

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Yvonne Becker, Christopher Nobles, Rosa
Ramirez, Valerie Seyler and Jannien
Weiner,

Plaintiffs,

vs.

Wells Fargo & Co.; Employee Benefit
Review Committee; Wells Fargo Bank,
National Association, and John and
Jane Does,1-20,

Defendants.

Case No. 0:20-cv-2016 (KMM/BRT)

**DECLARATION OF MICHELLE
C. YAU IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT
AND PROVISIONAL CLASS
CERTIFICATION**

CLASS ACTION

I, Michelle C. Yau, declare as follows:

1. I am a partner with the law firm Cohen Milstein Sellers & Toll PLLC, and am a member in good standing of the Bar of the State of Massachusetts and Bar of the District of Columbia. I am admitted to practice Pro Hac Vice in this Action.

2. My firm has prosecuted this litigation on behalf of Plaintiffs since its inception. I make this Declaration in support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement and Provision Class Certification. I have personal knowledge of the matters stated herein and, if called upon, I would competently testify thereto.

I. BACKGROUND OF SETTLEMENT

3. Attached hereto as Exhibit 1 is a true and correct copy of the Class Action Settlement Agreement and Release (“Settlement Agreement”).¹

4. During the last 15 months, the Parties conducted extensive discovery which resulted in the production of over one hundred and twenty thousand documents (spanning 1.5 million pages) from Parties and third parties. They completed several depositions of defense fact witness and all five of the Named Plaintiffs. The Court has held numerous conferences or motion arguments with the Parties.

5. The Parties have met and conferred over sixty times to attempt to resolve disputes without motion practice, which was indeed achieved for the vast majority of issues.

6. On November 4, 2021, the Parties held their first mediation session with Robert A. Meyer, an experienced and well-respected mediator, who has successfully resolved numerous ERISA class cases and other class actions. The parties were not able to resolve the case that day.

7. Thereafter, discovery continued apace. Document discovery was completed in mid-December of 2021 and several additional depositions occurred in November and December of 2021.

¹ The Settlement Agreement does not include Exhibits 1 and 2 thereto because they are outdated versions of the draft Proposed Preliminary Approval Order and Final Approval Order. Instead, an updated Proposed Order Preliminarily Approving Class Action Settlement is submitted with the Motion for Preliminary Approval of Class Action Settlement and an updated Proposed Order for Final Approval will be submitted to the Court with Plaintiffs’ Motion for Final Approval of Class Action Settlement.

8. On January 5, 2022, after the second full day of mediation, the Parties reached an arm's-length, class-wide resolution of this matter, subject to the Court's approval, which was memorialized in a term sheet executed that evening. Thereafter, the Parties negotiated the comprehensive Settlement Agreement that is the subject of this Motion.

9. Because the case was well-advanced before the Parties signed the term sheet, the Parties had a very good understanding of the strengths and weaknesses of their positions.

10. Each of the Class Representatives reviewed, considered, and expressed their approval of the Settlement Agreement presented to the Court for approval.

II. THE PROPOSED NOTICE PROGRAM

11. Attached to the Proposed Order Preliminarily Approving Class Action Settlement ("Proposed Order") as Exhibit A is the Class Notice that Plaintiffs propose be sent via email and U.S. Mail to the members of the Settlement Class. Under the proposed notice program, all Settlement Class members who have an email address on file with the current or former Plan recordkeeper will receive the Class Notice by email. If a Settlement Class member does not have an email address, or if the Settlement Administrator receives a notification that the Class Notice sent via email is undeliverable, then the Settlement Class member will receive the Class Notice via U.S. Mail sent to the best available addresses for those individuals. For Settlement Class members for whom no email is available and those for whom the email Class Notice bounced, the Settlement

Administrator will run the mailing addresses through the National Change of Address Database.

12. Additionally, if any mailed Class Notice is returned with an updated address provided by U.S.P.S., then the Settlement Administrator will re-mail the Class Notice to the updated address.

13. Attached to the Proposed Order as Exhibit C is the short-form notice that will be published in USA Today and distributed to additional news outlets via a PR Newswire press release.

14. Additionally, the Settlement Administrator will create a dedicated settlement website that provides access to the Class Notice, the Settlement Agreement, the Plan of Allocation and all Settlement pleadings and documents filed in this Action.

15. This proposed notice program provides information to the Settlement Class regarding, among other things: (1) the nature of the claims; (2) the definition of the Class; (3) the terms of the Settlement; (4) the process for submitting the Rollover Form for Former Participants (a form of which is attached to the Proposed Order as Exhibit D); (5) Settlement Class members' right to object to the Settlement or request for attorneys' fees, expenses and Case Contribution Awards and the deadlines for doing so; (6) the Class release; (7) the identity of Class Counsel and the amount of attorneys' fees they will seek in connection with the Settlement; (8) the amount of any requested Case Contribution Awards; (9) the date, time, and location of the Fairness Hearing; and (10) Settlement Class members' right to appear at the Fairness Hearing.

16. Together, the Class notification procedures provide the Settlement Class with the essential information about the Settlement and all information required by Rule 23 to inform the Settlement Class members of their rights and deadlines to act.

III. PLAN OF ALLOCATION

17. The Plan of Allocation is attached hereto as Exhibit 2.

18. The Plan of Allocation is designed to allocate the Net Settlement Fund among Settlement Class members who invested in the Challenged Funds based on (i) each Challenged Fund's percentage of alleged Total Losses² during the Class Period³ and (ii) each Settlement Class member's pro rata share of that Challenged Fund's assets during the Class Period, which will be determined by dividing respective Settlement Class members' aggregated investment balances compared to all Settlement Class members' aggregated investment balances in that Challenged Fund during the Class Period. POA ¶ 7. In other words, each Challenged Fund receives a percentage of the Net Settlement Fund based on its portion of alleged Total Losses among all Challenged Funds, and then each Settlement

² The alleged Total Losses refers to the aggregate value of alleged fee losses at the Plan level for all Challenged Funds (i.e., total fees paid Wells Fargo from a Challenged Fund, plus reinvestment income on those fees during the Class Period). However, for the Stable Value Fund, evidence produced in discovery showed that no fees were paid to Wells Fargo from such fund during the Class Period, and thus the alleged Plan-level fee losses are assumed to be \$100,000 to ensure a Net Settlement Fund allocation to the Stable Value Fund.

³ The Class Period is defined as March 13, 2014 through the date on which the Settlement becomes Final. However, for calculation purposes, the quarterly data used in the Plan of Allocation includes all full quarters from March 13, 2014 until January 31, 2022 (or earlier for Challenged Funds that were removed from the Plan during the Class Period).

Class member who invested in that a particular Challenged Fund receives a pro rata share of that Fund's alleged losses. *Id.*

19. For Current Participants, all Settlement payments will be automatically credited to the Participant's existing 401(k) account and no taxes will be withheld from those payments. POA ¶ 18.

20. If a Former Settlement Class member's recovery is less than \$5.00, it will be considered de minimis and it will not be distributed; instead, such amount will be reallocated to all other Settlement Class members (i.e., Current Participants and Former Participants whose recovery is \$5.00 or more) on a per capita basis. POA ¶ 8(g)-(h). Each Settlement Class member shall then receive their "Final Individual Dollar Recovery" as described in the Plan of Allocation. *Id.* The reason for the de minimis threshold is that, for Former Participants, the cost of issuing checks, 1099 tax reporting, potentially sending follow up emails to remind Settlement Class members to cash their checks and reissuing those checks if necessary is substantial.⁴ Based on my experience with prior settlements and a review of similar 401(k) settlements, given the substantial administration costs for effectuating payments to Former Participants, ERISA class settlements often use a de minimis threshold of \$5.00, \$10.00 or \$15.00.

21. Former Participants will have the opportunity to submit a Rollover Form electronically, which allows their Settlement payment to be rolled over (without any taxes

⁴ In addition, the cost of processing and effectuating a rollover into a qualified retirement account, is not inconsequential. However, based on my experience and the experience of Analytics, LLC, the vast majority of Former Participants will receive their Settlement recovery as a check.

withheld) into an individual retirement account or other eligible employer plan. POA ¶ 21. Former Participants who do not timely submit a Rollover Form or who do not submit sufficient information to effectuate the Rollover, will be sent their Settlement payments via check with any applicable 1099 taxes withheld. *Id.* ¶ 22(ii).

22. In order to help ensure that any checks sent to Former Participants are indeed received and cashed by the Participant, the Settlement Administrator will ensure that the following additional steps occur: (1) the Plan's recordkeeper will provide the mailing address for each Former Participant in its possession; (2) the Settlement Administrator will update all mailing addresses using the National Change of Address Database before checks are issued; (3) the Settlement Administrator shall attempt to find updated address information for checks that are returned as undeliverable and resend the check; (4) for Former Participants whose checks have **not** been returned as undeliverable but were **not** cashed within approximately 60 days of the issue date of the check, the Settlement Administrator will send an email to these individuals (if email is available) reminding them that all uncashed checks will be voided 120 days after their issue date and will perform a skip-trace to attempt to identify another mailing address and, if possible re-send the check to the updated address.

23. Any checks that are uncashed will revert to the Qualified Settlement Fund and will be paid to the Plan and distributed by the Plan's Recordkeeper across Current Participants on a per capita basis. In no event shall any part of the Net Settlement Fund be used to reimburse any Defendants or otherwise offset settlement-related costs incurred by any Defendant. POA ¶ 26.

24. Plaintiffs hired a damages expert to estimate and quantify the alleged damages associated with their claims. To calculate the alleged fee damages, the damages expert calculated the amount of fees paid by the Plan on a quarterly basis for each Challenged Fund and then assumed that fee was reinvested in the Challenged Funds (meaning if the fees were not charged those Plan assets would grow based on the historical returns of each Challenged Fund). This methodology resulted in total alleged fee damages of approximately \$81 million. Plaintiffs' damages expert also measured the alleged damages for each Challenged Fund by comparing the Fund's performance (i.e., investment returns) to the performance of the benchmark reported to Plan participants. Under this methodology, some Funds outperformed their benchmark and other Funds underperformed. Depending on whether excess performance of some Challenged Funds were netted against underperformance of others, the total alleged performance damages were between \$11 million and \$136 million. The midpoint between \$11 and \$136 million is \$74 million and thus comparable in relative value to the \$81 million of alleged damages using the fee methodology.

25. During the litigation, Defendants have asserted that for the Wells Fargo sponsored CITs⁵, all fees charged to the Plan were paid to third parties and not kept by Wells Fargo. For the Stable Value Fund, Defendants assert that all fees associated with this fund were paid directly by Wells Fargo and not paid by the Plan at all. Thus, Defendants

⁵ "CITs" refer to Collective Investment Trusts which are commingled funds that pool assets from several investors for investment purposes.

assert that there are no fee damages for the Wells Fargo State Street Target CITs, Wells Fargo Causeway CIT, Wells Fargo Federated CIT, and Stable Value Fund.

26. With respect to the Wells Fargo Emerging Growth and Wells Fargo 100% Treasury Money Market Fund fees, Defendants argue that if Plaintiffs prevailed on their claims, Plaintiffs would only be entitled to the profits Wells Fargo obtained from these fees, not the entire fee. If both these arguments were credited, then the value of the alleged fee damages would be approximately \$15 million.

27. The proposed Settlement recovery of \$32.5 million is substantial not only in the aggregate, but also as a percentage of the value of claims – as it recovers 40% of the alleged total fee damages estimated by Plaintiffs’ damages expert.

28. Plaintiffs did not discount the amount of the Settlement based on Defendants’ ability to pay, given that Wells Fargo was likely able to pay more than the Settlement achieved here based on assets alone.

IV. ATTORNEYS’ FEES AND CASE AWARDS

29. As permitted by the Settlement, Class Counsel intends to seek an award of attorneys’ fees as well as reimbursement of expenses. *See* Settlement Agreement § 3.2.5(j). Accordingly, the proposed Class Notice specifically advises Settlement Class members that Class Counsel will make an application for an attorney fee award in an amount “not to exceed 33% of the \$32,500,000.00 settlement amount plus their litigation expenses incurred in the prosecution of the case.” Exhibit A to the Proposed Order at 6.

30. Additionally, the proposed Class Notice advises that Class Counsel will ask the Court to approve Case Contribution Awards for each Named Plaintiff of \$15,000 for

the time and effort they devoted to prosecuting this Action. Each Plaintiff has demonstrated their willingness and ability to vigorously prosecute this Action by responding to Defendants' written discovery and testifying at deposition. Each Named Plaintiff who seeks to be a Settlement Class Representative understands their responsibilities in serving as class representatives.

V. EXPERIENCE OF CLASS COUNSEL

31. Class Counsel are experienced ERISA litigators. These lawyers and their respective firms have decades of experience in successfully handling ERISA class actions and class actions generally. They have litigated several ERISA class actions involving improper and imprudent 401(k) Plan investments and have served as lead counsel or co-lead counsel for numerous ERISA classes alleging breaches of defendants' fiduciary obligations. Further details about the lawyers and their firms are provided in the firm resumes attached hereto as Exhibits 3-5.

32. I declare, pursuant to 28 U.S.C. § 1746 and under penalty of perjury, that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: April 1, 2022.

By: /s/ Michelle C. Yau
Michelle C. Yau