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UNITED STATES DISTRICT COURT
Northern District of California

KRISTA O'DONOVAN, EDUARDO DE LA TORRE and LORI SAYSOURIVONG, individually and on behalf of all others similarly situated,

No. C 08-03174 MEJ

ORDER RE: CLASS NOTICE/DEFINITIONS

Plaintiffs,

[Docket Nos. 110, 113, 123 and 124]

v.

CASHCALL, INC., a California corporation,
Defendant.

_____ /

On November 15, 2011, the Court granted in part and denied in part Plaintiffs' motion for class certification. Dkt. No. 100. Since then, the parties have been meeting and conferring in an attempt to agree on specific class definitions as well as a class notice plan. While many issues have been resolved through this meet and confer process and the Court's previous order, several disputes remain and the parties have outlined these in the motions currently pending before the Court. Dkt. Nos. 110 and 113.¹ The Court addresses the pending issues in turn below.

Plaintiffs' current proposal is to provide notice to the following two classes:

- (1) The "Loan Unconscionability Class": "All individuals who, while residing in California, borrowed from \$2,500 to \$2,600 at an interest rate of 90% or higher from CashCall, Inc. for personal, family or household use at any time from June 30, 2004 to the present."
- (2) The "Conditioning Class": "All individuals who, while residing in California, borrowed money from CashCall, Inc. for personal, family, or household use at any time from June 30, 2004 to the present."

Dkt. No. 111 at 2. With respect to the Loan Unconscionability Class, Defendant only takes issue

¹ The Court issued a tentative ruling on these motions on April 23, 2012 and then held a hearing on April 26. Both parties have filed supplemental briefs with respect to the issues raised in the tentative ruling and at the hearing. Dkt. Nos. 123 and 124.

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1 with the end date of the class definition. Rather than providing notice to individuals who obtained
2 loans “from June 30, 2004 to the present,” Defendant argues that the class should be limited to only
3 those borrowers who obtained loans before July 11, 2011.² This is because, on July 11, Defendant
4 — following the United States Supreme Court decision in *AT&T Mobility LLC v. Concepcion* —
5 changed the terms of its promissory note to include a clause that mandates arbitration for any
6 lawsuits outside of small claims court and prohibits borrowers from being members of class action
7 lawsuits. According to Defendant, the “most efficient and expeditious procedure to address this
8 issue is to exclude CashCall borrowers who signed the [new] arbitration agreement from the class
9 definitions” at this stage of the proceedings. Dkt. No. 118 at 14.

10 Plaintiffs contend that the above argument “suffers from several flaws and raises a host of
11 issues that far exceed the scope of providing notice to the certified class.” Dkt. No. 117 at 11.
12 Plaintiffs only cursorily address some of these issues and state that if the Court does intend to
13 consider Defendant’s argument, they should be entitled to conduct discovery and provide additional
14 briefing on whether Defendant’s arbitration clause is valid and enforceable. *Id.*

15 While the Court prefers not to delay class notice, it is concerned about the following
16 situation. If borrowers who signed the post-July 11 promissory note receive the proposed notice and
17 do not ask to be excluded, they will believe that they are part of this class action lawsuit and have
18 given up their rights to individually sue Defendant. If the Court puts off its evaluation of the
19 arbitration clause until a later date — as Plaintiffs propose — and then the clause is found to be
20 valid, the post-July 11 borrowers would have to be notified that they are no longer members of the
21 class. Besides the additional work and expenses this would require, it will also confuse potential
22 class members about what is transpiring and the status of their legal rights.

23 At the April 26, 2012 hearing on the parties’ motions, Plaintiffs agreed that the Court should
24 rule on the arbitration clause issue before notice is given to the class. Both parties submitted further
25 briefing on this question, which the Court has now reviewed. Dkt. Nos. 123 and 124. Plaintiffs’

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27 ² Defendant also contends that there should be a July 11, 2011 cutoff for the Conditioning
28 Class.

1 supplemental brief provides that in the interest of moving this case forward, they will “not ask the
2 Court to allow the discovery and full-scale briefing required to determine whether CashCall’s
3 arbitration clause is enforceable.” Dkt. No. 123 at 6. Instead, Plaintiffs ask the Court to rule on only
4 one issue: whether Defendant’s new arbitration clause can be enforced against potential class
5 members in the absence of any petition to compel arbitration having been filed by Defendant. *Id.* In
6 other words, Plaintiffs believe that Defendant — which may technically waive its right to pursue
7 arbitration under its arbitration agreement with borrowers — must first seek an order compelling
8 arbitration before the arbitration clause can be enforced, something that Defendant cannot do with
9 members of the proposed class because this Court does not yet have jurisdiction over them. *Id.* at 8-
10 9. Plaintiffs do not cite any authority to support this novel theory and argue that it is an issue of first
11 impression. *Id.* at 10.

12 While the Court would be willing to entertain arguments with respect to the actual
13 enforceability of Defendant’s arbitration clause, the Court is not persuaded by the arguments from
14 Plaintiffs on this issue, particularly because it does not appear to be an issue of first impression. In
15 *Dienese v. McKenzie Check Advance of Wisconsin*, the court briefly addressed whether potential
16 class members who had signed the defendant’s arbitration agreement should receive class notice.
17 2000 WL 34511333, at *8 (E.D. Wis. Dec. 11, 2000). The *Dienese* court ruled that “[i]n the absence
18 of any showing that the Arbitration Agreement is unenforceable or that plaintiffs’ claims are not
19 amenable to arbitration, this court will not permit those who have signed the Agreement to
20 participate in the class.” *Id.* This Court finds *Dienese* instructive. If Plaintiffs’ position was
21 adopted, notice will be provided to all potential class members, who will subsequently become a part
22 of this class action if they do not ask to be excluded. Defendant will then be forced to file a motion
23 to compel arbitration with respect to post-July 11 class members — a motion that Plaintiffs have
24 chosen not to contest at this juncture even though they were given the opportunity to do so — and
25 the Court will consequently have to dismiss these class members from the class. Such a convoluted
26 process does not make sense from a procedural and class manageability perspective. Accordingly,
27 Defendant’s motion is GRANTED on this issue, and both class definitions should be limited to
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1 borrowers who did not sign Defendant's post-July 11, 2012 promissory note.

2 With respect to the Conditioning Class, Defendant argues the following: (1) the time period
3 for the class definition should be limited to only those borrowers who obtained loans after March 13,
4 2006 because the claim stems from the federal Electronic Funds Transfer Act ("EFTA"), which has
5 a statute of limitations of one year, and not California's Unfair Competition Law ("UCL"), which
6 has a statute of limitations of four years; (2) if the four-year statute applies, then the relief that
7 Plaintiffs seek — a refund of the nonsufficient funds fees they were charged — constitutes
8 restitution rather than damages and is not available under the UCL, resulting in there being no basis
9 to certify a class; and (3) under any circumstances, individual issues predominate the Conditioning
10 Class and therefore the class cannot be certified.

11 The Court only needs to address Defendant's first argument because it finds, as explained
12 below, that the EFTA's one-year statute of limitations applies to the Conditioning Class. The Court
13 notes that some of Defendant's third argument with respect to individual issues predominating was
14 considered last year when the Court decided to certify what the parties now refer to as the
15 Conditioning Class. Dkt. No. 100. Defendant asked the Ninth Circuit for permission to appeal this
16 decision, which was denied. Dkt. No. 108. While the Court retains the inherent power to review
17 class certification decisions, Defendant has not persuaded the Court that any circumstances have
18 changed that would warrant reconsideration at this time.

19 The Conditioning Class claim stems from the allegation that Defendant violated the EFTA
20 by conditioning the extension of credit on a customer agreeing to electronic payment. This violation
21 of a federal statute is also the predicate for Plaintiffs' UCL claim. Both parties agree that the EFTA
22 has a one year statute of limitations while the UCL's is four years. The issue for the Court is
23 whether Plaintiffs' claim is limited by the EFTA's statute of limitations or the UCL's longer
24 limitations period may be invoked. Neither of the parties provide authority on this exact question
25 and it appears to be an issue of first impression.

26 The Court follows the view adopted by other courts that have analyzed a similar issue and
27 found that UCL claims predicated on other federal law should be governed by that federal law's
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1 statute of limitations. In *Jordan v. Paul Financial, LLC*, the plaintiff brought UCL claims against
2 the defendant that were predicated on violations of the federal Truth in Lending Act (TILA). 644
3 F.Supp.2d 1156, 1171 (N.D. Cal. 2009). TILA, like the EFTA, requires claimants to file a lawsuit
4 within one year of any alleged violation.³ *Id.* The *Jordan* Court held that because the plaintiff's
5 "UCL claim is predicated on TILA violations, it may proceed only to the extent that the TILA
6 violations are not time barred." *Id.* at 1172. Other courts have reached similar decisions. *See*
7 *Adams v. SCME Mortg. Bankers Inc.*, 2009 U.S. Dist. LEXIS 46600, at *28 (E.D. Cal. May 22,
8 2009) (holding that if a TILA claim is time barred, a UCL claim based on TILA violations also fails
9 because courts should not permit a plaintiff to "plead around an absolute bar to relief simply by
10 recasting the cause of action as one for unfair competition"); *Newsom v. Countrywide Home Loans,*
11 *Inc.*, 714 F.Supp.2d 1000, 1014 (N.D. Cal. 2010) (finding that it is improper for the plaintiffs to
12 attempt to revive an otherwise time-barred TILA claim, which has a one year statute of limitations,
13 under the guise of a fraud claim, which has a three year statute of limitations).

14 Plaintiffs urge the Court to not follow these cases for two principle reasons. First, they argue
15 that the EFTA contains a safe harbor clause that allows states to provide greater protection to
16 consumers than under the provisions in the EFTA. *See* U.S.C. § 1693q ("A State law is not
17 inconsistent with this subchapter if the protection such law affords any consumer is greater than the
18 protection afforded by this subchapter."). This argument is misplaced. The issue here is not
19 whether California has enacted its own version of the EFTA, but whether Plaintiffs may assert a
20 UCL claim predicated on the EFTA and not be required to comply with the EFTA's statute of
21 limitations. Second, Plaintiffs contend that the above TILA decisions are inapplicable because they
22 have misinterpreted *Silvas v. E*Trade Mortgage Corporation* and are consequently based on a
23 flawed preemption analysis. 514 F.3d 1001, 1007 n. 3 (9th Cir. 2008). Plaintiffs again miss the
24 mark with this argument. While both *Adams* and *Newsom* discussed *Silvas*, they both concluded on
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26 ³ *See also Voeks v. Pilot Travel Centers*, 560 F.Supp.2d 718, 723 (E.D. Wisc. 2008) ("this
27 Court concludes that the cases that hold the TILA to be a useful analogy in analyzing the EFTA are
28 correct").

1 separate grounds that a federal statute’s limitations period should apply when a state law cause of
2 action is based on it. *See Newsom*, 714 F.Supp.2d at 1014 (“As set forth above, a state law claim
3 premised on violations of TILA is preempted. *In addition*, Plaintiffs impermissibly are attempting to
4 revive an otherwise time-barred TILA claim under the guise of a fraud claim.”) (emphasis added).

5 In their supplemental brief, Plaintiffs point out for the first time that the California Supreme
6 Court has expressly decided this issue by holding that the UCL’s statute of limitations provision
7 “admits no exceptions” and applies even if the predicate statute has a shorter limitations period.
8 *Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal.4th 163, 179 (2000). But *Cortez* — along with
9 many of the other cases cited by Plaintiffs in their supplemental brief — is not analogous because it
10 only holds that the UCL’s longer limitations period applies when the UCL claim is based on
11 violations of state law, which is not the question here since Plaintiffs’ UCL claim is based on a
12 federal statute that includes a preemption provision similar to TILA’s. As this issue is explained in
13 the California Practice Guide on UCL claims, “[n]otwithstanding *Cortez* and the rule that the longer
14 (four-year) limitations period of Section 17208 applies when borrowing a violation of a statute
15 carrying a shorter limitations period, the result may be different when the claim at issue is federal
16 and the federal law supplies a shorter limitations period.” Stern, *Cal. Prac. Guide: Bus. & Prof.*
17 *Code § 17200 Practice*, ¶ 5:292.1 (The Rutter Group 2012). Thus, while this is an unsettled issue
18 and authorities have been cited to support both views, the Court adheres to the approach taken by
19 courts such as *Newsom* and finds that parties should not be able to predicate their UCL claim on a
20 federal statute but then ignore that statute’s limitations period under the circumstances presented
21 here. Accordingly, the Court concludes that the EFTA’s one year statute of limitations applies to
22 Plaintiffs’ claim. The definition for the Conditioning Class should therefore be limited to only those
23 borrowers who obtained loans after March 13, 2006.⁴

24 Plaintiffs have also requested the Court to appoint their current counsel of record (James
25 Sturdevant, principal of the Sturdevant Law Firm, Arthur Levy, principal of the Law Office of

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27 ⁴ Both parties agree that the statute of limitations was tolled when Plaintiffs filed a class
28 action complaint on these issues in state court on March 13, 2007.

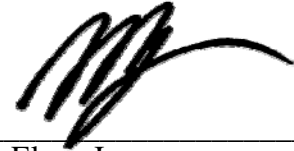
1 Arthur D. Levy, and Whitney Stark, associate at Rukin, Hyland, Doria & Tindall) as class counsel.
2 Defendants have not objected to this request and the Court finds that counsel of record meet the
3 standards outlined for class counsel in FRCP 23(g). Accordingly, they are appointed as class
4 counsel.

5 Lastly, on January 3, 2012, based on the parties' request, the Court vacated the deadline for
6 the parties to complete mediation in this matter. Dkt. No. 102. The new deadline to complete
7 mediation is now set for September 31, 2012.

8 The parties are ordered to meet and confer and submit, by July 18, 2012, an updated version
9 of Plaintiff's motion for approval of class notice plan (Dkt. No. 110), including a proposed order,
10 reflecting the Court's decisions in this opinion.

11 **IT IS SO ORDERED.**

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13 Dated: July 2, 2012



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15 Maria-Elena James
16 Chief United States Magistrate Judge
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