

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CAROLYN THOMAS, Individually	)	
and on Behalf of All Persons	)	Civil Action
Similarly Situated,	)	No. 00-CV-05118
	)	
Plaintiffs	)	
	)	
vs.	)	
	)	
NCO FINANCIAL SYSTEMS, INC.,	)	
	)	
Defendant	)	

\* \* \*

APPEARANCES:

ANN M. CALDWELL, ESQUIRE, and  
CLAYTON S. MORROW, ESQUIRE,  
On behalf of Carolyn Thomas,  
Individually and on Behalf of  
All Persons Similarly Situated,

JAY S. ROTHMAN, ESQUIRE,  
On behalf of NCO Financial  
Systems, Inc.,

\* \* \*

O P I N I O N

JAMES KNOLL GARDNER,  
United States District Judge

The matter is before the court on the Joint Motion Resubmitting Joint Motion for Certification of Settlement Class and Preliminary Approval of Settlement and Notice to the Class ("Joint Motion") filed November 21, 2003. Because we conclude that the method of communication with the proposed class presented by the parties is the best practicable under the circumstances, we grant the motion and certify the class for settlement purposes.

### Procedural History

The within civil action was initiated by a two-count Complaint filed October 10, 2000. Count one claims a violation of the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692o. Count two avers a violation of the Fair Credit Reporting Act, 15 U.S.C. 1681-1681v. The action is before the court on federal question jurisdiction. See 15 U.S.C. § 1681p; 28 U.S.C. § 1331. Venue is appropriate because defendant resides in Montgomery County, Pennsylvania. See 28 U.S.C. §§ 118, 1391. Plaintiff has made a jury demand.

Plaintiff seeks class certification. See Fed.R.Civ.P. 23. For purposes of settlement,<sup>1</sup> the parties agree that the proposed class may be certified. The parties have previously sought court approval for class certification and settlement.

The issues presented in the parties' motion were first presented to our former colleague United States District Judge Jay C. Waldman as a Joint Motion for Certification of Settlement Class and Preliminary Approval of Settlement and Notice to Class filed March 21, 2002. On August 1, 2002 Judge Waldman denied the

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<sup>1</sup> The agreements of counsel made for the purposes of this settlement are inadmissible to prove liability for the facts and circumstances averred in the Complaint in this or any subsequent proceeding should the within settlement agreement fail for any reason. See Fed.R.Evid. 408; Affiliated Manufacturers v. Aluminum Company of America, 56 F.3d 521, 526-528 (3d Cir. 1995). In such an event, the parties will be permitted to pursue those contentions made prior to the settlement agreement.

motion citing deficiencies in the evidence supporting the appointment of class counsel and supporting the parties' contention that publication notice was the best notice possible under the circumstances presented.<sup>2</sup>

In his August 1, 2002 Memorandum and Order, Judge Waldman made a number of legal determinations pertinent to our analysis. Initially, Judge Waldman concluded that the numerosity requirement was satisfied because joinder of all the proposed class members would be impracticable. Next, Judge Waldman held that the commonality requirement was met because common issues of fact and law within the putative class predominate over all other issues presented therein.

In addition, Judge Waldman held that the typicality requirement was satisfied because the claims of plaintiff, as class representative, arise from facts and circumstances that typify the other putative class members. Finally, Judge Waldman evaluated the proposed settlement agreement and determined that it was fair, acceptable, and within the range of settlements that the court would approve. We conclude that Judge Waldman's findings and conclusions are the law of the case and adopt his conclusions and reasoning. See Hamilton v. Leavy, 322 F.3d 776, 786-787 (3d Cir. 2003).

However, in his Memorandum and Order, Judge Waldman

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<sup>2</sup> The within action was transferred from Judge Waldman's docket to our docket on March 4, 2003.

reserved judgment in three areas. Initially, the parties neglected to offer any evidence concerning the qualifications of class counsel. Accordingly, Judge Waldman found that he could not determine the adequacy of counsel. Next, the parties neglected to offer any evidence of any pending overlapping actions. Consequently, Judge Waldman concluded that he could not declare that disposition of the facts and circumstances presented herein by a class action was a superior method of resolving this case. Finally, Judge Waldman found that the parties did not submit sufficient evidence to support the conclusion that publication notice by two notices in a two-week period in a single publication was the best possible method of notifying the class.

Therefore, Judge Waldman denied the initial motion because a determination regarding the manageability of the class action could not be made at that time. Because of these deficiencies, Judge Waldman denied the parties' motion without prejudice for the parties to resubmit a motion with additional, appropriate support.

On August 30, 2002 the parties resubmitted their motion for class certification. In that motion, the parties sought to cure the defects identified by Judge Waldman. On August 11, 2003 the undersigned held oral argument on the parties' motion. On August 13, 2003 the undersigned permitted the parties to file

supplemental memoranda in support of their motion.

By Order and Opinion dated October 21, 2003,<sup>3</sup> the undersigned denied the parties' renewed motion. Specifically, we concluded that class counsel was adequate; that, if the class could be properly noticed, the superiority requirement was met; and that individual notice was not the best practicable notice under the circumstances. However, we denied the parties' motion because we were unable to determine whether the publication notice proposed by the parties was the best possible notice to the putative class.<sup>4</sup>

Thus, the only issue addressed herein is whether the method of communicating with the proposed class presented by the parties is the best practicable publication notice.

#### Facts

Based upon the allegations contained in plaintiff's Complaint, the following are the pertinent facts. Carolyn Thomas is representative of a class of individuals within the United States who accrued and failed to repay debts for personal or household purposes. These debts of the class members were listed on their credit report for seven years and deleted prior to

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<sup>3</sup> On January 15, 2004, the Order and Opinion was amended. However, in our January 15, 2004 amendment we did not substantively alter our October 21, 2003 Order and Opinion.

<sup>4</sup> We incorporate the findings and conclusions of law in our previous Order and Opinion. See Hamilton, 322 F.3d at 786-787.

defendant NCO Financial Systems, Inc. ("NCO") reporting the debt to Trans Union, LLC; Experian Information Solutions, Inc.; and Equifax, Inc., the three credit reporting agencies.

NCO is a provider of accounts receivable collections services. NCO's focus is on recovery of delinquent and bad debt accounts.

At some point during or after 1998, NCO attempted to collect debts that it had purchased from Commercial Financial Services ("CFS"). (We refer to the names and addresses that NCO purchased from CFS as the "List".) Some of the debts that NCO sought to collect had already been deleted from debtors' credit reports pursuant to 15 U.S.C. § 1681c because seven years had passed since the debts were first placed on the debtors' credit reports. Nevertheless, NCO reported to the credit bureaus that the debts were valid and had the debts put back onto the debtors' credit reports.

#### Discussion

In our Order and Opinion dated October 21, 2003, we agreed that individualized notice was impractical under the circumstances and that publication notice was appropriate. Specifically, we concluded that the defendant's List of 2.2 million people who could be in the class was over-inclusive and

outdated.<sup>5</sup> However, we were unable to determine whether the proposed publication notice-whereby the putative class would be notified by publications in the USA Today and through PR Newswire's National Newslite (US1)-was sufficient notice. For the following reasons, we conclude that the proposed notification is sufficient.

District courts have a "fiduciary responsibility [to be] the guardian of the rights of the absentee class members." Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975). When, as in this case, the class is to be notified of the certification of a class and the settlement of the action, the notice to the putative class must satisfy the requirements of Rules 23(c)(2) and 23(e) of the Federal Rules of Civil Procedure. Carlough v. Amchem Products Inc., 158 F.R.D. 314, 324 (E.D. Pa. 1993). The

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<sup>5</sup> In their joint motion, the parties provide supplemental information in support of the conclusion that the List is outdated. In our previous decision, we noted that the nature of the offense required that the data be at least seven years old and reflect households which acquired debt for "primarily for personal, family, or household purposes" in order for liability to follow. 15 U.S.C. § 1692a(5).

The parties provided data and analysis from United State Bureau of the Census. On September 23, 2003, the Census Bureau reported that "[a]bout 120 million (46 percent) of the nation's population that was 5 years old and over in 2000 lived in a different home than they did in 1995". Joint Motion, Exhibit F. Furthermore, in 1996, the Census Bureau found the median duration of residence by persons over the age of fifteen years was 4.7 years. Joint Motion, Exhibit G. We take judicial notice of these facts. See Fed.R.Evid. 201.

When we consider these demographic facts together with the fact that the debts on the List were likely accrued in the early 1990's, it is possible, and perhaps likely, that the people on the List have moved two or more times since the debts were accrued.

Because these facts support the conclusion that the addresses in the List do not reflect the current addresses of the members of the putative class, the addition of these facts further supports the conclusion that use of the List will not result in appropriate notification to the putative class. Accordingly, we incorporate these facts into our previous analysis.

requirements of Rule 23(c)(2) include those in Rule 23(e) and are, in fact, stricter than those of Rule 23(e). Id. at 324-325. Thus, our analysis continues under Rule 23(c)(2).

In the execution of the court's fiduciary duty the court must ensure that "members of the class [receive] 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). "Individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort." Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 172, 94 S.Ct. 2140, 2150, 40 L.Ed.2d 732, 746 (1974).

"The Advisory Committee's Note to Rule 23 ... [states] that the 'mandatory notice pursuant to subdivision (c)(2) ... is designed to fulfill requirements of due process to which the class action procedure is of course subject.'" Eisen, 417 U.S. at 173-174, 94 S.Ct. at 2150, 40 L.Ed.2d at 746 (citing 28 U.S.C.App., p. 7768); see Mullane v. Central Hanover Bank & Trust, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865, 873 (1950)

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice 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, 339 U.S. at 314, 70 S.Ct. at 657, 94 L.Ed. at 873.

However, the absence of individual notice is not fatal to class certification or settlement. If the members of a putative class may not be determined by reasonable means, then constructive notice by publication may satisfy the requirements of Rule 23(c)(2). Carlough, 158 F.R.D. at 325.

In determining the reasonableness of the effort required, the court must look to the "anticipated results, costs, and amount involved." [In re Nissan, 552 F.2d 1088, 1099 (5th Cir. 1977).] For example, "[a] burdensome search through records that may prove not to contain any of the information sought" is not required. Id. Rule 23 does not require the parties to exhaust every conceivable method of identifying the individual class members. See, e.g., Burns v. Elrod, 757 F.2d 151, 154 (7th Cir. 1985).

Carlough, 158 F.R.D. at 325.

Thus, we must balance the potential for finding information that may permit individual notice against the possibility that the information in the parties' possession will not yield the names and contact information of those in the putative class and the expense or burden incurred to determine into which of the two categories the reality falls.

Instead of using the list in NCO's possession, the parties propose a two-pronged approach to class notification. First, the parties agree that NCO will publish, at its own expense, an 1/8 page-size advertisement in the national edition

of the USA Today newspaper, Monday through Thursday edition, for two consecutive weeks in substantially the form set forth in Exhibit B to the Agreement of Settlement. The parties propose that this notice be accomplished within 21 days of the entry an Order granting their joint motion. Second, NCO will publish, at its own expense, an advertisement in substantially the form set forth in Exhibit B to the Agreement of Settlement in PR Newswire's National Newslines (US1), once within 21 days of an Order.

The parties jointly assert that this combination of publication notices yields the best possible notice under the circumstances. We note that USA Today is the nation's largest selling daily newspaper with a circulation of approximately 5.6 million.<sup>6</sup> We further observe that the US1 distribution network of the PR Newswire Service reaches over 3,000 newspapers, magazines, national wire services, and broadcast networks that are located in all 50 states and the District of Columbia.<sup>7</sup> In addition, PR Newswire US1 distributes notices to 3,600 computer on-line databases, where the notices are automatically displayed on websites.<sup>8</sup>

The cost of publishing an 1/8 page, black and white

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<sup>6</sup> Joint Motion, Exhibit A.

<sup>7</sup> Joint Motion, Exhibit C.

<sup>8</sup> Joint Motion, Joint Stipulation of Facts Regarding Notice, Paragraph 6, and Exhibit D.

advertisement in the Monday through Thursday editions of USA Today is \$16,900. Because the advertisement would run twice, the cost of this publication is \$33,800.<sup>9</sup>

The cost of publishing notice by PR Newswire US1 would be less than \$1000.00.<sup>10</sup> This raises the total cost of the parties' proposed publication to less than \$34,800.

Not only is the proposed publication notice practical, but it also conforms to due process requirements. The proposed publication will distribute notice throughout the country in a variety of media. At the very least, notice will be published by USA Today and over 3,600 computer websites. At most, notice will be published by multiple newspapers, magazines, radio stations, television stations, and over the internet. Thus, we conclude that this notice is calculated to have a ubiquitous reach. Such a pervasive notice satisfies the requirements of the Due Process Clause. See Fed.R.Civ.P. 23; Carlough, 158 F.R.D. at 325.

On the opposing side of the scale, the bulk rate for the United States Postal Service is 27.8 cents per item mailed.<sup>11</sup> With 2.2 million addresses on the List, the cost of a direct mailing would be \$611,600.00. This does not include the costs

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<sup>9</sup> Joint Motion, Joint Stipulation of Facts Regarding Notice, Paragraph 1, and Exhibit A.

<sup>10</sup> Joint Motion, Joint Stipulation of Facts Regarding Notice, Paragraph 2, and Exhibit B.

<sup>11</sup> At the parties' request, we take judicial notice of this fact. See Fed.R.Evid. 201.

associated with printing the notices, and for purchasing envelopes and stationery.

In addition, because the information is outdated, a "skip-search" would have to be performed on the List for individual notice to be effective. A "skip-search" is a process for finding missing persons. The term comes from the debt-collection industry and refers to those who "skip-out" on their debts by moving and not leaving a forwarding address.<sup>12</sup>

Skip-searches can cost from \$10.00 to several hundred dollars per name. Thus, at a minimum, a skip-search for the list would cost at least \$22,000,000.00. This is grossly out of proportion with the less than \$34,800 for publication notice or the amount in controversy. When we further consider that a skip-search will neither remedy the over-inclusiveness of the List, nor guarantee individualized notice, we conclude that this method is impractical and unlikely to produce as effective notice as the method proposed by the parties. Accordingly, we reject this method of class notification.

#### Conclusion

For the foregoing reasons, we find that the publication of notice to the class of the proposed class action settlement, which has been jointly proposed by the parties, satisfies the due

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<sup>12</sup> Joint Motion, Exhibit E.

process requirements of the Fifth Amendment to the United States Constitution and is the best practicable notice under the circumstances. Accordingly, we grant the parties' motion and certify this action as a class action for the purposes of settlement.