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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO DIVISION**

Case No.: 3:15-cv-6344-RS

ALLEN BUCKINGHAM, EUNICE ANN
ROBINSON, ALVIN COURTS, and MELISSA
AGOSTO-CRUZ, individually, on behalf of others
similarly situated, and on behalf of the general
public,

Plaintiffs,

vs.

BANK OF AMERICA, National Association,

Defendant.

**[proposed] ORDER AND JUDGMENT
GRANTING FINAL APPROVAL OF
CLASS ACTION SETTLEMENT;
ATTORNEY FEES AND COSTS (AS
MODIFIED BY THE COURT)**

**[proposed] ORDER AND JUDGMENT GRANTING FINAL APPROVAL OF CLASS ACTION
SETTLEMENT; ATTORNEY FEES AND COSTS (AS MODIFIED BY THE COURT)**

1 This matter, a wage and hour class and collective action under the federal Fair Labor
2 Standards Act (FLSA) and several state laws, comes before the Court on plaintiffs' motion for
3 final approval of class action settlement (ECF No. 96), and motion for payment of attorney fees
4 and costs (ECF No. 92). A hearing was held on June 29, 2017.

5 The Court has reviewed and considered the record in this matter, including the
6 memorandum and declarations submitted in support of the motion for preliminary approval and
7 the exhibits attached thereto; the proposed settlement agreement and each of the class notices;
8 Plaintiffs' motion for final approval of the Settlement Agreement; the memorandum in support of
9 the motion for final approval submitted by plaintiffs; and the memorandum and declarations
10 submitted in support of the fee petition.

11 Good cause appearing, the Court GRANTS the final approval and fee motions. The
12 Court's order is based upon the following:

13 **I. BACKGROUND**

14 Plaintiffs were Client Fulfillment Consultants (CFCs) (also called Implementation
15 Advisors), employees in the treasury services department of defendant Bank of America, N.A.
16 ("BANA"), who allege they were misclassified as exempt from overtime. They now seek final
17 approval of a class-wide settlement that achieves a common fund, in addition to prospective relief
18 for the class.

19 On January 26, 2017, this Court granted preliminary approval of this settlement, certifying
20 the settlement class, preliminarily approving the settlement, and ordering dissemination of notice
21 to class members (ECF No. 87). This Court granted the parties' amendment to this settlement on
22 March 9, 2017 (ECF No. 91).

23 The claims administrator provided notice in accordance with this Court's order. Out of the
24 529 initial class members, only one class member requested exclusion from the class, and no
25 objections were filed. This settlement will result in recovery of \$6.6 million for class members, in
26 addition to the reclassification of the vast majority of currently employed class members and other
27 current CFCs as non-exempt. Under the settlement, defendant will deposit the settlement fund

28 **[proposed] ORDER AND JUDGMENT GRANTING FINAL APPROVAL OF CLASS ACTION
SETTLEMENT; ATTORNEY FEES AND COSTS (AS MODIFIED BY THE COURT)**

1 with the claims administrator within 15 days of this Order, and class members will receive their
2 pro-rata allocations shortly thereafter by mail.

3 **II. SUMMARY OF SETTLEMENTS**

4 **A. Settlement Terms**

5 The proposed settlements resolve all wage-and-hour claims against defendant stemming
6 from its alleged misclassification of CFCs. The settlement classes are defined as follows (ECF No.
7 91 at 3-4):

8 The California Class shall be “All persons who are or who have been employed by
9 defendant as exempt employees in its internal job code CI066, which includes the job titles
10 Implementation Advisors and Client Fulfillment Consultants, within the State of California from
11 December 31, 2011 through October 17, 2016.”

12 The North Carolina Class shall be “All persons who are or who have been employed by
13 Defendant as exempt employees in its internal job code CI066, which includes the job titles
14 Implementation Advisors and Client Fulfillment Consultants, within the State of North Carolina
15 from December 31, 2013 through October 17, 2016.”

16 The Illinois Class shall be “All persons who are or who have been employed by Defendant
17 as exempt employees in its internal job code CI066, which includes the job titles Implementation
18 Advisors and Client Fulfillment Consultants, within the State of Illinois from December 31, 2012
19 through October 17, 2016.”

20 The Connecticut Class shall be “All persons who are or who have been employed by
21 Defendant as exempt employees in its internal job code CI066, which includes the job titles
22 Implementation Advisors and Client Fulfillment Consultants, within the State of Connecticut from
23 December 31, 2013 through October 17, 2016.”

24 The FLSA Collective shall be: “All persons who are or who have been employed by
25 Defendant as exempt employees in its internal job code CI066, which includes the job titles
26 Implementation Advisors and Client Fulfillment Consultants, from December 31, 2012 through
27 October 17, 2016 and who timely joins the Collective Action.”

1 The proposed settlement classes mirror the classes certified for settlement purposes by this
2 Court on January 26 and March 9, 2017.

3 **B. The Settlement Consideration**

4 Under the proposed settlement, defendant will pay a total of \$6.6 million in cash, in
5 addition to the employer share of payroll taxes. Defendant also committed to reviewing all CFCs
6 and either (1) reclassifying current CFCs as non-exempt, or (2) modifying their job duties, all of
7 which it completed last year.

8 **C. Release of Claims**

9 Class members will release all federal and state-law wage-and-hour claims against
10 defendant if the settlement becomes final, relating to the conduct alleged in plaintiffs' complaint,
11 including:

12 [C]laims, demands, rights, liabilities, and causes of action that were asserted in the
13 Second Amended Complaint ("SAC") in the Lawsuit on behalf of Implementation
14 Advisors and any additional wage and hour claims that could have been brought
15 based on the facts alleged in the SAC on behalf of Implementation Advisors. The
16 Released Claims include all claims relating to or arising out of the designation and
17 treatment of the Class Representative and Class Members as "exempt" from
18 overtime compensation while they worked as Implementation Advisors, including
19 claims for violations of any state or federal statutes, rules, or regulations. This
20 includes, but is not limited to, claims that, during the Class Periods, Defendant
21 failed to pay overtime or any other wages due under California, North Carolina,
22 Illinois, or Connecticut state laws; failed to pay overtime or any other wages due
23 under the Fair Labor Standards Act; failed to provide legally-required meal and rest
24 periods or pay wages due for such failure; failed to timely furnish accurate itemized
25 wage statements; engaged in conduct subjecting Defendant to any statutory or civil
26 penalties under any statute, ordinance, or otherwise arising from or related to the
27 classification of Plaintiffs and Class Members as exempt from overtime, including,
28 without limitation, California Labor Code section 2698, et seq. and Labor Code
sections 203 and 226; engaged in any unfair business practices arising from the
misclassification alleged; and failed to pay all wages due to Class Representative
and Class Members upon termination of employment.

ECF No. 77-1 at ¶ 26. Class representatives Buckingham, Robinson, Courts, and Agosto-Cruz will
execute a general release of claims related to their employment with defendant, unlike absent class
members. *Id.*

1 **III. THE SETTLEMENT IS FAIR, REASONABLE AND ADEQUATE**

2 In order to approve a settlement in a class action, the court must conduct a three-step
3 inquiry. *First*, it must assess whether defendants have met the notice requirements under the Class
4 Action Fairness Act (CAFA). *See* 28 U.S.C. § 1715(d). *Second*, it must determine whether the
5 notice requirements of Federal Rule of Civil Procedure 23(c)(2)(B) have been satisfied. *Finally*, it
6 must conduct a hearing to determine whether the settlement agreement is “fair, reasonable, and
7 adequate.” *See* Fed. R. Civ. P. 23(e)(2); *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003)
8 (discussing the Rule 23(e)(2) standard); *Adoma v. Univ. of Phoenix, Inc.*, 913 F. Supp. 2d 964, 972
9 (E.D. Cal. 2012) (conducting three-step inquiry). Each of these requirements is met here.

10 **A. The Parties Have Complied with the Class Action Fairness Act**

11 CAFA requires that “[n]ot later than 10 days after a proposed settlement of a class action is
12 filed in court, each defendant that is participating in the proposed settlement shall serve [notice of
13 the proposed settlement] upon the appropriate State official of each State in which a class member
14 resides and the appropriate Federal official[.]” *See* 28 U.S.C. § 1715(b). The court may not grant
15 final approval of a class action settlement until the CAFA notice requirement is met. *See* 28
16 U.S.C. § 1715(d). Here, defendant timely provided the required CAFA notice. No Attorneys
17 General have submitted statements of interest or objections in response to these notices.

18 **B. The Settlement Class Meets All Requirements of Rule 23(e)**

19 In its order granting preliminary approval, and its order certifying the class on January 26,
20 2017 (ECF No. 87), the Court certified the class pursuant to Rule 23(b)(3). The same analyses
21 apply here, and the Court affirms its order certifying the class for settlement purposes under Rule
22 23(e).

23 **C. The Parties Have Complied with Rule 23(c) Notice Requirements**

24 Class actions brought under Rule 23(b)(3) must satisfy the notice provisions of Rule
25 23(c)(2), and upon settlement of a class action, “[t]he court must direct notice in a reasonable
26 manner to all class members who would be bound by the proposal.” Fed. R. Civ. P. 23(e)(1). Rule
27 23(c)(2) prescribes the “best notice that is practicable under the circumstances, including

1 individual notice” of particular information. Fed. R. Civ. P. 23(c)(2)(B).

2 The proposed notice plan was undertaken and carried out pursuant to the preliminary
3 approval order. The notice administrator provided direct notice via mail and, where possible, e-
4 mail (obtained from defendant) to class members. In addition, the notice administrator established
5 a toll-free telephone number that class members could contact with any questions. Plaintiffs’
6 counsel also made a case website publicly available which contained the full settlement
7 agreement, the operative complaint, the Court’s order granting preliminary approval to this
8 settlement, plaintiffs’ motion for preliminary approval, plaintiffs’ motion for attorney fees and
9 costs, and the notices.

10 The Court previously found that the notice itself informed class members of the nature of
11 the action, the terms of the proposed settlements, the effect of the action and the release of claims,
12 as well as class members’ right to exclude themselves from the action and their right to object to
13 the proposed settlements (ECF Nos. 87, 91). Plaintiffs have complied with all of the requirements
14 of Rule 23 and have complied with the notice provisions of the Class Action Fairness Act of 2005,
15 28 U.S.C. § 1715.

16 **D. The Proposed Settlement is Fair, Adequate and Reasonable**

17 The Court may approve a settlement that is fair, reasonable, and adequate. Fed. R. Civ. P.
18 23(e)(2). “It is the settlement taken as a whole, rather than the individual component parts, that
19 must be examined for overall fairness.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir.
20 1998). The factors typically considered when evaluating the fairness of a settlement agreement
21 are:

- 22 (1) the strength of the plaintiff’s case; (2) the risk, expense, complexity, and likely
23 duration of further litigation; (3) the risk of maintaining class action status
24 throughout the trial; (4) the amount offered in settlement; (5) the extent of
25 discovery completed and the stage of the proceedings; (6) the experience and views
of counsel; (7) the presence of a governmental participant; and (8) the reaction of
the class members of the proposed settlement.

26 *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 943 (9th Cir. 2011) (citing *Churchill*
27 *Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)). “[W]here, as here, a settlement is

1 negotiated prior to formal class certification, consideration of the[] eight *Churchill* factors alone is
2 not enough to survive appellate review.” *Id.* at 946. The award must also be scrutinized for
3 evidence of collusion between class counsel and the defendant, including: “when counsel receive a
4 disproportionate distribution of the settlement”; “when the parties negotiate a ‘clear sailing’
5 arrangement”; and “when the parties arrange for fees not awarded to revert to defendants.” *Id.* at
6 947.

7 “Where a settlement produces a common fund for the benefit of the entire class, courts
8 have discretion to employ either the lodestar method or the percentage-of-recovery method” when
9 determining a proper attorney fees award. *In re Bluetooth*, 654 F.3d at 942. Under the percentage-
10 of-recovery method, the Ninth Circuit “has established 25% of the common fund as a benchmark
11 award for attorney fees.” *Hanlon*, 150 F.3d at 1029. Yet the lodestar method, which multiplies
12 “the number of hours reasonably expended by a reasonable hourly rate,” *id.*, also produces a
13 “presumptively reasonable” fee award, *Bluetooth*, 654 F.3d at 941. Although the Court has
14 discretion to use either method, in either case the Ninth Circuit encourages a cross-check with the
15 alternative method in order to ensure the reasonableness of any award. *Id.* at 944. The Court may
16 also award reasonable litigation costs. *Id.* at 941.

17 The proposed settlement is sufficiently fair, reasonable, and adequate to qualify for final
18 approval. The settlement secures a substantial recovery for the plaintiff class members — 35% of
19 the case’s arguable value of over \$18 million — and resulted in reclassification of hundreds of
20 class members as nonexempt from the overtime laws at issue. Like the monetary reward, the
21 reclassification of CFCs as nonexempt represents something of value to the class. *See Vizcaino v.*
22 *Microsoft Corp.*, 290 F.3d 1043, 1049 (9th Cir. 2002) (“the litigation also benefitted employers
23 and workers nationwide by clarifying the law of temporary worker classification . . . many
24 workers who otherwise would have been classified as contingent workers received the benefits
25 associated with full time employment”).

26 Other factors favoring approval include the inherent risks of litigation, and the fact that
27 plaintiffs’ theories of liability have apparently never been tested for CFCs. Moreover, plaintiffs’

1 Class counsel's billing rates are clearly reasonable for the market; similar and higher rates
2 have been approved in this District. *See, e.g., In re Magsafe Apple Power Adapter Litig.*, No. 5:09-
3 CV-01911-EJD, 2015 WL 428105, at *12 (N.D. Cal. Jan. 30, 2015) ("In the Bay Area, reasonable
4 hourly rates for partners range from \$560 to \$800, for associates from \$285 to \$510, and for
5 paralegals and litigation support staff from \$150 to \$240."). The multiple, meanwhile, is certainly
6 on the high side, but is not fatal. *See Steiner v. Am. Broad. Co.*, 248 F. App'x 780, 783 (9th Cir.
7 2007) (citation omitted) ("Although this [6.85 times] multiplier is higher than those in many
8 common fund cases . . . it still falls well within the range of multipliers that courts have
9 allowed.").

10 Similar multiples have been approved in this District. *See, e.g., Gutierrez v. Wells Fargo*
11 *Bank, N.A.*, No. C 07-05923 WHA, 2015 WL 2438274, at *7 (N.D. Cal. May 21, 2015)
12 ("Accordingly, this order allows a multiplier of 5.5 mainly on account of the fine results achieved
13 on behalf of the class, the risk of non-payment they accepted, the superior quality of their efforts,
14 and the delay in payment."); *In re Apple iPhone/iPod Warranty Litig.*, 40 F. Supp. 3d 1176, 1181
15 (N.D. Cal. 2014) ("Furthermore, plaintiffs are correct that the resulting [3.62 times] multiplier
16 necessary to reach a \$15.9 award would not be out of bounds, given the success they achieved in
17 this action and the other relevant factors."). While the multiple is high, class counsel has achieved
18 substantial recovery for the class, and the lack of objections and opt-outs indicates the class is
19 pleased with the results. Accordingly, and because the fee request is at the 25% benchmark, the
20 motion for attorney fees is granted.

21 Class counsel also seeks \$15,000 in costs. Most of the claimed costs are from mediation
22 fees (\$6,250), mailing notices and reminders (\$4,043), and conducting depositions (\$2,280.45).
23 The remaining \$2,785.04 is for travel, document reproduction, legal research, and other litigation
24 costs. This cost request is reasonable, and is granted.

25 **V. SERVICE AWARDS FOR CLASS REPRESENTATIVES**

26 Plaintiffs request service awards in the amount of \$15,000 for plaintiff Buckingham, and
27 \$2,500 each for plaintiffs Robinson, Courts, and Agosto-Cruz, to be deducted from the gross

1 common fund. In the Ninth Circuit, service awards “compensate class representatives for work
2 done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the
3 action, and, sometimes, to recognize their willingness to act as a private attorney general.”

4 *Rodriguez v. W. Publ’g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009).

5 Here, the four class representatives have spent a significant amount of time assisting in the
6 litigation of this case. Plaintiff Buckingham sat for a full-day deposition and attended the parties’
7 mediation in person. Each class representative provided relevant information to plaintiffs’ counsel,
8 reviewed the settlement agreement to ensure it was in the best interest of the class, and, more
9 generally, took a reputational risk by representing the other class members. The class
10 representatives made these efforts on behalf of class members without receiving the benefits of the
11 reclassification, because they are all former employees. Moreover, each class representative
12 executed a broader release than absent class members, warranting additional consideration. The
13 requested awards are therefore approved.

14 **VI. THE REQUESTED CY PRES IS APPROPRIATE**

15 The requested *cy pres* beneficiary, Legal Aid at Work (formerly called Legal Aid Society-
16 Employment Law Center), meets the test under *Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir.
17 2012), “that there be a driving nexus between the plaintiff class and the *cy pres* beneficiaries.”
18 This suit seeks to enforce wage protections for workers. Legal Aid at Work
19 (<https://legalaidatwork.org>), provides direct legal services for low-wage workers in California.
20 Accordingly, the beneficiary is approved.

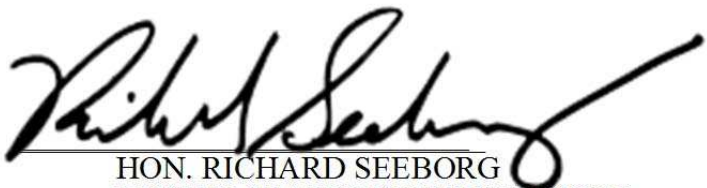
21 **VII. CONCLUSION**

22 The Court hereby enters Judgment approving the terms of the Settlement. This document
23 shall constitute a final judgment with respect to the Claims of the Settlement Class for purposes of
24 Rule 58 of the Federal Rules of Civil Procedure, and the Settlement Class Members are barred and
25 permanently enjoined from initiating or prosecuting the Released Claims as defined in the
26 Agreement.

1 The claims of the Settlement Class Members are hereby DISMISSED WITH PREJUDICE,
2 with each party to bear his, her, or its own attorney fees and costs, except as set forth herein, and
3 with this Court retaining exclusive jurisdiction to enforce the Settlement Agreement, including
4 jurisdiction regarding the disbursement of the Settlement Fund. Without affecting the finality of
5 this Order and Final Judgment, the Court retains jurisdiction over the Class Representatives, the
6 Settlement Class, and the Defendant as to all matters concerning the administration,
7 consummation, implementation, interpretation, and enforcement of the Settlement Agreement.

8 **IT IS SO ORDERED.**

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10 DATED: July 11, 2017


HON. RICHARD SEEBORG
UNITED STATES DISTRICT COURT

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