

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

STEPHEN YEAGLEY,
Plaintiff,

No. C 05-03403 CRB

MEMORANDUM AND ORDER

v.

WELLS FARGO & COMPANY and
WELLS FARGO BANK, N.A.,
Defendants.

This is a Fair Credit Reporting Act (“FCRA”) nationwide class action. The parties reached a settlement which the Court approved. The Court must now resolve class counsel’s motion for an award of \$1.5 million in attorney’s fees plus costs. The question presented is what is a reasonable attorney’s fee for a virtually worthless settlement of a meritless case.

BACKGROUND

A. Allegations of the Class Action Complaint

Under FCRA “[a] person shall not use or obtain a consumer report for any purpose unless --(1) the consumer report is obtained for a purpose for which the consumer report is authorized to be furnished under this section.” 15 U.S.C. § 1681b(f). See Complaint ¶ 17. The permissible purposes generally arise only in connection with transactions initiated by the consumer (the subject of the credit report). Complaint ¶ 18. However, FCRA does

1 permit a person to obtain a credit report in the absence of a consumer-initiated transaction
2 when the recipient of the credit report “undertakes to extend to the consumer a ‘firm offer of
3 credit.” Id. ¶ 19 (citing 15 U.S.C. § 1681b(c)(1)(B) (emphasis added)).

4 Defendant Wells Fargo “regularly obtains consumer reports on large numbers of
5 individuals without their knowledge or consent by purchasing ‘prescreening’ lists from
6 consumer reporting agencies.” Id. ¶ 23. Wells Fargo subsequently mails written solicitations
7 to individuals on the prescreening reports. Id. ¶ 24. Plaintiff alleges that these solicitations
8 do not satisfy the “firm offer of credit” requirement of section 1681b(c)(1)(B), and therefore
9 Wells Fargo’s use of the credit reports to make the solicitations violates FCRA. Id. ¶¶ 32-37.

10 **B. Procedural History**

11 Plaintiff filed this putative nationwide class action in August 2005 seeking injunctive
12 and declaratory relief, statutory damages, and fees and costs. The original complaint alleged
13 a class period of August 2003 through October 2005.

14 In January 2006 the Court granted Wells Fargo’s motion to dismiss the claims for
15 injunctive and declaratory relief on the ground that FCRA does not provide a private right of
16 action for such relief. As a result of that ruling, the only claim remaining was plaintiff’s
17 claim for damages. As plaintiff did not assert that he or any of the class members suffered
18 any *actual* damages, the class only had a claim for statutory damages. The class could
19 recover statutory damages, however, only if they proved that Wells Fargo’s alleged FCRA
20 violation was “willful.”

21 At the parties’ request the Court stayed the case through October 2006 pending
22 settlement negotiations. The parties subsequently stipulated to the filing of an amended
23 complaint that decreased the original two-year class period to two and one-half months. The
24 stipulation explains that plaintiff narrowed the class period because of plaintiff’s belief that
25 Wells Fargo has an advice of counsel defense for the original class period, but that such
26 defense will fail for the two and one-half month period alleged in the amended complaint.

27 A few months later the parties reached a settlement and the Court set a date for
28 preliminary approval. On March 28, 2007, the Court preliminarily approved the settlement.

1 **C. The Settlement Terms**

2 As part of the settlement, each class member received with the Notice of Settlement
3 a brochure prepared by class counsel concerning credit reports and FCRA. In addition, each
4 member who submitted a timely claim form became eligible to receive two free credit reports
5 that include the member's FICO score. The credit reports include merged reports from all
6 three credit reporting agencies and are in the same form as would be provided to a mortgage
7 lender. Wells Fargo must pay \$15.50 for each credit report provided to a class member. The
8 class member receives a second credit report only if the class member submits a second claim
9 form after January 1, 2008. According to the parties, this delay is intended to ensure that a
10 class member does not receive two credit reports at the same time. The class member can
11 also check a box asking to receive a telephone call from a Wells Fargo mortgage consultant
12 to discuss the offer of a \$50 rebate on a mortgage loan.

13 The settlement requires Wells Fargo to pay class counsel's fees up to \$1.5 million.
14 The settlement is not conditioned upon the award of fees; in other words, the Court can
15 award a different amount and the settlement is still valid.

16 **D. Class Response To The Settlement**

17 On May 11, 2007, class notice was mailed to the 3.8 million class members who
18 received the Wells Fargo mortgage solicitation during the class period. Class members had
19 until June 8, 2007 to opt out and file objections. Approximately 231,000 notices were
20 returned without forwarding addresses, and another 19,000 were returned with forwarding
21 addresses and were forwarded. Another 686 pieces of mail were returned as undeliverable.
22 Around 450 class members opted out and 25 or so filed written objections to the settlement.
23 Three class members (two represented by counsel) filed objections and moved to intervene.
24 Out of the original 3.8 million class members, only 29,168 have submitted timely, qualified
25 claim forms, that is, less than one percent of the class chose to participate in the settlement.

26 After the Court approved the settlement, but while it still had counsel's motion for
27 an award of attorney's fees under submission, the two represented objectors purported to
28 withdraw their objections to counsel's fee request. They agreed to withdraw their objections

1 in return for class counsel’s promise to pay the objectors’ counsel a portion of the fees class
2 counsel receive in this case. The amount class counsel agreed to pay is unrelated to the fees
3 incurred by the objectors, and is instead tied to the amount the Court ultimately awards class
4 counsel.

5 In any event, once a class member objects to a proposed settlement, or any portion
6 of that settlement, the objection may be withdrawn only with the court’s approval. Fed. R.
7 Civ. P. 23(e)(4)(B). The Court does not approve the purported withdrawal of the objections.
8 The reasons given for the withdrawal are unpersuasive and do not address the objectors’
9 reasons for opposing the settlement and the requested fees in the first instance. The Court
10 finds that class counsel simply “bought off” objectors’ counsel. Approving the withdrawal
11 of the objections under such circumstances is not in the interests of justice; instead, it will
12 encourage attorneys to interject objections for the sole purpose of extracting a payment from
13 class counsel.

14 DISCUSSION

15 I. Settlement Approval

16 Before addressing the amount of attorney’s fees to award class counsel, the Court
17 will explain why it approved the settlement despite its nominal value to the class. Such
18 discussion is critical to the attorney’s fees determination.

19 Federal Rule of Civil Procedure 23(e) provides that if a settlement of a class action
20 would bind class members, the court may approve the settlement “only after a hearing and on
21 finding that it is fair, reasonable, and adequate.” Fed. R. Civ. P. (e)(2) (2008). “It is the
22 settlement taken as a whole, rather than the individual component parts, that must be
23 examined for overall fairness.” Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir.
24 1998). Id. The court does not “have the ability to delete, modify or substitute certain
25 provisions. The settlement must stand or fall in its entirety.” Id. (internal quotation marks
26 and citation omitted).

27 “Assessing a settlement proposal requires the district court to balance a number of
28 factors: the strength of the plaintiffs’ case; the risk, expense, complexity, and likely duration

1 of further litigation; the risk of maintaining class action status throughout the trial; the
2 amount offered in settlement; the extent of discovery completed and the stage of the
3 proceedings; the experience and views of counsel; the presence of a governmental
4 participant; and the reaction of the class members to the proposed settlement.” Id.

5 The Court finds that while the settlement offers little of value to the class, plaintiff’s
6 case is weak and the class could not do better if the Court rejected the settlement.

7 **A. Settlement Value**

8 While the brochure mailed to all 3.8 million class members may have some
9 educational value, all of the information provided is available elsewhere, including on the
10 Internet. The likelihood that a class member actually read the brochure is low as is
11 demonstrated by the extraordinarily low participation rate in the offer of a free credit report--
12 less than one percent. Class counsel has not offered any evidence that suggests that any class
13 member actually read the brochure or that the same or similar brochures provided in similar
14 cases have had any tangible impact.

15 The receipt of a tri-merged credit report with a FICO score is of only marginal
16 value, and that value is only to the less than one percent of the class that submitted claim
17 forms. See Acosta v. Trans Union, LLC, 243 F.R.D. 377, 390 (C.D. Cal. 2007) (noting that a
18 class settlement of a free credit report with a FICO score has little actual value given that
19 “few class members are likely to have any use for an additional free credit report, given that
20 each class member is already entitled to at least one free credit report per year from each of
21 the credit reporting bureaus and that fewer than 10% of consumers take advantage of their
22 right to even one free credit report in any given year.”). While as a general matter consumers
23 are entitled to one free credit report a year from each credit reporting agency, participating
24 class members will receive one report with information from all three agencies at once. They
25 will also receive their FICO score which consumers usually can obtain for free only if they
26 have been denied credit or applied for a loan. Wells Fargo pays \$15.50 for each requested
27 credit report. Assuming it will provide 35,000 reports, which is nearly 6,000 more than were
28 timely and properly requested, it will pay \$542,500.00 for this part of the settlement.

1 Class counsel argue that a consumer would have to pay \$30 for a tri-merged credit
2 report and therefore the Court should value the reports at \$30 rather than the \$15.50 that
3 Wells Fargo paid. As is explained above, however, a consumer could obtain free credit
4 reports from all three credit reporting agencies; thus, the value of the tri-merged credit report
5 is the time a participating class member saved by not having to request free credit reports
6 from three different agencies. Under such circumstances, the Court finds that \$15.50 per
7 credit report--the amount Wells Fargo actually paid for the credit report--is a reasonable
8 assessment of the value of each provided credit report.

9 If a class member submits a second claim form *after* January 1, 2008, the member
10 will receive a second credit report and FICO score. This part of the settlement, too, is of only
11 nominal value. Less than one percent of the class submitted the claim form in the first place;
12 the likelihood that any of this small number of class members will remember to mail in a
13 second claim form after January 1, 2008 is extremely low and plaintiff offers no evidence to
14 suggest otherwise. This is especially so given that the second claim form was provided to the
15 class with the May 2007 class notice. In order to receive a second free credit report a class
16 member must (1) keep the second claim form, (2) remember some time in 2008 that the class
17 member can mail in the form to receive a free credit report, (3) find the claim form which the
18 class member received seven months earlier, and (4) mail it to the settlement administrator.
19 The Court accordingly finds that the offer of the second free credit report is of no value to the
20 class.

21 If the less than one percent of the class that submitted a claim form checked a
22 particular box on the form, a Wells Fargo representative will call the class member to discuss
23 a \$50 discount on a new mortgage. This “benefit” is a marketing opportunity for Wells
24 Fargo and does not provide the class any tangible benefit; plaintiff does not claim otherwise.

25 Finally, the settlement requires Wells Fargo to pay class counsel up to \$1.5 million
26 in attorney’s fees and costs, including the costs of class notice and settlement administration,
27 depending on what the Court orders.

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1 **B. Strength Of Plaintiff’s Case**

2 “Basic to [analyzing a proposed settlement] in every instance, of course, is the need
3 to compare the terms of the compromise with the likely rewards of litigation.” Protective
4 Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424-
5 25 (1968). Here, the likely rewards of litigation are nearly nil.

6 Plaintiff’s theory is that “firm offer of credit” in FCRA requires Wells Fargo to
7 include in the written solicitation the definitive amount of credit and interest rate offered.
8 Many courts have rejected this precise argument. See, e.g., Dixon v. Shamrock Financial
9 Corp., 482 F.Supp.2d 172, 176 (D. Mass. 2007); McDonald v. Nelnet, Inc., 477 F.Supp.2d
10 1010, 1013 (E.D. Mo. 2007); Nasca v. J.P. Morgan Chase Bank, N.A., 2007 WL 678407, *3
11 (S.D.N.Y. March 5, 2007). The statute defines “firm offer of credit” as “any offer of credit
12 or insurance to a consumer that will be honored if the consumer is determined, based on
13 information in a consumer report on the consumer to meet the specific criteria used to select
14 the consumer for the offer.” 15 U.S.C. § 1681a(l). The statute does not expressly require the
15 disclosure of interest rate and credit amount in the solicitation. Moreover, the Act itself
16 provides that the offer can be conditioned upon information the lender obtains in the post-
17 solicitation application and review of full credit report. Id. § 1681a(l)(1)-(3). While there is
18 some suggestion in two Seventh Circuit opinions (in dicta or in an off-hand way), that a firm
19 offer of credit must include interest rate and credit amount, the weight and trend of the law is
20 in the other direction.

21 In any event, plaintiff has yet another hurdle: because the class members have
22 suffered no actual damages, the class has only a claim for statutory damages, a claim which
23 requires proof that Wells Fargo’s alleged FCRA violation was “willful.” In Safeco Ins. Co.
24 of America v. Burr, the United States Supreme Court held that “willful” includes knowing
25 violations and reckless violations, but that recklessness must be analyzed under an objective
26 standard. “Thus, a company subject to FCRA does not act in reckless disregard of it unless
27 the action is not only a violation under a reasonable reading of the statute’s terms, but shows
28 that the company ran a risk of violating the law substantially greater than the risk associated

1 with a reading that was merely careless.” 127 S.Ct. 2201, 2215 (2007). Plaintiff cannot
2 satisfy this burden in light of the plain language of the statute and the recent unanimous
3 rulings of the district courts. If this case had proceeded to summary judgment it would have
4 almost certainly resulted in a complete defeat for the class.

5 In this context, the limited settlement benefits are fair and reasonable. See In re
6 Mego Fin. Corp. Secs. Litig., 213 F.3d 454, 458 (9th Cir. 2000). In other words, plaintiff’s
7 prospects for prevailing in this litigation are “so bleak as to render this a ‘good value for a
8 relatively weak case.’” Acosta, 243 F.R.D. at 392 (quoting Livingston v. Toyota Motor
9 Sales USA, 1995 U.S. Dist. LEXIS 21757 (N.D. Cal. 1995)). Class members, or at least the
10 less than one percent who requested a credit report, receive some value: the ease of
11 requesting the first credit report and the value of receiving a report which includes
12 information from all three credit reporting agencies in one document.

13 **II. Attorney’s Fees**

14 Having approved the settlement, the Court must determine the amount of attorney’s
15 fees to award class counsel. Class counsel seek \$1.5 million in fees plus \$33,000 in costs to
16 be paid by Wells Fargo.

17 **A. The Court Must Scrutinize The Fee Request**

18 Unlike most issues before the district court, an application for attorney’s fees from a
19 settlement fund is rarely contested. See In Re Quantum Health Resources, Inc., 962 F. Supp.
20 1254, 1256 (C.D. Cal. 1997). Here, Wells Fargo has contractually agreed not to challenge an
21 award of up to \$1.5 million; thus it cannot object to class counsel’s fee request. Absent class
22 members also infrequently oppose class counsel’s fee application as they often do not have
23 the resources to retain counsel to mount a credible objection. As there is no guarantee the
24 court will award a class member attorney’s fees incurred in opposing a fee application, the
25 absent class member’s potential gain from a reduced fee award must exceed the fees incurred
26 in opposing the application to make the objection economically sensible. See In re Unisys
27 Corp. Retiree Medical Benefits ERISA Litig., 886 F.Supp. 445, 457 n.17 (E.D. Pa. 1995)
28 (fee applications in common fund cases are generally unopposed “because those parties with

1 a stake in the matter, the plaintiffs, are usually unorganized or lack the incentive to make
2 challenges”).

3 Despite this risk of nonpayment, the Court received many written objections to class
4 counsel’s requested fee award and two class members appeared through counsel to object.
5 These two class members attempted to withdraw their objections only after class counsel
6 agreed to share their fees with the objectors. These class members complain that the amount
7 of fees requested is grossly disproportionate to--indeed, in excess of--the value of the
8 settlement to the class.

9 Wells Fargo’s agreement to pay class counsel’s fees in addition to the relief
10 provided to the class does not detract from the Court’s obligation to carefully scrutinize the
11 fee award. Staton v. Boeing Co., 327 F.3d 938, 964 (9th Cir. 2003). “Ordinarily, a
12 defendant is interested only in disposing of the total claim asserted against it . . . the
13 allocation between the class payment and the attorneys’ fees is of little or no interest to the
14 defense. . . .” Id. (internal quotation marks and citation omitted). Thus, the Court must
15 closely scrutinize the fee application and determine an appropriate fee award based on the
16 circumstances of this case. See Vizcaino v. Microsoft, 290 F.3d 1043, 1052 (9th Cir. 2002)
17 (“Rubber-stamp approval, even in the absence of objections, is improper”); see also Zucker
18 Occidental Petroleum Corp., 192 F.3d 1323, 1328 (9th Cir. 1999) (“In a class action, whether
19 the attorneys’ fees come from a common fund or are other paid, the district court must
20 exercise its inherent authority to assure that the amount and mode of payment of attorneys’
21 fees are fair and proper”); Fed. R. Civ. P. 23(b), Advisory Committee Notes, 2003
22 Amendments (“In a class action, the district court must ensure that the amount and mode of
23 payment of attorney fees are fair and proper whether the fees come from a common fund or
24 are otherwise paid. Even in the absence of objections, the court bears this responsibility.”).

25 **B. A Reasonable Fee**

26 Class counsel agree that the Court has discretion to award fees based on a lodestar or
27 percentage-of-the fund method. See Vizcaino, 290 F.3d at 1047. The only requirement is
28 that the fee be reasonable under the circumstances. See Powers v. Eichen, 229 F.3d 1249,

1 1256 (9th Cir. 2000). The Court finds that in the specific circumstances of this case a
2 reasonable attorney's fee is \$331,875.00.

3 Unlike most common fund cases, Wells Fargo did not agree to pay a certain dollar
4 amount to the class; instead, it agreed to pay for tri-merged credit reports to those class
5 members who timely requested such reports. As the Court explained previously, a monetary
6 value can be placed on this in-kind recovery; namely, \$15.50 per requested credit report.
7 Assuming 35,000 credit reports requested (5,000 more than actually reported to the Court
8 after the deadline for requesting reports had expired), the settlement resulted in a benefit to
9 the class valued at \$542,500.00.

10 While there is no evidence in the record that suggests that the brochure had any
11 tangible benefit to the class, the Court recognizes that some class members may have read the
12 brochure and learned something of value. The Court will attribute a value of \$500,000.00 to
13 the brochure, an amount which the Court finds is generous in light of the minuscule class
14 claim rate. See Fed. R. Civ. P. 23(h), Advisory Committee Notes, 2003 Amendments
15 ("Settlements involving nonmonetary provisions for class members . . . deserve careful
16 scrutiny to ensure that these provisions have actual value to the class."). Thus, the value of
17 the "common fund," that is, the recovery to the class, is \$1,042,500.00.

18 In cases in which the percentage-of-the-recovery method is used, the Ninth Circuit
19 has adopted a 25 percent benchmark for an award of fees. See Powers, 229 F.3d at 1256. "A
20 district court may depart from the benchmark but, '[i]f such an adjustment [to the
21 benchmark] is warranted, . . . it must be made clear by the district court how it arrives at the
22 figure ultimately awarded.'" Id. at 1256-57 (internal citation omitted).

23 The Court will adopt the 25 percent benchmark here. While the class participation
24 rate in the settlement is minuscule, that fact is reflected in the amount of the common fund
25 itself; thus, the Court need not reduce the percentage to reflect the class members' lack of
26 enthusiasm for the settlement. Twenty-five percent of \$1,042,500.00 is \$260,625.00. The
27 attorney's fees, however, should also be considered as part of the recovery on behalf of the
28 class; if Wells Fargo did not pay the fees the class members would have to pay. And, in most

1 common fund cases, the fees are paid from the class recovery; thus, it makes sense to include
2 the fees as part of the common fund. Accordingly, counsel should receive 25 percent of the
3 \$260,625.00 in fees, that is, an additional \$65,156.00. The total amount of fees, then, is
4 \$325,781.00, which the Court will round up to \$326,000.00, an amount that the Court finds is
5 reasonable in light of the relative merits of the lawsuit and the value of the settlement.¹

6 Class counsel contend that the Court must consider the amount Wells Fargo could
7 have paid under the settlement in determining the common fund for the purpose of attorney's
8 fees. They argue that under the Ninth Circuit's decision in Williams v. MGM-Pathe
9 Communications Co., 129 F.3d 1026 (9th Cir. 1997), the Court *must find* that since all 3.8
10 million class members could have made a claim for a free tri-merged credit report, the value
11 of the recovery, that is, the common fund, is at least \$114 million. Under this theory, class
12 counsel's requested \$1.5 million fee is a mere one percent of the common fund, a more than
13 reasonable percentage.

14 Williams does not require this Court to adopt the fiction that the settlement is worth
15 \$114 million. Williams cites the Ninth Circuit decision in Six (6) Mexican Workers v.
16 Arizona Citrus Growers, 904 F.2d 1301 (9th Cir. 1997), for the proposition that "attorneys
17 for a successful class may recover a fee based on the entire common fund created for the
18 class, even if some class members make no claims against the fund so that money remains in
19 it that otherwise would be returned to the defendants." 129 F.3d at 1027 (citing
20 Six (6) Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1997)).
21 Six (6) Mexican Workers involved a judgment for statutory penalties per class member after
22 a bench trial; accordingly, each class member had a calculable interest in the judgment, even
23 if some of the class members could not be located and therefore never collected on their
24 judgment.

25 Williams, in contrast, was a settlement of a securities-fraud class action for \$4.5
26 million in cash. The class members' actual claims against those funds, however, were only

27
28 ¹The Court has not included the costs paid by Wells Fargo, including the costs of class notice, in its computation of the common fund. It is the Court's practice to subtract costs from any class recovery before determining attorney's fees as a percentage of the class recovery.

1 \$10,000. 129 F.3d at 1027. The Ninth Circuit held it was an abuse of discretion for the
2 district court to determine attorney’s fees based on the \$10,000 figure. The court
3 acknowledged that unlike the class members in Six (6) Mexican Workers who had obtained a
4 judgment after trial, the absent class members in Williams did “not necessarily have a
5 calculable interest in the unclaimed money in the fund.” Id. Nonetheless, the court held that
6 the \$4.5 million figure was the appropriate number to use for determining a fee based on a
7 percentage “because it was in the settlement agreement, that the class attorneys would seek to
8 recover fees based on the entire \$4.5 million fund. The Defendants had some responsibility
9 to negotiate at the outset for a smaller settlement fund if they wished to limit the fees.” Id.
10 In other words, Williams is based on the defendants’ agreement to pay fees based on the
11 larger amount.

12 The settlement agreement here, in contrast, does not represent that class counsel will
13 seek fees based on the assertion that the settlement is worth at least \$114 million. Indeed, the
14 monetary value of the settlement is not anywhere described in the settlement agreement.
15 Settlement Agreement, filed March 20, 2007, ¶ 2.01 (describing settlement benefits).
16 Instead, Wells Fargo agreed to pay attorney’s fees *not to exceed* \$1.5 million; the parties’
17 agreement thus expressly left open the possibility that the Court would award less than \$1.5
18 million, and left unanswered the amount of the “common fund” for the purpose of computing
19 a reasonable attorney’s fee. In fact, the Court would not have approved the settlement had it
20 required the Court to award \$1.5 million in fees, or if it had purported to establish that the
21 amount of the recovery for the purpose of setting attorney’s fees is \$114 million or even a
22 fraction of that amount.

23 Class counsel’s \$114 million figure is pure fantasy. Counsel does not offer a shred
24 of evidence that suggests that the parties reasonably believed that Wells Fargo would actually
25 pay anything near that amount, and the Court finds that they did not. To accept class
26 counsel’s argument would “encourage the filing of needless lawsuits where, because the
27 value of each class member’s individual claim is small compared to the transaction costs in
28 obtaining recovery, the actual distribution to the class will inevitably be minimal.” Int’l

1 Precious Metal Corp. v. Waters, 530 U.S. 1223 (2000) (O, Connor, J., dissenting from denial
2 of certiorari). Nothing in Williams requires the Court to follow such an approach.

3 The Court's consideration of the actual number of credit reports requested in
4 determining an appropriate attorney's fee is consistent with the Class Action Fairness Act
5 ("CAFA"), enacted before this lawsuit was filed. Under CAFA, in any class action
6 settlement that provides for the recovery of coupons to a class member, "the portion of any
7 attorney's fee award to class counsel that is attributable to the award of the coupons shall be
8 based on the value to class members of the coupons that are redeemed." 28 U.S.C.
9 § 1712(a). CAFA does not define "coupons." The settlement here arguably provided the
10 class with a "coupon" for a free tri-merged credit report. On the other hand, the right to a
11 free credit report is unlike a coupon in that it does not require a class member to do business
12 with Wells Fargo and it entitles the class member to a whole product--a tri-merged credit
13 report--rather than merely a discount. See Synfuel Technologies, Inc. v. DHL Express
14 (USA), Inc., 463 F.3d 646, 654 (7th Cir. 2006).

15 Even if the free credit report does not fall under CAFA's "coupon" provisions,
16 CAFA is still instructive. In support of CAFA Congress specifically found that "class
17 members often receive little or no benefit from class actions, and are sometimes harmed,
18 such as where--(A) Counsel are awarded large fees, while leaving class members with
19 coupons or other awards of little or no value." Pub. L. 109-2, 119 Stat. 4, § 2(A)(3).
20 The recovery here--free credit reports--had little value to the class, as is demonstrated by the
21 meager claim rate. To reward class counsel \$1.5 million without regard to the true value of
22 the settlement would be to award counsel "large fees, while leaving class members with . . .
23 awards of little or no value" in direct contravention of Congress's intent. A fee of
24 approximately \$326,000.00, in contrast, appropriately compensates class counsel for the
25 benefits gained and the effort expended in the context of the questionable merits of the case.

26 Congress's CAFA findings highlight that one concern raised by a class action
27 settlement in which the defendant agrees to pay class counsel's fees is that because the
28 defendant only cares about how much it must pay in total, the parties will negotiate a

1 settlement that compensates class counsel at the expense of the class. See Staton, 327 F.3d at
2 964 (“If fees are unreasonably high, the likelihood is that the defendant obtained an
3 economically beneficial concession with regard to the merits provisions, in the form of lower
4 monetary payments to class members or less injunctive relief for the class than could
5 otherwise have obtained.”). Although the record reflects that the parties negotiated the class
6 benefit before any negotiations on the amount of attorney’s fees, that concern is still present
7 here. As the Third Circuit has noted, “[e]ven if the plaintiff’s attorney does not consciously
8 or explicitly bargain for a higher fee at the expense of the beneficiaries, it is very likely that
9 this situation has indirect or subliminal effects on the negotiations.” Court Awarded
10 Attorney Fees, Report of the Third Circuit Task Force, 108 F.R.D. 237, 266 (1985).

11 The concern is not merely one of controlling major abuse; indeed, an
12 excessively high fee would not be allowed by the court in any event. The
13 apprehension is rather for those situations, short of actual abuse, in which
14 the client’s interests are somewhat encroached upon by the attorney’s
interests. This type of conflict is not only one that is difficult to perceive on
the face of a settlement proposal, but even the parties may not be aware that
it exists at the time of their discussions.

15 Id. “In other words, the negotiation of class counsel’s attorneys’ fees is not exempt from the
16 truism that there is no such thing as a free lunch.” Staton, 327 F.3d at 964.

17 In any event, even if one could state with certainty that there was no such trade off
18 here, that does not mean that the Court should blindly accept class counsel’s fee request. Nor
19 does the fact that any award less than \$1.5 million will inure to Wells Fargo mean that the
20 Court should award class counsel fees without consideration of the result obtained for the
21 class. To award class counsel the same fee regardless of the claim participation rate, that is,
22 regardless of the enthusiasm of the class for the benefits purportedly negotiated on their
23 behalf, would reduce the incentive in future cases for class counsel to create a settlement
24 which actually addresses the needs of the class. In this case, for example, the one percent
25 claim rate demonstrates that the brochure did not effectively educate the class members about
26 the importance of credit reports and monitoring their credit. If the Court takes that
27 ineffectiveness into account in setting the fee, in future litigation class case counsel will
28 design a settlement that actually reaches consumers, perhaps through a different mode of

1 communication. If the Court ignores the settlement’s effectiveness, as class counsel urges,
2 there is little incentive to design an effective settlement since they will receive the same fee
3 regardless. Common sense dictates that a reasonable fee in a class action settlement is a fee
4 that takes into account the actual results obtained.

5 The Court had considered whether to award class counsel its lodestar, and, in fact,
6 referred the lodestar calculation to a Magistrate Judge for a Report and Recommendation.
7 The Magistrate Judge did not conduct a detailed review of the reasonableness of class
8 counsel’s claimed lodestar, but even after a more general review recommended that the
9 \$969,000.00 lodestar be reduced by 10 percent. Even a 10 percent reduction, however, would
10 result in an unreasonable fee; indeed, it would reward counsel with a fee worth more than the
11 credit reports actually provided to the class. The Court notes further that many of the fees
12 were incurred when this class action involved far more class members. More than a year and
13 a half after this lawsuit was filed plaintiff voluntarily reduced the class period from two years
14 to two and one-half months. Accordingly, the Court finds that percentage-of-the fund method
15 is most appropriate here because it compensates class counsel based on the actual value
16 provided to the class rather than the amount of time spent on a case with little merit.

17 **CONCLUSION**

18 After carefully considering the entire record in this case, including class counsel’s
19 fee submission, the Court awards class counsel \$326,000.00 in attorney’s fees and \$33,091.68
20 in unreimbursed expenses.

21 **IT IS SO ORDERED.**

22
23 Dated: Jan. 18, 2007

24 
25 _____
26 CHARLES R. BREYER
27 UNITED STATES DISTRICT JUDGE
28