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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO DIVISION**

RICHARD M. HORN, an individual	)	CASE NO. 3:12 cv-1718-GPC-BLM
and as Trustee of the Richard M. Horn)	
Trust Dated June 16, 2003, and MARIA	)	ORDER GRANTING
GUREVICH, fka Mary Bordetsky, an	)	PRELIMINARY APPROVAL TO
individual, on behalf of themselves, and	)	SETTLEMENT,
on behalf of the class of all others	)	PRELIMINARILY CERTIFYING
similarly situated,	)	SETTLEMENT CLASSES,
	)	APPOINTING CLASS COUNSEL
Plaintiffs,	)	AND REPRESENTATIVES, AND
	)	DIRECTING DISSEMINATION
v.	)	OF CLASS NOTICE
)	
BANK OF AMERICA, N.A., a national)	(ECF NOS. 56, 58)
banking association)	
)	
Defendant.)	
)	

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1 On behalf of themselves and others similarly situated, Plaintiffs Richard M.
2 Horn and Maria Gurevich have moved this Court for an order preliminary approving
3 a settlement in this case against Defendant Bank of America, N.A. (“BANA”). In
4 connection with their motion, Plaintiffs have also moved for preliminary certification
5 of two settlement classes with them as class representatives: one under Federal Rule
6 of Civil Procedure 23(b)(3) and the other under Federal Rule of Civil Procedure
7 23(b)(2). In addition, Michael R. Brown and David J. Vendler of Morris Polich &
8 Purdy LLP, along with Jeffrey D. Poindexter of the Law Offices of Jeffrey D.
9 Poindexter, have moved for preliminary appointment as counsel for the proposed
10 settlement classes.

11 The Parties have set forth the terms of their agreement in the Settlement
12 Agreement and Release, and the Confidential Supplemental Agreement to the
13 Settlement Agreement and Release (collectively, the “Settlement Agreement”). The
14 parties executed both agreements on December 13, 2013, and filed them with this
15 Court on the same day, with the Supplemental Agreement filed under seal because of
16 its confidential nature.

17 After reviewing the Settlement Agreement, record in this matter, and
18 applicable law to determine, among other things, whether to preliminarily certify the
19 proposed settlement classes and whether the Settlement Agreement is sufficiently
20 fair, reasonable, and adequate to warrant notice of the proposed settlement being sent
21 to the members of the proposed settlement classes, the Court orders as follows:

- 22 1. Settlement Agreement Incorporated By Reference. This Order
23 incorporates by reference the definitions in the Settlement Agreement. All
24 capitalized terms used herein shall have the same meanings as set forth in the
25 Settlement Agreement, unless otherwise set forth herein.

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1 2. Jurisdiction. The Court has personal jurisdiction over the parties and
2 subject-matter of this case under 28 U.S.C. §§ 1331 and 1367.

3 3. Preliminary Certification of Settlement Classes. The Court
4 preliminarily finds that the class action prerequisites of Federal Rule of Civil
5 Procedure 23(a), (b)(2), and (b)(3) have been satisfied. See *Staton v. Boeing Co.*,
6 327 F.3d 938, 952 (9th Cir. 2003) (“[I]n the context of a case in which the parties
7 reach a settlement agreement prior to class certification, courts must peruse the
8 proposed compromise to ratify both the propriety of the certification and the fairness
9 of the settlement.”).

10 As to Rule 23(a), the Court preliminarily finds that the settlement classes are
11 so numerous that joinder would be impractical, as each of the settlement classes are
12 estimated, based on BANA’s records, to be over 100,000 each.

13 The Court preliminarily finds that common questions of law and fact that can
14 be answered on a classwide basis exist, to wit, (1) whether payment of previously
15 deferred interest is “mortgage interest” under 26 U.S.C. § 6050H that should have
16 been included on the Forms 1098 that BANA sent to Class Members, and (2)
17 whether BANA was legally required to provide notice to borrowers when it stopped
18 reporting payments of deferred interest on Forms 1098.

19 The Court preliminarily finds the claims of the named plaintiffs, Horn and
20 Gurevich, are typical of the claims of the settlement classes because the named
21 plaintiffs were subjected to BANA’s Form 1098 reporting practices.

22 The Court preliminarily finds, based on their continued litigation of this case
23 to date, that the named plaintiffs will fairly and adequately protect the interests of the
24 class. The Court further preliminarily finds that the named plaintiffs have no
25 conflicts of interest with the settlement classes. The Court further preliminarily
26 finds, based on their briefing and other filings with the Court, that the named

1 plaintiffs' attorney are experienced and generally able to conduct this litigation and
2 that there is no evidence of collusion or other misconduct that would harm or
3 prejudice the settlement classes. Thus, finding the requirements of Rule 23(a)
4 satisfied, the Court turns to the requirements of Rule 23(b).

5 As to the proposed Monetary Settlement Class, the Court preliminarily finds
6 "the questions of law or fact common to class members predominate over any
7 questions affecting only individual members, and that a class action is superior to
8 other available methods for fairly and efficiently adjudicating the controversy." See
9 Fed. R. Civ. P. 23(b)(3).

10 As to predominance, the Court preliminarily finds the only significant
11 individualized question is the amount of deferred interest paid to BANA. The Court
12 preliminarily finds that, given the relative ease of answering this individualized
13 question be resort to, among other things, BANA's records, that the common
14 questions described above predominate over this individualized question.

15 As to superiority, the Court preliminarily finds that there is little incentive or
16 interest in class members individually controlling the prosecution of separate actions.
17 This is likely due in large part to most members of the settlement classes being
18 unaware of BANA's Form 1098 reporting practices. The Court further preliminarily
19 finds that, given the proposed claims process set forth by the parties, that there will
20 be little difficulty in managing a settlement class action. As such, the Court finds
21 that a class action is the superior method of resolving this case.

22 Accordingly, under Rule 23(b)(3), the Court preliminarily certifies the
23 Monetary Settlement Class, which is defined in the Settlement Agreement as
24 follows:

25 All persons who made Payments of Deferred Interest on their option
26 adjustable rate mortgages in Tax Year 2009 and for whom BANA was
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1 or would have been required by 26 U.S.C. § 6050H and 26 C.F.R.
2 § 1.6050H-1 to file a 2009 Form 1098.

3 As to the Injunctive Settlement Class, the Court preliminarily finds that
4 defendant has “acted or refused to act on grounds that apply generally to the class so
5 that final injunctive relief or corresponding declaratory relief is appropriate
6 respecting the class as a whole.” See Fed. R. Civ. P. 23(b)(2). More specifically, the
7 Court preliminarily finds that BANA’s Form 1098 reporting practices applied to all
8 members of the settlement classes generally, such that final injunctive relief
9 requiring BANA to change its Form 1098 reporting practices will affect the
10 Injunctive Settlement Class as a whole. Accordingly, under Rule 23(b)(2), the Court
11 preliminarily certifies the Injunctive Settlement Class, which is defined in the
12 Settlement Agreement as follows:

13 All persons who made Payments of Deferred Interest on their Option ARMs
14 in Tax Years 2010, 2011, or 2012 and for whom BANA was or would have
15 been required by 26 U.S.C. § 6050H and 26 C.F.R. § 1.6050H-1 to file a
16 Form 1098 for the same Tax Year in which the Payments of Deferred Interest
were made.

17 4. Preliminary Appointment of Class Counsel and Class Representatives.
18 After considering the factors set forth in Federal Rule of Civil Procedure 23(g), this
19 Court hereby preliminarily appoints Michael R. Brown and David J. Vendler of
20 Morris, Polich & Purdy LLP, along with Jeffrey D. Poindexter of the Law Offices of
21 Jeffrey D. Poindexter, as Class Counsel for the proposed Monetary Settlement Class
22 and the Injunctive Settlement Class. In addition, the Court hereby preliminarily
23 appoints Named Plaintiffs Richard M. Horn and Maria Gurevich as representatives
24 of those classes.

25 5. Preliminary Findings Concerning Proposed Settlement. The Court
26 preliminarily finds that the proposed Settlement should be approved as: (i) the result

1 of serious, extensive arm's-length and non-collusive negotiations; (ii) falling within a
2 range of reasonableness warranting final approval; (iii) having no obvious
3 deficiencies; (iv) not improperly granting preferential treatment to the Named
4 Plaintiffs, or segments of the settlement classes; and (v) warranting notice of the
5 proposed Settlement to Class Members and further consideration of the Settlement at
6 the Final Approval and Judgment Hearing described below.

7 6. Final Approval and Judgment Hearing. A hearing (the "Final Approval
8 and Judgment Hearing") will be held on **April 11, 2014, at 1:30 p.m.**, before the
9 Honorable Gonzalo P. Curiel, U.S. District Judge, in Courtroom 2D of the Edward J.
10 Schwartz United States Courthouse for the Southern District of California, 221 West
11 Broadway, San Diego, California 92101, to determine, among other things, (a)
12 whether the proposed settlement of the Action on the terms and conditions provided
13 in the Settlement Agreement is fair, reasonable, and adequate and should be finally
14 approved by the Court; (b) whether a Final Approval Order and Judgment in the
15 form of Exhibit E to the Settlement Agreement should be entered in this Action; and
16 (c) to consider Class Counsel's applications for attorneys' fees and for Named
17 Plaintiff Case Contribution Awards. Any papers in support of final approval of the
18 Settlement, Class Counsel's attorneys fee award, and the Named Plaintiffs Case
19 Contribution Award shall be filed with the Court on or before **March 14, 2013**.
20 Final Approval of the Settlement is not contingent on the Court's approval of the
21 attorney's fees award and the Named Plaintiffs Case Contribution Award.

22 7. Notice. Subject to the changes noted below, the Court approves the
23 form, substance, and requirements of the Class Notice, the Reporting Option
24 Election Form, and the Claim Form, attached to the Settlement Agreement as
25 Exhibits B, C, and D, respectively. The Court finds that the procedures established
26 for mailing and distributing the Class Notice, the Claim Form, and the Summary
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1 Notice in Sections 4.03 and 4.03 of the Settlement Agreement (a) constitute the best
2 notice to Class members practicable under the circumstances; (b) are reasonably
3 calculated, under the circumstances, to describe the terms and effect of the
4 Settlement Agreement, to apprise Monetary Settlement Class Members of their right
5 to opt-out of the Monetary Settlement Class, and to apprise all Class Members of
6 their right to object to the proposed Settlement; (c) are reasonable and constitute due,
7 adequate, and sufficient notice to all persons entitled to receive such notice; and (d)
8 satisfy all applicable requirements of the Federal Rules of Civil Procedure, including
9 Rules 23(c) and (d); the United States Constitution, including the Due Process
10 Clause; the Rules of this Court; and any other applicable law.

11 The Court makes the following **changes to the Class Notice**:

12 a. The following language appears at the end of page 2 and the
13 beginning of page 3 of the Class Notice: **“Your rights will be**
14 **affected by this Action and this Settlement whether you act or do**
15 **not act. Your legal rights and options—and the deadlines to**
16 **exercise them—are explained in this Notice. Please read this**
17 **Notice carefully.”** The parties are directed to move this language to
18 page 1 of the Class Notice, immediately following the sentence
19 stating, **“This is not a solicitation from a lawyer.”**

20 b. The parties are directed to correct the Clerk of Court’s mailing
21 address on page 12 of the Class Notice and anywhere else that the
22 address is provided. The Clerk of Court’s current mailing address is:
23 333 West Broadway, Suite 420, San Diego, CA 92101.

24 8. Retention of Claims Administrator and Manner of Notice. BANA is
25 hereby authorized to retain GCG, Inc. as the “Claims Administrator” to supervise
26 and administer the Class Notice Mailing, to receive opt-out requests, and to process
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1 Claims Forms. The Claims Administrator shall mail the Class Notice and the Claim
2 Form as set forth in Section 4.02 of the Settlement Agreement. The Claims
3 Administrator also shall file with this Court a sworn statement stating that it has
4 complied with the provisions of this Order pertaining to the Class Notice Mailing.

5 9. Submission of Claim Forms. To participate in the recovery for Eligible
6 Monetary Settlement Class Members provided in Section 2.01 of the Settlement
7 Agreement, a Monetary Settlement Class Member must submit a valid Claim Form,
8 as defined in Section 4.07 of the Settlement Agreement, that was either postmarked
9 or received by the Claims Administrator by the Claim Form Deadline. A Monetary
10 Settlement Class Member who does not submit a Claim Form or a valid and timely
11 Claim Form shall nonetheless be bound by the Court's Final Approval Order and
12 Judgment.

13 10. Opt-Outs from the Monetary Settlement Class. As described in the
14 Class Notice, a Monetary Settlement Class Member's opt-out request must, for it to
15 be timely, be postmarked or received by the Claims Administrator by the Opt-out
16 Deadline. Furthermore, to be valid, the opt-out request must comply with the
17 requirements of Section 4.04 of the Settlement Agreement. Any Monetary
18 Settlement Class Member who opts out of the Monetary Settlement Class shall not
19 be entitled to receive the payment owing to Eligible Monetary Settlement Class
20 Members under Section 2.01 of the Settlement Agreement. In addition, any
21 Monetary Settlement Class Member who does not submit a valid and timely request
22 to opt out of the Monetary Settlement Class shall nonetheless be bound by all of the
23 terms and conditions of the Settlement Agreement, and by all proceedings, rulings,
24 orders, and judgments in this case.

25 11. Objections to Settlement. Any Class Member who wishes to object to
26 the fairness, reasonableness, or adequacy of the settlement, to any term of the

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1 Settlement Agreement, the attorney fees requested by Class Counsel, and/or the
2 service awards requested by the Named Plaintiffs may file an objection. To be
3 considered, objections must comply with the requirements of Section 4.06 of the
4 Settlement Agreement. Any Class Member who files an objection that does not
5 comply with Section 4.06 of the Settlement Agreement shall be deemed to have
6 waived, and shall be foreclosed from raising, any objection to the Settlement.

7 12. Appearance at the Final Approval and Judgment Hearing. Any objector
8 who files and serves a timely, written objection in accordance with the instructions
9 above and herein, may also appear at the Final Approval and Judgment Hearing,
10 either in person or through counsel retained at the objector's expense so long as the
11 objector complies with the notice of intention to appear requirements set forth in
12 Section 4.06 of the Settlement Agreement. Any objector who does not comply with
13 Section 4.06 of the Settlement Agreement shall not be permitted to appear and be
14 heard at the Final Approval and Judgment Hearing.

15 13. Settlement Administration Costs. All reasonable settlement
16 administrative costs shall be paid by BANA, as set forth in Section 4.09 of the
17 Settlement Agreement, regardless of whether the Settlement is finally approved by
18 the Court or becomes effective.

19 14. Bar on Litigating Settled Claims. Pending the Final Approval Order
20 and Judgment, the Releasing Parties shall not institute, prosecute, participate in, or
21 assist in the institution, prosecution, or assertion of, any Released Claims against the
22 Released Parties.

23 15. Termination of Settlement. This Order shall become null and void, and
24 shall be without prejudice to the rights of the Parties, all of whom shall be restored to
25 their respective positions existing immediately before this Court entered this Order,
26 if the Settlement is terminated in accordance with the Settlement Agreement.

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1 16. Use of Order. This Order shall not be construed or used as an
2 admission, concession, or presumption by or against the Released Parties of any
3 fault, wrongdoing, breach, or liability or as a waiver of any arguments, defenses, or
4 claims he, she, or it may have if the Settlement Agreement is terminated.


5 17. Stay. All proceedings in this case are stayed until further order of the
6 Court, except as may be necessary to implement the Settlement or comply with the
7 terms of the Settlement Agreement and this Order. This Court retains exclusive
8 jurisdiction over this case to consider all further matters arising out of or connected
9 with the Settlement.

10 18. Continuance of the Final Approval and Judgment Hearing. The Court
11 reserves the right to continue or adjourn the Final Approval and Judgment Hearing
12 from time to time without further notice to Class Members. The Court may approve
13 the Settlement, with such modifications as may be agreed to by the Parties, if
14 appropriate, without further notice to Class Members.

15 19. Preliminary Approval Hearing Vacated. The hearing on Plaintiffs’
16 Motion for Preliminary Approval of Class Action Settlement, currently set for
17 January 10, 2014, is **VACATED**.

18 **IT IS SO ORDERED.**

19 DATED: January 7, 2014


HON. GONZALO P. CURIEL
United States District Judge

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