BLUMENTHAL, NORDREHAUG & BHOWMIK
Norman B. Blumenthal (State Bar #068687)
Kyle R. Nordrehaug (State Bar #205975)
Aparajit Bhowmik (State Bar #248066)
2255 Calle Clara
La Jolla, CA 92037
Telephone: (858)551-1223
Facsimile: (858) 551-1232
Website: www.bamlawca.com

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SHELLIE GORDON, REINA CORNEJO and HALLE FAROKHI, individually, and on behalf of all persons similarly situated,

Plaintiffs,

vs.

WELLS FARGO BANK, N.A.,

Defendant.

CASE No. **3:11-cv-00090-JAH -MDD**

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Hearing Date: August 20, 2012
Hearing Time: 2:30 p.m.
Courtroom: 11

Assigned to: Hon. John A. Houston
Mag. Judge: Hon. Mitchell D. Dembin

Complaint Filed: January 14, 2011

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Plaintiffs Shellie Gordon, Reina Cornejo and Halle Farokhi ("Plaintiffs") respectfully submits this memorandum of points and authorities in support of her motion for final approval of the class settlement and for entry of judgment and order dismissing action.

I. INTRODUCTION

The parties to this Action have reached a settlement. This Court preliminarily approved the settlement by Order dated April 4, 2012 [Doc. No. 40].

In accordance with the preliminary approval order, the required notice of the proposed settlement was disseminated to the 287 members of the settlement class, of whom 149 (52%) filed claims.[1] There have been no objections to the settlement. Upon final approval, the entire Gross Fund Value of Two Hundred Eighty Thousand Dollars ($280,000) will be paid by Defendant without a reversion to Wells Fargo. (See Stipulation of Class Settlement and Release ("Settlement Agreement") at ¶ 11, a copy of which is attached as Exhibit #2 to the Declaration of Norman Blumenthal "Decl. Blumenthal".)

The purpose of this Final Approval Hearing is to determine whether the proposed settlement of the litigation should be finally approved, the amount of the award of attorneys' fees and costs to be paid Class Counsel, and the amount of the Plaintiffs' service award. Plaintiffs respectfully submit this Memorandum in support of final approval and the proposed entry of the Final Approval Order in this class action.[2]

On or about January 14, 2011, Plaintiff Shellie Gordon filed a class action complaint ("the Lawsuit") in the United States District Court for the Southern District of California, Case No. 11-CV-0090 JAH, captioned *Gordon v. Wells Fargo Bank, N.A.* [Doc. No. 1]. The complaint alleged that Plaintiff Gordon and other current and former Business Sales Consultants

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[1] The details of the notice and claims administration process are set forth by the Claims Administrator in the Declaration of Bernella Osterlund ("Decl. Osterlund"), submitted herewith.

[2] Previously filed as Doc. No. 41 is the Motion for Award of Attorneys' Fees, Costs and Plaintiffs' service award. A detailed discussion of the background of the case, the major events of the litigation, the settlement negotiations, the terms of the proposed Settlement and its benefit to class members is set forth in the Declaration of Norman B. Blumenthal ("Decl. Blumenthal"), filed herewith.

were unlawfully denied overtime wages, reimbursement for business-related expenses, accurate paystubs, and that Defendant violated California Business and Professions Code § 17200 *et seq*. The complaint sought recovery of overtime wages under state and federal law, reimbursement of business-related expenses, relief for the failure to comply with the itemized employee wage statement provisions of Labor Code § 226, and attorneys' fees and costs from Defendant. Decl. Blumenthal, ¶ 6(a).

On February 15, 2011, Defendant filed an Answer to the Complaint which denied the allegations and alleged that the Business Sales Consultants were properly classified as exempt and alleged that a class could not be certified. [Doc. No. 5]. On April 5, 2011, the Parties engaged in an Early Neutral Evaluation Conference before Magistrate Bencivengo. [Doc No. 7]. The Parties were unable to resolve the action at that conference. Decl. Blumenthal, ¶ 6(b).

Plaintiff Gordon filed a First Amended Complaint ("FAC") to include a claim under the Private Attorneys General Act ("PAGA"). [Doc. No. 15]. All other allegations in the FAC remained the same. Defendant answered the FAC on June 27, 2011. [Doc. No. 17]. On July 26, 2011, Plaintiffs sought leave to file a Second Amended Complaint ("SAC"). [Doc. No. 19]. The Second Amended Complaint filed on August 11, 2011 added Plaintiffs Reina Cornejo and Halle Farokhi as named plaintiffs and proposed class representatives. [Doc. No. 23]. Decl. Blumenthal, ¶ 6(c).

Discovery was conducted following the Rule 26f conference. Plaintiffs served written discovery on Defendant, to which Defendant provided responses. After meet and confer efforts, Defendant also provided supplemental responses. Both Parties produced documents and in total nearly 2,000 pages of relevant documentation was produced by the Parties. After the mailing of a *BelAire* opt out notice, Plaintiffs obtained the list of putative class and began interviewing witnesses and obtaining declarations from these witnesses. Defendant also interviewed class members and obtained declarations. Defendant noticed the deposition of the Plaintiffs and Plaintiffs noticed the deposition of the Defendant's corporate designee as to many specific topics. Decl. Blumenthal at ¶ 6(d).

On November 3, 2011, the Parties participated in a mediation before mediator David

Rotman that resulted in a tentative settlement of the Lawsuit, subject to court approval. The parties signed a Memorandum of Understanding that day, and subsequently executed a more detailed, formalized settlement agreement now being submitted to this Court for approval. For purposes of settlement, the Parties recognized the similarities between the employees in this job position including Plaintiffs and, as a result, agreed that this Lawsuit can be settled collectively on behalf of all such employees similarly situated. Decl. Blumenthal at ¶ 6(e).

As ordered by this Court, the Settlement Class consists of "Shellie Gordon, Reina Cornejo, Halle Farohki, and all other individuals who worked for Wells Fargo Bank, N.A. in California in the job title of Business Sales Consultant I or II from January 19, 2007 to November 30, 2011." (Order at ¶ 2 [Doc. No. 40].)

The lawsuit has been actively investigated since the first complaint was filed in February 2010. There has been an ongoing investigation, and Class Counsel was provided with highly detailed and extensive information about the case, including Class Member data, job descriptions and relevant information for all positions at issue. Decl. Blumenthal at ¶ 6(f).

Plaintiffs and Defendant went through multiple sessions and arguments to resolve issues related to the positions at issue in the litigation. Wells Fargo maintains, among other things, that they have complied at all times with the California Labor Code, that the members of the putative class are properly classified as exempt under California law and that all members of the putative class were properly paid all wages and were reimbursed for all incurred business expenses. Specifically, in Wells Fargo's view, the Class Members are properly classified as exempt because they spend the majority of their time engaged in sales work outside of the Defendant's offices and were, therefore, covered under the outside sales exemption. Wells Fargo provided more than 20 declarations confirming that the exemption applied to these employees. Further, Wells Fargo provided an extensive analysis showing that Class Members were able to obtain reimbursement for any incurred business expenses and in fact received reimbursement for business expenses. Finally, Wells Fargo contends that class certification would be inappropriate because the Plaintiffs do not share common issues of fact or law with the proposed class, they are not an adequate representative of the proposed class, their claims are not typical of the

proposed class, and class treatment would require the Court to conduct individualized inquiries that would predominate over common questions of law or fact. Decl. Blumenthal at ¶ 6(g).

The parties agreed to mediation before David Rotman, one of the preeminent mediators of wage and hour class actions. Necessary information was provided by Defendant prior to the settlement negotiations. Wells Fargo provided Class Counsel with employment information and payroll data for the members of the Class. Defendant also provided more than 20 declarations establishing the applicable exemption and an analysis showing how Class members received reimbursement for all business expenses. Plaintiffs analyzed the data and the information with the assistant of damages expert DM&A and prepared and submitted a mediation brief to Mr. Rotman. The parties prepared for the mediation by exchanging data, calculating damages, and submitting mediation briefs to Mr. Rotman. Decl. Blumenthal at ¶ 7(a).

The November 11, 2011 mediation session before David Rotman was contentious and arm's length. Counsel for the Parties, after settlement negotiations lasting the entire day, reached an agreement, based upon Mr. Rotman's expertise as a mediator and the uncertainties of protracted litigation. As a result, the parties reached an agreement, the basic terms of which were set forth in a signed a Memorandum of Understanding. There can be no doubt that counsel for both parties possessed sufficient information to make an informed judgment regarding the likelihood of success on the merits and the results that could be obtained through further litigation. Decl. Blumenthal ¶ 7(c).

By reason of the settlement, Wells Fargo will make a payment of no more than Two Hundred Eighty Thousand Dollars ($280,000.00) (the "Gross Fund Value") to fund the settlement of this action. The settlement will be made on a claims-made basis, without a reversion to Wells Fargo. Payments by Defendant pursuant to the Settlement Agreement shall settle all pending issues between the Parties, including, but not limited to, all payments of class claims, administration costs, attorneys' fees and costs, and enhancement awards. Payments of any appropriate and lawfully required employer payroll taxes shall be drawn from unclaimed portions of the Gross Fund Value, if any, as set forth in paragraph 18, although Defendant will be required to pay such taxes separately if the unclaimed portion of the settlement fund is not

sufficient to cover that expense. (Settlement Agreement at ¶9).

After the mediation, the specific terms of the settlement required additional negotiation before the final written agreement could be signed. Class Counsel began the process of reviewing the settlement terms and drafting the final Settlement Agreement and exhibits. Even after the parties reached an agreement at the mediation, Class Counsel had to ensure that the terms of the final Settlement Agreement were fair to every member of the class and retained the requisite opportunities for notice, exclusion, and objection in accordance with class action law. Decl. Blumenthal ¶ 7(e).

By February 2012, the Settlement Agreement was finalized and thereafter the parties executed the Settlement Agreement. Class Counsel prepared the preliminary motion requesting Court approval of the settlement and filed the motion on February 28, 2012. [Doc. No. 37]. Decl. Blumenthal at ¶ 7(f). On April 4, 2012, this Court ruled at the preliminary approval stage that the "The Court preliminarily approves the provisions of the Settlement Agreement as being fair, just, reasonable and adequate to the members of the Settlement Class, subject to further consideration at the Final Approval Hearing after distribution of notice to the members of the Settlement Class as provided in paragraph 5 of this Order." (Order at ¶ 4 [Doc. No. 40].) Notice of the settlement providing class members with an opportunity to file a claim for monetary relief, to opt out, or to object was then mailed to the Class members on or about May 4, 2012 to the 287 current and former employees who comprise the Class. Decl. Osterlund at ¶5. On June 26, 2012, the Claims Administrator mailed a reminder notice to the class members who had not yet responded. Decl. Osterlund at ¶6. The results were that not one class member objected to the settlement and no class member requested exclusion. Decl. Osterlund at ¶¶12-13; Decl. Blumenthal at ¶4.

Importantly, the excellent result obtained by this settlement is evidenced by the overwhelmingly positive response of the Class. Decl. Blumenthal at ¶7(g). As documented by the Claims Administrator, claims were submitted by 149 employees (52%), and these claims represent 62% of the total number workweeks for the Settlement Class. Decl. Osterlund ¶9. The claims submitted by the class therefore evidence the favorable reception of the class to this

Settlement. Decl. Blumenthal at ¶7(g).

II. THE SETTLEMENT BEFORE THE COURT

For purposes of this Settlement, the "Settlement Class" is defined as follows:

> Shellie Gordon, Reina Cornejo, Halle Farohki, and all other individuals who worked for Wells Fargo Bank, N.A. in California in the job title of Business Sales Consultant I or II from January 19, 2007 to November 30, 2011.

(Order dated April 4, 2012 at ¶ 2 [Doc. No. 40].)

In consideration for settlement of this Lawsuit and a release of the claims described in paragraphs 7 and 8 of the Settlement Agreement, Wells Fargo agrees to pay a Gross Fund Value of Two Hundred Eighty Thousand Dollars ($280,000) to fund the settlement of this action. Payments by Defendant pursuant to the Settlement Agreement shall settle all pending issues between the Parties, including, but not limited to, all payments of class claims, administration costs, attorneys' fees and costs, and enhancement awards. Payments of any appropriate and lawfully required employer payroll taxes shall be drawn from unclaimed portions of the Gross Fund Value, if any, as set forth in paragraph 18 of the Settlement Agreement, although Defendant will be required to pay such taxes separately if the unclaimed portion of the settlement fund is not sufficient to cover that expense. Decl. Blumenthal at ¶ 3(a).

As per paragraph 11 of the Settlement Agreement, the Net Fund Value ("NFV") for the Settlement Class will constitute the total sum from which members of the respective Settlement Class will be paid after Court-approved attorneys' fees and costs, administration costs, and enhancement awards described herein are subtracted from the Gross Fund Value as described below. Decl. Blumenthal at ¶ 3(b).

As set forth in paragraph 12(c) of the Settlement Agreement, the Net Fund Value ("NFV") will be distributed as follows: Each Qualified Claimant's allocation of the NFV will be determined by dividing the NFV by the total number of class workweeks and multiplying that figure by the Qualified Claimant's individual workweek total. Workweeks will be calculated by (1) counting the number of days between each class member's first day in a class position and the last day in a class position (excluding any days in between in non-class positions) during the Class Period, (2) dividing that number by 7, and (3) rounding the result

to the nearest integer. Decl. Blumenthal at ¶ 3(b).

As per paragraph 18 of the Settlement Agreement, to the extent any members fail to claim their provisional share of the NFV, the unclaimed portion shall first be allocated to paying the employer share of any payroll taxes owed on the portion of the settlement upon which employer-side payroll taxes are owed. Any excess unclaimed portion of the settlement shall be allocated to the claims of Class Members who make valid claims, and shall be allocated on a proportional basis based on the size of each Class Member's claim. Decl. Blumenthal, ¶ 3(c).

As per paragraph 12(a) of the Settlement Agreement, Wells Fargo and their counsel will not oppose an attorneys' fees award to Class Counsel of twenty-five percent (25%) of the Gross Fund Value to compensate and reimburse Class Counsel for all of the work already performed by Class Counsel in this case and all of the work remaining to be performed by Class Counsel in documenting the settlement, securing Court approval of the settlement, administering the settlement, making sure that the settlement is fairly administered and implemented, and obtaining dismissal of the action. Class Counsel will also be allowed to apply separately for reimbursement of their actual litigation costs. Decl. Blumenthal, ¶ 3(d).

As per paragraph 12(b) of the Settlement Agreement, Class Counsel will request that Plaintiffs Shellie Gordon, Reina Cornejo, Halle Farohki receive service awards in an aggregate amount not to exceed Fifteen Thousand Dollars ($15,000), which equates to $5,000 each, to the Plaintiffs as consideration for serving as the Class Representatives. These service awards will be paid in addition to their individual claims for a share to which they are otherwise entitled through the claims process. Wells Fargo will not oppose this request. Decl. Blumenthal ¶ 3(e).

As per paragraph 12(g) of the Settlement Agreement, the reasonable costs of the Claims Administrator associated with the administration of this Settlement not to exceed $20,000 will be paid for from the Gross Fund Value. The Claims Administrator will be Gilardi & Company LLC. Decl. Blumenthal ¶ 3(f).

As per paragraph 12(d) of the Settlement Agreement, the Parties have allocated a total of Five Thousand Dollars ($5,000) of the Gross Fund Value shall be allocated to the Labor Code § 2699 claim. Of this amount, Three Thousand Seven Hundred Fifty Dollars ($3,750) will

be paid to the California Labor and Workforce Development Agency for penalties under the Private Attorneys General Act. This amount represents 75% of the total $5,000 that was allocated to settlement of LWDA claims. The remaining 25% of the Labor Code § 2699 claim shall be added to the NFV. Decl. Blumenthal ¶ 3(g).

Within five (5) business days of final approval of the settlement by the Court, Defendant will deposit the Gross Fund Value into an account, through the Claims Administrator, in an amount equal to the amount owed to pay (1) Qualified Claimants per the terms of this Settlement Agreement; and (2) Court approved attorney's fees, costs, administration costs and incentive payment. Interest accrued on this deposit (if any) shall be included in the NFV except that if final approval is reversed on appeal, then Defendant is entitled to prompt return of the principal and all interest accrued. (Settlement Agreement at ¶12(e).) Fifteen (15) business days after the "effective date" of final approval of the settlement, the Claims Administrator will pay all claims, and Court-approved attorney's fees, costs, and the enhancement payments. Decl. Blumenthal ¶ 3(h).

The Settlement in this case of $280,000 represents a substantial benefit for the Class. The calculations estimates for the amount due for the nonpayment of wages were calculated for Plaintiffs by Desmond, Marcello & Amster ("DM&A"), Plaintiffs' damage expert. Decl. Blumenthal at ¶ 8(d). For the Business Sales Consultant employees whose claims are at issue in this lawsuit, DM&A reviewed Wells Fargo's data and used information provided by Defendant to determine the damage valuation for the employees. Plaintiffs calculated that Wells Fargo was subject to claims of about $1,000,000. Consequently, Wells Fargo was subject to total damages of $1,000,000 for the entire Class Period for the damages that were susceptible to solid proof. The settlement of $280,000, before deductions, represents 28% of the potential damages, assuming these amounts could be proven at trial. Decl. Blumenthal at ¶ 8(d).

This recovery is equivalent to the 25% to 35% of the actual estimated loss to the settlement approved in Glass v. UBS Fin. Servs., 2007 U.S. Dist. LEXIS 8476 (N.D.Cal. Jan. 27 2007). As a result, the Settlement provides the Class with a recovery that compares favorably to what would have been sought at trial and is equal to what was obtained in similar

litigation. Decl. Blumenthal at ¶ 8(d).

The settlement is fair, adequate and reasonable to the class and should be finally approved. Decl. Blumenthal ¶ 3(i). In sum, this settlement valued at $280,000 is a good result and provides the Class Members with the opportunity to receive a substantial recovery of hundreds of dollars to each claimant. This result is particularly remarkable in light of the fact that liability in this case was far from certain in light of the defenses asserted by Defendant. Decl. Blumenthal at ¶ 3(i).

III. THE SETTLEMENT MEETS THE CRITERIA NECESSARY FOR THIS COURT TO GRANT FINAL APPROVAL

When a proposed class-wide settlement is reached, it must be submitted to the court for approval. 2 H. Newberg & A. Conte, Newberg on Class Actions (3d ed. 1992) at §11.41, p.11-87. Court approval of a class settlement is considered at a final settlement approval hearing, at which evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement may be presented and class members may be heard regarding the settlement. *See* Manual for Complex Litigation, Second §30.44 (1993). During final approval, the court must determine whether the settlement is fair, reasonable and adequate. *See* Officers for Justice v. Civil Service Com'n, etc., 688 F.2d. 615, 625 (9th Cir. 1982) and Fed. Rules Civ. Proc., rule 23(e).

Governing the settlement of class actions, the Federal Rules of Civil Procedure, §23 (e) specifically provides:

> The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

F.R.C.P. § 23(e)(1)(c).

Class action settlements should be approved where (1) the proposed settlement is fairly and honestly negotiated; (2) serious questions of law and fact exist placing the ultimate outcome of the litigation in doubt; (3) the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and (4) the parties have determined that

the settlement is fair and reasonable. Jones v. Nuclear Pharmacy, Inc., 741 F.2d 322, 324 (5th Cir. 1984); Marcus v. State of Kansas, 209 F. Supp. 2d 1179 (D.Kan. 2002); Lopez v. City of Santa Fe, 206 F.R.D. 285, 288 (D.N.M. 2002). Each of those four criteria is satisfied here.

As discussed in detail below, this Settlement was reached through arm's-length negotiations during a mediation. The Settlement was negotiated by experienced counsel for the Class and represented by adequate class representatives, who protected the interests of the Class Members. There were complex legal and factual issues that placed the ultimate outcome of this litigation in doubt. Accordingly, the immediate value of the settlement to the Class Members far outweighs the possibility of relief if this protracted and expensive litigation had continued through trial and appeal. Finally, the considered judgment of all parties to the Settlement is that the Settlement is fair and reasonable in light of the immediate benefit provided by the Settlement to the Class Members, which is a conclusion that is reinforced by the overwhelming response of the Class Members submitting claims.

Settlements of disputed claims are favored by the courts. Waits v. Weller, 653 F.2d 1288, 1291 (9th Cir 1981) ("settlement encouraged in appropriate class action settlements"). The Ninth Circuit has a "strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." Linney v. Cellular Alaska P'ship, 151 F.3d 1234, 1238 (9th Cir. 1998). In evaluating class settlements, the courts recognize that compromise is particularly appropriate since such litigation is difficult and notoriously uncertain.

Settlement is especially favored in class actions because it minimizes the litigation expenses of all parties and reduces the strain on judicial resources. Officers for Justice, supra, 688 F.2d at 625 ("voluntary conciliation and settlement are the preferred means of dispute resolution. This is especially true in complex class action litigation"); Cotton v. Hinton, 559 F.2d 1326, 1331 (5th Cir.1977) ("Particularly in class action suits, there is an overriding public interest in favor of settlement."); In re Dept. Of Energy Stripper Well Exemption Litig., 653 F.Supp. 108, 115 (D.Kan.1986) ("It is in the interests of the courts and the parties that there should be an end to litigation and the law favors the peaceful settlement of controversies.")

"[T]he court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." Officers for Justice, supra, 688 F.2d at 625. Under this standard, the court must decide whether the proposed settlement falls within the range of reasonable settlements, taking into account that settlements are compromises between the parties reflecting subjective, unquantifiable judgments concerning the risks and possible outcomes of litigation. Id.

In cases such as this one, courts have repeatedly emphasized that there is a strong initial presumption that the compromise is fair and reasonable. In re Heritage Bond Litig., 2005 U.S. Dist. Lexis 13555, at *11 (C.D. Cal. 2005). Courts are advised not to adjudicate the merits of the action, nor substitute their judgment for that of the parties who negotiated the settlement, nor should they reopen and enter into negotiations with the litigants in the hopes of improving the terms of the settlement. Id., at *11; Officers for Justice, supra 688 F.2d at 625.

The essential evaluation is whether, given the risks of litigation and the range of probable results, the settlement, taken as a whole, is fair, reasonable and adequate to all concerned. Officers for Justice, supra 688 F.2d at 625; Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998). Here, the facts and circumstances compel the conclusion that the proposed settlement satisfies that standard.

IV. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE

A. The Test for Fairness

To determine whether a proposed settlement is fair, reasonable, and adequate, courts consider some or all of the following factors: "(1) the strength of plaintiffs' case; (2) the risk, expense, complexity and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of

discovery completed and the stage of proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement." Officers for Justice, supra, 688 F.2d at 625; see also Staton v. Boeing Co., 327 F.3d 938, 959 (9th Cir. 2003).

The list of factors is not exhaustive and should be tailored to each case. Officers for Justice, at 625. Due regard should be given to what is otherwise a private consensual agreement between the parties. Id. The inquiry "must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." Id, at 625. "Ultimately, the [trial] court's determination is nothing more than 'an amalgam of delicate balancing, gross approximations and rough justice." Id.

The question whether a proposed settlement is fair, reasonable and adequate necessarily requires a judgment and evaluation by the attorneys for the parties based upon a comparison of "'the terms of the compromise with the likely rewards of litigation.'" Weinberger v. Kendrick, 698 F.2d 61, 73 (2d Cir. 1982), cert. denied 464 U.S. 818 (1983) (quoting Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424-25 (1968)). Therefore, many courts recognize that the opinion of experienced counsel supporting the settlement is entitled to considerable weight. Kirkorian v. Borelli, 695 F. Supp. 446, 451 (N.D. Cal. 1988); Reed v. General Motors Corp., 703 F.2d 170, 175 (5th Cir. 1983); Weinberger, 698 F.2d at 74; Armstrong v. Board of School Directors, 616 F.2d 305, 325 (7th Cir. 1980); Fisher Bros. v. Cambridge-Lee Indus., Inc., 630 F. Supp. 482, 489 (E.D. Pa. 1985). For example, in Lyons v. Marrud, Inc., [1972-1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) Paragraph 93,525 (S.D.N.Y. 1972), the court noted that "[e]xperienced and competent counsel have assessed these problems and the probability of success on the merits. They have concluded that compromise is well-advised and necessary. The parties' decision regarding the respective merits of their position has an important bearing on this case." Id. at ¶ 92,520.

B. The Settlement Satisfies the Test for Fairness

1. The Investigation and Discovery are Sufficient to Allow Counsel and the Court to Act Intelligently

The stage of the proceedings at which this settlement was reached militates in favor of final approval of the settlement. The agreement to settle did not occur until Class Counsel possessed sufficient information to make an informed judgment regarding the likelihood of success on the merits and the monetary results that could be obtained through further litigation. There was no need for continued litigation simply to reaffirm what was already known by the negotiating parties.

This class action was filed in January 2011, on behalf of a putative class of Business Sales Consultants. The theory of these cases was that the Plaintiffs and putative class members were not fully reimbursed for business expenses and were not exempt from California Labor laws and were therefore misclassified by Wells Fargo. Decl. Blumenthal ¶ 5.

Wells Fargo opposed this claim, and argued that many Class Members were barred from recovery by the outside sales exemption in California Labor Code §1171 because the Class members regularly spent the majority of their work time performing sales work outside of Defendant's offices. Defendant provided significant evidence in the form of declarations from many of the Class Members that established the exemption applied to the Class members. Wells Fargo also argued that their business expense reimbursement policies fully compensated the Class Members and therefore there was no violation of Labor Code §2802. To support this contention, Wells Fargo provided a detailed analysis refuting that there was a cap of expense reimbursement and showing that Class Members were fully reimbursed for such expenses. Of the defenses asserted by Defendant, the factual defenses asserted to support the exemption and supporting their expense reimbursement policies presented serious risks both to establishing class certification and liability. Decl. Blumenthal at ¶ 8(c).

Plaintiffs propounded significant discovery and the parties exchanged nearly 2,000 documents. Plaintiffs obtained information concerning the positions, including the job descriptions, as well as dates of employment and compensation paid to each class member.

Plaintiffs also obtained the contact information for the Class members to conduct interviews of these witnesses. The parties actively litigated this action from January 2011 to November 2011 when the parties then decided to use the services of a mediator to see if the case could be resolved, and engaged David Rotman for this purpose.

Class Counsel has litigated similar overtime cases against other employers. Decl. Blumenthal at ¶ 2. Although Plaintiffs and Class Counsel believed that their case had merit, they recognized the potential risks, both sides would face if litigation of this action continued. As the federal court held in Glass v. UBS Fin. Servs., 2007 U.S. Dist. LEXIS 8476 (N.D.Cal. 2007), where the parties faced uncertainties similar to those in this litigation:

> In light of the above-referenced uncertainty in the law, the risk, expense, complexity, and likely duration of further litigation likewise favors the settlement. Regardless of how this Court might have ruled on the merits of the legal issues, the losing party likely would have appealed, and the parties would have faced the expense and uncertainty of litigating an appeal. "The expense and possible duration of the litigation should be considered in evaluating the reasonableness of [a] settlement." See *In re Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 458 (9th Cir. 2000). Here, the risk of further litigation is substantial.

Id. at *12.

Lengthy mediation briefs were researched and prepared. A damage expert was engaged by Plaintiffs to prepare calculations of the damages under possible outcome scenarios. Decl. Blumenthal at ¶ 7(a).

During the mediation negotiations, which were both contentious and arm's-length, Defendant vigorously disputed liability. Moreover, Defendant disputed that the class could be certified because individual issues predominated as to the applicability of the exemptions and the expenses incurred that would to be separately determined for each Class Member based on their individual experience. While other cases have approved class certification in wage and hour claims, class certification in this action would have been hotly disputed and was by no means a foregone conclusion. Decl. Blumenthal at ¶ 7(b).

Based on the complexity of the case, the novelty of the legal issues, the substantial risks and uncertainty of the outcome on both liability and certification issues, as well as the need to establish damages, Plaintiffs believe that the Settlement is an excellent one and is more than fair

and in the best interests of the Class Members. There can be no doubt that counsel for both parties possessed sufficient information to make an informed judgment regarding the likelihood of success on the merits and the results that could be obtained through further litigation, given the relative strengths and weaknesses of their positions. Decl. Blumenthal at ¶ 7(d).

2. The Settlement Was Reached Through Arm's Length Bargaining

This settlement was the result of arm's-length negotiations as well as formal and informal settlement conferences between the parties through their respective attorneys. Wells Fargo disclosed confidential information relating to their organization, the company's employment policies, the various employment positions, the size of the putative class, the compensation paid, and the number of workweeks for the Class Members. This information permitted Class Counsel to evaluate liability and prepare valuation estimates. Class Counsel also interviewed members of the Class about their experiences. After comprehensive legal and factual analysis, including the factual and legal defenses asserted and prepared by Defendant, Class Counsel possessed sufficient information for intelligent evaluation of the case for purposes of settlement. Decl. Blumenthal at ¶ 7.

Prior to the initiation of settlement discussions, Class Counsel reviewed and outlined the case based upon the provided information, and determined the conditions of settlement which would be fair and reasonable to the Class. Class Counsel was experienced in the types of settlement appropriate to resolve these overtime claims, as Class Counsel has previously litigated and settled other employment actions. Initial informal discussions were productive and encouraged both parties to further analyze their positions and to pursue formal mediation. Decl. Blumenthal at ¶ 7.

Following this discovery and discussion between counsel, the parties agreed to mediation before David Rotman, a respected mediator for wage and hour class actions. The parties prepared for the mediation by exchanging payroll data, calculating damages, and submitting mediation briefs to Mr. Rotman. At the end of the day, after his independent review of the facts in this case, Mr. Rotman determined the amount that he believed was fair, reasonable, and

adequate, and recommended a settlement amount to the parties as the mediator's proposal that was not subject to further negotiation. Counsel for the parties, after contentious negotiations, both agreed to accept the mediator's proposal, which was given great weight by the parties given Mr. Rotman's expertise as a mediator, and the uncertainties and cost of the years of litigation the parties faced if the mediators' proposal was not accepted. Decl. Blumenthal at ¶ 7(c). Most importantly, Plaintiffs and Class Counsel believe that this settlement is fair, reasonable and adequate.

By reason of the settlement, Wells Fargo will make a payment of no more than Two Hundred Eighty Thousand Dollars ($280,000.00) (the "Gross Fund Value") to fund the settlement of this action. The settlement will be made on a claims-made basis, without a reversion to Wells Fargo. Payments by Defendant pursuant to the Settlement Agreement shall settle all pending issues between the Parties, including, but not limited to, all payments of class claims, administration costs, attorneys' fees and costs, and enhancement awards. Payments of any appropriate and lawfully required employer payroll taxes shall be drawn from unclaimed portions of the Gross Fund Value, if any, as set forth in paragraph 18, although Defendant will be required to pay such taxes separately if the unclaimed portion of the settlement fund is not sufficient to cover that expense.

After the mediation, the specific terms of the settlement required additional negotiation before the final written agreement could be signed. Class Counsel began the process of reviewing the settlement terms and finalizing the Settlement Agreement and exhibits. Even after the parties reached an agreement, Class Counsel had to ensure that the terms of the Settlement were fair to every member of the class and contained the requisite opportunities for notice, exclusion, and objection in accordance with California class action law. By February 2012, the Settlement Agreement was finalized and thereafter the parties executed the Settlement Agreement. Class Counsel prepared the preliminary motion requesting Court approval of the settlement and filed the motion on February 28, 2012. [Doc. No. 37]. Decl. Blumenthal at ¶7(f). On April 4, 2012, this Court ruled at the preliminary approval stage that the "The Court

preliminarily approves the provisions of the Settlement Agreement as being fair, just, reasonable and adequate to the members of the Settlement Class, subject to further consideration at the Final Approval Hearing after distribution of notice to the members of the Settlement Class as provided in paragraph 5 of this Order." (Order at ¶ 4 [Doc. No. 40].) Notice of the settlement providing class members with an opportunity to file a claim for monetary relief, to opt out, or to object was then mailed to the Class members on or about May 4, 2012 to the 287 current and former employees who comprise the Class. Decl. Osterlund at ¶5. The results were that not one class member objected to the settlement and not one class member requested exclusion. Decl. Osterlund at ¶¶12-13. Plaintiffs and Class Counsel believe that this settlement is fair, reasonable and adequate.

3. Counsel is Experienced in Similar Litigation

Class Counsel in this matter has extensive class action experience in many fields and has represented thousands of persons nationwide in actions including labor and overtime litigation, securities shareholder litigation, constitutional challenges to state and local statutes, collateral protection insurance cases, consumer refund actions and tobacco litigation. An list of previous and current class action cases managed and settled by the Class Counsel in this action is provided to the Court by way of the Declaration of Norman Blumenthal submitted in support of this motion. Decl. Blumenthal at ¶ 2. Class Counsel have participated in every aspect of the settlement discussions and have concluded the settlement is fair, adequate and reasonable and in the best interests of the Class. Decl. Blumenthal at ¶3(i).

4. There Are No Objectors to the Settlement and No Opt-Outs

After dissemination of the class notice to the 287 members of the Class, which provided each class member with the terms of the settlement, **not one class member has filed an objection to the settlement** and no class members requested exclusion from the settlement. Decl. Osterlund at ¶¶12-13. The absence of any objector strongly supports the fairness, reasonableness and adequacy of the Settlement. See In re Austrian & German Bank Holocaust Litigation 80 F. Supp. 2d 164, 175 (S.D.N.Y. 2000) ("If only a small number of objections are

received, that fact can be viewed as indicative of the adequacy of the settlement."); Stoetzner v. U.S. Steel Corp., 897 F.2d 115, 118-119 (3d. Cir. 1990) (29 objections out of 281 member class 'strongly favors settlement'); Laskey v. Int'1 Union, 638 F.2d 954 (6th Cir. 1981) (The fact that 7 out of 109 class members objected to the proposed settlement should be considered when determining fairness of settlement.)

Importantly, every Class Member was given the opportunity to participate in the Settlement under the same terms. Of the total 287 possible employees in the Class, there are 149 who filed claims, representing 52% of the employees in the Class. Decl. Osterlund at ¶9. In fact, the claims submitted constituted 62% of the total workweeks of the entire Class. Decl. Osterlund at ¶9. Here given the fact that not one Class Member objected and the majority of Class Members filed claims, the Court can conclude that the settlement is fair, reasonable and adequate.

5. The Risk, Expense, Complexity, and Likely Duration of Further Litigation

The complexities and duration of further litigation cannot be overstated. As discussed above, Wells Fargo asserted substantial and real defenses to this action. Even if Plaintiffs were successful on class certification and at trial, there is little doubt that Defendant would post a bond and appeal in the event of an adverse judgment. A post-judgment appeal by Defendant would have required many more years to resolve, assuming the judgment was affirmed. If the judgment was not affirmed in total, then the case could have continued for years after the appeal. The benefits of a guaranteed monetary recovery today, of the very remedy that Plaintiffs would seek at trial, outweigh an uncertain result three or more years in the future. Decl. Blumenthal at ¶ 8(a).

Both the Plaintiffs and Class Counsel recognize the expense and length of a trial in this action against Defendant through possible appeals which could take at least another three years. Class Counsel also have taken into account the uncertain outcome and risk of litigation, especially in complex actions such as this Action. Class Counsel are also mindful of and recognize the inherent problems of proof under, and alleged defenses to, the claims asserted in

the Action. Moreover, post trial motions and appeals would have been inevitable. Costs would have mounted and recovery would have been delayed if not denied, thereby reducing the benefits of an ultimate victory. Plaintiffs and Class Counsel believe that the settlement set forth in the Settlement Agreement confers monetary benefits upon the Settlement Class Members. Based upon their evaluation, Plaintiffs and Class Counsel have determined that the settlement set forth in the Settlement Agreement is in the best interest of the Class. Decl. Blumenthal at ¶ 8(b).

Similarly, Defendant has concluded that settlement of this Action is desirable in the manner and upon the terms and conditions set forth in the Settlement Agreement in order to avoid the expense, inconvenience, and burden of further legal proceedings, and the uncertainties of trial and appeals. There can be little doubt that the agreed upon settlement of claims is the most efficient and cost-effective method to provide payments to the members of the Class who are current and former employees of Defendant.

V. CONCLUSION

For the reasons stated herein and in the accompanying declarations, Plaintiffs respectfully submit that the proposed settlement satisfies the standard of fairness established by the federal courts and should therefore be finally approved.

Dated: July 26, 2012

BLUMENTHAL, NORDREHAUG & BHOWMIK

By: */s/Norman B. Blumenthal*
Norman B. Blumenthal, Esq.
Kyle R. Nordrehaug, Esq.
Attorneys for Plaintiffs and the Class