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14 *Attorneys for Nominal Defendant Wells Fargo & Co.*

15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

16 **COUNTY OF SAN FRANCISCO**

17 COORDINATION PROCEEDING  
18 SPECIAL TITLE [RULE 3.550]

19 WELLS FARGO DERIVATIVE CASES

20 Included Actions:  
21 Superior Court of California  
22 County of San Francisco  
23 *In re Wells Fargo & Company Derivative  
Litigation*  
No. CGC-16-554407

24 San Mateo County Superior Court  
25 *Herron v. Stumpf, et al.*  
26 No. 18-CIV-00466

JUDICIAL COUNCIL COORDINATION  
PROCEEDING NO. 4966

CJC-18-004966

**MEMORANDUM REGARDING THE  
INAPPLICABILITY OF CALIFORNIA RULE  
OF COURT 3.769(h) TO THE PROPOSED  
DERIVATIVE SETTLEMENTS**

1 Pursuant to the Court’s instructions during the July 3, 2019 hearing on Plaintiffs’ Renewed  
2 Motions for Preliminary Approval of Settlement, nominal defendant Wells Fargo & Company  
3 (“Wells Fargo” or “the Company”) and the individual Defendants hereby submit this  
4 Memorandum Regarding the Inapplicability of California Rule of Court 3.769(h) to the Proposed  
5 Derivative Settlements.<sup>1</sup>

6 **ARGUMENT**

7 In the Court’s Tentative Rulings re Plaintiffs’ Renewed Motions for Preliminary Approval  
8 of the proposed sales practices derivative settlement and the proposed CPI derivative settlement  
9 (“Tentative Rulings”), the Court asked whether the language in each Stipulation and Agreement of  
10 Compromise, Settlement and Release (“Settlements”) requiring dismissal of the instant actions  
11 (the “Actions”) with prejudice is inconsistent with Rule 3.769(h) of the California Rules of Court  
12 (“Rule 3.769(h)” or “the Rule”). (*See* Tentative Rulings, at 6.) It is not. Rule 3.769(h) prohibits  
13 California courts from dismissing class action lawsuits following approval of a settlement  
14 agreement, but by its terms Rule 3.769 applies only to “class actions” (*see* Rule 3.769 Settlement  
15 of class actions), not derivative actions such as the Actions.

16 Neither Rule 3.769 itself, nor the history of the amendment of subsection (h) of the Rule,  
17 so much as mentions derivative actions as falling within its ambit. According to the Civil and  
18 Small Claims Advisory Committee of the Judicial Council, subparagraph (h)’s prohibition against  
19 dismissal was added to protect the ability of “absent class members who did not participate in  
20 settlement negotiations” to enforce their individual rights under a settlement in a class action. *See*  
21 Exhibit A, Civil and Small Claims Advisory Committee, Report, Class Actions: Entry of  
22 Judgment Following Final Approval of Settlement (amend Cal. Rules of Court, rules 3.769 and  
23 3.770), <https://www.courts.ca.gov/documents/102408itema25.pdf> (last visited July 10, 2019)  
24 (“purpose of requiring court approval of a class settlement and court approval of the dismissal of a  
25 class action is to protect the interests of the class and its members”; “[r]ules prohibiting the

26 \_\_\_\_\_  
27 <sup>1</sup> An identical brief (apart from adjusted signature blocks, caption page, and other case-  
28 identifying information) is being filed concurrently in the CPI derivative action, *In re Wells Fargo  
& Company Auto Insurance Derivative Litigation*, Case No. CGC-17-561118.

1 concurrent entry of judgment following settlement with retention of jurisdiction and entry of  
2 dismissal will advance this purpose”). Here — unlike in a typical class action case, where absent  
3 class members are entitled to individual benefits under a class settlement — there are no absent  
4 class members who have individual rights that need to be protected. The benefits of the  
5 Settlements in these derivative Actions belong and go to Wells Fargo directly, not to its  
6 shareholders individually. *See, e.g., Lewis v. Chiles*, 719 F.2d 1044, 1048 (9th Cir. 1983) (“The  
7 difference [between derivative suits and class actions] lies in the nature of the right sought to be  
8 enforced. A class action is not brought on behalf of the corporation but rather to assert primary  
9 individual rights of each member of the [] class.”); *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304,  
10 1307 n.4 (3d Cir. 1993) (“In derivative suits, unlike [] class actions, recoveries belong to the  
11 corporation on whose behalf the suit was brought . . . . [S]hareholders normally cannot opt out of  
12 the class and pursue their own individual action.”) (internal quotation marks and citation omitted).  
13 As such, there is no risk here that any absent shareholder will forgo any of its rights if the Actions  
14 are dismissed. Notably, all of the parties who are affected by the Settlements — the named  
15 Plaintiffs, Wells Fargo and the individual Defendants — are signatories to the Settlements, are  
16 represented by counsel in the Actions, and have been active participants in the Actions and the  
17 Settlements. Moreover, the proposed Final Judgments and Orders of Dismissal in the sales  
18 practices and CPI Actions provide that this Court will “retain[] jurisdiction over all matters  
19 relating to the administration and consummation of the Settlement and all Parties hereto . . . .” (*see*  
20 ¶ 20 and ¶ 19, respectively), so there is no danger that any issue that may arise with regard to the  
21 Settlements cannot be addressed by the Court, if necessary.<sup>2</sup>

22 \_\_\_\_\_  
23 <sup>2</sup> The Court has authority under Code of Civil Procedure section 664.6 (“Section 664.6”) to  
24 dismiss the Actions following final approval of the Settlements while retaining jurisdiction to  
25 enforce their terms, as requested by the Parties. Section 664.6 provides that a court “may retain  
26 jurisdiction over the parties to enforce [a] settlement until performance in full of the terms of the  
27 settlement” if the parties stipulate to the settlement in writing or orally before the court and ask that  
28 the court retain jurisdiction to enforce its terms. This language has been interpreted to allow courts  
to dismiss an action while retaining jurisdiction to enforce the terms of a settlement when the  
parties request it. *See Wackeen v. Malis*, 97 Cal. App. 4th 429, 439 (2002) (“Settlement  
agreements often, if not generally, require dismissals to be filed so that the litigation comes to an  
end. We construe the second sentence of section 664.6 to mean, and we so hold, that even though

1 In short, therefore, neither the express language of Rule 3.769 nor the rationale for its  
2 prohibition on dismissals in subsection (h), supports the application of the Rule to these Actions.

3 California’s general policy of encouraging settlement also counsels against applying Rule  
4 3.769(h) to the Actions. *See, e.g., O’Hearn v. Hillcrest Gym & Fitness Ctr.*, 115 Cal. App. 4th  
5 491, 499 (2004) (noting the “strong policy of encouraging settlements”). The individual  
6 Defendants bargained for and obtained the provision for an order of dismissal as part of the  
7 consideration for an agreed-upon resolution of these matters, and that order provides an additional  
8 measure of finality to them in not having open, yet resolved lawsuits naming them as defendants  
9 on the books indefinitely. Were the Court to apply Rule 3.769(h), the Parties would need to  
10 renegotiate the Settlement Stipulations to remove the provisions requiring dismissal of the  
11 Actions, and upend the Settlements’ terms for which Wells Fargo and the Defendants bargained.  
12 Because the Court is not required to (and should not) apply Rule 3.769(h) in the derivative action  
13 context (as discussed above), California’s “strong public policy in favor of settlement” supports  
14 preliminary approval of the Settlements — subject to the Court’s role in providing review and  
15 oversight — on the terms that the Parties negotiated. *Am. Motorcycle Ass’n v. Super. Ct.*, 20 Cal.  
16 3d 578, 603 (1978).

17 Plaintiffs concur that Rule 3.769(h) does not apply to the Actions.

### 18 CONCLUSION

19 For the foregoing reasons, Rule 3.769(h)’s prohibition against dismissal does not apply,  
20

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21 a settlement may call for a case to be dismissed, or the plaintiff may dismiss the suit of its own  
22 accord, the court may, nevertheless, retain jurisdiction to enforce the terms of the settlement.”);  
23 *Satya v. Chu*, 17 Cal. App. 5th 960, 966 (2017) (same); *DeSaulles v. Cmty. Hosp. of Monterey*  
24 *Peninsula*, 62 Cal. 4th 1140, 1155 (2016) (“[W]hen a settlement pursuant to a stipulated judgment  
25 disposes of the entire case, a dismissal of the action generally follows as a matter of law . . . . The  
26 entry of a judgment pursuant to section 664.6 enables parties to enforce a settlement agreement  
27 without having to file a separate lawsuit. This is true whether the judgment calls for a dismissal or  
28 not.”) (citations omitted); 6 Witkin, Cal. Proc. 5th PWT § 125 (2008), (h) [§ 125] Retention of  
Jurisdiction (noting that the 1993 amendment to Section 664.6 allowed courts to “retain  
jurisdiction for purposes of enforcing [a] settlement” after the original action was dismissed, where  
the parties had requested such retention of jurisdiction; collecting cases). Thus, as with other non-  
class action cases, the Court may dismiss the claims in the Actions once final approval of the  
Settlements is granted pursuant to Section 664.6.

1 and should not be applied, to the Actions.

2 DATED: July 10, 2019

Respectfully submitted,

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# EXHIBIT A



**JUDICIAL COUNCIL OF CALIFORNIA  
ADMINISTRATIVE OFFICE OF THE COURTS**

455 Golden Gate Avenue  
San Francisco, California 94102-3688

**Report**

TO: Members of the Judicial Council

FROM: Civil and Small Claims Advisory Committee  
Hon. Lee Smalley Edmon, Chair  
Susan R. McMullan, Senior Attorney, 415-865-7990,  
susan.mcmullan@jud.ca.gov

DATE: August 12, 2008

SUBJECT: Class Actions: Entry of Judgment Following Final Approval of Settlement  
(amend Cal. Rules of Court, rules 3.769 and 3.770) (Action Required)

Issue Statement

Rule 3.769 of the California Rules of Court addresses court approval of class action settlements. Under subdivision (h) of that rule, if a court approves settlement and enters judgment, it is required to retain jurisdiction to enforce the terms of the judgment. Following final court approval of a class settlement and entry of judgment, in some cases parties have asked the court to enter dismissal as well. There is no authority, however, for both entry of judgment following settlement and entry of dismissal. In the circumstances of a class settlement, the entry of dismissal, governed by rule 3.770, may be inconsistent with a judgment.

Recommendation

The Civil and Small Claims Advisory Committee recommends that the Judicial Council, effective January 1, 2009, amend rules 3.769 and 3.770 of the California Rules of Court to provide that on the approval of a class settlement and entry of judgment, a court may not also enter dismissal of the action.

The text of amended rules 3.769 and 3.770 is attached at page 4.

Rationale for Recommendation

Rule 3.769 governs settlement of class actions. It requires a hearing and court approval of any settlement. (Cal Rules of Court, rule 3.769(a).) Subdivision (h) provides as follows:

If the court approves the settlement agreement after the final approval hearing, the court must make and enter judgment. The judgment must

include a provision for the retention of the court's jurisdiction over the parties to enforce the terms of the judgment.

Thus, the final settlement of a case with class action allegations includes court approval of the class settlement, entry of judgment, and retention of jurisdiction to enforce it. In some cases, in addition to entry of judgment, the defendant, or both sides, requests the court to enter dismissal. This is reportedly commonly done and some judges have expressed concern that settlement of the case and dismissal of the class claims are inconsistent.

The rules on settlement and dismissal of class actions do not address the situation of concurrent entry of judgment and dismissal.<sup>1</sup> Staff has found no case law either approving or disapproving the entry of judgment after approval of a class settlement with the retention of jurisdiction to enforce the judgment and the concurrent dismissal of a class action. A set of uniform statewide rules for class actions, of which these rules are a part, was adopted by the council, effective January 1, 2002. Neither the advisory committee materials, nor the council report addressing the class action rules from that time, discuss any interplay between entry of judgment following settlement approval with retention of jurisdiction and entry of dismissal.

Retention of jurisdiction to enforce a settlement in a non-class action case is governed by Code of Civil Procedure section 664.6. It provides that a court may retain jurisdiction to enforce the terms of a settlement if the parties stipulate to the settlement, either in writing or orally before the court, and ask the court to retain jurisdiction to enforce its terms while the case is still pending. In addition, case law has clarified that the court may both retain jurisdiction to enforce the terms of the settlement and enter dismissal. (See *Wackeen v. Malis* (1992) 97 Cal.App.4th 429, 439 ["We construe the second sentence of section 664.6 to mean, and we so hold, that even though a settlement may call for a case to be dismissed, or the plaintiff may dismiss the suit of its own accord, the court may nevertheless retain jurisdiction to enforce the terms of the settlement, until such time as all of its terms have been performed by the parties, if the parties have requested this specific retention of jurisdiction"].)

The court's holding in *Wackeen, supra*, has not been applied to a class settlement in a published opinion. Unlike a nonrepresentative action, in a class action, because of the need to protect the absent class members who did not participate in settlement negotiations, the settlement terms are reflected in the judgment when the court approves the class settlement, and it is not necessary in a class settlement for the parties to ask the court to retain jurisdiction to enforce the court-approved settlement terms. (Cal Rules of Court, rule 3.769(h) ["The judgment must include a provision for the retention of the

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<sup>1</sup> Rule 3.679, which governs settlement, does not address dismissal. Rule 3.770 requires court approval of a dismissal and, if the class has been certified, notice to the class.

court's jurisdiction over the parties to enforce the terms of the judgment.”]) Moreover, a typical nonrepresentative action does not require court approval of a settlement because all the parties to the settlement are before the court and their settlement may be enforced as any other private contractual agreement may be enforced.

The purpose of requiring court approval of a class settlement and court approval of the dismissal of a class action is to protect the interests of the class and its members. (See *La Sala v. American Sav. & Loan Assn.* (1971) 5 Cal.3d 864, 871; *In re Microsoft I-V Cases* (2006) 135 Cal.App.4th 706, 723 (citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1800–1801).) Rules prohibiting the concurrent entry of judgment following settlement with retention of jurisdiction and entry of dismissal will advance this purpose.

#### Alternative Actions Considered

Rules 3.769 and 3.770 could remain unchanged. As acknowledged above, it is not known how often courts are asked to concurrently enter judgment following final approval of a class settlement and dismiss the action.

Alternatively, rule 3.769(h) could be amended to explicitly authorize the entry of dismissal in a case in which the court has entered judgment, with retention of jurisdiction to enforce the judgment, following settlement approval. The Civil and Small Claims Advisory Committee believes these actions are inconsistent and recommended circulation of this proposal to prohibit it. Because commentators agreed with the proposal, the committee does not recommend this alternative.

#### Comments From Interested Parties

This proposal was circulated during the spring 2008 comment cycle. Five organizations submitted comments. All agreed with the proposed amendments. The State Bar of California Committee on Administration of Justice (CAJ) commented that there is confusion in the legal community about whether a dismissal can be entered along with the entry of judgment on final approval of a class settlement, even though this may result in an inconsistency between the judgment and the dismissal. CAJ noted that the proposal clears up the confusion. One commentator, a superior court judicial attorney, also noted that a dismissal concurrent with or after the final approval of a settlement is inconsistent with judgment and retention of jurisdiction. A chart summarizing the comments and the committee's response to each is attached at pages 5–6.

#### Implementation Requirements and Costs

The proposal clarifies an area of class action procedure. There are no implementation requirements and it will result in no costs.

#### Attachments



Rules 3.769 and 3.770 of the California Rules of Court are amended, effective January 1, 2009, to read:

1 **Rule 3.769. Settlement of class actions**

2  
3 (a)–(g) \* \* \*

4  
5 (h) **Judgment and retention of jurisdiction to enforce**

6  
7 If the court approves the settlement agreement after the final approval  
8 hearing, the court must make and enter judgment. The judgment must  
9 include a provision for the retention of the court’s jurisdiction over the  
10 parties to enforce the terms of the judgment. The court may not enter an  
11 order dismissing the action at the same time as, or after, entry of  
12 judgment.

13  
14  
15 **Rule 3.770. Dismissal of class actions**

16  
17 (a) **Court approval of dismissal**

18  
19 A dismissal of an entire class action, or of any party or cause of action in a  
20 class action, requires court approval. The court may not grant a request to  
21 dismiss a class action if the court has entered judgment following final  
22 approval of a settlement. Requests for dismissal must be accompanied by a  
23 declaration setting forth the facts on which the party relies. The declaration  
24 must clearly state whether consideration, direct or indirect, is being given for  
25 the dismissal and must describe the consideration in detail.

26  
27 (b)–(c) \* \* \*



**SPR08-30****Class Actions: Entry of Judgment Following Final Approval of Settlement** (amend Cal. Rules of Court, rules 3.769 and 3.770)

All comments are verbatim unless indicated by an asterisk (\*).

	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
1.	Orange County Bar Association Cathrine Castaldi, President	A	No specific comments.	No response required.
2.	State Bar of California, Committee on Administration of Justice Saul Bercovitz Staff Attorney	A	There is some confusion in the legal community about whether a dismissal can be entered in conjunction with the entry of judgment upon final approval of a class action settlement. In certain situations, the parties to a class action settlement request that the court enter a dismissal at the time of the entry of judgment or subsequent to the entry of judgment, following the final approval of a class action settlement, even though there are times when this may result in an inconsistency between the judgment and the dismissal. This proposal clears up that confusion and makes it certain that when a judgment is entered after final approval of a class action settlement, a dismissal may not be entered concurrent with or after the entry of such a judgment.	The committee notes the commentator's agreement.
3.	Superior Court of Los Angeles County	A	No specific comments.	No response required.
4.	Superior Court of San Bernardino County Debra Meyers	A	Once the case settles and is given final approval, a judgment to that effect is currently mandated and the court must retain jurisdiction to enforce its terms. CRC 3.769(h). A dismissal concurrent therewith or thereafter is inconsistent with judgment and retained jurisdiction.	The committee notes the commentator's agreement.
5.	Superior Court of San Diego County Michael M. Roddy	A	No specific comments.	No response required.

**SPR08-30**

**Class Actions: Entry of Judgment Following Final Approval of Settlement** (amend Cal. Rules of Court, rules 3.769 and 3.770)

All comments are verbatim unless indicated by an asterisk (\*).

	<b>Commentator</b>	<b>Position</b>	<b>Comment</b>	<b>Committee Response</b>
	Executive Officer			