BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
Salvatore Graziano (*pro hac vice*)
Salvatore@blbglaw.com
Adam Wierzbowski (*pro hac vice*)
Adam@blbglaw.com
Rebecca E. Boon (*pro hac vice*)
Rebecca.Boon@blbglaw.com
1251 Avenue of the Americas, 44th Floor
New York, NY 10020
Telephone: (212) 554-1400
Facsimile: (212) 554-1444

Lead Counsel for Lead Plaintiff and the Settlement Class

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GARY HEFLER, MARCELO MIZUKI, GUY SOLOMONOV, UNION ASSET MANAGEMENT HOLDING AG, and CITY OF HIALEAH EMPLOYEES' RETIREMENT SYSTEM, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

WELLS FARGO & COMPANY, JOHN G. STUMPF, JOHN R. SHREWSBERRY, CARRIE L. TOLSTEDT, TIMOTHY J. SLOAN, DAVID M. CARROLL, DAVID JULIAN, HOPE A. HARDISON, MICHAEL J. LOUGHLIN, AVID MODJTABAI, JAMES M. STROTHER, JOHN D. BAKER II, JOHN S. CHEN, LLOYD H. DEAN, ELIZABETH A. DUKE, SUSAN E. ENGEL, ENRIQUE HERNANDEZ JR., DONALD M. JAMES, CYNTHIA H. MILLIGAN, FEDERICO F. PEÑA, JAMES H. QUIGLEY, JUDITH M. RUNSTAD, STEPHEN W. SANGER, SUSAN G. SWENSON, and SUZANNE M. VAUTRINOT,

Defendants.

Case No. 3:16-cv-05479-JST

CLASS ACTION

LEAD PLAINTIFF'S MOTION FOR FINAL APPROVAL OF SETTLEMENT AND PLAN OF ALLOCATION

Judge: Hon. Jon S. Tigar
Courtroom: 9
Date: December 18, 2018
Time: 2:00 p.m.

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NOTICE OF MOTION FOR FINAL APPROVAL OF SETTLEMENT AND PLAN OF ALLOCATION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure and the Court's Order Granting Preliminary Approval of Class Action Settlement and Granting Motion to Seal ("Preliminary Approval Order," ECF No. 234), on December 18, 2018, at 2:00 p.m., Lead Plaintiff Union Asset Management Holding AG ("Union" or "Lead Plaintiff"), will move the Court, before the Honorable Jon S. Tigar, for: (1) entry of a Judgment granting final approval of the proposed settlement of this Action; and (2) entry of an Order granting approval of the proposed plan for allocating the net settlement proceeds.

This Motion is based on the following Memorandum of Points and Authorities set forth below, the accompanying Declaration of Salvatore J. Graziano in Support of (I) Lead Plaintiff's Motion for Final Approval of Settlement and Plan of Allocation, and (II) Lead Counsel's Motion for Approval of Attorneys' Fees and Litigation Expenses ("Graziano Declaration" or "Graziano Decl.") and its exhibits, all other prior pleadings and papers in this Action, arguments of counsel, and such additional information or argument as may be required by the Court.

A proposed Judgment and proposed Order approving the Plan of Allocation will be submitted with Lead Counsel's reply submission on December 11, 2018, after the November 27, 2018 deadline for Settlement Class Members to request exclusion from the Settlement Class or object to the Settlement and/or Plan of Allocation has passed.

STATEMENT OF ISSUES TO BE DECIDED

1. Whether the Court should approve the proposed Settlement as fair, reasonable and adequate under Rule 23(e).

2. Whether the Court should approve the Plan of Allocation as fair and reasonable.

3. Whether the Court should finally certify the Action as a class action pursuant to Rules 23(a) and (b)(3) for the purposes of the Settlement only.

MEMORANDUM OF POINTS AND AUTHORITIES

Lead Plaintiff Union respectfully submits this memorandum in support of its motion for final approval of the proposed Settlement, and approval of the proposed plan for allocating the net settlement proceeds to the Settlement Class ("Plan of Allocation").[1]

INTRODUCTION

Lead Plaintiff has reached a proposed Settlement of all claims asserted in the Action against Defendants in exchange for $480 million in cash. The proposed Settlement represents an extraordinary result for the Settlement Class, in light of the significant risks in the Action and the amount of potential recovery. The Settlement provides a considerable benefit to the Settlement Class by conferring a substantial, certain and immediate recovery while avoiding the significant risks and expense of continued litigation, including the risk that the Settlement Class could recover nothing or substantially less than the Settlement Amount after years of extensive litigation and delay.

The Settlement represents a very substantial percentage of the Settlement Class's likely recoverable damages. Specifically, estimated maximum damages here ranged from $351.3 million to $3.0639 billion, depending on what stock price declines ultimately would be accepted for loss causation purposes and the resolution of other related damages disputes. ¶175. Thus, the $480 million Settlement represents from 15% to 137% of the amount that might be proved at trial (if Plaintiffs prevailed on all other liability issues), which is an excellent recovery. That recovery is particularly noteworthy in light of the real risks that further litigation might result in no recovery at all. *Id.*

As discussed below and in the Graziano Declaration, Lead Plaintiff faced significant risks in this Action in (a) establishing that Defendants' alleged false statements about Wells Fargo's cross-selling metrics were false and material to investors; (b) proving that Individual Defendants acted with scienter; and (c) establishing that the correction of prior false statements, rather than other factors, were the cause of the price declines in Wells Fargo stock in September 2016.

This Settlement was reached after months of arm's-length settlement negotiations that involved

[1] Unless otherwise noted, capitalized terms have the meanings ascribed to them in the Stipulation and Agreement of Settlement dated July 30, 2018 (ECF No. 225-1) (the "Stipulation") or the Graziano Declaration, filed herewith. Citations to "¶" herein refer to paragraphs in the Graziano Declaration.

highly experienced counsel on both sides and participation in a formal mediation process overseen by former Judge Layn Phillips, an experienced and highly respected mediator. ¶61; *see also* Declaration of Layn R. Phillips ("Phillips Decl."), attached as Exhibit 1 to the Graziano Declaration.

When the Settlement was reached, Lead Plaintiff and its counsel were well-informed of the strengths and weaknesses of their case. Lead Counsel and the other Plaintiffs' Counsel, *inter alia*: (i) conducted a comprehensive investigation into the asserted claims and drafted highly-detailed Consolidated and Amended Complaints; (ii) researched and briefed a largely successful opposition to Defendants' eight motions to dismiss; (iii) consulted with several experts and consultants on the challenging loss causation and damages issues presented by this Action; and (iv) drafted and served extensive discovery requests on Defendants, and conducted substantial document discovery. ¶¶11, 31-99. Before Lead Plaintiff agreed to the terms of the Settlement, Lead Counsel undertook a review and analysis of more than 3.5 million pages of Wells Fargo documents to assure that the proposed Settlement was fair, reasonable, and adequate. ¶¶94, 212. The conclusion of that review supports Lead Counsel's conclusion that the result is an excellent one for the Settlement Class. ¶99.

The Settlement also has the full support of the Court-appointed Lead Plaintiff, which is a sophisticated institutional investor of the type Congress favored when it passed the Private Securities Litigation Reform Act of 1995 ("PSLRA"). Union was intimately involved in the litigation and settlement negotiations and witnessed first-hand Lead Counsel's vigorous prosecution of its claims. *See* Declaration of Andreas Zubrod ("Zubrod Decl."), attached as Exhibit 2 to the Graziano Declaration, at ¶¶3-4, 9-10, 16.

In light of the considerations discussed herein, Lead Plaintiff and Lead Counsel submit that the Settlement is fair, reasonable, and adequate, satisfies the standards of Rule 23, and provides a significant recovery for the Settlement Class. Lead Plaintiff accordingly respectfully requests that the Court grant final approval of the Settlement and deem the Plan of Allocation, set forth in the mailed Notice, to be a fair and reasonable method for distributing the Net Settlement Fund to eligible Settlement Class Members.

I. THE SETTLEMENT MERITS FINAL APPROVAL BY THE COURT

A. The Standards for Judicial Approval of Class Action Settlements

Under Rule 23(e) of the Federal Rules of Civil Procedure, a proposed class action settlement must

be presented to the Court for approval. Where a settlement is binding on class members (as this one is), the Court may approve it only "after a hearing and on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e).

The Ninth Circuit recognizes "a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned." *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008); *see also In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1041 (N.D. Cal. 2008) ("the court must also be mindful of the Ninth Circuit's policy favoring settlement, particularly in class action law suits"). Class action suits readily lend themselves to compromise because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation. Settlements of complex cases such as this one greatly contribute to the efficient utilization of scarce judicial resources and achieve the speedy resolution of claims. *See, e.g.*, *Garner v. State Farm Mut. Auto. Ins. Co.*, 2010 WL 1687832, at *10 (N.D. Cal. Apr. 22, 2010) ("'Settlement avoids the complexity, delay, risk and expense of continuing with the litigation and will produce a prompt, certain, and substantial recovery for the Plaintiff class.'").

The Court considers the settlement taken as a whole, rather than its individual component parts, and examines it for overall fairness. *See Officers for Justice v. Civil Serv. Comm'n of City & Cty. of San Francisco*, 688 F.2d 615, 628 (9th Cir. 1982). In its assessment, the Court should not "second guess" the settlement terms. Instead, its review should be "limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998).

A settlement hearing should "not to be turned into a trial or rehearsal for trial on the merits," *Officers for Justice*, 688 F.2d at 625, and a court "need not reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements." *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992); *see also Carson v. Am. Brands*, 450 U.S. 79, 88 n.14 (1981) (in considering the fairness of a proposed settlement, courts should "not decide the merits of the case or resolve unsettled legal questions").

Nor should a proposed settlement be judged "against a hypothetical or speculative measure of

what might have been achieved by the negotiators." *Officers for Justice*, 688 F.2d at 625. The question is "not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion." *Hanlon*, 150 F.3d at 1027; *see Lane v. Facebook, Inc.*, 696 F.3d 811, 819 (9th Cir. 2012) ("whether a settlement is fundamentally fair within the meaning of Rule 23(e) is different from [] whether the settlement is perfect in the estimation of the reviewing court").

B. The Settlement Is the Result of Arm's-Length Negotiations Assisted by an Experienced Mediator

The proposed Settlement is the product of extensive arm's-length settlement negotiations between highly experienced and capable counsel that included participation in a formal mediation process overseen by former Judge Layn Phillips, an experienced mediator of securities class actions. ¶¶61-66; 91-94; Phillips Decl. ¶¶7-15. As part of the mediation process, Lead Counsel submitted two sets of mediation statements, reviewed numerous internal documents Wells Fargo produced, and participated in two all-day formal mediation sessions (with the second session spanning into the following Saturday) in New York City, and multiple follow-up calls. *Id*. During the mediation sessions, the Parties fully explored the strengths and weaknesses of their respective claims and defenses. ¶¶64, 66, 93. The negotiations focused on the highly complex and heavily disputed issues of whether Wells Fargo or any of the Individual Defendants acted with the requisite scienter, on disputed loss causation issues, and the proper measure of damages. *Id*. During these negotiations, Lead Plaintiff was well informed about the strengths and weaknesses of Plaintiffs' claims as a result of its counsel's thorough investigation of the claims, their review of documents produced in discovery, and extensive consultation with damages experts. ¶¶40, 62-63, 91-92. Lead Plaintiff was fully informed of and actively participated throughout the settlement negotiations and its representatives personally attended the second mediation session. Zubrod Decl. ¶¶3-4, 9-10, 16. Throughout, the settlement negotiations were hard-fought and at arm's length. Phillips Decl. ¶¶14, 16.

As courts in this District and elsewhere have found, the fact that the Parties reached the Settlement after arm's-length negotiations between experienced counsel, and with the assistance of an experienced mediator, creates a presumption of its fairness. *See In re Netflix Privacy Litig.*, 2013 WL 1120801, at *4 (N.D. Cal. Mar. 18, 2013) ("Courts have afforded a presumption of fairness and reasonableness of a

settlement agreement where that agreement was the product of non-collusive, arms' length negotiations conducted by capable and experienced counsel"); *Int'l Bhd. of Elec. Workers Local 697 Pension Fund v. Int'l Game Tech., Inc.*, 2012 WL 5199742, at *2 (D. Nev. Oct. 19, 2012) ("*IBEW*") (finding settlement to be fair where it "was reached following arm's length negotiations between experienced counsel that involved the assistance of an experienced and reputable private mediator"); *In re Indep. Energy Holdings PLC Sec. Litig.*, 2003 WL 22244676, at *4 (S.D.N.Y. Sept. 29, 2003) ("the fact that the Settlement was reached after exhaustive arm's-length negotiations, with the assistance of a private mediator experienced in complex litigation, is further proof that it is fair and reasonable"); *see also Linney v. Cellular Alaska P'ship*, 1997 WL 450064, at *5 (N.D. Cal. July 18, 1997) ("The involvement of experienced class action counsel and the fact that the settlement agreement was reached in arm's length negotiations, after relevant discovery had taken place create a presumption that the agreement is fair."), *aff'd*, 151 F.3d 1234 (9th Cir. 1998).

Moreover, the assistance of an experienced mediator like Judge Phillips in the settlement process "confirms that the settlement is non-collusive." *In re Anthem, Inc. Data Breach Litig.*, 2018 WL 3872788, at *20 (N.D. Cal. Aug. 15, 2018); *Satchell v. Fed. Express Corp.*, 2007 WL 1114010, at *4 (N.D. Cal. Apr. 13, 2007); *see also Roberti v. OSI Sys., Inc.*, 2015 WL 8329916, at *3 (C.D. Cal. Dec. 8, 2015) (finding that history of arm's-length negotiations, including mediation with Judge Phillips, supported conclusion that settlement was free of collusion). Further, the Settlement has none of the indicia of possible collusion identified by the Ninth Circuit, such as a clear-sailing fee agreement or a provision that would allow unpaid fees to revert to Defendants (¶192). *See In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011). In short, the Settlement here was reached after arm's-length negotiations by capable counsel and was not a product of fraud, overreaching, or collusion among the parties.

C. The Factors Enumerated by the Ninth Circuit in *Hanlon* Support Final Approval

To evaluate the substantive fairness of a settlement, courts in the Ninth Circuit consider the following factors set forth in cases such as *Hanlon v. Chrysler Corp.* and *Churchill Village L.L.C. v. General Electric*:

> (1) the strength of the plaintiffs' case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of the class members to the proposed settlement.

Churchill, 361 F.3d 566, 575 (9th Cir. 2004); *see also Hanlon*, 150 F.3d at 1026; *Lane*, 696 F.3d at 819. The factors are non-exclusive and not all need be shown. *Churchill*, 361 F.3d at 576 n.7. Further, not all of these factors will apply to every class action settlement and, under certain circumstances, one factor alone may prove determinative in finding sufficient grounds for court approval. *See Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993). "The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought and the unique facts and circumstances presented by each individual case." *Officers for Justice*, 688 F.2d at 625. These factors strongly support approval of the proposed Settlement here.[2]

1. The Amount Offered in Settlement

The amount of a settlement "is generally considered the most important [factor], because the critical component of any settlement is the amount of relief obtained by the class." *Destefano v. Zynga, Inc.*, 2016 WL 537946, at *11 (N.D. Cal. Feb. 11, 2016).

"'It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair.'" *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000). In assessing the recovery, a fundamental question is how the value of the settlement compares to the amount the class potentially could recover at trial, discounted for risk, delay and expense. "Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with litigation." *Officers of Justice*, 688 F. 2d at 624; *see also Shapiro v. JPMorgan Chase & Co.*, 2014 WL 1224666, at *11 (S.D.N.Y. Mar. 24, 2014) (settlement amount must be judged "not in

[2] The "presence of a governmental participant" was not a relevant factor for or against the Settlement under the circumstances of this case and so it has not been included in the analysis of the factors below. *See Wren v. RGIS Inventory Specialists*, 2011 WL 1230826, at *10 (N.D. Cal. Apr. 1, 2011) (lack of government entity involved in case rendered factor inapplicable to the analysis).

comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case").

Here, the Settlement Amount—almost a half billion dollars in cash—is significant under any measure. If approved, the Settlement will be the fourth largest securities class action settlement in the Ninth Circuit and the second largest ever in this District. ¶6. The Settlement is ***sixty times*** the size of the median securities class action settlement in the Ninth Circuit ($8 million). *See* Cornerstone Research, *Securities Class Action Settlements: 2017 Review and Analysis* (2018), at 20 (Graziano Decl. Ex. 8) ("Cornerstone Report"). More importantly, the proposed recovery would provide a very substantial financial benefit to the Settlement Class in comparison to overall potential damages and eliminate the significant risk that the Settlement Class could recover less, or even nothing at all, if the Action continued. ¶¶175-76.

Lead Plaintiff's damages expert has estimated that the approximate maximum total damages that could be established in the Action would range from $351.3 million to $3.0639 billion. *See* Declaration of Chad W. Coffman, CFA (ECF No. 225-2) ("Coffman Decl.") ¶1. Proving the damages reflected in these estimates assumes that Lead Plaintiff would have prevailed on all of its merits arguments and been able to prove the elements of falsity, materiality, and scienter at trial, which was far from certain. ¶¶111-43. The reason that the "maximum damages" is expressed as a broad range here is that there are a number of separate arguments related to loss causation and damages that, if accepted, would have precluded investors from recovering for their losses based on price declines on certain days (even if the liability elements of falsity, materiality, and scienter were proven) or would have required that class members offset their losses by any gains on sales of shares bought before the Class Period. ¶¶144-67; Coffman Decl. ¶¶ 34-35.

Thus, the $480 million Settlement represents approximately 15% to 137% of the possible maximum damages that might have been established if Lead Plaintiff prevailed at trial (based on how the loss causation and damages issues might be resolved). ¶¶175-76. It goes without saying that a settlement of **137%** of the amount that could be obtained by a ***plaintiff's verdict*** at trial is very good indeed. Some midpoint outcomes, in which some of Defendants' arguments were accepted and some were not, might have led to damages of $900 million to $1 billion, *see* Coffman Decl. ¶ 34, and make the Settlement a

roughly 50% recovery, which is also an unquestionably strong recovery, given the substantial risks in the case.

Moreover, even in comparison to the absolute high-end estimate of roughly $3.06 billion, the Settlement represents more than 15% of the maximum damages, which is still many multiples above the typical percentage recovery in hard to prove securities actions. For example, one study has found that, from 2008-16, in all securities class actions where damages were estimated to be above $1 billion, the median settlement recovery was only 2.5% of damages. *See* Cornerstone Report at 8. Based on these statistics, courts have routinely approved and even lauded settlements with substantially lower percentage recoveries than here. *See, e.g.*, *In re Biolase, Inc. Sec. Litig.*, 2015 WL 12720318, at *4 (C.D. Cal. Oct. 13, 2015) (finding a settlement recovery of 8% of maximum recoverable damages "equals or surpasses the recovery in many other securities class actions"); *Omnivision*, 559 F. Supp. 2d at 1042 (settlement yielding 9% of potential damages held "higher than the median percentage of investor losses recovered in recent shareholder class action settlements"); *McPhail v. First Command Fin. Planning, Inc.*, 2009 WL 839841, at *5 (S.D. Cal. Mar. 30, 2009) (securities class action settlement recovery of 7% of estimated damages "weigh[s] in favor of final approval"); *IBEW,* 2012 WL 5199742, at *3 (approving settlement representing "about 3.5% of the maximum damages that Plaintiffs believe[d] could be recovered at trial" and finding it "within the median recovery in securities class actions settled in the last few years").

When viewed in this context and relative to other securities recoveries nationwide, the recovery achieved in this case is extremely favorable to the Settlement Class. Indeed, it is even more so in light of the substantial risks of establishing liability and damages here, as discussed below.

2. The Strength of Plaintiffs' Case and the Significant Risks of Continued Litigation

Courts evaluating proposed class action settlements consider the strength of the plaintiffs' case and the risks of further litigation. *See Torrisi*, 8 F.3d at 1376. To determine whether the proposed Settlement is fair, reasonable, and adequate, the Court "must balance the risks of continued litigation, including the strengths and weaknesses of plaintiff's case, against the benefits afforded to class members, including the immediacy and certainty of a recovery." *Knapp v. Art.com, Inc.*, 283 F. Supp. 3d 823, 831 (N.D. Cal. 2017).

In considering whether to enter into the Settlement, Lead Plaintiff, represented by counsel experienced in securities litigation, weighed the risks inherent in establishing the elements of their claims, including risks of proving falsity, materiality, Defendants' scienter, loss causation, and recoverable damages, as well as the expense and likely duration of the Action. Lead Plaintiff and Lead Counsel believed in the merits of the claims they asserted, but also acknowledged that there were considerable risks. Lead Plaintiff and Lead Counsel were aware that, in order to defeat a summary judgment motion and prevail at trial, they would have to prove not only that Defendants' statements about Wells Fargo's cross-selling metrics and related practices were false or misleading, but that those statements were material; that the Individual Defendants knew or were reckless in not knowing that their statements were false when made; and that those statements were corrected and caused recoverable damages for the class. Each of these elements is addressed in turn below.

Materiality. Defendants contended that that any false or misleading statements they may have made about cross-selling were not material to investors and thus not actionable. ¶¶41(i), (ii). Defendants likely would have argued that investors did not consider disclosures about the cross-sell metrics to be particularly significant, and that the scope of alleged sales misconduct at Wells Fargo (which overstated its cross-sell metric by only a few tenths or hundredths of a point) was too small to be material to investors in Wells Fargo, which is one of the world's largest banks with multiple business lines. ¶¶112-22.

Scienter. A defendant's state of mind in a securities case "is the most difficult element of proof and one that is rarely supported by direct evidence" such as an admission. *In re Amgen Inc. Sec. Litig.*, 2016 WL 10571773, at *3 (C.D. Cal. Oct. 25, 2016); *see also In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1172 (S.D. Cal. 2007) (noting that scienter is a "complex and difficult [element] to establish at trial"). Proof of scienter would have been challenging here as the Individual Defendants would argue that Wells Fargo actively took steps to prevent employees from opening unauthorized accounts (¶¶123-32) and that they believed any alleged sales misconduct was insignificant in number overall under control (¶¶119-21). Moreover, Defendants contended that they would never have instituted committees and monitoring methods to identify and reduce sales misconduct if they actually initiated those improper sales practices to inflate the stock price. ¶123. Defendants would argue that even if their conduct were "mismanagement" or a failure to exercise effective oversight, it was, at worst, negligence, not intentional

securities fraud. ¶41(viii). If Defendants successfully convinced the Court or a jury that they did not act with scienter, this would have resulted in zero recovery for the Settlement Class.

Truth-on-the-Market / Statute of Limitations. The Settlement Class would have also recovered nothing if Defendants successfully convinced the Court or a jury that Plaintiffs' claims were barred by a "truth-on-the market" defense or the two-year statute of limitations. Defendants would have argued that two articles published in the *Los Angeles Times* in October 2013 and December 2013 informed investors of the alleged cross-selling fraud more than two years before investors filed suit in September 2016. ¶169. Indeed, the *Financial Times* reported in September 2016 that "the whole story could be found in the pages of the *Los Angeles Times* nearly three years ago." *Id*. Lead Plaintiff believes it would have been able to refute any such defense. ¶170. However, had the Court, an appellate court, or jury determined that the statute of limitations had run prior to the filing of Plaintiffs' lawsuit in September 2016, the Settlement Class's recovery would have been eliminated. *Id*.

Loss Causation. Lead Plaintiff also faced substantial challenges in proving that the revelation of the truth about Defendants' false and misleading statements caused the declines in the price of Wells Fargo's stock, and in establishing the amount of class-wide damages. ¶¶144-67. Defendants had substantial arguments that the price declines on many of Plaintiffs' alleged corrective disclosure dates were not due to revelation of the alleged misstatements or omissions. *Id*. Indeed, at summary judgment, trial and appeal, Defendants would have challenged each of the claimed corrective disclosures as inadequate to support loss causation. *Id*. For example, Defendants could point to the fact that on September 8, 2016, when Wells Fargo first disclosed that it had settled regulators' claims of creating fake or unauthorized accounts, Wells Fargo's stock price did not decline, but, in fact, increased from the prior day's close. ¶148. Moreover, Defendants would argue that the decline in Wells Fargo's stock price the following day was not statistically significant (¶151), and that subsequent stock price declines were not caused by the revelation of new, actionable information because Defendants had already disclosed the alleged fraud on September 8. ¶150. Defendants would argue that subsequent actions taken by the government and any admissions by Wells Fargo did not materially add to the mix of information already in an efficient market as of September 8, 2016, and thus the price declines following those actions and admissions were not caused by revelation of the alleged fraud. ¶¶154, 156, 163.

Defendants also would argue that the expert trading model that Plaintiffs used to calculate damages, especially at the higher end of Plaintiffs' estimated recovery range, makes unsupportable assumptions that are contradicted by the facts and would not withstand a challenge under *Daubert*. ¶165. These were serious risks to recovery. Defendants' typical argument that class damages should be calculated based on netting out gains that class members made from selling their pre-Class Period holdings of stock during the Class Period (when its price was allegedly artificially inflated) would also, if accepted by the Court, have dramatically reduced class damages. *See* ¶166; *Jaffe Pension Plan v. Household Int'l, Inc.*, 756 F. Supp. 2d 928, 935 (N.D. Ill. 2010).

The resolution of these disputed issues regarding damages and loss causation would have come down to a "battle of experts," and there is little doubt that Defendants would have been able to present a well-qualified expert who would opine that the class had little or no damages. ¶165. As Courts have long recognized, the uncertainty as to which side's expert's view might be credited by the jury presents a substantial litigation risk. *See In re Celera Corp. Sec. Litig.*, 2015 U.S. Dist. LEXIS 157408, at *17 (N.D. Cal. Nov. 20, 2015) (risks related to the "battle of experts" weighed in favor of settlement approval); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 459 (S.D.N.Y. 2004) ("[P]roof of damages in securities cases is always difficult and invariably requires expert testimony which may, or may not be, accepted by a jury.").

3. The Risk of Maintaining Class Action Status Through Trial

At the time the Settlement was reached, Lead Plaintiff' had not yet moved for class certification. While Lead Plaintiff fully believes this Action is appropriate for class treatment, if the litigation had continued, Defendants undoubtedly would have raised various challenges to certification of the Class (¶105), including issues that could have dramatically reduced damages if Defendants' arguments were accepted that the Class Period should end on September 8, 2016, when there was no significant drop in the price of Wells Fargo common stock. ¶148. Even assuming Lead Plaintiff successfully obtained certification of the full Class Period, there was risk of an interlocutory Rule 23(f) appeal or decertification at a later stage in the proceedings. Accordingly, the risk and uncertainty surrounding certification of the Class also support approval of the Settlement. *See Bendon v. DTG Operations, Inc.*, 2018 WL 4976511, at *5 (C.D. Cal. Aug. 22, 2018); *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab.*

Litig., 2017 WL 2212783, at *14 (N.D. Cal. May 17, 2017).

4. The Complexity, Expense and Likely Duration of Litigation

Courts consistently recognize that the expense, complexity, and possible duration of the litigation are key factors in evaluating the reasonableness of a settlement. *See, e.g.*, *Torrisi*, 8 F.3d at 1375-76 (finding that "the cost, complexity and time of fully litigating the case" rendered the settlement fair). "Generally, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." *In re LinkedIn User Privacy Litig.*, 309 F.R.D. 573, 587 (N.D. Cal. 2015). Due to the "notorious complexity" of securities class actions in particular, settlement is often appropriate because it "circumvents the difficulty and uncertainty inherent in long, costly trials." *In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.*, 2006 WL 903236, at *8 (S.D.N.Y. Apr. 6, 2006); *see In re Heritage Bond Litig.*, 2005 WL 1594403, at *6 (C.D. Cal. June 10, 2005) (class actions have a well-deserved reputation as being the most complex).

Continuing litigation through the conclusion of fact discovery, through expert discovery, class certification, summary judgment, trial and appeals would have been extremely expensive and delay recovery for class members, possibly for years. *See Zynga*, 2016 WL 537946, at *10; *Amgen*, 2016 WL 10571773, at *3 ("A trial of a complex, fact-intensive case like this could have taken weeks, and the likely appeals of rulings on summary judgment and at trial could have added years to the litigation."). And, even with a verdict at trial affirmed on appeal, the Settlement Class would have faced a potentially complex, lengthy and (almost certainly) contested claims administration process.[3] Barring settlement, there is no question that resolution of this case would take considerable time and require additional expenses, with the end result far from certain. *See Hartless v. Clorox Co.*, 273 F.R.D. 630, 640 (S.D. Cal. 2011), *aff'd in part*, 473 F. App'x 716 (9th Cir. 2012) ("Considering these risks, expenses and delays, an immediate and certain recovery for class members … favors settlement of this action.").

[3] In other securities fraud class actions that have gone to trial, the time from a verdict to a final judgment has taken as long as *seven* years. *See Jaffe Pension Plan v. Household Int'l., Inc.*, No. 1:-02-cv-05893, Verdict Form, ECF No. 1611 (N.D. Ill. May 7, 2009) & Final Judgment and Order of Dismissal With Prejudice, ECF No. 2267 (N.D. Ill. Nov. 10, 2016); *see also Vivendi Universal, S.A. Sec. Litig.*, Civ. No. 02-5571 (RJH/HBP), Verdict Form, ECF No. 998 (S.D.N.Y. Feb. 2, 2010) (jury verdict issued on Jan. 29, 2010) & Final Judgment Approving Class Action Settlement of All Remaining Claims, ECF No. 1317 (S.D.N.Y. May 9, 2017).

Thus, the risk, expense, complexity, and likely duration of further litigation clearly support approval of the Settlement. The present value of a certain (very substantial) recovery now, as opposed to the mere chance for a possibly greater one years later, supports approval of a settlement that eliminates the expense and delay of continued litigation and the risk that the Settlement Class could receive no recovery. *Id*. (courts "shall consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation").

5. The Extent of Discovery and Stage of Proceedings

The purpose of considering the extent of discovery and stage of the proceedings at which the settlement was achieved is to ensure that plaintiffs and their counsel had sufficient information to "make an informed decision about the merits of their case." *Amgen*, 2016 WL 10571773, at *4. Specifically, "a settlement following sufficient discovery and genuine arms-length negotiation is presumed fair." *Nat'l Rural Telecomms. Coop. v. DirecTV, Inc*., 221 F.R.D. 523, 528 (C.D. Cal. 2004); *see also Nguyen v. Radient Pharm. Corp.,* 2014 WL 1802293, at *3 (C.D. Cal. May 6, 2014) (finding that the parties had "thorough sense of the options going forward and the likelihood of success at trial" where there had been "extensive fact and expert discovery and Plaintiffs successfully opposed summary judgment" and "an ongoing mediation process"); *see Eisen v. Porsche Cars N. Am., Inc*., 2014 WL 439006, at *4 (C.D. Cal. Jan. 30, 2014) (approving settlement when record established "all counsel had ample information and opportunity to assess the strengths and weaknesses of their claims and defenses"). In this case, as discussed below, Lead Plaintiff did not agree to the proposed Settlement until it had the opportunity to review over 3.5 million pages of discovery documents to ensure an informed assessment of the fairness of the Settlement. ¶¶94, 99.

Courts regularly approve settlements reached relatively early in the formal litigation process. *See, e.g.*, *Mego*, 213 F.3d at 459 (even absent extensive formal discovery, class counsel's significant investigation and research supported settlement approval); *Linney*, 151 F.3d at 1239 ("In 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."); *In re TD Ameritrade Account Holder Litig.*, 2011 WL 4079226, at *6 (N.D. Cal. Sept. 13, 2011) (settlement after the filing of a motion to dismiss and prior to significant discovery).

Here, the Settlement was reached after Plaintiffs' Counsel had already gathered extensive knowledge about the strengths and weaknesses of claims by: (i) conducting a thorough initial investigation into the claims against Wells Fargo (¶¶31-32); (ii) researching and drafting a detailed Consolidated Complaint and Amended Complaint (¶¶33-36, 76-77); (iii) researching and drafting their successful (in large part) opposition to Defendants' eight motions to dismiss (¶¶43-54); (iv) consulting with several damages experts and consultants on the challenging loss causation and damages issues presented by this Action (¶¶32, 40); and (v) preparing for and participating in two mediation sessions and additional negotiations with Defendants on an arm's-length basis to resolve the Action (¶¶61-66; 91-94; Phillips Decl. ¶¶7-15).

Nonetheless, Lead Counsel believed that, given the magnitude and importance of the case, further discovery was needed to fully assess the adequacy of the proposed Settlement. ¶¶95-96. Accordingly, when the Parties reached an agreement in principle to settle the Action, Lead Counsel drafted and signed a Term Sheet that expressly stated that the Settlement was subject to the completion of discovery by Lead Plaintiff for the purpose of assessing the reasonableness and adequacy of the Settlement. ¶94. Following subsequent meet and confers between the Parties concerning the scope of such discovery, Lead Counsel pushed for and obtained millions of additional pages of documents belonging to 65 Wells Fargo custodians, including documents from every Individual Defendant and the Company's most relevant senior executives and employees. ¶212. Lead Counsel reviewed and analyzed the documents produced to determine whether the documentary evidence substantially altered Lead Counsel's understanding of the risks of proving Plaintiffs' claims. ¶¶97-99. That review added significant depth and context to Defendants' likely arguments that Plaintiffs would be unable to prove scienter and materiality – including that Wells Fargo undertook extensive efforts to detect, analyze and eliminate perceived abusive sales practices and viewed the abuses it did detect as immaterial or "not systemic" – and provided further support for Lead Counsel's belief that the Settlement is exceptionally fair and reasonable. ¶¶110-43.

Accordingly, when the Settlement was ultimately executed, only at the conclusion of this robust discovery process, Lead Plaintiff and Lead Counsel had sufficient information to assess the strengths and weaknesses of their case and "to effectively evaluate […] the advantages of the settlement." *Elliott v. Rolling Frito-Lay Sales, LP*, 2014 WL 2761316, at *8 (C.D. Cal. June 12, 2014). This factor clearly weighs in favor of the Settlement's final approval.

6. The Experience and Views of Counsel

The informed opinion of experienced Lead Counsel that the Settlement is in the best interest of the Settlement Class should be afforded significant weight. "The recommendation of experienced counsel carries significant weight in the court's determination of the reasonableness of the settlement." *Kirkorian v. Borelli*, 695 F. Supp. 446, 451 (N.D. Cal. 1988); *see DirectTV*, 221 F.R.D. at 528 ("'Great weight' is accorded to the recommendation of counsel . . . because 'parties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in the litigation'") (citation omitted). Here, as set forth above, Lead Counsel has a thorough understanding of the merits and risks of the Action and extensive prior experience in securities litigation. ¶¶206-26. Therefore, Lead Counsel's belief that the Settlement represents a very favorable outcome for Settlement Class Members should be given substantial weight.

7. The Reaction of the Settlement Class to Date

The reaction of the Settlement Class to the Settlement is another factor in determining the adequacy of the Settlement. *See Amgen*, 2016 WL 10571773, at *4.

Pursuant to the Preliminary Approval Order, the Court-appointed Claims Administrator, Epiq Class Action & Mass Tort Solutions ("Epiq"), began mailing copies of Notice Packet (consisting of the Notice and Claim Form) to potential Settlement Class Members and nominees on September 25, 2018. *See* Declaration of Alexander Villanova Regarding (A) Mailing of the Notice and Claim Form; (B) Publication of the Summary Notice; and (C) Report on Requests for Exclusion Received to Date, Exhibit 3 to the Graziano Declaration ("Villanova Decl.") ¶¶3, 4.

As of November 9, 2018, Epiq had mailed a total of 1,866,302 copies of the Notice Packet to potential Settlement Class Members and nominees. *Id*. ¶8. In addition, the Summary Notice was published in *The Wall Street Journal* and *Los Angeles Times* and transmitted over the *PR Newswire*. *Id*. ¶9. The Notice sets out the essential terms of the Settlement and informs potential Settlement Class Members of, among other things, their right to opt out of the Settlement Class or object to the Settlement, Plan of Allocation, and/or Lead Counsel's motion for attorneys' fees and expenses. The deadline set by the Court for Settlement Class Members to exclude themselves or object to the Settlement is November 27, 2018. To date, 69 requests for exclusion and two non-specific objections have been received. As

provided in the Preliminary Approval Order, Lead Plaintiff will file reply papers on December 11, 2018, after the deadline for requesting exclusions or objecting has passed that will address all requests for exclusion and objections received at one time.

In addition, the Court-appointed Lead Plaintiff, who has a substantial financial interest in the outcome, actively participated in this Action and directly observed the substantial efforts undertaken by Lead Counsel to obtain the proposed recovery for the Class, notwithstanding the meaningful and multiple risks faced in this litigation, strongly endorses the Settlement. *See* Zubrod Decl. ¶¶3-4, 9-10, 16. Courts have considered "the role taken by the lead plaintiff in [the settlement] process, a factor somewhat unique to the PSLRA." *In re Portal Software, Inc. Sec. Litig.*, 2007 WL 4171201, at *3 (N.D. Cal. Nov. 26, 2007). Under the PSLRA, the Plaintiffs' support for a settlement should be accorded "special weight" because plaintiffs "have a better understanding of the case than most members of the class." *DirecTV*, 221 F.R.D. at 528; *see also In re Veeco Instruments Inc. Sec. Litig.*, 2007 WL 4115809, at *5 (S.D.N.Y. Nov. 7, 2007) (a settlement reached "under the supervision and with the endorsement of a sophisticated institutional investor . . . is 'entitled to an even greater presumption of reasonableness"').

* * *

In sum, all of the factors considered by the Ninth Circuit support approval of the Settlement but its approval is particularly warranted because (a) the Settlement Amount is very substantial in comparison to damages that could be proven at trial; (b) continued litigation would pose many significant risks of non-recovery or lesser recovery and would impose considerable delays and expense on the Class; and (c) Lead Plaintiff, through its counsel, was well informed about the strength of the case, including as a result of the extensive discovery conducted.

D. The Factors Identified in the Upcoming Amendments to Rule 23(e)(2) Also Support Approval of the Settlement

Absent Congressional action, a series of amendments to Rule 23 will go into effect on December 1, 2018 – after the filing of this motion but before the Settlement Hearing. Among these is a change to Rule 23(e)(2) that amends that rule by adding four specific factors that a court should consider in determining whether a settlement is "fair, reasonable, and adequate," *i.e.*, whether:

> (A) the class representatives and class counsel have adequately represented the class;

> (B) the proposal was negotiated at arm's length;
>
> (C) the relief provided for the class is adequate, taking into account:
>
> (i) the costs, risks, and delay of trial and appeal;
>
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
>
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
>
> (iv) any agreement required to be identified under Rule 23(e)(3); and
>
> (D) the proposal treats class members equitably relative to each other.

Proposed Amendment to Fed. R. Civ. P. 23(e). The proposed Settlement also meets all of these criteria, most of which are already covered by the traditional Ninth Circuit factors discussed above.

1. Lead Plaintiff and Lead Counsel Have Adequately Represented the Settlement Class

Lead Plaintiff and Lead Counsel have adequately represented the Settlement Class in connection with both the litigation and the Settlement. Lead Plaintiff and the other named Plaintiffs have claims that are typical of and coextensive with those of the Settlement Class and they lack any interests that are antagonistic to the interest of other members of the Settlement Class. *See Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978); *Hanlon*, 150 F.3d at 1020. On the contrary, Plaintiffs – like all other Settlement Class Members – have an interest in obtaining the largest possible recovery from Defendants. *See In re Polaroid ERISA Litig.*, 240 F.R.D. 65, 77 (S.D.N.Y. 2006) ("Where plaintiffs and class members share the common goal of maximizing recovery, there is no conflict of interest between the class representatives and other class members."). Moreover, Lead Plaintiff Union, a sophisticated institutional investor, has played a very active role in supervising and participating in the litigation. The counsel that Lead Plaintiff retained to prosecute the Action, including BLB&G and other Plaintiffs' Counsel are highly experienced in securities class action litigation and have vigorously pursued this case on behalf of the Settlement Class. Accordingly, this factor supports approval of the Settlement.

2. The Settlement Was Negotiated at Arm's Length

As discussed above in Part I.C, the Settlement was only reached after lengthy arm's-length negotiations between experienced counsel after two in-person mediation sessions overseen by the

experienced mediator and former federal judge Layn Phillips. Thus, this factor clearly supports approval of the Settlement.

3. The Relief Provided for the Settlement Class is Adequate, Taking Into Account the Costs, Risks, and Delay of Trial and Appeal and Other Factors

The core element of this factor – whether the Settlement Amount is adequate when taking into account the costs, risks and delay of further litigation is already encompassed by several of the *Hanlon* factors and discussed at length in Parts I.D.1, I.D.2, I.D.3 and I.D.4 above. The amended rule would also require consideration of several other issues. The first is the "effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims." Here, the proceeds of the Settlement will be distributed to class members who submit eligible Claim Forms with required documentation to Epiq. Epiq will review and process those claims, provide claimants with an opportunity to cure any deficiency or request review of the denial of their claim by the Court, and will ultimately mail or wire claimants their *pro rata* share of the Net Settlement Fund. This type of claims processing is standard in securities class actions and has long been used and found to be effective.[4] Such claim filing and processing is necessary because neither Plaintiffs nor Wells Fargo are in possession of individual investors' trading data that would allow the Parties to create a "claims-free" process to distribute Settlement funds without receiving claims from the Class.

The second item is "the terms of any proposed award of attorney's fees," which are discussed in the accompanying Fee Memorandum. Lastly, the new rule would require the Court to consider the fairness of the proposed settlement in light of any side agreements made in connection with it (*i.e.*, "any agreement required to be identified under Rule 23(e)(3)"). Here, the only such agreement is the Parties' confidential Supplemental Agreement, which was previously submitted to the Court for its review in connection with a motion to seal that document. ECF No. 226-3. The Supplemental Agreement sets forth the conditions under which Wells Fargo would be able to terminate the Settlement if the number of Settlement Class Members who request exclusion from the Settlement Class reaches a certain threshold. That type of agreement is a standard provision in securities class action and has no negative impact on the fairness of

[4] Lead Counsel provides data concerning three examples of prior distributions successfully conducted in this manner by BLB&B and Epiq. ¶194.

the Settlement.

4. The Settlement Treats Class Members Equitably Relative to Each Other

The proposed Settlement treats members of the Settlement Class equitably relative to one another. As discussed below in Part II, pursuant to the Plan of Allocation, eligible claimants approved for payment by the Court will received their *pro rata* share of the recovery. Lead Plaintiff and the other named Plaintiffs will receive precisely the same level of *pro rata* recovery (based on the Recognized Claim as calculated under the Plan of Allocation) as all other class members and have not requested any additional awards under the PSLRA as reimbursement for the time they spent working on the Action. As discussed below in Part II, the Plan of Allocation provides a method of allocating the Net Settlement Fund among Settlement Class Members tied to Plaintiffs' same damages methodology that would be offered at trial which Lead Plaintiff and Lead Counsel believe is fair and equitable.

II. THE PLAN OF ALLOCATION IS FAIR AND REASONABLE

In addition to seeking final approval of the Settlement, Lead Plaintiff seeks approval of the proposed plan for allocating the proceeds of the Settlement (the "Plan of Allocation").

The standard for approval of a plan of allocation in a class action under Rule 23 is the same as the standard applicable to the settlement as a whole—the plan must be "fair, reasonable, and adequate." *Class Plaintiffs*, 955 F.2d at 1284-85; *see also Omnivision*, 559 F. Supp. 2d at 1045. An allocation formula need only have a reasonable basis, particularly if recommended by experienced class counsel. *See Heritage Bond*, 2005 WL 1594403, at *11. Moreover, "[a] plan of allocation that reimburses class members based on the extent of their injuries is generally reasonable." *In re Oracle Sec. Litig.*, 1994 WL 502054, at *1 (N.D. Cal. June 18, 1994); *Omnivision*, 559 F. Supp. 2d at 1045 ("It is reasonable to allocate the settlement funds to class members based on the extent of their injuries or the strength of their claims on the merits.").

The Plan of Allocation is set forth at pages 10 to 12 of the Notice mailed to Settlement Class Members. *See* Villanova Decl. Ex. A. Lead Counsel developed the Plan of Allocation with the assistance of Lead Plaintiff's experienced damages expert, Chad Coffman of Global Economics Group. ¶186; *see also* Coffman Decl. ¶37. The Plan provides for the distribution of the Net Settlement Fund to Settlement Class Members who submit Claim Forms that are approved for payment by the Court on a *pro rata* basis

based on their extent of their injuries attributable to the alleged fraud. ¶191.

In developing the Plan of Allocation, Lead Plaintiff's expert calculated the estimated amount of artificial inflation in the per-share closing prices of Wells Fargo's common stock that was allegedly proximately caused by Defendants' alleged false and misleading statements and omissions. ¶188. To calculate the estimated artificial inflation, Lead Plaintiff's expert considered the price changes in Wells Fargo common stock in reaction to the public disclosures that allegedly corrected the alleged misrepresentations and omissions, adjusting for price changes attributable to market or industry factors. *Id.*; Notice ¶55. The same methodology would have been proffered by Plaintiffs at trial had the Action not settled. ¶193.

The Plan of Allocation calculates a "Recognized Loss Amount" for each purchase of Wells Fargo common stock during the Class Period that is listed in the Claim Form and for which adequate supporting documentation is provided. ¶189. Just as it would at trial, the calculation of Recognized Loss Amounts depends upon several factors, including when the stock was purchased and sold and the purchase and sales price. *Id.* In general, Recognized Loss Amounts will be the lesser of: (i) the difference between the estimated artificial inflation on the date of purchase and the date of sale, and (ii) the difference between the actual purchase price and sales price. *Id.*; Notice ¶59.[5] Claimants who purchased shares during the Class Period but did not hold those shares through at least one of the alleged corrective disclosures will have no Recognized Loss Amount as to those transactions because any loss they suffered would not have been caused by the disclosure of the alleged fraud. ¶190; Notice ¶57. The sum of a claimant's Recognized Loss Amounts for all his, her or its Class Period purchases is the Claimant's "Recognized Claim," and the Net Settlement Fund will be allocated to eligible claimants on a *pro rata* basis based on the relative size of their Recognized Claims. ¶191; Notice ¶67.[6]

[5] For shares sold during the 90-day period following the end of the Class Period or held to the end of that period, the Plan also limits Recognized Loss Amounts based on the average closing price of the stock during that period, consistent with the PSLRA. Notice ¶¶59(c), (d).

[6] The Plan of Allocation also identifies a proposed *cy pres* recipient of any residual funds that may remain after one or more distributions of the Net Settlement Fund: the Investor Protection Trust, a 501(c)(3) nonprofit organization devoted to investor education. Notice ¶70. However, under the Plan, 100% of the Net Settlement Fund will be distributed to eligible claimants and, if any funds remain after the initial distribution (for example, as a result of uncashed or returned checks), subsequent distributions to eligible claimants will be conducted until the residual amount left is so small that a further re-distribution would not be cost effective. Only then would a donation to the *cy pres* recipient be made.

Lead Plaintiff and Lead Counsel believe that the proposed Plan of Allocation will result in a fair and equitable distribution of the Settlement proceeds among Settlement Class Members who suffered losses as a result of the conduct alleged in the Action similar to any result if Plaintiffs were successful at trial. ¶193. Moreover, as of November 9, 2018, more than 1.86 million copies of the Notice, which contains the Plan of Allocation, and advises Settlement Class Members of their right to object to the Plan if they wish to do so, have been mailed to potential Settlement Class Members, *see* Villanova Decl. ¶8, and, to date, no objections to the Plan of Allocation have been received. *See* ¶197. For all of these reasons, Lead Plaintiff respectfully requests that the Court approve the proposed Plan of Allocation, with one minor amendment which would not affect any member of the Class other than any Wells Fargo ERISA plan that participates in the Settlement.

Specifically, after consulting with fiduciary counsel for Wells Fargo ERISA Plans, Lead Plaintiff moves to strike only the last sentence of ¶49 in the Notice in its entirety. That sentence would have placed restrictions on how a Wells Fargo ERISA Plan that participates as a claimant in the Settlement could distribute the funds received to its own beneficiaries. After speaking with the independent fiduciary for Wells Fargo's 401(k) Plan, Lead Counsel believes that under applicable law (*see*, *e.g.*, 29 U.S.C. §1056(d)(1)), the Plan itself should make its own determinations about distribution of such funds to its beneficiaries without any pre-restrictions.

III. THE SETTLEMENT CLASS SHOULD BE CERTIFIED

The Court's Preliminary Approval Order conditionally certified the Settlement Class under Rules 23(a) and (b)(3) for purposes of the Settlement. ECF No. 234 at 3-7. For all the reasons stated in the Preliminary Approval Order and Lead Plaintiff's' Notice of Unopposed Motion for Preliminary Approval of the Settlement and Memorandum of Points and Authorities in Support Thereof (ECF No. 225 at 14-18), Lead Plaintiff respectfully requests that the Court grant final certification to the Settlement Class under Rules 23(a) and (b)(3). *See* Preliminary Approval Order (ECF No. 234) at 3-7 (analyzing how the Action satisfies each element for class certification).

IV. NOTICE TO THE SETTLEMENT CLASS SATISFIED THE REQUIREMENTS OF RULE 23 AND DUE PROCESS

The Notice provided to the Settlement Class satisfied all the requirements of due process, Rule 23,

and the PSLRA. For any class certified under Rule 23(b)(3), due process and Rule 23 require that class members be given "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974). In addition, the Court must direct notice of a settlement in a "reasonable manner to all class members who would be bound by the proposal." Fed. R. Civ. P. 23 (e)(1). Notice of a class action settlement "is satisfactory if it generally describes the terms of the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come forward and be heard." *See Churchill*, 361 F.3d at 575; *Luna v. Marvell Tech. Grp.*, 2018 WL 1900150, at *2 (N.D. Cal. Apr. 20, 2018) (same); *Spann v. J.C. Penney Corp.*, 314 F.R.D. 312, 330 (C.D. Cal. 2016) ("Settlement notices must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings.").

Both the substance of the Notice and the method of its dissemination to potential members of the Settlement Class satisfied these standards here. The Notice provides the necessary information for Settlement Class Members to make an informed decision regarding the Settlement and contains all of the information required by Rule 23(c)(2)(B), the PSLRA (15 U.S.C. § 78u-4(a)(7)), and the N.D. Cal. Procedural Guidelines for Class Action Settlements. The Notice informed Settlement Class Members of, among other things: (1) an explanation of the nature of the Action and the claims asserted; (2) the definition of the Settlement Class; (3) the amount of the Settlement; (4) the reasons why the Parties are proposing the Settlement; (5) the estimated average recovery per affected share of Wells Fargo common stock; (6) the maximum amount of attorneys' fees and expenses that will be sought; (7) the identity and contact information for the representatives of Lead Counsel who are reasonably available to answer questions from Settlement Class Members; (8) Settlement Class Members' right to opt-out of the Settlement Class or to object to the Settlement, the Plan of Allocation or the requested attorneys' fees or expenses; (9) the binding effect of a judgment on Settlement Class Members; and (10) the dates and deadlines for certain Settlement-related events. The Notice also contains the Plan of Allocation and provides Settlement Class Members with information on how to submit a Claim Form in order to be eligible to receive a distribution from the Net Settlement Fund.

As noted above, in accordance with the Court's Preliminary Approval Order, Epiq, the Court-

approved Claims Administrator, began mailing copies of the Notice Packet to potential Settlement Class Members and nominees on September 25, 2018. *See* Villanova Decl. ¶¶3, 5. As of November 9, 2018, Epiq had mailed 1,866,302 copies of the Notice Packet by first-class mail to potential Settlement Class Members and nominees. *See id*. ¶8. In addition, Epiq arranged for the Summary Notice to be published in *The Wall Street Journal* and *Los Angeles Times* and transmitted over the *PR Newswire* on October 9, 2018. *See id*. ¶9. Epiq established a dedicated settlement website, www.WellsFargoSecuritiesLitigation.com, to provide potential Settlement Class Members with information concerning the Settlement and access to downloadable copies of the Notice and Claim Form, as well as copies of the Stipulation and Preliminary Approval Order. *Id*. ¶13. Copies of the Notice and Claim Form are also available on Lead Counsel's website, www.blbglaw.com. ¶183.

This combination of individual first-class mail to all Settlement Class Members who could be identified with reasonable effort, supplemented by notice in appropriate, widely-circulated publications, transmission over a newswire, and publication on internet websites, was "the best notice . . . practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B); *see, e.g*., *Hayes v. MagnaChip Semiconductor Corp.*, 2016 WL 6902856, at *4-5 (N.D. Cal. Nov. 21, 2016) (approving similar notice program); *Zynga*, 2016 WL 537946, at *7 (finding individual notice mailed to class members combined with summary publication constituted "the best form of notice available under the circumstances"); *Portal Software*, 2007 WL 4171201, at *1.

In sum, the Notice fairly apprises Settlement Class Members of their rights with respect to the Settlement, is the best notice practicable under the circumstances, and complies with the Court's Preliminary Approval Order, the Federal Rules of Civil Procedure, the PSLRA and due process.

CONCLUSION

For the reasons stated herein and in the Graziano Declaration, Lead Plaintiff respectfully requests that the Court grant final approval of the proposed Settlement and approve the Plan of Allocation.

Dated: November 13, 2018

Respectfully Submitted,

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

/s/ Salvatore Graziano
Salvatore Graziano (*pro hac vice*)
Salvatore@blbglaw.com
Adam Wierzbowski (*pro hac vice*)
Adam@blbglaw.com
Rebecca E. Boon (*pro hac vice*)
Rebecca.Boon@blbglaw.com
1251 Avenue of the Americas, 44th Floor
New York, NY 10020
Telephone: (212) 554-1400
Facsimile: (212) 554-1444

Lead Counsel for Lead Plaintiff and the Class

KLAUSNER KAUFMAN JENSEN & LEVINSON
Robert D. Klausner
bob@robertdklausner.com
Stuart A. Kaufman
stu@robertdklausner.com
780 NW 4th Street
Plantation, FL 33317
Telephone: (954) 916-1202
Facsimile: (954) 916-1232

Counsel for Plaintiff City of Hialeah Employees' Retirement System

ROBBINS GELLER RUDMAN & DOWD LLP
Shawn A. Williams
Aelish M. Baig
Jason C. Davis
Post Montgomery Center
One Montgomery Street, Suite 1800
San Francisco, CA 94104
Telephone: (415) 288-4545
Facsimile: (415) 288-4534

Liaison Counsel for Plaintiffs