UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

GREGORY YOUNG, et al., Plaintiffs, v. WELLS FARGO & COMPANY and WELLS FARGO BANK, N.A., Defendants.	Case No. 4:08-cv-00507-RP-CFB

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

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I. INTRODUCTION

Plaintiffs[1] respectfully move the Court for final approval of this class action settlement and the proposed Plan of Allocation ("POA") and request that the Court finally certify the Class for purposes of carrying out the Settlement. The Settlement before the Court is the product of more than seven years of complex and hard-fought litigation, including voluminous discovery and substantial motion practice (including a motion to transfer venue, two motions to dismiss, several discovery motions, and considerable briefing on class certification before this Court and the Eighth Circuit Court of Appeals); extensive work with consultants and experts; six months of intense arm's-length negotiation; and two mediation sessions with the aid of an experienced and well-respected mediator, Hon. Arthur J. Boylan (Ret.). (*See* Decl. Clark-Weintraub Supp. Mot. Final Approval Settlement ¶¶ 4–5, 13–43, 44–47 ("Clark-Weintraub Decl." or "Clark-Weintraub

[1] Capitalized terms shall have the meaning that the Stipulation ascribes to them. (*See generally* Stip. Settlement, ECF No. 243-3.)

Declaration") (filed concurrently herewith).) Thus, at the time the Parties reached an agreement to settle, Plaintiffs and Class counsel had extensively litigated the Action and possessed a thorough understanding of the strengths and weaknesses of the claims Plaintiffs asserted on behalf of the Settlement Class.

The Settlement resolves vexing legal issues arising out of Plaintiffs' allegations that Wells Fargo improperly and unreasonably (and often repeatedly) ordered and charged for property inspections for delinquent borrowers, without regard to whether the inspections were necessary to protect the lender's interest in the property, as well as concealed the true nature of the charges by labeling them as "Other Charges" on borrowers' monthly statements. The Settlement benefits the Class by conferring a guaranteed, immediate, and substantial benefit of $25,750,000 and avoids the risks and expenses of continued litigation, including the risk of recovering less than the amount of the Settlement Fund after substantial delay or of recovering nothing at all. Furthermore, Class Members have been given the opportunity to object or to opt out. Out of over 2.7 million potential Class Members, to date, only 4 have objected, and only 102 have opted out.[2] As detailed below, Plaintiffs respectfully submit that the Settlement is fair, reasonable, and adequate and in the best interests of the Class Members, and that final approval of the Settlement following the Settlement Fairness Hearing—scheduled for January 21, 2016—is warranted.

II. OVERVIEW OF THE HISTORY OF THE LITIGATION

The Clark-Weintraub Declaration is an integral part of this submission. Plaintiffs respectfully refer the Court to it for, among other things, a detailed description of the factual and procedural history of the litigation and the claims and defenses the Parties asserted.

[2] Plaintiffs' Counsel will address all objections in the reply due to be filed on January 14, 2016. At this time, they will also update the Court on the number of opt outs.

III. PRELIMINARY APPROVAL AND SUBSEQUENT EVENTS

The Court granted preliminary approval on September 2, 2015. (Order Preliminarily Approving Settlement, ECF No. 245.) On September 30, 2015, Wells Fargo deposited $25,750,000 in cash into the Escrow Account pursuant to the Settlement Agreement. (Clark-Weintraub Decl. ¶ 7.) Dissemination of notice to the Class Members commenced on October 16, 2015. (*Id.* at ¶ 50.)

IV. SUMMARY OF THE PROPOSED SETTLEMENT

The Settlement establishes a non-reverting common fund of $25,750,000 to be used to compensate Class Members, pay for the costs of notice and claims administration, and pay for Plaintiffs' Counsel's attorneys' fees, costs, and expenses. Plaintiffs have proposed a plan for allocating the proceeds of the Settlement among members of the Class. (*See* Clark-Weintraub Decl. ¶¶ 55–58.) The POA seeks to distribute the Settlement proceeds equitably to Class Members who have suffered an economic loss as a proximate result of Wells Fargo's alleged wrongdoing. (*Id.* at ¶ 55.) The POA generally estimates the amount of loss that a Class Member could claim for purposes of making pro rata distributions from the Net Settlement Fund ("Recognized Claims"). (*Id.*) Each eligible Class Member shall be allocated a pro rata share of the Net Settlement Fund based on his or her Recognized Claim compared to the total Recognized Claims of all Class Members. (*Id.*)

V. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE AND WARRANTS FINAL APPROVAL

"Settlement agreements are generally encouraged and favored by the courts." *Justine Realty Co. v. Am. Nat. Can Co.*, 976 F.2d 385, 391 (8th Cir. 1992); *see also Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1148 (8th Cir. 1999); *Little Rock Sch. Dist. v. Pulaski Cty. Special Sch. Dist. No. 1*, 921 F.2d 1371, 1388 (8th Cir. 1990). Indeed, "[a] settlement agreement is

'presumptively valid.'" *In re Uponor, Inc., F1807 Plumbing Fittings Prods. Liab. Litig.*, 716 F.3d 1057, 1063 (8th Cir. 2013) ("*Uponor II*") (citing and quoting *Little Rock Sch. Dist.*, 921 F.2d at 1391). "Settlement of the complex disputes often involved in class actions minimizes the substantial burdens to the parties and to scarce judicial resources that such litigation entails." *White v. Nat'l Football League*, 822 F. Supp. 1389, 1416 (D. Minn. 1993) (citation omitted).

"A district court may approve a class action settlement only after determining that it is 'fair, reasonable, and adequate.'" *Uponor II*, 716 F.3d at 1063 (citing and quoting Fed. R. Civ. P. 23(e)(2)). "In making that determination a district court should consider (1) 'the merits of the plaintiff's case[ ] weighed against the terms of the settlement,' (2) 'the defendant's financial condition,' (3) 'the complexity and expense of further litigation,' and (4) 'the amount of opposition to the settlement.'" *Id.* (citing and quoting *Van Horn v. Trickey*, 840 F.2d 604, 607 (8th Cir. 1988)); *accord In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 932 (8th Cir. 2005). A settlement satisfies the "fair, reasonable, and adequate" standard when "the interests of the class are better served by the settlement than by further litigation." MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.61 (2004). Approval of a class action settlement "is committed to the sound discretion of the trial judge." *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975) (citation and quotation omitted).

As Plaintiffs set out below, analysis of the Settlement under the factors listed above shows it is fair, reasonable, and adequate, and the Court should grant final approval.

A. The Settlement is excellent when the merits of the case are weighed against the Settlement terms

In assessing "overall adequacy of the settlement . . . the most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in the settlement." *Grunin*, 513 F.2d at 124 (internal citations, quotation marks, and parentheses

omitted); *accord Van Horn*, 840 F.2d at 607. In evaluating the settlement, "the court does not have the responsibility of trying the case or ruling on the merits of the matters resolved by agreement," *White*, 822 F. Supp. at 1417 (citation and quotation omitted), and "the value of the settlement need not be determined with absolute precision," *DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171, 1178 (8th Cir. 1995).

The Settlement establishes a $25,750,000 fund to cover the costs of notice and administration and make awards to Class Members that reflect the relative strength of Class Members' claims. This recovery represents a significant percentage of recoverable damages. Based on their analysis of the discovery taken and the legal basis for the claims asserted, Plaintiffs believe their strongest claims related to subsequent inspection fees—instances in which an inspection had been conducted within 30 or 60 calendar days of a prior inspection—that Class Members had paid or were still reflected on Wells Fargo's books as owed by borrowers with Active Loans. Based on their expert's preliminary analysis of the loan level data Wells Fargo produced, Plaintiffs estimated the amount of such fees ranged from $100 million to $115 million. Of course, Wells Fargo claimed these numbers were much lower for various reasons including its contention that borrowers who had signed loan modification agreements which had rolled outstanding property inspection and other charges into the principal balance of their modified loans had released any claims relating to these charges and could no longer challenge them.[3] Thus, the proposed Settlement is well within the realm of reasonableness as recognized by the courts. *See, e.g.*, *Zilhaver v. UnitedHealth Grp., Inc.*, 646 F. Supp. 2d 1075, 1080 (D. Minn. 2009) (approving settlement and holding that a $17 million settlement was fair, reasonable, and

[3] These estimates also vary depending on whether a "subsequent" inspection is defined as one occurring within 30 or 60 days of a prior inspection. The above quoted range is based on a 60 day interval and would decline if a 30 day interval were utilized.

adequate when claimed maximum damages ranged from $94 million to $105 million).

As summarized below and detailed in the Clark-Weintraub Declaration (*see infra* Part V.C), Plaintiffs' decision to enter into the Settlement was based on their thorough understanding of the strengths and weaknesses of their claims against Wells Fargo after seven years of litigation that included substantial motion practice and near complete discovery with respect to the merits of Plaintiffs' claims. Further, the Settlement was achieved with the assistance of an experienced and well-respected mediator, Hon. Arthur J. Boylan (Ret.). It is well-settled that the participation of a highly qualified mediator "strongly supports finding that negotiations were conducted at arm's length and without collusion." *Yang v. Focus Media Holding Ltd.*, No. 11 CIV. 9051 CM GWG, 2014 WL 4401280, at *5 (S.D.N.Y. Sept. 4, 2014) (citations omitted).

B. Wells Fargo's financial condition is a neutral factor

A pertinent consideration in approving some settlements is the defendant's overall financial condition and ability to pay. *Grunin*, 513 F.2d at 125. Here, Wells Fargo is well able to pay the Settlement or to continue to litigate. Thus, Wells Fargo's financial condition is a neutral factor. *Marshall v. Nat'l Football League*, 787 F.3d 502, 512 (8th Cir. 2015).

C. Further litigation would be complex and expensive and entail significant risk

"Class actions, in general, place an enormous burden of costs and expense upon [ ] parties." *Marshall*, 787 F.3d at 512. Furthermore, "[t]he very purpose of compromise is to avoid the delay and expense of . . . a trial." *DeBoer*, 64 F.3d at 1178.

As noted in Plaintiffs' preliminary approval brief, the outcome of this litigation was far from certain. Throughout the case, Wells Fargo strenuously argued that: (i) the challenged property inspections complied with the law and were reasonably necessary to protect the lender's interests; (ii) the risk of neglect and property damage is significantly greater for properties with

delinquent mortgages, and Wells Fargo risked lawsuits, sanctions, and fines if it did not inspect properties frequently enough and they fell into disrepair (*see, e.g.*, Expert Report of Hamm ¶¶ 23, 25, ECF No. 158-14); and (iii) it was not incentivized to order unnecessary inspections because it did not mark up inspection costs and, in fact, lost millions of dollars each year on unpaid property inspection fees (*id.* at ¶¶ 38–39). Further, discovery revealed that in certain instances Wells Fargo had attempted (albeit frequently unsuccessfully) to suppress property inspections due to contact with the borrower and had itself uncovered and sought to rectify instances in which it had ordered duplicative inspections of properties with first and second mortgages. Notwithstanding the foregoing, Plaintiffs believe the evidence showed: (i) Wells Fargo's policies and procedures for ordering inspections resulted in numerous unnecessary inspections, imposing significant cost on Class Members, (ii) the numbers of inspections ordered exceeded relevant guidelines, and (iii) the vast majority of the inspections were not necessary to protect the lender's interests. However, they recognized Wells Fargo's arguments might have persuaded a jury otherwise.

Further, although this Court previously held Plaintiffs had adequately alleged the elements of a civil RICO violation, since the Court's decision was issued, other courts evaluating the adequacy of similar claims brought against other defendants have disagreed. *See, e.g., Cirino v. Bank of Am., N.A.*, No. CV 13-8829 PSG MRWX, 2015 WL 3669078, at *3–5 (C.D. Cal. Feb. 10, 2015) (holding that defendant bank and its property inspection vendors did not share a common purpose and, therefore, did not constitute a valid RICO enterprise; RICO claims dismissed with prejudice); *Stitt v. Citibank, N.A.*, No. 12-CV-03892-YGR, 2015 WL 75237, at *4–7 (N.D. Cal. Jan. 6, 2015) (same); *Ellis v. J.P.Morgan Chase & Co.*, No. 12-CV-03897-YGR, 2015 WL 78190, at *4–7 (N.D. Cal. Jan. 6, 2015) (same).

In addition, there were substantial risks to maintaining class certification through trial. Although this Court granted Plaintiffs' class certification motion and the Eighth Circuit denied Wells Fargo's Rule 23(f) petition, this Court was free to re-examine class certification at any time. *See* Fed. R. Civ. P. 23(c)(1)(C).

Finally, Plaintiffs faced substantial challenges to establishing damages. For example, although loans as to which there had been a foreclosure sale, short sale, or deed-in-lieu accounted for more than half of the property inspection fees assessed during the relevant period, Wells Fargo maintained that borrowers paid only a fraction of these amounts, if they were paid at all. In addition, as noted above, Wells Fargo maintained that borrowers who had signed loan modification agreements agreeing to pay principal balances that included capitalized property inspection fees had relinquished any claim in this case that such fees were unlawful. *See Anselmo v. Manufacturers Life Ins. Co.*, 771 F.2d 417, 419–20 (8th Cir. 1985); *Grady v. Ocwen Loan Servicing, LLC*, No. 11-CV-1531, 2014 WL 231952, at *5 (N.D. Ill. Jan. 21, 2014). Moreover, the expert analysis required of the more than 13.5 gigabytes of loan level data Wells Fargo produced, which was necessary to establish damages, promised to be protracted and expensive.

The proposed Settlement eliminates all of these significant risks and provides an immediate benefit to Class Members. Accordingly, Plaintiffs' Counsel firmly believe that settling the Action at this juncture and for the amount negotiated was and is in the best interests of the Class.

D. The Class Members' reaction to the proposed Settlement has been overwhelmingly positive

The reaction of the Class Members to the proposed Settlement has been overwhelmingly positive. As Plaintiffs discuss below, direct mail notice was disseminated to over 2.7 million Class Members and was published nationwide. (*See infra* Part VIII.) Out of that large number of

potential Class Members, to date, there have been only 4 objections[4] and 102 requests for exclusion, representing less than 0.004% of the Class—a miniscule fraction of the Class. (Decl. Keough Regarding Notice Dissemination & Publication ¶ 14 ("Keough Decl.") (filed concurrently herewith).)

The very low numbers of objections and exclusions indicate an overwhelming level of approval for the Settlement. *Petrovic*, 200 F.3d at 1152 (approving settlement where objectors represented less than 4% of class); *DeBoer*, 64 F.3d at 1178 ("The fact that only a handful of class members objected to the settlement similarly weighs in its favor."); *see also TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 458, 462–64 (2d Cir. 1982) (approving settlement despite objections of large number of class members).

For all of the preceding reasons and the reasons set forth in the Clark-Weintraub Declaration and Plaintiffs' preliminary approval brief, the Court should finally approve the Settlement as fair, reasonable, and adequate.

VI. THE PROPOSED PLAN OF ALLOCATION IS FAIR AND REASONABLE

Plaintiffs also seek approval of the proposed Plan of Allocation ("POA") as fair and reasonable. A plan of allocation "need only have a reasonable, rational basis, particularly if recommended by 'experienced and competent' class counsel." *In re Charter Commc'ns, Inc., Sec. Litig.*, No. 4:02-CV-1186 CAS, 2005 WL 4045741, at *10 (E.D. Mo. June 30, 2005) (quoting *In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 429–30 (S.D.N.Y. 2001)). Plans of allocation which vary payouts based on the strength of claims have been repeatedly approved in the class action context. *See, e.g., In re Omnivision Techs., Inc.*, 559 F.

[4] As Plaintiffs noted above, Plaintiffs will address the substance of these objections and any other objections in their Reply Memorandum in Support of Final Approval of the Settlement, which will be filed after the deadline for filing objections.

Supp. 2d 1036, 1045 (N.D. Cal. 2008) ("It is reasonable to allocate the settlement funds to class members based on the extent of their injuries or the strength of their claims on the merits."); *In re Heritage Bond Litig.*, No. 02-ML-1475, 2005 WL 1594403, at *11 (C.D. Cal. June 10, 2005) ("A plan of allocation . . . fairly treats class members by awarding a pro rata share to every Authorized Clamant, [even as it] sensibly makes interclass distinctions based upon, *inter alia*, the relative strengths and weaknesses of class members' individual claims and the timing of purchases of the securities at issue." (quotation omitted)).

As Plaintiffs set out above, the POA seeks to distribute the Settlement proceeds equitably to Class Members who have suffered an economic loss as a proximate result of Wells Fargo's alleged wrongdoing. (Clark-Weintraub Decl. ¶ 55.) The POA generally estimates Recognized Claims, *i.e.*, the amount of loss that a Class Member could claim for purposes of making pro rata distributions from the Net Settlement Fund. (*Id.*) Each eligible Class Member shall be allocated a pro rata share of the Net Settlement Fund based on his or her Recognized Claim compared to the total Recognized Claims of all Class Members. (*Id.*)

As noted above, it is the judgment of Plaintiffs and Plaintiffs' Counsel, based on their review of the law and the evidence, and after consultation with experts, that borrowers with Active or Paid-In-Full Loans who were assessed Subsequent Fee Code 4 Inspection Fees—*i.e.*, an inspection within 30 or 60 calendar days of a prior inspection on a loan not in foreclosure status—possessed the strongest claims and, therefore, the Recognized Claim formula gives the greatest weight to these charges. Plaintiffs and Plaintiffs' Counsel believed that the ordering of an initial inspection with respect to delinquent loans and inspections of properties once loans reached foreclosure status might be viewed as more defensible by a jury in light of the expert evidence Wells Fargo intended to present regarding the risk of loss with respect to such

properties. (*See, e.g.*, Expert Report of Hamm ¶¶ 23, 25, ECF No. 158-14.)

To date, there have been no objections to the POA. Accordingly, for all of the reasons set forth herein and in the Clark-Weintraub Declaration, the proposed POA is fair and reasonable and should be approved.

VII. THE COURT SHOULD CERTIFY THE CLASS FOR SETTLEMENT PURPOSES PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23

The benefits of the proposed Settlement can be realized only through final certification of the Class for settlement purposes pursuant to Rule 23 of the Federal Rules of Civil Procedure.[5] The United States Supreme Court has emphatically confirmed the viability of settlement classes. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). In *Amchem Products, Inc.*, the Supreme Court reiterated the "dominant concern" governing analysis under Rule 23: "whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives." *Id.* at 621. Here, the proposed Class satisfies this dominant concern; indeed, as Plaintiffs set forth in their preliminary approval brief (Mem. Supp. Uncontested Mot. Prelim. Approval Settlement 14–17, ECF No. 243-1), and for the reasons the Court gave in its Order granting Plaintiffs' motion for class certification (Order, Oct. 23, 2013, ECF No. 206), the Class satisfies all prerequisites of Rule 23(a), as well as all requirements of Rule 23(b)(3). Fed. R. Civ. P. 23(a)(1)–(4), (b)(3); *Kelly v. Phiten USA, Inc.*, 277 F.R.D. 564, 568–69 (S.D. Iowa 2011).

Furthermore, no one has challenged the Court's preliminary certification of the Class, and nothing has occurred subsequently to cast doubt on whether the Class meets the applicable

[5] On September 2, 2015, the Court preliminarily certified the following Class pursuant to Rules 23(a) and (b)(3) for settlement purposes only (*see* Order Preliminarily Approving Settlement ¶¶ 1–3, ECF No. 245): all Persons who have or had a mortgage serviced by Wells Fargo and owe or paid a property inspection fee assessed during the period August 1, 2004 through December 31, 2013, inclusive. Excluded from the Class are Defendants, any entity in which a Defendant has a controlling interest or is a parent or subsidiary of, or any entity that is controlled by a Defendant, and any of Defendants' officers, directors, employees, affiliates, legal representatives, heirs, predecessors, successors, and assigns. Also excluded from the Class are those Persons who timely and validly request exclusion from the Class.

requirements of Rule 23. The Court should now finally certify the Class for Settlement purposes.

A. The Class satisfies Rule 23(a) of the Federal Rules of Civil Procedure

As set out below, the proposed Class easily satisfies each Rule 23(a) prerequisite.

Numerosity: The proposed Class, which potentially includes over 2.7 million borrowers (*see, e.g.*, Clark-Weintraub Decl. ¶ 51), is sufficiently numerous to satisfy Rule 23(a)(1).

Commonality: Rule 23(a)(2) requires at least one common question of law or fact, which "must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). "The threshold for commonality is low, requiring only that the legal question 'linking the class members is substantially related to the resolution of the litigation.'" *In re Uponor, Inc., F1807 Plumbing Fittings Prods. Liab. Litig.*, No. 11-MD-2247 ADM/JJK, 2012 WL 2512750, at *4 (D. Minn. June 29, 2012) ("*Uponor I*").

Here, in certifying a litigation class, the Court held the case "involves an allegation concerning a policy that was applied uniformly to all class members" and "the common question of whether this policy constitutes a RICO and/or a UCL violation is certainly amenable to a common answer, which will drive the resolution of this litigation." (Order 10, Oct. 23, 2013, ECF No. 206.) For the same reasons, the proposed Class satisfies the commonality requirement.

Typicality: Typicality under Rule 23(a)(3) "requires that there are 'other members of the class who have the same or similar grievances as the plaintiff.'" *Kelly*, 277 F.R.D. at 568. "The burden of demonstrating typicality is fairly easily met so long as other class members have claims similar to the named plaintiff." *DeBoer*, 64 F.3d at 1174. "When the claim arises out of the same legal or remedial theory, the presence of factual variations is normally not sufficient to

preclude class action treatment." *Donaldson v. Pillsbury Co.*, 554 F.2d 825, 831 (8th Cir. 1977).

Here, as the Court held in certifying a litigation class, "the named Plaintiffs' claims are typical of the class claims because the class members' grievances are virtually identical with those of the named Plaintiffs'—they all contend that they have been the victims of the exact same policy that is at issue in this lawsuit." (Order 12 n.9, Oct. 23, 2013, ECF No. 206.)

Adequacy: "Rule 23(a)(4) focuses on whether '(1) the class representatives have common interests with the members of the class, and (2) whether the class representatives will vigorously prosecute the interests of the class through qualified counsel.'" *Kelly*, 277 F.R.D. at 569. "The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc.*, 521 U.S. at 625. "Class representatives need not share identical interests with every class member, but only common objectives and legal and factual positions." *Uponor II*, 716 F.3d at 1064 (citation and quotation marks omitted). "The adequacy of class representation . . . is ultimately determined by the settlement itself." *DeBoer*, 64 F.3d at 1175 (citation and quotation marks omitted).

Here, Plaintiffs have suffered the same injury as the other Class Members, such that Plaintiffs' "interests are identical to those of absent class members, [and] they seek the same form of relief." *Uponor I*, 2012 WL 2512750, at *4. Further, Plaintiffs "have demonstrated their commitment through their diligent litigation of this matter," *id.*, by vigorously pursuing the case for over seven years and by, among other things, producing documents in response to Wells Fargo's discovery requests and sitting for depositions. (Clark-Weintraub Decl. ¶¶ 11, 13–43.) The Court-appointed Class Counsel are experienced complex litigation firms with significant resources and class action experience. (Clark-Weintraub Decl. ¶ 71; Decl. Reese, Ex. 1.) And, as Plaintiffs set forth above, the Settlement represents an excellent result for the Class Members.

(*See supra* Part V.) For all of these reasons, adequacy is met. *See DeBoer*, 64 F.3d at 1175.

B. The Class satisfies Rule 23(b)(3) of the Federal Rules of Civil Procedure

"To qualify for certification under Rule 23(b)(3), a class must meet two requirements beyond the Rule 23(a) prerequisites: Common questions must 'predominate over any questions affecting only individual members'; and class resolution must be 'superior to other available methods for the fair and efficient adjudication of the controversy.'" *Amchem Prods., Inc.*, 521 U.S. at 615.[6] Here, the Class satisfies both requirements.

"The predominance requirement tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." (Order 25–26, Oct. 23, 2013, ECF No. 206 (citation and internal quotation marks omitted).) "Whether an issue predominates can only be determined after considering what value the resolution of the class-wide issue will have in each class member's underlying cause of action." *Klay v. Humana, Inc.*, 382 F.3d 1241, 1255 (11th Cir. 2004). "Common issues of fact and law predominate if they have a direct impact on every class member's effort to establish liability and on every class member's entitlement to injunctive and monetary relief." *Id.*

In certifying a litigation class, the Court held, after thorough analysis of the Parties' arguments and the record before it, that predominance was met. (Order 25–32, Oct. 23, 2013, ECF No. 206.) Critically, the Court held "there can be little doubt that whether the challenged policy [of indiscriminately ordering drive-by property inspections] constitutes a RICO and/or a UCL violation can be established by common evidence and requires no examination of the individual circumstances of each class member." (*Id.* at 28 (citations omitted).) Thus, common

[6] "When a class is being certified for settlement, the Court need only analyze the predominance of common questions of law and the superiority of class action for fairly and effectively resolving the controversy; it need not examine Rule 23(b)(3)(A-D) manageability issues, because it will not be managing a class action trial." *Uponor I*, 2012 WL 2512750, at *5 (citations omitted).

questions related to the challenged policy at the core of this case predominate over any individual questions. *See Klay*, 382 F.3d at 1257 ("[C]orporate policies . . . constitute the very heart of the plaintiffs' RICO claims here, and would necessarily have to be re-proven by every plaintiff if each [plaintiff's] claims were tried separately.").

A class action is also the superior method for resolving Plaintiffs' claims. The prosecution of separate actions by individual Class Members would create a risk of inconsistent or varying adjudications, which would establish incompatible standards of conduct for Wells Fargo and would lead to repetitive trials of the predominant common questions of fact and law. Further, absent a class action, Class Members would be left to bring individual claims for damages amounts that often would be too small to provide an economic justification for individually bringing suit, in light of the costs of litigation. Consequently, the superiority requirement is satisfied. *Kelly*, 277 F.R.D. at 569.

For the preceding reasons, the Class satisfies Rules 23(a) and (b)(3), and the Court should finally certify the Class for settlement purposes only, affirming Plaintiffs as representatives of the Class and Scott+Scott, Attorneys at Law, LLP, and Reese LLP as Co-Lead Class Counsel.

VIII. THE SETTLEMENT NOTICE SATISFIES FEDERAL RULE OF CIVIL PROCEDURE 23 AND DUE PROCESS

A. The distribution and timing of the notice satisfy Federal Rule of Civil Procedure 23 and the United States Constitution

The threshold requirement concerning class notice is whether the means employed to distribute the notice were reasonably calculated to apprise the class of the pendency of the action, of the proposed settlement, and of the class members' right to opt out or object. *Petrovic*, 200 F.3d at 1153 ("The Supreme Court has found that the notice must be 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford

them an opportunity to present their objections.'" (citing and quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950))); Fed. R. Civ. P. 23(e) ("The court must direct notice in a reasonable manner to all class members who would be bound by the [proposed judgment]."). Because Plaintiffs seek final certification of the Class under Rule 23(b)(3), the notice must be the "best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R Civ. P. 23(c)(2)(B); *see also Mullane*, 339 U.S. at 315; *Petrovic*, 200 F.3d at 1152–53; *DeBoer*, 64 F.3d at 1176. The due process requirements of the United States Constitution may be satisfied by sending a copy of the notice by first class mail to each class member whose address can be located with reasonable effort, along with publication notice. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173–77 (1974); *Mullane*, 339 U.S. at 314, 318.

Dissemination of class notice based on Wells Fargo's customer data, plus national publication and Internet websites amply satisfy the procedural requirements for class notice under Rules 23(c)(2) and (e), as well as the constitutional requirements. In accordance with the Court's Order granting preliminary approval, beginning on October 16, 2015, Plaintiffs' Counsel, through the Court-appointed Claims Administrator, Garden City Group, LLC ("GCG"), notified potential Class Members of the Settlement by mailing a copy of the Postcard Notice to potential Class Members. (*See* Keough Decl. ¶ 10.) During the course of discovery, Plaintiffs' Counsel obtained from Wells Fargo a list of over 2.7 million borrowers potentially impacted by the wrongful conduct at issue in this action. (Clark-Weintraub Decl. ¶ 51.) Plaintiffs' Counsel forwarded this list to GCG. (Keough Decl. ¶ 5.) As of the date of this filing, GCG has disseminated a total of 2,713,463 Postcard Notices (including re-mailings) to potential Class Members and has mailed 18,623 Notice Packets containing the long-form Notice and Proof of

Claim form in response to Class Member inquiries. (*See id.* at ¶¶ 10, 12.)

In addition to the Postcard Notice, GCG published the Summary Notice in The Wall Street Journal and transmitted it over the *PR Newswire* on October 22, 2015, as the preliminary approval Order required. (Keough Decl. ¶ 11.) GCG also set up and maintained a toll-free number and a Settlement Website that includes copies of the Notice, the Stipulation, the Proof of Claim form, Plaintiffs' brief and supporting declaration in support of final approval, and Plaintiffs' Counsel's application for an award of attorneys' fees and reimbursement of litigation expenses and for service awards for the Class Representatives. (*See id.* at ¶ 13.)

Timing of the notice was also sound. Class Members have approximately 140 days following publication of the class notice to submit claims (*see* Order Preliminarily Approving Settlement ¶ 9(a), ECF No. 245) and approximately 60 days following publication of the class notice to determine whether to object or opt out of the Settlement (*see id.* at ¶¶ 5, 10, 11). These periods are longer than those deemed adequate in other class action settlements. *Grunin*, 513 F.2d at 121 (19 days between notice mailings and settlement hearing sufficient); *see also Miller v. Republic Nat. Life Ins. Co.*, 559 F.2d 426, 430 (5th Cir. 1977) (four weeks); *Greenspun v. Bogan*, 492 F.2d 375, 378 (1st Cir. 1974) (four weeks); *United Founders Life Ins. Co. v. Consumers Nat. Life Ins. Co.*, 447 F.2d 647, 652 (7th Cir. 1971) (24 days).

B. The content of the notice and the opportunity to opt out satisfy Federal Rule of Civil Procedure 23 and the United States Constitution

"As a general rule, the contents of a settlement notice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with (the) proceedings." *Grunin*, 513 F.2d at 122 (citations and quotation marks omitted). "Under [Rule 23(e)], the district court directs the form of the notice of settlement, and the notice need only satisfy the broad reasonableness standards imposed by due

process." *Petrovic*, 200 F.3d at 1153 (citing *Grunin* 513 F.2d at 121) (quotation marks omitted); *see also DeBoer*, 64 F.3d at 1176 (class notice need only be "reasonable enough to satisfy due process"); *Van Horn*, 840 F.2d at 606 ("Class members need be given only the opportunity to object."). Due process is satisfied where non-resident class members receive notice, an opportunity to be heard and to participate in the litigation, and an opportunity to opt out of the class. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985). "[T]he notice may consist of a very general description of the proposed settlement, including a summary of the monetary or other benefits that the class would receive and an estimation of attorneys' fees and other expenses." *Grunin*, 513 F.2d at 122 (citation omitted). Here, the Settlement notice more than satisfies these standards.

As Plaintiffs set forth above, GCG notified Class Members of the Action and the Settlement through methods including: (i) direct mailing of Postcard Notices to over 2.7 million potential Class Members, based on Wells Fargo's records; (ii) written publication of the Summary Notice in nationwide publications The Wall Street Journal and *PR Newswire*; (iii) a Settlement Website located at http://www.wellsfargopropertyinspectionsettlement.com/.

The Postcard Notices contain a summary of the Action and the Settlement and informed Class Members (i) whether they will receive an automatic payment (Active and Paid-in-Full loans) or must file a claim to participate (Post-Sale Loans); (ii) of their right to object to the proposed Settlement and the date by which they must do so; (iii) of their right to exclude themselves if they do not want to be bound by the proposed Settlement and the date by which they must do so; and (iv) that any judgment, whether favorable or not, will bind all Class Members who do not request exclusion. (*See* Keough Decl., Ex. A.) They also direct recipients to the dedicated Settlement Website, where additional information with respect to the Action is

posted, including the more detailed long-form notice. (*See id.* at ¶ 13.)

The long-form notice consists of a description of the terms of the Settlement (including notice of the opportunity to opt out or object, a short and plain statement of the background of the action, a full explanation of the Plan of Allocation, an explanation of the reasons for the Settlement, and notice of the amount of Plaintiffs' Counsel's attorneys' fees and expenses to be submitted for approval by the Court). (*See generally* Stip. Settlement, Ex. A-1, ECF No. 243-5.) The notice advises Class Members that they will be bound by the judgment and orders of the Court if they do not request exclusion by December 22, 2015, and that any Class Member may enter an appearance. (*See id.*) The notice also advises that the Court will conduct a Settlement Fairness Hearing on January 21, 2016, at 10:00 a.m., at which time Class Members may be heard. (*See id.*) The notice also states the nature of the pending litigation and the terms of the Settlement. (*See id.*) If there are any remaining questions, the notice contains a toll-free telephone number for GCG. (*See id.*)

The content of the notice thus goes far beyond the "reasonable summary" information required by Rule 23(e). *Petrovic*, 200 F.3d at 1153. Unquestionably, the Class notice was adequate, comprehensive, and timely, and it provides Class Members with sufficient information to make an informed and intelligent decision with respect to whether to participate in the Settlement.

IX. CONCLUSION

For all of the reasons given above, following the January 21, 2016, Settlement Fairness Hearing, the Court should grant final approval to the Settlement and enter Final Judgment.

Date: December 8, 2015

Respectfully submitted,

/s/ *Deborah Clark-Weintraub*
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CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2015, the foregoing document was filed with the Clerk of the Court via the Court's CM/ECF electronic filing system and served on all counsel of record registered to receive electronic notice. Those not registered to receive electronic notice were served via regular first class mail.

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