UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MICHELLE F. HARTLEY, STEVEN TOMLINSON, individually and on behalf of all others similarly situated, and MARIA DEGENNERO,

Plaintiffs,

vs.

WELLS FARGO & COMPANY; WACHOVIA SECURITIES FINANCIAL HOLDINGS, LLC; and WELLS FARGO ADVISORS, LLC, as successor in interest to Wachovia Securities, LLC,

Defendants.

Civil Action No. 14-cv-5169

MEMORANDUM OF LAW IN SUPPORT OF JOINT MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATE CASES

CASES - OTHER

STATUTES - OTHER

FEDERAL RULES

TABLE OF AUTHORITIES
(continued)

Page(s)

FEDERAL REGULATIONS

OTHER AUTHORITIES

Plaintiffs Michelle F. Hartley and Steven Tomlinson (collectively, "Named Plaintiffs") and Defendant Wells Fargo Advisors, LLC ("Wells Fargo") respectfully request that the Court grant preliminary approval for their proposed class action settlement in this matter. The proposed settlement was reached through arms-length bargaining and after a mediation session with a neutral mediator who specializes in these types of cases. The proposed settlement class consists of current and former Financial Advisors (herein "FAs") in New York during the pertinent limitations period, provides for a Gross Settlement Amount of $3,900,000, will result in the termination of this litigation, and will resolve Named Plaintiffs' claims in the lawsuit alleging that Wells Fargo (a) subjected its New York Financial Advisors to wage deductions in violation of New York Labor Law ("NYLL") section 193; and (b) misclassified them as exempt employees and therefore, *inter alia*, failed to pay them minimum wages and/or premium overtime wages in violation of the NYLL and the federal Fair Labor Standards Act ("FLSA"). The settlement will result in the dismissal of Named Plaintiffs' FLSA claims for putative class members outside of New York *without prejudice*. In other words, the settlement for which preliminary approval is sought herein is for current and former employees who worked for Wells Fargo in New York State only.

At this stage, the Settling Parties are seeking only preliminary approval, *i.e.*, approval to send the agreed upon notice to the proposed class and then seek final approval later and with the benefit of the responses to these notices. As set forth in greater detail below, this settlement satisfies all of the pertinent criteria for preliminary approval under *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974).

For these reasons, Plaintiffs and Wells Fargo (collectively, the "Settling Parties") respectfully and jointly request that the Court: (1) grant preliminary approval of the Stipulation

re: Settlement of Class Action ("Stipulation"), which the Settling Parties are submitting concurrently; (2) provisionally certify the proposed settlement class under Federal Rule of Civil Procedure 23 in connection with the settlement process; (3) appoint The Law Office of Christopher Q. Davis, PLLC, as Class Counsel; (4) appoint Rust Consulting, Inc. as Claims Administrator for the settlement; (5) approve the [Proposed] Notice to Class Members attached as Exhibit 2 to the Stipulation; and (6) approve the Settling Parties' proposed schedule for final settlement approval.

All defined terms contained herein shall have the same meanings as set forth in the Stipulation executed by the Settling Parties and filed with this Court.

FACTUAL AND PROCEDURAL BACKGROUND

I. Procedural History

On September 3, 2014, Named Plaintiff Michelle Hartley, on behalf of herself and others similarly situated to her, and Maria DeGennero filed the initial Class Action Complaint by and through Class Counsel, The Law Office of Christopher Q. Davis, PLLC, alleging that Wells Fargo purportedly (1) violated NYLL section 193 by adjusting Financial Advisor compensation for supplemental staff support and trading errors and voluntary repayments; and (2) misclassified its Financial Advisors as "exempt" employees, *i.e.*, employees who are exempt under New York and/or federal law from minimum wage compensation, overtime pay, and other wage and hour requirements. (ECF No. 1.)

On October 6, 2014, Wells Fargo filed a pre-motion conference letter with the Court seeking leave to file a Rule 12(b)(6) motion for dismissal of the Named Plaintiffs' NYLL section 193 and FLSA claims. (ECF No. 13.) Wells Fargo argued that Plaintiffs' state law deduction claims were barred as a matter of law under existing precedent, including a case involving allegedly similar claims against another brokerage firm. Wells Fargo also argued that Named Plaintiff's national FLSA claims should not proceed in light of *Tsyn v. Wells Fargo Advisors*, LLC, No. 14-2552, United States District Court for the Northern District of California. (Within a month of the filing of this case, Wells Fargo also filed a notice of pending case in the *Tsyn* action notifying the Court and counsel in that case of the pendency of this matter. As this Court

is aware, on June 2, 2015, the Settling Parties have also notified the *Tsyn* Court and counsel about this settlement had been tentatively reached and would be filed with this Court.)

On October 27, 2014, Named Plaintiffs filed their Amended Class Action Complaint, which added Steven Tomlinson as a Named Plaintiff and Class Representative and revised the Named Plaintiffs' NYLL section 193 claims. (ECF No. 15.)

On November 10, 2014, Wells Fargo renewed its pre-motion conference letter with the Court, again seeking leave to file a Rule 12(b)(6) motion for dismissal of the Named Plaintiffs' claims. (ECF No. 19.) The Court subsequently waived the pre-motion conference requirement on November 24, 2014 and granted Wells Fargo leave to file its motion to dismiss.

II. Overview of Investigation and Discovery

Before and during the formal litigation of this action, Class Counsel conducted a thorough investigation into the merits of the potential claims and defenses. (Decl. of Christopher Q. Davis in Supp. of Joint Mot. for Prelim. Approval of Class Settlement ("Davis Decl.") ¶¶ 4–39.) Class Counsel engaged in extensive discussions with the Named Plaintiffs and gathered documents and other information from the Named Plaintiffs concerning their employment with Wells Fargo. (Davis Decl. ¶¶ 5–7, 12–13, 20–21, 26.) Class Counsel retained the services of outside attorneys, including a tax specialist and other third parties, to assess Plaintiffs' litigation risks in light of Wells Fargo's complicated Compensation Plan for Financial Advisors and, in particular, how it impacted the relevant exemptions and possible class action defenses. (Davis Decl. ¶¶ 22–23.) Class Counsel also produced documents to Wells Fargo and communicated requests for documents and data from Wells Fargo. (Davis Decl. ¶¶ 20–21, 26.) Class Counsel reviewed and analyzed large amounts of time and payroll data provided electronically by Wells Fargo and analyzed thousands of pages of policy and other documents received from Wells Fargo at Class Counsel's request. (Davis Decl. ¶ 26.) Finally, Class Counsel performed

individual damages calculations for a class exceeding one thousand class members. (Davis Decl. ¶¶ 27–28.)

III. Settlement Negotiations

Following the Court's order granting Wells Fargo leave to file a motion to dismiss, the parties, through counsel experienced in these types of cases, agreed to mediate the Litigation. (Davis Decl. ¶¶24–25.) Prior to the mediation, the Settling Parties engaged in an informal exchange of significant information, including provision by Wells Fargo of the number of potential class members, their total pay, the nature and extent of the adjustments at issue, and the amount of applicable months worked by putative class members during the alleged class period. (Davis Decl. ¶¶ 20, 26.) The Settling Parties also exchanged detailed mediation statements setting forth their legal positions. (Davis Decl. ¶¶ 29–30.) On May 14, 2015, the Settling Parties engaged in an extensive, arms-length negotiation facilitated by a professional mediator who specializes in wage and hour law, David Rotman, Esq. (Davis Decl. ¶¶ 24, 31; Decl. of Mediator David Rotman in Supp. of Joint Mot. for Prelim. Approval of Class Settlement ¶¶ 1–6.) At the conclusion of the full-day mediation session, the parties reached agreement on the terms now formally reflected in the Stipulation. (Davis Decl. ¶¶ 33–34.)

In Class Counsel's estimation, the settlement represents a meaningful percentage of the recovery that the class members would have achieved had they prevailed on all of their claims, survived an appeal, and sought to enforce and collect upon a judgment. (Davis Decl. ¶ 35.) The Named Plaintiffs and the Defendants have all agreed upon the written terms of the Stipulation and have executed the final Stipulation. (Davis Decl. ¶¶ 33–35.) At all times during the settlement negotiation process, negotiations were conducted on an arm's-length basis. (Davis Decl. ¶ 34.)

SUMMARY OF THE SETTLEMENT TERMS

I. The Settlement Amount

The Settling Parties agreed to settle this case for a Gross Settlement Amount of $3,900,000.00. (Stipulation ¶ 1.15.) The Gross Settlement Amount covers the Maximum Settlement Portion for Payments to Participating Claimants, enhancement payments to Class Representatives, administration fees and costs, and Class Counsel's fees and costs. (*Id.*) The Maximum Settlement Portion for Payments to Participating Claimants will be $2,460,000.00. (Stipulation ¶¶ 1.15, 2.2.1.)

In order to receive a Settlement Sum payment from the Maximum Settlement Portion for Payment to Participating Claimants, a Class Member must become a Participating Claimant by submitting a Qualifying Settlement Claim Certification Form before the Notice Response Deadline. (Stipulation ¶¶ 1.26, 1.31, 2.1.3.) Those portions of the Maximum Settlement Portion for Payments to Participating Claimants that are not claimed shall remain the property of or revert to Wells Fargo. (Stipulation ¶ 2.1.3.)

II. Releases

The Stipulation provides that all Class Members who submit a Qualifying Settlement Claim Certification Form release Wells Fargo from liability from all Released Claims,[1] including

[1] Specifically, the Released Claims are defined as follows: "'Released Claims' shall collectively mean any and all claims, including without limitation Unknown Claims, demands, rights, liabilities and causes of action of every nature and description whatsoever, including without limitation statutory, constitutional, contractual or common law claims, whether known or unknown, whether or not concealed or hidden, whether arising under federal or state or other law, against the Wells Fargo Releasees, or any of them, accruing prior to the Approval Date and arising out of the Class Member's employment as a Financial Advisor by any Wells Fargo Releasee, for (1) failure to pay any types of wages, including without limitation minimum hourly, minimum salary, regular, straight-time, over-time, premium, or "gap time" wages, and any and all associated remedies, including without limitation unpaid wages, damages, liquidated damages, punitive damages, penalties, interest, attorney fees, litigation costs, restitution,

without limitation Unknown Claims, as defined in the Stipulation and including covered claims under both the NYLL and the FLSA. (Stipulation ¶¶ 1.33, 1.45, 2.7.1.) The Stipulation provides that all Class Members who do not opt out of the action will release all covered claims under state law, regardless of whether they become a Participating Claimant, but those Class Members who neither opt out nor submit a Qualifying Settlement Claim Certification Form will not release FLSA claims for unpaid wages. (Stipulation ¶ 1.33.)

In response to a request from counsel handling a separate matter asserting claims about training costs for Financial Advisors, Wells Fargo has agreed to the following provision concerning the Released Claims: "The Settling Parties acknowledge *Williams v. Wells Fargo Advisors*, Case 1:14-cv-01981, United States District Court for the Northern District of Illinois. The Settling Parties agree that the term "Released Claims" as defined above in this Stipulation does not include (a) claims challenging the lawfulness of any agreement that would allow Wells Fargo to recover training costs from Financial Advisors or Financial Advisor Trainees or New Financial Advisors following an already completed or future departure; and/or (b) claims or defenses under the FLSA alleging failure to pay minimum wages to Financial Advisors or Financial Advisor Trainees or New Financial Advisors specifically because of successful past or future efforts by WFA to recover training costs; and/or (c) claims for overtime wages during the

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equitable relief, and any other remedies, under the NYLL, the FLSA, the Portal to Portal Act, or any other applicable state, federal, or local law; (2) deductions, withholdings, or downward adjustments from wages and/or loan recovery, and any and all associated remedies, including without limitation unpaid wages, damages, liquidated damages, punitive damages, penalties, interest, attorney fees, litigation costs, restitution, equitable relief, and any other remedies, under New York, Virginia, Missouri, or any other applicable state, federal, or local law; and (3) to the extent not covered by the above, any and all claims pled in or reasonably arising out of the Litigation." (Stipulation ¶ 1.33.)

Although all other Released Claims are released by all Settlement Class Members, the Settling Parties agree that FLSA claims for unpaid wages are released with respect to Participating Claimants only.

period of the FA training in which Wells Fargo classified trainees as non-exempt from the FLSA, i.e., paid on an hourly basis." (Stipulation ¶ 2.11.23).

III. Eligible Employees

Under the terms of the Stipulation and subject to Court approval, Named Plaintiffs and all persons who were employed by Wells Fargo, or its predecessor Wachovia Securities as a Financial Advisor in New York in Wells Fargo's Private Client Group from May 11, 2009 through the date on which the Court enters the preliminary approval order will receive a Notice to Class Members Re: Pendency of a Class Action and Notice of Hearing on Proposed Settlement and Settlement Claim Certification Form. (Stipulation ¶¶ 1.2, 1.4, 1.5.) Class Members who submit a Qualifying Settlement Claim Certification Form (*i.e.*, a Participating Claimant) will receive payments from the settlement. (Stipulation ¶¶ 1.26, 2.1.1.)

IV. Allocation Formula

A Participating Claimant's Settlement Sum shall be the product of the Settlement Sum Variable multiplied by the number of Qualifying Work Months worked by him or her. (Stipulation ¶ 1.38.) A Qualifying Work Month is any full calendar month in which a Class Member was actively employed by Wells Fargo or its predecessor Wachovia Securities in New York as a Private Client Group Financial Advisor during the Class Period of May 9, 2011, through the date of the preliminary approval order. (Stipulation ¶¶ 1.5, 1.10, 1.32.) The Settlement Sum Variable shall be the quotient of the Maximum Settlement Portion for Payments to Participating Claimants (*i.e.*, $2,460,000) divided by the total number of Qualifying Work Months worked by all Class Members. (Stipulation ¶ 1.39.) For purposes of illustration, if the total number of Qualifying Work months is 58,200, then the Settlement Sum Variable would be approximately $42.29. (*Id.*) The Settling Parties have not yet determined the precise number of

Qualifying Work Months because the Class Period is not closed until preliminary approval, but they have provided estimates in the Stipulation consistent with the above approximation.

Settlement Sums paid to Participating Claimants will be allocated twenty-five percent (25%) as wage income subject to legally required withholdings, and seventy-five percent (75%) as a payment in settlement of claims for liquidated damages, interest, and/or penalties not subject to withholdings. (Stipulation ¶ 2.1.1.)

V. Attorneys' Fees and Costs

Consistent with the Stipulation and without objection from Wells Fargo, Class Counsel will apply for reimbursement from the Gross Settlement Amount for (a) litigation costs and expenses in the amount of $40,000; and for (b) one-third ($1,300,000) of the Gross Settlement Amount to compensate them for attorneys' fees. (Stipulation ¶ 2.8.1.) The Court need not rule on fees and costs now, however. Pursuant to Rules 23(h) and 54(d)(2) of the Federal Rules of Civil Procedure, Class Counsel will file a motion for approval of attorneys' fees and reimbursement of expenses prior hearing on the parties' motion for final approval of the settlement, and prior to the deadline to respond to the notice should the Court so direct.

VI. Enhancement Payments

In addition to their individualized Settlement Sums, the Class Representatives (Michelle Hartley and Steven Tomlinson) will apply for enhancement payments in recognition of the services they rendered on behalf of the Class. The Class Representatives will apply to receive no more than $20,000 each as enhancement payments. (Stipulation ¶¶ 2.8.2, 2.8.4.) The Class Representatives have served the Class by retaining Class Counsel, assisting with the preparation of the complaint, producing documents in support of their claims, assisting with the preparation of the mediation briefing and the mediation session, and shouldering the risks incurred as Named

Plaintiffs. (Davis Decl. ¶¶ 4–6, 12–13, 30–32.) The Named Plaintiffs will be required to execute general releases to obtain these payments.

Enhancement payments of this type are commonly awarded in complex wage and hour litigation. The Court need not rule on the proposed enhancement payments now. Named Plaintiffs will move for Court approval of the enhancement payments simultaneously with the parties' motion for final approval of the settlement.

CLASS ACTION SETTLEMENT PROCEDURE

The well-defined class action settlement procedure includes three distinct steps:

1. Preliminary approval of the proposed settlement after submission to the Court of a written motion for preliminary approval;

2. Dissemination of mailed and/or published notice of settlement to all affected class members; and

3. A final settlement approval hearing at which class members may be heard regarding the settlement, and at which argument concerning the fairness, adequacy, and reasonableness of the settlement may be presented.

See Fed. R. Civ. P. 23(e); *see also* William B. Rubenstein *et al.*, *Newberg on Class Actions* ("*Newberg*"), § 13:10 (5th Ed. 2014). This process safeguards class members' procedural due process rights and enables the Court to fulfill its role as the guardian of class interests.

With this motion, the Settling Parties jointly and respectfully request that the Court take the first step: granting preliminary approval of the Stipulation, approving Class Notice, and authorizing the Settling Parties to send Notice to the Class.

ARGUMENT

I. Preliminary Approval of the Stipulation is Appropriate

A. Preliminary Approval Is Warranted So Long As There Is "Probable Cause" to Substantiate Settlement to the Class.

The law favors compromise and settlement of class action suits. *See Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (noting the "strong judicial policy in

favor of settlements, particularly in the class action context") (internal quotation marks omitted); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004) ("[T]here is an overriding public interest in settling class action litigation, and it should therefore be encouraged."); *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982) ("[V]oluntary conciliation and settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation . . . ."); *Speed Shore Corp. v. Denda*, 605 F.2d 469, 473 (9th Cir. 1979) ("It is well recognized that settlement agreements are judicially favored as a matter of sound public policy. Settlement agreements conserve judicial time and limit expensive litigation.").

The approval of a proposed class action settlement is a matter of discretion for the trial court. *See Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1995). In exercising this discretion, courts should give "proper deference to the private consensual decision of the parties." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998).

Preliminary approval, which is what the Settling Parties seek here, "requires only an 'initial evaluation' of the fairness of the proposed settlement on the basis of written submissions and an informal presentation by the settling parties." *Puglisi v. TD Bank, N.A.*, No. 13-cv-00637 (LDW)(GRB), 2015 WL 574280, at *1 (E.D.N.Y. Feb. 9, 2015); *see also Lizondro-Garcia v. Kefi LLC*, 300 F.R.D. 169, 179 (S.D.N.Y. 2014) (same). To grant preliminary approval, a court need only find that there is "'probable cause' to submit the [settlement] to class members and hold a full-scale hearing as to its fairness." *In re Traffic Exec. Ass'n E. R.Rs.*, 627 F.2d 631, 634 (2d Cir. 1980).

"A court determines a settlement's fairness by looking at both the settlement's terms and the negotiating process leading to settlement." *Wal-Mart Stores*, 396 F.3d at 116. "A

presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Id.* (internal quotation marks omitted); *see also Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1148 (8th Cir. 1999) ("[A] strong public policy favors [settlement] agreements, and courts should approach them with a presumption in their favor."); *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1354 (11th Cir. 1982) (recognizing courts rely on adversarial nature of litigated wage and hour case resulting in settlement as indicia of fairness); *Marcus v. Kan. Dep't of Revenue*, 209 F. Supp. 2d 1179, 1182 (D. Kan. 2002) ("When a settlement is reached by experienced counsel after negotiations in an adversarial setting, there is an initial presumption that the settlement is fair and reasonable.").

If the settlement was achieved through experienced counsel's arm's-length negotiations, "[a]bsent fraud or collusion, the court should be hesitant to substitute its judgment for that of the parties who negotiated the settlement." *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, Nos. 05-cv-10240 *et al.*, 2007 WL 2230177, at *4 (S.D.N.Y. July 27, 2007); *see also In re Top Tankers, Inc. Sec. Litig.*, No. 06-cv-13761(CM), 2008 WL 2944620, at *3 (S.D.N.Y. July 31, 2008) (same); *In re BankAmerica Corp. Sec. Litig.*, 210 F.R.D. 694, 700 (E.D. Mo. 2002) ("In evaluating the settlement, the Court should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation; a presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery.") (internal quotation marks omitted).

Preliminary approval is the first step in the settlement process. It simply allows notice to issue to the class and for class members to object to or opt out of the settlement. After the notice

period, the Court will be able to evaluate the settlement with the benefit of the class members' input.

B. The Settlement Here Is Fair, Reasonable, and Adequate

In evaluating a class action settlement, courts in the Second Circuit generally consider the nine factors set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). *See, e.g.*, *Hernandez v. Immortal Rise, Inc.*, 306 F.R.D. 91, 99 (E.D.N.Y. 2015) (holding a court "evaluates whether the terms of the settlement are fair, adequate, and reasonable according to the factors set forth in *City of Detroit v. Grinnell Corp.*"). Although the court's task on a motion for preliminary approval is merely to perform an "initial evaluation," *Puglisi*, 2015 WL 574280, at *1, to determine whether the settlement falls within the range of possible final approval, or "the range of reasonableness," *Parker v. Time Warner Entm't*, 239 F.R.D. 318, 337 (E.D.N.Y. 2007), it is useful for the Court to consider the criteria on which it will ultimately judge the settlement.

The *Grinnell* factors are (1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement amount in light of the best possible recovery; and (9) the range of reasonableness of the settlement amount to a possible recovery in light of all the attendant risks of litigation. 495 F.2d at 463. All of the relevant *Grinnell* factors counsel in favor of preliminary approval of the Stipulation.

1. Litigation Through Trial Would Be Complex, Costly, and Long (*Grinnell* Factor 1)

By reaching a favorable settlement before class certification proceedings, dispositive motions, or trial, Named Plaintiffs seek to avoid significant expense and delay, and instead ensure recovery for the Class. "Most class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000), *aff'd sub. nom. D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001). This case is certainly no exception.

Although the parties have already undertaken time and expense investigating and litigating this matter, further litigation without settlement would necessarily result in substantial additional expense and delay. Wells Fargo's motion for partial dismissal would be briefed and litigated. Plaintiffs would move for class and collective certification, which Wells Fargo would vigorously oppose. A full discovery schedule would be required, including the potential for significant expensive expert testimony. And, to the extent certification was granted and dispositive motions denied, preparing and putting on evidence on the pertinent factual and legal issues would consume tremendous amounts of time and resources for both sides, as well as requiring substantial judicial resources to adjudicate the parties' disputes. A further trial of the damages issues, even if permitted on a representative basis (again, a disputed point), would be costly and further delay closure. In addition, even after judgment, there would the potential for appeal, thereby extending the duration and expense of the litigation. This settlement, on the other hand, makes monetary relief available to Class Members in a prompt and efficient manner.

2. The Reaction of the Class (*Grinnell* Factor 2)

Although notice of the settlement and its details has not yet issued to the Class, the Class Representatives support the settlement. Although the Court should more fully analyze this factor

after notice issues and Class Members are given the opportunity to object or opt out, preliminary approval will permit the circulation of the detailed notice and facilitate the final approval analysis.

3. Plaintiffs and Their Counsel Have Sufficient Information to Resolve the Case Responsibly (*Grinnell* Factor 3)

Although litigating this case through trial would require significantly more hours of discovery for both sides, the Named Plaintiffs and their counsel had sufficient information to negotiated the instant settlement. "To approve a proposed settlement, the Court need not find that the parties have engaged in extensive discovery." *In re Austrian*, 80 F. Supp. 2d at 176. The proper determination is "'whether counsel had an adequate appreciation of the merits of the case before negotiating.'" *Sakiko Fujiwara v. Sushi Yasuda, Ltd.*, 58 F. Supp. 3d 424, 433 (S.D.N.Y. 2014) (quoting *Warfarin*, 391 F.3d at 537); *see also In re Austrian*, 80 F. Supp. 2d at 176 ("[I]t is enough for the parties to have engaged in sufficient investigation of the facts to enable the Court to 'intelligibly make . . . an appraisal' of the Settlement.").

The parties' investigation and discovery here meets this standard. Class Counsel has conducted extensive investigation of the claims in the lawsuit, including, but not limited to, discussions with the Named Plaintiffs, review of thousands of pages of documents, including time and payroll data produced by Wells Fargo at Plaintiffs' specific requests, analysis and preparation of a comprehensive damages analysis, exchange of mediation briefs with Wells Fargo, extensive settlement discussions with Wells Fargo, and a full-day mediation session with an experienced wage-and-hour mediator. (Davis Decl. ¶¶ 3–39.)

4. Plaintiffs Would Face Real Risks If the Case Proceeded (*Grinnell* Factors 4 and 5)

Although Named Plaintiffs and their counsel continue to believe that their claims have been asserted in good faith and have merit, Named Plaintiffs and their counsel also recognize

that Wells Fargo has mounted considerable defenses to liability and damages. In weighing the risks of establishing liability and damages, the court "'must' weigh the likelihood of success by the plaintiff class against the relief offered by the settlement." *In re Austrian*, 80 F. Supp. 2d at 177 (internal quotation marks omitted).

Plaintiffs' Unlawful Deduction Claims. Named Plaintiffs claim that WFA has violated the technical restrictions of New York law by (1) adjusting the calculation of Financial Advisor incentive compensation to account for voluntary supplemental staff support and trade errors; and (2) enforcing a practice of unlawful deductions from earned compensation. However, as it has already argued to this Court, Wells Fargo contends that New York courts have addressed these very issues and have held that it is entirely proper for a licensed financial advisor to agree to a compensation plan that sets forth the variables to be applied to calculate compensation before it is earned. Specifically, these courts have held that for employees paid through incentive compensation, the term "wages" refers only to commissions that have been "earned." *Pachter v. Bernard Hodes Grp., Inc.*, 891 N.E.2d 279, 284 (N.Y. 2008); *see also Levy v. Verizon Info. Servs. Inc.*, 498 F. Supp. 2d 586, 601 (E.D.N.Y. 2007) ("Incentive compensation and bonuses constitute 'wages' under the NYLL only once they become vested."). If adjustments or deductions are made "before the commissions were earned, section 193 d[oes] not prohibit them." *Pachter*, 891 N.E.2d at 284. Applying this principle, one federal court has rejected an essentially identical claim against another brokerage firm. *In re Morgan Stanley Smith Barney LLC Wage & Hour Litig.*, No. 2:11-cv-03121(WJM), 2014 WL 2101904, at *3–6 (D.N.J. May 20, 2014).

With respect to the claims concerning purportedly unlawful payroll deductions, Wells Fargo contends that the Financial Advisors suffered no harm or lost wages because the payments

to which they (licensed financial professionals) voluntarily and expressly agreed were used to make payments that Wells Fargo contends were for the benefit of the FAs. Against this backdrop, Wells Fargo contends that New York law itself permits authorized payroll deductions that are revocable and create no rights in a third party, especially given recent amendments to the pertinent New York statute. Moreover, Wells Fargo contends that the pertinent agreements at issue are expressly governed by Virginia and Missouri law, which plainly permit such voluntary repayment methods, and the leading New York case on the application of choice of law terms to such claims squarely holds that such provisions are enforceable. *See Boss v. Am. Express Fin. Advisors, Inc.*, 15 A.D.3d 306, 308 (N.Y. App. Div. 2005). And, at the very least, Wells Fargo contends that because Financial Advisors suffered no harm (no wages are due) and also because Wells Fargo has good faith defenses to the claim, there is no basis for recovery under the New York law, even if it does apply here. *See* N.Y. Lab. Law § 198 (providing for liquidated damages in the "amount of the wages found to be due" only if the employer has no "good faith" defense to the claim).

Plaintiffs' Misclassifications Claims. Named Plaintiffs contend that Wells Fargo misclassified its licensed Financial Advisors as exempt employees and that these employees are therefore now entitled to recover premium overtime wages for any overtime hours worked because they perform "nonexempt inside-sales and production work" and because they receive draw payments. Wells Fargo disputes these allegations and contends that, consistent with industry standard, it has properly classified its licensed Financial Advisors as exempt, administrative employees. Specifically, Wells Fargo contends that all WFA FAs are licensed and must abide by the so-called "know your client" and "suitability" rules requiring them to learn each client's individual financial situation/needs, make client-appropriate recommendations

and market appropriate firm services, thereby performing the very tasks that the pertinent regulations declare exempt. *See* 29 CFR § 541.203(b). Indeed, the pertinent federal regulations dating back to 1949 make clear that registered representatives like the Financial Advisors at issue here are paradigmatic exempt administrative employees. 29 C.F.R. § 541.205(c)(5) (1949) (listing "customers' brokers in stock exchange firms" as illustrative example of administrative employees). Consistent with these regulations, the Department of Labor issued a 2006 opinion letter generally declaiming that registered financial representatives, just like those at issue here, are properly classified as exempt employees, even if they are compensated on the basis of a draw. *See* DOL Opinion Letter, No. FLSA2006-43, 2006 WL 3832994 (Nov. 27, 2006) ("2006 DOL Opinion Letter").

In short, while Named Plaintiffs and their counsel continue to believe in their case and capably represented the Class's interests in litigation and mediation, they recognize that Wells Fargo has presented significant and potentially dispositive arguments that pose a significant risk to their chances for class-wide recovery, and this favors preliminary approval.

5. Establishing a Class and Maintaining It Through Trial Would Not Be Simple (*Grinnell* Factor 6)

While Named Plaintiffs and their counsel similarly continue to believe that they could obtain class certification in contested proceedings, they recognize that this issue also presents a considerable risk.

Should the Court deny approval for the settlement, Wells Fargo will contend that contested litigation of the class claims will not be manageable or appropriate. Specifically, Wells Fargo will contend that determining which Financial Advisor was subject to adjustments for voluntary adjustments will require individualized review, especially if Named Plaintiffs, as they have now suggested through the amended complaint, will allege that some FAs were

individually led to believe that they received personalized documents reflecting their wages earned in contravention of the written compensation policy. Similarly, Wells Fargo will contend that evaluation of the misclassification claims will require assessment of each FA's duties, and the daily activities of the FAs within the class will vary based on a number of factors such as nature of practice, client base, locations, seniority, additional licenses, expertise, etc. And, the company will argue, even if Plaintiffs could somehow establish that a broad swath of FAs have effectively abdicated their legally mandated advisory obligations and engaged in nothing more than mere sales, it will still be necessary to determine to assess the individual situation of each Financial Advisor to determine whether he or she qualifies for the outside sales exemption. Finally, the company will argue, all of the damages pursued here are inherently individualized and will require numerous determinations concerning the hours, pay rates, adjustments and deductions of each FA.

Wells Fargo contends that for these same reasons, every federal court to review such claims in the context of contested class proceedings has denied class certification. *See, e.g., Alakozai v. Chase Inv. Servs. Corp.*, No. 11-cv-09178 SJO (JCx), 2014 WL 5660697 (C.D. Cal. Oct. 6, 2014); *Litty v. Merrill Lynch & Co., Inc.*, No. 14-cv-0425 PA (PJWx), 2014 WL 5904907 (C.D. Cal. Aug. 4, 2014); *Drake v. Morgan Stanley*, No. 09-cv-6467 ODW (RCx), 2010 WL 2175819 (C.D. Cal Apr. 30, 2010); *Perry-Roman v. AIG Ret. Servs., Inc.*, No. 09-cv-2287 DOC (RNBx), 2010 WL 8697061 (C.D. Cal. Feb. 24, 2010); *Bachrach v. Chase Inv. Servs. Corp.*, No. 06-cv-2785 (WJM), 2007 WL 3244186 (D.N.J. Nov. 1, 2007); *Perry v. U.S. Bank*, No. 00-cv-1799-PJH, 2001 WL 34920473 (N.D. Cal. Oct. 16, 2001).

In short, while Named Plaintiffs and their counsel continue to believe they could proceed on a class basis, they recognize that Wells Fargo has presented significant dispositive arguments that pose a significant risk to their chances for certification, and this favors preliminary approval.

6. Defendants' Ability to Withstand a Greater Judgment Is Not at Issue (*Grinnell* Factor 7)

Wells Fargo's ability to withstand a greater judgment is currently not at issue. Even so, a "defendant's ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair." *In re Austrian*, 80 F. Supp. 2d at 178 n.9.

7. The Settlement Amount Is Substantial, Even in Light of the Best Possible Recovery and the Attendant Risks of Litigation (*Grinnell* Factors 8 and 9)

Class Counsel has determined that this case presents significant risks that militate toward substantial compromise. Wells Fargo has agreed to settle this case for a substantial amount, $3,900,000.00. (Stipulation ¶ 1.15.) The settlement amount represents a good value given the attendant risks of litigation, even though recovery could be greater if the Named Plaintiffs and the Class Members succeeded on all claims at trial and such a result survives an appeal. In Class Counsel's estimation, the settlement represents a significant percentage of the recovery that the Class Members would have achieved had they prevailed on all of their claims, survived an appeal, and sought to enforce and collect upon a judgment. (Davis Decl. ¶ 35.)

The determination of whether a settlement amount is reasonable "does not involve use of a 'mathematical equation yielding a particularized sum.'" *Frank v Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005) (quoting *In re Austrian*, 80 F. Supp. 2d at 178). "Instead, 'there is a range of reasonableness with respect to a settlement—a range which recognized the uncertainties of law and fact in any particular case and the concomitant risks and costs

necessarily inherent in taking any litigation to completion.'" *Id.* (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972)).

Here, each Participating Claimant will receive a significant payment based upon his or her length of time working for Wells Fargo as a Financial Advisor during the Class Period. (Stipulation ¶ 1.38.) As explained in detail above, the amount that each Participating Claimant will receive reflects a careful balancing of the strengths of the underlying claims and the risks that those claims would not ultimately prevail. Wells Fargo has insisted, and will continue to insist, that they are not liable to Plaintiffs on any of the claims. Specifically, Wells Fargo contends that (a) the class members suffered no damages with respect to the deduction claims, and in fact, the class members agreed to the various adjustments at issue; and (b) the notion that licensed financial advisors are hourly employees who must punch a time clock and receive premium overtime pay not only contravenes commonsense, but it also run afoul of decades of consistent regulations and guidance. Weighing the benefits of the settlement against the risks associated with proceeding in the litigation, the Settling Parties respectfully submit that the settlement amount is reasonable.

Accordingly, all of the pertinent *Grinnell* factors weigh in favor of issuing preliminary approval of the settlement, authorizing the notice and permitting the putative class members to respond to the notice before the Court assesses final approval. Because the settlement, on its face, is "'fair, adequate, and reasonable, and not a product of collusion,'" *Frank*, 228 F.R.D. at 184 (quoting *Joel A. v. Giuliani*, 218 F.3d 132, 138–39 (2d Cir. 2000)), preliminary approval is appropriate.

II. Named Plaintiffs Contend that Settlement Certification Is Appropriate

For settlement purposes only, Named Plaintiffs seek to certify a class under Rule 23 of the Federal Rule of Civil Procedure. Even in the context of a settlement in which the parties

have stipulated to certification for settlement purposes only, the Court should make a determination that the proposed settlement class satisfies Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy of representation, and at least one of the subsections of Rule 23(b). *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *Hanlon*, 150 F.3d at 1019. Here, Named Plaintiffs request that the Court provisionally (for settlement purposes only) certify the settlement class, and appoint Plaintiff's counsel as Class Counsel and Michelle Hartley and Steven Tomlinson as the Class Representatives.

As discussed below, Named Plaintiffs respectfully submit that all of the requirements for certification for settlement purposes are met, and the Settling Parties have consented to provisional certification for settlement purposes only. (Stipulation at p. 3, ¶ 2.3.1; Davis Decl. ¶ 34.) *See also Cnty. of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1422, 1424 (E.D.N.Y. 1989) ("It is appropriate for the parties to a class action suit to negotiate a proposed settlement of the action prior to certification of the class."), *aff'd in part, rev'd in part on other grounds*, 907 F.2d 1295 (2d Cir. 1990); *Newberg* § 11.27 ("When the court has not yet entered a formal order determining that the action may be maintained as a class action, the parties may stipulate that it be maintained as a class action for the purpose of settlement only.").

Provisional settlement class certification and appointment of class counsel have several practical purposes, including avoiding the costs of litigating class status while facilitating a global settlement, ensuring notification of all class members of the terms of the proposed settlement agreement, and setting the date and time of the final approval hearing. *See, e.g.*, *Asare v. Change Group of N.Y., Inc.*, No. 12-cv-3371(CM), 2013 WL 6144764, at *5–15 (S.D.N.Y. Nov. 18, 2013) (certifying New York class for failure to pay wages under FLSA and NYLL and for deductions under NYLL section 193 and granting approval to settlement).

Under Rule 23, a class action may be maintained if all of the prongs of Rule 23(a) are met, as well as one of the prongs of Rule 23(b). Rule 23(a) requires that:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). Rule 23(b)(3) requires the court to find that: questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *Id.* at (b)(3).

Wells Fargo disputes that the claims alleged in the action are proper for certification under Rule 23 or the FLSA on behalf of the purported class, but it has agreed, for the purposes of settlement only, not to contest class certification. Named Plaintiffs have agreed that Wells Fargo has reserved all of its certification arguments should approval for the settlement be denied and the parties resume litigation.

A. Numerosity

The proposed class easily satisfies the numerosity because there are approximately 1,150 Class Members. (Stipulation ¶ 1.2). "[N]umerosity is presumed at a level of 40 members . . . ." *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995).

B. Commonality

Named Plaintiffs submit that the proposed class satisfies the commonality requirement, the purpose of which is to test "whether the named plaintiff's claim and the class claims are so interrelated that the interest of the class members will be fairly and adequately protected in their absence." *Gen Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). Although the claims "need not be identical, . . . there must exist common questions of fact or law. *Frank*, 228 F.R.D.

at 181 (citing *Port Auth. Police Benev. Ass'n, Inc. v. Port Auth. Of N.Y. & N.J.*, 698 F.2d 150, 153–54 (2d Cir. 1983)). Courts construe the commonality requirement liberally. *Id.*

Named Plaintiffs maintain that this case involves numerous common issues. Primarily, the Named Plaintiffs and the Class Members bring the identical claim that Wells Fargo made unlawful adjustments to their wages and misclassified them as exempt and thus failed to pay them minimum wage and overtime compensation.

C. Typicality

Rule 23 requires that the claims of the representative party be typical of the claims of the class. "Typicality . . . is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997) (internal quotation marks omitted).

Named Plaintiffs contend that their claims arose from the same factual and legal circumstances that form the bases of the Class Members' claims. Named Plaintiffs contend that all New York Financial Advisors employed by Wells Fargo were at least subject to the same common policies and practices. Named Plaintiffs contend that they share the same job title and have the same job duties as the Class Members. Named Plaintiffs also claim the same general injuries as the Class Members—that Wells Fargo made unlawful deductions from their wages and misclassified them as exempt and consequently failed to properly pay them for hours worked.

D. Adequacy of the Class Representatives

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "The adequacy requirement exists to ensure that the [class] representatives will 'have an interest in vigorously pursuing the claims of the

class, and . . . have no interests antagonistic to the interests of other class members." *Toure v. Cent. Parking Sys. of N.Y.*, No. 05-cv-5237(WHP), 2007 WL 2872455, at *7 (S.D.N.Y. Sept. 28, 2007) (quoting *Penney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006)). "[O]nly a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status." *Martens v. Smith Barney, Inc.*, 181 F.R.D. 243, 259 (S.D.N.Y. 1998).

Named Plaintiffs are represented by experienced and able counsel, and they contend that they have no interests contrary to those of the class. Furthermore, under the structure of the settlement, those class members who do not wish to participate in the settlement can elect to opt out of the settlement.

E. Certification is Proper Under Rule 23(b)(3)

Rule 23(b)(3) requires that common questions of law or fact not only be present, but also that they "predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). This inquiry examines "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623.

To establish predominance, plaintiffs must first demonstrate that "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, . . . predominate over those issues that are subject only to individualized proof." *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 107–08 (2d Cir. 2007).

Here, Named Plaintiffs contend that all members of the class are unified by common factual allegations—all class members allege that they were subject to Wells Fargo's wage and hour violations, including making unlawful adjustments to their wages and misclassifying them as exempt and thus failing to pay them premiums overtime wages.

The second part of the Rule 23(b)(3) analysis is a relative comparison examining whether "the class action device [is] superior to other methods available for a fair and efficient adjudication of the controversy." *Green v. Wolf Corp.*, 406 F.2d 291, 301 (2d Cir. 1968). Here, of course, manageability is not an issue because the case is being resolved as part of a proposed settlement. *See Frank*, 228 F.R.D. at 183 ("The court need not consider the [manageability] factor, however, when the class is being certified solely for the purpose of settlement.").

In addition, it is important to note that certification under Rule 23(b)(3) will allow class members to opt out of the settlement and preserve their right to seek damages independently. *Cf. Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992). This approach protects putative Class Members' due process rights, and is consistent with the Supreme Court's decision in *Ortiz v. Fibreboard Corp.*, which explains that due process requires an opportunity to opt out of significant monetary relief. 527 U.S. 815, 846–48 (1999).

III. Plaintiffs' Counsel Should Be Appointed Class Counsel

Named Plaintiffs respectfully submit that their lawyers, The Law Office of Christopher Q. Davis, PLLC, should be appointed as Class Counsel. Rule 23(g), which governs the standards and framework for appointing class counsel for a certified class, sets forth four criteria the district court must consider in evaluating the adequacy of proposed counsel:

> (i) the work counsel has done in identifying or investigating potential claims in the action;
>
> (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
>
> (iii) counsel's knowledge of the applicable law; and
>
> (iv) the resources that counsel will commit to representing the class.

Fed. R. Civ. P. 23(g)(1)(A). The court may also consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class. Fed. R. Civ. P. 23(g)(1)(B)

The Advisory Committee has noted that "[n]o single factor should necessarily be determinative in a given case." Fed R. Civ. P. 23(g), 2003 Advisory Committee Note.

Named Plaintiffs respectfully submit that proposed Class Counsel meet all of these criteria. As set forth in the Declaration of Christopher Q. Davis, The Law Office of Christopher Q. Davis has done substantial work identifying, investigating, prosecuting, and settling employment class actions, including wage and hour class actions; and the lawyers assigned to this matter are well-versed in wage and hour law and in class action law and are well-qualified to represent the interests of the Class. (Davis Decl. ¶¶ 40–59.)

IV. The Proposed Notice Is Appropriate

The content of the proposed Class Notice fully complies with the requirements under Federal Rule of Civil Procedure 23. Pursuant to Rule 23(c)(2)(B), the notice must provide:

> The best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language: the nature of the action; the definition of the class certified; the class claims, issues, or defenses; that a class member may enter an appearance through counsel if the member so desires; that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded; and the binding effect of a class judgment on class members under Rule 23(C)(3).

The proposed Class Notice here satisfies each of these requirements. The Class Notice also describes the terms of the settlement, informs the class about the allocation of attorneys' fees, and provides specific information regarding the date, time, and place of the final approval hearing.

Accordingly, the detailed information in the proposed Class Notice to the Class Members is more than adequate to put class members on notice of the proposed settlement and is well within the requirements of Rule 23(c)(2)(B). Courts have approved class notices even when they provided only general information about a settlement. *See, e.g., In re Michael Milken & Assocs.*

Sec. Litig., 150 F.R.D. 57, 60 (S.D.N.Y. 1993) ("Normally, settlement notices need only describe the terms of the settlement generally."). The proposed Class Notice far exceeds this bare minimum and fully complies with the requirements of Rule 23(c)(2)(B) and the FLSA.

CONCLUSION

For the reasons set forth above, the Settling Parties respectfully request that the Court grant their Motion for Preliminary Approval of Class Settlement and enter the Proposed Order.

Dated: September 21, 2015

THE LAW OFFICE OF CHRISTOPHER Q. DAVIS, PLLC

By: */s/ Christopher Q. Davis*
Christopher Q. Davis

Attorneys for Plaintiffs

Dated: September 21, 2015

MUNGER, TOLLES & OLSON LLP

By: */s/ Malcolm A. Heinicke*
Malcolm A. Heinicke

Attorneys for Defendants