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FOR COURT USE ONLY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF Santa Clara
STREET ADDRESS: 191 N. First St.
MAILING ADDRESS: 191 N. First St.
CITY AND ZIP CODE: San Jose, CA 95113
BRANCH NAME: Downtown Superior Court, Department 3

PLAINTIFF/PETITIONER: Larry Wallace
DEFENDANT/RESPONDENT: Wells Fargo & Company, et al.

NOTICE OF ENTRY OF JUDGMENT OR ORDER

CASE NUMBER:
17CV317775

(Check one): [x] **UNLIMITED CASE** (Amount demanded exceeded $25,000) [ ] **LIMITED CASE** (Amount demanded was $25,000 or less)

TO ALL PARTIES :

1. A judgment, decree, or order was entered in this action on *(date)*: November 29, 2021

2. A copy of the judgment, decree, or order is attached to this notice.

Date: November 29, 2021

Annick M. Persinger
(TYPE OR PRINT NAME [x] ATTORNEY [ ] PARTY WITHOUT ATTORNEY)


(SIGNATURE)

Form Approved for Optional Use
Judicial Council of California
CIV-130 [New January 1, 2010]

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

LARRY WALLACE, individually and on behalf of himself and all others similarly situated, Plaintiff, vs. WELLS FARGO & CO. and WELLS FARGO BANK, N.A., Defendants.	Case No. 17CV317775 **AMENDED ORDER RE: MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT; AMENDED JUDGMENT**

The above-entitled matter came on for hearing on Wednesday, November 17, 2021, at 1:30 p.m. in Department 3, the Honorable Patricia M. Lucas presiding. The court reviewed and considered the written submissions filed by the parties and issued a tentative ruling on Tuesday, November 16, 2021. Although no party contested the tentative ruling, counsel did appear at the hearing and requested that the court change the tentative ruling. The court orders as follows:

I. INTRODUCTION

This is a putative class action. According to the allegations of the Complaint, filed on October 19, 2017, defendant Wells Fargo Bank, N.A. ("Defendant") promises its customers who do not opt into its Overdraft Service that it will not authorize or charge overdraft fees on non-recurring debit card transactions. (Complaint, ¶ 1.) However, Defendant authorizes and charges

overdraft fees on Uber and Lyft and other one-time transactions that it knows or should know are not recurring. (*Ibid.*) The Complaint sets forth the following causes of action: (1) Declaratory Relief for Permanent Injunction; (2) Breach of Contract; (3) Violation of the Consumers Legal Remedies Act, Cal. Civ. Code § 1750; (4) Violation of the California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200; and (5) Fraud Pursuant to California Code of Civil Procedure Section 1281.2.

The parties have reached a settlement. On July 15, 2021, the court granted preliminary approval of the settlement, subject to modification of the class notices. The court approved the amended class notices on July 28, 2021. Plaintiff Larry Wallace ("Plaintiff") now moves for final approval of the settlement.

II. LEGAL STANDARD

Generally, "questions whether a settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion." (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 234-235 (*Wershba*), citing *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794 (*Dunk*).)

> In determining whether a class settlement is fair, adequate and reasonable, the trial court should consider relevant factors, such as "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement."

(*Wershba*, *supra*, 91 Cal.App.4th at pp. 244-245, citing *Dunk*, *supra*, 48 Cal.App.4th at p. 1801 and *Officers for Justice v. Civil Service Com'n, etc.* (9th Cir. 1982) 688 F.2d 615, 624 (*Officers*).)

"The list of factors is not exclusive and the court is free to engage in a balancing and weighing of factors depending on the circumstances of each case." (*Wershba*, *supra*, 91 Cal.App.4th at p. 245.) The court must examine the "proposed settlement agreement to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a

whole, is fair, reasonable and adequate to all concerned." (*Ibid.*, quoting *Dunk*, *supra*, 48 Cal.App.4th at p. 1801 and *Officers*, *supra*, 688 F.2d at p. 625, internal quotation marks omitted.)

> The burden is on the proponent of the settlement to show that it is fair and reasonable. However "a presumption of fairness exists 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 objectors is small."

(*Wershba*, *supra*, 91 Cal.App.4th at p. 245, citing *Dunk*, *supra*, 48 Cal.App.4th at p. 1802.)

III. DISCUSSION

The case has been settled on behalf of the following class:

> [A]ll present and former holders of Demand Deposit Accounts with Wells Fargo who were not opted into Wells Fargo's Debit Card Overdraft Service at the end of a month in which they were charged an overdraft fee by Wells Fargo for a debit card transaction with Uber or Lyft during the Class Period. Excluded from the Class are the Judge presiding over this Action and the Court staff.

As discussed in connection with the motion for preliminary approval, Defendant will pay a maximum non-reversionary amount of $10,536,098. Plaintiff asserted that the settlement payment includes attorney fees of $3,511,681 (33.33 percent of the settlement fund), costs estimated to be $19,271, a service award of $10,000 for the class representative, and settlement administration costs estimated to be $327,126.[1]

Checks will be mailed in two distributions. Funds remaining after payments are made in the first distribution to satisfy service awards, fee awards, and administration expenses, as well as settlement shares, will be distributed evenly to settlement class members who cashed the first check sent to them. Checks from the second distribution that are not cashed for 90 days from the date of issuance will be distributed to Center for Responsible Lending.

On August 29, 2021, a dedicated website was established for the settlement at which class members can obtain detailed information about the case and review key documents, including the long form notice, postcard notice, settlement agreement, complaint, motion for preliminary approval, and unopposed fee application and service award application.

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[1] Plaintiff advised the court in connection with the approval of the amended class notices that the estimated settlement administration expenses increased from the original estimate of $267,763 due to the need to use a larger size postcard to include all the required information and the notices were updated to reflect that the estimate for settlement administration is $327,126.

(Declaration of Cameron R. Azari, Esq. Regarding Implementation and Adequacy of Settlement Notice Program ("Azari Dec."), ¶ 19.) As of October 18, 2021, there were 2,639 visitors to the website and 4,428 website pages presented. (*Ibid.*)

On August 30, 2021, a toll-free telephone number was established to allow class members to call for additional information in English or Spanish, listen to answers to frequently asked questions, and request that a long form notice be mailed to them. (Azari Dec., ¶ 20.) As of October 18, 2021, the telephone number handled 345 calls, representing 1,207 minutes of use, and the settlement administrator mailed 30 long form notices as a result of requests made via the telephone number. (*Ibid.*)

Also, on August 30, 2021, individual postcard notices were mailed to 177,817 class members. (Azari Dec., ¶ 14.) As of November 10, 2021, 169,404 of those class members successfully received notice. (Supplemental Declaration of Cameron R. Azari, Esq. Regarding Implementation and Adequacy of Settlement Notice Program ("Supp. Azari Dec."), ¶ 10.) The settlement administrator had not received any objections or requests for exclusion as of November 10, 2021. (*Id.* at ¶ 14.)

Counsel's expectation is that each class member who does not request exclusion will receive a check for just over $35. (Declaration of Annick M. Persinger in Support of Unopposed Fee Application and Service Award Application ("Persinger Dec."), ¶ 32.)

The court previously found that the proposed settlement generally is fair and the court continues to make that finding for purposes of final approval.

Plaintiff requests an incentive award of $10,000.

> The rationale for making enhancement or incentive awards to named plaintiffs is that they should be compensated for the expense or risk they have incurred in conferring a benefit on other members of the class. An incentive award is appropriate if it is necessary to induce an individual to participate in the suit. Criteria courts may consider in determining whether to make an incentive award include: 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation. These "incentive awards" to class representatives must not be disproportionate to the amount of time and energy expended in pursuit of the lawsuit.

(*Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1394-1395, quotation marks, brackets, ellipses, and citations omitted.)

The class representative has submitted a declaration in which he states that he searched for and provided documents to class counsel, discussed the case with class counsel, and reviewed documents filed in the case. (Declaration of Larry Wallace in Support of Plaintiff's Motion for Attorneys' Fees, Costs, and Service Award, ¶¶ 4-7.) Plaintiff did not provide an estimate of the time spent on these activities. The court finds that Plaintiff's efforts in the case resulted in a benefit to the class. However, based on the information provided, the requested amount is too high. Accordingly, the court approves the service award in the amount of $7,500.

The court also has an independent right and responsibility to review the requested attorney fees and only award so much as it determines reasonable. (See *Garabedian v. Los Angeles Cellular Telephone Co.* (2004) 118 Cal.App.4th 123, 127-128.) In this case, five law firms represented Plaintiff: Kaliel Gold ("KG"); the Kick Law Firm ("Kick"); Kopelowitz Ostrow Ferguson Weiselberg Gilbert ("KO"), McCune-Wright-Arevalo ("McCune"); and Tycko & Zavereei LLP ("T&Z"). Plaintiff's counsel seek a fee of $3,511,681 (approximately 1/3 of the total settlement fund) for both attorney fees and costs. Plaintiff's counsel state that they have elected to forego seeking a separate award for costs. Plaintiff's counsel provide evidence of incurred costs in the amount of $11,119.56. (Persinger Dec., ¶¶ 91 & 93; Declaration of Jonathan M. Streisfeld in Support of Fee Application and Service Award Application ("Streisfeld Dec."), ¶ 49.)

Plaintiff's counsel provide evidence demonstrating a total lodestar of $811,575.20, based on 1,224.25 hours spent on the case by 19 attorneys and 12 paralegals in these five law firms, with billing rates of $208-$919 per hour. (Persinger Dec., ¶¶ 76-78 & 80-84, concerning T&Z; Streisfeld Dec., ¶ 43, concerning KO; Declaration of Jeffrey D. Kaliel in Support of Plaintiff's Unopposed Application for Fees and Application for Service Award ("Kaliel Dec."), ¶¶ 8-9, concerning KG; Declaration of Taras Kick in Support of Plaintiff's Unopposed Application for Fees and Application for Service Award ("Kick Dec."), ¶¶ 8-10, concerning Kick.)

Plaintiff's request results in a multiplier of 4.35, which is beyond the range that courts typically approve. (See *Laffitte v. Robert Half Intern. Inc*. (Cal. 2016) 1 Cal.5th 480, 488, 503–504 (*Laffitte*) [trial court did not abuse its discretion in approving fee award of 1/3 of the common fund, cross-checked against a lodestar resulting in a multiplier of 2.03 to 2.13]; *Wershba, supra*, 91 Cal.App.4th at p. 255 ["[m]ultipliers can range from 2 to 4 or even higher"]; *Vizcaino v. Microsoft Corp*. (9th Cir. 2002) 290 F.3d 1043, 1051, fn. 6 [stating that multipliers ranging from one to four are typical in common fund cases and citing the court's own survey of large settlements finding "a range of 0.6–19.6, with most (20 of 24, or 83%) from 1.0–4.0 and a bare majority (13 of 24, or 54%) in the 1.5–3.0 range"].)

"While the percentage method has been generally approved in common fund cases, courts have sought to ensure the percentage fee is reasonable by refining the choice of a percentage or by checking the percentage result against a lodestar-multiplier calculation." (*Laffitte, supra*, 1 Cal.5th at pp. 494–495.) Applying the latter approach:

> "…the percentage-based fee will typically be larger than the lodestar-based fee. Assuming that one expects rough parity between the results of the percentage method and the lodestar method, the difference between the two computed fees will be attributable solely to a multiplier that has yet to be applied. Stated another way, the ratio of the percentage-based fee to the lodestar-based fee implies a multiplier, and that implied multiplier can be evaluated for reasonableness. If the implied multiplier is reasonable, then the cross-check confirms the reasonableness of the percentage-based fee; if the implied multiplier is unreasonable, the court should revisit its assumptions."

(*Laffitte, supra*, 1 Cal.5th at p. 496, quoting Walker & Horwich, The Ethical Imperative of a Lodestar Cross-check: Judicial Misgivings About "Reasonable Percentage" Fees in Common Fund Cases (2005) 18 Geo. J. Legal Ethics 1453, 1463.) As described by the Supreme Court of California, "[i]f the multiplier calculated by means of a lodestar cross-check is extraordinarily high or low, the trial court should consider whether the percentage used should be adjusted so as to bring the imputed multiplier within a justifiable range, but the court is not necessarily required to make such an adjustment." (*Laffitte, supra*, 1 Cal.5th at p. 505.)

The court is mindful of the work, the risks, and the results, as framed in counsel's declarations. While the contingent nature of counsel's representation and the results obtained justify the application of a reasonable multiplier (see *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1132 (*Ketchum*) [lodestar may be adjusted by the court based on factors including the contingent

nature of the fee award]; *Lealao v. Beneficial California, Inc*. (2000) 82 Cal.App.4th 19, 45 [California and federal courts often use the amount at stake and the result obtained by counsel as relevant factors justifying enhancement of a lodestar fee through use of a multiplier]), the court finds that a downward adjustment to counsel's requested fee award is appropriate.

Here, an excessively high multiplier would exacerbate certain concerns about the lodestar, apparent on study of counsel's declarations. A large number of lawyers, working at several different firms, contributed to the lodestar. Whenever there is a team as large as 31 professionals, there is a risk of inefficiency, which is aggravated when the team includes not one or two but five firms. While counsel states the conclusion that "Plaintiff's counsel coordinated their work to avoid duplication of effort and assigned work to associates and paralegal personnel whenever possible and prudent to keep costs low" (Kaliel Dec., ¶ 11), large teams require time to be spent on coordination, and even the minimal information provided as to tasks performed shows that there was duplication.

A further concern about efficiency arises from the top-heavy staffing approach in which top billers performed the bulk of the work. A premise underlying very high billing rates is that efficiency can be preserved by having work performed by the competent person with the lowest billing rate. That approach is not reflected in the record evidence. More than 70% of the hours worked at T&Z were put in by the three top billers, for whose work an hourly rate of either $919 or $764 is sought. At KO, more than 80% of the hours worked are billed at the top rate of $919. Though the Kick firm accumulated fewer hours overall, 95% of them were are the top rate of $919.

Finally, some of the award sought is not supported by admissible evidence. No declaration is presented by an attorney or staff member my McCune concerning the work done by that firm; the evidence consists only of a hearsay reference in the Persinger Dec. at ¶ 80, that the declarant was "advised" that two partners, an associate, and two paralegals spent time on the case valued at $9, 084.10. It appears that the Kick firm did not follow the protocol adopted by the other firms of breaking out separately the value of work not yet performed. (Kick Dec. at ¶¶ 8-10.)

Taking the lodestar as given but balancing the stated concerns with the evidence concerning the contingency risk, the nature of the work, and the benefit to individual class members, the court adopts a multiplier of 3.25 and finds a fee award of $2,637,619.40 to be appropriate. The court approves counsel's request in that amount, with the remainder of the fees and the service award requested to be distributed to the class.

The settlement administration costs of $327,126 are also approved. (Azari Dec., ¶ 23.)

Accordingly, the motion for final approval of the class action settlement is GRANTED as modified above. The settlement agreement is incorporated herein, and the parties and the settlement administrator are directed to implement its terms. The class members are bound by the release therein.

Pursuant to Rule 3.769, subdivision (h), of the California Rules of Court, the court retains jurisdiction over the parties to enforce the terms of the Settlement Agreement, and the final Order and Judgment.

The court sets a compliance hearing for September 14, 2022, at 2:30 p.m. in Department 3. At least ten court days before the hearing, class counsel and the settlement administrator shall submit a summary accounting of the net settlement fund identifying distributions made as ordered herein, the number and value of any uncashed checks, amounts remitted to Defendant, the status of any unresolved issues, and any other matters appropriate to bring to the court's attention. Counsel may appear at the compliance hearing remotely.

Dated: November 24, 2021

Patricia M. Lucas
Judge of the Superior Court

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

LARRY WALLACE individually and on behalf of himself and all others similarly situated,

Plaintiff,

v.

WELLS FARGO & CO, and WELLS FARGO BANK, N.A.,

Defendant.

Case No. 17CV317775

PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Alameda, State of California. My business address is 1970 Broadway, Suite 1070, Oakland, CA 94612.

On November 29, 2021, I served true copies of the following document(s) via email on the recipients indicated below:

- Notice of Entry of Judgment or Order
- Amended Order and Amended Judgment Granting Final Approval of Class Action Settlement

On the interested parties in this action as follows:

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Attorneys for Defendants

EXECUTED this 29th day of November, 2021, in Oakland, California.

/s/ Connor S. Rowe
Connor S. Rowe