

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

ARKANSAS FEDERAL CREDIT UNION
and THE SUMMIT FEDERAL CREDIT
UNION, on Behalf of Themselves and All
Others Similarly Situated,

Plaintiffs,

v.

HUDSON'S BAY COMPANY, SAKS
INCORPORATED, and LORD & TAYLOR,
LLC,

Defendants.

Case No. 19-cv-4492 (PKC)

**DECLARATION OF RICHARD
W. SIMMONS OF ANALYTICS
CONSULTING LLC IN
SUPPORT OF PLAINTIFFS'
PROPOSED NOTICE
PROGRAM**

I, Richard W. Simmons, have personal knowledge of the facts and opinions set forth herein, and I believe them to be true and correct to the best of my knowledge. If called to do so, I would testify consistent with the sworn testimony set forth in this Declaration. Under penalty of perjury, I state as follows:

SCOPE OF ENGAGEMENT

1. I am the President of Analytics Consulting LLC ("Analytics")¹. My company is one of the leading providers of class and collective action notice and claims management programs in the nation. It is my understanding that Analytics' class action consulting practice, including the design and implementation of legal notice campaigns, is the oldest in the country. Through my work, I have personally overseen court-ordered class and collective notice programs in more than 1,000 matters.

¹ In October 2013, Analytics Consulting LLC acquired Analytics, Incorporated. I am the former President of Analytics, Incorporated. References to "Analytics" herein include the prior legal entity.

QUALIFICATIONS AND EXPERIENCE

2. Founded in 1970, Analytics has consulted for 49 years regarding the design and implementation of legal notice and claims management programs relating to class and collective action litigation involving antitrust, consumer fraud, employment, insurance, product liability, discrimination, and securities litigation.

3. Analytics' clients include corporations, law firms (both plaintiff and defense), and the federal government. Analytics' long term federal contracts include the following:

- a) Since 1998, Analytics has been under contract with the Federal Trade Commission ("FTC") to administer and provide expert advice regarding notice and claims processing in their settlements/redress programs;
- b) In 2012, Analytics was awarded a 10-year contract by the Department of Justice ("DOJ") to administer and provide expert advice regarding notice and claims processing to support their asset forfeiture/remission program;
- c) Since 2013, Analytics has been under contract with the Securities and Exchange Commission ("SEC") to administer and provide expert advice regarding notice and claims processing to support their investor settlements; and

4. I joined Analytics in 1990 and have 31 years of experience in designing and implementing class action settlements and notice campaigns. The notice programs I have managed range in size from fewer than 100 class members to more than 40 million, including some of the largest and most complex notice and claims administration programs in history.

5. I have testified in state and federal courts as to the design and implementation of notice programs, claims processes, and the impact attorney communications has had on claims rates. As has always been my practice, I personally performed or oversaw Analytics' consulting services in each of the cases indicated on my CV, which is attached hereto as **Exhibit 1**.

6. I have also presented to panels of judges and lawyers on issues regarding class notice, claims processing, and disbursement. In 2011, I was a panelist at the Federal Judicial Center's ("FJC") workshop/meeting regarding class action notice and settlement administration. In 2014, I was interviewed by the CFPB regarding notice and claims administration in class action litigation as part of their study on arbitration and consumer class litigation waivers. In 2016, I worked with the FTC to conduct research regarding the impact of alternate forms of notice on fund participation rates. In 2016, I was an invited participant to the Duke Law Conference on Class Action Settlements regarding electronic notification of class members. In 2017, I was the primary author of the Duke Law Conference on Class Action Settlement's guide to best practices regarding the evaluation of class action notice campaigns (including notice by electronic means). I am currently contributing to George Washington University Law School's forthcoming Class Action Best Practices Checklist, developing recommendations for judges to use when approving a class-action settlement to ensure efficient methods of notice and distribution, compliance with Rule 23, and overall fairness.

7. I have co-authored and presented CLE programs and whitepapers regarding class notice and class action claims administration. In 2016, I co-authored a paper titled "Crafting Digital Class Notices That Actually Provide Notice" (Law360.com, New York (March 10, 2016)). My speaking engagements regarding notice include: *Risks and Regulations: Best Practices that Protect Class Member Confidentiality*, HB Litigation Conference on Class Action Mastery in New York City (2018); *Recent Developments in Class Action Notice and Claims Administration*, Practising Law Institute in New York City (2017); *The Beginning and the End of Class Action Lawsuits*, Perrin Class Action Litigation Conference in Chicago (2017); *Class Action Administration: Data and Technology*, Harris Martin Target Data Breach Conference in San Diego

(2014); *Developments in Legal Notice*, accredited CLE Program, presented at Shook Hardy & Bacon, LLP in Kansas City (2013), Halunen & Associates in Minneapolis (2013), and Susman Godfrey in Dallas (2014); and *Class Actions 101: Best Practices and Potential Pitfalls in Providing Class Notice*, CLE Program, presented to the Kansas Bar Association (March 2009).

8. I have been recognized by courts for my opinion as to which method of notification is appropriate for a given case and whether a certain method of notice represents the best notice practicable under the circumstances. Some of the cases in which I testified are:

- a) Honorable Stephen J. Murphy III, *Doe I v. Deja vu Servs., Inc.*, No. 2:16-cv-10877, ECF No. 77 (E.D. Mich. June 19, 2017):

Also, the Plaintiffs certified that notice had been provided in accordance with the Court's preliminary approval order. The notices stated—in clear and easily understandable terms—the key information class members needed to make an informed decision: the nature of the action, the class claims, the definition of the class, the general outline of the settlement, how to elect for a cash payment, how to opt out of the class, how to object to the settlement, the right of class members to secure counsel, and the binding nature of the settlement on class members who do not to opt out.

* * *

In addition, the parties took additional steps to provide notice to class members, including through targeted advertisements on social media. The Court finds that the parties have provided the “best notice that is practicable under the circumstances,” and complied with the requirements of the Federal Rules of Civil Procedure, the Class Action Fairness Act of 2005, and due process.²

- b) Associate Justice Edward P. Leibensberger, *Geanacopoulos v. Philip Morris USA, Inc.*, No. 9884CV06002, Dkt. No. 230 (Mass. Super. Ct. Sept. 30, 2016):

The Court finds that the plan of Notice as described in paragraphs 12 through 20 of the Settlement Agreement, including the use of email, mail, publication and internet notice, constituted the best notice practicable under the circumstances and constituted due and sufficient notice to the Class.

² Unless otherwise indicated, citations are omitted and emphasis is added.

- c) Honorable Edward J. Davila, *In re: Google Referrer Header Privacy Litig.*, No. 5:10-cv-04809, ECF No. 85 (N.D. Cal. Mar. 31, 2015):

On the issue of appropriate notice, the court previously recognized the uniqueness of the class asserted in this case, since it could potentially cover most internet users in the United States. On that ground, the court approved the proposed notice plan involving four media channels: (1) internet-based notice using paid banner ads targeted at potential class members (in English and in Spanish on Spanish-language websites); (2) notice via “earned media” or, in other words, through articles in the press; (3) a website devoted solely to the settlement (in English and Spanish versions); and (4) a toll-free telephone number where class members can obtain additional information and request a class notice. In addition, the court approved the content and appearance of the class notice and related forms as consistent with Rule 23(c)(2)(B).

The court again finds that the notice plan and class notices are consistent with Rule 23, and that the plan has been fully and properly implemented by the parties and the class administrator.

- d) Honorable Terrence F. McVerry, *Kobylanski. v. Motorola Mobility, Inc.*, No. 2:13-cv-01181, ECF No. 43 (W.D. Pa. Oct. 9, 2014):

The Court finds that the distribution of the Notice to Settlement Class Members Re: Pendency of Class Action, as provided for in the Order Granting Preliminary Approval for the Settlement, constituted the best notice practicable under the circumstances to all Persons within the definition of the Class and fully met the requirements of due process under the United States Constitution.

- e) Honorable Thomas N. O’Neill, Jr., *In re: CertainTeed Fiber Cement Siding Litig.*, No. 2:11-md-02270, ECF No. 119 (E.D. Pa. Mar. 20, 2014):

Settlement class members were provided with notice of the settlement in the manner and form set forth in the settlement agreement. Notice was also provided to pertinent state and federal officials. The notice plan was reasonably calculated to give actual notice to settlement class members of their right to receive benefits from the settlement or to be excluded from the settlement or object to the settlement. The notice plan met the requirements of Rule 23 and due process.

- f) Honorable Robert W. Gettleman, *In re Aftermarket Filters Antitrust Litig.*, No. 1:08-cv-04883, ECF No. 1031 (N.D. Ill. Oct. 25, 2012):

Due and adequate notice of the Settlement was provided to the Class. . . . The manner of giving notice provided in this case fully satisfies the requirements of Federal Rule of Civil Procedure 23 and due process, constitutes the best notice practicable under the circumstances, and constituted due and sufficient notice to all persons entitled thereto. A full and fair opportunity was provided to the members of the Class to be heard regarding the Settlements.

- g) Honorable Marco A. Roldan, *Plubell v. Merck & Co., Inc.*, NO. 04CV235817-01, Final Judgment and Order (Mo. Cir. Ct. Mar. 15, 2013):

Under the circumstances, the notice of this Settlement provided to Class Members in accordance with the Notice Order was the best notice practicable of the proceedings and matters set forth therein, including the proposed Settlement, to all Persons entitled to such notice, and said notice fully satisfied the requirements due process and Missouri law.

- h) Honorable James P. Kleinberg, *Skold v. Intel Corp.*, No. 2005-CV-039231, Order on Motion for Approval (Cal. Super. Ct. Mar. 14, 2013):

The Court finds that Plaintiff's proposed Notice plan has a reasonable chance of reaching a substantial percentage of class members.

- i) Honorable J. Phil Gilbert, *Greenville IL v. Syngenta Crop Prot., Inc.*, No 3:10-cv-00188, ECF No. 325 (S.D. Ill. Oct. 23, 2012):

The Notice provided to the Class fully complied with Rule 23, was the best notice practicable, satisfied all constitutional due process requirements, and provides the Court with jurisdiction over the Class Members.

9. In addition to my class action consulting work, I taught a college course in antitrust economics, was a guest lecturer at the University of Minnesota Law School on issues of statistical and economic analysis, was a charter member of the American Academy of Economic and Financial Experts, and am a former referee for the Journal of Legal Economics (reviewing and critiquing peer-reviewed articles on the application of economic and statistical analysis to legal issues).

10. This Declaration describes the Notice Program³ and the Long-Form Notice and Summary Notice attached to the Settlement as Exhibits B & C, respectively (the "Notices"), proposed herein for the Parties' Settlement in the Litigation.

³ All capitalized terms not defined herein have the same meaning as those defined in the Settlement Agreement and Release (the "Settlement," "Settlement Agreement" or "SA").

NOTICE PROGRAM DETAIL

11. Rule 23 directs that the best notice practicable under the circumstances must include “individual notice to all members who can be identified through reasonable effort.” Fed. R. Civ. P. 23(c)(2)(B). The proposed notice effort here satisfies this mandate. The identities of Settlement Class Members are known with certainty and proposed address research and remailing protocols will meet or exceed those used in other class action settlements.

12. The Settlement Agreement defines the “Settlement Class” as:

All financial institutions in the United States (including its Territories and the District of Columbia) that issued Alerted-On Payment Cards in connection with the Data Security Incident at Defendants’ stores from May 1, 2017 to March 31, 2018.

Excluded from the Settlement Class are the Court, and any immediate family members of the Court; directors, officers, and employees of Defendants; parents, subsidiaries, and any entity in which Defendants have a controlling interest; and financial institutions who timely and validly request exclusion from the Settlement Class.

Development of List of Potential Settlement Class Members

13. Because of the nature of the Settlement Class, nearly all Settlement Class Members are known with certainty and address information will be available for nearly all of them. Data provided by Visa, MasterCard, and Discover will be consolidated into a single database of Settlement Class Members (the “Class List”). This list will be de-duplicated and consolidated, selecting the best possible address information available. If address information is unavailable for a given Settlement Class Member, third-party data⁴ will be manually researched to obtain a correct mailing address.

Direct Mailed Notice (the “Mail Notice”)

⁴ This third-party data includes data from the Federal Deposit Insurance Corporation (“FDIC”), the National Credit Union Administration (“NCUA”), and commercial sources such as Bloomberg or Dun & Bradstreet.

14. In preparation for mailing, mailing addresses will be updated using the National Change of Address (“NCOA”) database maintained by the United States Postal Service (“USPS”);⁵ certified via the Coding Accuracy Support System (“CASS”);⁶ and verified through Delivery Point Validation (“DPV”).⁷ This ensures that all appropriate steps have been taken to send Mail Notices to current and valid addresses. This address updating process is standard for the industry and is required by the USPS for mailings of this size.

15. Analytics will request that the USPS return (or otherwise notify Analytics) Mail Notices with undeliverable mailing addresses. Addresses for these Settlement Class Members will be researched using third-party data to identify potential updated mailing addresses, and a Mail Notice will be mailed to the Settlement Class Member if an updated address becomes available. Additionally, the Mail Notice will be mailed to all persons/entities who request one via the toll-free phone number maintained by Analytics.

16. Due to the comprehensive individual notice effort described above, moderate supplemental paid media targeting executives at Settlement Class Member financial institutions is proposed for this Settlement. In this matter, the initial published notice will appear in the ABA Banking Journal Digital Edition and/or other publications typically read by bank and credit union executives, which shall be selected, if at all, based upon a review of data provided regarding

⁵ The NCOA database contains records of all permanent change of address submissions received by the USPS for the last four years. The USPS makes this data available to mailing firms and lists submitted to it are automatically updated with any reported move based on a comparison with the person’s name and last known address.

⁶ The CASS is a certification system used by the USPS to ensure the quality of ZIP +4 coding systems.

⁷ Records that are ZIP +4 coded are then sent through Delivery Point Validation (“DPV”) to verify the address and identify Commercial Mail Receiving Agencies. DPV verifies the accuracy of addresses and reports exactly what is wrong with incorrect addresses.

Settlement Class Members, the availability of advertising space in alternative publications, and in consultation with the Parties. Other means of published notice may be utilized in consultation with the Parties.

Toll-Free Phone Support

17. Prior to the mailing of the Notice, we will coordinate with Class Counsel to implement a dedicated toll-free number as a resource for Settlement Class Members seeking information about the Settlement or assistance in submitting claims. By calling this number, Settlement Class Members will be able to listen to answers to Frequently Asked Questions (“FAQs”) or request to have a Notice mailed to them. Automated messages will be available to Settlement Class Members 24-hours a day, 7-days a week, with live call center representatives (agents) available during standard business hours.

Settlement Website

18. Prior to the mailing of the Notice, Analytics will coordinate with Class Counsel to develop an informational website (the “Settlement Website” or “Website”) to provide information to Settlement Class Members regarding the Litigation and Settlement. Guided by the intent to keep Settlement Class Members fully informed, the Website will conform to key e-commerce best practices:

- a) The top section of the home page, most prominent on lower resolution monitors, will include a summary message about the litigation along with a prominent orange button labeled “File Your Claim.” This button will be outside the color scheme of the page (black, gray, and white), making it especially prominent; and

- b) The home page content will be simplified and streamlined, so that specific prominent language and graphic images can direct Settlement Class Members to specific content areas:
 - i) **File Your Claim:** “If Eligible, Your Financial Institution will Receive a Cash Payment. This is the only way to get Compensation from the Settlement.”
 - ii) **Frequently Asked Questions:** “Learn How This Settlement Affects Your Financial Institution’s Rights and Get Answers to Questions About the Settlement”;
 - iii) **Important Deadlines:** “Important Settlement Deadlines That Will Affect Your Financial Institution’s Rights”; and
 - iv) **Case Documents:** “Detailed Information About the Case, Including the Settlement Agreement.”

19. Recognizing the increasingly mobile nature of advertising and communications, the Website will be mobile optimized, meaning it can be clearly read and used by Settlement Class Members visiting the Website via smart phone or tablet. By visiting the Website, Settlement Class Members are able to read and download key information about the litigation, including, without limitation:

- a) Settlement Class Members’ rights and options;
- b) important dates and deadlines;
- c) answers to FAQs;
- d) case documents;
- e) download and print Claim Forms; and,

- f) submit Claim Forms online.

Email Support

20. The Website will contain prominent links for Settlement Class Members to ask questions about the Litigation and Settlement. These links and the supporting email address will be operational prior to the commencement of the Notice Program.

21. Every email received by Analytics will be assigned a tracking number, and the sender received an immediate response confirming receipt along with a link to additional information regarding the Litigation. When Settlement Class Members' questions have been answered, they will be sent a follow up email asking if they have any additional questions and verifying that their questions were answered.

PERFORMANCE OF THE NOTICE PROGRAM

Reach

22. Because of the nature of the Settlement Class, and the fact that nearly all Settlement Class Members are known, we expect to successfully deliver the Notice to virtually all of the Settlement Class. Many courts have accepted and understood that a 75% or 80% reach is sufficient. In 2010, the FJC issued a "Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide" (the "FJC Guide"). This FJC Guide states that, "[t]he lynchpin in an objective determination of the adequacy of a proposed notice effort is whether all the notice efforts together will reach a high percentage of the class. It is reasonable to reach between 70–95%."⁸ In this matter, we expect to deliver notice at the high-end of this range.

⁸ *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide* at 3, FED. JUD. CTR. (2010), <https://www.fjc.gov/sites/default/files/2012/NotCheck.pdf>.

PLAIN LANGUAGE NOTICE DESIGN

23. The Notices themselves are designed to be “noticed,” reviewed, and by presenting the information in plain language, understood and acted upon by Settlement Class Members. The design of the Notices follows the principles embodied in the FJC’s illustrative “model” notices posted at www.fjc.gov. Many courts, and as previously cited, the FJC itself, have approved notices that we have written and designed in a similar fashion. The Notices contain substantial, albeit easy-to-read, summaries of key information about Settlement Class Members’ rights and options.

24. All Notices were designed to increase noticeability and comprehension. Because mailing recipients are accustomed to receiving junk mail that they may be inclined to discard unread, the Notice Program calls for steps to bring the mailed Notice to the attention of Settlement Class Members. This includes conspicuous messages on the outside of the mailing envelope regarding the importance and contents of the mailing (“Important Court Notice” on the front and “If your financial institution issued one or more payment cards identified as having been at risk as a result of the data security incident that Hudson’s Bay Company announced in 2018, it could get a payment from a class action settlement.” on the back of the envelope.). Once people “notice” the Notices, it is critical that they can understand them. As such, the Notices, as produced, are clearly worded with an emphasis on simple, plain language to encourage readership and comprehension.

25. The Notices feature a prominent headline (“**If your financial institution issued one or more payment cards identified as having been at risk as a result of the data security incident that Hudson’s Bay Company announced in 2018, it could get a payment from a class action settlement.**”) in bold text. This alerts recipients and readers that the Notice is an important document authorized by a court and that the content may affect them, thereby supplying reasons to read the Notice.

26. The body of the Notice provides substantial information to Settlement Class Members. It begins with a summary page providing a concise overview of the important information and a table highlighting key options available to the Settlement Class. A table of contents, categorized into logical sections, helps to organize the information, while a question and answer format makes it easy to find answers to common questions by breaking the information into simple headings.

CONCLUSION

27. In class action notice planning, execution, and analysis, we are guided by due process considerations under the United States Constitution, state and local rules and statutes, and further by case law pertaining to notice. This framework requires that: (1) notice reaches the class; (2) the notice that actually comes to the attention of the class is informative and easy to understand; (3) how likely are class members to respond given the means, or combination of means, of sending notice; and (4) class members rights and members' rights and options easy to act upon. All of these requirements will be met in this case:

- a) The Long-Form Notice is provided by mail to nearly all Settlement Class Members in this Litigation. This is supplemented with print media and research for Settlement Class Members with undeliverable addresses;
- b) The formats and means selected to provide notice are those most likely to have Settlement Class Members actively make an informed decision regarding their rights and options; and
- c) The Notices are designed to be "noticed" and are written in carefully organized, plain language.

28. The proposed Notice Program will inform Settlement Class Members of the existence of the Litigation and Settlement through direct mail and regional publications. These

notice efforts will be supplemented by a website, email support, and toll-free phone support. Given the availability of data regarding Settlement Class Members, this Notice Program provides comprehensive notice and support to Settlement Class Members.

29. The Notice Program will provide the best notice practicable under the circumstances of this case, conforms to all aspects of Fed. R. Civ. P. 23, and comports with the guidance for effective notice articulated in the Manual for Complex Litigation, Fourth.

30. In my opinion, the Notice Program, if implemented, will provide the best notice practicable under the circumstances of this Litigation.

31. This Notice Program is consistent with, or exceeds:

- a) historic best practices for class notification;
- b) FJC guidance regarding class notification; and
- c) Standards established by federal agencies with notification and distribution funds, such as the FTC, DOJ, and SEC.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on the 29th of April, 2021, in Chanhassen, MN.



Richard W. Simmons
President
Analytics Consulting LLC