties engaged "in sufficient investigation of the facts to enable the court to 'intelligently make … an appraisal' of the settlement." *Polar Int'l Brokerage Corp. v. Reeve*, 187 F.R.D. 108, 114 (S.D.N.Y. 1999) (internal quotations omitted). As detailed above, prior to reaching the Agreement, the parties conducted significant discovery and put forth all of their legal theories before the Court in the motions to dismiss and motion to supplement the complaint. The settlement negotiations were hard fought and involved many contested issues, including liability, damages, and whether the plaintiffs even had standing to bring this action notwithstanding the Court's determination that they had sufficiently alleged standing for the purposes of pleading. At all times, the parties zealously advocated their positions and were clearly informed of the strengths and weaknesses of the claims, both factually and legally.

The parties discussed settlement with two separate neutrals, Hon. Ronald M. Sabraw (Ret.) and Magistrate Judge Berg. Only after protracted, arm's-length negotiations were the parties able to reach an agreement. Given the uncertainties, risks and significant expense of continued litigation, both parties decided that settling the litigation based on the terms of the proposed Settlement was in their best interests. Therefore, all of the circumstances surrounding the negotiations strongly support preliminary approval. *See Rodriguez v. W. Publ'g Corp*., 563 F.3d 948, 965 (9th Cir. 2009) ("We put a good deal of stock in the product of an arms-length, non-collusive, negotiated resolution."); *In re Wireless Facilities, Inc. Sec. Litig. II*, 253 F.R.D. 607, 610 (S.D. Cal. 2008) ("Settlements that follow sufficient discovery and genuine arms-length negotiation are presumed fair.").

B. The Settlement Provides a Significant Benefit to the Class in Light of the Risks and Costs of Continued Litigation.

The preliminary approval inquiry can be summarized as raising the question of whether the class's interests are better served by settlement than further litigation. *See Eisen*, 417 U.S. at 178. This is not a close call given the Court's rulings. The consideration here being proposed will provide all Class Members who submit valid claims a significant benefit. Moreover, the class of persons that this settlement applies to is significantly fewer in number than the class of persons who had suffered harm prior to Nationstar's 2016 "fix."

Specifically, Class Members who paid deferred interest in 2016, 2017, or 2018 that was not reported in Nationstar's original "fix" will now be permitted to claim greater mortgage interest deductions. Class Members who paid deferred interest that was not reported between 2010 and 2015 and are unable to file amended terms will receive monetary compensation.

Thus, while plaintiffs' counsel believe that their clients' position should be vindicated if they were to bring the case to the Ninth Circuit, plaintiffs' counsel are aware that litigation is never free from risk and uncertainty and success cannot be assured. *See In re Aremis Soft Corp. Sec. Litig.*, 210 F.R.D. 109, 125 (D.N.J. 2002) ("Regardless of the strength of case counsel might present at trial, victory in litigation is never guaranteed."). As noted in the *Horn* case, the theory advanced by plaintiffs is "novel" and this Court certainly was skeptical of it. *Id.* at 2014 WL 1455917 * 3.

Indeed, the positions being advanced by plaintiffs are so novel that other than plaintiffs' counsel's other cases, plaintiffs' theory has never even been attempted before in any case nation-wide. In light of this fact, plaintiffs' counsel recognize that they owe Class Members the duty to properly weigh the risks, especially when presented with a settlement that offered as much to the class as this one does.

Continued litigation would also only delay recovery. As time passes, the

number of Class Members that would actually be able to participate decreases both because of death and the loss of valid addresses as people move and because of the immutable 3-year statute of limitations for amending tax returns. Finally, because of the nature of Option ARM loans and whom they were marketed to, it can be presumed the Settlement Class is composed primarily of financially strapped borrowers to whom a settlement will be a real boon.

In consideration of all the facts, the relative strengths and weaknesses of the legal claims and defenses asserted, the serious issues and disputes remaining among the parties, and the time and expense necessary to prosecute this case, the plaintiffs and their counsel believe that the proposed settlement is fair, adequate and reasonable and warrants preliminary approval. *See Rodriguez*, 563 F.3d at 967 ("[P]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in litigation.") (citing *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995)).

C. The Proposed Manner And Form Of The Notice To The Class Comports With Rule And Due Process.

Rule 23 (c)(2)(B) provides that "for any class certified under Rule 23(b)(3), the court must direct to Class Members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23 (c)(2)(B). Rule 23(e)(1) similarly states, "The court must direct notice in a reasonable manner to all Class Members who would be bound by a proposed settlement, voluntary dismissal, or compromise." Fed. R. Civ. P. 23(e)(1). Notice is "adequate if it may be understood by the average class member." Newberg on Class Actions, §11:53, at 167 (4th Ed. 2002).

Rule 23(c)(2)(B) does not require "actual notice" or that a notice be "actually received." *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994). 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.

The proposed Settlement provides for a notice campaign reasonably tailored to the unique and particular circumstances of this case. Because of the nature of this case—dealing with home loans—notice by way of first class mail is indisputably the best form of notice to reach Class Members. The Claims Administrator's address will be the address listed as the return addressee on the envelope of the notice packages to allow it to conduct skip traces on returned mail.

The proposed Class Notice (Vendler Dec., Exhibit 2) consists of a class notice that contains the information required by Rule 23 in plain language and in an easy-to-follow format.

The settling parties propose to provide notice to the class as soon as practicable, but in no event later than one week after the class notice list is provided to the Claims Administrator. The class notice list will be provided within five business days following receipt of notice of the entry of the preliminary approval order.

Before mailing the class notice, the class administrator will check the addresses in the class notice list by using National Change of Address ("NCOA") searches. If the address in the NCOA records for a class member differs from the last known address in the class notice list, the class administrator will mail the class notice to the address in the NCOA records.

If a class notice mailing is returned to the claims administrator because the class member's address is no longer valid and the envelope contains a forwarding address, the class administrator will send the class notice to the forwarding address within 5 calendar days of receiving the undeliverable mail. A website and toll-free hot line will also be maintained which will give class members access to certain

pleadings, the class notice, and a way for them to get their questions answered. The class notice will also contain the contact information for plaintiffs' counsel.

V. CONCLUSION

For the foregoing reasons, plaintiffs and Nationstar respectfully request that the Court: (1) grant preliminary approval of the Settlement on the terms outlined above and in the Agreement, (2) order certification of the Settlement Classes for settlement purposes pursuant to Fed. R. Civ. P. 23 (b)(2), (3), (3) approve the plaintiffs as class representatives and their attorneys as Class Counsel, (4) approve the form and content of the class notice, (5) establish a deadline for Class Members to opt out or object, and (6) set a date for a hearing on final approval of the Settlement as reflected in the Agreement.

For the convenience of the Court, Plaintiffs summarize the proposed schedule leading up to the Final Approval Order and Judgment. A proposed preliminary approval order is attached to the Vendler Dec. as Exhibit 4 and a proposed final order approving the settlement is attached as Exhibit 5.

Event	Governing Section	Date
Plaintiffs file motion seeking Preliminary Approval Hearing and entry of Preliminary Approval Order.	Section 3.01	August 14, 2009
Preliminary Approval Hearing.	Section 3.01	Subject to Court availability and/or request to the parties for oral argument.[2]

[2] Because of this Court's policy not to schedule hearing dates for motions, and because the dates for providing notice to the class, etc. are scheduled to occur under (footnote continued)

Nationstar Provides Class Notice List to Claims Administrator.	Section 3.03	10 business days after entry of the Preliminary Approval Order
Class Administrator Mails the Class Notice.	Section 3.03	10 calendar days after receiving the Class Notice List
Plaintiffs' Counsel File Their Fee Petition	N/A	At least 14 Days Prior To Objection Deadline
Objection Deadline and Opt-out Deadline.	Section 3.06 and 3.08	45 calendar days after Notice Mailing Date
Settlement Administrator provides opt-out notices to parties and Court.	Section 3.06	No later than 1 week after the deadline for Opt-Outs
Plaintiffs file motion seeking Final Approval Hearing and entry of Final Approval Order and Judgment.	Section 3.10	28 days before the Final Approval Hearing
Final Approval Hearing And Hearing On Objections (if any).	Section 3.10	Subject to Court availability.

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the settlement agreement based on the trigger of the Court issuing its preliminary approval order, the parties' current proposed preliminary approval order contains blanks for the various deadlines included therein. If the Court determines to preliminarily approve the settlement, it will either make an order with its own dates for providing class notice, etc., or the parties are prepared to submit a new proposed order with all of the dates filled in based on the actual date that the Court preliminarily approved the settlement.

Dated: August 13, 2019

Respectfully submitted,

By: /s/ David J. Vendler

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