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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

DEWONE WESTERFIELD, CHARLOTTE MACHADO, JOHN MCMACKIN, NICOLE MCMACKIN, TRIG MAGELSSEN, PATRICIA KEMESIES, SAMUEL SANCHEZ, STEPHEN CAGNACCI, DERRICK RUDOLPH, JOHN RA, MARK JOHNSON, LOUISE KAPLAN, RAFAEL GUTIERREZ, on behalf of themselves and classes of those similarly situated, Plaintiffs, v. WASHINGTON MUTUAL BANK, Defendant.	No. 06-CV-2817 (CBA)(JMA)

CESAR C. JORDAN, individually and on behalf of all other similarly situated employees,

Plaintiffs,

v.

WASHINGTON MUTUAL BANK,

Defendant.

No. 08 Civ. 00287 (CBA)(JMA)

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR CERTIFICATION OF SETTLEMENT CLASSES AND FINAL APPROVAL OF A CLASS ACTION SETTLEMENT

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PRELIMINARY STATEMENT

After over three years of active litigation, an enormous amount of discovery and motion practice, hard-fought negotiations, multiple mediation sessions facilitated by three separate, experienced mediators, and extensive settlement practice and administration, the parties' arm's length settlement to these wage-and-hour class actions is ready for final court approval.

This settlement involves three lawsuits against Washington Mutual Bank ("Washington Mutual") – *Westerfield v. Washington Mutual Bank*, 06 Civ. 2817 (CBA)(JMA) ("*Westerfield*"), *Jordan v. Washington Mutual Bank*, 08 Civ. 00287 (CBA)(JMA) ("*Jordan*"), and *Jumapao v. Washington Mutual Bank*, 07-cv-5095 (CBA)(JMA) ("*Jumapao*") – filed by former employees who worked as mortgage loan consultants in home loan centers and various offices around the country. JPMorgan Chase Bank, N.A., as acquirer of certain assets and liabilities of Washington Mutual from the Federal Deposit Insurance Corporation ("FDIC"), acting as receiver (collectively, "Defendant") acknowledges its role as the Successor in Interest to Washington Mutual for the limited objective of resolving this matter.

Named Plaintiffs and Defendant have agreed to settle this matter for significant monetary relief of $38,000,000. The settlement resolves all Plaintiffs' and class members' claims of all three lawsuits. It also satisfies all of the criteria for final approval under federal law.

Accordingly, Plaintiffs submit this Memorandum of Law in support of their Motion, pursuant to Federal Rule of Civil Procedure 23(e), for an order: (1) certifying the settlement classes described below; (2) approving as fair and adequate the class wide settlement of this action, as set forth in the Joint Stipulation of Settlement and Release ("Settlement Agreement")

attached as Exhibit A to the Declaration of Adam T. Klein in Support of Plaintiffs' Motion for Final Approval of Settlement ("Klein Decl.")[1]; and (3) dismissing the action with prejudice.

On June 24, 2009, the Court preliminarily approved this class action and appointed Nichols Kaster, PLLP, and Outten & Golden, LLP, as class counsel, as well as directed mail notice be served on class members and set the date and time for the final fairness hearing on the settlement and related relief. (*See* Klein Decl. Ex. H, ¶ 11.) Since the Court's preliminary approval order, the Claims Administrator has mailed the approved notices to 4,974 potential class members, answered 1,925 telephone calls from class members, and processed and evaluated 3,134 claim forms. (*Id.* ¶ 23.) Accordingly, the members of the class have been notified of the terms of the settlement, their anticipated share of the settlement, and their right to opt out of the settlement. To date, only one settlement class member has filed an objection to the settlement. (Klein Decl. ¶ 37.) The objection relates to the proper calculation of her entitlement to payment based on dates of employment. (*Id.*) Plaintiffs' counsel is in the process of verifying the accuracy of the dates of employment for this particular settlement class member and will modify the calculation in the event of an error. (*Id.*) With such unequivocal support, and for the reasons stated below, the settlement should be granted final approval.

BACKGROUND FACTS AND NEGOTIATIONS

I. Litigation History

The plaintiffs are individuals formerly employed by Washington Mutual in locations across the country as residential mortgage loan consultants or loan officers ("Loan Consultants"). On June 6, 2006, Named Plaintiffs Dewone Westerfield, Charlotte Machado and Patricia Kemesies commenced the *Westerfield* action in the Eastern District of New York as a putative

[1] Unless otherwise indicated, all exhibits are attached to the Declaration of Adam T. Klein.

class action under Fed. R. Civ. P. 23 and a collective action under 29 U.S.C. § 216(b). (*See id.* ¶¶ 8-9.) They sought unpaid overtime compensation, penalties, interest, liquidated damages, injunctive relief, and attorneys' fees.

In the original Complaint, Named Plaintiffs Westerfield, Machado and Kemesies alleged that Washington Mutual violated the FLSA and the state laws of California, Illinois and New York by failing to properly compensate them for all hours they worked beyond 40 hours each week. Named Plaintiffs Westerfield, Machado and Kemesies alleged that, each week, they worked selling residential loans for Washington Mutual during regular business hours as well as during the mornings, evenings and on weekends – in excess of 40 hours per week. Plaintiffs also alleged that Loan Consultants consistently worked sixty (60) hour weeks, working late nights, weekends, and through their lunch hours. (*Id.*) Additionally, Plaintiffs claimed that Washington Mutual maintained a nationwide policy of failing to record Loan Consultants' work hours and did not pay Loan Consultants for overtime hours worked. (*Id.*)

Plaintiffs further alleged that Loan Consultants sold loans by filling out and submitting home loan applications on behalf of customers while in Washington Mutual offices. (*Id.* ¶ 10.) Plaintiffs claimed that they spent only a small portion of their work time outside of the office performing tasks unrelated to loan sales. For example, they alleged that as Loan Consultants, they occasionally ate lunch with real estate agents, attorneys, or other potential referral sources, or engaged in other networking activities such as attending open houses and home closings. (*Id.* ¶ 11.) Defendant has denied all liability under the FLSA and/or any state statutes, denies that the Loan Consultants' primary duty was to sell loans, and denies Plaintiffs' allegations regarding the nature, location, and quantity of work performed. However, as explained more fully below, notwithstanding Defendant's denial of the merits of Plaintiffs' claims, the Parties entered into

arm's length, good-faith negotiations that resulted in this settlement due to their understanding of the risks inherent in any litigation.

Over the course of the litigation, Plaintiffs amended the *Westerfield* Complaint three times, adding new Named Plaintiffs and their similar claims under the wage-and-hour laws of six additional states. On July 20, 2006, Plaintiffs filed the Corrected Amended Class Action and Collective Action Complaint, adding Stephen Cagnacci and Samuel Sanchez as Named Plaintiffs. (*See* Docket No. 12.) Mr. Cagnacci brought claims under the FLSA and New Jersey state law and Mr. Sanchez brought claims solely under the FLSA. Plaintiffs filed the Second Amended Class Action and Collective Action Complaint on November 5, 2007, adding three new named Plaintiffs for the California Rule 23 class – John McMackin, Nicole McMackin and Trig Magelssen. (*See* Docket No. 188.) On January 2, 2008, Plaintiffs filed the Third Amended Class Action and Collective Action Complaint, adding meal and rest break claims under California state law,[2] and adding Named Plaintiffs Derrick Rudolph, John Ra, Mark Johnson, Louise Kaplan, and Rafael Gutierrez, who brought claims under the state laws of Colorado, Pennsylvania, Nevada, Oregon and Washington, respectively. (*See* Docket No. 220.) On January 18, 2008, after Washington Mutual argued that the Court should dismiss a group of late

[2] The meal and rest break claims were originally filed by attorneys unconnected to *Westerfield* or *Jordan* in the *Jumapao* action. *Jumapao* was filed in the Southern District of California in October 2006, several months after *Westerfield*. In July 2007, Plaintiffs reached an agreement with the *Jumapao* attorneys to transfer the case to the Eastern District of New York and to consolidate it with *Westerfield*. Washington Mutual opposed transfer and consolidation, but the Court ultimately granted both motions. On September 19, 2008, the Court approved Plaintiffs' previously filed Third Amended Complaint, which added the California meal and rest breaks claims from the *Jumapao* action, and tolled the statute of limitations on those claims to the *Jumapao* filing date, October 11, 2006. (*See* Docket No. 325.)

opt-ins from *Westerfield*, Named Plaintiffs' counsel filed *Jordan* as a related case in the Eastern District of New York.[3]

In addition to the Named Plaintiffs, hundreds of other Loan Consultants joined *Westerfield* and *Jordan* as FLSA "opt-in" plaintiffs. (Klein Decl. ¶ 13.) A total of approximately 1,067 are currently involved in the actions as Named Plaintiffs or Opt-in Plaintiffs (collectively "Plaintiffs") – in *Westerfield* (851) and *Jordan* (216). (*Id.*) There are approximately 3,330 putative Rule 23 class members from the nine (9) state-law classes located in California, Colorado, Illinois, Nevada, New Jersey, New York, Oregon, Pennsylvania, and Washington in *Westerfield*. (*Id.*) There are approximately 700 putative collective action members in *Jordan*. (*Id.*)

The parties engaged in substantial discovery, informal and formal, before agreeing to resolve the *Westerfield* and *Jordan* actions. In *Westerfield*, 764 plaintiffs produced executed interrogatories, 534 plaintiffs produced supplemental executed interrogatories, and 551 plaintiffs produced documents related to Washington Mutual. (*Id.* ¶ 14.) Washington Mutual produced, and Plaintiffs' counsel reviewed, thousands of documents relating to Washington Mutual's pay policies, employee policies, Loan Consultants' job duties and Plaintiffs' personnel records. Washington Mutual also produced payroll data for more than 1,000 Plaintiffs and more than 3,000 class members that Plaintiffs' counsel analyzed. (*Id.* ¶ 15.) On July 28, 2008, the Court ordered Washington Mutual to produce redacted loan applications, or Form 1003s, submitted by Plaintiffs during their employment with Washington Mutual. (*See* Docket No. 304.) Plaintiffs

[3] On July 28, 2008, the Court granted Washington Mutual's request to stay discovery in *Jordan* pending the outcome of motion practice in *Westerfield*.

were also seeking email and other electronic information from Washington Mutual while settlement discussions took place. (Klein Decl. ¶ 16.)

The Parties' counsel traveled to 17 states to take or defend a total of 57 Plaintiff depositions, 17 depositions of Loan Consultants' managers and supervisors, and depositions of two Rule 30(b)(6) witnesses. (*Id.* ¶ 18.) On July 7, 2008, the Court ordered Washington Mutual to produce the names and contact information for former managers and permitted Plaintiffs to depose them in conjunction with the Plaintiff depositions. (*See* Docket No. 292; Klein Decl. ¶ 19.)

Defendants repeatedly sought to dismiss Plaintiffs' claims throughout the approximate two years of litigation. (Klein Decl. ¶ 20.) Defendants filed their first motion to dismiss prior to filing their Answer to the First Amended Complaint. (Docket No. 43.) During discovery, they filed motions to dismiss approximately 550 Named and Opt-In Plaintiffs. (Docket Nos. 274, 276, 279, 281-282, 285, 298.) The Court refused to grant Defendants' motions, except for one portion of the fifth cause of action brought under section 1174 and 1174.5 of the California Labor Code. (Docket No. 171.)[4] Following discovery, the Court approved the FLSA Collective, which includes all individuals who were employed by Washington Mutual in the position of Loan Consultant and who filed consent to join forms in either the *Westerfield* action or the *Jordan* action as of May 1, 2009, or who fall within the FLSA class definition in those actions. (Docket No. 354.)

[4] On July 28, 2008, the Court denied Defendant's motion to dismiss Opt-in Plaintiffs who had not returned signed interrogatories, supplemental interrogatories or tax returns, with leave to renew following the close of discovery.

II. Seizure and Sale of Washington Mutual to Chase

On September 25, 2008, anticipating the collapse of Washington Mutual's parent company, the FDIC seized the company and sold its banking operations, including Washington Mutual Bank, to JP Morgan Chase Bank, N.A. The following day, the Court granted Washington Mutual's emergency application seeking a stay in the *Westerfield* action. (*See* Docket No. 330; Klein Decl. ¶ 21.) On October 8, 2008, the Court extended the stay in proceedings to allow Defendant to determine the identity of the client and to assess what, if any, liability JPMorgan Chase Bank, N.A., had in relation to these litigations. (*Id.*)

On January 23, 2009, the Court officially lifted the stay without resolving the pending discovery disputes and Plaintiffs' request to file a motion for conditional certification in the *Jordan* matter. (*Id.* ¶ 22.) On May 5, 2009, the FDIC issued letters to the Named Plaintiffs in *Westerfield* and *Jordan*, disallowing their claims against the FDIC and confirming that their claims against Washington Mutual are a contingent liability of JPMorgan Chase Bank, N.A. (*Id.*¶ 23.) Defendant continues to deny liability and will defend that position in the event that this settlement is not approved by the Court.

III. Settlement Negotiations

The parties reached this settlement under the supervision of an experienced employment mediator, Michael E. Dickstein of Dickstein Dispute Resolution/MEDiate, after three mediation sessions with two other experienced mediators failed over the course of almost two years. (*Id.* ¶ 25.)

In an attempt to resolve the *Westerfield* action, the parties attended their first mediation session in New York, New York on July 24, 2007, with the assistance of experienced employment mediator Hunter Hughes of Rogers & Hardin, LLP. The parties exchanged

information, including some payroll data which the parties analyzed and for which Plaintiffs' counsel obtained the assistance of a professional statistician. After a full day of negotiating without a resolution, the parties and Mr. Hughes agreed to reconvene the mediation in San Francisco, California on August 14, 2007. Despite that second session, the parties were unable to reach an agreement and thereafter continued to aggressively pursue discovery in *Westerfield*, while Plaintiffs also filed the *Jordan* action. (*Id.* ¶ 25.)

In December 2008, during the Court's stay of discovery in both actions, the parties attempted mediation of both *Westerfield* and *Jordan*. This time the parties enlisted experienced employment mediator, Joan S. Morrow, to assist with their mediation in Washington, D.C. from December 18 through 19, 2008. In preparation for the mediation sessions with Ms. Morrow, the parties analyzed deposition testimony, documentary evidence, payroll data, and further outlined and debated evolving pertinent case law. Nevertheless, the three-day mediation session ended without agreement. (*Id.* ¶ 26.)

On January 23, 2009, the Court lifted the stay of discovery in *Westerfield*, and the parties again agreed to engage in a fourth mediation session, which took place in Los Angeles, California on March 26, 2009 with the assistance of Mr. Dickstein. After a full day of mediation that extended late into the evening, the parties reached an agreement, and executed a Memorandum of Understanding ("MOU") setting forth the key material terms to the settlement. (*Id.* ¶ 27.)

Plaintiffs moved for preliminary approval of the proposed Settlement and notice to the putative class on June 19, 2009. (*See* Docket No. 347.) On June 24, 2009, this Court granted preliminary approval of the proposed Settlement, ordered that notice be given to the putative class, and set a final settlement approval hearing. (*See* Docket No. 352.) Written notice of the

proposed Settlement, including the right to opt-out and the right to object to the Settlement and the right to opt into the FLSA portion of the Settlement by filing a consent form to be a party plaintiff ("Settlement Form"), went to 4,974 class members.[5] (Klein Decl. ¶ 36, Ex. H ¶ 11.) 3,283 class members, including the Named Plaintiffs, have filed Settlement Forms. (Klein Decl. ¶ 36.)

No Class Members objected to the substance of the settlement. (*Id*. ¶¶ 38.) To date, only one settlement class member has filed an objection to the settlement. (*Id*.) The objection relates to the proper calculation of her entitlement to payment based on dates of employment. (*Id*.) Plaintiffs' counsel is in the process of verifying the accuracy of the dates of employment for this particular settlement class member and will modify the calculation in the event of an error. (*Id*.) Only twelve (12) Class Members have opted out of the settlement. (*Id*. at ¶39.)

SUMMARY OF THE SETTLEMENT TERMS AND ADMINISTRATION

I. The Settlement Fund

The parties agree to settle all claims in the Litigation for $38,000,000. The following will be deducted from this settlement amount: (i) attorneys' fees; (ii) costs; (iii) class representative, named plaintiff, and key class member enhancements payments; (iv) employer and employee payroll taxes; (v) an allocation correction amount; (vi) agency costs; and (vii) settlement administration costs.

II. Releases

Each eligible employee received a Notice of the Settlement and a Settlement Form. (*Id.* ¶¶35-36, Ex. H ¶11) Each Settlement Form included a statement that by signing the Settlement Form, the claimant affirmatively opts into the settlement and agrees to release Defendant from

[5] The parties provided Rust Consulting, Inc. with a class list of 4,974 names. (Klein Decl. Ex. H ¶ 9.)

all known or unknown: (a) state wage-and-hour claims and (b) federal wage-and-hour claims, including those under the FLSA relating to their employment at Washington Mutual. In addition, the Settlement Form included a statement that the claimant is waiving all rights and benefits afforded by California Civil Code § 1542 and that the claimant does so understanding the significance of that waiver. The Settlement Form quoted the following language from section 1542: "A general release does not extend to claims which the creditor [*i.e.*, a Class Member] does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor [*i.e.*, the Defendant Releasees]."

In addition to the Settlement Form, each of the 15 Named Plaintiffs and Class Representatives signed a general release, which released Defendant from additional claims relating to their employment at Washington Mutual. The release in the Settlement Form and the general release cover time working for Washington Mutual, including continuous time when JPMorgan Chase, N.A., acquired Washington Mutual. (Klein Dec. ¶ 7, Ex. E.)

III. Eligible Employees

A. The Settlement Classes

As part of the Settlement Agreement, Defendant agreed, for settlement purposes only, not to oppose certification of the following state settlement classes:

1. The California Class. The California settlement class includes: all former Washington Mutual employees who were employed by Washington Mutual in the position of Loan Consultant in California at any time from June 5, 2002 to the Date of Preliminary Approval.

2. The Colorado Class. The Colorado settlement class includes: all former Washington Mutual employees who were employed by Washington Mutual in the position of Loan Consultant in Colorado at any time from June 5, 2003 to the Date of Preliminary Approval.

3. The Illinois Class. The Illinois settlement class includes: all former Washington Mutual employees who were employed by Washington Mutual in the position of Loan Consultant in Illinois at any time from June 5, 2003 to the Date of Preliminary Approval.

4. The Nevada Class. The Nevada settlement class includes: all former Washington Mutual employees who were employed by Washington Mutual in the position of Loan Consultant in Nevada from June 5, 2004 to the Date of Preliminary Approval.

5. The New Jersey Class. The New Jersey settlement class includes: all former Washington Mutual employees who were employed by Washington Mutual in the position of Loan Consultant in New Jersey at any time from June 5, 2004 to the Date of Preliminary Approval.

6. The New York Class. The New York settlement class includes: all former Washington Mutual employees who were employed by Washington Mutual in the position of Loan Consultant in New York at any time from June 5, 2000 to the Date of Preliminary Approval.

7. The Oregon Class. The Oregon settlement class includes: all former Washington Mutual employees who were employed by Washington Mutual in the position of Loan Consultant in Oregon at any time from June 5, 2004 to the Date of Preliminary Approval.

8. The Pennsylvania Class. The Pennsylvania settlement class includes: all former Washington Mutual employees who were employed by Washington Mutual in the position of Loan Consultant in Pennsylvania at any time from June 5, 2003 to the Date of Preliminary Approval.

9. The Washington Class. The Washington settlement class includes: all former Washington Mutual employees who were employed by Washington Mutual in the position of Loan Consultant in Washington at any time from June 5, 2003 to the Date of Preliminary Approval.

The members of the settlement classes have been individually identified from Washington Mutual's payroll records.

In addition, Defendant has agreed, for settlement purposes only, to establish an FLSA Collective ("FLSA Collective") that includes all individuals who were employed by Washington Mutual in the position of Loan Consultant and who filed consent to join forms in either the

Westerfield action or the *Jordan* action as of May 1, 2009, or who fall within the FLSA class definition in those actions.

IV. Allocation Formula

The parties have agreed to a settlement allocation for each potential claimant that was communicated in the Settlement Form. (Klein Decl. ¶ 6, Ex. D.) The allocated amounts were calculated based on each claimant's statutory claims, damages, dates of employment as a Loan Consultant, and an average of ten (10) hours of overtime per week. (*Id.* ¶ 29.)

The individual settlement payments include sums for wages, penalties, and interest. The parties agree that fifty percent (50%) of all payments to claimants, including any enhancement payments, will be deemed to constitute wages and thus will be subject to W-2 reporting. Therefore, normal payroll taxes and withholdings will be deducted from this portion of each claimant's individual settlement payment, pursuant to state and federal law. The employer and employee's portion of all such payroll taxes and withholdings will be deducted from the settlement payment. The remaining fifty percent (50%) will be deemed to constitute interest and penalties or other non-wage income, and the Claims Administrator will issue to each claimant an IRS Form 1099 for that portion of their payments.

ARGUMENT

I. THE COURT HAS ALREADY GRANTED PRELIMINARY APPROVAL.

Federal Rule of Civil Procedure 23 governs class action suits, including the settlement of class actions. Rule 23 requires court approval for a class-wide settlement: "The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class," FED. R. CIV. P. 23(e)(1)(A), and "[t]he court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal,

or compromise," FED. R. CIV. P. 23(e)(1)(B). Rule 23 also requires that the parties seeking approval of a settlement under Rule 23(e)(1) "file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise." FED. R. CIV. P. 23(e)(2).

The Manual for Complex Litigation, Fourth (Federal Judicial Center 2007) ("MCL 4th") § 21.6 describes the procedure for judicial review and approval of proposed class action settlements as a two-step process, which courts in this district have adopted. *See, e.g., In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 151 (E.D.N.Y. 2000); *In re Nasdaq Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997); *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 205 (S.D.N.Y. 1995). The two-step process safeguards class members' procedural due process rights and enables the Court to fulfill its role as the guardian of class interests.

First, Class Counsel submits the proposed terms of settlement to the court for a "preliminary fairness evaluation." MCL 4th § 21.632. The court makes a preliminary determination as to the "fairness, reasonableness, and adequacy of the settlement terms," and directs the preparation of class notice, and sets the date for the final fairness hearing. *Id.* Second, after the class has received notice and the deadline for class members to opt-out or object to the settlement has elapsed, the court conducts a final fairness hearing where a final determination is made about whether the proposed settlement is "fair, reasonable, and adequate." MCL 4th § 21.634. During the final fairness hearing, the parties can present witnesses, experts, and affidavits or declarations, and objectors and class members can appear and testify about the terms of the settlements. *Id.* If, after the final hearing, the court concludes that the settlement is

"fair, reasonable, and adequate," the court shall grant final approval to the settlement and final certification to the class. *Id.*

After a detailed inquiry on the fairness of the settlement, and the propriety of class certification, the Court has already granted preliminary approval. Now, the notice process has been completed, and the parties respectfully request that the Court confirm the fairness of the settlement.

II. FINAL APPROVAL OF THE SETTLEMENT IS APPROPRIATE.

Courts review proposed settlements in light of the strong judicial and public policies favoring voluntary resolution of cases. *In re Ivan F. Boesky Sec. Litig.*, 948 F.2d 1358, 1368 (2d Cir.1991); *In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 46, 53 (S.D.N.Y. 1993). In the class action context, settlement has become a "stock device," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 618 (1997), offering the advantages of efficiency and certainty. *See also* 2 Newberg § 11.41 (courts favor settlement particularly in class actions where substantial resources can be conserved by avoiding the time, cost, and rigors of formal litigation.).

A. The Settlement Class Meets the Legal Standard for Class Certification.

When faced with a proposed class settlement, it is appropriate for courts to first examine whether the settlement class is certifiable. *See Denney v. Deutsche Bank AG*, 443 F.3d 253, 270 (2d Cir. 2006); *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 180 (W.D.N.Y. 2005).

Here, Plaintiffs seek to certify, for settlement purposes only, classes under Federal Rule of Civil Procedure 23(e) that include all Loan Consultants who worked in California, Colorado, Illinois, Nevada, New Jersey, New York, Oregon, Pennsylvania, and Washington during the

limitations period applicable under each state's wage-and-hour law.[6] The members of the settlement classes have been identified from Washington Mutual's payroll records.

Certifying settlement classes for the state law claims is appropriate here because all of the certification requirements for settlement purposes are met and Defendant consents to certification for settlement purposes. Specifically, this settlement class satisfies Rule 23(a)'s requirements of numerosity, commonality, typicality and adequacy of representation, and at least one of the subsections of Rule 23(b). *See Amchem Prods., Inc.*, 521 U.S. at 620; *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998); *Newberg* § 11:27 (citing *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995)).

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

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

FED. R. CIV. P. 23(a). Rule 23(b)(3) requires the court to find that:

> questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

[6] Cal. Code Civ. Pro. §337 (four years); Colo. Rev. Stat §8-4-122 (three years); 820 Ill. Comp. Stat. 105/12(a) (three years); Nev. Rev. Stat. §608.195 (two years); N.J. Stat. Ann. § 34:11-56a25.1 (two years); N.Y. Labor Law §198 (six years); Or. Rev. Stat. §652.355(1)(a) (two years); 43 Pa. Stat. Ann. §260.9(a) (three years); Wash. Rev. Code §4.16.080(3) (three years).

FED. R. CIV. P. 23(b)(3). In the Second Circuit, "Rule 23 is given liberal rather than restrictive construction, and courts are to adopt a standard of flexibility" in evaluating class certification. *Reade-Alvarez v. Eltman, Eltman & Cooper, P.C.*, 237 F.R.D. 26, 31 (E.D.N.Y. 2006) (quoting *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997)).

1. Numerosity

The numerosity requirement is satisfied when the class is "so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1); *see also Hanlon*, 150 F.3d at 1019. "Impracticable does not mean impossible." *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993). "[N]umerosity is presumed at a level of 40 members." *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995); *Stambaugh v. Kansas Dep't of Corrections*, 151 F.R.D. 664, 673 n.3 (D. Kan. 1993) (quoting *Robidoux*, 987 F.2d at 936) ("[T]he difficulty in joining as few as 40 class members should raise a presumption that joinder is impracticable.").

Plaintiffs easily satisfy the numerosity requirement here. A total of approximately 1,066 are currently involved in the actions as Named Plaintiffs or Opt-in Plaintiffs (collectively "Plaintiffs") – in *Westerfield* (851) and *Jordan* (216). There are approximately 3,330 putative Rule 23 class members from the state-law classes located in California, Colorado, Illinois, Nevada, New Jersey, New York, Oregon, Pennsylvania, and Washington in *Westerfield*. (Klein Decl. ¶ 13.) There are approximately 700 putative collective action members in *Jordan*. In total, there are 4,974 Class Members. (*Id*.) Such a proposed class easily satisfies numerosity.

2. Commonality

The proposed class also satisfies the commonality requirement, the purpose of which is to test "whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Gen. Tel. Co. of*

Sw. v. Falcon, 457 U.S. 147, 157 n.13 (1982). Although the claims need not be identical, they must share common questions of fact or law. *Port Auth. Police Benev. Ass'n, Inc. v. Port Auth. of N.Y. & N.J.*, 698 F.2d 150, 153-54 (2d Cir. 1983); *Savino v. Computer Credit, Inc.*, 173 F.R.D. 346, 352 (E.D.N.Y. 1997), *aff'd in part, rev'd in part on other grounds*, 164 F.3d 81 (2d Cir. 1998); *Chamberlan v. Ford Motor Co.*, 223 F.R.D. 524, 526 (N.D. Cal. 2004); *Trief v. Dun & Bradstreet Corp.*, 144 F.R.D. 193, 198 (S.D.N.Y. 1992). The proper question is whether there is a "unifying thread" among the claims to warrant class certification. *Kamean v. Local 363, Int'l Bhd. of Teamsters*, 109 F.R.D. 391, 394 (S.D.N.Y. 1986). Courts construe the commonality requirement liberally. *Frank*, 228 F.R.D. at 181 (citing *Trief*, 144 F.R.D. at 198-99).

This case involves numerous common issues. Primarily, the Plaintiffs and the class members of all the state settlement classes bring the identical claim that Washington Mutual failed to pay them earned overtime wages in violation of state wage-and-hour laws. Other common issues include: (a) whether Plaintiffs and the state settlement class members were exempt from overtime eligibility during portions of the class period; (b) whether Washington Mutual failed to pay Plaintiffs and the state settlement class members overtime premium pay for all hours they worked over 40 in a workweek; and (c) whether Washington Mutual maintained accurate time records of the hours Plaintiffs and the state settlement class members worked.

These alleged wage-and-hour violations are a common set of operative facts stemming from corporate policies that affected the class members in the same way. Because they present common operative facts and present common questions of law, the commonality factor is met. *See Lenahan v. Sears, Roebuck & Co.*, No. 02 Civ. 0045, 2006 U.S. Dist. LEXIS 60307, at *22 ("Here, the commonality requirement is met because the federal and state claims . . . present common operative facts and common questions of law, namely: (1) whether Sears failed to

compensate technicians for time spent in their morning and evening commutes to the first customer of the day and back home from the last customer of the day, respectively, for which they should have been paid; and (2) whether Sears required technicians to perform uncompensated incidental activities at home and elsewhere for which they should have been paid.") In the absence of class certification and settlement, each individual state settlement class member would be forced to litigate each common issue of fact.

3. Typicality

Rule 23 requires that the claims of the representative party be typical of the claims of the class. "Like the commonality requirement, typicality does not require the representative party's claims to be identical to those of all class members." *Frank*, 228 F.R.D. at 182; *Milonas v. Williams*, 691 F.2d 931, 938 (10th Cir. 1982). Typicality is satisfied "when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Marisol A.*, 126 F.3d at 376 (quoting *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 290 (2d Cir. 1992) (internal quotations omitted). "Minor variations in the fact patterns underlying individual claims" do not defeat typicality when the defendant directs "the same unlawful conduct" at the named plaintiffs and the class. *Robidoux*, 987 F.2d at 936-37. Courts evaluate typicality "with reference to the company's actions, not with respect to particularized defenses it might have against certain class members." *Trinidad v. Breakaway Courier Sys., Inc.*, No. 05 Civ. 4116, 2007 U.S. Dist. LEXIS 2914, at *15 (S.D.N.Y. Jan. 12, 2007) (quoting *Wagner v. NutraSweet Co.*, 95 F.3d 527, 534 (7th Cir. 1996)).

The claims of the Named Plaintiffs from each state settlement class arise from the same factual and legal circumstances that form the basis of the Rule 23 Class Members' claims. The Named Plaintiffs of each state settlement class shared the same job titles and had the same job

duties as the class members. They also suffered the same injuries as did the class members – that Washington Mutual permitted them to work without compensation. *See Lenahan*, 2006 U.S. Dist. LEXIS 60307, at **25-26 ("Here, the same allegedly unlawful conduct affected both the named Plaintiffs and the putative class members . . . . Both the named Plaintiffs and the class members have alleged that Sears' failure to compensate Technicians for work at home and travel time violated the applicable state and federal wage-and-hour laws. Accordingly, this Court finds the typicality requirement of Rule 23(a)(3) is also satisfied."); *Frank*, 228 F.R.D. at 182 (finding that class members satisfied the typicality requirement where "all class members . . . allege that Kodak failed to pay them . . . overtime wages for hours worked in excess of forty per week during the relevant time period"). Accordingly, the typicality factor is satisfied.

4. Adequacy of the Named Plaintiffs

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a)(4). "The adequacy requirement exists to ensure that the class representatives will 'have an interest in vigorously pursuing the claims of the class, and . . . have no interests antagonistic to the interests of other class members.'" *Toure v. Cent. Parking Sys.*, No. 05 Civ. 5237, 2007 U.S. Dist. LEXIS 74056, at **18-19 (S.D.N.Y. Sept. 28, 2007) (quoting *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006)). "'[O]nly a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status.'" *Dziennik v. Sealift, Inc.*, No. 05 Civ. 4659, 2007 U.S. Dist. LEXIS 38701, at *19 (E.D.N.Y. May 29, 2007) (quoting *Martens v. Smith Barney Inc.*, 181 F.R.D. 243, 259 (S.D.N.Y. 1998)).

Here, there is no evidence of conflicting interests between the Named Plaintiffs and the rest of the class; their interests are sufficiently aligned with those of the rest of the class. During

the notice period and fairness hearing, no evidence or complaint of conflicting interests were brought forward. Because there is no evidence or indicia that they have interests that are antagonistic or at odds with Class Members, the adequacy of representation factor is met.

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

Rule 23(b)(3) requires that common questions of law or fact not only be present, but "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). This inquiry examines "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521 U.S. at 623. That Plaintiffs easily meet the Rule 23(a) criteria is a strong indicator that Rule 23(b)(3) is satisfied. *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 598 (2d Cir. 1986) (satisfaction of Rule 23(a) "goes a long way toward satisfying the Rule 23(b)(3) requirement of commonality").

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

a. Common Questions Predominate

To establish predominance, Plaintiffs must demonstrate that "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, . . . predominate over those issues that are subject only to individualized proof." *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 136 (2d Cir. 2001), *overruled on other grounds*, *Teamsters Local*

445 Freight Div. Pension Fund v. Bombardier, Inc., 546 F.3d 196 (2d Cir. 2008); *Hanlon*, 150 F.3d at 1022. The essential inquiry is whether "liability can be determined on a class-wide basis, even when there are some individualized damage issues." *In re Visa Check/MasterMoney Antitrust Litig*, 280 F.3d at 139. Simply because a defense "'may arise and [] affect different class members differently does not compel a finding that individual issues predominate over common ones.'" *Noble v. 93 Univ. Place Corp.*, 224 F.R.D. 330, 339 (S.D.N.Y. 2004) (quoting *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d at 138). Where plaintiffs are "unified by a common legal theory" and by common facts, the predominance requirement is satisfied. *McBean v. City of New York*, 228 F.R.D. 487, 502 (S.D.N.Y. 2005). The predominance requirement is "more demanding than the Rule 23(a) commonality inquiry and is designed to determine whether 'proposed classes are sufficiently cohesive to warrant adjudication by representation.'" *Frank*, 228 F.R.D. at 183 (quoting *Amchem*, 521 U.S. at 623).

Here, all members of each of the state settlement classes are unified by common factual allegations: all class members worked over 40 hours per week and Washington Mutual subjected them to a policy of not paying them for this time. They are also unified by a common legal theory – that Washington Mutual's policy violates the wage-and-hour laws of the states in which they worked. *See Iglesias-Mendoza v. La Belle Farm, Inc.*, 239 F.R.D. 363, 373 (S.D.N.Y. 2007) (the issue of whether employees were supposed to be paid overtime was "about the most perfect question[] for class treatment"); *Torres v. Gristede's Operating Corp.*, No. 04 Civ. 3316 (PAC), 2006 U.S. Dist. LEXIS 74039, at *52 (S.D.N.Y. Sept. 28, 2006) (plaintiffs "introduced sufficient proof that Defendants engaged in a common practice to deny employees overtime pay," and "this issue predominates over any individual calculations of overtime wages"); *Lenahan*, 2006 U.S. Dist. LEXIS 60307, at *23 ("a similar legal question: whether the alleged

failure to pay [plaintiffs] for all hours worked . . . violated the applicable state wage and hour laws . . . . predominate[s] over any factual variations . . . , such as the length of [plaintiffs'] commute or hourly wage. These individual issues affect only [plaintiffs'] potential damages, but not the nature or legal basis of class claims").

The only individualized issues in this case pertain to the calculation of damages. However, individualized damages calculations do not defeat the Rule 23(b)(3) predominance requirement. *See Frank*, 228 F.R.D. at 183-84 (collecting cases holding that calculation of damages in overtime litigation does not impact the predominance analysis); *Lenahan*, 2006 U.S. Dist. LEXIS 60307, at *23 (same). Moreover, predominance is not defeated simply because different defenses may apply to some class members. *See In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d at 136; *see also id.* at 139 ("[t]he predominance requirement calls only for *predominance, not exclusivity*, of common questions") (emphasis added); *In re Crazy Eddie Sec. Litig.*, 135 F.R.D. 39, 41 (E.D.N.Y. 1991) ("Rule 23(b) does not require that all issues in a class action be communal"); *In re Sumitomo Copper Litig.*, 182 F.R.D. 85, 91 (S.D.N.Y. 1998) (if the same "liability issue is common to the class, common questions are held to predominate over individual questions") (internal quotation marks omitted).

Rule 23(b)(3)'s predominance requirement "tests whether [the] proposed class[] [is] sufficiently cohesive to warrant adjudication by representation." *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d at 136. This standard is satisfied where "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, . . . predominate over those issues that are subject only to individualized proof." *Id.* (internal quotation marks omitted). "So long as a sufficient constellation of common issues binds class members

together," variations in the applicable facts or law do not foreclose class certification. *Id.* (internal quotation marks omitted).

In this circumstance, common factual and legal questions unify all class members within each state settlement class and predominate over any issues that affect them individually because all class members have the same legal claim: they performed common work on behalf of their employer and did not receive proper wages in exchange for those services.

i. Common Factual Questions Predominate

With respect to the common factual questions, if litigation continued, Plaintiffs would seek to prove that all class members within each state settlement class were subject to Washington Mutual's nationwide policies and practices, pursuant to which, Plaintiffs (1) performed common tasks of selling residential loans to customers by filling out and submitting loan applications on their behalf; (2) filled out and submitted loan applications from Washington Mutual offices or Plaintiffs' own homes; (3) regularly worked over 40 hours per week, including nights and weekends; (4) were not paid overtime; (5) were paid solely on commission; and (6) did not have their hours of work recorded by Washington Mutual.

ii. Common Legal Questions Predominate

In addition to factual commonality, all class members within each state settlement class are united by a common legal theory: that it is illegal to require or permit workers to work without pay. The state laws under which the class members within each state settlement class brought their claims are substantively the same.[7]

[7] New York Labor Law Article 6, §§ 190 *et seq.*; New York Minimum Wage Act, New York Labor Law §§ 650 *et seq.*, and supporting New York State Department of Labor regulations, 12 N.Y.C.R.R. Part 142; California Unfair Competition Law, Cal Bus. & Prof. Code §§ 17200 *et seq.*; Cal. Labor Code §§ 201 *et seq.*; Cal. Wage Order No. 4; 820; Illinois Minimum Wage Law, Ill. Comp. Stat. §§ 105/1, *et seq.*; Illinois Wage Payment and Collection Act, 820 Ill.

iii. The "Manageability" Element of Predominance Does Not Come into Play Here.

Because this certification request arises in the settlement context, the proposed settlement class does not pose the risk of trial unmanageability, an important concern underlying the predominance requirement. *See* FED. R. CIV. P. 23(b)(3)(D) (courts should consider "the likely difficulties in managing a class action" in making their predominance finding); *In re Fresh Del Monte Pineapples Antitrust Litig.*, No. 1:04-md-1628 (RMB), 2008 U.S. Dist. LEXIS 18388, at **12-13 (S.D.N.Y. Feb. 20, 2008) ("An unmanageable class is an indication that individual issues predominate over common questions of law and fact and that there is a better method for adjudicating these issues.") If this settlement is approved, there will be no trial. *See Amchem*, 521 U.S. at 620 (in a settlement-only class certification, "a district court need not inquire whether the case, if tried, would present intractable management productions . . . for the proposal is that there be no trial").

b. A Class Action Is a Superior Mechanism

The second part of the Rule 23(b)(3) analysis is a relative comparison examining whether "the class action device [is] superior to other methods available for a fair and efficient adjudication of the controversy." *Green v. Wolf Corp.*, 406 F.2d 291, 301 (2d Cir. 1968); *Morris v. Transouth Fin. Corp.*, 175 F.R.D. 694, 701 (M.D. Ala. 1997) ("One of the most important objectives of the class action procedure is the aggregation of a small number of claims

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Comp. Stat. §§ 115/1 *et seq.*; 56 IL ADC §§ 210.100, *et seq.*; New Jersey Wage and Hour Law, N.J.S.A. 34:11-56a *et seq.*, and supporting New Jersey State Department of Labor and Workforce Development regulations, including N.J.S.A. 34:11-56a4 and N.J.A.C. 12:56-3.1; Colorado Minimum Wage Act, C.R.S. §§ 8-6-101 *et seq.*; 43 Pa. Stat. §§ 333.103 *et seq.;* Nevada Compensation, Wages and Hours Laws, N.R.S. 608.005 *et seq.*; Oregon Conditions of Employment Laws, O.R.S. 651.010 *et seq.*; Oregon Administrative Rules, O.A.S. 839-020-0030, 0080 *et seq.*; Washington Minimum Wage Act, R.C.W. 49.46.005 *et seq.*.

to allow for relief in situations where it might not otherwise be obtainable."); *Sollenbarger v. Mountain States Tel. & Tel. Co.*, 121 F.R.D. 417, 436 (D.N.M. 1988) ("Plaintiffs have small claims that they could not effectively litigate on an individual basis."). Rule 23(b)(3) sets forth a non-exclusive list of factors pertinent to judicial inquiry into the superiority of a class action, including: whether individual class members wish to bring, or have already brought, individual actions; and the desirability of concentrating the litigation of the claims in the particular forum. FED. R. CIV. P. 23(b)(3).

Here, Plaintiffs and the class members have limited financial resources with which to prosecute individual actions, and Plaintiffs are unaware of any individual lawsuits that have been filed by class members arising from the same allegations. Regarding the forum, concentrating the litigation in this Court is desirable because some of the allegedly wrongful conduct occurred within the jurisdiction of this Court.

Employing the class device here will not only achieve economies of scale for putative class members, but will also conserve the resources of the judicial system and preserve public confidence in the integrity of the system by avoiding the waste and delay of repetitive proceedings and prevent inconsistent adjudications of similar issues and claims. *See Hanlon*, 150 F.3d at 1023; *Lenahan*, 2006 U.S. Dist. LEXIS 60307, at *28 ("This settlement class involves Sears Technicians nationwide, and, therefore, traditional methods of joinder and consolidation are impracticable.")

In sum, certifying a class action here is the most suitable mechanism to fairly, adequately, and efficiently resolve the putative settlement class members' claims.

B. The Proposed Settlement is Fair, Reasonable, and Adequate, and Should Be Approved in All Respects.

Rule 23(e) of the Federal Rules of Civil Procedure requires court approval for any settlement of a class action to ensure that it is procedurally and substantively fair, reasonable, and adequate. *See* FED. R. CIV. P. 23(e). Towards that end, courts examine the "negotiating process leading up to the settlement as well as the settlement's substantive terms," in light of "the judicial policy favor[ing] the settlement of class actions." *Weinberger v. Kendrick*, 698 F.2d (2d Cir. 1982) at 74; *Gilliam v. Addicts Rehab. Ctr. Fund.*, No. 05 Civ. 3452 (RLE), 2008 U.S. Dist. LEXIS 23016, at *9 (S.D.N.Y. Mar. 24, 2008). Accordingly, courts in this circuit examine both procedural and substantive fairness with the understanding that the law favors compromise and settlement of class action suits. *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (noting the "strong judicial policy in favor of settlements, particularly in the class action context.") (internal quotations omitted); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 535 (3d Cir. 2004) ("there is an overriding public interest in settling class action litigation, and it should therefore be encouraged."); *see also Newberg on Class Actions* § 11.41 (4th ed. 2002) ("The compromise of complex litigation is encouraged by the courts and favored by public policy.").

The approval of a proposed class action settlement is a matter of discretion for the trial court. *Churchill Village, LLC v. Gen. Elec. Co.*, 361 F.3d 566, 575 (9th Cir. 2004); *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1998). In exercising this discretion, courts should give "proper deference to the private consensual decision of the parties." *Hanlon*, 150 F.3d at 1027.

Here, both procedural and substantive considerations support approving this Settlement Class.

1. Procedural Fairness Considerations Support Approving this Settlement Class.

A "presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arm's length negotiations between experienced, capable counsel after meaningful discovery." *Wal-Mart Stores Inv. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (quoting *Manual for Complex Litigation, Third*, § 30.42 (1995)); *see also D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir.2001)).

If the settlement was achieved through experienced counsels' arm's-length negotiations, "[a]bsent fraud or collusion," "[courts] should be hesitant to substitute [their] judgment for that of the parties who negotiated the settlement." *In re EVCI Career Colls. Holding Corp. Sec. Litig.*, No. 05 Civ. 10240, 2007 U.S. Dist. LEXIS 57918, at *12 (S.D.N.Y. July 27, 2007); *In re Top Tankers, Inc. Sec. Litig.*, No. 06 Civ. 13761, 2008 U.S. Dist. LEXIS 58106, at **10-11 (S.D.N.Y. July 31, 2008) (same); *In re BankAmerica Corp. Sec. Litig.*, 210 F.R.D. 694, 700 (E.D. Mo. 2002) ("In evaluating the settlement, the Court should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation; a presumption of fairness, adequacy and reasonableness may attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery.") (internal quotations omitted).

Here, the settlement was reached between the parties after substantial and contentious discovery and extensive negotiations. As described in detail in parts I and III, *supra*, the parties exchanged documents, answered interrogatories, deposed parties, and reviewed records on a massive scale. Only after four separate mediation sessions, calling on the assistance of three different experienced mediators, did the parties agree to the settlement terms outlined here. (Klein Decl. ¶¶ 25-27).

Given the extent of the exchange of information during the litigation, as well as third party neutral facilitation, the Settlement Agreement ultimately reached by the parties handily meets the procedural fairness standard. *See Gilliam*, No. 05 Civ. 3452 (RLE), 2008 U.S. Dist. LEXIS 23016, at *10 (holding that the court's extensive involvement with the settlement discussions leads to a finding of procedural fairness).

2. The Second Circuit's Standard for Examining Substantive Fairness of Class Action Settlements Favors Granting Final Approval.

More than three decades ago, the Second Circuit in *City of Detroit v. Grinnell Corp.*, set forth the analytical framework for evaluating the substantive fairness of a class action settlement. 495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds*, *In re IPO Secs. Litig.*, No. 21MC92 (SAS), 2009 U.S. Dist. LEXIS 49296, at *13 (S.D.N.Y. June 10, 2009). This framework, known as the *Grinnell* factors, guide district courts by setting out the following factors for determination: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. 495 F.2d at 463. All of the *Grinnell* factors weigh in favor of final approval of this Settlement Agreement.

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

By reaching a favorable settlement prior to dispositive motions or trial, Plaintiffs seek to avoid significant expense and delay, and instead ensure recovery for the class. "Most class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000), *aff'd sub. nom. D'Amato*, 236 F.3d 78 (2d Cir. 2001). In complex wage-and-hour litigation, involving both federal and state statutory rights, protracted litigation is costly and burdensome, including motion practice and potential appeals over class certification, discovery, and a lengthy trial. *See Gilliam*, 2008 U.S. Dist. LEXIS 23016, at **10-11.

This case is no exception to these general rules, with 4,974 putative class members and multiple wage-and-hour claims under federal and nine different state statutes. Although the parties have already undertaken considerable expense in litigating this matter, (Klein Decl. ¶ 31), further litigation without settlement would necessarily result in additional expense and delay. Additional discovery would be required to establish liability and damages. A complicated trial would be necessary, featuring extensive testimony by Defendant, Plaintiffs, and numerous class members, in addition to extensive expert testimony. Preparing and putting on evidence on the complex factual and legal issues at such a trial would consume tremendous amounts of time and resources for both sides, as well as requiring substantial judicial resources to adjudicate the parties' disputes. A trial of the damages issues, even on a representative basis, would be costly and would further defer closure. Any judgment would likely be appealed, thereby extending the duration of the litigation. This settlement, on the other hand, makes monetary relief available to class members in a prompt and efficient manner, and corrects the proposed violations by requiring substantial injunctive relief.

Therefore, the first *Grinnell* factor weighs in favor of judicial approval of the settlement.

b. The Reaction of the Class Has Been Positive (*Grinnell* Factor 2).

"It is well-settled that the reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy." *Maley v. Dale Global Techs. Corp.*, 186 F. Supp. 2d 358, 362-63 (S.D.N.Y. 2002). Lack of objection to a settlement strongly favors judicial approval. *See, e.g., In re EVCI Sec. Litig.*, No. 05 Civ. 10240 (CM), 2007 U.S. Dist. LEXIS 57918, at *6 (S.D.N.Y., July 27, 2007). Here, despite 4,974 notices sent to the class, only one has objected to the Settlement, and only 12 (a negligible .24%) have requested exclusion. (Klein Decl. ¶ 12.) Furthermore, approximately 62.94% of the class members – whose claims represent over 85% of the total damages – have submitted claims. (*Id*.) This response rate percentage represents a high return rate in litigation of this type and demonstrates that the class actively supports the results achieved on its behalf.

This favorable reception by the class constitutes "strong evidence" of the fairness of the proposed settlement and supports judicial approval. *See RMED Int'l, Inc. v. Sloan's Supermarkets, Inc.*, No. 94 Civ. 5587(PKL)(RLE), 2003 U.S. Dist. LEXIS 8239, at *4 (S.D.N.Y., May 15, 2003) ("The lack of class member objections ... may itself be taken as evidencing the fairness of a settlement") (*quoting Ross v. A.H. Robbins, Inc.*, 700 F. Supp. 682, 684 (S.D.N.Y. 1988)); *see also Wright v. Stern*, 553 F. Supp. 2d 337, 345 (S.D.N.Y. 2008) (only 13 objections out of class of 3,500 is a "strong indication" of fairness); *Velez v. MaJik Cleaning Serv., Inc.*, No. 03 Civ. 8698(SAS), 2007 U.S. Dist. LEXIS 46223, at **17-18 (S.D.N.Y. June 22, 2007).

c. Discovery Has Advanced Far Enough to Allow the Parties to Responsibly Resolve the Case (*Grinnell* Factor 3).

Although preparing this case through trial would require many more hours of discovery work for both sides, the parties have completed more than enough discovery to recommend settlement. The proper question is "whether counsel had an adequate appreciation of the merits of the case before negotiating." *Warfarin*, 391 F.3d at 537. "The pretrial negotiations and discovery must be sufficiently adversarial that they are not designed to justify a settlement . . . [but] an aggressive effort to ferret out facts helpful to the prosecution of the suit." *In re Austrian*, 80 F. Supp. 2d at 176 (internal quotations omitted).

The parties' discovery here meets this standard. As outlined above, the discovery here was "an aggressive effort" to litigate the case. In *Westerfield*, 764 plaintiffs produced executed interrogatories, 534 plaintiffs produced supplemental executed interrogatories, and 551 plaintiffs produced documents related to Washington Mutual. (Klein Decl. ¶ 14.) The Parties' counsel traveled to 17 states to take or defend a total of 57 Plaintiff depositions, 17 depositions of Loan Consultants' managers and supervisors, and depositions of two Rule 30(b)(6) witnesses. (*Id.* ¶ 18.)

Washington Mutual produced, and Plaintiffs' counsel reviewed, thousands of documents relating to Washington Mutual's pay policies, employee policies, Loan Consultants' job duties and Plaintiffs' personnel records. Washington Mutual also produced payroll data for more than 1,000 Plaintiffs and more than 3,000 class members that Plaintiffs' counsel analyzed. (*Id.* ¶ 15.) On July 28, 2008, the Court ordered Washington Mutual to produce redacted loan applications, or Form 1003s, submitted by Plaintiffs during their employment with Washington Mutual. Plaintiffs were also seeking email and other electronic information from Washington Mutual while settlement discussions took place. (*Id.* ¶ 16.)

In addition, the parties have submitted and vigorously contested motions pertaining to the substantive and procedural issues of this case. Such extensive motion practice along with the discovery completed provides the parties with ample opportunity to familiarize themselves with the merits of their positions. Such knowledge of the "strengths and weaknesses of their cases," supports a finding that the Settlement Agreement reached in this matter is the result of fair and reasonable negotiation. *See Frank*, 228 F.R.D. at 185 (holding that when counsel understands the "strengths and weaknesses of their cases" through extensive discovery, this knowledge support final approval).

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

Litigation inherently involves risks. *See In re Painewebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 126-27 (S.D.N.Y. 1997). Indeed, "if settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome." *In re Ira Haupt & Co.*, 304 F. Supp. 917, 934 (S.D.N.Y. 1969); *see also Velez*, 2007 U.S. Dist. LEXIS 46223 at **21-22. In weighing the risks of establishing liability and damages, the court "must only weigh the likelihood of success by the plaintiff class against the relief offered by the settlement." *In re Austrian*, 80 F. Supp. 2d at 177 (internal quotations omitted).

Although Plaintiffs' case is strong, it is subject to non-negligible risks as to liability and damages. A trial on the merits would involve significant risks to Plaintiffs because of the fact-intensive nature of proving liability under the FLSA and nine state's wage laws, and in light of the defenses available to Defendant, which would pose substantial risk as to both liability and damages.

Defendant has aggressively defended this case, and has asserted a number of different exemptions and other arguments to defeat class certification and with respect to the merits of the

case. A trial on the merits is generally risky for Plaintiffs because of the fact-intensive nature of proving liability under the FLSA and the state wage-and-hour laws, and in light of the various defenses available to Defendant that a jury could consider and potentially find in Defendant's favor.

In addition, proving the amount of time Loan Consultants spent performing uncompensated tasks would present challenges for Plaintiffs under federal and state law. Defendant has strongly contended that Loan Consultants did not work the hours that they claimed, and that a considerable amount of their work was performed outside of the office. Defendant would also likely contend that Loan Consultants should not be compensated for work performed outside the continuous workday or outside of its control. *See generally IBP, Inc., v. Alvarez*, 546 U.S. 21, 37 (2005).

Defendant also continues to argue that Plaintiffs were exempt employees. First, Defendant argues that Plaintiffs' work-related activities outside of their Washington Mutual offices render Plaintiffs exempt outside-sales employees. Although Plaintiffs believe that these occasional, non-sales activities do not render Loan Consultants outside sales employees, Defendant's arguments do present some risk. *See, e.g.*, 29 C.F.R. § 541.503(b) ("Promotion activities directed toward consummation of the employee's own sales are exempt."); *Olivo v. GMAC Mortg. Corp.*, 374 F. Supp. 2d 545, 550 (E.D. Mich. 2004) (concluding that the time loan officers spent at the office, including "following up on contacts and leads generated during outside sales visits," was incidental to the loan officers' outside sales efforts); *Ackerman v. Coca-Cola Enters., Inc.*, 179 F.3d 1260, 1267 (10th Cir. 1999) (employees who spent 20-60% of their workweek promoting defendant's products including in the office were exempt outside salespeople because their in-office activities were incidental to outside sales efforts).

Defendant also argues that these workers are exempt under the administrative and executive exemptions. These two "white collar" exemptions require the payment of a *bona fide* salary to the employees in order to apply. *Yourman v. Giuliani*, 229 F.3d 124, 127 (2d Cir. 2000); *Torres v. Gristede's Operating Corp.*, No. 04 Civ. 3316, 2006 U.S. Dist. LEXIS 74039, at *6 (S.D.N.Y. Sept. 29, 2006). Although Plaintiffs believe that both exemptions are unavailable to Defendant because Washington Mutual's Loan Consultants could not satisfy the FLSA's salary basis test as purely commissioned employees with no predetermined or regular amount of pay, Defendant has made a reasonable argument that Plaintiffs met the salary basis test, and could support that with the evidence gathered. Under the FLSA, this means that they must "regularly receive[] each pay period . . . a predetermined amount . . . not subject to reduction because of variations in the quality or quantity of the work performed," and receive their "full salary for any week in which [they] perform any work without regard to the number of days or hours worked." *Yourman*, 229 F.3d at 127-28 (quoting 29 C.F.R. § 541.118(a)); *Torres*, 2006 U.S. Dist. LEXIS 74039, at *21 (citing 29 C.F.R. § 541.602). Defendant argues that to the extent some Plaintiffs received a guaranteed minimum draw in excess of the statutory minimum for a period of three to four months at the beginning of their employment with Washington Mutual (or, in certain cases, for their entire employment), they may have met the salary basis test. Moreover, Defendant argues that because Washington Mutual instituted a guaranteed minimum draw for all Loan Consultants as of January 1, 2007, Plaintiffs employed as Loan Consultants during that period meet the salary basis test.

Finally, given that Washington Mutual went into receivership, Plaintiffs still face the risk that JPMorgan Chase Bank, N.A., would continue to argue that Washington Mutual's liability to Plaintiffs conveyed to the FDIC and not to JPMorgan Chase Bank, N.A. Although the FDIC has

taken the position that JPMorgan Chase Bank, N.A. acquired liability for Plaintiffs' claims, JPMorgan Chase Bank, N.A., has contested, and could continue to contest, the FDIC's position. In that event, Plaintiffs would expend considerable time and resources conducting discovery and motion practice relating to whether JPMorgan Chase Bank, N.A. is obligated to defend this action and satisfy a money judgment. In the alternative, Plaintiffs may be required to pursue action against the FDIC to fully protect their interests.

While Plaintiffs believe that they could ultimately establish Defendant's liability on these claims, this would require significant factual development. While Plaintiffs believe that their claims are meritorious, their counsel are experienced and realistic, and understand that the resolution of liability issues, the outcome of the trial, and the inevitable appeals process are inherently uncertain in terms of outcome and duration. The proposed settlement alleviates this uncertainty. This factor weighs heavily in favor of final approval.

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

The risk of maintaining the class status through trial is also present. The Court has not certified the state law classes yet, and the parties anticipate that such a determination would be reached only after intense, exhaustive briefing by both parties. Washington Mutual requested up to 300 depositions of Opt-in Plaintiffs and corresponding depositions of Washington Mutual managers – *before the Plaintiffs moved for class certification.* (Klein Decl. ¶ 17.)

Defendant argues that the number and variety of individual questions preclude class certification, such as Loan Consultants' interactions with customers, the number of hours Loan Consultants worked, where Loan Consultants performed work, what tasks they performed outside of Washington Mutual's offices, and to what extent they received a "draw" in lieu of commission payments. Defendant contests Plaintiffs' allegation that Washington Mutual's pay

practices were consistent from one region to another. Defendant also argues that a class action is not a superior method to resolve Plaintiffs' claims and that a class trial would not be manageable. Based on similar arguments, Defendant likely would have also moved to decertify the conditionally certified collective action in *Westerfield* and likely would also have sought permission to file an interlocutory appeal under FED. R. CIV. P. 23(f). Risk, expense, and delay permeate such a process. Settlement eliminates this risk, expense, and delay. This factor favors final approval.

f. Defendant's Ability to Withstand a Greater Judgment is Not Clear (*Grinnell* Factor 7).

Plaintiffs have no evidence as to whether they could obtain a greater judgment. In contrast, there is ample dispute as to whether Washington Mutual even exists, let alone whether it would be capable of providing more in damages to Plaintiffs and the class members. Defendant, who has assumed liability for Washington Mutual in these cases alone, will be paying the amounts provided for in the Settlement Agreement.

Although it is possible that Defendant could pay more than the amount set forth in the Settlement Agreement, a "defendant's ability to withstand a greater judgment, standing alone, does not suggest that the settlement is unfair." *Frank*, 228 F.R.D. at 186 (quoting *In re Austrian*, 80 F. Supp. 2d at 178 n.9). This factor is not determinative and Plaintiffs continue to face the prospect of being limited to the FDIC receivership process if Defendant prevailed on its stated position that the FDIC – and not JPMorgan Chase Bank, N.A. – is liable for Plaintiffs' allegedly unpaid wages. Accordingly, this factor also favors final judicial approval.

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

The Court should approve the settlement because even in the light of the best possible recovery, given the attendant risks, Defendant's agreement to settle for a substantial amount, $38 million, supports a finding that it is fair and reasonable. The resulting average per-class member settlement amount is approximately $5,000. (Klein Decl. ¶ 29.)

The determination of whether a settlement amount is reasonable "does not involve the use of a 'mathematical equation yielding a particularized sum.'" *Frank*, 228 F.R.D. at 186 (quoting *In re Austrian*, 80 F. Supp. 2d at 178). "Instead, 'there is a range of reasonableness with respect to a settlement – a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.'" *Id.* (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972)).

"[T]here is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Grinnell Corp.*, 495 F.2d at 455 n.2. "It is well-settled that a cash settlement amounting to only a fraction of the potential recovery will not *per se* render the settlement inadequate or unfair." *Officers for Justice v. The Civil Serv.Comm'n of the City & County of San Francisco*, 688 F.2d 615, 628 (9th Cir. 1982); *see also Cagan v. Anchor Sav. Bank FSB*, No. 88 Civ. 3024, 1990 U.S. Dist. LEXIS 11450, at **34-35 (E.D.N.Y. May 17, 1990) (approving $2.3 million class settlement over objections that the "best possible recovery would be approximately $121 million"); *Brooks v. Am. Export Indus., Inc.*, No. 71 Civ. 5128, 1977 U.S. Dist. LEXIS 17313, at **16-18 (S.D.N.Y. Feb. 17, 1977) (approving settlement of less than 1% of the best possible recovery).

When settlement assures immediate payment of substantial amounts to class members, "even if it means sacrificing 'speculative payment of hypothetically larger amount years down the road,'" such settlements should be found reasonable under this factor. *See Gilliam*, 05 Civ. 3452 (RLE), 2008 U.S. Dist. LEXIS 23016, at *13 (*quoting Teachers' Ret. Sys. of Louisiana v. A.C.L.N. Ltd.*, No. 01 Civ. 11814(MP), 2004 U.S. Dist. LEXIS 8608, at *16 (S.D.N.Y. May 14, 2004)).

The $38 million settlement amount represents a good value given the attendant risks of litigation, even though recovery could be greater if Plaintiffs succeeded on all claims at trial and survived an appeal. Plaintiffs' counsel has determined that this case presents significant risks that militate toward substantial compromise. Weighing the benefits of the settlement against the risks associated with proceeding in the litigation, the settlement amount is reasonable.

* * *

The *Grinnell* factors all weigh in favor of issuing final approval of the settlement. Because the settlement is "'fair, adequate, and reasonable, and not a product of collusion,'" *Frank*, 228 F.R.D. at 184 (quoting *Joel A. v. Giuliani*, 218 F.3d 132, 138-39 (2d Cir. 2000)), the Court should grant its final approval.

III. APPROVAL OF THE FLSA SETTLEMENT IS APPROPRIATE UNDER FEDERAL LAW.

Plaintiffs also request that this Court finally approve the settlement of their FLSA wage-and-hour claims. The Settlement Agreement between the parties settles all wage-and-hour claims brought by the Plaintiffs, both under the FLSA and nine state wage-and-hour laws. FLSA claims are brought as a "collective action," in which employees must affirmatively "opt-in" to the litigation. 29 U.S.C. § 216(b). The state wage claims are not subject to the "collective action" opt-in provisions of the FLSA's § 216(b) – they are brought as standard opt-out class

actions under general class-action provisions of Rule 23 of the Federal Rules of Civil Procedure. *Ansoumana v. Gristedes Operating Corp.*, 201 F.R.D. 81, 84-85 (S.D.N.Y. 2001), *leave to appeal denied*, No. 01-8021 (2d. Cir. 2001) ("[t]here is no opt-in requirement, analogous to the procedure authorized by the FLSA, under the [NYLL]"). Accordingly, the class certification standards only apply to the state wage-and-hour claims, and not the FLSA claims.

When determining final approval of "hybrid" collective actions of state wage-and-hour class claims and federal FLSA collective action claims, courts in this circuit look to the fairness, adequacy, and reasonableness of the class settlement for both statutory frameworks by examining the *Grinnell* factors. *See, e.g., Frank*, 228 F.R.D. at 184; *Gilliam*, 2008 U.S. Dist. LEXIS 23016, at **9-10. While district courts are under an obligation to evaluate the appropriateness of class certification for the state class claims under Rule 23, that certification standard is not appropriate for FLSA's § 216(b) opt-in procedure. The standard for approval of an FLSA settlement is lower than for a Rule 23 settlement because an FLSA settlement does not implicate the same due process concerns as does a Rule 23 settlement. *See McKenna v. Champion Int'l Corp.*, 747 F.2d 1211, 1213 (8th Cir. 1984) (explaining that FLSA collective actions do not implicate the same due process concerns as Rule 23 actions because, under the FLSA, "parties may elect to opt in but a failure to do so does not prevent them from bringing their own suits at a later date").

Courts approve FLSA settlements when they are reached as a result of contested litigation to resolve *bona fide* disputes. *See Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1353 n.8 (11th Cir. 1982). Typically, courts regard the adversarial nature of a litigated FLSA case to be an adequate indicator of the fairness of the settlement. *Id.* at 1353-54. If the proposed settlement reflects a reasonable compromise over contested issues, the court should

approve the settlement. *Id.* at 1354; *see also Manning v. N.Y. Univ.*, No. 98 Civ. 3300(NRB), 2001 U.S. Dist. LEXIS 12697, at **36-37 (S.D.N.Y. Aug. 22, 2001) (recognizing that the Supreme Court has allowed an FLSA settlement for unpaid wages or overtime pursuant to a judicially-supervised stipulated settlement); *Sampaio v. Boulder Rock Creek Developers, Inc.*, No. 07 Civ. 153, 2007 U.S. Dist. LEXIS 66013, at *3 (E.D.N.Y. Sept. 6, 2007) (same).

In this case, the settlement was the result of vigorously contested litigation and arm's length negotiation. (Klein Decl. ¶¶ 24-27.) Recognizing the uncertain legal and factual issues involved, the parties engaged in multiple mediation sessions with three different experienced mediators and, after numerous rounds of negotiation, ultimately reached the settlement pending before the Court. During the litigation and at the mediations, Plaintiffs and Defendant were both represented by counsel. Accordingly, the Settlement Agreement resolves a clear and actual dispute under circumstances supporting a finding of fair and reasonable arm's length settlement, and is therefore appropriate for final court approval.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court (1) certify as final the settlement class described below; (2) approve as fair and adequate the class wide settlement of this action, as set forth in the Settlement Agreement; and (3) dismiss the action with prejudice.

Dated: September 21, 2009
New York, New York

Respectfully submitted,
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