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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JENNIFER MORALES, an individual, on behalf of herself, and on behalf of all persons similarly situated

Plaintiff,

v.

WELLS FARGO INSURANCE SERVICES USA, INC., a North Carolina Corporation; and Does 1 through 50, Inclusive,

Defendants.

CASE No. **CV 13 3867 EDL**

NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT; and,

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Date: June 9, 2015
Time: 9:00 a.m.

Judge: Hon. Elizabeth D. Laporte
Courtroom: E - 15th Floor

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on June 9, 2015, at 1:30 p.m. in the United States District Court for the Northern District of California, located at the San Francisco Courthouse, Courtroom E - 15th Floor, 450 Golden Gate Avenue, San Francisco, CA 94102, before the Honorable Elizabeth D. Laporte, Plaintiff Jennifer Morales ("Plaintiff") will move and hereby does move for preliminary approval of the proposed Class Settlement with Defendant Wells Fargo Insurance Services USA, Inc. ("Defendant"). This motion is unopposed as based on the Joint Stipulation of Class Settlement and Release (the "Stipulation") between the parties filed concurrently with this motion.

The motion will be based on this Notice of Motion and the attached Memorandum of Points and Authorities filed herewith, the Declaration of Kyle Nordrehaug and attached exhibits, the argument of counsel and upon such other material contained in the file and pleadings of this action.

Respectfully submitted,

Dated: April 27, 2015 BLUMENTHAL, NORDREHAUG & BHOWMIK

By: */s/ Kyle R. Nordrehaug*
Kyle R. Nordrehaug
Attorneys for Plaintiff

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MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff Jennifer Morales ("Plaintiff") respectfully submits this memorandum of points and authorities in support of the motion for preliminary approval of settlement of the class action.

I. INTRODUCTION

Plaintiff and Defendant Wells Fargo Insurance Services USA, Inc. ("Defendant") have reached a full and final settlement of the above-captioned class action, which is embodied in the Joint Stipulation of Class Settlement and Release (the "Stipulation") filed concurrently with the Court as Exhibit 1 to the Declaration of Kyle Nordrehaug ("Decl. Nordrehaug").[1] By this motion, Plaintiff seeks preliminary approval of the Stipulation as fair, reasonable and adequate, conditional certification of the Class for settlement purposes, entry of the Preliminary Approval Order, and scheduling of the Fairness Hearing to determine final approval of the Settlement.

II. DESCRIPTION OF THE SETTLEMENT

Counsel for the Parties, after litigation and settlement negotiations, agreed to a settlement that is fair, reasonable and favorable to the Class, which is defined as: "all individuals employed in California by Defendant Wells Fargo Insurance Services USA, Inc. in the positions Account Executive 1 and/or Account Executive 2 at any time during the Class Period." (Stipulation at ¶ II(E).) The Class Period is July 12, 2009 through December 31, 2014. (Stipulation at ¶ II(G).) The Class consists of about 500 current and former employees of Defendant. Decl. Nordrehaug, ¶3.

Under the terms to which the Parties have agreed, Defendant agrees to pay Two Million Dollars and No Cents ($2,000,000.00) (the "Settlement Payment") in consideration for the settlement and the release of the Participating Class Members' claims as described in the Stipulation. (Stipulation at ¶ II(W.) The Settlement Payment

[1] Capitalized terms in this Memorandum have the same meaning as contained in Section II of the Stipulation.

will fund: (i) the Settlement Shares; (ii) any award of attorneys' fees and costs to Class Counsel or otherwise; (iii) the Plaintiff's Service Payment, (iv) the fees and expenses of the Settlement Administrator, and (v) payment in the amount of $10,000.00 to the California Labor and Workforce Development Agency ("LWDA") for Plaintiff's Private Attorney General Act ("PAGA") penalty claims. (Stipulation at ¶ II(W).) Decl. Nordrehaug, ¶4.

As per Paragraph II(W) of the Stipulation, all attorneys' fees and costs, the costs of settlement administration, the Plaintiff's Service Payment, and the PAGA payment to the LWDA will be deducted from the Settlement Payment. The Net Qualified Settlement Fund (Net QSF") is defined as the value of the Settlement Payment less the above deductions. (Stipulation at ¶ II(W).) The Net QSF will be distributed as the Settlement Shares to the Participating Class Members. (Stipulation at ¶ II(W).) In addition to the Settlement Payment, Defendant shall pay the employer's share of applicable payroll taxes on portions of the Settlement Shares or Plaintiff's Service Payment. (Stipulation at ¶ II(W).) Decl. Nordrehaug, ¶5.

This is a good result for the members of the Class. Liability in this case was uncertain because a jury may have found that some or all of the Class Members may have been exempt from overtime requirements applicable to nonexempt employees. Indeed, some courts have found exemptions to apply in cases involving similar facts. Decl. Nordrehaug, ¶6. Moreover, there was further uncertainty as to whether class certification could have been achieved and maintained throughout the litigation. These defenses could have reduced the amount recovered or denied a recovery altogether to the members of the class. Decl. Nordrehaug, ¶6.

III. NATURE OF THE CASE

On July 12, 2013, Plaintiff filed a lawsuit in the Superior Court of the State of California, County of San Francisco, on behalf of herself and a putative class consisting of all persons who were employed by Defendant in California in the positions Account Executive 1 or Account Executive 2. On August 21, 2013, Defendant removed the

lawsuit to the United States District Court for the Northern District of California. On December 5, 2013, Plaintiff filed a First Amended Complaint. Decl. Nordrehaug, ¶7.

In the Action, Plaintiff asserts the following claims based on the primary allegation that Defendant misclassified her and other employees in California in the Account Executive 1and 2 positions as exempt employees: (1) unpaid overtime under the California Labor Code; (2) missed meal and rest period compensation; (3) wage statement penalties; (4) waiting time penalties; (5) PAGA penalties; and (6) derivative relief under the California Business and Professions Code §17200 ("UCL"). Defendant denies all of the material allegations in the Action, and denies that it has violated any wage/hour or wage payment or other law or obligation to Plaintiff or any of the Class Members. Decl. Nordrehaug, ¶8.

In the course of litigating the Action, Defendant provided payroll and employment data regarding the Class Members to Plaintiff and Class Counsel. Plaintiff served written discovery on Defendant and Class Counsel also interviewed multiple Class Members. Based on this data, and their own independent investigation and evaluation, Class Counsel has thoroughly analyzed the value of the Class Members' claims during the prosecution of this Action. This discovery, investigation, and prosecution has included, among other things, (a) multiple meetings and conferences with Plaintiff; (b) inspection and analysis of the documents and materials produced by Plaintiff and Defendant; (c) analysis of the various legal positions taken and defenses raised by Defendant; (d) investigation into the viability of class treatment of the claims asserted in the Action; (e) analysis of potential class-wide damages; (f) research of the applicable law with respect to the claims asserted in the Complaint and the potential defenses thereto, (g) the exchange of information through informal discovery, and (h) assembling data for calculating damages, including retaining an expert for this calculation. Decl. Nordrehaug, ¶9.

Although a settlement has been reached, Defendant vigorously denies and continues to deny all of the material allegations asserted in the Action, and denies that

it has violated any wage and hour law or wage payment or any other law or obligation to the Plaintiff or any of the Class Members. Decl. Nordrehaug, ¶10.

On April 28, 2014, the Parties participated in a good-faith, arms-length mediation presided over by Jeffrey A. Ross, but were unable to reach a settlement. Mediator Ross continued to negotiate with the parties over the next several months and was ultimately able to reach a settlement between the Parties through a mediator's proposal on August 6, 2014 which the Parties accepted. Based on the mediator's proposal and these negotiations, the Parties agreed to settle the Action on the terms and conditions set forth in this Stipulation. Decl. Nordrehaug, ¶11.

The discovery conducted in this matter, as well as discussions between counsel, have been adequate to give the Class Representative and Class Counsel a sound understanding of the merits of their positions and to evaluate the worth of the claims of the Class Members in light of Defendant's defenses to them. Plaintiff and Class Counsel believes that the settlement with Defendant for the consideration and on the terms set forth in this Stipulation is fair, reasonable, and adequate and is in the best interest of the Class in light of all known facts and circumstances, including the risk of significant delay, the likelihood that Defendant would prevail on its defenses, and numerous potential appellate issues. Decl. Nordrehaug, ¶12.

IV. PLAN OF ALLOCATION

To implement the terms of this Settlement, Defendant agrees to pay the Settlement Payment of Two Million Dollars and No Cents ($2,000,000.00) to resolve the Claims. (Stipulation at ¶ II(W).) The Settlement Payment will be the sole source and maximum payment by Defendant, under this Stipulation, to fund: (i) the Settlement Shares; (ii) any award of attorneys' fees and costs to Class Counsel or otherwise; (iii) the Plaintiff's Service Payment, (iv) the fees and expenses of the Settlement Administrator, and (v) payment in the amount of $10,000.00 to the California Labor and Workforce Development Agency ("LWDA") for Plaintiff's Private Attorney General Act ("PAGA") penalty claims. After deduction of items (ii)-(v), the remaining funds will constitute the

Net Qualified Settlement Fund ("Net QSF"). (Stipulation at ¶II(W).) Decl. Nordrehaug at ¶13.

The Net QSF shall be allocated to the Class Members who do not opt out (the "Participating Class Members"). Participating Class Members' Settlement Shares will be calculated as follows: (1) calculating the total weeks worked by all Participating Class Members based on the dates each Participating Class Member held an Account Executive 1 and/or 2 position in California pursuant to the Class Data (the "Total Work Weeks"); (2) dividing each Participating Class Member's work weeks (based on the dates each Participating Class Member held the Account Executive 1 and/or 2 position in California position pursuant to the Class Data) by the Total Work Weeks to determine his or her proportionate share of the Net QSF (for each Participating Class Member, the "Settlement Share Proportion"); and (3) multiplying each Participating Class Member's Settlement Share Proportion by the Net QSF. (Stipulation at ¶ XIII(A)(2).) Decl. Nordrehaug at ¶14.

Participating Class Members will be automatically mailed a check for their Settlement Share as calculated based on the above formula. (Stipulation at ¶ XIII(A)(1).) All checks sent to Participating Class Members that remain uncashed after one hundred and twenty (120) days, as well as all amounts allocated to Class Members who elect to opt-out of the Settlement, will be distributed cy pres to The Interdisciplinary Center for Healthy Workplaces. (Stipulation at ¶ XIII(A)(5).) Decl. Nordrehaug at ¶15.

Subject to Court approval, the Parties have agreed that Gilardi & Co., LLC will be appointed as Settlement Administrator. (Stipulation at ¶II(B).) The Claims Administrator's shall administer this settlement by: (i) using data provided by Defendant to prepare the Notice Materials; (ii) obtaining forwarding addresses for Class Members using appropriate methods, as described in the Stipulation; (iii) mailing the Notice Materials to Class Members; (iv) tracking non-delivered Notice Materials and taking reasonable steps to re-send them to Class Members' current addresses; (v) tracking and timely reporting to Class Counsel and Counsel for Defendant returned Elections Not to

Participate in Settlement; (vi) establishing the QSF; (vii) disbursing all amounts payable from the QSF and handling all tax reporting; (viii) calculating the Settlement Shares; (ix) notifying Class Counsel and Counsel for Defendant of any Participating Class Members who have not cashed their Settlement Share checks by the deadline set forth below; and, (x), handling the disbursement and tax reporting, if any, of amounts associated with uncashed checks.. (Stipulation at ¶ VI(A).) The costs of settlement administration will be paid from the Settlement Payment. (Stipulation at ¶ VII(A).) Decl. Nordrehaug at ¶16.

Class Counsel will apply to the Court for an award of an amount up to twenty-five percent (25%) of the Settlement Payment for reasonable attorneys' fees, and for reimbursement of litigation costs not to exceed $25,000. (Stipulation at ¶ IX.) Plaintiff will also apply approval of the Plaintiff's Service Payment in an amount not to exceed $10,000. (Stipulation at ¶ IX(B).) The motion shall be scheduled for determination at the Fairness Hearing but will be filed and served before the Notice is distributed to the Class. (Stipulation at ¶ IX(C).) Decl. Nordrehaug at ¶17.

V. THE SETTLEMENT MEETS ALL CRITERIA NECESSARY FOR PRELIMINARY APPROVAL

When a proposed class-wide settlement is reached, the settlement must be submitted to the court for approval. Fed. R. Civ. P. 23(e)(1)(A); 2 H. Newberg & A. Conte, *Newberg on Class Actions* (3d ed. 1992) at §11.41, p.11-87. Preliminary approval is the first of three steps that comprise the approval procedure for settlements of class actions. See e.g. *Louie v. Kaiser Found. Health Plan, Inc.*, 2008 U.S. Dist. LEXIS 78314 (S.D. Cal. 2008). The second step is the dissemination of notice of the settlement to all class members. The third step is 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).

The question presented on a motion for preliminary approval of a proposed class

action settlement is whether the proposed settlement is "within the range of possible approval." *Manual for Complex Litigation*, Second §30.44 at 229; *Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982); *Louie*, *supra*, at *7. Preliminary approval is merely the prerequisite to giving notice so that "the proposed settlement . . . may be submitted to members of the prospective Class for their acceptance or rejection." *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 323 F. Supp. 364, 372 (E.D. Pa. 1970). There is an initial presumption of fairness when a proposed settlement, which was negotiated at arm's length by Class Counsel, is presented for court approval. *Newberg*, 3d Ed., §11.41, p.11-88. However, the ultimate question of whether the proposed settlement is fair, reasonable and adequate is made after notice of the settlement is given to the class members and a final settlement hearing is held by the Court.

A. The Role Of The Court In Preliminary Approval Of A Class Action Settlement

The approval of a proposed settlement of a class action suit is a matter within the broad discretion of the trial court. *Staton v. Boeing*, 327 F.3d 938, 959 (9th Cir. 2003). Preliminary approval does not require the trial court to answer the ultimate question of whether a proposed settlement is "fair, reasonable and adequate." *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991); *Manual for Complex Litigation*, Third, §§ 20.212. That determination is made only after notice of the settlement has been given to the members of the class and after the class members have been given an opportunity to voice their views of the settlement or to be excluded from the settlement class. See, e.g., 3B J. Moore, *Moore's Federal Practice* §§23.80 - 23.85 (2003).

In considering a potential settlement for preliminary approval purposes, the trial court does not have to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute (*Detroit v. Grinnell Corp.*, 495 F.2d 448, 456 (2d Cir. 1974)), and need not engage in a trial on the merits. *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983). The court is

not required to determine that certification of a settlement class is appropriate until the final settlement approval. *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 797 (3d Cir. 1995).

The question of 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. Factors To Be Considered In Granting Preliminary Approval

A number of factors are to be considered in evaluating a settlement for purposes of preliminary approval. No one factor should be determinative, but rather all factors should be considered. These criteria have been summarized as follows:

"If the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, then the court should direct that the notice be given to the

class members of a formal fairness hearing." *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2011), citing *Manual of Complex Litigation*, Second §30.44. Here, the settlement meets all of these criteria.

1. The Settlement is the Product of Serious, Informed and Noncollusive Negotiations

This settlement is the result of extensive and hard fought negotiations. Defendant denies each and every one of the claims and contentions alleged in this Action. Defendant has asserted and continues to assert many defenses thereto, and has expressly denied and continues to deny any wrongdoing or legal liability arising out of the conduct alleged in the Action. Nonetheless, Defendant has concluded that this Action be settled in the manner and upon the terms and conditions set forth in the Stipulation in order to avoid the expense, inconvenience, and burden of further legal proceedings, and the uncertainties of trial and appeals. Defendant has decided to put to rest the alleged claims of the Class.

Settlement negotiations took place between experienced counsel. Counsel for the Parties, after formal mediation and settlement negotiations conducted over several months, reached an agreement, based upon the experience of counsel and the uncertainties of protracted litigation. Most importantly, Plaintiff and Class Counsel believe that this settlement is fair, reasonable and adequate. By reason of the settlement, Defendant agrees to pay the Settlement Payment of Two Million Dollars and No Cents ($2,000,000.00) in full settlement of the alleged claims. (Stipulation at ¶ II(W).)

Class Counsel has conducted a thorough investigation into the facts of the class action, including a review of relevant documents and data and a diligent investigation of the Class Members' claims against Defendant. Class Counsel also retained an expert to prepare a damage valuation in advance of mediation. Based on the foregoing documents and data, and their own independent investigation and evaluation, Class Counsel is of the opinion that the settlement with Defendant for the consideration and

on the terms set forth in the Stipulation is fair, reasonable, and adequate in light of all known facts and circumstances, including the risk of significant delay, defenses asserted by Defendant, and numerous potential appellate issues. Decl. Nordrehaug, ¶12. Defendant and Defendant's counsel also agree that the Settlement is fair and in the best interest of the Settlement Class Members.

Plaintiff and Class Counsel recognize the expense and length of continuing to litigate and trying this Action against Defendant through possible appeals which could take several years. Class Counsel has also taken into account the uncertain outcome and risk of litigation, especially in complex actions such as this litigation. Class Counsel is also mindful of and recognize the inherent problems of proof under, and alleged defenses to, the claims asserted in the Action. Based upon their evaluation, Plaintiff and Class Counsel have determined that the settlement set forth in the Stipulation is in the best interest of the Class Members. Decl. Nordrehaug, ¶18.

Here the negotiations have been hard-fought and aggressive with capable advocacy on both sides. Decl. Nordrehaug, ¶19. Accordingly, "[t]here is likewise every reason to conclude that settlement negotiations were vigorously conducted at arms' length and without any suggestion of undue influence." *In re Wash. Public Power Supply System Sec. Litig.*, 720 F. Supp. 1379, 1392 (D. Ariz. 1989).

2. The Settlement Has No "Obvious Deficiencies" and Falls Within the Range for Approval

The proposed Settlement herein has no "obvious deficiencies" and is well within the range of possible approval. All Class Members will receive an opportunity to participate in and receive payment.

In advance of negotiations, Class Counsel received class data concerning their employment and payroll information, which permitted Class Counsel to make an intelligent evaluation. Decl. Nordrehaug at ¶9. For the individuals whose claims are at issue in this Action, Plaintiff reviewed the data and used information provided by

Defendants to determine the damage valuation. With the assistance of a damage expert, DM&A, Plaintiff calculated that the overtime damages, totaled $13,818,562, assuming overtime was worked every day by every class member. Defendant argued persuasively that the actual damages were far less. Decl. Nordrehaug, ¶20.

Consequently, Defendants were subject to a total overtime damage claim of $13,818,562 for the entire Class. The settlement of $2,000,000, before deductions, represents more than 13.7% of Plaintiff's estimated overtime damages for the Class, assuming these amounts could be proven in full at trial. This settlement amount is fair and reasonable given the significant liability problems. Specifically, Defendant claim of the overtime exemption relied on the Department of Labor Opinion Letter FLSA2009-28 (January 9, 2009), which held that employees who consult with clients regarding their insurance needs, as the Class in this case, generally met the requirements of the administrative exemption. Therefore, because the alternative to this Settlement could likely be the Class receiving nothing, Class Counsel accepted the mediator's proposal as fair and reasonable. Clearly the goal of this litigation to obtain redress for the Class has been met. Decl. Blumenthal, ¶20.

In *Glass v. UBS Fin. Servs.*, 2007 U.S. Dist. LEXIS 8476 (N.D. Cal. January 27, 2007) the federal district court for the Northern District of California recently approved a settlement of an action claiming unpaid overtime wages where the settlement amount constituted approximately 25% of the estimated overtime damages the class. In *Dunleavy v. Nadler (In re Mego Fin. Corp. Sec. Litig.)*, 213 F.3d 454, 459 (9th Cir. 2000), the Court of Appeals affirmed the approval of a class settlement which represented "roughly one-sixth of the potential recovery". Here the settlement consideration similarly constitutes a reasonable percentage of the estimated actual overtime loss to the Class.

Where both sides face significant uncertainty, the attendant risks favor settlement. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998). Here, a number of

defenses asserted by Defendants presented serious threats to the claims of Plaintiff and the other Class Members. Defendant contends that Defendant's employment practices complied with all applicable Labor laws.

For example, Defendants contended that Class Members were barred from recovery by the "administrative exemption". For this exemption, Defendant argued that Class Members were primarily engaged in exempt duties which required the exercise of discretion and independent judgment. Defendants contended that Class Members' primary duty was work directly related to the management or general business operations of Defendant. In support of this defense, Defendant relied on the Department of Labor Opinion Letter FLSA2009-28 (January 9, 2009) which holds, in relevant part:

> Your describe the primary duty of the agents in this group as including meeting with current or prospective clients, typically in person, to collect and discuss each client's life insurance and financial information... ...we conclude that these agents satisfy the duties requirement under 29 C.F.R. § 541.203(b).
>
> Similar to the employees discussed in the 2004 preamble in *John Alden*, *Hogan*, and *Wilshin* — all of whom were found to satisfy the duties requirements of the administrative exemption—the agents service their employer's financial services business by engaging in promotion and business development activities

Federal decisions further support the claimed exemption. See *Hogan v. Allstate Ins. Co.*, 361 F.3d 621, 626-28 (11th Cir. 2004) (insurance agents administratively exempt who serviced and advised existing customers, adapted customer's policies to their needs, promoted sales, and hired and trained staff, among other duties); *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1, 8-14 (1st Cir. 1997) (administrative exemption applied to insurance marketing representatives who represented company to third party agents, promoted sales, and kept informed about market to help match products with customer needs); *Wilshin v. Allstate Ins. Co.*, 212 F. Supp. 2d 1360, 1376-79 (M.D. Ga 2002) (administrative exemption applied to insurance agent who stayed knowledgeable about market and needs of customers and recommended products to clients). There were also inherent problems with proof of damages, as Defendant argued there were no time

records documenting overtime hours as Class members primarily worked during normal business hours. If successful, Defendant's defenses could eliminate or substantially reduce any recovery to the Class. While Plaintiffs believe that these defenses could be overcome, Defendants maintain these defenses have merit and therefore present a serious risk to recovery by the Class. Decl. Blumenthal at ¶21.

Moreover, there was also a significant risk that, if the Action was not settled, Plaintiff would be unable to obtain class certification and thereby not recover on behalf of any employees other than herself. At the time of the mediation, Defendant forcefully opposed the propriety of class certification, arguing that individual issues precluded class certification. 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 ¶22.

After vigorous negotiations, the Parties agreed to the Settlement of $2,000,000. Recognizing the potential risks, both sides agreed. As the federal court recently held in *Glass*, where the parties faced uncertainties similar to those here:

> 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.

3. The Settlement Does Not Improperly Grant Preferential Treatment To The Class Representative or Segments Of The Class

The relief provided in the settlement will benefit all Class Members equally. The settlement does not improperly grant preferential treatment to the Class Representative or any individual segments of the Class. Each Settlement Class Member, including the Plaintiff, will be entitled to cash payment based on the plan of allocation. Decl. Nordrehaug at ¶4. Each Settlement Class Member's Payment will be determined as

follows:

The Net QSF shall be allocated to the Class Members who do not opt out (the "Participating Class Members"). Participating Class Members' Settlement Shares will be calculated as follows: (1) calculating the total weeks worked by all Participating Class Members based on the dates each Participating Class Member held an Account Executive 1 and/or 2 position in California pursuant to the Class Data (the "Total Work Weeks"); (2) dividing each Participating Class Member's work weeks (based on the dates each Participating Class Member held the Account Executive 1 and/or 2 position in California position pursuant to the Class Data) by the Total Work Weeks to determine his or her proportionate share of the Net QSF (for each Participating Class Member, the "Settlement Share Proportion"); and (3) multiplying each Participating Class Member's Settlement Share Proportion by the Net QSF. (Stipulation at ¶ XIII(A)(2).) Decl. Nordrehaug at ¶14.

In addition, the Class Representative will apply to the trial court for a service award of $10,000. (Stipulation at ¶ IX(B).) In *Glass*, the District Court awarded each of the class representatives in an overtime wages class action a service award of $25,000. *Glass*, 2007 U.S. Dist. LEXIS 8476 at *51-52. The payment of service award in this amount to the named plaintiff in a wage and hour class action is approved by settled authority, and the requested service award in the amount of $10,000 is reasonable in this case in light of the amount approved in *Glass* and other decisions.

4. The Stage Of The Proceedings Is Sufficiently Advanced To Permit Preliminary Approval Of The Settlement

The stage of the proceedings at which this settlement was reached also militates in favor of preliminary approval and ultimately, final approval of the settlement. Class Counsel has conducted a thorough investigation into the facts of the class action. Class Counsel began investigating the Class Members' claims before this action was filed. Class Counsel propounded discovery and interviewed Class Members. In advance of mediation, Defendant provided the information necessary for Class Counsel to

intelligently negotiate a settlement. Decl. Nordrehaug at ¶23.

Class Counsel obtained production of employment and payroll records. Class Counsel engaged in an extensive review and analysis of the relevant documents and data. Class Counsel also examined the applicable law governing these claims and the exemption defense. Accordingly, 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 results that could be obtained through further litigation. Decl. Nordrehaug at ¶23.

Based on the foregoing information and data and their own independent investigation and evaluation, Class Counsel is of the opinion that the settlement with Defendant for the consideration and on the terms set forth in the Stipulation is fair, reasonable, and adequate and is in the best interest of the class in light of all known facts and circumstances, including the risk of significant delay, defenses asserted by Defendant, and numerous potential appellate issues. 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. Nordrehaug at ¶24.

In *Glass*, the Northern District of California recently granted final approval of an overtime and meal wage action although in Glass no formal discovery had been conducted prior to the settlement:

> Here, no formal discovery took place prior to settlement. As the Ninth Circuit has observed, however, "[i]n the context of class action settlements, 'formal discovery is not a necessary ticket to the bargaining table' where the parties have sufficient information to make an informed decision about settlement." See In re Mego Financial Corp. Securities Litigation, 213 F.3d at 459.

2007 U.S. Dist. LEXIS 8476 at *14.

Here, Class Counsel was in a better position to evaluate the fairness of this settlement as in *Glass* because they conducted formal and informal discovery, as well as independent investigations, interviews and due diligence to confirm the accuracy of the

information supplied by Defendant.

VI. THE CLASS IS PROPERLY CERTIFIED FOR SETTLEMENT PURPOSES

The proposed settlements meet all of the requirements for certifying a settlement class under F.R.C.P. §23(b)(2) as demonstrated below, and therefore, the Court may appropriately approve the Class as defined in the Stipulation. This Court should conditionally certify a class for settlement purposes only that consists of "all individuals employed in California by Defendant Wells Fargo Insurance Services USA, Inc. in the positions Account Executive 1 and/or Account Executive 2 at any time during the Class Period." (Stipulation at ¶ II(E).) The Class Period is July 12, 2009 through December 31, 2014. (Stipulation at ¶ II(G).) The Class consists of about 500 current and former employees of Defendant. Decl. Nordrehaug, ¶25.

A. Rule 23 of the Federal Rules of Civil Procedure Governs

Plaintiff seeks certification of this action for settlement purposes under F.R.C.P §23(b)(3). This portion of rule 23 applies to class actions where "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed.R.Civ.P. 23(b)(3).

To maintain a class action under rule 23(b)(3), the four prerequisites of F.R.C.P. Rule 23(a) must first be satisfied. These prerequisites are referred to as numerosity, commonality, typicality, and adequacy of representation, and are set forth in Rule 23(a) as follows:

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

While Defendant disputes that the Plaintiff can satisfy these requirements, the Parties

agree that, for purposes of settlement, these requirements may be satisfied in this case, and therefore, the proposed Class should be certified for purposes of settlement only.

B. The Numerosity Requirement Is Satisfied

Rule 23(a) merely requires that the class be "so numerous that joinder of all members is impracticable." F.R.C.P. §23(a). "Courts have routinely found the numerosity requirement satisfied when the class comprises 40 or more members." *EEOC v. Kovacevich "5" Farms*, 2007 U.S. Dist. LEXIS 32330 at *57 (E.D.Cal. April 18, 2007); see also *Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 654 (C.D. Cal. 2000); *Ansari v. New York Univ.*, 179 F.R.D. 112, 114 (S.D.N.Y. 1998); *Lockwood Motors, Inc. v. General Motors Corp.*, 162 F.R.D. 569, 574 (D. Minn. 1995). In *Bowles v. Superior Court*, 44 Cal.2d 574 (1955), the Court held that a class of 10 members was sufficiently numerous.

Here, the Class is composed of about 500 Class Members, which is sufficiently numerous for settlement purposes. Decl. Nordrehaug at ¶25.

C. Common Questions of Law and Fact Bind the Class

Rule 23(a) requires that there be a common question of law or fact. There is no requirement that the members of the class be identically situated, only that there exists one or more factual or legal questions common to all members. *Jenson v. Continental Fin. Corp.*, 404 F. Supp. 806 (D. Minn. 1975). This threshold of "commonality" is not particularly high. *Jenkins v. Raymark Ind., Inc.*, 782 F.2d 468, 472 (5th Cir. 1986). The fundamental question is whether the resolution of the common legal or factual questions would affect all or a substantial number of the class members. *Jenkins*, *supra*, 782 F.2d at 472. Indeed, if a claim "arises out of the same legal or remedial theory, the presence of factual variations is normally not sufficient to preclude class action treatment." *Donaldson v. Pillsbury Co.*, 554 F.2d 825, 831 (8th Cir. 1977), cert. denied, 434 U.S. 856 (1977).

Rule 23(a) is satisfied where "the course or conduct giving rise to the cause of

action affects all class members, and at least one of the elements of that cause of action is shared by all of the class members." *Lockwood Motors*, 162 F.R.D. at 575. This requirement is met if common questions of liability are present, even if there may be individual variations. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998); *Kurihara v. Best Buy Co.*, 2007 U.S. Dist. LEXIS 64224, *17 (N.D. Cal. 2007).

Here, common questions of law and fact, as alleged by the Plaintiff, are present, specifically the question of whether the Class Members employed by Defendant were "exempt." Decl. Nordrehaug, ¶25. Defendant disputes that commonality exists for purposes of a litigation class, but does not oppose such a finding for purposes of this settlement only.

D. The Claims of the Plaintiff Are Typical of the Class Claims

The typicality requirement of Rule 23(a) requires that the members of the class have the same or similar claims as the named plaintiff. "The typicality requirement is met when the claims of the named plaintiff arise from the same event or are based on the same legal theories." *Tate v. Weyerhaeuser Co.*, 723 F.2d 598, 608 (8th Cir. 1983). In *Hanlon v. Chrysler Co.*, 150 F.3d 1011 (9th Cir. 1998), the Ninth Circuit held that "[u]nder the rule's permissive standards, representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." 50 F.3d at 1020. Typicality "does not mean that the claims of the class representative[s] must be identical or substantially identical to those of the absent class members." *Stanton*, *supra*, at 957.

In the instant case, there can be little doubt that the typicality requirement is fully satisfied. The Plaintiff, like every other member of the Settlement Class, was employed by Defendant as an "Account Executive 1 and/or 2", was classified as "exempt," and was therefore not paid overtime for overtime hours worked and not provided with legally required meal and/or rest breaks. The Plaintiff, like every other member of the Class, claims compensation as a result of the exempt classification, including compensation for

unpaid overtime, missed meal and rest breaks and related penalties. Thus, the claims of both the Plaintiff and the members of the Class arise from the same course of conduct by Defendant, involve the same issues, and are based on the same legal theories. Decl. Nordrehaug, ¶25. The typicality requirement of Rule 23 is met as to the common issues presented in this case. While Defendant disputes that Plaintiff has claims typical of the individuals she purports to represent, Defendant does not oppose a finding of typicality for purposes of this settlement only.

E. The Class Representative Has Fairly and Adequately Protected the Interest of the Class

The Plaintiff provided adequate representation of the interests of the class in that: (a) their attorneys are competent, experienced in class litigation and generally able to conduct the proposed litigation; and (b) the Class Representative does not have interests antagonistic to those of the class. *White v. Local 942*, 688 F.2d 85, (9th Cir. 1982). Simply put, Rule 23 asks whether the Class Representative will vigorously prosecute on behalf of the class and have a basic understanding of the claims. This requirement has been met here. First, Plaintiff is well aware of her duties as the representative of the class and have actively participated in the prosecution of this case to date. Plaintiff effectively communicated with Class Counsel, providing documents to Class Counsel and participated extensively in the investigation of the action. The personal involvement of the Plaintiff was essential to the prosecution of the action and the monetary settlement reached. Decl. Nordrehaug, ¶25. Second, the Plaintiff retained competent counsel who have extensive experience in class actions. Class Counsel has extensive experience in class action litigation in California and throughout the country. Class Counsel has been involved as class counsel in over two hundred (200) class action matters, including many wage and hour class actions. See e.g., Resume, attached as Exhibit 2 to the Decl. Nordrehaug at ¶26. Third, there is no antagonism between the interests of the Plaintiff and those of the Class. Both the Plaintiff and the Class Members seek monetary relief

under the same set of facts and legal theories. Under such circumstances, there can be no conflicts of interest, and adequacy of representation is presumed. *In re Wirebound Boxes Antitrust Lit.*, 128 F.R.D. 268 (D. Minn. 1989). While Defendant disputes that the Plaintiff is an adequate class representative, Defendant does not oppose such a finding for purposes of this settlement only.

F. The Additional Requirements of Rule 23 Are Satisfied

Since the requirements of Rule 23(a) have been satisfied, the Court now must look to Rule 23(b)(3) in order to determine whether a class should be maintained under one of the listed categories. Under Rule 23(b)(3), a class action may be maintained if two basic conditions are met. First, common questions must predominate over individual issues, and second, the class action must be superior to other available other methods for the fair and efficient adjudication of the controversy.

1. The Predominance Requirement Is Met

Rule 23(b)(3) provides that a class may be maintained if "the court finds that the questions of law and fact common to the members of the class predominate over any questions affecting only individual members." There is no bright line to determine whether common issues predominate. A claim will meet the predominance requirement in cases where generalized evidence of the Defendant's conduct will prove or disprove an element of the claim on a simultaneous class-wide basis. The "fundamental question" is whether the claim asserted is seeking a remedy to a "common legal grievance." *Lockwood Motors*, 162 F.R.D. at 580; *Buchholtz v. Swift & Co.*, 62 F.R.D. 581, 598 (D.Minn. 1973). Further, the mere fact that there are certain issues that may need to be determined on an individual basis does not preclude the satisfaction of the predominance requirement. See Newberg & Comte, *Newberg on Class Actions* §4.25 (3d ed. 1992).

Here, the adjudication of the common issues surrounding Defendant's uniform and systematic exempt classification policy could establish Defendant's liability on a class-wide basis. Plaintiff contends that Defendant had engaged in a uniform course of

misclassification with respect to overtime and meal/rest breaks which resulted in a systematic failure to provide compensation as required by law and that Defendant's policies with respect to these issues are uniform. The only question is whether Defendant's conduct supports a meritorious claim for liability. Such suits challenging the legality of a standardized course of conduct are generally appropriate for resolution by means of a class action. Accordingly, Plaintiff maintains that the common issues of law and fact present in this case predominate. Decl. Nordrehaug at ¶25.

In the context of wage and hour litigation, courts have often found that common issues predominate where an employer treats the putative class members uniformly, even where the party opposing class certification presents evidence of individualized variations. See e.g. *Ghazaryan v. Diva Limousine, Ltd.*, 169 Cal. App. 4th 1524, 1538 (2008) (wage and hour claims "routinely proceed as class actions"); *Prince v. CLS Transportation, Inc.*, 118 Cal.App.4th 1320, 1329 (2004); *Martinez v. Joe's Crab Shack Holdings*, 231 Cal. App. 4th 362, 384 (2014).

While Defendant disputes that the predominance requirement may be satisfied for purposes of a litigation class, Defendant does not oppose such a finding for purposes of this settlement only.

2. The Superiority Requirement Is Met

To certify a class, the Court must also determine "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." F.R.C.P. Rule 23 (b)(3). "Where classwide litigation of common issues will reduce litigation costs and promote greater efficiency, a class action may be superior to other methods of litigation." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996).

"If the plaintiffs' claims are substantiated, a question as to which the court presently has no opinion, the class action mechanism is clearly the most efficient means of resolving the many claims which may be asserted. If the case were not handled as a class, thousands of small claims would either be brought or unjustly abandoned. The

first possibility would be a flood of cases, the second would involve individual claims abandoned because of cost." *In re Workers' Compensation.*, 130 F.R.D. at 110.

Here, a class action is the superior mechanism for the settlement of the claims as pled by the Plaintiff. While Defendant disputes that the superiority requirement may be satisfied for purposes of a litigation class, Defendant does not oppose such a finding for purposes of this settlement only.

VII. THE PROPOSED METHOD OF CLASS NOTICE IS APPROPRIATE

The Parties have agreed upon procedures by which the Settlement Class will be provided with written notice of the Settlement similar to that approved and utilized in hundreds of class action settlements. The Parties have jointly drafted a Class Notice, attached to the Stipulation as Exhibit A and is hereby submitted for approval.

The Notice, drafted jointly and agreed upon by the Parties through their respective counsel, includes information regarding the nature of the Action; a summary of the substance of the Settlement, including Defendant's denial of liability; the definition of the Class; the procedure and time period for objecting to the Settlement, exclusion from the Settlement and participating in the Settlement; a statement that the District Court has preliminarily approved the Settlement; and information regarding the calculation of settlement shares. See Exhibit A to the Stipulation.

The Notice explains that Class Members who wish to participate in the settlement do not need to do anything, and a check will be mailed to them automatically after final approval. The Notice shall also provide that any Class Member may choose to opt out of the Class, and that any such person who chooses to opt out of the Class will not be entitled to any recovery obtained by way of the settlement and will not be bound by the settlement or have any right to object, appeal or comment thereon. Decl. Nordrehaug at ¶27.

The Notice will provide that all objections to the Settlement by anyone, including members of the Settlement Class, must be filed in the District Court and served upon all counsel of record by no later than thirty (30) days from the mailing of the Notice. The

deadline applies notwithstanding any argument regarding non-receipt of the notice. All objections must state with particularity the basis on which they are asserted. In accordance with *Mercury Interactive Corp. Secs. Litig. v. Mercury Interactive Corp.*, 618 F.3d 988 (9th Cir 2010), the application for attorneys' fees and costs will be filed when the notice is distributed to the Class. Thus, all Class Members will have ample opportunity to review and comment on the attorneys' fees and costs before the objection deadline. The attorneys' fees and costs will be heard in conjunction with the motion for final approval on the Final Approval Hearing date as set by this Court in the Preliminary Approval Order. Decl. Nordrehaug at ¶27.

The notice also informs members of the Settlement Class about the release. Specifically, the notice explains that unless they exclude themselves, upon final approval they will release any and all Claims asserted in the Litigation and including all claims that could be asserted based on the facts alleged in the complaint. Decl. Nordrehaug at ¶28.

This notice program was designed to meaningfully reach the largest possible number of potential Settlement Class Members. The mailing and distribution of the Notice satisfies the requirements of due process, and is the best notice practicable under the circumstances and constitutes due and sufficient notice to all persons entitled thereto. Decl. Nordrehaug at ¶28.

This notice satisfies the content requirements for notice following the exemplar class notice in the *Manual for Complex Litigation*, Second §41.43. This notice also fulfills the requirement that Class notices be neutral. *Newberg*, at §8.39.

VIII. CONCLUSION

Counsel for the Parties have committed substantial amounts of time, energy, and resources litigating and ultimately settling this case. In the judgment of Plaintiff and Class Counsel, the proposed settlement is a fair and reasonable compromise of the issues in dispute in light of the strengths and weaknesses of each party's case. After weighing the certain and immediate benefits of these settlements against the uncertainty of trial,

and appeal, Plaintiff believes the proposed settlement is fair, reasonable and adequate, and warrants this Court's preliminary approval.

Accordingly, Plaintiff respectfully requests that the Court preliminarily approve the proposed settlement and enter the proposed Preliminary Approval Order submitted herewith.

Dated: April 27, 2015

BLUMENTHAL, NORDREHAUG & BHOWMIK

By: */s/ Kyle R. Nordrehaug*
Kyle R. Nordrehaug
Attorneys for Plaintiffs

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