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13
14 **UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

15 In re:
16
17 WELLS FARGO HOME MORTGAGE
18 OVERTIME PAY LITIGATION

MDL Case No.: 3:06-md-1770-MHP
**NATIONWIDE PLAINTIFFS' UNOPPOSED
MOTION FOR APPROVAL OF THE
SETTLEMENT ON BEHALF OF FLSA
CLASS MEMBERS AND
DECERTIFICATION AND DISMISSAL
WITHOUT PREJUDICE OF THE
NATIONWIDE RULE 23 CLASS CLAIMS**

19
20 This document relates to NATIONWIDE
21 CASES ONLY

Date: August 9, 2010
Time: 2:00 P.M.
Judge: Hon. Marilyn Hall Patel
Courtroom 15

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23
24 TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

25 NOTICE IS HEREBY GIVEN that, pursuant to Local Rule 7-2 and the Court's June
26 28, 2010 Order, a hearing on matters raised in this Motion will take place on August 9, 2010,
27
28

1 at 2:00 p.m. before the Honorable Marilyn Hall Patel, District Court Judge for the Northern
2 District of California. The hearing will be at Courtroom 15 in the United States Courthouse
3 located at 450 Golden Gate Avenue, San Francisco, California.

4 Nationwide Plaintiffs request this Court to: (a) approve the FLSA settlement in its
5 entirety as fair and reasonable; and (b), decertify the Rule 23 Class, dismiss their claims
6 without prejudice and order notice be sent to them substantially in the form attached as
7 Exhibit B advising them of their rights.

8 This Motion is based upon this Notice, the Memorandum of Points and Authorities,
9 affidavits, pleadings and other exhibits in support thereof, as well as any documents or
10 testimony presented at the time of hearing.

11 DATED: July 26, 2010

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The parties to the Nationwide Action have reached a settlement. The settlement is
4 memorialized in a written agreement (“Agreement,” attached to the Declaration of Robert W.
5 Thompson as Exhibit 1, with attachments 1-A and 1-B.) Under the terms of the Agreement,
6 the FLSA Collective Action is being settled for a total gross amount of \$20 million, and the
7 Rule 23 Class is to be decertified and dismissed without prejudice. For all the reasons set
8 forth below and in the supporting documents, the settlement is fair, reasonable, and adequate.
9 The FLSA settlement meets all requirements for approval, and decertification of the Rule 23
10 Class is appropriate.

11 Pursuant to the terms of the Agreement, Nationwide Plaintiffs request this Court to:
12 (a) approve the FLSA settlement in its entirety as fair and reasonable; and (b), decertify the
13 Rule 23 Class, dismiss their claims without prejudice and order notice be sent to them
14 substantially in the form attached as Exhibit B advising them of their rights.

15 **II. STATEMENT OF FACTS**

16 **A. Procedural Background**

17 Several separate wage and hour actions were brought against Wells Fargo on behalf
18 of current and former loan originators, otherwise known as Home Mortgage Consultants
19 (“HMCs”). The cases are: *Mevorah v. Wells Fargo Home Mortgage, Inc.*, N.D. Cal. 3:05-
20 1175; *Perez v. Wells Fargo Mortgage Co.*, N.D. Cal. 3:05-2722; *Perry v. Wells Fargo Home*
21 *Mortgage, Inc.*, S.D. Ill. No. 3:05-890; and *Miles v. Wells Fargo Mortgage Company*, N.D.
22 Cal., Case No. 3:06-CV-01991 MEJ. On June 15, 2006, the Judicial Panel on Multidistrict
23 Litigation transferred these actions pursuant to 28 U.S.C. § 1407 to the United States District
24 Court for the Northern District of California (“the Court”).

25 The consolidated cases were brought on behalf of two subgroups of HMCs. The first
26 group consists of current and former HMCs who worked in California (“California
27 Plaintiffs”). The second group consists of current and former HMCs who worked in the
28

1 United States, but outside of California (“Nationwide Plaintiffs”). This settlement involves
2 the Nationwide Plaintiffs only.

3 On October 18, 2007, the Court issued two orders regarding the Nationwide
4 Plaintiffs: (i) the Court certified a Rule 23 class based on the alleged violation of the
5 California Unfair Competition Law (“the Nationwide Rule 23 Class”), and (ii) the Court
6 certified a 29 U.S.C. § 216(b) collective class based on the alleged violation of the Fair Labor
7 Standards Act (“the FLSA Collective Action”). Also on October 18, 2007, the Court issued a
8 similar but separate order certifying the California Plaintiffs as a Rule 23 class.

9 A notice approved by the Court was sent in February 2008. Following notice, and
10 after excluding individuals who returned exclusion forms, the Nationwide Rule 23 Class
11 consisted of approximately 23,561 individuals.

12 Approximately 4,570 HMCs returned consent to join forms, which were filed with the
13 Court, and as a result, those individuals became plaintiffs in the FLSA Collective Action. In
14 their respective consent-to-join forms, each FLSA Collective Action plaintiff designated
15 “Genaro Perez and Derrick Perry as my representative, and to the fullest extent possible, to
16 make decisions on my behalf concerning the case, the method and manner of conducting the
17 case, the entering of an agreement with Plaintiffs’ counsel regarding payment of attorneys’
18 fees and court costs, the approval of settlements, and all other matters pertaining to this
19 lawsuit.” (*See, e.g.*, Notice of Consent to Join, Docket # 241.) Each person who consented
20 to join also affirmatively chose to be represented by the lead counsel for the Nationwide
21 Plaintiffs.¹ (*Id.*)

22 Shortly after the Court issued its orders certifying the California and Nationwide Rule
23 23 classes, Wells Fargo filed an appeal of both decisions pursuant to Fed. R. Civ. P. 23(f).
24 On July 7, 2009, the United States Court of Appeals for the Ninth Circuit reversed the

25 1. In its July 27, 2006 Case Management Order consolidating and coordinating the
26 cases, the Court appointed the law firms of Callahan McCune & Willis, APLC (now Callahan,
27 Thompson, Sherman & Caudill, LLP) and Stueve Siegel Hanson LLP as lead counsel for
28 Nationwide Plaintiffs.

1 Court's order certifying the California Plaintiff class. *In re Wells Fargo Home Mortgage*
2 *Overtime Pay Litigation*, 571 F.3d 953 (9th Cir. 2009). On remand, this Court denied class
3 certification to the California Plaintiffs. *In re Wells Fargo Home Mortgage Overtime Pay*
4 *Litigation*, no. 06-1770, 2010 WL 174329 (N.D. Cal. Jan. 13, 2010). Because a threshold
5 issue – specifically, whether the California Unfair Competition Law may be applied to non-
6 California workers – is pending before the California Supreme Court in *Sullivan v. Oracle*
7 *Corp.*, Cal. Sup. Court Case No. S170577 (4/22/09), the Ninth Circuit has not ruled on Wells
8 Fargo's appeal of the Court's order certifying the Nationwide Rule 23 Class. *In re Wells*
9 *Fargo*, 571 F.3d at 955, fn 1.

10 The parties mediated this case on four separate occasions. The last three mediations
11 were conducted with David Rotman of Gregorio, Haldeman, Piazza, Rotman, Frank & Feder
12 in San Francisco. At the conclusion of the most recent mediation on May 7, 2010, Mr.
13 Rotman made a mediator's proposal that was accepted by the parties and the parties
14 thereafter executed a settlement term sheet. The settlement was thereafter memorialized in
15 the Agreement attached as Exhibit 1.

16 **B. Claims and Defenses**

17 This litigation involved claims by HMCs living and working in a variety of settings
18 across the country to sell home mortgage products for Wells Fargo. The plaintiffs alleged
19 they were misclassified as exempt and were entitled to compensation for the overtime they
20 had worked. They asserted causes of action directly under the Fair Labor Standards Act
21 ("FLSA"), 29 U.S.C. §§ 201, et seq., as well as under California's unfair competition law,
22 Cal. Bus. & Profs. Code §§ 17200, et seq.

23 Wells Fargo asserted numerous defenses, both as to class status and as to liability.
24 Chief among them were Wells Fargo's affirmative defenses based on exemption. Wells
25 Fargo argued the HMCs are exempt, variously and alternatively, as commissioned
26 salespersons, outside salespersons, highly compensated, and administrative employees. The
27 federal commissioned salesperson exemption was eliminated through summary judgment,
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1 but Wells Fargo continued to vigorously assert the administrative, outside sales, and highly
2 compensated exemptions.

3 **III. SUMMARY OF SETTLEMENT**

4 The parties agreed to settle the FLSA Collective Action claims, and that the Rule 23
5 Class should be decertified and dismissed without prejudice. (See Exhibit 1, Agreement §
6 3.1.) The terms of the Agreement are summarized as follows and are set forth in full in the
7 attached Agreement. (Exhibit 1, 1-A, and 1-B.)

8 With regard to the settlement of the FLSA Collective Action, a \$20 million settlement
9 fund will be created after approval by this Court, inclusive of attorneys' fees and costs, and
10 other costs of the settlement other than Wells Fargo's portion of payroll taxes. Each FLSA
11 Collective Action member will receive a proportionate share of the settlement fund according
12 to a formula based on the length of each person's individual tenure and compensation. (See
13 Settlement Agreement § 3.4 and Exhibit 1-B.) The Agreement further provides for a
14 minimum payment of \$100 to each Collective Action member. (Agreement § 3.4.) The
15 average gross per capita recovery for Collective Action members will be approximately
16 \$4,375. The settlement equates to approximately \$250 for each month worked by FLSA class
17 members. Thus, the overall gross recovery for the average individual who worked for the
18 entire class period will be in the range of \$20,000. Likewise, the recovery for individuals
19 who worked for only a few weeks or months, or whose compensation was lower than the
20 average will be proportionately lower. (Hanson Decl., ¶ 8.) The computation and handling
21 of the settlement will be accomplished by a neutral administrator. These payments are made
22 in exchange for dismissal with prejudice and a release of claims by the FLSA Collective
23 Action members. (Agreement § 5.)

24 The Agreement also calls for the Rule 23 Class to be decertified, and their claims
25 dismissed without prejudice. (Agreement § 3.1.) Notice will be sent to the Rule 23 Class
26 fully advising them as to the decertification and their rights. (*See Id.* and Notice attached as
27 Agreement Exhibit 1-A.)

1 IV. APPROVAL OF THE FLSA SETTLEMENT

2 A. Legal Authority

3 As a general matter, settlement of claims brought under the FLSA requires court
4 approval. *Stalnaker v. Novar Corp.*, 293 F. Supp. 2d 1260, 1262 (M.D. Ala. 2003) (citing
5 *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945)); see also *Lynn's Food Stores, Inc. v.*
6 *U.S.*, 679 F.2d 1350, 1354 (11th Cir. 1982). Pursuant to a private enforcement action under 29
7 U.S.C § 216(b) of the FLSA, the district court may approve a settlement of contested litigation to
8 resolve a bona fide dispute between the parties. *Lynn's Food.*, 679 F.2d at 1353; see also *Yue*
9 *Zhou v. Wang's Restaurant*, No. C05-0279, 2007 WL 2298046, *1 (N.D. Cal. Aug. 8, 2007)
10 (“The proper procedure for obtaining court approval of the settlement of FLSA claims is for the
11 parties to present to the court a proposed settlement, upon which the district court may enter a
12 stipulated judgment only after scrutinizing the settlement for fairness.”). The Court must
13 “determine whether the settlement is a fair and reasonable resolution of a bona fide dispute.”
14 *Trinh v. JP Morgan & Chase Co.*, 2009 WL 532556 at *1 (S.D. Cal. 2009). Typically, courts
15 rely on the adversarial nature of a litigated FLSA case resulting in settlement as indicia of
16 fairness. *Lynn's Food Stores*, 679 F.2d at 1354. If the proposed settlement reflects a reasonable
17 compromise over contested issues, the court may approve the settlement in order to promote the
18 policy of encouraging settlement of litigation. *Id.*; see also *Walton v. United Consumers Club,*
19 *Inc.*, 786 F.2d 303, 306 (7th Cir. 1986).

20 Federal courts in California routinely approve similar settlements reached in FLSA
21 collective actions. See, e.g., *Gribble*, 2008 WL 5281665; *Glass v. UBS Fin. Servs., Inc.*, 2007
22 WL 221862 (N.D. Cal. Jan. 26, 2007); *Rosenburg .v Int'l Bus. Machines Corp.*, 2007 WL
23 128232 (N.D. Cal. Jan. 11, 2007); *Aguayo v. Oldenkamp Trucking*, 2006 WL 3020943 (E.D. Cal.
24 Oct. 17, 2006); *Moralex v. Five J's Trucking, Inc.*, 2006 WL 1409733 (E.D. Cal. May 23, 2006).

25 Unlike settlements under Fed. R. Civ. P. 23, FLSA settlements are not subject to a two-
26 stage process of preliminary approval followed by final approval, and no final fairness hearing is
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1 required. However, Court approval of this collective action settlement remains necessary to
2 effectuate a valid and enforceable release of Nationwide Plaintiffs' FLSA claims.

3 **B. The Settlement Resolves a Bona Fide and Contested Dispute.**

4 This Nationwide litigation was strongly contested, protracted, and reflected a bona fide
5 and contested dispute between the parties. (Thompson Decl. ¶ 12, Hanson Decl. ¶ 5.) Multiple
6 lawsuits were filed by different plaintiffs using different law firms in different courts. The cases
7 were consolidated in this Court by the Judicial Panel on Multi-District Litigation. The earliest
8 cases were filed in 2005 – more than five years ago. The motion practice was enormously
9 complicated, hard-fought and the parties strenuously argued their positions. Further, as noted
10 above, Wells Fargo claimed numerous defenses to Plaintiffs' claims, including that HMCs were
11 paid lawfully, that class and collective action treatment was inappropriate, and that the pay
12 practices varied from location to location. Nationwide Plaintiffs successfully brought a motion
13 for summary adjudication with regard to the federal commissioned salesperson exemption, but
14 other affirmative defenses asserted by Wells Fargo remained in doubt after the Court's initial
15 certification orders. Wells Fargo appealed both class certification orders, and was successful
16 before the Ninth Circuit in reversing and remanding the certification order with regard to the
17 California Class. In short, this hard and long-fought case reflects a bona fide dispute in a
18 contested litigation and, as such, the settlement enjoys a presumption of fairness. (Thompson
19 Decl. ¶ 12, Hanson Decl. ¶ 5.)

20 **C. The Proposed Settlement Is Fair and Reasonable.**

21 The second prong of the Court's settlement approval inquiry focuses on the fairness and
22 reasonableness of the proposed settlement. As explained below, the Court should readily
23 conclude that the settlement meets the criteria for approval.

24 This settlement was the product of arm's-length negotiations by experienced counsel and
25 has the salutary effect of (1) providing substantial and immediate relief to the Collective Action
26 members, and (2) eliminating the inherent risks both sides would bear if this complex litigation
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1 continued to resolution on the merits. A fourth mediation with a qualified mediator, David
2 Rotman, ultimately allowed the parties to bridge the significant gap between the parties'
3 settlement positions and obtain the resolution described above. (Thompson Decl. ¶ 11, Hanson
4 Decl. ¶ 7.) Under these circumstances, a presumption of fairness should attach to the proposed
5 settlement. *See Lynn's Food Stores, Inc.*, 679 F.2d at 1354. Moreover, consideration of several
6 additional factors confirms that the proposed settlement is fair and reasonable.

7
8 1. The Amount Offered in Settlement is Reasonable.

9 By any objective measure, the compensation this settlement makes available to class
10 members is favorable and provides class members reasonable consideration for their alleged
11 claims. The settlement brings class members significant monetary value *now*, not years from
12 now, and provides certainty about the outcome. Further, the average per capita gross
13 compensation – and \$4,375, representing approximately \$250 for each month worked – provides
14 a meaningful recovery. This is not a case where the benefit to the class is largely injunctive or of
15 modest value. Although the maximum possible award at trial could be larger than the settlement
16 amount, the inquiry as to whether a settlement is reasonable examines the benefits of the
17 settlement in light of the risks of establishing liability and damages. *See, e.g., Singer v. Becton*
18 *Dickinson and Co.*, No. 08-CV-821, 2009 WL 4809646 (S.D. Cal. Dec. 9, 2009) (finding the
19 amount offered in settlement to be adequate “in light of the uncertainties involved”); *Sandoval v.*
20 *Tharaldson Employee Mgmt.*, No. EDCV 08-00482, 2009 WL 3877203 (C.D. Cal. Nov. 17,
21 2009) (settlement amount was reasonable considering, among other factors, the risk of proving
22 liability and damages at trial); *Glass v. UBS Fin. Serv., Inc.*, No. C-06-4068, 2007 WL 221862,
23 *4 (N.D. Cal. Jan. 26, 2007) (finding settlement of wage and hour class action for a percentage
24 of the claimed damages to be reasonable in light of uncertainties involved in the litigation).
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1 2. The Expense, Complexity, and Duration of Further Litigation.

2 This case is complex and carries significant risks for the parties as to both legal and
3 factual issues. There is no question that litigating the case to trial would require substantial time
4 and expenses in addition to that already expended. Among the risks faced by Plaintiffs was the
5 uncertainty of maintaining a certified collective action. The Ninth Circuit reversed the Court's
6 Rule 23 certification of the California Class, and on remand, the Court denied California
7 Plaintiffs' renewed motion for class certification. Although the standards for certification under
8 § 216(b) of the FLSA are different, there is no doubt that Wells Fargo would vigorously argue
9 that the FLSA collective action should be decertified for the same reasons that doomed the Rule
10 23 class. Further, a massive amount of discovery and trial preparation would have been required
11 given the size of the FLSA class (4,570 individuals). And an expert's sampling of opt ins,
12 analysis and extrapolation of damages would have been lengthy and extremely costly. All of
13 these factors show that a trial was not on the near horizon, even absent any additional appeals.
14 Finally, it is very likely that in the event Plaintiffs were to prevail at trial, Wells Fargo would
15 appeal such a result. It is safe to say that trial preparation, trial and post-trial litigation could
16 consume at least another three years before there would be finality in this litigation that dates
17 back to 2005. (See Hanson Decl. ¶¶ 5-7, Thompson Decl. ¶12.)
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21 3. The Experience and Views of Counsel.

22 The experience of Class Counsel in litigating and negotiating complex wage and hour
23 disputes likewise strongly favors approving the settlement. "The involvement of experienced
24 class action counsel and the fact that the settlement agreement was reached in arm's length
25 negotiations, after relevant discovery ha[s] taken place create[s] a presumption that the
26 agreement is fair." *Linney v. Alaska Cellular P'ship*, No. C-96-3008, 1997 WL 450064, *5
27 (N.D. Cal. July 18, 1997). Although the Court is not bound by counsels' opinion, their opinion
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1 is nonetheless entitled to great weight. *Gribble*, 2008 WL 5281665, at *9. The putative class
2 had the benefit of attorneys who are highly experienced in complex litigation and familiar with
3 the facts and law in the case, and who have negotiated many such class and collective action
4 settlements. (Thompson Decl. ¶¶ 3-11, Hanson Decl. ¶¶ 1-9.) As with all aspects of the
5 litigation, the settlement negotiations were hard-fought and at arm's length. In Nationwide
6 Plaintiffs' Counsels' view, the settlement provides substantial benefits to the Class, especially
7 when one considers, among other things, the attendant expense, risks, difficulties, delays, and
8 uncertainties of litigation, trial, and post-trial proceedings. Further, in Nationwide Plaintiffs'
9 Counsels' experience, when evaluated against the risks and compared with similar litigation, the
10 relief to the class is substantial. (*Id.*) Because this settlement is fair, adequate, and eminently
11 reasonable, it should be approved.

12 **D. Incentive Awards**

13 In recognition of their service, their assistance in prosecuting the case, their participation
14 in written discovery and appearing for depositions, and their participation in settling the case, the
15 Plaintiffs ask the Court to approve incentive awards of \$5,000 to each of the three named
16 Plaintiffs.

17 A \$5,000 incentive award is presumptively reasonable in this Court. *See Hopson v.*
18 *Hanesbrands, Inc.*, 08-0844, 2009 WL 928133, *10 (N.D. Cal. April 3, 2009) "When
19 determining incentive awards, courts may consider a variety of factors, including risks to
20 Plaintiffs in commencing the suit, personal difficulty encountered by Plaintiffs, the amount of
21 time and effort spent by Plaintiffs, and the personal benefit enjoyed by representatives as a result
22 of the litigation." *Tarlecki v. bebe Stores, Inc.*, No. C05-1777, 2009 WL 3720872, *5 N.D. Cal.
23 Nov. 3, 2009) (citing *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal.
24 1995)); *Misra v. Decision One Mortgage Co.*, No. CV 07-0994, 2009 WL 4581276, *8 (C.D.
25 Cal. April 13, 2009) ("It is appropriate for courts to award enhancements to representative
26 plaintiffs who undertake the risk of personal or financial harm as a result of litigation."). In the
27 *Glass* case, this Court approved \$25,000 incentive awards to each of four class representatives in
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1 a case where no formal discovery was conducted. 2007 WL 221862, at *16-17. Further, an
2 award of \$5,000, as sought here, is warranted when the Plaintiffs have spent a significant amount
3 of time assisting counsel and participating in the discovery process. *See Jacobs v. California*
4 *State Auto Ass'n Inter-Ins. Bureau*, No. 07-00362, 2009 WL 3562871, *5 (N.D. Cal. Oct. 27,
5 2009) (awarding \$7,500 to class representative who spent “somewhat more time assisting
6 counsel than occurs in the average case”); *In re M.L. Stern Overtime Litig.*, No. 07-cv-118, 2009
7 WL 3272872, *3-4 (S.D. Cal. Oct. 9, 2009) (awarding class representatives \$15,000 each);
8 *Fleury v. Richemont North Am., Inc.*, No. C-05-4525, 2009 WL 1010514, *1 (N.D. Cal. April 14,
9 2009) (approving incentive awards to the class representatives in the amount of \$10,000 each).

10 Plaintiffs Perez and Perry – the appointed and certified representative plaintiffs – worked
11 closely with counsel and met with them on multiple occasions, traveled from their homes to be
12 deposed by Wells Fargo (Perez traveled from his home in New Jersey to San Francisco),
13 participated in developing factual material and strategy, and participated in discovery both in
14 terms of responding and developing discovery to be propounded, and communicated routinely
15 with counsel regarding the case and regarding the mediation and settlement in this case. Brenda
16 Miles, the third named-plaintiff, while not appointed as a class representative, similarly took the
17 initiative to file a lawsuit on behalf of others, participated in her own deposition, and was
18 instrumental in the settlement being achieved. (Thompson Decl. ¶ 14, Hanson Decl. ¶ 17.)

19 For each of these depositions, the Plaintiffs met with counsel in advance to prepare.
20 Further, they worked closely with Class Counsel in managing the settlement process and in
21 reviewing and approving the settlement agreement. These depositions and assistance were used
22 to evaluate the case and were used in support of class certification. (*Id.*)

23 The requested incentive awards are a tiny fraction of the \$20 million settlement fund in
24 this case – together totaling only .075% of the settlement fund. Without the active Plaintiffs’
25 participation in this case, the settlement would not have been possible. The total settlement fund
26 here easily demonstrates the substantial benefits the active plaintiffs have brought to the class as
27 a whole justifies incentive awards.

1 **E. Attorneys' Fees and Costs**

2 Pursuant to 29 U.S.C. § 216(b), plaintiffs are entitled to an award of reasonable attorneys'
3 fees. In cases involving a fee-shifting statute, the Supreme Court has expressed a preference that
4 the parties agree to the amount of the fee: "A request for attorney's fees should not result in a
5 second major litigation. Ideally, of course, litigants will settle the amount of a fee." *Hensley v.*
6 *Eckerhart*, 461 U.S. 424, 437 (1983).

7 Here, Nationwide Counsel seek \$5 million for attorneys' fees (25% of the total settlement
8 fund) and \$154,019.39 as actual costs, as provided in the Settlement Agreement. (See
9 Declarations of Thompson and Hanson regarding the actual costs incurred.) Wells Fargo has
10 agreed not to object to or oppose such amounts. (See Agreement, § 2.2.) Plaintiffs' Counsels'
11 fee request is fair and reasonable and there is no reason the Court should disturb the agreement
12 of the parties.

13 In analyzing the reasonableness of a fee, courts may apply the percentage-of-the-fund or
14 the lodestar method. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002). Plaintiffs
15 request that the Court adopt the percentage method, as that is what the parties have agreed. The
16 fee request is reasonable under either standard.

17 In applying the percentage of the fund methodology, the Ninth Circuit has held that 25%
18 of the total settlement fund is the benchmark fee award. *Six (6) Mexican Workers v. Ariz. Citrus*
19 *Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990), and the usual range is 20-30%, *Vizcaino*, 290
20 F.3d at 1047. Here, the representative plaintiffs, Perry and Perez have entered into retainer
21 agreements with Nationwide Counsel that would provide for attorneys' fees of one-third or more
22 of the total recovery, and the opt-ins have authorized the named plaintiffs to enter into
23 agreements on their behalf regarding the payment of attorneys' fees. (Thompson Decl. ¶ 15,
24 Hanson Decl. ¶ 10.) Plaintiffs counsel, however, have agreed to limit their fee to just 25% of the
25 total settlement fund, which is in keeping with the benchmark approved by the Ninth Circuit.
26 (Agreement § 2.2.)

27 Further, the Ninth Circuit sets out a non-exhaustive list of factors which may be relevant
28

1 to the district court's determination of the fees ultimately awarded: (1) the results achieved; (2)
2 the risk of litigation; (3) the skill required and quality of work; (4) the contingent nature of the
3 fee and the financial burden carried by the plaintiffs; and (5) awards made in similar cases. *See*
4 *Vizcaino*, 290 F.3d at 1048-50. Each of these factors also supports the agreed-upon attorney fee
5 request:

- 6 (1) The settlement reflects excellent results – This settlement puts meaningful relief into
7 the hands of FLSA Collective action. The per capita gross settlement amount is more
8 than \$4,375 per plaintiff and, on average, approximately \$250 per month worked in
9 the class period. (See Hanson Decl. ¶ 8.)
- 10 (2) The litigation was risky – As evidenced by other wage and hour cases involving loan
11 officers, this litigation had significant risks. These included the risk that the
12 collective action would be decertified, as the California Rule 23 class was; the risk of
13 loss given Wells Fargo's asserted exemption defenses; the risk of further appeal; and
14 even if the plaintiffs were to prevail, the risk that a court or jury could find that
15 measure of damages to be smaller than that sought. (Thomson Decl. ¶ 12, Hanson
16 Decl. ¶ 5.)
- 17 (3) The litigation required significant skill – Counsel effectively and diligently
18 prosecuted this challenging and complicated case. This litigation went before the
19 Judicial Panel on Multi-District Litigation and several individual lawsuits filed in
20 various locations were all consolidated into one large action. A Case Management
21 Order was created appointing the Callahan and Stueve Siegel firms as co-lead counsel
22 for the nationwide, non-California actions. The collective action and Rule 23 class
23 action certifications were both highly contentious battles requiring tremendous
24 amounts of factual and legal work. Counsel prepared and produced clients for
25 multiple depositions and took several corporate depositions – including depositions of
26 high-ranking corporate officers. The fact that this case required four separate
27 mediations with two different, highly-skilled and nationally-recognized class action
28

1 mediators before a settlement was finally achieved is further testament to the skill of
2 counsel in obtaining these results. (See Thompson Decl. ¶¶ 10-12, Hanson Decl. ¶¶ 5-
3 7.)

4 (4) Plaintiffs' Counsel took the case on a contingency fee arrangement and expended a
5 great deal of their own resources in prosecuting the case – Nationwide Counsel have
6 prosecuted this case since early 2005 and have paid significant costs and expenses up
7 front. They have expended a great deal of time in the case as well. As of this filing,
8 Plaintiffs' Counsel have expended approximately 7,000 hours and \$154,019.39 in
9 costs, amounts certain to increase through the administration and notice phases.
10 (Thompson Decl. ¶¶ 16-20, Hanson Decl. ¶¶ 10-16.)

11 (5) The requested fee award is in line with similar cases – As discussed above, courts
12 routinely award attorneys' fees of 25% of the settlement fund in similar wage and
13 hour litigation. "In wage and hour cases, 'twenty-five percent is considered a
14 benchmark for attorneys' fees in common fund cases.'" *Barcia v. Contain-A-Way,*
15 *Inc.*, No. 07-938, 2009 WL 587844, at *5 (S.D. Cal. March 6, 2009); *accord Perry v.*
16 *Nat'l City Bank*, Order Approving Settlement, Attorneys' Fees and Service Awards in
17 loan originator wage case, No. 3:05-CV-00891-DRH-PMF (S.D. Ill. March 3, 2008)
18 (approving request for 33 percent of the settlement fund). And the Ninth Circuit has,
19 several times, awarded fees in excess of 25% of the common fund requested here.
20 *See Vizcaino*, 290 F.3d at 1050 (affirming 28% of fund as attorney fee); *In re Mego*
21 *Fin. Corp. Sec. Litig.*, 213 F.3d 454, 457, 463 (9th Cir. 2000) (affirming 33% of fund
22 as fee); *In re Pac. Enter. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming 33%
23 of fund as fee). Accordingly, this factor fully supports the benchmark fee request.
24 Similarly, in recent wage cases involving the same defendant, courts have awarded
25 the same or higher 25% of the fund requested here. *See, Garnica, et al. v. Wells*
26 *Fargo Bank, N.A.*, Case No. 01264187 (33.9 % of the fund); *see also Osinga v. Wells*
27 *Fargo* Case No. BC305453 (25% of the fund).
28

1 Lastly, although not required, the Ninth Circuit permits a district court to conduct a
2 “lodestar crosscheck” on a percentage-of-the-fund fee request. Class Counsel’s lodestar is
3 \$3,470,010.00.² (Thompson Decl. ¶¶ 17-19, Hanson Decl. ¶¶ 11-12.) The lodestar multiplier on
4 the hours worked to date, therefore, is 1.44. This multiplier is not unreasonable as “multiples
5 ranging from one to four are frequently awarded in common fund cases when the lodestar
6 method is applied.” 3 Newberg § 14.03 at 14-5; *accord Vizcaino*, 290 F.3d at 1051 (approving
7 multiplier of 3.65 and identifying several other cases with multipliers of four or greater); *In re*
8 *NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y. 1998) (“In recent years
9 multipliers of between 3 and 4.5 have become common”).

10 Class Counsel’s request for 25% of the settlement fund is fully justified by the fact that it
11 is equal to or less than the benchmark set by the Ninth Circuit, is fully supported by each of the
12 relevant factors and is further supported by a lodestar crosscheck. The Court should, therefore,
13 approve the fee as agreed upon between the parties.

14 **V. DECERTIFICATION OF THE RULE 23 CLASS**

15 In addition to settling the FLSA Collective Action, the parties have agreed that the
16 previously certified Rule 23 class of non-California plaintiffs be decertified and that their claims
17 be dismissed without prejudice.

18 Decertification of the Rule 23 Class and dismissal without prejudice of their claims from
19 this lawsuit requires court approval. *See* Fed. R. Civ. Proc., R. 23(e). A district court’s decision
20 on maintainability of class status is inherently tentative and the class is subject to decertification
21 at any time before final judgment. Fed. R. Civ. Proc., R. 23(c)(1)(C); *Officers for Justice v. Civil*
22 *Service Comm’n of City and County of San Francisco* 688 F.2d 615, 633. (9th Cir. 1982).

23
24 ²The lodestar includes only hours by the Lead Counsel firms of Stueve Siegel Hanson
25 LLP and Callahan Thompson Sherman & Caudill, LLP. Lead Counsel has requested the time
26 records from counsel in the *Miles* action. Although Lead Counsel do not have the complete time
27 records of the *Miles* attorneys at this time, Lead Counsel anticipates the amount of time will be
28 modest. As part of its responsibilities as Court-appointed lead counsel in the MDL, Lead
Counsel will ensure that lawyers in the *Miles* action are fairly compensated from the awarded
attorneys fees for their time in the case.

1 Decertification is appropriate here. Shortly after the Court issued its orders certifying the
2 California and Nationwide Rule 23 classes, Wells Fargo filed an appeal of both decisions
3 pursuant to Fed. R. Civ. P. 23(f). On July 7, 2009, the United States Court of Appeals for the
4 Ninth Circuit reversed the Court's order certifying the California Rule 23 Class. *In re Wells*
5 *Fargo Home Mortg. Overtime Pay Litigation*, 571 F.3d 953 (9th Cir. 2009). On remand, this
6 Court denied class certification to the California Plaintiffs.

7 As to the Rule 23 class of non-California plaintiffs, the Ninth Circuit has not yet ruled on
8 Wells Fargo's appeal because the California Supreme Court has not yet ruled whether the
9 California Unfair Competition Law may be applied to non-California workers. *Sullivan v.*
10 *Oracle Corp.*, Cal. Sup. Court Case No. S170577 (4/22/09).

11 While Nationwide Plaintiffs maintain that Rule 23 certification was appropriate, given
12 the Ninth Circuit's rulings regarding the California Class in this case (*In re Wells Fargo Home*
13 *Mortg. Overtime Pay Litigation*, 571 F.3d 953 (9th Cir. 2009)) and in its companion opinion of
14 *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935 (9th Cir. 2009), and given this Court's
15 order denying class certification in the California case on remand, Nationwide Plaintiffs
16 appreciate that decertification of the Nationwide Rule 23 Class is likely inevitable. The class
17 representatives and class counsel have fiduciary obligations to the Rule 23 Class, but those
18 obligations do not require the representatives or counsel to take positions with no reasonable
19 chance of success.

20 Pursuant to the terms of the Agreement between the parties, the Rule 23 Class will be
21 decertified, their claims dismissed without prejudice, and they will receive notice clearly
22 advising them of the decertification and dismissal and advising them of their rights. (See Notice,
23 attached to the Settlement Agreement as Exhibit 1-A.) The statute of limitations on their
24 California Unfair Competition Law claims has been tolled during the pendency of the period of
25 certification, (*American Pipe & Const. Co. v. Utah*, 414 U.S. 538 (1974)), and the parties have
26 agreed to further tolling of the statute of limitations for the Unfair Competition Law claims for
27 an additional 90 days from the date the notice is mailed. (Agreement § 3.1.) Rule 23 Class
28

1 Members wishing to move forward with their claims will be permitted to pursue them in
2 individual lawsuits.

3 Plaintiffs, therefore, request that the Court order the Rule 23 class decertified, their
4 claims dismissed without prejudice, and approve the notice submitted.

5 **VI. CONCLUSION**

6 For all the foregoing reasons, Plaintiffs request that the settlement be approved and the
7 Rule 23 Class decertified, with notice to be sent to the Rule 23 Class members in substantially
8 the form presented.

9 Respectfully submitted,

10
11 DATED: July 26, 2010

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The e-filer has obtained the concurrence of all signatories.

CERTIFICATE OF SERVICE

1
2 I hereby certify that on July 26, 2010, I electronically filed the foregoing with the Clerk
3 of Court using CM/ECF system which will send email notification of such filing(s) to the
4 following:

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