

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI**

MICHELLE R. LINDSAY on Behalf of)	
Herself and All Others Similarly Situated,)	
)	Case No. 4:12-CV-00577-JAR
Plaintiff,)	
)	
vs.)	
)	
WELLS FARGO ADVISORS LLC,)	
and DOES 1 through 10,)	
)	
Defendants.)	

**MEMORANDUM IN SUPPORT OF
JOINT MOTION FOR APPROVAL OF FLSA SETTLEMENT**

Plaintiff Michelle R. Lindsay (“Plaintiff”) and Defendant Wells Fargo Advisors LLC (“Defendant” or “Wells Fargo”) (collectively the “Parties”) have reached a collective action settlement in this matter, and pursuant to the provisions to the federal Fair Labor Standards Act (“FLSA”), the Parties now jointly and respectfully seek Court approval for this settlement. The Parties hereby provide their Memorandum in Support of their Joint Motion for Approval of FLSA Settlement. Specifically, the Parties seek approval of the settlement and authorization to conduct a notice and opt-in process after which the Parties will submit a stipulated judgment for final resolution of the case.

I. THE PARTIES, THE CLAIMS AND THE DEFENSES

Plaintiff is a former, hourly (non-exempt) Client Associate who worked at Wells Fargo’s branch office in Dallas, Texas. Plaintiff filed this FLSA class action on March 29, 2012, asserting a collective action on behalf of herself and all similarly situated, unlicensed Client Associates employed by Defendant in the United States. Plaintiff claims that she was not compensated for all regular and overtime hours worked. Specifically, she claims that Defendant implemented an unwritten policy of only paying its client associates for their *scheduled* hours. [Doc. No. 1]. Plaintiff sought back pay for the nonpayment of wages, liquidated damages, and attorneys’ fees.

Wells Fargo vigorously disputes these allegations, and on May 19, 2012, Wells Fargo filed its Answer to Complaint, denying Plaintiff's material allegations including those related to its failure to pay Plaintiff for all hours worked. [Doc. No. 7]. In addition, Wells Fargo raised numerous affirmative defenses.

The parties engaged in substantial discovery, including the production of documents by Wells Fargo, which were reviewed by Plaintiff's counsel. In addition, Wells Fargo deposed Plaintiff.

On September 25, 2012, Plaintiff moved the court for conditional certification. Defendant opposed the motion. On March 11, 2013, after full briefing, oral argument and supplemental briefing by the Parties, this Court granted Plaintiff's motion for conditional certification. Thereafter, pursuant to the Court's alternative dispute resolution order, the Parties agreed to mediate the case, and they did so before the deadline to complete the conditional certification notice process.

II. THE SETTLEMENT PROCESS

The mediation in this matter was conducted on April 29, 2013 with the assistance of an independent mediator, David Rotman, from San Francisco, California. Mr. Rotman is a professional and well-respected mediator who specializes in the mediation of wage and hour collective and class actions.

Following a full day of mediation, the Parties reached an agreement to settle the case in its entirety and identified a class period of April 29, 2010 to the date the settlement is approved by the Court. Over the following two months, the Parties worked through and exchanged multiple drafts of the long form settlement agreement, proposed notice to be sent to similarly situated client associates, opt-in and release form and a timeline for the submission of opt-in requests.

Plaintiff and Defendant share an interest in fully and finally resolving the issues raised in this action. Because the Parties recognize the expense and difficulty of continuing to prosecute this action through further certification/decertification, trial and subsequent appeals, as well as

the risk and uncertainty of the outcome inherent in such litigation, the Parties have agreed to be bound by the settlement that is presently before this Court for approval. All terms of the settlement are conditioned on the Court's approval, and absent that approval, the entire settlement will be null and void.

III. THE COMPLEX NATURE AND UNCERTAINTY OF THE CASE

The Parties agree that the burden of proving liability, affirmative defenses and damages is complicated and uncertain as a result of numerous factual disputes, the need to access comparable database entries, and the conflict between the actual written timekeeping policies implemented by Defendant and Plaintiff's (bitterly disputed) allegation concerning the implantation of unwritten practices at more than 800 branch offices in the United States.

Defendant contends that it had at all pertinent times a lawful, written policy that: 1) requires all client associates to record all hours worked; and 2) requires Wells Fargo to pay for all hours worked. Indeed, at the hearing on the motion for conditional certification of the collective action class, this Court concluded that Wells Fargo's formal time-keeping policy (and the associated requirement of pre-approval for overtime) was lawful. Plaintiff nevertheless contends that despite the written policy, there existed during the pertinent period a nationwide practice of compensating client associates for *only* the hours they were scheduled to work and not compensating client associates for hours worked beyond their shift or beyond pre-approved overtime. Defendant vigorously contested this allegation and further took the position that although Plaintiff had obtained conditional certification, she would be unable to maintain collective action status because of, among other things, the inherent need to analyze individual branch practices to assess her claims.

IV. THE SETTLEMENT TERMS

After a contentious, all-day mediation, the Parties agreed to the settlement. The settlement was a product of arms'-length negotiations by experienced counsel and provides substantial relief to Plaintiffs and the settlement class and will eliminate the risks of litigation for both sides. Thus, the Parties believe the settlement is far and reasonable and should be approved.

The Parties have agreed upon a gross settlement fund of \$4,000,000. From that fund, the Parties agree that 33%, or \$1,320,000 should be allocated to recoverable attorneys' fees under the FLSA; up to \$35,000 should be allocated to Plaintiff's litigation expenses; \$10,000 will be payable to Plaintiff as an incentive award for her service to the class; up to \$50,000 will be allocated to the claims administrator for the costs of administering the settlement; and \$2,000 will be paid to the California Labor and Workforce Development Agency ("LWDA") under the California Labor Code Private Attorney General Act of 2004 ("PAGA"). The balance of the gross settlement fund, approximately \$2,583,000, will be available to be claimed by class members based on the number of qualifying work weeks worked by each class member, i.e., weeks worked in the pertinent positions during the period April 29, 2010 to the date the settlement is approved by the Court. Notice of the settlement and an Opt-In and Release Form will be mailed to each class member at his or her last known address as set forth in Defendant's employee payroll database. During the period from March 11, 2010 through March 10, 2013, Wells Fargo employed approximately 3,125 individuals throughout the nation in the pertinent positions. It is therefore anticipated that during the agreed upon class period, i.e., April 29, 2010 to the date of Court approval, there will be approximately 3,300 to 3,400 people in the pertinent class. As a result, the average gross (pre-tax) settlement payment available to class members is anticipated to be approximately \$770, although that amount will vary for each individual depending on the actual number of qualifying weeks worked by each class member.

An independent claims administrator will be utilized to mail the notice of settlement and Opt-In and Release Form, to update and resend any returned mailings, and to calculate and file all applicable employment taxes relating to the settlement. Class members will be given an opportunity to opt into this case as plaintiffs and receive their allocation of the settlement by returning by mail the Opt-In and Release Form within forty-five days following the date the claims administrator mails the Notice of Settlement to class members. Any client associate who does not affirmatively opt in will preserve their rights to pursue claims against Defendant in their

own action or join another action if they so desire and their share of the settlement will not be paid and instead remain the property of Defendant.

As a result, no rights of any client associate will be waived by this settlement without their express consent. Put differently, because this is purely an opt in settlement, class members will not be bound to it and its release of pertinent wage and hour claims unless they expressly sign up for the settlement and consent to the release as set forth in the agreement and the notice.

V. THE STANDARD OF APPROVAL OF AN FLSA SETTLEMENT

Plaintiff's FLSA claims and release are valid and enforceable only upon Court approval. The policies behind the FLSA generally prohibit a contractual agreement between an employer and an employee to waive the latter's minimum wage and/or overtime rights. Thus, court approval is required to protect employees. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 704-710, 65 S.Ct. 895, 89 L.Ed.2d 1296 (1945). When the litigation arises from a private enforcement action under the FLSA, the standard of approval is straightforward: a district court should approve a fair and reasonable settlement if it was reached as a result of contested litigation to resolve a bona fide dispute under the FLSA. *Lynn's Food Stores, Inc. v. U.S.*, 679 F.2d 1350, 1352-54 (11th Cir. 1982) (citing *Brooklyn Savings Bank, v. O'Neil*, 324 U.S. 697(1945)).

A settlement under the FLSA is dissimilar to a settlement in a Rule 23 class action. A FLSA settlement requires class members to affirmatively opt into a collective action to be bound to the results. Court approval simply assures that there was a fair and reasonable settlement of a contested, bona fide dispute, but does not seek to address due process concerns seen for *absent* class members in a Rule 23 class action who have their rights determined unless they opt-out. *See, e.g., Collins v. Sanderson Farms, Inc.* 568 F.Supp.2d 714, 719 (E.D. La. 2008). Because FLSA class members must opt into the settlement, there is no requirement that the Court conduct a fairness hearing as would be required under a Rule 23 class action settlement. *Moore v. Ackerman Inv. Co.*, Case No. C 07-3058, 2009 W.L. 2848858, *2 (N.D. Iowa, Sept. 1, 2009).

The adversarial nature of a litigated FLSA case resulting in an arms'-length settlement contains the necessary indicia of fairness. *Lynn's Food Stores, Inc. v. U.S.*, 679 F.2d at 1354.

By approving this settlement, the Court will be providing each current and putative opt-in Plaintiff with the choice to either participate in this settlement, and thereby release his or her wage and hour claims, or not to participate in the settlement and retain the right to bring or participate in a separate action as to such claims. Thus, the proposed settlement hearing provides finality to the "opt-in" rights of putative FLSA opt-in plaintiffs. *See, e.g., Chemi v. Chamion Mortgage*, Case No. 2:05-cv-1238, 2009 W.L. 1470429 (D.N.J., May 26, 2009).

A. The Proposed Settlement is the Product of Contested Litigation

Plaintiff's FLSA claims were brought forth in litigation and were contested by Defendant. In her complaint, Plaintiff made the factual allegations describing the practices of Wells Fargo that allegedly resulted in unpaid wages. Defendant disputed Plaintiff's claims, instead contending that its actual practices were consistent with its written policies to pay client associates for all hours worked.

The Parties conducted extensive factual investigation regarding Plaintiff's specific allegations, including written discovery and Plaintiff's deposition. In particular, the Parties explored the methods Plaintiff claimed were implemented to cut time entries submitted by client associates as well as directions provided through the chain of command that client associates were not to be paid for hours worked beyond the hours they were scheduled to work.

B. A Bona Fide Dispute Exists Between the Parties

Plaintiff alleges that Defendant failed to properly pay minimum wages and overtime wages for hours worked beyond a client associate's work schedule. Defendant argued that it followed its written employment policies that required payment for all hours worked, including hours worked beyond an employee's schedule. If Plaintiff's claims were ultimately found to have merit, and Defendant's subsequent motion for decertification was denied, Defendant would be faced with the prospect of a monetary verdict in favor of Plaintiff as well as an obligation to pay litigation fees and costs incurred by Plaintiff and Defendant. If Defendant's efforts to

decertify the case were successful and/or its arguments and defenses on the merits were ultimately to prevail, then Plaintiff and the potential plaintiffs might receive no recovery of any kind. Accordingly, the Court should readily conclude that a bona fide dispute exists between the Parties.

C. The Proposed Settlement is Fair and Reasonable

The proposed settlement in this case will provide substantial monetary relief to all client associates who opt into the case and participate in the settlement. Each client associate is eligible to receive an average gross recovery of approximately \$770 (depending on the number of weeks worked and subject to change depending on the final class period), *after* the payment of all fees, costs, PAGA penalties and administrative expenses. Because the settlement allocation is to be determined by the number of qualifying weeks worked by each client associate, in comparison to total weeks worked by all client associates, one who worked more weeks will receive a higher allocation than one who worked fewer weeks.

The settlement was a product of arms'-length negotiations by experience counsel and has the effect of 1) providing substantial relief to Plaintiff and client associates she represents and 2) eliminating inherent risks to both sides should this complex litigation continue to resolution on the merits. Under such circumstances, a presumption of fairness should attach to the proposed settlement. *See, Lynn's Food Stores, Inc.*, 679 F.2d at 1354.

If litigation continues, Plaintiff will face many obstacles, including a motion for decertification and a jury trial. Even if Plaintiff prevailed on both, Plaintiff would still face considerable obstacles in proving the nature and extent of Plaintiff's damages, not to mention issues on appeal. The settlement, on the other hand, brings substantial value to Plaintiff and other client associates immediately rather than years from now and provides certainty regarding the outcome of this litigation. A significant factor weighing in favor of approval of the proposed settlement is the immediate certainty of these substantial benefits. *See In re BankAmerica Corp. Securities Litig.*, 210 F.R.D. 694, 700 (E.D. Mo. 2002) ("As courts have recognized, when considering settlement agreements they should consider the vagaries of litigation and compare

the significance of immediate recovery by way of the compromise to the mere probability of relief in the future, after protracted and expensive litigation. In this respect, it has been held proper to take the bird in the hand instead of a prospective flock in the bush.”).

D. The Incentive Payment to Named Plaintiff is Reasonable

Under the terms of the settlement, the Named Plaintiff will receive an incentive payment of \$10,000 for being a class representative and assisting in the substantial relief for all client associates. Ms. Lindsay subjected herself to the personal toils of being directly involved in an out-of-state litigation in order to assert her rights and the rights of her fellow client associates. She took the initiative to file and pursue this matter on behalf of others. She assisted counsel throughout the litigation and appeared for a full day deposition in Texas on behalf of herself and similarly situated client associates. Ms. Lindsay also responded to written discovery and produced documents demanded by Wells Fargo. Incentive awards of this amount are not uncommon. *See, e.g. Wolfert v. UnitedHealth Group, Inc.* 2009 U.S. Dist. LEXIS 74261 (E.D. Mo. 2009) (incentive award of \$30,000 approved); *Tussey v. ABB, Inc.*, 2012 U.S. Dist. LEXIS 157428 (W.D. MO, November 2, 2012) (\$25,000 incentive awards approved for each of three named plaintiffs). The amount sought as an incentive payment here comprises a quarter of one percent of the gross settlement and is fair and reasonable and should be approved by this Court.

E. Plaintiff’s Counsel is Entitled to a Reasonable Award of Fees and Expenses

The FLSA provides that Plaintiff may recover reasonable attorneys’ fees spent in recovering unpaid wages. 29 U.S.C. §216(b). Plaintiff’s counsel dedicated a substantial amount of their time over the past 15 months investigating Plaintiff’s claims, contacting and questioning other client associates throughout many of Defendant’s 800 branch offices in the United States, reviewing documentation, consulting with database experts, determining whether and in what manner comparable database information could be obtained and used to establish liability and damages, moving for conditional certification, mediating the case in San Francisco, California, and otherwise litigating this case. Every hour worked on this case was an hour that counsel was unable to spend on other matters and limited the number of other cases that counsel could accept.

Pursuant to the Settlement Stipulation, Plaintiff's counsel is to receive 30% of the gross settlement, or \$1,320,000.

Plaintiff's counsel has incurred litigation expenses in excess of \$35,000, but has agreed to limit the request for reimbursement to that figure. Further, Plaintiff's counsel will continue to expend time implementing the settlement and responding to inquires from client associates regarding the distribution of the settlement proceeds. All of the tasks were performed at a high level, without compensation and with the risk of no compensation. Accordingly, the Parties request that the Court approve the payment of \$1,320,000 in attorneys' fees and \$35,000 in litigation expenses as part of the Parties' negotiated settlement.

Contemporaneous herewith, Plaintiff has filed her Motion for Approval of Attorneys' Fees and Litigation Expenses.

VI. CONCLUSION

The settlement in this contested litigation over a bona fide dispute between the parties under the FLSA was reached following lengthy investigation and during formal mediation. The settlement is fair and reasonable. It provides Plaintiff and client associates with significant relief in a hotly contested matter where substantial issue of law and fact are uncertain. For these reasons, and those set forth above, the Parties respectfully request that the Court approve the settlement, including the award of attorneys' fees to Plaintiff's counsel, and authorize the mailing of the notice to the proposed class.

Respectfully submitted:

/s/ Robert D. Blitz

Robert D. Blitz, #24387MO
Christopher O. Bauman, #52480MO
Blitz, Bardgett & Deutsch, L.C.
120 South Central Avenue, Suite 1650
St. Louis, Missouri 63105
(314) 863-1500
(314) 863-1877 (facsimile)

/s/ Derek J. Emge

Derek J. Emge, CASBN: 161105

Emge & Associates

225 Broadway, Suite 1350

San Diego, CA 92101

(619) 595-1400

(619) 595-1480 (facsimile)

/s/ Matthew J. Zevin

Matthew J. Zevin, CASBN: 170736

Stanley Iola, LLP

225 Broadway, Suite 1350

San Diego, CA 92101

(619) 235-5306

(619) 377-8419 (facsimile)

ATTORNEYS FOR PLAINTIFFS

By: /s/ Malcolm H. Heinicke

Terry E. Sanchez

Malcolm H. Heinicke

Jeffrey M. Osofsky

Munger and Tolles LLC

355 South Grand Avenue, 35th Floor

Los Angeles, CA 90071-1560

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

A copy of the foregoing was served on the following via the Court's electronic service system on this 2nd day of August, 2013.

Kimberly A. Yates
LITTLER MENDELSON, P.C
One Metropolitan Square
211 North Broadway, Suite 1500
St. Louis, Missouri 63102
kyats@littler.com
Attorney for Wells Fargo Advisors LLC

Malcolm A. Heinicke
MUNGER AND TOLLES, LLP
560 Mission Street, 27th Floor
San Francisco, CA 94105
Malcolm.heinicke@mto.com
Attorney for Wells Fargo Advisors LLC

Terry E. Sanchez
MUNGER AND TOLLES LLC
355 S. Grand Avenue, 35th Floor
Los Angeles, CA 90071
Terry.Sanchez@mto.com
Attorney for Wells Fargo Advisors LLC

