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

LUEGENA MONTGOMERY	:	
	:	CIVIL ACTION
v.	:	
	:	
BENEFICIAL CONSUMER DISCOUNT COMPANY d/b/a BENEFICIAL MORTGAGE CO. OF PENNSYLVANIA	:	NO. 04-CV-2114

SURRICK, J. **MARCH 2, 2005**

MEMORANDUM & ORDER

Presently before the Court is Defendant Beneficial Consumer Discount Company d/b/a Beneficial Mortgage Co. of Pennsylvania's ("Beneficial") Motion to Dismiss Civil Complaint of Luegena Montgomery (Doc. No. 3). In this Motion, Defendant moves to dismiss Plaintiff's Complaint because her claims have already been released pursuant to a class action settlement in the Northern District of California. (*Id.* at 7-11.) For the following reasons, Defendant's Motion will be granted.

I. BACKGROUND

A. Current Action

On April 2, 2004, Plaintiff Luegena Montgomery filed a Complaint in the Court of Common Pleas, Philadelphia County, alleging claims under the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601-1667f; the Home Ownership and Equity Protection Act of 1994 ("HOEPA"), 15 U.S.C. §§ 1602(aa), 1639; the Real Estate Settlement Procedures Act of 1974 ("RESPA"), 12 U.S.C. §§ 2601-2617; the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Cons. Stat. Ann. §§ 201-1 to 201-9.1; and Chapter 9-2400 of the Philadelphia Code,

entitled "Prohibition Against Predatory Lending." (Doc. No. 1 Ex. A.) The Complaint alleges that Defendant offered Plaintiff a larger, more expensive, secured loan than the smaller, unsecured loan she had requested.[1] (*Id.* ¶¶ 8-23.) Plaintiff claims that Defendant failed to properly disclose the terms of the loan when she signed the loan documents, and that Plaintiff also incurred an undisclosed financial charge (credit life insurance) as part of the loan. (*Id.* ¶¶ 23-25.) Plaintiff asserts that if Defendant had adequately disclosed the terms of the loan, she would not have entered into the agreement. (*Id.* ¶ 26.)

On May 14, 2004, Defendant removed the action to this Court pursuant to 28 U.S.C. § 1446(a). (Doc. No. 1.) On May 19, 2004, Defendant filed the instant Motion pursuant to Federal Rule of Civil Procedure 12(b)(6).

B. California Action / Class Settlement

On December 12, 2003, the Honorable Claudia Wilken of the United States District Court for the Northern District of California preliminarily approved a settlement between Household Finance Corporation ("HFC"), Beneficial Corporation, their subsidiaries, and a class of individuals who obtained home mortgages from Beneficial.[2] *In re Household Lending Litig.*, Civ. A. No. 02-1240 CW (N.D. Cal. Dec. 12, 2003) (order granting preliminary approval of class settlement) ("Preliminary Approval Order"). The class was defined to include:

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[1] Specifically, Plaintiff alleges that on June 18, 2001, she signed a mortgage agreement with Beneficial on her residence, located at 3206 West Willard Street, Philadelphia, Pennsylvania. (Doc. No. 1 Ex. A ¶¶ 4, 23.) According to Plaintiff, the amount of the mortgage was for $33,330.35, with an annual interest rate of 19.973%. (*Id.* Ex. A ¶ 23.) Plaintiff also alleges that she incurred a fee of $2,083 in connection with the mortgage. (*Id.* Ex. A ¶ 26.)

[2] The Defendant in this action, Beneficial Consumer Discount Company d/b/a Beneficial Mortgage Co. of Pennsylvania, is a subsidiary of Beneficial Corporation. (Doc. No. 3 at 2 n.2).

> All current and former borrowers of Household Finance Corporation, Beneficial Corporation, Household Insurance Group and Household Realty Corporation ("HFC/Beneficial") (and any subsidiary or parent, whether direct or indirect, of HFC/Beneficial) who:
>
> > (a) On or after January 1, 1999, and on or before December 24, 2003, entered into a real estate secured loan originated or processed at a United States retail consumer lending branch of HFC/Beneficial or of any subsidiary or parent, whether direct or indirect; or
> >
> > (b) On or after January 1, 1998, but before January 1, 1999, entered into a real estate secured loan originated or processed at a United States retail consumer lending branch of HFC/Beneficial or of any subsidiary or parent, whether direct or indirect, of HFC/Beneficial in California, Massachusetts, Washington, Pennsylvania, New Jersey, Minnesota, Maine or Michigan.

(*Id.* ¶ 2.)

The Preliminary Approval Order provided for the designation of a settlement administrator, who would mail notice to the last known address of all settlement class members and publish notice of the class settlement twice in the national edition of *USA Today*. (*Id.* ¶ 8.) In the event that notice sent to a class member was returned as undeliverable, HFC/Beneficial would make reasonable efforts to obtain updated address information for the class member, and the settlement administrator would resend notice to the updated address. (*Id.*)

A settlement class member could request exclusion from the settlement up to twenty-one (21) days before the April 30, 2004, fairness hearing. (*Id.* ¶ 10.) To be excluded, a class member was required to mail to the settlement administrator "a request for exclusion that includes the requesting party's name, address, telephone number and HFC/Beneficial loan number, and that is personally signed by the person requesting exclusion." (*Id.*) Only exclusion requests that complied with these requirements would be deemed valid, and any settlement member who was not excluded from the class would be bound by all determinations and judgments of the class

settlement, including the release of claims against HFC/Beneficial and its subsidiaries. (*Id.* ¶¶ 9-10.)

After conducting a fairness hearing, Judge Wilken granted final approval to the class settlement on April 30, 2004, pursuant to Federal Rule of Civil Procedure 23. *In re Household Lending Litig.*, Civ. A. No. 02-1240 CW (N.D. Cal. Apr. 30, 2004) (order granting final approval of settlement and judgment) ("Final Approval Order"). The Final Approval Order used the same definition for the class members and the defendants as in the Preliminary Approval Order. (*Id.* ¶¶ 1, 5.) The Final Approval Order provided that:

> [A]ll Settlement Class Members are deemed to have released . . . Household Finance Corporation, Beneficial Corporation, Household Group, Inc., HIG Holding Co., Household Realty Corporation, and Household International, Inc. (collectively, and including each and all of their direct and indirect parents, subsidiaries, affiliated, and related entities, "HFC/Beneficial") . . . from all claims, causes of actions of liabilities which any and all Settlement Class Members may have or have had as of December 24, 2003, including without limitation, in contract, in tort . . . , statute, regulation or common law, whether in an arbitration, administrative or judicial proceeding, whether known or unknown, suspected or unsuspected, threatened or unasserted, actual or contingent, liquidated or unliquidated, that arise from or are related to the matters alleged in the Consolidated Action, the Private Lawsuits and/or by reason of the following practices by [HFC/Beneficial] in connection with real estate secured loans originated or processed by HFC/Beneficial or any subsidiary or parent, whether direct or indirect, of HFC/Beneficial during the Class Period: [HFC/Beneficial's] conduct with respect to multiple real estate secured loans originated by [HFC/Beneficial] that are or were made at or near the same date to the same borrower (*i.e.*, "split loans"), loan points and origination fees, interest rates, monthly payment amounts, single premium credit and other insurance products, prepayment penalties, loans offered through a negotiable check (*i.e.*, "Live Checks"), home equity lines of credit, loan billing practices relating to simple interest calculations, balloon payment, payoff information, non-English language documentation, and net tangible benefit in loan refinancing (collectively, the "Released Claims").

(*Id.* ¶ 9.) The court ordered that no class members "shall commence or prosecute against

HFC/Beneficial . . . any action or proceeding in any court or tribunal asserting any of the Released Claims," and that class members shall take all actions "necessary to effectuate the dismissal of their claims." (*Id.* ¶ 7.) All proceedings relating to the Released Claims in any forum were ordered to be permanently stayed under the All Writs Act, 28 U.S.C. § 1651(a) (2000). (*Id.* ¶ 8.) The court also determined that the notice provided to the settlement class members under the Preliminary Approval Order was the best notice practicable under the circumstances and satisfied the requirements of Federal Rule of Civil Procedure 23 and constitutional due process.[3] (*Id.* ¶ 11.)

II. STANDARD

When considering a Rule 12(b)(6) motion to dismiss, we must "accept as true all of the allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the non-moving party." *Rocks v. City of Philadelphia*, 868 F.2d 644, 645 (3d Cir. 1989). The court may dismiss a complaint only if "'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *H. J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 249 (1989) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)); *see also Markowitz v. Northeast Land Co.*, 906 F.2d 100, 103 (3d Cir. 1990) ("Dismissal under Rule 12(b)(6) . . . is limited to those instances where it is certain that no relief could be granted under any set of facts that could be

[3] Several class members filed two separate appeals from the Final Approval Order. *In re Household Lending Litig.*, Civ. A. No. 02-1240 CW (N.D. Cal. Apr. 30, 2004) (order granting final approval of settlement and judgment), *appeals docketed*, Nos. 04-16100 (9th Cir. May 24, 2004), 04-16140 (9th Cir. June 1, 2004). On June 29, 2004, the appellants in both actions voluntarily dismissed their appeals. *ACORN v. Guetling*, No. 04-16100 (9th Cir. June 29, 2004) (order voluntarily dismissing appeal pursuant to Federal Rule of Appellate Procedure 42(b)); *ACORN v. Dykes-Howe*, No. 04-16140 (9th Cir. June 29, 2004) (same).

proved."). When considering a motion to dismiss, we need not credit a party's "bald assertions" or "legal conclusions." *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997).

III. DISCUSSION

A. Judicial Notice of Attachments to Defendant's Motion

Defendant asserts that Plaintiff's claims should be dismissed pursuant to the class settlement in the Northern District of California. (Doc. No. 3 at 7-11.) As a preliminary matter, we must decide whether we may consider certain documents, including court orders approving the settlement, submitted in support of its Rule 12(b)(6) motion.

"As a general matter, a district court ruling on a motion to dismiss may not consider matters extraneous to the pleadings." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997). The Third Circuit has recognized, however, that a court may also consider exhibits attached to a plaintiff's complaint and matters of public record if they are related to plaintiff's claims. *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993) (citing 5A Charles Alan Wright & Arthur Miller, Federal Practice and Procedure § 1357, at 299 (2d ed. 1990)); *see also In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357, 368 n.8 (3d Cir. 1993) (holding that "a court may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document'" (quoting *Pension Benefit Guar. Corp.*, 998 F.2d at 1196)); *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 773 (2d Cir. 1991) ("In considering a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), a district court must limit itself to facts stated in the complaint or in documents attached to the complaint as exhibits or incorporated in the complaint by reference. Of course, it may also consider matters of which judicial notice may

be taken under Fed. R. Evid. 201.").

Here, Defendant has submitted the following documents in support of its Motion: (1) copies of the Preliminary Approval Order and the Final Approval Order in the class settlement (Doc. No. 3 Exs. A, C); (2) the Declaration of Julie Redell, the settlement administrator (*id.* Ex. C); and (3) the Declaration of Michael Jinkins, an account manager at Poorman-Douglas Corporation ("PDC"), the company responsible for administering the class settlement.[4] (Doc. No. 5 Ex. A.) The Preliminary Approval Order and Final Approval Order are clearly public records that we may judicially notice.[5] *See Lum v. Bank of Am.*, 361 F.3d 217, 222 n.3 (3d Cir. 2004) ("[A] prior judicial opinion constitutes a public record of which a court may take judicial notice . . . ."); *see also GE Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1081 (7th Cir. 1997) ("Like other court records, judicial approval of a class action settlement is an appropriate subject for judicial notice because it is a source 'whose accuracy cannot reasonably be questioned.'" (quoting Fed. R. Evid. 201(b))). We exclude, however, the Redell and Jinkins declarations because they are not documents subject to judicial notice, *Hinton v. Dep't of Justice*,

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[4] Defendant has also submitted excerpts from the Stipulation and Agreement of Settlement ("Stipulation") filed in connection with the class settlement. (Doc. No. 3 Ex. B.) Because most of the terms in this document are incorporated in the court's Preliminary and Final Approval Orders, we need not consider it for purposes of deciding this Motion.

[5] The Third Circuit has cautioned that we may not take judicial notice of a prior court opinion in order to establish the truth of the adjudicative facts on which the opinion is based. *See S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group, Ltd.*, 181 F.3d 410, 426 (3d Cir. 1999) ("Specifically, on a motion to dismiss, we may take judicial notice of another court's opinion--not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity."). Here, we do not rely on the class settlement's Preliminary Approval Order and Final Approval Order for any adjudicative facts, but only to determine whether Plaintiff's action falls within the scope of the claims released under the settlement.

844 F.2d 126, 130 n.1 (3d Cir. 1988), and consideration of them would require us to convert Plaintiff's motion to dismiss into a motion for summary judgment.[6] *Rose v. Bartle*, 871 F.2d 331, 340 (3d Cir. 1989).

B. Release of Plaintiff's Claim Pursuant to the Class Settlement

In its Motion, Defendant contends that Plaintiff's claim is barred and/or has been released as a result of the class settlement and that we should therefore dismiss Plaintiff's Complaint. (Doc. No. 3 at 7-11.) Defendant is correct. In her Complaint, Plaintiff asserts that in May, 2001, she contacted one of Defendant's offices to apply for a $10,000 debt consolidation loan. (Doc. No. 1 Ex. A ¶¶ 8, 12.) One of Defendant's employees, Sondra Johnson, allegedly assured Plaintiff that Defendant would approve a $10,000 loan, but did not disclose the size of the monthly payment or the fact that Defendant would record a mortgage against Plaintiff's home. (*Id.* ¶¶ 14-15.) When Plaintiff arrived at Defendant's office on June 18, 2001, to sign the loan papers, she was allegedly informed for the first time that the amount of the loan was actually $33,330.35, and that the loan would be secured by a mortgage against Plaintiff's home. (*Id.* ¶¶ 19, 23.) Plaintiff was also allegedly charged $2,083 in loan fees in connection with the mortgage. (*Id.*) After receiving a notice from the Pennsylvania Attorney General's office that the Commonwealth of Pennsylvania had entered into a settlement agreement with Defendant

[6] Federal Rule of Civil Procedure 12(b) provides that if, on a 12(b)(6) motion to dismiss, "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed. R. Civ. P. 12(b). We may not convert a 12(b)(6) motion into a motion to summary judgment unless we: (1) provide prior notice of our intention to convert the motion; and (2) permit the parties an opportunity to submit materials admissible in a summary judgment proceeding or grant a hearing. *Rose*, 871 F.2d at 340.

regarding its allegedly deceptive and misleading lending practices, Plaintiff filed suit in the Court of Common Pleas of Philadelphia County, alleging violations of various federal and state laws and a local ordinance. (*Id.* ¶¶ 27, 46-65.)

Plaintiff's allegations clearly fall within the definition of the claims released in the class settlement. The class settlement encompassed all Settlement Class Members who "may have or have had" claims against HFC/Beneficial or its subsidiaries "as of December 24, 2003, including without limitation, [claims] in contract, in tort . . . , statute, regulation or common law . . . in connection with real estate secured loans originated or processed by HFC/Beneficial or any subsidiary" during the class settlement period. (Final Approval Order ¶ 9.) The settlement class is defined as any individual who, "[o]n or after January 1, 1999 and on or before December 24, 2003, entered into a real estate secured loan originated or processed at a United States retail consumer lending branch of HFC/Beneficial or of any subsidiary or parent, whether direct or indirect, of HFC/Beneficial." (Doc. No. 1 ¶¶ 14-23.) Based upon the allegations in Plaintiff's Complaint, Plaintiff is a member of the settlement class, and her claims fall within the scope of the class settlement. The Complaint alleges that Plaintiff entered into a loan secured by a home mortgage (i.e., a real estate secured loan) with Beneficial, and that the transaction allegedly occurred on June 18, 2001, within the class period. (*Id.* ¶¶ 18-23, 34.)

The Final Approval Order states that all class members, unless they "opted out" of the settlement, are deemed to have released HFC/Beneficial and its subsidiaries from all claims. (Final Approval Order ¶¶ 5, 9.) Plaintiff does not allege in either her Complaint or opposition to Defendant's Motion that she has opted out of the settlement (Doc. Nos. 1, 4), and a review of the settlement administrator's "opt out" list, which is attached to the Final Approval Order, does not

include Plaintiff. (Final Approval Order Ex. A.) Thus, Plaintiff's claims against Defendant have been released in the class settlement.

In her opposition to Defendant's Motion, Plaintiff asserts that her claims are not precluded because she did not receive actual notice of the class settlement. *See* Doc. No. 4 at unnumbered 2 ("Defendant argues that plaintiff's claims are now res judicata as a result of the settlement in the Household Lending Litigation. Defendant's argument is misguided. In order for Plaintiff to have released her claims against defendant, defendant had to first send plaintiff notice of the proposed settlement by first class, postage paid, regular mail to her last known address.") This is incorrect. Under Federal Rule of Civil Procedure 23(c)(2), the court is required to give class members "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[7] Fed. R. Civ. P. 23(c)(2)(B); *see also* Fed. R. Civ. P. 23(e)(1)(B) ("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."). The requirement of "best notice practicable under the circumstances" has consistently been held ***not*** to require actual notice for every class member. *See, e.g.*, *Dusenbery v. United States*, 534 U.S. 161, 170-71 (2002) (holding that "actual notice" is not required by the Due Process Clause; rather, "it requires only that the Government's effort be 'reasonably calculated' to apprise a party of the pendency of the action"); *Silber v. Mabon*, 18 F.3d 1449, 1453-54 (9th Cir. 1994) (holding that actual notice is not required under Rule 23(b)); *In re Mass. Diet Drug Litig.*, 338 F. Supp. 2d 198, 209 (D. Mass. 2004) ("Rule 23 nor due process, however,

[7] The Final Approval Order certified the class solely for purposes of settlement under Federal Rule of Civil Procedure 23(b)(3). (Final Approval Order ¶ 5.)

requires that each class member receive actual notice . . . ."); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 177 F.R.D. 216, 231 (D.N.J. 1997) ("Courts have consistently recognized that due process does not require that every class member receive actual notice so long as the court reasonably selected a means likely to apprise interested parties."), *aff'd on adequacy of notice issue*, 148 F.3d 283 (3d Cir. 1998); *see also Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (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. . . . [I]f with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied."). As a leading treatise on class actions notes:

> [D]ue process does not require actual notice, but rather a good faith effort to provide actual notice. Courts have consistently recognized that due process does not require that every class member receive actual notice so long as the court reasonably selected a means likely to apprize interested parties. Similarly, Rule 23 does not require the parties to exhaust every conceivable method of identifying the individual class members.

4 Alba Conte, Newberg on Class Actions § 11:53 (4th ed. 2002).

In this case, the Final Approval Order provided for "best notice practicable under the circumstances" by ordering that the settlement administrator mail notice to each individual class member's last known address and, in the event that the mail was returned as undeliverable, to conduct an internet search (employing class members' Social Security Numbers where possible) and resend the notice. (Preliminary Approval Order ¶ 8(a).) The order also provided for publication of notice in the national edition of *USA Today* twice within a seven-day period. (*Id.*

¶ 8(b).) This "extensive program of individual mailings," *Entin v. Barg*, 412 F. Supp. 508, 512 (E.D. Pa. 1976) (Becker, J.) to over 900,000 potential class members, when combined with publication in the nation's largest daily newspaper,[8] qualifies as "best notice practicable under the circumstances." Thus, Plaintiff's assertion that she did not receive actual notice, even if true, will not prevent the settlement from barring Plaintiff's claims in this action. *See Reppert v. Marvin Lumber & Cedar Co.*, 359 F.3d 53, 56-57 (1st Cir. 2004) ("After . . . appropriate notice is given, if the absent class members fail to opt out of the class action, such members will be bound by the court's actions, including settlement and judgment, even though those individuals never actually received notice."). Accordingly, we will grant Defendant's Motion.[9]

An appropriate Order follows.

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[8] Audit Bureau of Circulations, *The Top 150 Newspapers by Daily Reported Circulation* (Mar. 1, 2005), *at* http://www.accessabc.com/reader/top100.htm.

[9] We note that in her Memorandum of Law in Opposition to Motion of Defendant to Dismiss Complaint Pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6) (Doc. No. 4), Plaintiff asserts that Defendant should be required to present evidence that it complied with the Final Approval Order and mailed individual notice to her. (*Id.* at unnumbered 3-4.) As previously mentioned, consideration of matters outside the pleadings, except for matters of public record and undisputedly authentic documents relating to Plaintiff's claims, would convert Plaintiff's Rule 12(b)(6) motion into a Rule 56 motion for summary judgment. If we were to accept Plaintiff's invitation, however, we note that Defendant submitted evidence that individual notice was sent to Plaintiff. Defendant offered the affidavit of Michael Jinkins, an account manager responsible for the oversight of PDC's compliance with the Preliminary Approval Order's notice requirements. (Doc. No. 5 Ex. A.) Jinkins averred that notice was mailed to Plaintiff at her home address, and that this notice was not returned as undeliverable. (Jinkins Decl. ¶¶ 4-5.)

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

LUEGENA MONTGOMERY	:	
	:	CIVIL ACTION
v.	:	
	:	
BENEFICIAL CONSUMER DISCOUNT	:	NO. 04-CV-2114
COMPANY d/b/a BENEFICIAL	:	
MORTGAGE CO. OF PENNSYLVANIA	:	

ORDER

AND NOW, this 2nd day of March, 2005, upon consideration of Defendant Beneficial Consumer Discount Company d/b/a Beneficial Mortgage Co. of Pennsylvania's Motion to Dismiss Civil Complaint of Luegena Montgomery (Doc. No. 3, 04-CV-2114), it is ORDERED that the Motion is GRANTED. Plaintiff's Complaint is DISMISSED with prejudice.

IT IS SO ORDERED.

BY THE COURT:

S:/R. Barclay Surrick, Judge