UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

ALEJANDRO CARRILLO, individually and on behalf of all others similarly situated, Plaintiff, v. WELLS FARGO BANK, N.A., Defendant.	NO. 2:18-cv-03095-SJF-SIL ECF Case Judge Sandra J. Feuerstein Magistrate Judge Steven I. Locke **JURY DEMANDED HEREON**

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT

TABLE OF CONTENTS

PAGE No.:

TABLE OF AUTHORITIES

PAGE No.:

FEDERAL CASES

FEDERAL RULES

OTHER AUTHORITIES

INTRODUCTION

Plaintiff Alejandro Carrillo has reached a settlement with Defendant Wells Fargo Bank in which Wells Fargo agrees to pay $6,945,095 to establish a non-reversionary settlement fund for the benefit of Plaintiff and Settlement Class Members who entered into a Buydown Agreement with Wells Fargo within the Class period.[1] All Settlement Class Members will receive a significant cash payment, ranging between $50 and $14,109.30. The amount of the payment depends on the amount the Class Member allegedly overpaid and whether the Class Member is entitled to statutory damages under the federal Truth in Lending Act (TILA). The mean payment is approximately $423 per loan, and the median payment is approximately $364 per loan. The proposed settlement resolves Plaintiff's claims on a classwide basis, resolves this litigation in its entirety, and satisfies all of the criteria for preliminary settlement approval.

Plaintiff respectfully requests that the Court: (1) grant preliminary approval of the Settlement Agreement and Release; (2) provisionally certify the proposed Class; (3) appoint Terrell Marshall Law Group PLLC and Schlanger Law Group LLP to serve as Class Counsel; (4) appoint Alejandro Carrillo to serve as Class Representative; (5) approve the proposed notice plan and the forms of notice; (6) appoint JND Legal Administration to serve as Settlement Administrator; and (7) schedule the final fairness hearing and related dates.

STATEMENT OF FACTS

A. Background and Procedural History

Wells Fargo is one of the largest originators and servicers of residential mortgages nationwide, making hundreds of thousands of residential loans every year. Wells Fargo once offered consumers a residential mortgage feature called a Buydown Agreement. This feature—also known as a "buydown deposit agreement"—lowered the required monthly payment for up to the first three years of a borrower's residential home mortgage loan.

[1] The Settlement Agreement is attached as Exhibit A to the Declaration of Beth E. Terrell submitted in support of this motion. Unless otherwise noted, all exhibits are attached to the Terrell Declaration. Unless otherwise stated, all defined terms used in this motion have the definitions in the Settlement Agreement.

Plaintiff filed this lawsuit on May 25, 2018, alleging "that Wells Fargo offers its customers buydown agreements that promise a reduced interest rate on their mortgage loans in the first year of repayment, but then amortizes the payments by applying a higher rate from the onset." *Carrillo v. Wells Fargo Bank, N.A.*, 2019 WL 3714801, at *7 (E.D.N.Y. May 10, 2019). Wells Fargo denies all material allegations in the Complaint. *See* ECF No. 56 (Answer).

After Plaintiff filed the Complaint, Wells Fargo moved to dismiss for failure to state a claim or, in the alternative, to strike class allegations. ECF No. 14. Plaintiff filed his First Amended Complaint on September 7, 2018. ECF No. 17. Wells Fargo again moved to dismiss for failure to state a claim or, in the alternative, to strike class allegations. ECF No. 18. After the motion was fully briefed, ECF Nos. 33–36, the Court referred it to Magistrate Judge Steven I. Locke, who recommended that Wells Fargo's motion be denied. ECF No. 46. The Court adopted the Magistrate's recommendation over Wells Fargo's objections. ECF No. 53.

B. Discovery, Mediation, and Settlement Negotiations

This case has been hard fought for over almost three years. Following the parties' Rule 26(f) discovery conference, Plaintiff served requests for production of documents on Wells Fargo. Terrell Decl. ¶ 10. Wells Fargo then filed a letter motion for a protective order to temporarily stay discovery until its motion to dismiss was resolved. ECF No. 38. The Court granted the motion to stay. ECF No. 45. After Wells Fargo's motion to dismiss was denied, Plaintiff served a new set of requests for production and interrogatories. Terrell Decl. ¶ 11.

The parties engaged in motion practice regarding various aspects of the discovery process. For example, the parties reached an impasse in negotiating the terms of a joint stipulated protective order governing the designation and treatment of confidential material produced in discovery. Terrell Decl. ¶ 11. Plaintiff moved for a court order to settle the dispute, which the Court denied with instructions for Wells Fargo to revise the proposed confidentiality agreement and "commence producing responsive documents as soon as possible." ECF No. 64.

After Wells Fargo's initial document productions in November 2019 and January 2020, Plaintiff filed a motion to compel Wells Fargo to produce additional documents relating to its

buydown feature. ECF No. 69 and 79. The Court provided a partial resolution to that dispute, and the parties worked with Magistrate Judge Locke to address additional discovery issues as they arose at hearings held on March 3, 2020 and April 23, 2020. The parties then engaged in extensive, additional document discovery consistent with the Court's instructions. Each of these discovery disputes, and many others that did not require adjudication, involved extensive work during the meet and confer process including exchange of numerous, detailed written meet and confer letters, replies and supplements, as well as innumerable telephonic meet and confer calls and email exchanges. Terrell Decl. ¶ 12.

Wells Fargo eventually produced nearly half a million pages of documents, including Buydown Agreements, email correspondence, corporate policies and procedures relating to the buydown feature, borrower account information, payment history data, training materials, agreements, marketing materials, etc. In addition, pursuant to a mutually agreed upon sampling protocol, hundreds of thousands of pages of underlying loan documents were produced and reviewed for verification of information contained in the produced data. Terrell Decl. ¶ 13.

Wells Fargo propounded written discovery requests on Plaintiff, and Plaintiff provided written responses and produced responsive documents. *Id*. ¶ 14. Plaintiff also took the Rule 30(b)(6) deposition of Wells Fargo. *Id*. ¶ 15.

On July 29, 2020, the parties participated in a full day mediation session with Hunter R. Hughes III of Hunter ADR. Terrell Decl. ¶ 16. The next day, the parties memorialized the material settlement terms in a tentative agreement. Among other things, the term sheet set forth a process for confirming the number of qualifying loans and the total amount needed for the Settlement Fund by analyzing nationwide data relating to Wells Fargo's Buydown Agreements. *Id*. ¶ 17. At all times the settlement discussions were arm's-length and adversarial in nature. *Id*. ¶ 18.

Since July 29, 2020, the parties have diligently worked together to finalize the settlement, including negotiating numerous additional significant details and terms; production and review of extensive, additional confirmatory discovery; production, analysis and repeated refinement of

the loan and servicing data compilation necessary to calculate the recovery of every class member; numerous drafts of all of the settlement documents, proposed orders, notices, second amended complaint, etc. presented as part of the instant motion; as well as extensive work relating to the settlement distribution process and other settlement logistics. Terrell Decl. ¶ 19.

C. The Settlement Terms

The terms of the parties' proposed settlement are set forth in the Settlement Agreement. The following summarizes the Settlement Agreement's terms.

1. The Class

The parties request certification for settlement purposes only of the following Classes (referred to collectively in the settlement as the "Class"):

> **TILA Class**. All persons in the United States (a) who entered into Buydown Agreements with Wells Fargo in residential real estate mortgage transactions; (b) within one year prior to the filing of the Initial Complaint; (c) in which Wells Fargo disclosed in the borrower's loan Closing Disclosure a lower effective interest rate for an initial period followed by a higher interest rate for the remainder of the life of the loan; and (d) as to whom, during the initial period, Wells Fargo amortized the loan at a rate higher than the lowest disclosed effective rate.
>
> **Breach of Contract Class**. All persons in the United States who during the Class Period entered into Buydown Agreements with Wells Fargo in residential real estate mortgage transactions in which Wells Fargo disclosed a lower effective interest rate for an initial period followed by a higher interest rate for the remainder of the life of the loan but, during the initial period, amortized the loan at a rate higher than the lowest disclosed effective rate.

The "Class Period" is (i) for all Class Members who obtained a Buydown Agreement in connection with residential real estate located within the state of New York, six years from the filing date of the Initial Complaint (May 25, 2018); and (ii) for all non-New York real estate transactions, the relevant statute of limitations period applicable to the jurisdiction in which the mortgage property is located, and the applicable date range, as listed on Exhibit 2 to the Settlement Agreement. Settlement Agreement ¶ 25. The Settlement Class is comprised of Class Members who do not exclude themselves from the Class.

2. Second Amended Complaint

The Settlement Agreement requires Plaintiff to file a Second Amended Complaint. Settlement Agreement ¶ 8, Ex. 1. Like the Initial Complaint and First Amended Complaint, the Second Amended Complaint challenges Wells Fargo's implementation and disclosure of the Buydown Agreement feature. *Id.* In the Second Amended Complaint, Plaintiff seeks to certify the TILA Class and the Breach of Contract Class. *Id.*

3. Monetary Relief

The Settlement Agreement requires Wells Fargo to pay $6,945,095 into a Qualified Settlement Fund. Settlement Agreement ¶ 62. The Settlement Fund will be used to pay Cash Awards to all Settlement Class Members; administration costs estimated at approximately $51,772; any expenses, taxes and fees associated with establishing and maintaining the Qualified Settlement Fund; Court-approved attorneys' fees and litigation costs to Class Counsel; and a Court-approved service award to Plaintiff. Settlement Agreement ¶¶ 62, 94.

a. Settlement Class Member Payments

Each Settlement Class Member shall be entitled to receive a Cash Award from the Net Settlement Fund. Settlement Agreement ¶ 70. The Net Settlement Fund is calculated by subtracting Class Counsel's anticipated requested attorneys' fees and costs, estimated settlement administration costs, and Plaintiff's anticipated requested incentive award from the Settlement Fund. Of the Net Settlement Fund, $250,000 will be allocated to TILA statutory damages. Each TILA Settlement Class Member will receive a pro rata share of the TILA statutory damages (the "TILA Award Payment"). The amount of each TILA Award Payment depends on the number of "Qualifying Loans" that the TILA Settlement Class Member has. Individual TILA Award Payments will be calculated using the following formula: $250,000 divided by the total Qualifying Loans times the number of Qualifying Loans the TILA Settlement Class Member has ($250,000/total Qualifying Loans x TILA Settlement Class Member loans). A Qualifying Loan is a loan issued in the Class Period and subject to a Buydown Agreement.

The Remaining Settlement Fund will be distributed pro rata among Settlement Class Members based on Settlement Class Members' actual damages as determined by Class Counsel and a formula that divides the Remaining Settlement Fund by total actual damages times the individual Settlement Class Member's actual damages. Settlement Agreement ¶ 70(b). No Settlement Class Member will receive less than $50. *Id.* ¶ 70(c). Plaintiff estimates that the average (mean) recovery is $423.75 per loan. The median recovery is $364.64 per loan. The proposed distribution of settlement recoveries is summarized in the following chart:

Estimated Settlement Amount Per Loan	**Number of Loans**
$50	106
$50.01-$100	314
$100.01-$500	7,377
$500.01-$1,000	2,670
$1,000.01-$5,000	294
$5,000.01-$14,109.30	14

Class Members do not need to submit a claim form in order to receive a payment. Cash Award checks will be mailed to each Settlement Class member. *Id.* ¶ 78. The Settlement Administrator will make reasonable efforts to locate the proper address for any Settlement Class Member whose check is returned as undeliverable and will re-mail it once to the updated address. *Id.*

b. Administration Costs

JND has been retained to serve as Settlement Administrator. Settlement Agreement ¶ 91. The Settlement Administrator will be responsible for preparing and sending notice (via U.S. mail), establishing and maintaining the Qualified Settlement Fund, fielding questions from Class Members, establishing and maintaining a settlement website, establishing a toll-free phone number, serving CAFA notice, processing Opt-Out requests, and distributing Cash Award checks

to the Settlement Class Members. Settlement Agreement ¶ 92. JND estimates notice will cost $51,772, a competitive bid based on the class size and scope of notice. Terrell Decl. ¶ 21.

c. Attorneys' Fees and Litigation Expenses

Plaintiff's counsel will apply for an award of attorneys' fees in an amount up to one-third of the Settlement Fund, or $2,314,800, and reimbursement of approximately $17,250 in out-of-pocket litigation costs and expenses they incurred prosecuting this action. Settlement Agreement ¶ 116. The Settlement Agreement is not contingent on the amount of attorneys' fees or costs awarded. Settlement Agreement ¶ 119. The Court need not rule on fees and costs now; Plaintiff's counsel will file a motion for approval of fees, costs, and a service award. *See* Fed. R. Civ. P. 23(h).

d. Service Award

The Settlement Agreement provides that Plaintiff's counsel may request Court approval of a service award to Plaintiff Alejandro Carrillo in the amount of $12,500. Settlement Agreement ¶ 118. Plaintiff assisted with the drafting of the complaint, including providing feedback on drafts; provided information about his experience with Wells Fargo's buydown agreement; responded to discovery; stayed apprised of the matter at every juncture; and was prepared to testify at trial. Terrell Decl. ¶ 22. The proposed service award compensates Plaintiff for his time and effort, the risks he undertook in prosecuting the case, and his willingness to prosecute this case for the benefit of the Class. The Settlement Agreement is not contingent on the Court's approval of a service award. Settlement Agreement ¶ 119. The Court need not decide whether to approve a service award now; Plaintiff's counsel will file a motion for approval of attorneys' fees, costs, and a service award.

4. Release

In exchange for the settlement benefits, Settlement Class Members will release claims against Wells Fargo and other Released Parties, which include Wells Fargo's past, present and future parents, subsidiaries, affiliated companies and corporations, and each of their respective past, present, and future directors, officers, managers, employees, agents, general partners, limited

partners, principals, insurers, reinsurers, shareholders, attorneys, advisors, representatives, predecessors, successors, divisions, assigns, or related entities, and each of their respective executors, successors, and legal representatives. Settlement Agreement ¶¶ 50, 82. The release is tailored to the claims asserted in this litigation and claims that could have been alleged asserting that excess interest was assessed, charged or collected, or that the loan allegedly was inappropriately amortized in connection with the application, implementation or use of any Buydown Agreement. *Id.*

5. Settlement Notice

The parties propose a notice plan consisting of mailed notice to Class Members, who can be identified from Wells Fargo's records. Settlement Agreement ¶¶ 96-97. The proposed method and form of notice are described below.

AUTHORITY AND ARGUMENT

A. The Settlement Approval Process

Federal courts strongly favor and encourage settlements, particularly in class actions and other complex matters, where the inherent costs, delays, and risks of continued litigation might otherwise overwhelm any potential benefit the class could hope to obtain. *See Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005); *see also* William B. Rubenstein, Newberg on Class Actions ("Newberg") § 13.1 (5th ed. June 2020 update) (citing cases). The Manual for Complex Litigation describes a three-step procedure for approval of class action settlements: (1) preliminary approval of the proposed settlement and certification of a settlement class; (2) dissemination of notice of the settlement to class members; and (3) a "fairness hearing" or "final approval hearing," at which class members may be heard regarding the settlement, and at which evidence and argument concerning the fairness, adequacy, and reasonableness of the settlement may be presented. Manual for Complex Litigation (Fourth) §§ 21.632-21.634 (4th ed. May 2020 update). This procedure safeguards class members' due process rights and enables the court to fulfill its role as the guardian of class interests. *See* Newberg § 13.1.

Plaintiff requests that the Court take the first step in the settlement approval process by granting preliminary approval of the proposed Settlement Agreement and provisionally certifying the Class. When considering a motion for preliminary approval, "a district court must consider whether the court 'will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal.'" *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 692 (S.D.N.Y. 2019) (citation omitted); *see also In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 330 F.R.D. 11, 28 (E.D.N.Y. 2019) (at the preliminary approval stage, the Court "determine[s] whether it will likely grant final approval based on the information currently before the Court").

B. The settlement satisfies the criteria for preliminary approval.

To determine whether it will likely approve a proposed class settlement, courts consider the factors outlined in Rule 23(e)(2) for final approval of a settlement. *In re Payment Card Interchange Fee*, 330 F.R.D. at 28-29. These factors include whether "(A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided by the settlement is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief including the method of processing class-member claims, if required; (iii) the terms of any proposed award of attorneys' fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3) made in connection with the proposed settlement; and (D) the proposal treats class members equitably relative to each other. Fed. R. Civ. P. 23(e)(2).

The Rule 23(e)(2) factors supplement the factors traditionally considered by courts in this circuit, which are set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974): "(1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class through the trial; (7) the ability of the defendants to withstand a greater judgment; (8)

the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation." *In re Payment Card Interchange Fee*, 330 F.R.D. at 28-29 (citation omitted).

Consideration of these factors supports preliminary approval of the settlement.

1. Plaintiff and his counsel have adequately represented the Class.

"Determination of adequacy typically entails inquiry as to whether: (1) plaintiff's interests are antagonistic to the interest of other members of the class and (2) plaintiff's attorneys are qualified, experienced and able to conduct the litigation." *In re Payment Card Interchange Fee*, 330 F.R.D. at 30 (citation omitted). Plaintiff has no interests antagonistic to the interests of other Class Members. All have been subject to the same alleged conduct by Wells Fargo, suffered the same type of alleged damages, and will recover a fair share of the Settlement Fund. Plaintiff has also demonstrated his interest in vigorously pursuing the claims of the Class by actively participating in the litigation. Terrell Decl. ¶ 22. Plaintiff's counsel are experienced in litigating and resolving class actions generally and consumer protection litigation in particular. *See id*. ¶¶ 1-8; Declaration of Daniel A. Schlanger ("Schlanger Decl.") ¶¶ 5-27. This factor therefore supports preliminary approval.

2. The settlement is the product of informed, arm's-length negotiations.

Rule 23(e)(2)(B) requires "procedural fairness, as evidenced by the fact that 'the proposal was negotiated at arm's length.'" *In re GSE Bonds*, 414 F. Supp. 3d at 693 (quoting Fed. R. Civ. P. 23(e)(2)(B)). This settlement was reached after more than two years of litigation and with the assistance of an experienced mediator, Hunter R. Hughes III of Hunter ADR. Terrell Decl. ¶¶ 16-17. At all times the settlement discussions, which took place during the full-mediation and in subsequent conversations, were arm's-length and adversarial in nature. *Id.* ¶ 18.

Plaintiff's counsel, experienced class action litigators who have litigated and settled dozens of consumer protection cases against large corporate entities like Wells Fargo, are satisfied that they obtained the best deal possible for the Class. *Id.* ¶ 23; Schlanger Decl. ¶ 33. A

class settlement reached after extensive arm's-length negotiations by experienced, competent counsel knowledgeable in complex class litigation is entitled to "a presumption of fairness." *In re GSE Bonds*, 414 F. Supp. 3d at 693 (citation omitted). And the opinion of experienced counsel supporting the settlement is entitled to considerable weight in a court's evaluation of a proposed settlement. *Bravo v. Palm West Corp.*, No. 14 Civ. 9193 (SN), 2015 WL 5826715, at *1 (S.D.N.Y. Sept. 30, 2015) ("In exercising this discretion, courts should give weight to the parties' consensual decision to settle class action cases because they and their counsel are in unique positions to assess potential risks"); *see also Reed v. Gen. Motors Corp.*, 703 F.2d 170, 175 (5th Cir. 1983) ("[T]he value of the assessment of able counsel negotiating at arm's length cannot be gainsaid. Lawyers know their strengths and they know where the bones are buried."). This factor therefore supports preliminary approval as well.

3. The relief provided by the settlement is adequate taking into account the strength of Plaintiff's case and the risk, cost, and delay of continued litigation.

The $6,945,095 Plaintiff recovered for the Settlement Class is an outstanding result, particularly given the risks and costs of continued litigation.

a. *The stage of the proceedings, the amount of discovery completed, and the risks of establishing liability and damages.*

In evaluating the reasonableness of a settlement, courts consider whether the litigation has advanced to a stage where the parties "have a clear view of the strengths and weaknesses of their cases." *Teachers' Ret. Sys. of La. v. A.C.L.N., Ltd.*, No. 01 Civ. 11814 (MP), 2004 WL 1087261, at *3 (S.D.N.Y. May 14, 2004) (citation omitted). The parties have vigorously litigated this case for over two years, conducting substantial discovery into the claims and defenses, and briefing the merits on a motion to dismiss. Terrell Decl. ¶¶ 9-20. It is with this foundation that Plaintiff's counsel negotiated this settlement and determined it to be in the best interests of the proposed Class. *Id.* ¶ 23; Schlanger Decl. ¶ 33. While Plaintiff believes he has a strong case for liability, his claims turn on language in the loan documents that the Magistrate Judge found to be ambiguous. ECF No. 46 at 10-11, 19-20. The Court agreed that the language is ambiguous and

that "reasonably intelligent people who examine all of the Loan Documents" could reach different opinions about the interest rate to be applied. ECF No. 53 at 6-7. While this conclusion was based purely on the language of the documents and in the context of a motion to dismiss without the benefit of evidence, it highlights the fact that both parties face losing on the merits should litigation continue. *See Ayzelman v. Statewide Credit Servs. Corp.*, 242 F.R.D. 23, 27 (E.D.N.Y. 2007) (finding that the risk of establishing liability weighed in favor of settlement approval where "defendants ... presented several affirmative defenses through which they may avoid liability"). And even if Plaintiff prevails, he may not recover the maximum amount of damages available for his claims. *See id.* at 28 (recognizing that the class may not recover all available statutory damages even if the plaintiffs prevailed on their claims).

b. *The costs, risks, and delay of continued litigation.*

Rule 23 also calls for consideration of the costs and delay of trial and appeal. Fed. R. Civ. P. 23(e)(2)(C)(i). "Settlement is favored if settlement results in 'substantial and tangible present recovery, without the attendant risk and delay of trial.'" *In re Payment Card Interchange Fee*, 330 F.R.D. at 36 (citation omitted). There is still a fair amount of work remaining to prepare this case for trial if the settlement is not approved. The parties have not completed fact discovery, and Plaintiff's motion to compel was pending when the parties reached this settlement. Expert discovery remains to be completed as well. Plaintiff has not yet moved for class certification and while he believes this case is well suited for classwide litigation, there is always a possibility the Court will not agree. The parties would also likely move for summary judgment, which presents additional risk, cost, and delay. Trial is always a cost-intensive undertaking with no guarantees. And even if Plaintiff did recover more for the Settlement Class at trial, the additional delay it presents, along with post-trial motions and the potential appellate process, could deny the Class any recovery for years, further reducing its value. *See Hicks v. Morgan Stanley & Co.*, No. 01 Civ. 10071 (RJH), 2005 WL 2757792, at *6 (S.D.N.Y. Oct. 24, 2005) ("Further litigation would necessarily involve further costs; justice may be best served with a fair settlement today as opposed to an uncertain future settlement or trial of the action."); *Strougo v. Bassini*, 258 F.

Supp. 2d 254, 257 (S.D.N.Y. 2003) ("even if a … class member was willing to assume all the risks of pursuing the actions through further litigation … the passage of time would introduce yet more risks … and would, in light of the time value of money, make future recoveries less valuable than this current recovery"). And Wells Fargo would vigorously challenge both class certification as well as the underlying merits, and a favorable decision for Defendant at any stage could result in Class members receiving nothing.

c. *The range of reasonableness of the settlement fund in light of the best possible recovery and in light of all the attendant risks of litigation.*

The Second Circuit has explained that the "range of reasonableness" reflects "a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 119 (2d Cir. 2005) (citation omitted). Courts "compare 'the terms of the compromise with the likely rewards of litigation.'" *In re Payment Card Interchange Fee*, 330 F.R.D. at 48. "[T]he fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Id*. at 49 (quoting *Grinnell*, 495 F.2d at 455).

The Settlement Agreement provides excellent relief for the Settlement Class. Wells Fargo has agreed to pay $6,945,095 into the Settlement Fund. None of the funds will revert to Wells Fargo. Each Settlement Class Member will receive at least $50.00. Plaintiff's counsel estimate that the average amount Settlement Class Members will receive is $423.75 which is approximately 41% of the maximum damages they might recover at trial, assuming Plaintiff succeeded in obtaining class certification, overcoming Wells Fargo's summary judgment motion, proving his and the Class's claims and achieving a maximum statutory award, as well as all potentially available actual damages. Terrell Decl. ¶ 20. This is an excellent recovery for the Class especially in light of the risk they would recover nothing if they lost at trial. *See, e.g., Beebe v. V&J Nat'l Enter., LLC*, No. 6:17-CV-06075 EAW, 2020 WL 2833009, at *7 (W.D.N.Y. June 1, 2020) (approving settlement where total settlement amounted 31% of actual

damages); *Morris v. Affinity Health Plan, Inc.*, 859 F. Supp. 2d 611, 621 (S.D.N.Y. May 8, 2012) (approving settlement where plaintiff demonstrated that settlement amount represents approximately 38% of the estimated value of the case).

d. *The ability of Wells Fargo to withstand a greater judgment.*

The Second Circuit has recognized that it is not an abuse of discretion for a district court to conclude that even if a defendant could withstand a higher judgment, "this factor, standing alone, does not suggest that the settlement is unfair." *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2d Cir. 2001). It may be that a higher judgment could be ordered by the Court at the conclusion of a trial, but the parties negotiated the $6,945,095 Settlement Fund based on their respective risks in addition to the total amount of damages Plaintiff could recover if he won every motion and prevailed at trial. Thus, when balanced against the many other factors weighing in favor of approval, that Wells Fargo may be able to sustain a greater judgment does not impact the fairness of the settlement. *See In re Payment Card Interchange Fee*, 330 F.R.D. at 47 (finding this factor did not preclude a finding that settlement was fair even though "[u]ndoubtedly, Defendants can withstand a greater judgment").

4. The settlement treats all Settlement Class Members fairly.

All Settlement Class Members will be treated fairly by the settlement. Each TILA Settlement Class Member will receive a pro rata share of the $250,000 TILA statutory damages based on the number of Qualifying Loans they have, and all Settlement Class Members will receive a pro rata share of the Remaining Net Settlement Fund based on their actual damages. Settlement Agreement ¶ 70. "Courts frequently approve plans involving *pro rata* distribution." *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, No. 05-MD-1720 (MKB) (JO), 2019 WL 6875472, at *20 (E.D.N.Y. Dec. 16, 2019) (citing cases). Settlement Class Members will not have to file claims to receive these Cash Payments.

Plaintiff's counsel will request a reasonable attorneys' fee award and a reasonable service award for Plaintiff's time and effort in litigating this case. Plaintiff's counsel intend to request an award of attorneys' fees in an amount up to one-third of the Settlement Fund, or $2,314,800, and

reimbursement of the approximately $17,250 they have advanced as litigation costs. Settlement Agreement ¶ 116. Courts in this circuit have found similar fee awards to be reasonable. *See, e.g., Suarez v. Rosa Mexicano Brands Inc.*, No. 16 Civ. 5464 (GWG), 2018 WL 1801319, at *1 (S.D.N.Y. April 13, 2018) (approving a fee award of 33.3% of $3.6 million settlement fund); *Zorrilla v. Carlson Rests., Inc.*, No. 14 Civ. 2740 (AT), 2018 WL 1737139, at *2 (S.D.N.Y. April 9, 2018) (approving a fee award equal to one-third of $19.1 million settlement fund). Plaintiff's counsel will file a motion for attorneys' fees and reimbursement of costs at least 30 days prior to the objection deadline, addressing the factors courts consider when awarding attorneys' fees in class action cases and explaining why their requested award is appropriate in this case. The Settlement Agreement is not contingent on the amount of attorneys' fees or costs awarded.

Plaintiff's counsel will also request a service award of $12,500. In this circuit, courts have approved service awards ranging from $2,500 to $85,000. *See Dornberger v. Metro. Life Ins. Co.*, 203 F.R.D. 118, 125 (S.D.N.Y. 2001); *see also Sheppard v. Consol. Edison Co. of New York*, No. 94-CV-0403(JG), 2002 WL 2003206, at *6 (E.D.N.Y. Aug. 1, 2002) (service awards ranging from $8,333 to $29,167); *Matheson v. T-Bone Rest., LLC*, No. 09 Civ. 4214, 2011 WL 6268216, at *9 (S.D.N.Y. 2011) (approving service award of $45,000); *Dial Corp. v. News Corp.*, 317 F.R.D. 426, 439 (S.D.N.Y. 2016) (approving service awards of $50,000).

5. The reaction of the Settlement Classes.

Settlement Class Members will have an opportunity to react to the settlement once they have been provided with notice of the settlement.

C. The Court should provisionally certify the Class.

When a plaintiff seeks preliminary approval of a classwide settlement for a class that has not yet been certified, the court "must determine whether 'giving notice is justified by the parties' showing that the court *will likely be able to* … certify the class for purposes of judgment on the proposal.'" *In re Payment Card Interchange Fee*, 330 F.R.D. at 50 (quoting Fed. R. Civ. P. 23(e)(1)(B)(ii)). "A court may certify a class for settlement purposes where the proposed

settlement class meets the requirements for Rule 23(a) class certification, as well as one of the three subsections of Rule 23(b)." *In re GSE*, 414 F. Supp. 3d at 700.

1. The Rule 23(a) requirements are satisfied.

The Rule 23(a) requirements of numerosity, commonality, typicality and adequacy are satisfied. The numerosity requirement requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). A class is deemed sufficiently numerous if it consists of at least 40 members. *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995). Plaintiff has identified 4,246 loans issued to TILA Class Members and 10,347 loans issued to Breach of Contract Class Members. Although some TILA and Breach of Contract Class Members may have more than one qualifying loan, it can be inferred from the sheer number of loans that the Class numbers in the thousands, satisfying numerosity.

The commonality requirement is satisfied where a plaintiff asserts claims that "depend upon a common contention" that is "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, 2556 (2011). Even a single common question will do. *Kalkstein v. Collecto, Inc.*, 304 F.R.D. 114, 120 (E.D.N.Y. Jan. 5, 2015). A central common question in this case is whether Wells Fargo has a policy and practice in residential real estate transactions involving rate buydowns of amortizing loans at a higher rate during the initial period despite disclosing that a lower interest rate applies during that period. This question is central to the TILA and breach of contract claims and its truth or falsity can be determined on a classwide basis, satisfying the commonality requirement. *See* ECF No. 46 at 24-25.

The typicality requirement requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "The typicality requirement is not demanding." *Fogarazzao v. Lehman Bros., Inc.*, 232 F.R.D. 176, 180 (S.D.N.Y. 2005). Typicality is satisfied "when each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's

liability." *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993). "When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims." *Id.* at 936–37. Typicality is "not highly demanding." *Bolanos v. Norwegian Cruise Lines Ltd.*, 212 F.R.D. 144, 155 (S.D.N.Y. 2002) (internal quotation and citation omitted). The typicality requirement is satisfied because Plaintiff's and Class Members' claims all arise from the same course of conduct by Wells Fargo, and turn on the same legal arguments. *See* ECF No. 46 at 26.

Finally, the adequacy requirement is satisfied, as discussed above.

2. The Rule 23(b)(3) requirements are satisfied.

Class certification under Rule 23(b)(3) is appropriate where (1) "the questions of law or fact common to class members predominate over any questions affecting only individual members;" and (2) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3); *Erica P. John Fund, Inc. v. Halliburton*, 131 S. Ct. 2179, 2184 (2011). Both requirements are satisfied.

Predominance is satisfied "if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *Roach v. T.L Cannon Corp.*, 778 F.3d 401, 405 (2d Cir. 2015) (citation omitted). This case is particularly well suited for settlement class treatment because the focus of the claims is on Wells Fargo's alleged conduct. As discussed above, a central common question in this case is whether Wells Fargo allegedly improperly amortizes loans involving rate buydowns by applying a greater interest rate than promised. Additional common questions include whether Wells Fargo allegedly mischaracterizes buydown funds as paid by the Class member or combines the buydown funds with other loan costs in its disclosures, whether Wells Fargo allegedly violated TILA by providing one interest rate for the initial period of the loans in its disclosures but effectively charging a higher rate due to its method of amortization, and

whether Wells Fargo allegedly breached its agreements with Class members by amortizing loans at a higher interest rate during the initial period. If tried, these common questions would turn on generalized proof consisting of the disclosures, internal Wells Fargo documents, and expert testimony. Certification is particularly appropriate in this case because standardized forms and procedures govern Wells Fargo's buydown products. *See In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 124-26 (2d Cir. 2013) (affirming certification of breach of contract claims where the contracts' relevant terms were materially similar); *see also Kelen v. World Fin. Network Nat'l Bank*, 295 F.R.D. 87, 91, 95 (S.D.N.Y. 2013) (certifying class and noting that "TILA specifically contemplates and allows class actions to address creditors' failures to comply with the statute and applicable regulations").

Class certification is also "superior to other available methods for fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). "The superiority requirement is often met where class members' claims would be too small to justify individual suits, and a class action would save litigation costs by permitting the parties to assert their claims and defenses in a single proceeding." *Kaye v. Amicus Mediation & Arbitration Group, Inc.*, 300 F.R.D. 67, 81 (D. Conn. 2014). Settlement Class Members are unlikely to be willing or able to pursue relief on an individual basis, making classwide settlement the superior method of resolving these claims. *See Zivkovic v. Laura Christy LLC*, 329 F.R.D. 61, 76 (S.D.N.Y. 2018) ("It is unlikely that the class members would engage in individual action because the amount of potential recovery is low and likely to be outweighed by the individual cost of litigation."). In addition, resolution of all Settlement Class Members' claims relating to the form documents in a single proceeding would promote judicial efficiency and avoid inconsistent opinions. *See Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 155 (1982) (noting "the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every class member to be litigated in an economical fashion under Rule 23"). And because the claims are being certified for purposes of settlement, the Court need not consider any manageability issues. *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 620 (1997) ("Confronted with a request for settlement-

only certification, a district court need not inquire whether the case, if tried, would present intractable management problems … for the proposal is that there be no trial.").

For these reasons, provisional certification of the Settlement Class is appropriate.

D. The proposed notice program is constitutionally sound.

Rule 23(e)(1) states that "[t]he court must direct notice in a reasonable manner to all class members who would be bound by" a proposed settlement, voluntary dismissal, or compromise. Class members are entitled to the "best notice that is practicable under the circumstances" of any proposed settlement before it is finally approved by the Court. Fed. R. Civ. P. 23(c)(2)(B). The amendments to Rule 23(c)(2)(B) provide that "notice may be by one or more of the following: United States mail, electronic means, or other appropriate means." To comply with due process, notice must be "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Amchem Prods.*, 521 U.S. at 617. The notice must state in plain, easily understood language: (i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3). Fed. R. Civ. P. 23(c)(2)(B).

The parties have developed a notice program that will be administered by the Settlement Administrator. Wells Fargo will provide a list of Class Members and their addresses, which the Settlement Administrator will update before sending the Mail Notice (Exhibit 5 to the Settlement Agreement) to all Class Members via first class mail no later than 45 days after entry of the Preliminary Approval Order, or such other date that the Court may set ("Notice Deadline"). Settlement Agreement ¶¶ 96-98. The Settlement Administrator will establish and maintain a Settlement Website where Class Members can access the Long Form Notice (Exhibit 6 to the Settlement Agreement), the Settlement Agreement, and other relevant pleadings and documents, including the motion for attorneys' fees, costs, and service award. *Id.* ¶ 97(f). The Settlement

Administrator will also establish and maintain a toll-free telephone number for Class Members to obtain additional information, including an individualized estimate of their Cash Award, and to leave messages to be returned by the Settlement Administrator. *Id.* ¶ 97(h).

The Mail Notice and Long Form Notice are both written in plain English so they will be easy to understand. They include key information about the settlement, including the deadlines to file a claim, request exclusion or object to the Settlement, and the date of the Final Approval Hearing (and that the hearing date may change without further notice). The notices state the amount of the fee and cost award Class Counsel will request, the amount of the service award Plaintiff will request, and the estimated Administrative Expenses. The notices disclose that, by participating in the Settlement, Settlement Class Members give up the right to sue Wells Fargo for the conduct at issue. The notices direct Class Members to the Settlement Website and the toll-free number for further information. Settlement Agreement ¶ 97, Exs. 5 & 6.

Class Members will have 45 days from the Notice Deadline to object to or opt out of the settlement. Settlement Agreement ¶¶ 99, 101. The Settlement Administrator will track and process any Opt-Out requests and will prepare an affidavit listing the individuals who have opted out to be filed with the motion for final approval. Settlement Agreement ¶ 92(j).

E. The Court should schedule a final approval hearing.

The next steps in the settlement approval process are to schedule a Final Approval Hearing, notify Class Members of the settlement and hearing, and provide Class Members with the opportunity to object, opt out, or comment on the Settlement. The parties propose the following schedule:

Event	**Date**
Notice Deadline	Within 21 days after entry of Preliminary Approval Order
Motion for attorneys' fees, costs and service award	15 days after Notice Deadline
Deadline for exclusions and objections	45 days after Notice Deadline

Event	Date
Motion for final approval and response to objections	No later than 14 days before the Final Approval Hearing
Final Approval Hearing / Noting Date	No earlier than 100 days after entry of the Preliminary Approval Order

CONCLUSION

Plaintiff requests that the Court grant his motion for preliminary approval of the settlement.

RESPECTFULLY SUBMITTED AND DATED this 5th day of March, 2021.

TERRELL MARSHALL LAW GROUP PLLC

By: /s/ Beth E. Terrell, *Admitted Pro Hac Vice*
Beth E. Terrell, *Admitted Pro Hac Vice*
Email: bterrell@terrellmarshall.com
Adrienne D. McEntee, *Admitted Pro Hac Vice*
Email: amcentee@terrellmarshall.com
Ari Y. Brown, *Admitted Pro Hac Vice*
Email: abrown@terrellmarshall.com
Brittany J. Glass, *Admitted Pro Hac Vice*
Email: bglass@terrellmarshall.com
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
Telephone: (206) 816-6603
Facsimile: (206) 319-5450

Daniel A. Schlanger (4431920)
Email: dschlanger@consumerprotection.net
SCHLANGER LAW GROUP LLP
80 Broad Street, Suite 1301
New York, New York 10004
Telephone: (212) 500-6114
Facsimile: (212) 612-7996

Counsel for Plaintiff and Proposed Settlement Classes

CERTIFICATE OF SERVICE

I, Beth E. Terrell, hereby certify that on March 5, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Jennifer M. Rosa
Email: jrosa@mayerbrown.com
Robert W. Hamburg
Email: rhamburg@mayerbrown.com
Niketa K. Patel
Email: npatel@mayerbrown.com
MAYER BROWN LLP
1221 Avenue of the Americas
New York, New York 10020
Telephone: (212) 506-2500
Facsimile: (212) 262-1910

Debra Lee Bogo-Ernst, *Admitted Pro Hac Vice*
Email: dernst@mayerbrown.com
Lucia Nale, *Admitted Pro Hac Vice*
Email: lnale@mayerbrown.com
Jed W. Glickstein, *Admitted Pro Hac Vice*
Email: jglickstein@mayerbrown.com
Lucy L. Holifield, *Admitted Pro Hac Vice*
Email: lholifield@mayerbrown.com
Michael Bornhorst, *Admitted Pro Hac Vice*
Email: mbornhorst@mayerbrown.com
MAYER BROWN LLP
71 South Wacker Drive
Chicago, Illinois 60606
Telephone: (312) 782-0600
Facsimile: (312) 701-7711

Attorneys for Defendant

DATED this 5th day of March, 2021.

TERRELL MARSHALL LAW GROUP PLLC

By: /s/ Beth E. Terrell

Beth E. Terrell, *Admitted Pro Hac Vice*
Email: bterrell@terrellmarshall.com
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
Telephone: (206) 816-6603
Facsimile: (206) 319-5450

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

ALEJANDRO CARRILLO, individually and on behalf of all others similarly situated, Plaintiff, v. WELLS FARGO BANK, N.A., Defendant.	NO. 2:18-cv-03095-SJF-SIL ECF Case Judge Sandra J. Feuerstein Magistrate Judge Steven I. Locke **JURY DEMANDED HEREON**

PROPOSED PRELIMINARY
APPROVAL ORDER

WHEREAS, Plaintiff Alejandro Carrillo ("Plaintiff") and Defendant Wells Fargo Bank, N.A. ("Wells Fargo") (together the "Parties"), have reached a proposed settlement of this Litigation, which is set forth in the Settlement Agreement filed with the Court as ECF No. __; and

WHEREAS, Plaintiff has applied to the Court for preliminary approval of the proposed settlement, the terms and conditions of which are set forth in the Settlement Agreement, and for preliminary certification of a Settlement Class; and

WHEREAS, Defendant joins in the request for preliminary approval of the settlement and preliminary certification of a Settlement Class; and

WHEREAS, the Court has fully considered the record of these proceedings, the Settlement Agreement and all exhibits thereto, the representations, arguments and recommendation of counsel for the Parties and the requirements of law; and

WHEREAS, it appears to the Court upon preliminary examination that adequate investigation and research has been conducted such that the counsel for the Parties at this time are able to reasonably evaluate their respective positions. It further appears to the Court that settlement at this time will avoid substantial additional costs by all Parties, as well as avoid the delay and risks that would be presented by the further prosecution of this Litigation.

WHEREAS, it appears to the Court upon the preliminary examination that the proposed settlement is fair, reasonable and adequate, and that a hearing should be held after notice to the Class of the proposed settlement to finally determine whether the proposed Settlement is fair, reasonable and adequate and whether a Final Approval Order and Judgment should be entered in this Litigation.

THIS COURT FINDS AND ORDERS AS FOLLOWS:

1. The capitalized terms used in this Preliminary Approval Order shall have the same meaning as defined in the Settlement Agreement except as may otherwise be ordered.

2. Preliminary approval of the proposed settlement is granted and the Parties are ordered to direct notice of the proposed settlement to the Class, in the manner set forth below. Pursuant to the standards for settlement approval set forth in Rule 23(e), the Court finds that it likely will be able to approve the settlement under Rule 23(e)(2)-(5) because it appears the Class Representative and Class Counsel have adequately represented the Class and negotiated the settlement at arm's length; it appears the settlement provides adequate relief for the Class, taking into account the costs, risks, and delay of trial and appeal; the proposed method of distributing relief to the Class is effective; it appears the terms related to the award of attorneys' fees are reasonable; it appears Class Counsel have identified all required agreements related to the

settlement; it appears the settlement treats all Class Members equitably relative to each other; and the settlement provides Class Members with an opportunity to object. Fed. R. Civ. P. 23(e)(2)-(3), (5). In addition, the Court finds that it appears the *Grinnell* factors also support preliminary approval of the settlement and issuing notice to the Class, including the complexity, expense and likely duration of the Litigation; the amount of discovery completed at this stage of the Litigation; the risks of establishing liability and damages; the risk of certifying and maintaining a certified class through trial; the reasonableness of the settlement fund compared to the best possible recovery; and the reasonableness of the settlement fund, taking into account all the risks of continued litigation. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000).

3. The Settlement Agreement was entered into by experienced counsel after substantial adversarial proceedings, including significant discovery and motions, and only after extensive arm's-length negotiations, including a full-day private mediation conducted by Hunter Hughes, Esq. (Ret.), an experienced mediator, and free of any apparent collusion.

4. For purposes of the settlement only and subject to the Settlement Agreement, the Court finds that it will likely be able to certify the Class for purposes of judgment on the settlement proposal because it appears the prerequisites for class certification under Rule 23 of the Federal Rules of Civil Procedure have been preliminarily satisfied, and conditionally certifies the following two classes, collectively, the Class:

a. TILA Class: all persons in the United States (a) who entered into Buydown Agreements with Wells Fargo in residential real estate mortgage transactions; (b) within one year prior to the filing of the Initial Complaint; (c) in which Wells Fargo disclosed in the borrower's loan Closing Disclosure a lower effective interest rate for an initial period followed by a higher interest rate for the remainder of the life of the loan; and (d) as to

whom, during the initial period, Wells Fargo amortized the loan at a rate higher than the lowest disclosed effective rate.

b. Breach of Contract Class: all persons in the United States who during the Class Period entered into Buydown Agreements with Wells Fargo in residential real estate mortgage transactions in which Wells Fargo disclosed a lower effective interest rate for an initial period followed by a higher interest rate for the remainder of the life of the loan but, during the initial period, amortized the loan at a rate higher than the lowest disclosed effective rate.

5. The persons potentially comprising the Class and to whom Notice is to be mailed are identified in the Notice Database, as defined in the Settlement Agreement, which list will be maintained as indicated in the Settlement Agreement.

6. For purposes of the settlement only and subject to the Settlement Agreement, the Court further finds that "Class Period" means (i) for all Class Members who obtained a Buydown Agreement in connection with residential real estate located within the state of New York, six years from the filing date of the Initial Complaint (May 25, 2018); and (ii) for all non-New York real estate mortgage transactions, the relevant statute of limitations period applicable to the jurisdiction in which the mortgaged property is located, and the applicable date range.

7. For purposes of settlement only, the Court preliminarily finds that the proposed Settlement Class satisfies the prerequisites for a class action under Fed. R. Civ. P. 23(a) and 23(b)(3), and the Court, pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure, conditionally certifies the Settlement Class. The Court finds, for purposes of settlement only, that the following requirements are met: (a) the above-described Class Members are so numerous that joinder is impracticable; (b) there are questions of law and fact common to the Class Members; (c) Plaintiff's claims are typical of Class Members' claims; (d) Plaintiff has fairly and adequately represented the interests of the Settlement Class and will continue to do so, and Plaintiff has retained experienced Class Counsel; (e) the questions of law and fact common to the Class

Members predominate over any affecting any individual Class Member; and (f) a class action provides a fair and efficient method for settling the controversy under the criteria set forth in Rule 23 and is superior to alternative means of resolving the claims and disputes at issue in this Action. Accordingly, as required by Rule 23(e)(1)(B)(ii), the Court will likely be able to certify the class for purposes of judgment on the proposal.

8. The Court finds that it has jurisdiction over the subject matter of this Action and personal jurisdiction over the Parties and all Class Members, including absent Class Members.

9. The Court appoints named Plaintiff Alejandro Carrillo as Class Representative. The Court preliminarily finds that he will fairly and adequately represent and protect the interests of all Class Members, including absent Class Members.

10. The Court appoints Beth E. Terrell, Ari Brown, and Adrienne D. McEntee of Terrell Marshall Law Group PLLC, and Daniel A. Schlanger of Schlanger Law Group LLP, as Class Counsel. The Court preliminarily finds that they are competent, capable of exercising all responsibilities as Class Counsel and will fairly and adequately represent and protect the interests of all Class Members, including absent Class Members.

11. Class Counsel are authorized to act on behalf of the Settlement Class with respect to all acts or consents required by, or which may be given pursuant to, the Settlement Agreement, and such other acts reasonably necessary to consummate the Settlement Agreement. Any Settlement Class Member may enter an appearance through counsel of his or her own choosing and at his or her own expense. Any Settlement Class Member who does not enter an appearance or appear on his or her own will be represented by Class Counsel.

12. The Court approves JND Legal Administration to serve as the Settlement Administrator, which shall fulfill the functions, duties, and responsibilities of the Settlement

Administrator as set forth in the Agreement and this Order. By accepting this appointment, the Settlement Administrator has agreed to the Court's jurisdiction solely for purposes of enforcement of the Settlement Administrator's obligations under the Settlement Agreement.

13. Any information comprising or derived from the Notice Database or Class List provided to the Settlement Administrator or Class Counsel pursuant to the Settlement Agreement shall be provided solely for the purpose of providing Notice, or following final approval, Cash Awards, to Class Members and informing such Class Members about their rights under the settlement; shall be kept in strict confidence; shall not be disclosed to any third party other than as set forth in the Settlement Agreement to effectuate the terms of the Agreement or the administration process; shall be used for no other cases; and shall be used for no other purpose.

14. To the extent that any federal or state law governing the disclosure and use of consumers' financial information (including but not limited to "nonpublic personal information" within the meaning of the Graham–Leach–Bliley Act, 15 U.S.C. § 6801 *et seq*., and its implementing regulations) permits such disclosure only as required by an order of a court, this Order—

(a) qualifies as "judicial process" under 15 U.S.C. § 6802(e)(8); and

(b) authorizes the production of such information subject to this order's protections, in which case the producing party's production of such information in accordance with this Order constitutes compliance with the applicable law's requirements. To the extent that any such law requires a producing or requesting party to give prior notice to the subject of any consumer financial information before disclosure, the Court finds that the limitations in this Order furnish good cause to excuse any such requirement, which the Court hereby excuses.

15. Plaintiff has filed, with Defendant's consent, the Second Amended Complaint for purposes of effecting the settlement.

16. If the settlement is terminated or is not consummated for any reason, the foregoing conditional certification of the Class, appointment of the Class Representative and Class Counsel, and filing of the Second Amended Complaint shall be void and of no further effect, and the Parties to the proposed Settlement shall be returned to the status each occupied before entry of this Order, without prejudice to any legal argument that any of the parties to the settlement might have asserted but for the settlement.

17. A Final Approval Hearing shall be held before this Court on _____, 2021, at ____ _.m.,[1] to address, among other things: (a) whether the Court should finally certify the Settlement Class and whether the Class Representative and Class Counsel have adequately represented the Settlement Class; (b) whether the proposed settlement should be finally approved as fair, reasonable and adequate and whether the Final Approval Order and Judgment should be entered; (c) whether the Released Claims of the Settlement Class should be dismissed on the merits and with prejudice; (d) whether Class Counsel's Motion for Attorneys' Fees and Costs and the Class Representative's Service Award should be approved; and (e) such other matters as the Court may deem necessary or appropriate.

18. Papers in support of final approval of the settlement, the Class Representative's Service Award, and Class Counsel's Motion for Attorneys' Fees and Costs shall be filed with the Court according to the schedule set forth in paragraph 30, below. The Final Approval Hearing may be postponed, adjourned, or continued by order of the Court without further notice to the

[1] A date not earlier than 140 days following entry of the Preliminary Approval Order as detailed in paragraph 30, *infra.*

Settlement Class, except as provided in paragraph 34 below. After the Final Approval Hearing, the Court may enter a Final Approval Order and Judgment in accordance with the Settlement Agreement that will adjudicate the rights of all Settlement Class Members with respect to the Released Claims being settled. The Court may finally approve the settlement at or after the Final Approval Hearing with any modifications agreed to by Wells Fargo and the Class Representative and without further notice to the Settlement Class, except such notice as may be provided through the Settlement Website.

19. The Court approves, as to form and content, the use of a Long Form Notice and a short form Mailed Notice (together the "Notice") substantially similar to the forms attached as Exhibits 5 and 6 to the Settlement Agreement, respectively. Mailed Notice will be provided to members of the Class by first-class U.S. mail using Wells Fargo's records as well as other investigations deemed appropriate by the Settlement Administrator, updated by the Settlement Administrator in the normal course of business. Mailed Notices shall be mailed within 45 days of the date of entry of this Preliminary Approval Order (the Notice Deadline). The Long Form Notice will be posted on the Settlement Website established by the Settlement Administrator, as set forth under the Settlement Agreement, within 45 days of the date of the entry of this Preliminary Approval Order (the Notice Deadline). Prior to the Final Approval Hearing, the Settlement Administrator will submit to the Court a declaration of compliance with these notice provisions.

20. In the event the Mailed Notice is returned undeliverable with a forwarding address, the Settlement Administrator shall promptly re-mail the Mailed Notice to the indicated forwarding address. In the event the Mailed Notice is returned undeliverable without a forwarding address, the Settlement Administrator shall promptly perform reasonable address

traces for such returned notices. The Settlement Administrator shall complete the re-mailing of Mailed Notices to those Class Members who were identified as of that time through address traces or forwarding addresses promptly and no later than 35 days from the Notice Deadline. Except as set forth herein, there shall be no further obligation or attempt to obtain a forwarding address for any such returned mail or to further re-mail any such Mailed Notice or returned mail. Prior to the Final Approval Hearing, the Settlement Administrator will submit to the Court a declaration of compliance with these notice re-mailing provisions.

21. The Settlement Administrator shall have the discretion to revise the format of the Mailed Notice in a reasonable manner to reduce mailing or administrative costs. Non-substantive changes may be made to the Class Notices by agreement of the Parties without further order of the Court.

22. The Notice, as directed in this Order and set forth in the Settlement Agreement, constitutes the best notice practicable under the unique circumstances of this case and is reasonably calculated to apprise the members of the Settlement Class of the pendency of this Action and of their right to object to the settlement or exclude themselves from the Settlement Class. The Court further finds that the Notice Program is reasonable, that it constitutes due, adequate, and sufficient notice to all persons entitled to receive such notice and that it meets the requirements of due process and of Federal Rule of Civil Procedure 23.

23. The cost of Notice and settlement administration shall be paid from the Settlement Fund, with recoverable advances, if needed, provided by Wells Fargo, as provided for in the Settlement Agreement.

24. Any member of the Class who desires to be excluded from the Settlement Class, and therefore not be bound by the terms of the Settlement Agreement, must submit to the

Settlement Administrator, pursuant to the instructions and requirements set forth in the Notice, a timely and valid written request for exclusion postmarked no later than 45 days following the Notice Deadline.

25. Each request for exclusion, or "Opt-Out", must be personally signed by the individual Class Member; any so-called "mass" or "class" opt-outs shall not be allowed. Further, to be valid and treated as a successful exclusion or "Opt-Out" the request must be signed by the Class Member and include: (a) the Requester's full name, address, account number, telephone number, and the name and number of this Litigation; and (b) state unequivocally that the Requester desires to be excluded from the Settlement Class, to be excluded from the Settlement, not to participate in the Settlement, and/or to waive all rights to the benefits of the Settlement. No person shall purport to exercise any exclusion rights for any other person, or purport to exclude any other Class Member as a group, aggregate or class involving more than one Class Member, or as an agent or representative, except upon proof of a legal power of attorney, conservatorship, trusteeship, or other legal authorization. Any such purported exclusion shall be void and the person that is the subject of the purported opt-out shall be treated as a Settlement Class Member and be bound by the Settlement.

26. Any member of the Settlement Class who elects to be excluded shall not be entitled to receive any of the benefits of the Settlement, shall not be bound by the release of any claims pursuant to the Settlement Agreement, and shall not be entitled to object to the settlement or appear at the Final Approval Hearing.

27. Any Class Member who does not submit a valid and timely request for exclusion may object to the proposed settlement. Any such Class Member shall have the right to appear and be heard at the Final Approval Hearing, either personally or through an attorney retained at

the Class Member's own expense. Any such Class Member must file with the Court and mail or hand-deliver to the Settlement Administrator and Counsel for the Parties a written and detailed statement of the specific objections made, delivered or postmarked no later than the Objection Deadline[2]. Each Objection must (i) state the case name and case number of this Litigation; (ii) set forth the Settlement Class Member's full name, current address, and address of the property associated with the Buydown Agreement; (iii) contain the objector's original signature; (iv) state that the objector objects to the settlement, in whole or in part; (v) set forth the reasons why the objector objects to the settlement along with copies of any supporting materials; (vi) set forth the identity of any attorney who assisted, provided advice, or represents the objector as to this Litigation or such objection; and (vii) state whether the objector intends on appearing at the Final Approval Hearing either *pro se* or through counsel and whether the objecting Settlement Class Member plans on offering testimony at the Final Approval Hearing.

28. Any Settlement Class Member who fails to timely object in the manner set forth herein shall be deemed to have waived, and shall forever be foreclosed from raising, any objection or opposition, by appeal, collateral attack, or otherwise and shall be bound by all of the terms of this settlement upon Final Approval and by all proceedings, orders and judgments, including but not limited to the Release in the Litigation.

29. Pending entry of the Final Approval Order and Judgment, the Plaintiff, Class Members, and any person or entity allegedly acting on behalf of the Settlement Class, either directly, representatively or in any other capacity, are preliminarily enjoined from commencing or prosecuting against the Released Parties any action or proceeding in any court or tribunal

---

[2] A date that is no later than 45 days following the Notice Deadline and which will be specified by reference to a date certain in the Notices.

asserting any of the Released Claims, provided, however, that this injunction shall not apply to individual claims of any Class Members who timely exclude themselves in a manner that complies with this Order and the Agreement. This injunction is necessary to protect and effectuate the settlement, this Order, and the Court's flexibility and authority to effectuate this settlement and to enter judgment when appropriate, and is ordered in aid of the Court's jurisdiction and to protect its judgments pursuant to 28 U.S.C. § 1651(a).

30. Further settlement proceedings in this matter shall proceed according to the following schedule:

EVENT	SCHEDULED DATE
Notice Deadline (short form Mailed Notice; Long Form website posting)	45 days after entry of Preliminary Approval Order
Attorney's Fees and Costs and Service Award application due by[3]	60 days after entry of Preliminary Approval Order
Last day for Class Members to opt-out of Settlement (the Opt-Out Deadline)[4]	90 days after the entry of Preliminary Approval Order
Last day for Class Members to Object to the Settlement (the Objection Deadline)[5]	90 days after the entry of Preliminary Approval Order
Deadline to file briefs in support of Final Approval or Opposition to any Objections	14 days prior to the Final Approval Hearing
Settlement Administrator to file certification regarding CAFA notice requirements	14 days prior to the Final Approval Hearing
Final Approval Hearing	On the date set in paragraph 17, but no earlier than 140 days after entry of Preliminary Approval Order

[3] Per Settlement Agreement ¶ 116, a date that is 30 days before the Objection Deadline.
[4] Per Settlement Agreement ¶ 99, a date that is 45 days following the Notice Deadline.
[5] Per Settlement Agreement ¶ 101, a date that is 45 days after the Notice Deadline.

31. Service of all papers on counsel for the Parties shall be made as follows: for settlement Class Counsel to Beth E. Terrell, Terrell Marshall Law Group PLLC, 936 N. 34th Street, Suite 300, Seattle, WA 98103; for Defendant to Lucia Nale, Debra Bogo-Ernst, Mayer Brown LLP, 71 S. Wacker Dr., Chicago, IL 60606.

32. The address of this Court for purposes of any Objection as set forth in paragraph 25 is: Clerk of the Court, U.S. District Court for the Eastern District of New York, 100 Federal Plaza, Central Islip, NY 11722.

33. In the event that a Final Approval Order and Judgment is not entered by the Court, or the Effective Date of the Settlement does not occur, or the Settlement Agreement otherwise terminates according to its terms, this Order and all orders entered in connection therewith shall become null and void, shall be of no further force and effect, and shall not be used or referred to for any purposes whatsoever, including without limitation for any evidentiary purpose (including but not limited to class certification), in this Action or any other action. In such event the Settlement Agreement, exhibits, attachments and all negotiations and proceedings related thereto shall be deemed to be without prejudice to the rights of any and all of the Parties, who shall be restored to their respective positions as of the date and time immediately preceding the execution of the Settlement Agreement.

34. Any deadlines set in this Preliminary Approval Order may be extended, or other aspects of the settlement modified, by order of the Court, for good cause shown, without further notice to the Settlement Class, except that notice of any such orders shall be posted by the Settlement Administrator to the Settlement Website that the Settlement Administrator will establish and maintain in accordance with the Agreement. Class Members should check the

Settlement Website regularly for updates, changes, and/or further details regarding extensions of deadlines, orders entered by the Court and other information regarding the settlement.

35. The Parties are hereby authorized to establish the means necessary to administer the Settlement.

36. All proceedings in this Litigation, other than those necessary to carry out, or incidental to carrying out, the terms and conditions of this Order are stayed and suspended until further order of this Court.

37. The settlement shall not constitute an admission, concession, or indication of the validity of any claims or defenses in the Litigation, or of any wrongdoing, liability, or violation by Wells Fargo, which vigorously denies all of the claims and allegations raised in the Litigation.

It is SO ORDERED.

HON. SANDRA J. FEUERSTEIN
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF NEW YORK

cc: All Counsel of Record