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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

COORDINATION PROCEEDING SPECIAL TITLE [RULE 3.550] WELLS FARGO DERIVATIVE CASES Included Actions: Superior Court of California County of San Francisco *In re Wells Fargo & Company Derivative Litigation* No. CGC-16-554407 San Mateo County Superior Court *Herron v. Stumpf, et al.* No. 18-CIV-00466	JUDICIAL COUNCIL COORDINATION PROCEEDING NO. 4966 CJC-18-004966 **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF <u>RENEWED</u> MOTION FOR PRELIMINARY APPROVAL OF PROPOSED DERIVATIVE SETTLEMENT** Date: June 26, 2019 Time: 10:00 a.m. Dept. 613 Hon. Teri L. Jackson

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I. INTRODUCTION

This Memorandum is submitted in support of the Renewed Motion (the "Motion") filed by Plaintiffs William C. Sarsfield, Franklin Chin, Amy Cook, Monique Frese, Dustin Roth Granger, Vladimir Gusinsky, as Trustee of the Vladimir Gusinsky Revocable Trust, Terence J. Keeley, as Trustee of the Barbara F. and Terence J. Keeley Revocable Living Trust, Dennis Palkon, Christian Aurelio Reyes III, William Russell and Juanita Russell, Trustees of the William and Juanita Russell Trust, and David L. Underwood ("Plaintiffs") seeking preliminary approval of the Stipulation and Agreement of Compromise, Settlement and Release (the "Stipulation" or "Settlement")[1] of the claims brought in the above-captioned shareholder derivative action (the "Action") on behalf of Wells Fargo & Company ("Wells Fargo" or the "Bank") against certain of its current and former officers and directors (the "Defendants").

As discussed below, the Settlement achieves valuable benefits for the Bank and Wells Fargo's current shareholders in the face of extreme litigation risks and is the outcome of extensive arm's-length negotiations between the Settling Parties. The Settlement is unquestionably fair, reasonable, and adequate, and warrants preliminary approval.

The Settlement consists of both material monetary and non-monetary components. Wells Fargo has received $60 million in forfeited unvested equity awards from John G. Stumpf, the Company's former Chairman and Chief Executive Officer, and Carrie L. Tolstedt, the Bank's former Senior Executive Vice President and head of Community Banking. Wells Fargo will also benefit from the implementation of a series of Corporate Governance Reforms aimed at addressing the alleged improper sales practice that gave rise to the Action. As detailed herein, these reforms include, *inter alia*, (i) the separation of the roles of Board Chair and CEO; (ii) the addition of several new directors to the Board; (iii) the appointment of new directors to serve on (and new leaders to chair) the Board's key committees, including the Risk Committee, Human Resources Committee ("HRC"), and the Governance and Nominating Committee; (iv) changes to the Risk Committee's makeup and oversight responsibilities (with a new subcommittee formed for

[1] The Stipulation is attached as Exhibit 1 to the Molumphy Declaration, filed herewith. Except as otherwise noted, all capitalized terms herein have the same meaning as defined in the Stipulation.

oversight of compliance); and (v) the implementation of new compensation and performance management programs in the Community Bank focused on the customer experience.

Further, at the Court's direction, Plaintiffs have now provided a detailed record in support of preliminary approval, including an explanation of the potential value of the derivative claims and the risks of recovery given the facts at issue, the applicable Delaware law, and most importantly, prior rulings by this Court. *See* Declaration of Mark C. Molumphy ("Molumphy Decl."), filed herewith.

Plaintiffs provide a record supporting the extraordinary value of the benefits realized by Wells Fargo from the Settlement, including the Clawback of $60 million in equity awards and implementation of Corporate Governance Reforms estimated to be worth at least $100 million to Wells Fargo, and likely far more. *See* Declaration of Professor Daniel J. Morrissey ("Morrissey Decl."), filed herewith.

Plaintiffs provide a record of the negotiation process, supervised by the Honorable Daniel Weinstein (Ret.), defeating any possible suggestion that the terms were somehow illusory or that the settlement negotiations were anything other than informed and arm's-length. *See* Declaration of the Honorable Daniel H. Weinstein (Ret.) ("Weinstein Decl."), filed herewith.[2]

Finally, in the event the Court grants preliminary approval, Plaintiffs have modified the substance of the notices to address the Court's stated concerns and now provide a record supporting publication notice – based on a combination of publication, SEC filings, a dedicated website, and follow-up direct mailing – the same program recently approved by District Court Judge Tigar in the Federal Sales Practices Derivative Action, as well as by essentially every other court that has considered this issue.

Accordingly, Plaintiffs respectfully request that the Court enter the [Proposed] Order Setting Settlement Hearing and Approving Notice of Proposed Derivative Settlement (the "Order"), and (1) preliminarily approve the proposed Settlement as within the range of reasonableness; (2) schedule a hearing at which the Court will consider final approval of the

[2] Pursuant to the Court's directions, the Parties have also revised the terms of the Settlement to remove as one of the triggering events for the Effective date an entry of a final judgment that dismisses the claims in this Action with prejudice.

Settlement (the "Settlement Hearing"); and (3) approve the form and manner distributing the Notice (the "Notice") and Summary Notice (the "Summary Notice") to Wells Fargo shareholders.

II. OVERVIEW OF THE DERIVATIVE LITIGATION

A. Inspection Demand for Books and Records

On September 13, 2016, Plaintiff William Sarsfield initiated these derivative proceedings by making a formal demand, pursuant to California's Corporations Code, to inspect the books and records of Wells Fargo. Molumphy Decl. at ¶ 5. Sarsfield's demand followed the Bank's September 8, 2016 disclosure of issues relating to its sales practices and fines by the Office of the Comptroller of the Currency ("OCC") and the Consumer Financial Protection Bureau ("CFPB") relating to these sales practices. *Id.* at ¶ 5. Plaintiff Sarsfield's inspection demand was extensive and covered Board minutes and other materials relating to Wells Fargo's sales practices, as well as training, monitoring and internal controls at the Bank dating back to 2011. *Id.*

B. Initial Complaints Seeking Relief Including Restitution of Compensation and Governance Reforms

Beginning on September 21, 2016, several shareholder derivative complaints were filed in San Francisco County Superior Court (the "Court") against the Director and Officer Defendants and Wells Fargo (as nominal defendant), alleging, among other things, unlawful conduct relating to fictitious customer accounts created at Wells Fargo, and that certain of the Director and Officer Defendants breached their fiduciary duties to Wells Fargo in connection with these actions or omissions, and engaged in insider trading and were unjustly enriched with respect to this alleged conduct. Molumphy Decl. at ¶ 6. Plaintiffs also alleged that the Bank's Board failed to act on alleged "red flag" warnings of illegal conduct and to exercise appropriate risk management and oversight of the Bank, allegedly resulting in Wells Fargo opening accounts without consumers' consent, funding the accounts through unauthorized transfers of funds, submitting credit card applications and issuing debit cards without consumers' consent, and enrolling consumers in online-banking services without their consent. *Id.*

Plaintiffs further alleged that the Director and Officer Defendants engaged in breaches of fiduciary duty, corporate waste, unjust enrichment, and insider trading allegedly resulting in significant damages to the Bank based on harm to goodwill, as well as fines and penalties paid to

federal regulators and class action plaintiffs. *Id.* at ¶ 7. Plaintiffs sought various forms of relief, including monetary damages, restitution, and disgorgement of compensation earned by the Director and Officer Defendants from the challenged practices, and corporate governance reforms at Wells Fargo. *Id.*

C. Consolidated Amended Complaint

The derivative actions were ultimately deemed to be complex under California Rules of Court and singly assigned to the Honorable Curtis E.A. Karnow in this Court. Molumphy Decl. at ¶ 8. The derivative actions were cooperatively organized by Plaintiffs' Counsel and, after negotiations between Plaintiffs' and Defendants' Counsel, the Court entered a stipulation and order consolidating the derivative actions under the above-titled caption, *In re Wells Fargo & Company Derivative Litigation*, Lead Case No. CGC-16-554407. *Id.* at ¶ 8.

On November 22, 2016, the Court appointed Cotchett, Pitre & McCarthy ("CPM") as lead counsel for the derivative plaintiffs in the Action. *Id.* at ¶ 9.

On January 12, 2017, Plaintiffs filed a Consolidated Complaint which alleged that Wells Fargo employees created millions of fake accounts in order to meet unrealistic sales goals, and harmed Wells Fargo's customers. *Id.* at ¶10. Plaintiffs also alleged that the Bank's Board failed to act on alleged warnings of illegal conduct and to exercise appropriate risk management and oversight of Wells Fargo, allegedly resulting in Wells Fargo opening accounts without consumers' consent, funding the accounts through unauthorized transfers of funds, submitting credit card applications and issuing debit cards without consumers' consent, and enrolling consumers in online-banking services without their consent. *Id.* Plaintiffs alleged damages to Wells Fargo based on harm to goodwill, as well as fines and penalties paid to federal regulators and class action plaintiffs. *Id.*

Plaintiffs' Consolidated Complaint asserted causes of action for (1) breach of fiduciary duty; (2) unjust enrichment; (3) corporate waste; (4) abuse of control; (5) gross mismanagement; and (6) insider trading in violation of California Corporations Code section 25402.[3] *Id.*

[3] The Action is a part of a larger number of derivative actions filed on behalf of the Company. After this Action was filed, eight derivative actions were filed in federal court against certain of the

Plaintiffs again sought extensive monetary and non-monetary relief, including a constructive trust over executive compensation, restitution of unearned equity awards, and reforms to the Bank's governance. *Id.*

D. First Round of Demurrers

In March 2017, Wells Fargo filed a demurrer to Plaintiffs' Consolidated Complaint, asserting that Plaintiffs should have made a pre-suit demand on the Board to evaluate their claims and that Plaintiffs had not sufficiently alleged why a pre-suit demand would have been futile. Molumphy Decl. at ¶ 13. The Director and Officer Defendants separately demurred to some or all of Plaintiffs' claims. *Id.*

On May 10, 2017, after extensive briefing and argument, the Court sustained Defendants' first set of demurrers with leave to amend as to demand futility and the underlying causes of action for breach of fiduciary duty, unjust enrichment, and corporate waste. *Id.* at ¶ 14. The Court dismissed without leave to amend the claims for abuse of control, gross mismanagement, and insider trading under California Corporations Code § 25402, which the Court held were governed by Delaware law under the internal affairs doctrine. *Id.*

E. Writ Petition on Insider Trading Claims

On June 14, 2017, Plaintiffs filed a petition for a writ of mandate from that portion of the Court's demurrer order dismissing insider trading claims under the California Corporations Code. The writ was denied by the Court of Appeal on August 17, 2017, without prejudice to the issue of potential liability pursuant to the California insider-trading statute being raised on appeal from a final judgment. *Id.* at ¶ 15.

F. Amended Complaint Following Production of Books and Records

In May 2017, Wells Fargo made a production of internal "books and records" to Plaintiffs pursuant to an inspection demand served under Delaware law. Plaintiffs reviewed the documents produced by Wells Fargo for incorporation into the forthcoming Amended Complaint. Molumphy Decl. at ¶ 16.

Individual Defendants. The federal cases were consolidated as *Shaev v. Baker*, Case No. 16-cv-05541-JST (hereinafter, the "Federal Derivative Action"), and are now pending in the United States District Court for the Northern District of California before District Court Judge Jon S. Tigar.

On June 9, 2017, Plaintiffs filed their Amended Complaint in this Action. *Id.* at ¶ 17. The Amended Complaint added allegations that the Director and Officer Defendants had contemporaneous knowledge of illegal sales practices and recklessly or intentionally failed to stop them, in breach of their fiduciary duties. *Id.* The Amended Complaint referred to Wells Fargo's Board minutes and internal records, communications with regulators, pleadings in other actions, news articles, and consent orders with Wells Fargo's regulators, and alleged a new insider trading cause of action under Delaware law. *Id.* Plaintiffs alleged that the illegal sales practices dated back to 2002. *Id.*

G. Federal Plaintiffs' Motion to Intervene and Stay – The Case is Limited to Pre-2011 Conduct and Damages

The plaintiffs in the Federal Derivative Action also moved to intervene and stay this Action based on Judge Tigar's order denying Defendants' motion to dismiss the Federal Derivative Action. Molumphy Decl. at ¶ 18. On July 10, 2017, the Court issued an order indicating that the Court intended to grant the motion and enter a stay but asking for further briefing. *Id.* On July 28, 2017, the Court entered a temporary general stay. Because of the stay, the demurrers to the Amended Complaint were not ruled on by the Court. *Id.*

On November 30, 2017, the Court issued an order modifying the stay to allow Plaintiffs to proceed on claims that did not overlap with the Federal Derivative Action. *Id.* at ¶ 19. Specifically, Plaintiffs were permitted to proceed on: (1) insider trading claims under Delaware law; and (2) all other claims to the extent they involved the time period not implicated by the Federal Derivative Action (pre-2011 misconduct) and damages incurred prior to 2011. *Id.* At the Court's direction, Plaintiffs identified the operative paragraphs of the Amended Complaint referring to these discrete theories and damages. *Id.*

The Court's limitation to pre-2011 conduct and damages was a seminal ruling in the case, impacting virtually every issue. *Id.* at ¶ 20. Specifically, Plaintiffs were now limited to pre-2011 misconduct and damages. *Id.* More important, just to have standing to bring the case, Plaintiffs were required to demonstrate that a majority of the ***2017*** Board of Directors were incapable of fairly acting on a shareholder demand to pursue claims regarding conduct and damages prior to ***2011***, even though most of the Directors joined the Board ***after 2011***. *Id.*

H. Demurrers to Amended Complaint

Wells Fargo and the Director and Officer Defendants filed demurrers to Plaintiffs' Amended Complaint on February 9, 2018. Molumphy Decl. at ¶ 21. Defendants again argued that Plaintiffs failed to adequately plead demand futility or any claims against the Director and Officer Defendants. Plaintiffs filed briefs opposing these demurrers. *Id.*

On April 25, 2018, the Court issued an order sustaining the demurrers with leave to amend and denying Plaintiffs' request for judicial notice of Judge Tigar's orders. *Id.* at ¶ 22. The Court declined to consider Judge Tigar's ruling based on its earlier decision to stay the action to the extent Plaintiffs' claims were based on conduct that occurred in or after 2011. *Id.* The Court declined to consider such conduct for purposes of assessing whether Plaintiffs adequately had alleged demand futility as to claims arising out of pre-2011 conduct. *Id.*

The Court then requested supplemental briefing on whether it should impose a general stay in the case. *Id.* The parties submitted supplemental memoranda on May 9, 2018. *Id.* at ¶ 23. On May 14, 2018, the Court issued an order staying the entire action indefinitely. *Id.* Plaintiffs' subsequent Petition for Writ of Mandate seeking to lift the stay was denied by the Court of Appeal. *Id.* at ¶ 24.

I. *Herron* Action

On January 30, 2018, another shareholder derivative action was filed by Plaintiff Joan Herron in San Mateo County Superior Court (the "*Herron* Action"). The *Herron* Action was brought by a shareholder who made a written demand on Wells Fargo's Board dated September 23, 2016 (as supplemented by letter dated April 8, 2017). By letter dated June 30, 2017, the Wells Fargo Board denied the demand. An amended complaint was filed in the *Herron* Action on February 20, 2018. Wells Fargo filed a petition to transfer the *Herron* Action to this Court and to coordinate it with this Action, which was granted on April 12, 2018. The *Herron* Action alleges claims substantially similar to those raised in Plaintiffs' Amended Complaint regarding the alleged improper sales practices, but also names as defendants the Additional Director/Officer Defendants. Plaintiff Joan Herron in the *Herron* Action agreed to be bound by the terms of the Settlement, and joins in this Motion.

J. Settlement Negotiations

Beginning in October 2018, the Parties engaged in extensive, arm's-length negotiations regarding a potential resolution of the Action, using the assistance of the Honorable Daniel Weinstein (ret.) and Mr. Jed Melnick, Esq., who also oversaw the mediation of the Federal Derivative Action, as well as the mediation of derivative actions challenging Wells Fargo's automobile collateral protection insurance practices (the "CPI Derivative Actions"). Molumphy Decl. at ¶ 26; *see* Weinstein Decl. The Parties' mediation efforts culminated in mediators' proposals for settlements of both the Federal Derivative Action and this Action, which included as components recognition for certain compensation-related actions ("Clawbacks") and corporate governance reforms at Wells Fargo (the "Corporate Governance Reforms") designed, in part, to address the alleged improper sales practices. The mediators' proposals also required the contemporaneous (but unconnected) resolution of the CPI Derivative Actions. Molumphy Decl. at ¶ 27. After further discussion, and fully informed of the strength and weaknesses of the claims and defenses, the Parties accepted the mediators' proposals. *Id.* at ¶ 27.

The terms of the Settlement also reflect that this Action was resolved as part of an effort to resolve all derivative actions brought in both state and federal court asserting derivative claims regarding both Sales Practices and CPI. Wells Fargo and Plaintiffs agreed that it was in Wells Fargo's interests to mediate and resolve all of the Sales Practices and CPI derivative actions at once. The value of the Settlement to Wells Fargo, therefore, must be considered in conjunction with the consideration Wells Fargo received through all of the Sales Practices and CPI settlements, which includes both the Corporate Governance Reforms in this Action and the $240 million payment and other benefits that Wells Fargo will receive through the separately negotiated settlement of the Federal Sales Practices Derivative Action.

III. THE SETTLEMENT TERMS

A. Corporate Governance Reforms

Plaintiffs and Wells Fargo agreed to a series of reforms and improvements to the Bank's corporate governance and internal procedures designed to help protect the Bank and its

shareholders from a future occurrence of the improper sales practices alleged in the Action. Molumphy Decl. at ¶ 28.

These reforms, fully outlined in Exhibit A to the Stipulation, include: (i) the separation of the roles of Board Chair and CEO; (ii) the addition of several new directors to the Board; (iii) the appointment of new directors to serve on (and new leaders to chair) its key committees, including the Risk Committee, Human Resources Committee ("HRC"), and the Governance and Nominating Committee; (iv) changes to the Risk Committee's makeup and oversight responsibilities (with a new subcommittee formed for oversight of compliance); (v) a new policy limiting the number of public company boards on which its directors may serve; (vi) ending product sales goals for retail banking team members in branches and call centers; (vii) the implementation of new compensation and performance management programs in the Community Bank focused on the customer experience; and (viii) the Audit and Examination Committee ("A&E Committee") and Risk Committee are the principal recipients of regularly scheduled reports and those reports are received or discussed when appropriate, in sessions not attended by senior management. *Id.* at ¶ 29.

B. Monetary Consideration

In addition, Plaintiffs and Wells Fargo agreed and acknowledge that facts alleged in the Action were significant factors taken into account in conducting an investigation respecting the alleged improper sales practices and in taking the following actions:

- On or about September 27, 2016, Defendant John G. Stumpf, the Bank's former Chairman and Chief Executive Officer, agreed to forfeit all of his outstanding unvested equity awards, valued at approximately $41 million (based on the then-recent closing price of the Bank's common stock).
- On or about September 27, 2016, the Board caused to be forfeited $19 million (based on the then-recent closing price of the Bank's common stock) of unvested equity awards held by Defendant Carrie L. Tolstedt, the Bank's former Senior Executive Vice President and head of Community Banking.

Molumphy Decl. at ¶ 30.

IV. LEGAL STANDARDS GOVERNING PRELIMINARY APPROVAL

A. The Law Favors Settlement

California has a well-established and strong public policy favoring compromises of litigation. *See Hamilton v. Oakland Sch. Dist.* (1933) 219 Cal. 322, 329 ("[i]t is the policy of the law to discourage litigation and to favor compromises"); *Bell v. Am. Title Ins. Co.* (1991) 226 Cal. App. 3d 1589, 1607. This policy is particularly compelling in complex shareholder actions. *See 7-Eleven for Fair Franchising v. Southland Corp*. (2000) 85 Cal. App. 4th 1135, 1151; *see also Cohn v. Nelson* (E.D. Mo. 2005) 375 F.Supp. 2d 844, 852 ("[s]ettlements of shareholder derivative actions are particularly favored because such litigation 'is notoriously difficult and unpredictable.'"); *Maher v. Zapata Corp*. (5th Cir. 1983) 714 F.2d 436, 455 (same); *see also In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.* (3d Cir. 1995) 55 F.3d 768, 784 (settlements are favored "particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation").

B. A Settlement Merits Preliminary Approval if it is Within the "Range of Possible Approval" Warranting Notice to Shareholders

Under California law, plaintiffs who prosecute claims in a representative capacity, such as plaintiffs in a shareholder derivative action, cannot settle or dismiss actions without court approval. *See* 9 Witkin, Summary of Cal. Law (10th ed. 2005), Corporations, §178 (citing *Whitten v. Dabney* (1915) 171 Cal. 621, 631; *Spellacy v. Superior Court* (1937) 23 Cal. App. 2d 142, 148; *Ensher v. Ensher, Alexander & Barsoom* (1960) 187 Cal. App. 2d 407, 410). At the preliminary approval stage, the ***sole*** issue before the court is whether the proposed settlement is within a range of what might be found fair, reasonable, and adequate so that notice of the proposed settlement can be given to shareholders and a date set for a final hearing to consider final settlement approval. Ann. Manual for Complex Litigation §§13, 14, 21.632, 21.633 (4th ed. 2016) (emphasis added). As the Manual for Complex Litigation explains:

> If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys, and appears to fall within the range of possible approval, … [a] trial court's approval of a class action settlement as fair is a two-step process: a preliminary evaluation of the fairness of the settlement; and a formal fairness hearing where arguments for and against settlement are put forth.

Ann. Manual for Complex Litigation §21.662 (4th ed. 2016).

Thus, preliminary approval does not require the trial court to answer the ultimate question – whether a proposed settlement is fair, reasonable, and adequate. *Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1801. Rather, the ultimate determination is made only after notice of the settlement has been given to shareholders and after they have been given the opportunity to comment on the settlement. *See* Manual for Complex Litigation §§21.633, 21.634 (4th ed. 2016).

C. In Considering Final Approval of the Derivative Settlement, Courts Typically Consider the Same Factors Applied in Class Actions

While this is only the preliminary approval stage, the Court may find instructive the factors typically applied to evaluate a proposed derivative settlement at the final approval stage, which are similar to those applied by courts evaluating settlements of class actions. *See Robbins v. Alibrandi* (2005) 127 Cal. App. 4th 438, 449 n.2 (in reviewing a derivative settlement, "[t]he duty of a court reviewing a settlement of a class action provides a useful analogy"); *see also* 7 Newberg on Class Actions, §§22.110 (4th ed. 2016) ("[t]he role of the court and the criteria to be considered in evaluating the adequacy and fairness of a derivative settlement are substantially the same as in a class action.")

In California, courts may consider: (1) the strength of the plaintiff's case; (2) the risk, expense, complexity and likely duration of further litigation; (3) the amount offered in settlement; (4) the extent of discovery completed and the stage of the proceedings; and (5) the experience and view of counsel. *See Dunk*, *supra*, 48 Cal. App. 4th at 1801-02 (applying these factors and affirming settlement approval where the case was three years old when it settled, extensive discovery and pretrial litigation had been conducted, discovery revealed various strengths and weaknesses pertaining to the allegations and damage calculations, and only several people objected to the settlement out of an entire class of over 65,000). Courts recognize that these factors are not exhaustive and that a reviewing court should tailor its consideration of the settlement to the facts of each case. *Id.* at 1801 ("[u]ltimately, the court's determination is nothing more than 'an amalgam of delicate balancing, gross approximations and rough justice.'").

Further, while recognizing that not all class action factors will be applicable to a derivative action, California courts hold that a settlement is presumptively fair where: "(1) the settlement is

reached through arm's-length bargaining; (2) investigation and discovery are sufficient to allow counsel and the court to act intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of objections is small." *Id.* at 1802. As set forth below, each of these factors warrants preliminary approval of the Settlement.

Similarly, federal law interpreting Fed. R. Civ. P. 23.1, which governs a district court's analysis of the fairness of a settlement of a shareholder derivative action, is also instructive. *See e.g.*, Fed. R. Civ. P. 23; *Wiener v. Roth* (8th Cir. 1986) 791 F.2d 661. Like California courts, federal courts must exercise "sound discretion" in approving the settlement. *Ellis v. Naval Air Rework Facility* (N.D. Cal. 1980) 87 F.R.D. 15, 18 *aff'd*, (9th Cir. 1981) 661 F.2d 939; *Torrisi v. Tuscan Elec. Power Co.* (9th Cir. 1993) 8 F.3d 1370, 1375. In exercising its discretion, however, "the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must 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." *Officers for Justice v. Civil Serv. Comm'* (9th Cir. 1982) 688 F.2d 615, 625. The Ninth Circuit defines the limits of the inquiry to be made by the court in the following manner:

> Therefore, the settlement or fairness hearing is not to be turned into a trial or rehearsal for trial on the merits. Neither the trial court nor this court is to 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. The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved by the negotiators.

Id.

V. THE SETTLEMENT SHOULD BE PRELIMINARILY APPROVED

A. The Settlement Was Reached Following Substantial Investigation By Counsel Who Had Extensive Experience In Complex Derivative Litigation

In light of Plaintiffs' Counsel's background and experience, and their extensive knowledge of the issues in the Action, Plaintiffs' Counsel agreed to a Settlement that confers significant benefits upon Wells Fargo. Molumphy Decl. at ¶ 32. Plaintiffs' Counsel concluded that the proposed Settlement is fair, reasonable, and in the best interests of Wells Fargo and its current

shareholders following substantial investigation, analysis, and evaluation. *Id.* at ¶¶ 33-34. In reaching this determination, Plaintiffs' Counsel reviewed and analyzed data from many sources, including: (1) Wells Fargo's public filings with the SEC, press releases, announcements, transcripts of investor conference calls, and news articles; (2) the Bank's internal "books and records" produced to Plaintiffs pursuant to an inspection demand served under Delaware law; (3) securities analyst, business, and financial media reports about Wells Fargo; and (4) filings in related class actions. Plaintiffs' Counsel also analyzed the following legal sources, including: (1) researched the applicable law with respect to the claims asserted (or which could be asserted) in the Action and the potential defenses thereto; (2) researched, drafted, and filed complaints, and oppositions to demurrers; and (3) prepared for and participated in extensive settlement discussions with counsel for the Settling Defendants. *Id.* at ¶ 35. Thus, Plaintiffs' Counsel were able to fully assess the strengths and weaknesses of the claims in the Action. *Id.* at ¶ 35.

As to the legal merits of Plaintiffs' claims, Plaintiffs' counsel expended significant time and resources litigating Defendants' petition for writ of mandate, two rounds of demurrers, a motion to seal, and two motions to intervene. Thus, Plaintiffs were fully informed of the strengths and weaknesses of the claims, and the significant risks of prevailing – detailed below.

Further, the arm's-length negotiations of the Settlement were conducted on both sides by highly qualified counsel experienced in shareholder derivative litigation. Lead Counsel for Plaintiffs, CPM, is vastly experienced in shareholder derivative lawsuits. *Id.* at ¶ 32, Ex. A. Based on their considerable prior litigation experience and similar settlements obtained for the benefit of many other public companies, Plaintiffs' Counsel submits that the Settlement provides substantial benefits to Wells Fargo and its current shareholders. *Id.*, *see Nat'l Rural Telecomm'ns Coop. v. DIRECTV, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 528 ("'[g]reat weight' is accorded to the recommendation of counsel, who are most closely acquainted with the facts underlying litigation.") (Quoting *In re PaineWebber Ltd. P'ships Litig*. (S.D.N.Y. 1997) 171 F.R.D. 104, 125); *7-Eleven, supra,* 85 Cal. App. 4th at 1152. Plaintiff's counsel in the *Herron* Action agree that the proposed Settlement is fair, reasonable, and in the best interests of Wells Fargo and its current shareholders. Thus, this factor favors preliminarily approving the Settlement.

B. Plaintiffs Took Into Account the Litigation Risks to Prevailing

While the merits of the underlying claims "are not a basis for upsetting the settlement of a class action," Plaintiffs – in the Molumphy Declaration – have addressed the Court's request for a more developed record regarding the value of the claims and risks of recovery, based on the relevant factual and legal arguments made by both sides and, most importantly, the applicable Delaware state law and prior rulings by this Court severely limiting the scope of this case. *See 7-Eleven, supra,* 85 Cal.App.4th at 1150. Plaintiffs – in Professor Morrissey's Declaration – have also addressed the value of the relief obtained in consideration for release of these claims, which is extraordinary given the likelihood of success were this case to move forward. Morrissey Decl. ¶¶ 36-53.

As discussed in the Molumphy Declaration, there can be no question that derivative actions are uniquely complex and fraught with risk to a shareholder plaintiff. Molumphy Decl. at ¶ 38. Indeed, the Ninth Circuit, in affirming the district court's approval of a settlement in a derivative action, noted that "the odds of winning [a] derivative lawsuit [are] extremely small" because "derivative lawsuits are rarely successful." *In re Pac. Enters. Sec. Litig.* (9th Cir. 1995) 47 F.3d 373, 378. This case was no different.

In a shareholder derivative action, the shareholder is asserting claims that belong to a corporation, and bound by the laws where the corporations is incorporated. Molumphy Decl. at ¶ 39. Like many public corporations, Wells Fargo was incorporated in Delaware, where the state's corporation code is perceived to be protective of the interests of corporations and corporate management, and its courts have developed a large body of case law governing seminal issues in derivative actions including the pleading standards for demand futility, demand refusal, special litigation committees and the business judgment rule. *Id.* at ¶ 39.

For example, under Delaware law, a corporation is permitted to adopt provisions in its charter or bylaws that eliminate or limit a director's liability for breach of his or fiduciary duty of care. *Id.* at ¶ 40. These "exculpation" provisions essentially preclude shareholder derivative claims for breach of the duty of care, and limit liability to breaches of the duty of loyalty, a much more difficult standard to allege and prove, arguably requiring evidence of conscious wrongdoing.

Indeed, Delaware courts have referred to the type of claims asserted here, involving a breach of the duty of oversight, as perhaps the most difficult claim to prevail upon under Delaware corporate law. *Id.*

Unsurprisingly, Well Fargo has such an exculpation provision which protects its directors from liability for claims of breach of fiduciary duty of care. *See* Molumphy Decl., Exhibit 3.

In addition, a shareholder must first establish standing just to bring a derivative suit in the first place. *Id.* at ¶ 42. Under Delaware law, a board of directors typically control the decision whether to bring a lawsuit and, in order for a shareholder to step in the shoes of the corporation, he or she must either make a demand on the Board to bring a suit or establish that demand is futile. *Id.* Notably, by making a demand on the Board, the shareholder arguably concedes that the Board is capable of evaluating the demand – precluding that shareholder from later challenging their independence. *Id.* Conversely, a shareholder who does not make a demand, must establish that demand would have been futile. *Id.* Delaware courts require a shareholder to allege the basis of "demand futility" with specificity, and demonstrate that a ***majority*** of the Board at the time the complaint is filed is incapable of independently evaluating a demand. *Id.* Since demand futility is evaluated by the composition of the Board at the time a complaint is filed, each time an amended complaint is filed the issue of demand futility is then reassessed again based on the composition of the Board at the time the amended complaint is filed. *Id.* Thus, a change in Board composition during the pendency of a case can prevent a shareholder from alleging demand futility. *Id.*

Here, these risks are not hypothetical – the Court previously ruled against Plaintiffs on two prior rounds of demurrers in this case. *Id.* at ¶ 43. On May 10, 2017, after extensive briefing and argument, the Court sustained Defendants' first round of demurrers with leave to amend, finding allegations of demand futility and the underlying causes of action for breach of fiduciary duty, unjust enrichment, and corporate waste, were insufficient. *Id.* The Court also sustained the demurrers without leave to amend relating to claims for abuse of control, gross mismanagement, and insider trading under California Corporations Code § 25402, which the Court held were governed by Delaware law under the internal affairs doctrine. *Id.* Wells Fargo and the Director and Officer Defendants filed a second round of demurrers to Plaintiffs' Amended Complaint and,

on April 25, 2018, the Court issued an order sustaining the demurrers with leave to amend and denying Plaintiffs' request for judicial notice of Judge Tigar's orders. *Id.*

The Court also later stayed Plaintiffs' action to the extent it overlapped with the Federal Derivative Action, and limited their ability to pursue claims and damages to conduct prior to 2011 (finding the federal derivative action was already pursuing claims and damages based on conduct from 2011 forward). *Id.* at ¶ 44. These rulings not only limited Plaintiffs' case, but severely impacted Plaintiffs' ability to establish demand futility going forward since Wells Fargo's Board had undergone changes and a majority of its current directors had joined after 2010 – and thus, did not personally participate in the conduct that the Court has limited Plaintiffs to pursuing in this Action. *Id.*

Thus, in considering the risks and merits of further litigation, Plaintiffs had to take into account the fact that, if a settlement was not reached and this Action moved forward, Plaintiffs would not only have to convince the Court to lift the stay but then file a new amended complaint and establish demand futility against a majority of the current ***2019*** Board – even though, by 2019, virtually all of the current directors were new members and had joined well after 2010. In fact, a majority of the current Wells Fargo Board joined in or after 2017 – after this Action was initially filed. *Id.* at ¶ 44.

Even if Plaintiffs were able to prevail on demand futility, they still had to overcome the Individual Defendants' individual demurrers, all of which relied on the protections available to corporate executives under Delaware corporate law. *Id.* at ¶ 45. As noted above, Wells Fargo's directors were protected from liability from all but the most egregious types of duty of loyalty claims due to the exculpation provisions. Wells Fargo's officers were protected by the business judgment rule and presumption that they acted in the best interest of the corporation. All of the Individual Defendants were assisted by the Court's time limitations, since only conduct prior to 2011 could support liability, and would likely have pursued statute of limitations defenses as to these allegations. *Id.*

Plaintiffs also had to take into account the possibility, indeed probability, that had Plaintiffs survived pleadings challenges, Wells Fargo's Board could have then convened a special litigation

committee ("SLC") – composed of independent directors who had joined after the lawsuits were commenced – to independently evaluate the lawsuit. *Id.* at ¶ 46. Delaware law recognizes the right of a SLC to file a motion to take over or dismiss a derivative action, even after it has survived pleading challenges, upon a proper investigation. *Zapata Corp. v. Maldonado* (Del. 1981) 430 A.2d. 779, 784.

Finally, assuming survival of pleading motions and a SLC motion to dismiss, Plaintiffs would still need to establish liability and prevail at trial, and then again on any likely appeal. Given the complex issues of liability and damages, the trial and post-trial stages posed additional risks to recovery. *Id.* at ¶ 47.

C. Plaintiffs Took Into Account the Value of the Claims and the Consideration Received

Plaintiffs' Counsel also took into account the value of the claims were they to prevail past the pleadings motions, SLC motions, trial and appeal. Molumphy Decl. at ¶ 48.

Here, the potential range of recovery were Plaintiffs to prevail on the claims being released in the Settlement is approximately $100-$200 million, based on the out-of-pocket costs incurred by Wells Fargo attributable to the Improper Sales Practices and related damages incurred during the period of 2002 to 2010, based on the Court's prior ruling that Plaintiffs could not pursue damages or conduct after 2010. *Id.* at ¶ 49. Estimated damages were based on the approximately $1.1 billion in costs incurred by the Bank from the Improper Sales Practices during the entire period, 2002 to 2018. *Id.* at ¶ 50. The $1.1 billion includes (1) $186.5 million paid by Wells Fargo in regulatory fines, penalties and payments (including $100 million settlement with the CFPB, $35 million penalty paid to the OCC, $1.5 million penalty paid to the Financial Industry Regulatory Authority ("FINRA"), and $50 million settlement with the Los Angeles City Attorney), (2) $200 million paid by Wells Fargo for the class action settlement with shareholders (the Bank paid about $200 million of $480 million total); (3) $142 million paid by Wells Fargo for the class action settlement with consumers; (4) approximately $443 million in costs associated with investigations and litigation; and (5) approximately $138 million spent for remediation to customers and increased bank monitoring. *Id.*

While it is somewhat difficult to allocate damages between periods, assuming an equal allocation of damages per year, the 2002-2010 period is approximately half the period, or $550 million. *Id.* at ¶ 51. However, the damages attributable to this Action would likely have been far less than that amount, and likely closer to $100-$200 million. *Id.* For example, the CFPB's $100 million fine was related to conduct dating back to January 1, 2011, i.e., after the period at issue in this Action. The $200 million paid by Wells Fargo in the securities class action covered a class of investors purchasing stock between 2014 and 2016, based on alleged misrepresentations during that period; none of that can be attributed to damages in this Action. *Id.* While the $142 million consumer class action was paid to customers from 2002 to 2017, the initial settlement of $110 million only covered those customers between 2009 and 2017, and was later amended to add $32 million more for class member who purchased between 2002 and 2008. *Id.* Thus, the amount of the class action settlement attributable to 2002 to 2010 is approximately $32-$50 million. *Id.*

Conversely, in consideration for releasing these claims, the Settlement provides significant monetary and non-monetary relief. *Id.* at ¶ 53. As described in more detail in the Settlement, Wells Fargo is benefitting from $60 million in Clawbacks from its former CEO and Head of Consumer Banking. *Id.* This restitution was specifically sought as relief in the derivative complaints. *Id.* Wells Fargo has also agreed to implement and/or maintain extensive reforms meant to address the alleged Improper Sales Practices and improve its risk management and governance going forward. *Id.* These types of corporate governance reforms provide certain and substantial value to a corporation and, in the specific case of Wells Fargo, will continue to benefit the Bank (and its shareholders) for years while reducing the likelihood of future fines, lawsuits and government limitations on its operations. Morrissey Decl. ¶ 52. Moreover, Professor Daniel Morrissey, a corporate governance expert from Gonzaga University, has separately opined that the Corporate Governance Reforms alone are valued at over $100 million, if not more, and will serve to improve the Company's operational risk management, compliance, and oversight, and strengthen the Company's operations and reporting mechanisms. *See* Morrissey Decl. Thus, along with $60 million in Clawbacks, the value of $160 million from the Settlement relief, at a

minimum, is an exceptional recovery given the potential damages of $100-200 million and the litany of risks to prevailing and collecting anything close to that amount. Molumphy Decl. at ¶ 55.

California, Delaware and federal courts have long recognized the substantial benefits corporations (and shareholders) receive from changes in corporate governance or policies that result from shareholder litigation. *See Fletcher v. A.J. Indus., Inc.* (1968) 266 Cal.App.2d 313, 324-25 (stockholder suit where non-pecuniary benefits are obtained serve an important consideration of public policy) (superseded by statute on separate grounds). "As corporate debacles such as Enron, Tyco and WorldCom demonstrate, strong corporate governance is fundamental to the economic well-being and success of a corporation" and "'[c]ourts have recognized that corporate governance reforms such as those achieved here provide valuable benefits to public companies.'" *In re NVIDIA Corp. Derivative Litig.* (N.D. Cal. Dec. 22, 2008) No. C-06-06110-SBA (JCS), slip op. at 4 (citation omitted) (preliminarily approving settlement that included "valuable corporate governance policies and changes" and other financial benefits); *see also A10 Derivative Litigation,* (Cal. Super. Nov. 22, 2016) (preliminarily approving settlement that provided for a number of corporate reforms, but no monetary recovery to the company); *see also In re Hewlett-Packard Company Shareholder Derivative Litigation* (N.D. Cal., Mar. 13, 2015) No. 3:12-CV-06003-CRB, 2015 WL 1153864 at *5.; *Goldman* v. *Northrop Corp.* (9th Cir. 1979) 603 F.2d 106, 109 ("[i]nstead of choosing the course of securing the greatest possible money judgment from the Northrop officers, the parties and the court chose the course of terminating litigation and taking steps to assure that such conduct as had been disclosed could not occur in the future.").

The Corporate Governance Reforms are aimed at preventing any future occurrence of the wrongdoing alleged in the Action and will serve to improve the Bank's operational risk management, compliance, and oversight, and strengthen the Bank's operations and reporting mechanisms. The Reforms are designed specifically to address the allegations raised in the Action. Weinstein Decl. ¶ 3.

D. The Derivative Action Served as an Impetus for the Reforms

Finally, the Reforms are not illusory but a direct result of the litigation and the facts alleged, and were specifically designed to address the allegations raised in the Action. The negotiations were also overseen by Judge Weinstein, a nationally-recognized and well-respected mediator. Weinstein Decl. ¶ 13. Wells Fargo (and Judge Weinstein) has also confirmed that the Reforms are valuable consideration. *Id.* ¶¶ 10, 12, 14. That is an adequate showing under the law.

Indeed, under applicable Delaware law, "courts 'recognize a presumption that there is a causal relationship between [a] benefit [achieved] and a timely filed suit.'" *Alaska Elec. Pension Fund* v. *Brown* (Del. 2007) 941 A.2d 1011, 1015 (remanding for further proceedings in accordance with the presumption); *In re Infinity Broad. Corp. Shareholders Litig.* (Del. 2002) 802 A.2d 285, 290 (applying presumption where timeline showed that a special committee advocated for the benefit received at the same time as class counsel because counsel's efforts could not "fairly be considered as redundant, insignificant, or superficial") citing *McDonnell Douglas Corp. v. Palley* (Del. 1973) 310 A.2d 635, 637.

If anything, it is an objecting party's burden to "demonstrate[e] that the lawsuit did not in any way cause its action." *Alaska Elec. Pension Fund*, *supra*, 941 A.2d at 1015 (emphasis added); *McDonnell Douglas Corp*, *supra*, 310 A.2d at 637 (holding appellant did not meet its burden of proving that there was no causal connection between the pendency of the litigation and the cancellation of Second Preferred Stock) (emphasis added). No potential objector can meet this burden.

Where, as here, a benefit to the corporation is "causally related to the [derivative] lawsuit," that benefit will serve as consideration for a derivative settlement regardless of who proposes it, and even if it was implemented before the settlement. *Polk* v. *Good* (Del. 1986) 507 A.2d 531, 538. In *Polk*, appellant Texaco shareholders argued that plaintiffs received insufficient consideration for the settlement because a voting rights modification was already adopted when the parties agreed to settle. *Id.* at 538. However, the court found several problems with this argument. *Id.* The thrust of the allegations involved a repurchase that was an illegal vote-buying scheme. *Id.* After the complaint was filed, but before a shareholders meeting that Plaintiffs sought to enjoin,

the voting provision of the repurchase agreement was modified so that shares in another company would be voted proportionally to those of all Texaco common stockholders. *Id*. As a result, the parties stipulated in advance of the stockholders' meeting that Texaco would relinquish its right to direct the vote of the other company's stock. *Id*. In return, the plaintiffs agreed that the scheduled meeting would proceed free from injunction or challenge. *Id*. Therefore, the Chancellor could reasonably infer that the modification was causally related to the lawsuit. *Id*.

Here, as acknowledged by Wells Fargo in the Settlement, facts alleged in the complaints in the Action and subsequent amendments thereto, as well as proposals made by Plaintiffs in connection with the prosecution and proposed resolution of the Action, were all significant and contributing factors taken into account by Wells Fargo in implementing the Corporate Governance Reforms. The reforms serve as valuable consideration for the Settlement, even those that were first implemented before the Settlement occurred. Thus, the Court should find that the reforms formulated after the action was filed should be treated as a response to the litigation, as a benefit conferred by the Settlement, and as a direct result of the Settling Parties' efforts and these derivative proceedings.

E. The Settlement Was Reached Via Arm's-Length Bargaining

The Settlement is the product of lengthy and vigorous arm's-length negotiations between the Parties, who were represented by highly experienced attorneys. Plaintiffs' counsel has significant experience in securities and other complex class action litigation and has negotiated numerous settlements of derivative actions. Moreover, the negotiations were conducted with the assistance of an independent mediator. In *Dunk v. Ford Motor Co.*, the Court of Appeal noted in support of its conclusion that a settlement was fair and reasonable that "[t]he independent mediator, a retired superior court judge and appellate justice with substantial experience and respect in the legal community," had recommended the settlement. *Dunk*, 48 Cal.App.4th at 1802-03. Here, the Settlement is similarly supported by a declaration of Judge Weinstein recommending that the Settlement be approved.

VI. THE PROPOSED NOTICE PROGRAM SHOULD BE APPROVED

The Court's prior Tentative Order confirmed that it would apply the rule applicable to class actions, California Rule of Court 3.769, in evaluating the process and substance of notice in this derivative action.

A. Notice by Publication is the Best Practicable Method of Notifying Shareholders of the Settlement

First, as to process, California law provides that shareholders must be given notice of a settlement of a derivative action. *Trosky v. Los Angeles Fed. Sav. & Loan Assn*. (1957) 48 Cal.App.3d 134, 151-52 (trial court has "'virtually complete discretion' " in determining how that can most practicably be accomplished; *see also 7–Eleven Owners for Fair Franchising, supra,* 85 Cal.App.4th at 1164. In the class action context,

> If personal notification is unreasonably expensive or the stake of individual class members is insubstantial, or if it appears that all members of the class cannot be notified personally, the court may order a means of notice reasonably calculated to apprise the class members of the pendency of the action--for example, publication in a newspaper or magazine; broadcasting on television, radio, or the Internet; or posting or distribution through a trade or professional association, union, or public interest group.
>
> Cal. Rules of Court § 3.766

In this case, Plaintiffs propose notice by publication in the following manner:

1) Wells Fargo will publish the Summary Notice, substantially in the form of Exhibit D to the Stipulation, as a quarter-page advertisement in the San Francisco Chronicle, the Los Angeles Times and the Investor Business Daily;

2) Lead Plaintiffs' Counsel will publish the same notice via a national wire service;

3) Wells Fargo will publish a Current Report on Form 8-K with the Securities and Exchange Commission;

4) Wells Fargo will cause the Stipulation and the Notice, substantially in the form of Exhibit C to the Stipulation, to be made electronically available on an Internet page created by Wells Fargo that will be accessible via a link on the "Investor Relations" page of http://www.wellsfargo.com, the address of which shall be contained in the Notice and Summary Notice; Wells Fargo will send the Notice by U.S. Mail to persons who request such Notice by calling a hotline number to be identified in the

Summary Notice; and

5) Lead Plaintiffs' Counsel's will cause the Stipulation and Notice, substantially in the form of Exhibit C to the Stipulation, to be made electronically available at a website to be identified in the Summary Notice created specifically for the purpose of disseminating notice.

Notice by publication is the best form of notice in this case, and similar forms of notice have been approved by other courts – state and federal – as satisfying due process. For example, in *In re Hewlett-Packard Co. S'holder Derivative Litig*., the United States District Court Judge Breyer approved notice of a derivative settlement including that (1) notice in The New York Times, Investor's Business Daily, The Wall Street Journal, and The San Francisco Chronicle, (2) filing an 8-K with the U.S. Securities and Exchange Commission ("SEC"), and (3) publishing the notice on the Hewlett-Packard website. After an appeal was filed by a shareholder, represented by Richard Greenfield, it was soundly rejected by the Ninth Circuit, which held these were the "best procedures practicable under the circumstances, and provide[d] due and sufficient notice to all interested persons of all matters relating to the Settlement." (9th Cir. 2017) 716 F. App'x 603, 608; *see also* Declaration of Anya Thepot, filed herewith ("Thepot Decl.") Ex. 10. Notably, Mr. Greenfield objected that publication notice was deficient because it was not promulgated by direct mail, citing *Mullane v. Central Hanover Bank & Trust Company* (1950) 339 U.S. 306. The Ninth Circuit found that publication notice satisfied due process requirements identified in *Mullane*. *In re Hewlett-Packard Co. S'holder Derivative Litig*., *supra*, 716 F. App'x at 608.

Indeed, Federal and California State Courts have overwhelming approved similar notice programs involving publication procedures virtually identical to that proposed here (including other cases involving Mr. Greenfield and his client, Mr. Feuer):

- *Wells Fargo Federal Derivative Litigation*, (N.D. Cal. May 14, 2019). The federal court approved notice by publication in (1) newspaper, (2) SEC filing, (3) dedicated website, and (4) Wells Fargo's website. *See* Thepot Decl. Ex. 2.
- *Feuer v. Thompson, Wells Fargo, et al*., *Deriv. Litig.,* 2012 WL 6652597, at *2-3 (N.D. Cal. Dec. 13, 2012). The federal court approved notice by publication in (1)

The New York Times and The Wall Street Journal, (2) SEC filing, and (3) Wells Fargo's website. Mr. Greenfield represented the plaintiff in that action, Mr. Feuer, brought on behalf of Wells Fargo. *See* Thepot Decl. Ex. 7.

- *Intuitive Surgical Inc., Shareholder Derivative Litigation*, (Cal. Super. Aug. 9, 2017). The California state court approved notice by publication in (1) Intuitive's website; (2) plaintiffs' counsels' website; and (3) a one-time publication in Investor's Business Daily. Mr. Greenfield represented another plaintiff in this case, objected to the notice, but then failed to appear at the hearing. *See* Thepot Decl. Ex. 11.
- *A10 Derivative Litigation,* (Cal. Super. Nov. 22, 2016). The California state court approved notice by publication in (1) A10's website; (2) an Investor's Business Daily publication; and (3) an SEC filing. *See* Thepot Decl. Ex. 12.
- *Hemminson v. Elkins, Derivative Litigation*, 2016 WL 6822262 (Cal. Super. Oct. 14, 2016). The California state court approved notice by publication in (1) an SEC filing; (2) on the "investor relations" section of MagnaChip's website; (3) a PR Newswire publication. *See* Thepot Decl. Ex. 13.
- *Espinoza* v. *Wu*, *Derivative Litigation*, 2011 WL 9697435 (Cal. Super. July 22, 2011). The California state court approved notice by publication in an SEC 8-K filing. *See* Thepot Decl. Ex. 14.
- *In re Sunpower Corp. Shareholder Deriv. Litig.*, 2009 WL 10295313 (Cal. Super. Dec. 1, 2009). The California state court approved notice by publication in (1) SunPower's website; (2) an SEC filing; (3) an Investor's Business Daily publication; (4) plaintiffs' counsels' respective websites. *See* Thepot Decl. Ex. 15.
- *In re: Affymax, Inc., Shareholder Derivative Litigation,* 2013 WL 10208393 (Cal. Super. Mar. 9, 2013). The California state court approved notice by publication in (1) Affymax's website; and (2) an SEC filing. *See* Thepot Decl. Ex. 16.
- *Rosa v. Rosa, Shareholder Derivative Litigation,* 2013 WL 6910834 (Cal. Super. Oct. 22, 2013). The California state court approved notice by publication in (1) the company website; and (2) the law firms' websites. *See* Thepot Decl. Ex. 17.

- *In Re Diamond Foods, Inc., Shareholder Derivative Litigation*, (Cal. Super. Jun. 14, 2013). The California state court approved notice by publication in (1) the "Investor Relations" section of Diamond Food's website; (2) an SEC filing; and (3) a one-time publication in Investor's Business Daily. *See* Thepot Decl. Ex. 18.
- *Yahoo!, Inc., Shareholder Derivative Litigation*, (Cal. Super. Oct. 26, 2018). The California state court approved notice by publication in (1) the "Investor Relations" page of Yahoo's (then known as Altaba) website; (2) two publications in Investor's Business Daily; and (3) an SEC filing. *See* Thepot Decl. Ex. 19.
- *PG&E., Shareholder Derivative Litigation*, (Cal. Super. Apr. 4, 2017). The California state court approved notice by publication in (1) two publications in the national edition of Investor's Business Daily; and (2) the "Investor Relations" section of the PG&E website. *See* Thepot Decl. Ex. 20.
- *Arace v. Thompson*, 2011 WL 3627716, at *4 (S.D.N.Y. Aug. 17, 2011). The federal court denied a motion for relief from final judgment, rejected movant's argument that publication notice of derivative settlement was insufficient, and held that "[i]n a derivative action, a court may determine that notice of a proposed settlement by publication is appropriate under the circumstances…[h]ere, the publication of the notice in the September 25, 2009 edition of the Investor's Business Daily—'a nationally-circulated business-oriented publication catering to investors' — sufficiently apprised Wachovia shareholders of the nature of the proposed settlement, the upcoming public hearing on the matter, and the opportunity to object."
- *In re PMC–Sierra, Inc. Deriv. Litig*., 2010 U.S. Dist. LEXIS 5818, at *4 (N.D. Cal. Jan. 26, 2010). The federal court approved notice by publication in (1) Investor's Business Daily and (2) the company's website.
- *In re Heelys, Inc. Deriv. Litig.,* 2009 WL 10704478, at *5 (N.D. Tex. Nov. 17, 2009). The federal court held "that the publication of the Summary Notice in Investor's Business Daily, the filing of the Notice via a Form 8-K with the SEC, and the posting of the Notice and Stipulation on the websites of [company and plaintiffs' counsel] met

the requirements for notice pursuant to Federal Rule of Civil Procedure 23.1(c) and the United States Constitution, including the Due Process clause, and are the best forms of notice practicable under the circumstances and shall constitute due and sufficient notice to all Persons entitled thereto."

- *In re Fab Universal Corp. S'holder Deriv. Litig*. (S.D.N.Y. 2015) 148 F. Supp.3d 277, 282. The federal court held: "The Notice of Settlement was published in Investor's Business Daily on August 28, 2015, posted to the Company's website with the Stipulation, published via national wire in Globe Newswire on August 28, 2015, and posted to Lead Counsel's website….[t]he Notice requirement of Rule 23.1 is therefore met."
- *In re MRV Communications, Inc. Deriv. Litig.,* 2013 WL 2897874 at * (C.D. Cal. June 6, 2013). The federal court approved notice by publication in (1) an SEC filing, (2) the company's website, and (3) Investor's Business Daily.

Notably, these are just some of the reported decisions approving publication notice, and most of them approved publication procedures involving much less notice than proposed in this case. Conversely, Plaintiffs are unaware of any court decision that held publication notice in a shareholder derivative action failed to comply with due process, nor any that required direct mailing notice in a shareholder derivative action involving a publicly-traded corporation. Thepot Decl. at ¶ 8.

Direct mailing is not a requirement in a derivative action because, unlike in a shareholder class action, shareholders are not the direct recipients of any settlement consideration. *Id.* at ¶ 7. A derivative action is brought on behalf of the corporation itself, and any recovery goes to the corporation. *Id.* Accordingly, while Wells Fargo's shareholders certainly have an interest in this derivative suit, they have no direct individual stake in the recovery. *Id.*

Indeed, in proposing publication notice in a prior case, Mr. Greenfield argued that it complied with due process requirements:

> The proposed forms and method of notice will fairly and reasonably apprise Wells Fargo Shareholders of the essential terms of the proposed Settlement and of information regarding the fee and expense application of Plaintiffs' Counsel. It will also set forth the procedure for objecting to the Settlement or to the fee

> request. Thus, the proposed forms of notice fully satisfy due process requirements. S*ee Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) . . . .

See Feuer v. Thompson, Wells Fargo, et al., *Derivative Litigation* (N.D. Cal. Dec. 13, 2012) 2012 WL 6652597, Motion and Memorandum of Points and Authorities. Thepot Decl. Ex.8. Similarly, in the order approving final judgment in the *Feuer* case, the District Court stated that notice by publication in accordance with that Court's Preliminary Approval Order, complied with the requirements of Federal Rule of Civil Procedure 23.1 and satisfied the requirements of due process of the United States Constitution. *See* Thepot Decl. Ex. 9.

In this case, the proposed publication notice procedure is the most practicable. Wells Fargo has 4,494,342,882 shares outstanding, and providing direct notice to every shareholder is virtually impossible and unreasonably expensive. *See* Thepot Decl. Ex. 1, ¶ 6. Based on estimates provided by class action notice providers, a direct mailing notice to Wells Fargo shareholders would require several steps, including an initial mailing to institutions and brokerages to obtain their client mailing information, import of broker and nominee mailing files into a data file, mailing, and follow-up to account for undelivered mail or changes of address. *See* Thepot Decl. ¶ 6. This process would also require several months to complete. *Id*. While the costs are dependent on a number of variables, very conservatively using a notice population of 750,000 (the actual number may be much higher) and a 10-page notice, the estimated costs are more than $500,000. *Id*. Even a postcard notice program would run close to $300,000. *Id*. Given that Wells Fargo is one of the largest publicly traded companies in the United States, the proposed Notice by publication is tailored to provide the best form of notice, under the circumstances, and it stands the best chance to reach a substantial percentage of the current shareholders.

The newspapers in which publication is proposed were chosen for specific reasons. The Investor's Business Daily is one of the largest, national publications in the United States. It is also one of the most widely-read, financial oriented publications in the United States and targeted to Registered Investment Advisors, Financial Planners, and Institutional Investors who hold Wells Fargo stock. The Los Angeles Times and San Francisco Chronicle were selected not only because of their geographic proximity to Wells Fargo's headquarters, but also because of their unique

coverage of the conduct at issue – which has been picked up by the press throughout the world. The Los Angeles Times was the first newspaper to break the story of fictitious accounts, and Plaintiffs cited to the Times' articles in their Amended Consolidated Complaint. *See, e.g.,* Times article, dated October 3, 2013, "Wells Fargo Fires Workers Accused of Cheating on Sales Goals" and dated December 21, 2013, "Wells Fargo Pressure Cooker Sales Culture Come at a Cost." The Chronicle has also published actively on Wells Fargo's sales practices and interactions with government regulators, drawing on its proximity to Wells Fargo's headquarters.

In connection with multiple online publications, the various print publications, and the Form 8-K filing, the proposed Notice procedure stands to reach a substantial percentage of the current shareholders. *See In re Hewlett-Packard Co. S'holder Derivative Litig*., 716 F. App'x at 608. Based on the foregoing, the Settling Parties believe that the proposed procedure for providing notice readily comports with applicable law and due process.

B. The Modified Proposed Notice Uses Concise and Readable Language to Notify Shareholders of All the Information Required by the California Rules of Court

California Rule of Court 3.769 provides that "'notice of the final approval hearing must be given … in the manner specified by the court.'" S*ee also Litwin v. iRenew Bio Energy Solutions, LLC* (2014) 226 Cal.App.4th 877, 883. "'The notice must contain an explanation of the proposed settlement and procedures … to follow in filing written objections to it and in arranging to appear at the settlement hearing and state any objections to the proposed settlement.'" *Id*.; *see also Churchill Vill., LLC v. Gen. Elec.* (9th Cir. 2004) 361 F.3d 566, 575 ("[n]otice 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.'").

Mindful of the Court's directions, the Parties have also modified the form and substance of the Notice and Summary Notice to make it more clear and readable.

The proposed Notice includes all the information required by Rule 3.769 for the settlement of a class action and that is otherwise necessary for shareholders to make an informed evaluation of the proposed Settlement, including: (i) an explanation of the nature of the Action and the claims asserted; (ii) the Settlement consideration, including the governance reforms and the scope of the releases that the Settling Defendants will obtain; (iii) the Parties' reasons for proposing the

Settlement; (iv) Plaintiffs' Counsel's and Herron's counsel's application for an award of attorneys' fees and expenses not to exceed $7,750,000 and $420,000, respectively, as well as Reimbursement Awards for Plaintiffs and Herron to be paid from any fee award, in recognition of the substantial benefits conferred; (v) how to appear at the Settlement Hearing; (vi) how to object to the Settlement by filing a written objection; (vii) the deadlines for Settlement-related events; and (viii) the binding effect that entry of a final judgment approving the Settlement will have on current Wells Fargo shareholders. The Settling Parties believe that the proposed forms of notice, and the proposed procedure for providing notice, readily comport with applicable law and due process. *See* Cal. R. Ct. 3.769(f); *Litwin*, 226 Cal.App.4th at 883-884.

Finally, at the Court's directions, the Parties now propose an easier process to submit objections (giving them the option of filing directly with the Court or through Plaintiffs' Counsel), a certain deadline based on a postmark date, and a longer period to submit objections (with a proposed Settlement Hearing at least 65 days following preliminary approval, the same period approved in the Federal Derivative Action).

Accordingly, Plaintiffs request that the Court: (1) approve the forms of and method for providing the Notice and Summary Notice to current Wells Fargo shareholders regarding the pendency of the proposed Settlement; (2) direct that the Notice be published and posted as provided in the Stipulation; and (3) set a date for the Settlement Hearing and a schedule of events. In this regard, Plaintiffs propose and request that the Court establish the schedule below:

Date for Distribution of Notice ("Notice Date")	Seven (7) calendar days after the entry of the [Proposed] Order Setting Settlement Hearing and Approving Notice of Proposed Derivative Settlement
Date to file Motions for Final Approval of Settlement, Award of Attorneys' Fees and Expenses to Plaintiffs' Counsel, and Reimbursement Awards to Plaintiffs	Sixteen (16) court days prior to the Settlement Hearing
Date for Wells Fargo shareholders to file objection and/or notice of appearance	Nine (9) court days prior to the Settlement Hearing
Date to reply to any objections	Five (5) court days prior to the Settlement Hearing
Date of Settlement Hearing	At least sixty-five (65) days after the Notice Date, or any such other date as may be selected by the Court

VII. CONCLUSION

For the foregoing reasons, the proposed Settlement should be preliminarily approved as provided in the Stipulation and the [Proposed] Order submitted herewith·

Dated: June 14, 2019 COTCHETT, PITRE & McCARTHY, LLP

By: */s/ Mark C. Molumphy*
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