SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEPARTMENT 613

IN RE WELLS FARGO & COMPANY AUTO INSURANCE DERIVATIVE LITIGATION	Lead Case No. CGC-17-561118 Consolidated With CGC-17-561968 TENTATIVE RULING RE PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF PROPOSED DERIVATIVE SETTLEMENT

TENTATIVE RULING

Plaintiffs noticed motions for preliminary approval of two consolidated derivative actions involving nominal defendant Wells Fargo & Company for contemporaneous hearings. Both motions will be denied without prejudice.[1] Plaintiffs have not submitted an adequate record for the court to determine that preliminary approval is appropriate. The court's concerns are summarized in more detail below.[2] Denial of the motions is without prejudice to the filing of a renewed motion for preliminary approval.

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[1] This is a tentative ruling. The hearing will be held as scheduled and the parties may argue for a different result.

[2] This summary is prepared in an effort to aid the parties in their preparation of a renewed motion. However, the court may not have been able to identify every concern that will be presented by subsequent motion practice.

I. Fairness

A. Legal Standard

"A court reviewing a settlement agreement considers whether the proposed settlement is fair and reasonable in light of all relevant factors. (*In re Caremark Intern. Inc. Deriv. Lit.* (Del.Ch.1996) 698 A.2d 959, 966 (*Caremark*); *Polk v. Good* (Del.1986) 507 A.2d 531, 536.) A court reviews the settlement of a derivative suit as a means of protecting the interests of those who are not directly represented in the settlement negotiations. In class actions, for example, '[a]lthough the court gives regard to what is otherwise a private consensual agreement between the parties, the court must also evaluate the proposed settlement agreement with the purpose of protecting the rights of the absent class members who will be bound by the settlement. [Citation.] The court must therefore scrutinize the proposed settlement agreement 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.' [Citations.]' (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 245, 110 Cal.Rptr.2d 145.)" (*Robbins v. Alibrandi* (2005) 127 Cal.App.4th 438, 449 [footnote omitted].)

"The duty of a court reviewing a settlement of a class action provides a useful analogy because the court in such cases seeks to protect the members of the class who, like the corporation and non-named shareholders in a derivative suit, may have no independent representation and little control over the action." (*Id*. at 449 n.2.) In the class settlement context, the trial court is obligated to "independently satisfy itself that the consideration being received for the release of the class members' claims is reasonable in light of the strengths and weaknesses of the claims and the risks of the particular litigation. The court undoubtedly should give considerable weight to the competency and integrity of counsel and the involvement of a neutral mediator in assuring itself that a settlement agreement represents an arm's length transaction entered without self-dealing or other potential misconduct. While an agreement reached under these circumstances presumably will be fair to all concerned, particularly when few of the affected class members express objections, in the final analysis it is the court that bears the responsibility to ensure that the recovery represents a reasonable compromise, given the magnitude and apparent merit of the

claims being released, discounted by the risks and expenses of attempting to establish and collect on those claims by pursuing the litigation." (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal.App.4th 116, 129.)

In *Kullar*, the Court of Appeal reversed the trial court's approval of a class action settlement, ruling that the trial court was required to "receive and consider enough information about the nature and magnitude of the claims being settled, as well as the impediments to recovery, to make an independent assessment of the reasonableness of the terms to which the parties have agreed." (*Id*. at 133.) "While the court is not to try the case, it is called upon to consider and weigh the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable." (*Ibid*. [quotations, emphasis, and citation omitted].) "This the court cannot do if it is not provided with basic information about the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of those claims represents a reasonable compromise." (*Ibid*.)

B. Application

Plaintiffs have not provided "basic information about the nature and magnitude of the claims in question and the basis for concluding that the consideration being paid for the release of those claims represents a reasonable compromise." (*Kullar*, 168 Cal.App.4th at 133; see also *Robbins*, 127 Cal.App.4th at 449, 449 n.2.) Accordingly, the court cannot find, on an independent evaluation of the record, that the "proposed settlement is within a range of what might be found fair, reasonable, and adequate." (See Cross-Selling Motion, 13 [arguing that the foregoing is the legal standard that should apply at preliminary approval]; CPI Motion, 5 [same].)

Plaintiffs argue that the court should grant preliminary approval based on the representations of counsel and the neutral mediator. ((See Cross-Selling Motion, 14-18; CPI Motion, 8-11.) But the court will not be able to approve the settlement without conducting an independent evaluation under *Kullar*. Without any record to evaluate the value of the claims and with only conclusory assertions about the utility of the settlements – which in both cases includes non-monetary relief and in one of the cases is based entirely on non-monetary relief – the court cannot find that preliminary approval is appropriate. To the extent Plaintiffs contend that the court should delay any substantive evaluation of the value of the

settlement until final approval, such an approach creates an unnecessary risk that the costs of disseminating notice will be wasted should the Plaintiffs fail to provide adequate documentation at final approval.

In any renewed motion, Plaintiffs should provide a detailed explanation of the value of the claims that are being released against each of the defendants. Plaintiffs should provide a detailed explanation of the value of the relief obtained. Plaintiffs should provide a detailed explanation of their decision to discount the claims for settlement purposes, including a discussion of the relevant factual issues and legal arguments made by both sides. The foregoing explanations should be supported by a declaration summarizing any pertinent evidence. In addition, the assertions that these actions provided an impetus for actions taken by Wells Fargo before the settlements were entered, such that those actions should be considered as part of the settlement value, should be supported by declarations.[3]

II. Notice

A. Process

Both settlements provide for the same notice process. Plaintiffs have not provided sufficient information about the anticipated efficacy of the proposed notice process for the court to approve the procedure. Moreover, the court has specific concerns about certain aspects of the notice process.

At the outset, in one of the briefs plaintiffs question whether notice is required under California law. (Compare CPI Motion, 6:10-12; with Cross-Selling Motion, 13.) As in the class action context, notice of a derivative settlement serves as a due process safeguard. (See *Litwin v. iRenew Bio Energy Solutions, LLC* (2014) 226 Cal.App.4th 877, 883 [class action]; *Maher v. Zapata Corp.* (5th Cir. 1983) 714 F.2d 436, 450-51 [shareholder derivative action]; see also *Papilsky v. Berndt* (2d Cir. 1972) 466 F.2d 251, 258.) The court is not persuaded by the suggestion that notice may be dispensed with.

[3] Plaintiffs should provide argument in anticipation of potential objections that the relief is illusory because (1) Wells Fargo provided some of the relief prior to settlement and would have done so without this litigation; and (2) the Proposed Settlement does not do enough to bind Wells Fargo to the governance reforms. Among other things, Plaintiffs should address (1) whether a requirement that the Board maintain the governance changes in "substantially the same or improved" form is enforceable, given potential ambiguity in the term "improved"; and (2) Whether a requirement to implement changes as "soon as practicable" is enforceable, given the ambiguity inherent in that requirement.

In the class action context, notice of a proposed settlement must be disseminated in a way that has "a reasonable chance of reaching a substantial percentage of the class members." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 251 [disapproved of on other grounds in *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260].) Plaintiffs have not articulated a reason to deviate from this standard in the context of a shareholder derivative action.

Plaintiffs have not shown that the proposed notice has a reasonable chance of reaching a substantial percentage of the current shareholders. Plaintiffs have not estimated the number of shareholders. Plaintiffs have not estimated the efficacy of their proposed mechanisms of publication notice – such as by, for example, explaining their decisions to publish notice in the San Francisco Chronicle and Los Angeles Times. Plaintiffs have not articulated why there are no practicable means of direct notice.[4]

In addition, the procedure proposed by Plaintiffs will present unreasonable obstacles to shareholders who may wish to respond. First, Plaintiffs seek a hearing date only 45 days from the dissemination of notice, with objections due nine court days before the hearing. This implies a notice period of about one month. This notice period is inadequate, especially in the context of notice by publication. Second, Plaintiffs require objectors to file their objections in this court. The parties should agree on a process through which objections will be mailed to a designated recipient, which, if it is not one of the parties, will provide the objections to the parties. Plaintiffs will be responsible for filing the timely objections. The parties should revise the proposed procedure to ensure that it does not deter shareholders from filing objections by making it impracticable to do so.

B. Substance

In the class context, the notice must fairly apprise the class members of the terms of the proposed compromise and the options open to dissenting class members. (See *Litwin*, 226 Cal.App.4th at 883 [class action settlement context].) The court is guided by those general requirements in reviewing the substance of the notices provided by the parties here. The notices are lacking. Here, the court provides

[4] Plaintiffs may be of the opinion that the impracticability is so obvious that it does not require a record. The court will require a record. However, the record may be established by means of a declaration.

general guidance for a revision of the notices. The court intends to closely review the revised settlement notices before they are disseminated to the shareholders.

1. General Guidance

The notices should be drafted in plain language. The notices should be organized in a way that makes them easy to follow and understand. The notices should balance concision with the elucidation of the material details. The notices should be presented to the court in the format that they will be presented to the shareholders – including, for example, in the format in which they will be published in the newspapers. The notices need not appear on pleading paper.

2. Long Form Notice

There are differences in the content of the long form notices prepared for the two settlements. However, their structure is sufficiently similar that the long form notices may be discussed together. The language here specifically refers to the long form notice submitted in connection with the proposed settlement in the Cross-Selling action.

First, the notices should be revised to clearly convey and emphasize the central information – the claims in the case, the consideration secured through the settlement, the scope of the release, and the options available to respond to the notice. To that end, a few facts bear mention. The notice runs for fifteen pages.[5] The first header, which is "II," appears on the seventh page. While neither fact is inherently problematic, these facts are illustrative of the density of the discussion in the notice and the extent to which certain information is emphasized. For example, the second page of the notice contains a half-page passage stating, in conclusory fashion, that defendants dispute Plaintiffs' allegations and contend that they acted in good faith. The same passage is repeated, verbatim except that an additional sentence is included at the end of the passage, under a separate header on the eighth page of the notice. This information can be conveyed more clearly and at less length to make the notice easier to understand. At the same time, the notice conveys almost no information about the consideration secured through the settlement. Moreover, there is no reference to objecting to the proposed settlement until the fourteenth

[5] The first page of the notice is page 2, as there is a numbered caption page.

page of the notice – the right to object and the deadline to do so should be emphasized in the introductory portion of the notice.[6]

Second, the discussion regarding objections should be revised. As noted above, the court does not approve of the process whereby objections will be filed.[7] Moreover, the notice indicates that the parties will not use postmark dates to evaluate compliance with deadlines. The parties should set their response deadlines using postmark dates. The date on which a letter must be "mailed to ensure receipt" on a subsequent date is too ambiguous. In addition, the notice implies that objecting alone may be sufficient to preserve the right to appeal. The notice should advise the recipient that objecting may be insufficient to preserve that right under *Hernandez*, cited above.

Third, the notice should provide directions to access the court's online docket. (See https://sfsuperiorcourt.org/online-services.)

3. Summary Notice

As with the long form notice, there are differences in the content of the summary notices prepared for the two settlements. However, their structure is sufficiently similar that the summary notices may be discussed together. The summary notice should be revised consistent with the instructions above regarding general issues and particular issues applicable to the long form notice. Most notably, the language should be revised for concision and simplicity.[8]

III. Miscellaneous Provisions

First, one of the triggering events for the effective date of the settlement is an entry of a final judgment that dismisses the claims in these actions with prejudice. In the class action context, California courts are not permitted to enter such orders. (Cal. Rules of Court, Rule 3.769(h).) Moreover, it is not apparent that the entry of such a judgment is practically necessary. To the extent the parties believe such

[6] The examples here are not an inclusive list of all areas that should be revised. The parties should review the entire notice with an eye towards using clear and simple language while emphasizing the important information, de-emphasizing less important information, and using formatting, such as more extensive use of headers, to highlight certain discussions within the notice.

[7] In subsequent papers, the parties should explain the need for all pieces of information that the parties intend to require objectors to submit with their objections.

[8] Among other things, language such as "you are hereby notified" and "this notice also informs you of" should be abandoned.

a judgment is necessary, the parties are asked to explain the need for such a judgment and to identify authority confirming that such a judgment is appropriate.

Second, the Proposed Cross-Selling Settlement has a section identifying the consideration that is provided in exchange for the release, whereas the Proposed CPI Settlement does not. While this discrepancy is flagged here, this may not have practical significance.

Third, the proposed settlements reference a settlement in a parallel federal action. The parties should explain the extent to which that settlement impacted this settlement. To the extent relevant, the parties should describe the relief obtained through the federal settlement.