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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE WELLS FARGO & COMPANY
SHAREHOLD DERIVATIVE
LITIGATION

Lead Case No. 16-cv-05541-JST

This Document Relates To:

ALL ACTIONS

**ORDER GRANTING PRELIMINARY
APPROVAL OF DERIVATIVE
ACTION SETTLEMENT**

Re: ECF No. 270

United States District Court
Northern District of California

Before the Court is Plaintiffs’ unopposed motion for preliminary approval of a derivative action settlement. ECF No. 270. The Court will grant the motion.¹

I. BACKGROUND

A. Parties and Claims

This is a shareholder derivative action on behalf of nominal Defendant Wells Fargo & Co. against the company’s officers, directors, and senior management (“Individual Defendants”). Consolidated Amended Verified Stockholder Derivative Complaint (“Compl.”), ECF No. 83 ¶ 64. The substance of Plaintiffs’ claims is set forth in greater detail in the Court’s prior orders on Defendants’ motions to dismiss. *See* ECF No. 129 at 1-9; ECF No. 174 at 2-4. In short, Plaintiffs allege that, “[f]rom at least January 1, 2011 to the present (‘the Relevant Period’), Defendants knew or consciously disregarded that Wells Fargo employees were illicitly creating millions of deposit and credit card accounts for their customers, without those customers’ knowledge or consent.” Compl. ¶ 1. Plaintiffs seek to hold Individual Defendants accountable for these failures under various securities laws and common-law duties.

¹ Pursuant to Federal Rule of Civil Procedure 78(b) and Civil Local Rule 7-1(b), the Court finds this matter suitable for disposition without oral argument.

1 **B. Procedural History**

2 Based on these Improper Sales Practices² and alleged oversight failures, several entities
3 filed shareholder derivative complaints in this district, which have since been consolidated into a
4 single action. ECF Nos. 39, 70, 219. The Court appointed Fire & Police Pension Association of
5 Colorado and City of Birmingham Retirement & Relief System as Co-Lead Plaintiffs and Lieff
6 Cabraser Heimann & Bernstein and Saxena White as Co-Lead Counsel. ECF No. 70. Plaintiffs
7 then filed a consolidated amended complaint on February 24, 2017. ECF No. 83.

8 On March 17, 2017, Wells Fargo filed a motion to dismiss for failure to plead demand
9 futility, in which the Individual Defendants joined. ECF Nos. 99, 100, 101, 102, 107, 108, 110.
10 The Court largely denied the motion. ECF No. 129.

11 Various Individual Defendants proceeded to file a series of motions to dismiss for failure
12 to state a claim. ECF Nos. 139, 140, 141, 143, 144, 145. On October 4, 2017, the Court denied
13 the motions in large part. ECF No. 174.

14 After an initial unsuccessful round of three mediation sessions, the parties resumed
15 intensive negotiations in September 2018. ECF No. 270 at 16. The parties engaged in four day-
16 long sessions under the supervision of Judge Daniel Weinstein (Ret.) and Jed Melnick. ECF No.
17 270-3 ¶ 7. On December 12, 2018, the parties accepted Judge Weinstein’s mediator’s proposal,
18 which forms the basis for the proposed settlement agreement. *Id.* ¶ 12.

19 On February 28, 2019, Plaintiffs filed this motion for preliminary approval. ECF No. 270.
20 At the Court’s request, Plaintiffs provided supplemental briefing on the value of their claims on
21 April 2, 2019. ECF No. 272.

22 **C. Terms of the Settlement**

23 The proposed settlement agreement (“Settlement”) resolves the claims Plaintiffs have
24 asserted on behalf of Wells Fargo in this action. Settlement, ECF No. 270-1 at 1-36.

25 Pursuant to the Settlement, the Individual Defendants’ insurers will pay \$240 million to
26 Wells Fargo. Settlement ¶ V(33). The Settlement also identifies additional Wells Fargo reform

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28 ² Consistent with Plaintiffs’ motion and the parties’ settlement agreement, the Court refers to
Wells Fargo’s illicit account creation as the “Improper Sales Practices.”

1 actions that are purportedly attributable in part to Plaintiffs' pursuit of this action. First, after this
2 suit was filed, Wells Fargo's board clawed back \$122.5 million from certain Individual
3 Defendants through "stock grant forfeitures, reduced compensation, and return of incentive
4 compensation." *Id.* ¶ V(1); *see also* ECF No. 270-1 at 47-48. The parties agree that Plaintiffs'
5 suit was a "significant factor in the determination to undertake [these] actions, and that these
6 remedial actions conferred a value to Wells Fargo of \$60 million." ECF No. 270-1 at 48. Second,
7 the Settlement points to "Corporate Governance Reforms," meaning "the corporate actions
8 undertaken by Wells Fargo to address Improper Sales Practices including, but not limited to,
9 amending certain corporate charters and bylaws, increasing oversight and monitoring of business
10 units, leadership changes, the creation of positions, and the increased reporting from business
11 units." Settlement ¶ V(5); *see also* ECF No. 270-1 at 40-44. The parties note that Plaintiffs
12 proposed "certain of these corporate governance reforms" and "agree and acknowledge that these
13 reforms have conferred significant benefits to Wells Fargo," of which \$20 million can be
14 attributed to Plaintiffs. ECF No. 270-1 at 44.

15 In exchange, Plaintiffs agree to release the following claims on behalf of themselves, Wells
16 Fargo, and its shareholders:

17 [A]ny and all manner of claims, demands, rights, liabilities, losses,
18 obligations, duties, damages, costs, debts, expenses, interest,
19 penalties, sanctions, fees, attorneys' fees, actions, potential actions,
20 causes of action, suits, agreements, judgments, decrees, matters,
21 issues and controversies of any kind, nature or description
22 whatsoever, whether known or unknown, disclosed or undisclosed,
23 accrued or unaccrued, apparent or not apparent, foreseen or
24 unforeseen, matured or not matured, suspected or unsuspected,
25 liquidated or not liquidated, fixed or contingent, including Unknown
26 Claims, whether based on state, local, foreign, federal, statutory,
27 regulatory, common or other law or rule, brought or that could be
28 brought derivatively or otherwise by or on behalf of Wells Fargo
against any of the Released Parties, which now or hereafter are based
upon, arise out of, relate in any way to, or involve, directly or
indirectly, any of the actions, transactions, occurrences, statements,
representations, misrepresentations, omissions, allegations, facts,
practices, events, claims or any other matters, things or causes
whatsoever, or any series thereof, that are, were, could have been, or
in the future can or might be alleged, asserted, set forth, claimed,
embraced, involved or referred to in the Derivative Action and relate
to, directly or indirectly, the subject matter of the Derivative Action
in any court, tribunal, forum or proceeding, including, without
limitation, any and all claims by or on behalf of Wells Fargo which

1 are based upon, arise out of, relate in any way to, or involve, directly
 2 or indirectly: (i) Improper Sales Practices; or (ii) any of the allegations
 3 in any complaint or amendment(s) thereto filed in (x) the Derivative
 Action or (y) any Action described above in Section II.C, with the
 exception, as described above, of the CPI Allegations in the
Connecticut Laborers Action.

4 Settlement ¶ V(26).³ The “Released Parties” consist of the Individual Defendants, Wells Fargo,
 5 American Express, and various other “Related Parties.” *Id.* ¶¶ V(25), (27). The Settlement does
 6 not, however, release (1) claims to enforce the agreement, (2) direct claims asserted on behalf of
 7 present or former Wells Fargo shareholders at issue in *Hefler v. Wells Fargo & Co.*, No. 16-cv-
 8 05479-JST (N.D. Cal.),⁴ or (3) certain claims that “the Individual Defendants or Wells Fargo may
 9 have against any of the Insurers.” *Id.* ¶ V(26).

10 In addition, the parties separately negotiated Wells Fargo’s payment of attorney’s fees to
 11 Co-Lead Counsel. *Id.* ¶ (V)(44). Wells Fargo has agreed not to oppose Plaintiffs’ request for
 12 attorney’s fees and costs of up to \$68 million. *Id.* Plaintiffs also intend to seek \$25,000 service
 13 awards for each Co-Lead Plaintiff, to be paid from the fee award. *Id.*

14 The parties propose the following notice plan to inform shareholders of the proposed
 15 settlement. Wells Fargo will (1) publish the Summary Notice in the *Wall Street Journal*, *New*
 16 *York Times*, *Los Angeles Times*, and *Investor Business Daily*; (2) publish a Current Report on
 17 Form 8-K with the Securities and Exchange Commission (“SEC”); and (3) make the Settlement
 18 and Notice available on the “Investor Relations” page of its website, <http://www.wellsfargo.com>.
 19 *Id.* ¶ V(35). The Summary Notice will identify the specific address for that portion of Wells
 20 Fargo’s website, as well as a hotline number that persons may call to request a copy of the full
 21 Notice by mail. *Id.* In addition, Co-Lead Counsel will publish the Summary Notice via a national
 22 wire service and create an additional website (to be identified in the Summary Notice) where the
 23 Settlement and Notice will be made available. *Id.*

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 26 ³ As explained in the Settlement, the *Connecticut Laborers Action* includes additional allegations
 27 regarding Wells Fargo’s implementation of certain collateral protection insurance (“CPI”) programs. Settlement ¶ II(5).

28 ⁴ The Court previously approved a Rule 23 class action settlement in the *Hefler* case. See *Hefler*, ECF Nos. 252-255. An objector has appealed the settlement. *Id.*, ECF No. 260.

1 **II. LEGAL STANDARD**

2 Pursuant to Federal Rule of Civil Procedure 23.1, “[a] derivative action may be settled,
3 voluntarily dismissed, or compromised only with the court’s approval.” Fed. R. Civ. P. 23.1(c).
4 Rule 23, in turn, “governs a district court’s analysis of the fairness of a settlement of a shareholder
5 derivative action.” *In re Hewlett-Packard Co. S’holder Derivative Litig.*, No. 3:12-CV-06003-
6 CRB, 2015 WL 1153864, at *3 (N.D. Cal. Mar. 13, 2015); *see also In re Cadence Design Sys.,*
7 *Inc. Sec. Litig.*, No. 08-4966 SC, 2011 WL 13156644, at *2 (N.D. Cal. Aug. 26, 2011) (“Within
8 the Ninth Circuit, Rule 23’s requirements for approval of class action settlements apply to
9 proposed settlements of derivative actions.” (citing *In re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 377
10 (9th Cir. 1995)). Accordingly, “[c]ourts considering settlements of derivative actions have
11 generally found ‘[c]ases involving dismissal or compromise under Rule 23(e) of nonderivative
12 cases . . . relevant by analogy.’ *Lloyd v. Gupta*, No. 15-CV-04183-MEJ, 2016 WL 3951652, at *4
13 (N.D. Cal. July 22, 2016) (second and third alterations in original) (quoting 7C Charles A. Wright
14 & Arthur R. Miller, *Federal Practice and Procedure* § 1839 (3d ed. 2007)). The Ninth Circuit
15 maintains a “strong judicial policy” that favors the settlement of class actions. *Class Plaintiffs v.*
16 *City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992).

17 Rule 23 requires courts to employ a two-step process in evaluating a class action or
18 derivative action settlement. First, the parties must show “that the court will likely be able to . . .
19 (i) approve the proposal under Rule 23(e)(2).” Fed. R. Civ. P. 23(e)(1)(B). In other words, a court
20 must make a preliminary determination that the settlement “is fair, reasonable, and adequate”
21 when considering the factors set out in Rule 23(e)(2). Fed. R. Civ. P. 23(e)(2). The court’s task at
22 the preliminary approval stage is to determine whether the settlement falls “within the range of
23 possible approval.” *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007)
24 (citation omitted). “The initial decision to approve or reject a settlement proposal is committed to
25 the sound discretion of the trial judge.” *City of Seattle*, 955 F.2d at 1276 (citation omitted).

26 Second, if the court preliminarily approves a derivative action settlement, notice “must be
27 given to shareholders or members in the manner that the court orders.” Fed. R. Civ. P. 23.1(c).
28 The court must then hold a hearing to make a final determination whether the settlement is “fair,

1 reasonable, and adequate.” Fed. R. Civ. P. 23(e)(2).

2 Within this framework, preliminary approval of a settlement is appropriate if “the proposed
3 settlement appears to be the product of serious, informed, non-collusive negotiations, has no
4 obvious deficiencies, does not improperly grant preferential treatment to class representatives or
5 segments of the class, and falls within the range of possible approval.” *In re Tableware*, 484 F.
6 Supp. 2d at 1079 (citation omitted). The proposed settlement need not be ideal, but it must be fair
7 and free of collusion, consistent with counsel’s fiduciary obligations to the class. *Hanlon v.*
8 *Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998) (“Settlement is the offspring of compromise;
9 the question we address is not whether the final product could be prettier, smarter or snazzier, but
10 whether it is fair, adequate and free from collusion.”). To assess a settlement proposal, courts
11 must balance a number of factors:

12 [T]he strength of the plaintiffs’ case; the risk, expense, complexity, and likely
13 duration of further litigation; the risk of maintaining class action status throughout
14 the trial; the amount offered in settlement; the extent of discovery completed and the
15 stage of the proceedings; the experience and views of counsel; the presence of a
16 governmental participant; and the reaction of the class members to the proposed
17 settlement.

18 *Id.* at 1026 (citations omitted).⁵ The proposed settlement must be “taken as a whole, rather than
19 the individual component parts,” in the examination for overall fairness. *Id.* Courts do not have
20 the ability to “delete, modify, or substitute certain provisions”; the settlement “must stand or fall in
21 its entirety.” *Id.* (citation omitted).

22 **III. ANALYSIS**

23 **A. Preliminary Settlement Approval**

24 **1. Procedural Concerns**

25 In the class action context, the Court must consider whether “the class representatives and
26 class counsel have adequately represented the class” and whether “the proposal was negotiated at

26 ⁵ These factors are substantially similar to those articulated in the 2018 amendments to Rule 23(e),
27 which were not intended “to displace any factor [developed under existing Circuit precedent], but
28 rather to focus the court and the lawyers on the core concerns of procedure and substance that
should guide the decision whether to approve the proposal.” *Hefler v. Wells Fargo & Co.*, No. 16-
cv-05479-JST, 2018 WL 6619983, at *4 (N.D. Cal. Dec. 18, 2018) (quoting Fed. R. Civ. P.
23(e)(2) advisory committee’s note to 2018 amendment).

1 arm’s length.” Fed. R. Civ. P. 23(e)(2)(A)-(B). As the Advisory Committee notes suggest, these
 2 are “matters that might be described as ‘procedural’ concerns, looking to the conduct of the
 3 litigation and of the negotiations leading up to the proposed settlement.” Fed. R. Civ. P.
 4 23(e)(2)(A)-(B) advisory committee’s note to 2018 amendment.

5 **a. Adequate Representation**

6 Like class representatives, “a stockholder who brings suit on a cause of action derived
 7 from the corporation . . . sues, not for himself alone, but as representative of a class comprising all
 8 who are similarly situated.” *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 549 (1949).

9 Here, Co-Lead Plaintiffs and their counsel have “prosecute[d] the action vigorously on
 10 behalf of the [shareholders].” *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir.
 11 2000). As detailed in their motion, not only did they prevail on two intensive rounds of motions to
 12 dismiss, but they also obtained stays of numerous related derivative actions pending in other
 13 courts. ECF No. 270 at 12-15; *see also* ECF No. 270-2 ¶¶ 11-14.

14 Prior to reaching the Settlement, the parties also engaged in extensive document discovery.
 15 Co-Lead Plaintiffs obtained hundreds of thousands of documents from Wells Fargo, the Individual
 16 Defendants, and non-parties. ECF No. 270-2 ¶ 15. Co-Lead Plaintiffs subjected over 332,000 of
 17 those documents to a multi-stage review and had begun preparing to depose over 40 fact
 18 witnesses, including all 20 Individual Defendants. *Id.* ¶¶ 16-19. Under these circumstances, the
 19 Court is satisfied that they possessed “sufficient information to make an informed decision about
 20 settlement.” *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d at 459 (citation omitted). Accordingly,
 21 this factor also weighs in favor of approval.

22 **b. Arm’s Length Negotiation**

23 The Settlement was the product of multiple sessions of arm’s length negotiations
 24 supervised by mediators Jed Melnick and former Judge Daniel Weinstein. ECF No. 270-3 ¶ 7.
 25 That the major terms of the Settlement came from Judge Weinstein’s proposal further supports the
 26 procedural fairness of the Settlement. *Id.* ¶ 12.

27 The Court therefore concludes that this factor weighs in favor of approval.
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United States District Court
Northern District of California

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2. Substantive Concerns

Rule 23(e)(2)(C) and (D) set forth factors for conducting “a ‘substantive’ review of the terms of the proposed settlement.” Fed. R. Civ. P. 23(e)(2)(C)-(D) advisory committee’s note to 2018 amendment. Most relevant to a shareholder derivative settlement, the Court examines, “the costs, risks, and delay of trial and appeal,” and “the terms of any proposed award of attorney’s fees, including timing of payment.” Fed. R. Civ. P. 23(e)(2)(C)(i), (iii).

a. Strength of Plaintiffs’ Case, Risk of Continuing Litigation, and Settlement Amount

Consistent with Rule 23’s instruction to consider “the costs, risks, and delay of trial and appeal,” Fed. R. Civ. P. 23(e)(2)(C)(i), courts in this circuit evaluate “the strength of the plaintiffs’ case; the risk, expense, complexity, and likely duration of further litigation,” *Hanlon*, 150 F.3d at 1026. In addition, though not articulated as a separate factor in Rule 23(e), “[t]he relief that the settlement is expected to provide to [the company] is a central concern.” Fed. R. Civ. P. 23(e)(2)(C)-(D) advisory committee’s note to 2018 amendment. To evaluate the adequacy of the settlement amount in light of the case’s risks, “courts primarily consider plaintiffs’ expected recovery balanced against the value of the settlement offer.” *In re Tableware*, 484 F. Supp. 2d at 1080. But “[i]t is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair.” *Officers for Justice*, 688 F.2d at 628.

Here, the risk, expense, complexity, and likely duration of further litigation weigh in favor of preliminary approval. While Plaintiffs have survived motions to dismiss on the threshold issue of demand futility, ECF No. 129, and on their ability to state a claim, ECF No. 174, significant obstacles remain to proving their case and prevailing at trial. For instance, as Plaintiffs highlight, their breach of fiduciary duty claims based on the Director Defendants’ “alleged failure adequately to oversee corporate activities is, ‘possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment.’” *In re Oracle Corp. Derivative Litig.*, No. C 10-3392 RS, 2011 WL 5444262, at *3 (N.D. Cal. Nov. 9, 2011) (quoting *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996)). More generally, courts have recognized

1 that it is often difficult for plaintiffs to prevail in derivative actions and on securities fraud claims.
2 *See, e.g., Hefler*, 2018 WL 6619983, at *13 (“Courts have recognized that, in general, securities
3 actions are highly complex and that securities class litigation is notably difficult and notoriously
4 uncertain.” (quoting *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 2018 WL 6168013, at
5 *15)); *In re Oclaro, Inc. Derivative Litig.*, No. C-11-3176 EMC, 2014 WL 4684993, at *2 (N.D.
6 Cal. Sept. 19, 2014) (“[A]s other courts have commented, it is generally difficult to prevail in a
7 derivative suit.”).

8 Moreover, not only would litigating this complex case on the merits have been a lengthy
9 and costly process, the lingering uncertainty would have hampered Wells Fargo’s efforts to move
10 past this series of scandals. These accumulating costs could significantly mitigate the value of a
11 judgment on the merits. *Cf. In re Apple Computer, Inc. Derivative Litig.*, No. C 06-4128 JF
12 (HRL), 2008 WL 4820784, at *2 (N.D. Cal. Nov. 5, 2008) (“The principal factor to be considered
13 in determining the fairness of a settlement concluding a shareholders’ derivative action is the
14 extent of the benefit to be derived from the proposed settlement by the corporation, the real party
15 in interest.” (quoting *Shlensky v. Dorsey*, 574 F.2d 131, 147 (3d Cir. 1978)).

16 Finally, without a settlement, Plaintiffs faced the prospect of additional or collateral
17 litigation with Individual Defendants’ insurers, further prolonging any resolution beneficial to
18 Wells Fargo. *See In re Galena Biopharma, Inc. Derivative Litig.*, No. 3:14-CV-00382-SI, 2016
19 WL 10840600, at *2 (D. Or. June 24, 2016) (noting that the individual defendants’ “insurers
20 dispute coverage and if the Action does not settle and continues to be litigated, there is a risk that
21 insurance coverage will be denied and an additional insurance coverage lawsuit may ensue”).

22 With those risks in mind, the Court considers the fractional recovery represented by the
23 Settlement amount. In supplemental briefing, Plaintiffs identify two categories of potential
24 monetary damages. ECF No. 272 at 2. First, Plaintiffs catalogue \$1.1 billion in out-of-pocket
25 costs incurred by Wells Fargo as a result of the Improper Sales Practices, including \$529 million
26 in civil and regulatory fines, penalties, and payments, as well as \$443 million in related
27 investigations and litigation. *Id.* at 3. Second, Plaintiffs estimate that Wells Fargo suffered
28 between \$1.4 billion and \$2.4 billion in lost income, due to both the Federal Reserve’s asset

1 growth restrictions and general lost business and reputational harm. *Id.* at 3-4. The Court is
2 persuaded that \$2.5 to \$3.5 billion represents a reasonable estimate of the value of Plaintiffs'
3 claims.

4 At a minimum, then, the Settlement's \$240 million insurer-funded payment represents a
5 6.9 percent recovery of the maximum \$3.5 billion value. At the other end of the spectrum,
6 crediting the full \$80 million value asserted for clawbacks and corporate governance reforms,
7 measured against the low-end \$2.5 billion liability estimate, the Settlement represents a 12.8
8 percent recovery.⁶

9 Pending any objection from shareholders and further information from the parties, the
10 Court withholds a definitive conclusion on what value to assign to the remedial actions taken by
11 Wells Fargo. The Court acknowledges that the parties agree that "facts alleged in the Derivative
12 Action were a significant factor" in the clawback decisions, ECF No. 270-1 at 48, and that Co-
13 Lead Plaintiffs proposed "certain of these corporate governance reforms," *id.* at 44. At the same
14 time, these conclusory assertions by parties to the Settlement do not eliminate "[o]ther causative
15 factors such as the [regulatory] investigation[s], the class action and public scrutiny," which were
16 clearly present here. *In re Oracle Sec. Litig.*, 852 F. Supp. 1437, 1447 (N.D. Cal. 1994); *see also*
17 *In re Oclaro*, 2014 WL 4684993, at *4 (discounting attorney's declaration representing company's
18 acknowledgment that suit was contributing factor because "[t]his hearsay testimony of a self-
19 interested declarant fails to prove those reforms were a proximate result of their derivative
20 lawsuits").

21 Nonetheless, the Court need not decide the issue now, because even setting aside these
22 secondary benefits, the insurer-funded payment alone puts the Settlement within the range of
23 possible approval. As Plaintiffs point out by rough analogy,⁷ their low-end recovery estimate

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25 ⁶ Plaintiffs also assert that the \$500 million in combined insurance policy limits for Individual
26 Defendants represents a practical ceiling on what they could recover at trial. ECF No. 272 at 4.
27 Given that the Court does not have a clear picture of the Individual Defendants' financial
28 resources – which would also be available to pay a potential judgment – the Court declines to
adopt the Plaintiffs' analysis. *Cf.* Compl. ¶ 476 (alleging that "while overseeing and encouraging
Wells Fargo's aggressive sales culture, [Defendants] Stumpf and Tolstedt together earned nearly
\$300 million").

1 exceeds “recoveries achieved in . . . securities fraud class actions of similar size (over \$1 billion in
 2 estimated damages), which settled for median recoveries of 2.5 percent between 2008 and 2016,
 3 and 3 percent in 2017.” *Hefler*, 2018 WL 6619983, at *8 (citing Cornerstone Research, Securities
 4 Class Action Settlements, 2017 Review and Analysis, at 8 (2018)); *see also* Cornerstone Research,
 5 Securities Class Action Settlements, 2018 Review and Analysis, at 6 (2019) (noting average 2
 6 percent recovery for 2018). The Court also takes into account the particular difficulties of
 7 establishing the larger category of lost income damages. *See* ECF No. 272 at 4. In light of the
 8 risks described above, the Court finds that the Settlement amount weighs in favor of preliminary
 9 approval.

10 **b. Terms of Attorney’s Fees**

11 “For more than two decades, the Ninth Circuit has set the ‘benchmark for an attorneys’ fee
 12 award in a successful class action [at] twenty-five percent of the entire common fund.’” *Rodman*
 13 *v. Safeway Inc.*, No. 11-CV-03003-JST, 2018 WL 4030558, at *3 (N.D. Cal. Aug. 23, 2018)
 14 (quoting *Williams v. MGM-Pathe Commc’ns Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997)).

15 The Court agrees with Plaintiffs’ implicit assumption that it is appropriate to measure Co-
 16 Lead Counsel’s fee award as a percentage of the total Settlement value, because the value of the
 17 Settlement will be conferred to Wells Fargo, while Wells Fargo will *pay* attorney’s fees.
 18 Settlement ¶¶ V(33), (44). In like circumstances, courts have recognized that the difference
 19 between those two amounts equals the actual value received by the company, much as a Rule 23
 20 class receives the value of a settlement minus attorney’s fees paid from a common fund. *See In re*
 21 *Atmel Corp. Derivative Litig.*, No. C 06-4592 JF (HRL), 2010 WL 9525643, at *12 (N.D. Cal.
 22 Mar. 31, 2010) (“The Agreement provides for a cash payment of \$9.65 million to Atmel and a
 23 payment of \$4.94 million in attorneys’ fees and costs. Because Atmel is responsible for paying the
 24 attorneys’ fees, the net payment to Atmel is \$4.71 million.”); *In re Apple Computer*, 2008 WL
 25 4820784, at *2 (similar analysis).

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 27
 28 ⁷ At least one other court in this district has found the comparison useful. *See In re Atmel Corp. Derivative Litig.*, No. C 06-4592 JF (HRL), 2010 WL 9525643, at *12 (N.D. Cal. Mar. 31, 2010) (comparing company’s “net cash recovery” to securities class action settlements).

1 Here, Co-Lead Counsel intend to request \$68 million in attorney's fees and costs, which
 2 represents 21.25 percent of the asserted \$320 million value of the Settlement. ECF No. 270 at 28-
 3 29. Even were the Court to consider only the \$240 million cash payment, the requested fee award
 4 would be approximately 28.33 percent of the Settlement. At the preliminary approval stage, this
 5 percentage range of attorney's fees does not weigh against approval.⁸

6 **c. Preferential Treatment**

7 The two Co-Lead Plaintiffs intend to seek a total of \$50,000 in service awards, or \$25,000
 8 each. Settlement ¶ V(45). The awards, if approved, will be paid from Co-Lead Counsel's
 9 attorney's fees. *Id.*

10 The Ninth Circuit has recognized that service awards to named plaintiffs in a class action
 11 are permissible and do not necessarily render a settlement unfair or unreasonable. *See, e.g.,*
 12 *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009). Derivative plaintiffs may
 13 likewise merit compensation "for work done on behalf of the [shareholders]." *Id.*; *see also In re*
 14 *Galena Biopharma*, 2016 WL 3457165, at *12 (approving incentive award to derivative action
 15 lead plaintiffs). The Court notes, however, that an average award of \$25,000 is five times the
 16 presumptively reasonable amount of \$5,000 for such awards. *See Smith v. Am. Greetings Corp.*,
 17 No. 14-CV-02577-JST, 2016 WL 362395, at *10 (N.D. Cal. Jan. 29, 2016) ("Several courts in this
 18 District have indicated that incentive payments of \$10,000 or \$25,000 are quite high and /or that,
 19 as a general matter, \$5,000 is a reasonable amount." (quoting *Harris v. Vector Marketing Corp.*,
 20 No. C-08-5198 EMC, 2012 WL 381202, at *7 (N.D. Cal. Feb. 6, 2012))).

21 The Court need not resolve the specific amount of the service award at this time as the
 22 matter will be conclusively determined at the final hearing. However, Co-Lead Plaintiffs should

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 24 _____
 25 ⁸ Plaintiffs' motion for attorney's fees is not yet before the Court. However, Co-Lead Counsel
 26 estimate that the award would represent a multiplier on counsel's lodestar of 3.32. ECF No. 270
 27 at 29. While Plaintiffs correctly note that this multiplier falls within the upper end of the range of
 28 multipliers commonly awarded in common fund cases, *see Vizcaino v. Microsoft Corp.*, 290 F.3d
 1043, 1051 & n.6 (9th Cir. 2002), Co-Lead Counsel should ensure that the motion for attorney's
 fees provides appropriate detail and documentation. The parties are also invited to consider this
 Court's recent opinion in a class action concerning the relationship between total recovery by the
 class and the appropriate percentage of that recovery to be allocated to attorney's fees. *Rodman*,
 2018 WL 4030558, at *4-5.

1 be mindful of addressing these issues and providing appropriate detail and documentation in
2 connection with their motion for service awards.

3 **d. Experience and Views of Counsel**

4 As the Court has previously noted, Co-Lead Counsel have “significant experience
5 obtaining favorable results as lead counsel in shareholder derivative litigation.” ECF No. 70 at 4.
6 That counsel advocate in favor of this Settlement weighs in favor of its approval.⁹

7 **3. Reaction of Shareholders to Proposed Settlement**

8 The Court will wait until the final approval hearing to determine shareholders’ reaction to
9 the Settlement.

10 **4. Presence of Obvious Deficiencies**

11 The Court has reviewed the Settlement and did not find any obvious deficiencies. To the
12 extent any shareholder calls attention to any such deficiency, the Court will consider it at the final
13 hearing.

14 **B. Notice Plan**

15 The Court must separately evaluate the proposed notice procedure. Rule 23.1(c) requires
16 that notice of the Settlement “must be given to shareholders or members in the manner that the
17 court orders.” Fed. R. Civ. P. 23.1(c). In determining the appropriate notice method, “the Court
18 considers whether such notice would be sufficient to reach the majority of interested
19 stockholders.” *Bushansky v. Armacost*, No. 12-CV-01597-JST, 2014 WL 2905143, at *6 (N.D.
20 Cal. June 25, 2014) (citing Wright & Miller, Federal Practice & Procedure § 1839).

21 The parties propose to provide notice through (1) publication in several major newspapers
22 and a national newswire service, (2) filing a Form 8-K with the SEC, and (3) publishing notice on
23 both Wells Fargo’s website and an additional website created specifically for this purpose.
24 Settlement ¶ V(35). Courts have found that similar procedures satisfy Rule 23.1 and due process.

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26 _____
27 ⁹ The Court considers this factor, as it must, but gives it little weight. “[A]lthough a court might
28 give weight to the fact that counsel for the class or the defendant favors the settlement, the court
should keep in mind that the lawyers who negotiated the settlement will rarely offer anything less
than a strong, favorable endorsement.” *Principles of the Law of Aggregate Litigation* § 3.05
cmt. a (Am. Law. Inst. 2010).

United States District Court
Northern District of California

1 See *In re Hewlett-Packard Co. S'holder Derivative Litig.*, 716 F. App'x 603, 608 (9th Cir. 2017)
2 (affirming district court's approval of "notice procedures, which included placing notice of the
3 settlement on two consecutive days in *The New York Times*, *Investor's Business Daily*, *The Wall*
4 *Street Journal*, and *The San Francisco Chronicle*, filing an 8-K with the SEC, and publishing the
5 notice on its website")¹⁰; *Bushansky*, 2014 WL 2905143, at *6 (collecting cases). The Court
6 reaches the same conclusion here.

7 Similarly, the Court finds that the content of the proposed notice "describes the terms of
8 the settlement in sufficient detail to alert those with adverse viewpoints to investigate and to come
9 forward and be heard." *In re Hewlett-Packard*, 716 F. App'x at 609 (quoting *Churchill Vill.,*
10 *L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)).

11 **CONCLUSION**

12 For the foregoing reasons, the Court preliminarily approves the proposed Settlement and
13 Notice Plan. The fairness hearing shall be held on August 1, 2019 at 2:00 p.m. All other dates
14 and deadlines shall be calculated pursuant to the terms of the Settlement.

15 **IT IS SO ORDERED.**

16 Dated: May 14, 2019

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18 _____
19 JON S. TIGAR
20 United States District Judge

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¹⁰ Pursuant to Ninth Circuit Rule 36-3, *Hewlett-Packard* is not binding precedent. The Court nonetheless considers it as persuasive authority.