SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEPARTMENT 305

DAWN LOFTON, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

WELLS FARGO HOME MORTGAGE, a Division of WELLS FARGO BANK, NATIONAL ASSOCIATION,

Defendant.

TERRI MAXON, as successor in interest to David Mark Maxon,

Intervenor.

No. CGC-11-509502

ORDER (AFTER JUNE 24, 2015 HEARING):

1. **DETERMINING THE STATUS AND DISPOSITION OF THE $4,921,140.04 ON DEPOSIT WITH THE COURT;**
2. **REQUIRING ILG TO DEPOSIT FURTHER FUNDS WITH THE COURT;**
3. **DENYING MOTION FOR PERMANENT INJUNCTION;**
4. **DENYING TWO (2) MOTIONS TO INTERVENE;**
5. **DENYING MOTION TO VACATE THE JUDGMENT;**
6. **RULING ON OSC RE SUBCLASS CERTIFICATION;**
7. **DENYING MOTION TO BE APPOINTED INTERIM LEAD COUNSEL;**
8. **RULING ON OSC RE PRELIMINARY INJUNCTION; AND**
9. **DENYING TWO (2) MOTIONS TO DISQUALIFY**

I. Introduction

Judgment in this class action was entered on July 27, 2011. After judgment was entered, the law firm Initiative Legal Group ("ILG") attempted to arrogate to itself more than $5 million in class action attorneys' fees without court approval. As discussed more fully below, ILG reached a side-deal with defendant Wells Fargo in which ILG was to receive attorneys' fees for work performed on behalf of members of the class in this action, for claims which were resolved and extinguished by the settlement and judgment in this action. In short, these fees are properly construed as class action attorneys' fees which required approval by this Court.

But for the efforts of one class member, David Maxon, and his attorneys, ILG would have successfully evaded court review of its side-agreement for class action attorneys' fees. This Court first became aware of ILG's attempt to appropriate to itself millions of dollars of attorney fees in September of 2012, when Mr. Maxon moved to intervene in this action and sought a temporary restraining order to freeze the unapproved attorneys' fees obtained by ILG. Mr. Maxon's motion to intervene was granted,[1] and Judge Harold E. Kahn issued a temporary restraining order which, among other things, required ILG to deposit nearly $5 million of the misappropriated funds into a court-controlled account. The Court of Appeal affirmed the temporary restraining order in all respects, and remanded the matter to this Court for "limited proceedings designed to resolve . . . outstanding issues with respect to the *Lofton* settlement[.]"[2]

Since remand, there has been a flood of activity. On June 24, 2015, this Court held a hearing on eleven matters: (1) disposition of the remaining funds—$4,921,140.04—on deposit with the Court pursuant an order issued on April 29, 2015; (2) intervenor Terri Maxon's motion for a permanent injunction; (3) class member Linda Summers' motion to vacate the judgment; (4) Ms. Summers' motion to intervene; (5) a motion to intervene by class members Daniel Robert Spotts and Thomas R. Sebring; (6) an order to show cause whether a subclass should be certified; (7) a motion by Chavez & Gertler LLP to be appointed interim lead counsel; (8) an order to show cause why a preliminary injunction should not issue; (9) class representative Dawn Lofton's motion to disqualify attorneys Mark Yablonovich and Burke Huber; (10) intervenor Maxon's motion to disqualify attorneys Mark Yablonovich and Burke Huber; and

[1] Mr. Maxon died recently. His wife, Terri Maxon, in her capacity as Mr. Maxon's successor-in-interest, has assumed his status as intervenor. *See* Apr. 29, 2015 Order at 2.

[2] *Lofton v. Wells Fargo Home Mortgage*, 230 Cal.App.4th 1050, 1065 (2014).

(11) intervenor Maxon's motion for attorneys' fees. At the hearing, the Court took all of the matters under submission, with the exception of Ms. Maxon's motion for attorneys' fees, which was continued to July 31, 2015. Having fully considered the matters, and good cause appearing, the Court now rules on each of the matters taken under submission.

II. Evidentiary Rulings

In connection with the matters heard on June 24, the Court received scores of requests for judicial notice and more than one-hundred pages of evidentiary objections. The Court has ruled on those requests and objections in separate orders issued concurrently herewith.

III. Background

A. HMC Litigation Against Wells Fargo

1. Mevorah *and* Lofton

The history of this litigation dates back to 2005 when Class Counsel, Kevin McInerney, filed a wage-and-hour class action on behalf of Home Mortgage Consultants ("HMCs") against Wells Fargo, *Mevorah v. Wells Fargo Home Mortgage* ("*Mevorah*"). *Mevorah* was filed in San Francisco Superior Court on February 10, 2005 and asserted claims for unpaid overtime, meal and rest break violations, and waiting time penalties on behalf of HMCs throughout California.[3] Wells Fargo removed the action to the Northern District of California.[4] The District Court granted plaintiff's motion for class certification,[5] but the Ninth Circuit vacated the certification order, remanding the matter to the District Court for reconsideration.[6] On remand, the District Court denied plaintiff's renewed class certification motion.[7]

2. *ILG's HMC Litigation Against Wells Fargo*

Over the span of more than four years—after *Mevorah* was filed, and before *Lofton* was filed—ILG filed a host of lawsuits which asserted claims on behalf of HMCs against Wells Fargo including: (a) a PAGA representative action, initially styled as a class action, *Strickler v. Wells Fargo Bank, N.A.*

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[3] Complaint, ILG's RJN Opp. to Maxon's Mot. for Injunction, filed June 3, 2015, Ex. 4. For reasons unexplained, Class Counsel's filings often refer to *Mevorah* having been filed in Alameda County Superior Court, and even the *Lofton* class notice indicates that *Mevorah* originated in Alameda. This discrepancy is not relevant to any issues now before this Court.

[4] Notice of Removal, *Id.*, Ex. 1.

[5] *In re Wells Fargo Home Mort. Overtime Pay Litig.*, 527 F.Supp.2d 1053 (N.D. Cal. 2007).

[6] *In re Wells Fargo Home Mort. Overtime Pay Litig.*, 571 F.3d 953 (9th Cir. 2009).

[7] *In re Wells Fargo Home Mort. Overtime Pay Litig.*, 268 F.R.D. 604 (N.D. Cal. 2010).

("*Strickler*");[8] (b) at least one class action, *Hollander v. Wells Fargo Bank, N.A.* ("*Hollander*");[9] and (c) ten individual "mass actions."[10] The ten individual mass actions were brought on behalf of more than 600 HMCs whom ILG had retained as clients (the "ILG Clients"). (The Court will refer to these twelve actions collectively as the "ILG Actions.")

Another HMC class action, *Paula Peña v. Wells Fargo* ("*Peña*"), was filed by the Law Offices of Mark Yablonovich on November 15, 2010.[11] In their motions to disqualify Mr. Yablonovich—Mr. Yablonovich having been a founding partner of ILG,[12] having been listed by ILG as its lead attorney in *Strickler*[13]and *Hollander*,[14] and having left the firm in the summer of 2009[15]—class representative Lofton and intervenor Maxon assert that Mr. Yablonovich's firm "operates as a front for ILG in litigation, and the two firms work in tandem to advance their common interests"[16] and that *Peña* was no more than a thirteenth ILG Action filed "to create additional settlement leverage" against Wells Fargo.[17] There is evidence in the record to support this assertion: The *Peña* complaint was drafted by ILG and filed by Mr.

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[8] San Diego Cnty. Super. Ct., Case No. GIN-052537, Maxon's RJN Supp. Mots., filed May 21, 2015 ("Maxon's RJN"), Ex. 6; *see also* Declaration of David Mark Maxon Supp. Mot. Intervene, filed Sept. 7, 2012 ("9/7/12 Maxon Decl." [Maxon's RJN, Ex. 23]), Ex. H (Mar. 12, 2012 Letter from G. Arthur Meneses, stating that *Strickler* "was initially filed as a class action [on May 15, 2006], but was amended as a representative action under California's Private Attorneys General Act").

[9] Alameda Cnty. Super. Ct., Case No. RG-07-360701, filed on December 11, 2007, Maxon's RJN, Ex. 7.

[10] The ten mass actions were: (1) *McLane v. Wells Fargo Bank*, Orange County Sup. Ct., No. 30-2010-0037754, filed June 8, 2010 ("*McLane*"); (2) *Gagliano v. Wells Fargo Bank*, San Bernardino Sup. Ct., No. CIVDS 1008071, filed June 9, 2010; (3) *Sosa v. Wells Fargo Bank*, Riverside Super. Ct., No. RIC 10011491, filed June 18, 2010; (4) *Williams v. Wells Fargo Bank*, Los Angeles Sup. Ct., No. BC438024, filed May 20, 2010; (5) *Bhalla v. Wells Fargo Bank*, Santa Clara Sup. Ct., No. 110-CV-176172, filed August 6, 2010; (6) *Greene v. Wells Fargo Bank*, Alameda Sup. Ct., No. RG10522400, filed June 6, 2010; (7) *Pope v. Wells Fargo Bank*, Solano Sup. Ct., No. FCS036686, filed October 1, 2010; (8) *Strickland v. Wells Fargo Bank*, San Francisco Sup. Ct., No. CGC-10-500064, filed June 9, 2010; (9) *Haynes v. Wells Fargo Bank*, Orange County Sup. Ct., No. 30-2011-00448124, filed February 7, 2011; and (10) *Mather v. Wells Fargo Bank*, San Francisco Sup. Ct., No. CGC-10-505630, filed November ("*Mather*"). *See* Maxon's RJN, Exs., 9-15, 17-18.

[11] Los Angeles Sup. Ct., No. BC449502, Maxon's RJN, Ex. 16.

[12] Dec. 29, 2009 *Ex Parte* App. to Hear Joint Petition to Confirm Arbitration Award at p. 4 (Declaration of Marc Primo, ¶ 2), *Primo et al. v. Initiative Legal Group LLP*, Los Angeles Super. Ct, No. SS018923, Maxon's RJN, Ex. 28.

[13] Maxon's RJN, Ex. 6.

[14] Maxon's RJN, Ex. 7.

[15] Yablonovich Decl. Opp. Mot. Disqualify, filed June 4, 2015, ¶ 4.

[16] Maxon's Mot. Disqualify MPA, filed May 22, 2015, at 2:3-4.

[17] June 24, 2015 Hr'g Tr. at 58:5-6.

Yablonovich's associate at ILG's direction; and similarly, the *Pena* dismissal was drafted by ILG and filed by Mr. Yablonovich's associate at ILG's direction.[18]

Each of the ILG Actions (with one possible exception) and *Peña* advanced claims that overlapped with those alleged in *Mevorah* and, as discussed below, were released by the *Lofton* Settlement and extinguished by the judgment in this action. That possible exception is *Mather*, which sought a $750 penalty for failure to provide employment records in violation of Labor Code section 226.

3. *Mediation of* Lofton, *the ILG Actions, and* Peña

Class Counsel was "on the verge of filing a new motion for class certification [in *Mevorah*] when Wells Fargo agreed to attend a mediation on February 15, 2011 before mediator David Rotman."[19] At that mediation, Class Counsel and Wells Fargo reached a claims-made, non-reversionary class settlement which called for Wells Fargo to pay to the class $19,000,000, inclusive of attorneys' fees and costs and costs of administration. Also attending the February 15 mediation before Mr. Rotman were ILG attorney Mark Primo,[20] and *Peña* counsel, Mark Yablonovich.[21]

Following the mediation, the instant action was filed on March 24, 2011 for the purposes of seeking court approval of that settlement (the "*Lofton* Settlement"). Class Counsel explains that the "main reason we sought approval of the settlement in this Court rather than in the Northern District of California was because the Vinole [v. Countrywide Home Loans, Inc., 571 F.3d 935 (9th Cir. 2009)] decision caused us to question whether a misclassification involving individualized affirmative defenses could ever be certified [in federal court], even for settlement purposes."[22]

4. *Preliminary Approval and the* Lofton *Settlement*

The *Lofton* Settlement was presented to Judge Loretta M. Giorgi for preliminary approval on April 27, 2011.[23] The proposed *Lofton* Class was defined as: "All persons who, at any time from February 10,

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[18] *See* Chavez Reply Decl. Supp. Mot. Disqualify, filed June 10, 2015, Ex. A (Sworn Statement of Michael Coats at 30-34, 73-74).

[19] Lofton's Mot. Disqualify MPA, filed May 22, 2015, at 5:15-17; *see also* Declaration of Kevin J. McInerney, filed Sept. 20, 2012 ("9/20/12 McInerney Decl."), ¶4.

[20] Declaration of Marc Primo Regarding Settlement with Wells Fargo, filed May 21, 2015 ("Primo Settlement Decl."), ¶ 5.

[21] Declaration of Mark Yablonovich Opp. Mot. Disqualify, filed June 4, 2015, ¶ 8.

[22] 9/20/12 McInerney Decl., ¶ 8, n. 4.

[23] The *Lofton* Settlement is attached as Exhibit 1 to the Declaration of Kevin J. McInerney, filed Apr. 13, 2015 ("4/13/15 McInerney Decl.").

2001 up to and including March 26, 2011, are or were employed by Wells Fargo Bank, N.A. ("Defendant") as Home Mortgage Consultants ("HMCs") in the State of California and classified by Wells as exempt from overtime."[24] The ILG Clients were members of that proposed *Lofton* Class.

The *Lofton* Settlement presented to Judge Giorgi contained a broad release:[25]

> The Class Members . . . hereby fully and finally release and discharge Wells [Fargo] from any and all applicable state and federal wage-and-hour claims, rights, demands, liabilities and cause of action of every nature and description, whether known or unknown, arising during the Class Members' Released Period, including without limitation, statutory, constitutional, contractual or common law claims for wages, damages, unpaid costs, civil or statutory penalties[,] liquidated damages, punitive damages, interest, attorneys' fees, litigation costs, restitution, or equitable relief, based on the following categories of allegations: (a) any and all claims for the failure to pay any type of overtime or minimum wages; (b) any and all claims for the failure to provide meal and/or rest periods; (c) any and all claims for failure to provide accurate or complete itemized wage statements; (d) any and all claims for failure to timely pay wages; (e) any and all claims stemming from or based on the alleged misclassification of employees as exempt employees; and (f) [] any claims derived from or based upon or related to or arising out of the factual predicate of the Action (collectively, "Class Members' Released Claims"). The Class Members' Released Claims include claims meeting the above definition under any and all applicable California or federal laws, statutes, regulations, and Wage Orders including any existing under the Fair Labor Standards Act of 1938, as amended, and California political subdivisions and municipalities. Notwithstanding the foregoing, nothing in this Settlement releases any claims that cannot be released as a matter of law.

Present at the April 27, 2011 preliminary approval hearing were Class Counsel (Kevin McInerney and James Clapp), counsel for Wells Fargo (Lindbergh Porter and Richard H. Rahm), Arthur Meneses from ILG, and Michael Coats from the Law Offices of Mark Yablonovich.[26] Mr. Meneses appeared at the

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[24] *Lofton* Settlement, § I.5.

[25] *Id.*, ¶ 43.

[26] Apr. 27, 2011 Hr'g Tr. at 3:3-4:6 [Maxon's RJN, Ex. 48].

hearing on behalf of the "approximately 600" ILG Clients;[27] and Mr. Coats appeared, representing to the Court that, "[w]e have a class action pending in Los Angeles [*Peña*] . . . It's related to this action. . . . And so we came up to ask the Court to grant a two-week continuance [to] look into the effect of this settlement upon our case[.]"[28] Mr. Meneses joined in that request for a continuance.[29]

Class Counsel, Mr. McInerney, explained to Judge Giorgi that: "These individuals' cases that these gentlemen [Mr. Meneses and Mr. Coats] have been referring to were essentially settled on the very same day in front of the very same mediator, David Rotman, back on February 15th and all the details of who would be in the proposed class. Everything else was worked out. Wells has a separate settlement agreement with these folks. . . . [¶] Indeed the thought of the settlement was that these gentlemen representing the two firms would have all their individual plaintiffs opt out. If they did not, then they would be covered by the proposed class settlement."[30]

No one at the preliminary approval hearing contradicted or clarified what Mr. McInerney said about the resolution of the cases. Neither Mr. Meneses nor Mr. Coats spoke up and told Judge Giorgi that no settlement was reached between ILG's (or Yablonovich's) clients and Wells Fargo. Indeed, counsel for Wells Fargo confirmed what Mr. McInerney told the Court: "The parties, all of the parties and their counsel, who are here resolved these cases in mediation and we are proceeding I think consistent with that resolution."[31] No one informed Judge Giorgi (or Class Counsel) that the "settlement" between the ILG Clients and Wells Fargo was "tentative"[32] or "unenforceable."[33] After the preliminary approval hearing, Judge Giorgi issued a Preliminary Approval Order which, among other things, granted preliminary approval of the *Lofton* Settlement, directed notice be given to the class, and set a final approval hearing

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[27] *Id.* at 3:13-15.

[28] *Id.* at 3:28-4:4.

[29] *Id.* at 4:10-11.

[30] *Id.* at 4:27-5:10.

[31] *Id.* at 6:17-19. When Mr. Coats complained that "[w]e were not given notice of this [hearing]" (*id.* at 8:3), Mr. Porter responded that "Mr. Yablonovich was present at the negotiations where the cases were settled February 15, 2011 before David Rotman. So for it to be suggested that these parties and counsel hadn't been aware is not to state it correctly." *Id.* at 8:11-15.

[32] Declaration of Lindbergh Porter, Jr. Regarding *Lofton* Settlement, filed May 21, 2015 ("Porter Settlement Decl."), ¶ 4.

[33] Primo Settlement Decl., ¶ 11.

for July 27, 2011.[34] Notice was given in compliance with Preliminary Approval Order.[35] Opt-out requests and objections were due by June 27, 2011; and claim forms were due July 12, 2011.[36]

ILG encouraged and directed its clients to make claims from the *Lofton* Settlement (even telling some of its clients to send claim forms directly to ILG and not the claims administrator) and never advised its clients of the benefits of opting out of the *Lofton* Class.[37] Nearly all of the ILG Clients (549) made claims in *Lofton*—including representative plaintiffs Laurie Strickler, Michael Hollander, and Paula Peña.[38] A total of $1,522,881.05 (before taxes and withholdings) was paid to ILG Clients from the *Lofton* Settlement.[39] None of the ILG Clients opted out of the *Lofton* Class. Thus, all of the ILG Clients are members of the *Lofton* Class as finally approved, and on which judgment was entered. As confirmed by ILG's counsel at oral argument on June 24,[40] it is undisputed that given the ILG Clients' participation in the *Lofton* Settlement and failure to opt out of *Lofton* Class, all of the claims in the ILG Actions (with the "arguable" exception of those advanced in *Mather*) were extinguished by the *Lofton* Settlement.[41]

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[34] Apr. 27, 2011 Order Granting Preliminary Approval.

[35] Declaration of Stacy Roe, filed July 11, 2011 [4/13/15 McInerney Decl., Ex. 4].

[36] 9/7/12 Maxon Decl. [Maxon RJN, Ex. 23], Ex. A (Notice of Settlement).

[37] *See* 9/7/12 Maxon Decl. [Maxon RJN, Ex. 23], ¶¶ 8-15, Ex. B: May 16, 2011 email from ILG attorney Joseph Liu ("send the claim form directly to us and not to the administrator"), Ex. D: June 30, 2011 email from ILG attorney Joseph Liu ("[i]n order for you to receive the settlement monies your are owed, you must submit a claim form"); Declaration of Sandy Baresi, filed June 10, 2015 ("Baresi Decl."), ¶¶ 8-9; Declaration of Michael Furtch, filed June 10, 2015 ("Furtch Decl."), ¶¶ 7-9; Declaration of Carryne Latada, filed June 10, 2015 ("Latada Decl."), ¶¶ 7-8; Declaration of Joseph McGreevy, filed June 10, 2015 ("McGreevy Decl."), ¶¶ 8-9; and Declaration of Marianne Pennington, filed June 10, 2015 ("Pennington Decl."), ¶¶ 8-10. ILG offered no evidence to refute Maxon's assertions and evidence that ILG encouraged and directed its clients to make a claim in, and not opt out of, *Lofton*. Neither the attorney-client privilege, nor the mediation privilege, prevented ILG from proffering evidence which would support the conclusion that it did not encourage and direct *all* of its clients to participate in, and not opt out of, *Lofton*. For example, ILG could have, but failed to, offer a declaration from an ILG attorney which stated, without revealing any client confidences or names, that it advised some (or even one) of its clients to opt out of (or even the benefits of opting out of) the *Lofton* Class.

[38] Clapp Decl. Opp. Spotts' & Sebring's Mot. Intervene, filed June 3, 2015, ¶ 2.

[39] *Ibid.*

[40] June 24, 2015 Hr'g Tr. at 80:2-15.

[41] *See also* 9/7/12 Maxon Decl., Ex. D, June 30, 2011 email from ILG attorney Joseph Liu to David Maxon ("As you know, the *Lofton v. Wells Fargo* class settlement resolves your wage claims"); Ex. E, Jan. 30, 2012 Letter from ILG to David Maxon (the "litigation involving Wells Fargo including three class actions, a labor code private attorney general action, and the approximately 600 individual actions, including yours, [was] resolved by *Lofton.*"); and Ex F, attachment to Jan. 30, 2012 Letter from ILG to David Maxon ("The upcoming dismissal of your lawsuit is not contingent on any action by you, since you already released your claims in favor of Wells Fargo in connection with your participation in

5. *Final Approval and Judgment*

No objections were made to the *Lofton* Settlement or Class Counsel's application for attorneys' fees.[42] On July 27, 2011, Judge Giorgi issued orders which, among other things, granted final approval to the *Lofton* Settlement, awarded Class Counsel $6,333,333 in attorneys' fees and $249,278.73 in litigation costs, and directed that judgment be entered pursuant to the terms of the *Lofton* Settlement.[43] At this point, the claims advanced in the ILG Actions (with the "arguable" exception of those in *Mather*) were extinguished as a matter of law.

B. ILG'S CONTINUED NEGOTIATIONS WITH WELLS FARGO AND THE SUPPLEMENTAL SETTLEMENT

Despite the representations made, and those not made, to Judge Giorgi at the preliminary approval hearing, ILG and Wells Fargo now assert that no settlement was reached between the ILG Clients and Wells Fargo at the February 15, 2011 mediation.[44] Rather, ILG and Wells Fargo now submit that they continued to negotiate (through the same mediator, Mr. Rotman) until January or February 2012.[45] These negotiations took place without the ILG Clients' knowledge, consent, or authorization.[46]

The results of the negotiations were first communicated to the ILG Clients through a form letter—sent in January of 2012, nearly six months after judgment was entered in *Lofton*—in which ILG proposed to its clients that ILG would receive more that $5.5 million for attorneys' fees and costs, and the ILG

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the *Lofton* settlement.").

[42] Declaration of Stacy Roe, filed July 11, 2011, ¶ 19 [4/13/15 McInerney Decl., Ex. 4]

[43] July 27, 2011 Order Granting Final Approval of Class Action Settlement and Entry of Judgment; July 27, 2011 Order Granting Plaintiff's Motion for Attorney Fees and Litigation Costs.

[44] *See, e.g.*, Porter Settlement Decl., ¶¶ 4-5 ("As of the date of preliminary approval hearing, Wells Fargo had a tentative settlement with ILG regarding its clients . . . [and] after the date of the preliminary approval hearing . . . a dispute arose between Wells Fargo and ILG and/or between ILG and its clients concerning the tentative agreement and releases."); and Primo Settlement Decl., ¶ 11 ("As of the preliminary approval hearing in *Lofton* on April 27, 2011, . . . there was no enforceable settlement or agreement.")

[45] *See* Primo Settlement Decl., ¶ 6 ("The mediation continued after the February 15, 2011 in person session with Lindbergh Porter, counsel for Wells Fargo, and me conducting confidential settlement discussions with the assistance of mediator David Rotman through January of 2012."); ¶ 8 ("The mediation ended in February of 2012 when ILG's clients began to agree to proposed settlements with Wells Fargo that were mailed out at the end of January 2012").

[46] *See* 9/7/12 Maxon Decl., ¶¶ 17-27; Chavez Reply Decl. Supp. Maxon's Resp. to ILG's Hr'g Br., filed June 10, 2015, Ex. C (Declaration of Michael Hollander, ¶¶4-5); Baresi Decl., ¶¶ 4-7, 9-11; Furtch Decl., ¶¶3-6, 9-10; Latada Decl., ¶¶ 3-6, 8-9; McGreevy Decl., ¶¶4-7, 9-10; Pennington Decl., ¶¶ 4-7, 10-11. ILG offered no evidence to refute this conclusion, which could have been done without disclosing confidential communications. *See* footnote 37 above.

Clients would receive $750 each (roughly $450,000 total).[47] Thus, in the January 2012 Letter, ILG wrote:

> We thought we had concluded a settlement of $6 million dollars with Wells Fargo for the fees and costs incurred by our firm since May 15, 2006 for the work performed on litigation involving Wells Fargo including three class actions, a labor code private attorney general action, and the approximately 600 individual actions, including yours, that were resolved by *Lofton.*
>
> There is a claim, however, our firm brought over Wells Fargo's failure to produce employment records under Labor Code Section 226(b) in *Mather et al. v. Wells Fargo Bank, N.A.* ("*Mather* action"). Arguably, this claim was not released by the *Lofton* settlement. Labor Code section 226(f) provides for a maximum penalty of $750 if an employer violates section 226(b) by not permitting the inspection or copying of records within 21 calendar days. Accordingly, we [ILG[48]] have agreed that by signing the enclosed form, you will receive $750 and our fees will be the remaining approximately $5,520,000.

The "enclosed form" included with January 2012 Letter was titled "Confidential Individual Release and Acknowledgement."[49] That Confidential Release provides:

> A total of $6,000,000 has been negotiated by Initiative Legal Group APC (ILG) in connection with the final resolution of approximately 600 individual cases against Wells Fargo, including yours, along with four representative actions with claims that were released as the result of the *Lofton v. Wells Fargo* class action settlement in which you

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[47] A copy of the letter is found as Exhibit E to the 9/7/12 Maxon Decl. [Maxon RJN, Ex. 23]. As conceded by ILG, the January 2012 letter is not a privileged communication. *See* June 24, 2015 Hr'g Tr. at 92:25-93:1 ("The letter is not covered by the mediation."). Given ILG's statement that "proposed settlements with Wells Fargo that were mailed out at the end of January 2012" (Primo Payment Decl., ¶ 8), and given that ILG produced 575 identical Confidential Releases executed by its clients (*id.*, Ex. 4), and given that six former ILG clients declared that they received a letter around the same time containing at least some identical language (*see* footnote 52 below), and given the lack of any evidence to the contrary, this Court concludes that identical form letters were sent to all of ILG's clients. *See* footnote 37 regarding ILG's failure to offer evidence despite its ability to do so without violating any privilege.

[48] At oral argument on June 24, 2015, counsel for ILG confirmed that the "we" refers to ILG. June 24, 2015 Hr'g Tr. at 91:3-4.

[49] Maxon's RJN, Ex. 23 (9/7/12 Maxon Decl., Ex. F) (the "Confidential Release").

participated: *Peña v. Wells Fargo*, *Hollander v. Wells Fargo*, *Mather v. Wells Fargo*, and *Strickler v. Wells Fargo*.[50]

We [ILG] propose, and by signing below you agree, to an allocation of $750.00 to each of the approximately 600 individuals, including yourself. This will leave approximately $5,525,000, for ILG. Wells Fargo has not specified or agreed to any allocation toward attorneys fees. Consequently, the allocation is based solely on an agreement between individual plaintiffs and ILG.

The upcoming dismissal of your lawsuit is not contingent on any action by you, since you already released your claims in favor of Wells Fargo in connection with your participation in the *Lofton* settlement. However, your supplemental release and acknowledgement is a requirement to receive the additional payment. All you need to do to receive your $750.00 is sign below and return this release and acknowledgement to ILG[.[51]]

From January through March of 2012, 575 (or 571) of the ILG Clients signed identical versions of the Confidential Release.[52] Both ILG and Wells Fargo represent that the executed Confidential Releases are the only documents reflecting an agreement by Wells Fargo to distribute nearly $5.9 million to ILG and the ILG clients.[53] (The parties refer to this arrangement between Wells Fargo, ILG, and the ILG Clients as a "Supplemental Settlement;" for the sake of consistency, the Court will too. However, the Court's use of the term *settlement* is not to be construed as a finding that the executed Confidential Releases are, or are not, an enforceable agreement.)

C. DISBURSEMENT OF THE SUPPLEMENTAL SETTLEMENT FUNDS

In May 2012, after the ILG Clients signed Confidential Releases, Wells Fargo deposited a total of

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[50] Other former ILG clients received a letter and release from Arthur Meneses in January 2012, which release begins with the sentence "A total of $6,000,000 has been negotiated by Initiative Legal Group APC (ILG) in connection with the final resolution of approximately 600 individual cases against Wells Fargo, including yours[.]" Pennington Decl., ¶ 11; McGreevy Decl., ¶ 10; Latada Decl., ¶ 9; Furtch Decl., ¶ 10; and Barresi Decl., ¶ 10.

[51] The Confidential Release then contains a release in favor of Wells Fargo.

[52] *See* Porter Settlement Decl., ¶ 7, Exs. A-K (attaching 571 executed Confidential Releases); Primo Settlement Decl., ¶ 20, Ex. 4 (attaching 575 executed Confidential Releases).

[53] *See, e.g.*, Porter Settlement Decl., ¶ 7; Primo Settlement Decl., ¶ 20.

$5,888,749 with Rust Consulting (the "Supplemental Settlement Fund").[54] Monies from the Supplemental Settlement Fund were paid out by Rust (the same administrator used in the *Lofton* Settlement) as follows:

1) 575 ILG Clients received $750 each, for a total of $431,250, "in exchange for their individual settlements with Wells Fargo."[55]

2) The three ILG Clients who served as purported class (and PAGA) representative plaintiffs—Laura Strickler, Michael Hollander, and Paula Peña[56]— received $7,500 each (the same amount awarded by Judge Giorgi to class representative Dawn Lofton in this action), in addition to the $750 listed above.[57] "In light of the effort [they] had made,"[58] this total payment of $22,500 to the representative plaintiff clients was made "at ILG's request."[59] None of these payments were disclosed to the respective courts when the *Strickler*, *Hollander*, and *Peña* actions were dismissed.

3) Rust paid itself $9,499 for administering the above-listed payments.[60]

4) $5,425,500 was then paid to ILG for "Attorney's Fees and Costs."[61]

ILG contends that by signing the Confidential Release, its clients agreed to an approximately $6 million settlement with Wells Fargo in which: (a) the clients released their individual claims that survived *Lofton*—namely, the claims advanced in *Mather*—in exchange for $750; and (b) nearly $5.5 million was allocated to ILG for fees and costs for work performed on matters other than *Mather*, and for claims that were released by the *Lofton* Settlement.[62]

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[54] Declaration of Marc Primo Identifying Recipients of Settlement Checks and Amounts Paid by Rust Consulting and/or Initiative Legal Group, APC, filed May 8, 2015 ("Primo Payment Decl."), ¶ 4.

[55] *Id.*, ¶5, Ex. 1.

[56] In addition to serving as a purported class representative in the *Peña* action (filed by the Law Offices of Mark Yablonovich), Ms. Peña was represented by ILG in *McLane* (Maxon's RJN, Ex. 9) and *Mather* (Maxon's RJN, Ex. 17).

[57] *Id.*, ¶ 6, Ex. 1.

[58] *Ibid.*

[59] Primo Decl. Opp. OSC, filed Sept. 25, 2012, ¶ 22. According to ILG, "it was agreed that they would receive $7500 along with their $750 individual payments." Primo Payment Decl., ¶ 6.

[60] Primo Payment Decl., ¶ 7.

[61] *Id.*, ¶ 8.

[62] *See, e.g.*, ILG's Opp. Maxon's Mot. Inj., filed June 29, 2015, at 4; and ILG's Omnibus Reply, filed June 17, 2015, at 3-4.

D. MAXON DISPUTES THE FEE ALLOCATION

At least one ILG client was not satisfied with the proposed fee allocation. That client, David Maxon, who intervened in this action, wrote to ILG on March 5, 2012, before the Supplemental Settlement Funds were disbursed by Wells Fargo: "I have received your letter of 1/30/12 regarding the Wells Fargo Litigation and do not understand why it is I am to receive only $750 while your firm will receive over $5,500,000 in fees and costs."[63] Maxon had a telephone conversation on March 9, 2012 with ILG attorney, G. Arthur Meneses, in which Mr. Meneses "advised [Mr. Maxon] that the large amount of fees in the [S]upplemental [S]ettlement was to compensate ILG for 6 years of work, including work on three class actions."[64] Mr. Meneses followed up that conversation with a letter which provided more detail "about the work [ILG had] done over the last almost 6 years on the Wells Fargo litigation that was the basis for our fee negotiations and ultimate fee settlement with Wells Fargo."[65] That letter details the work performed on the ILG Actions—beginning with the filing of *Strickler*, continuing to the filing of *Hollander*, and ending with the filing of "ten other individual mass actions"— as justification for ILG's multi-million dollar claim to attorneys' fees.

After failed attempts to get more information and documentation from ILG,[66] in June 2012, Maxon retained counsel, Richard Zitrin, "for the purpose of assisting him in obtaining documents from [ILG] . . . and investigating the activities of ILG."[67] In July 2012, Mr. Zitrin was in communication with attorney James J. Banks who was then acting as counsel for ILG.[68] Mr. Zitrin "advised Mr. Banks that [Zitrin] had brought in Chavez & Gertler as class counsel, that [Zitrin and Chavez & Gertler] intended to proceed with the Maxon matter on a class basis[.][69] A "privileged" telephone "call among Mark Chavez, Mr. Banks, and [Mr. Zitrin]" took place on August 15, 2012.[70]

Two days after that "privileged" telephone call, on August 17, 2012, ILG sent to (at least some of) its now former clients, a letter which enclosed a disclosure statement and a check in the amount of $1,000

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[63] 9/7/12 Maxon Decl., Ex. G.
[64] *Id.*, ¶ 29.
[65] *Id.*, ¶ 30, Ex. H (Mar. 12, 2012 Letter).
[66] *Id.*, ¶¶ 32-35
[67] Zitrin Decl. Supp. Maxon's Mot. Intervene, filed Sept. 7, 2012, ¶ 2.
[68] *Id.*, ¶¶ 3-5.
[69] *Id.*, ¶ 6.
[70] *Id.*, ¶ 7.

(The "August 17 Letter").[71] The August 17 Letter explained that a former client [Maxon] "disputed the amount of attorneys' fees and costs paid by Wells Fargo to ILG."[72] ILG wrote: "to avoid a potentially protracted dispute with our clients, we are proposing to settle any potential claims you may have by paying you an additional $1000 in exchange for you executing a settlement agreement and release of all claims."[73] From the money it received from the Supplemental Settlement Funds, ILG paid a total of $504,391 to 500 of its former clients in exchange for such a release.[74]

In the August 17 Letter, ILG continued to claim entitlement to the $5-plus million in fees for work performed on claims that were resolved by the *Lofton* Settlement.[75] Enclosed with the August 17 letter was a document entitled, "Disclosure Statement and Settlement Agreement and Release." In an apparent attempt to justify why its clients received so little from the Supplemental Settlement Fund, ILG wrote in that enclosure: "The *Lofton v. Wells Fargo* class action settlement resulted in payments totaling approximately $12,286,824 to the class members, of which you were one. . . . ILG was not class counsel and received no fees or costs from the *Lofton* settlement."[76] ILG further explained that "the fees cover legal services provided over six years of litigation against Wells Fargo Bank on behalf of its clients, including the *Strickler* . . . action, the *Mather* action, the *Hollander* action, [and] the approximate 600 individual action filed in eight different California counties (the work for which is described in more

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[71] The August 17 Letter is attached as Exhibit A to the Declaration of Stanley Schechtman, filed on May 20, 2015 ("Schechtman Decl."). *See also* McGreevy Decl., ¶ 14 (describing receipt of letter, disclosure, and check); Latada Decl., ¶ 12 (same); Furtch Decl., ¶ 13 (same); Barresi Decl., ¶ 13 (same); Pennington Decl., ¶ 13 (check only). ILG offered no evidence that it did not send such a letter to any of the other ILG Clients. *See* footnote 37 above.

[72] Schechtman Decl., Ex. A, August 17 Letter at 2.

[73] *Ibid.*

[74] *See* Primo Payment Decl., ¶¶ 9-10, (explaining that from the money ($5.4255 million) ILG received from Rust, ILG paid $1,000 each to 495 former clients "in exchange for their release of any claims against ILG" for a total of $495,000; and a total of $9,391 to "5 former ILG clients who were unwilling to release their claims against ILG for $1000 and instead negotiated additional amounts for the release of their claims.")

[75] Schechtman Decl., Ex. A, August 17 Letter at 1 ("[A]s set out in the Individual Settlement and Release and our prior correspondence, ILG's fees and costs were paid by Wells Fargo for all of the work performed and costs expended on litigation against Wells Fargo over the last six plus years. . . . Our work on the litigation actually began well over six years ago with pre-litigation investigation before the filing of *Strickler*").

[76] Schechtman Decl., Ex. A, August 17 Letter Enclosure at 1.

detail below in Section 7)."[77]

Section 7, titled "Detailed Summary of Related Wells Fargo Litigation," recites the work ILG performed in *Strickler*, *Hollander*, and the "ten individual mass actions" over the span of five single-spaced pages.[78] Four of those five pages are wholly devoted to ILG's efforts in *Strickler* and *Hollander*. ILG's work in *Mather*—the only action which "arguably" survived the *Lofton* judgment—is mentioned briefly in the next to last paragraph of the summary, with no explanation of what work ILG performed in that action other than filing the lawsuits.

E. MAXON INTERVENES AND IS GRANTED A TRO

On September 7, 2012, Mr. Maxon moved to intervene in this action and applied for a temporary restraining order which would, among other things, require ILG to deposit the funds it received from the Supplemental Settlement into a court-controlled trust account. Having heard Mr. Maxon's requests on shortened time, on September 13, Judge Kahn granted the motion to intervene, issued a temporary restraining order, and set the matter for hearing on a preliminary injunction.[79] ILG appealed, and the Court of Appeal affirmed the temporary restraining order in all respects.[80]

Pursuant to the temporary restraining order issued by Judge Kahn, ILG deposited $4,921,109 into an ILG trust account at Bank of America.[81] The "$4,921,109 represents the $5,425,500 received by ILG from Wells Fargo through Rust Consulting less subsequent payments to ILG clients of $504,391."[82] The subsequent payments being those made by ILG in exchange for releases from 500 of its former clients as described above.

Following a case management conference on April 24, 2015, this Court ordered the funds on deposit in an ILG trust account with Bank of America to be transferred to the San Francisco Superior Court.[83] Subsequently, ILG wired $4,921,140.04 ($4,921,109 plus $31.04 in accrued interest) to the San

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[77] *Ibid.*

[78] *Id.*, August 17 Letter Enclosure at 4-9.

[79] The written Order granting the application for a TRO and issuing an OSC re Preliminary Injunction was filed on September 14, 2012.

[80] *Lofton*, 230 Cal.App.4th at 1069.

[81] Primo Decl. re TRO Compliance, filed Sept. 19, 2012.

[82] *Id.*, ¶ 15.

[83] Apr. 29, 2015 Order After Apr. 24, 2015 CMC ("April 29 Order"), ¶ 1.

Francisco Superior Court's trust account.[84] Those funds remain on deposit with the Court.

IV. Discussion

Following issuance of the remittur, this Court held a case management conference on April 24, 2015 where the Court, among other things, scheduled briefing and argument (a) on motions which had been filed, (b) to determine the disposition of the funds then on deposit in the ILG trust account at Bank of America, and now on deposit with the Court, and (c) on additional matters, including any claim to attorneys' fees from the Supplemental Settlement Funds.[85] Additional motions were filed.[86] With respect to the ten matters taken under submission by the Court on June 24, 2015,[87] those matters having been fully briefed and argued, the Court finds and orders as follows.

A. DISPOSITION OF THE FUNDS ON DEPOSIT WITH THE COURT

1. *Jurisdiction*

The Court of Appeal specifically held that this Court has jurisdiction over the Supplemental Settlement Funds.[88] Indeed, the Court of Appeal held not only that this Court has jurisdiction over the funds, but also that this Court has an "obligation . . . to ensure that ILG did not unduly profit at class members' expense."[89] These holdings are "law of the case," and this Court and the parties are bound by these determinations.[90]

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[84] *See* Register of Actions, May 1, 2015 entry; Heaton Decl. Confirming Transfer of Funds, filed May 5, 2015.

[85] April 29 Order, ¶¶9-10.

[86] Those additional motions were: (1) ILG's motion for a protective order, filed May 5, 2015, argued May 29, 2015, and denied by a written order issued by this Court on June 2, 2015; (2) intervenor Maxon's motion to appoint Chavez & Gertler LLP as interim lead counsel of a class of ILG Clients, filed May 8, 2015; (3) intervenor Maxon's motion for a permanent injunction, filed May 20, 2015; (4) class member Linda Summers' motion to intervene, filed May 20, 2015; (5) intervenor Maxon's motion to disqualify attorney, filed May 21, 2015; (6) class representative Linda Summers' motion to disqualify;

[87] *See* § I (Introduction).

[88] *See, e.g., Lofton*, 230 Cal.App.4th at 1055 (this Court has "jurisdiction to consider the propriety of the settlement of class member claims, even for those class members represented by ILG on class or related claims"); *id.* at 1064 ("it would be within th[is C]ourt's jurisdiction to review the supplemental fee agreement and to order the ILG attorneys to disgorge some or all of the fees already received"); *id.* at 1065 ("limited proceedings, designed to resolve . . . outstanding issues with respect to the *Lofton* settlement fall within the scope of the Court's continuing jurisdiction under section 664.6, section 128 and the court's equitable authority").

[89] *Id.* at 1062.

[90] *See, e.g., Searle v. Allstate Life Ins. Co.*, 38 Cal.3d 425, 434-35 (1985); *Griset v. Fair Political Practices Commission*, 25 Cal.4th 688, 701 (2001); *Nally v. Grace Community Church*, 47 Cal.3d 278,

2. *ILG's Claimed Attorneys' fees Belong to the* Lofton *Class*

This Court concludes that the $5,425,500 which ILG claims it is entitled to as attorneys' fees belong to the *Lofton* Class. The Court reaches this inevitable conclusion given the following, undisputed facts: (a) all of the ILG Clients are members of the *Lofton* Class; (b) ILG appeared at the preliminary approval hearing in *Lofton* (and failed to correct Class Counsel's misunderstanding that the ILG Clients had their own settlement with Wells Fargo); (c) ILG encouraged and directed its clients to make claims from the *Lofton* Settlement, even filing claim forms for its clients (essentially diluting the monies available to the other *Lofton* claimants); (d) ILG's claimed entitlement for fees is based (almost) entirely for work performed on claims that were extinguished by the *Lofton* Settlement; and (e) ILG never disclosed the existence of the purported fee agreement to, or sought approval of it from, *any* court, let alone this Court.

This Court determines that ILG's claimed fees are properly construed as class action attorneys' fees which should have been disclosed to this Court as part of the resolution of *Lofton*. If ILG wished to keep any of the funds as attorneys' fees, it was required to seek Court approval of its purported fee award.[91] This ILG did not do. It does not matter that some ILG Clients "agreed" to an "allocation" of more than $5 million in fees to ILG. Approval of ILG's class action attorneys' fees was the exclusive province of this Court, not ILG's clients. And it does not matter that judgment had been entered in *Lofton*. As ILG was aware (or as class action attorneys who represented class members in this action should have been aware), this Court retained jurisdiction to approve or disapprove such a claim for fees "under [Code of Civil Procedure] section 664.6, section 128 and the court's equitable authority to ensure the fair and orderly administration of justice and to protect the integrity of its judgment in the class action."[92]

Having concealed its purported fee agreement from the Court, and having tried to appropriate those funds to itself without Court approval, this Court determines that ILG is not entitled to any of the

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301 (1988).

[91] *See Lofton*, 230 Cal.App.4th at 1064; Rule of Court 3.769(b) ("Any agreement . . . with respect to the payment of attorney's fees . . . must be set forth in full in any application for approval of the dismissal or settlement of an action that has been certified as a class action.").

[92] *Lofton*, 230 Cal.App.4th at 1065.

claimed fees. As stated by the Court of Appeal, "there is a question on this record whether ILG is entitled to any fees at all."[93] Given the record before it, this Court concludes that the answer to that question is "no."

In addition to those funds already on deposit with the Court, ILG is hereby ordered to deposit with the Court, no later than July 30, 2015 a total amount of $526,891. That amount represents funds which were not paid to ILG Clients in connection with any agreement between ILG Clients and Wells Fargo: (a) the $22,500 paid to representative plaintiffs Strickler, Hollander, and Peña, which appears to this Court to be either an unapproved service award to purported class representatives, or, an improper fee-sharing agreement with a non-lawyer;[94] and (b) the $504,391 paid to ILG Clients in exchange for a purported release of claims against ILG.

This order of disgorgement is well within this Court's jurisdiction and is required by the circumstances here presented in order "to ensure that ILG [does] not unduly profit at class members' expense."[95] As held by the Court of Appeal, "[i]f the [trial] court determines that Maxon's allegations are true, it would be within the [trial] court's jurisdiction to review the supplemental fee agreement and to order the ILG attorneys to disgorge some or all of the fees already received."[96] Maxon "alleges that the $6 million dollar settlement negotiated by ILG was in fact a second fee agreement that must be considered part of the *Lofton* settlement."[97] Having fully considered the record before it, this Court determines this allegation to be true: ILG negotiated for itself a side-deal for attorneys' fees which must be considered part of the *Lofton* Settlement.

The Court determines that the interests of justice require distribution of the funds to those members of the *Lofton* class who previously made claims, including the ILG clients, on a *pro rata* basis in proportion to each class members' prior award in *Lofton*. Subtracted from this distribution will be (a) the costs of administering such payments, and (b) any award of attorneys' fees made to counsel for intervenor Maxon on her now-pending motion for attorneys' fees.

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[93] *Id.* at 1064.
[94] *See* Cal. Rules Prof. Conduct 1-320(A))
[95] *See Lofton*, 230 Cal.App.4th at 1063.
[96] *Id.* at 1064.
[97] *Id.* at 1063.

The Court will hold a hearing on July 31 to determine the mechanics of the distribution of the funds.

3. *No Further Notice is Needed*

This Court's conclusion to return to the Class the monies ILG attempted to keep for itself without court approval ameliorates any dilution to the *Lofton* Settlement caused by the participation of the ILG Clients. In fact, the results here reached are more favorable to the class members than the settlement approved by Judge Giorgi.

The notice previously received by class members stated that each claimant's recovery may increase depending on (a) the number of claims made; and/or (b) the amount of fees awarded to class counsel. This Court's determination that the Supplemental Settlement Funds belong to the *Lofton* claimants has the same effect as (a) fewer claims having been made; and/or (b) attorneys fees having been awarded in an amount less than that requested by Class Counsel.

Accordingly, the Court determines that no additional notice to the *Lofton* Class is necessary.

4. *The Instant Proceedings Have Afforded ILG Due Process*

ILG contends that on the instant record, and given this action's procedural posture, this Court cannot order that the funds ILG claims as attorneys' fees be distributed to the *Lofton* Class. Thus, ILG asserts that: (1) this Court cannot make a permanent determination about the claimed fees without a full-blown trial on the merits; and/or (2) because of the attorney-client and mediation privileges, ILG is unable to "defend" itself. The Court rejects both of these contentions.

First, this Court has done no more than determine that ILG should have sought this Court's approval of it attorneys' fees for work performed on behalf of *Lofton* class members for claims that were resolved by the *Lofton* Settlement. In these circumstances, no "trial" is necessary. Courts routinely determine the entitlement to class action attorneys' fees through motions. As class action lawyers, ILG knows (or should know) that class action attorneys' fees require court approval. ILG has been on notice since at least March of 2012, when Mr. Maxon first complained of the proposed fee "allocation," that there was objection to its claimed fees. ILG was on notice that its claim to attorneys' fees was in jeopardy from the TRO proceedings, from Judge Kahn's order to show cause, from the Court of Appeal, and from Maxon's motion for a permanent injunction. Indeed, this Court's Order after the April 24, 2015 Case

Management Conference gave ILG notice that on June 24, the Court would hold a hearing on the "status and determination of disposition of the $5.9 million Wells Fargo transferred to ILG."[98] Despite its claim of entitlement to more process: ILG never made an application for fees, even after this Court's invitation to do so;[99] ILG never sought relief from the TRO which prohibited it from communicating with the ILG clients; ILG never attempted to conduct any discovery (as far as the Court is aware); ILG resisted Maxon's efforts to present oral testimony at the June 24 hearing;[100] ILG objected to class representative Dawn Lofton's subpoenas;[101] and the ILG lawyers present at the June 24 hearing declined this Court's invitation to speak on their own behalf.[102]

Second, ILG cannot simply refer to the attorney-client and mediation privileges and contend that they prevent it from "defending" itself. ILG made no offer as to what evidence it would present in support of its claim for fees but for those privileges. As discussed above,[103] ILG could have refuted assertions made and evidence offered in connection with the instant proceedings, in ways which did not disclose any confidential information. For reasons unexplained, ILG failed to do so. Indeed, when this Court inquired at the June 24 hearing, "what is it that that you think you haven't presented to the Court that you would like to present?"[104] Counsel for ILG responded, "we presented everything that we wanted to present with respect to this issue [disposition of the funds on deposit with the Court]."[105] In the absence of an offer of evidence to support its claim to fees, this Court can only conclude there is none.

B. MAXON'S MOTION FOR A PERMANENT INJUNCTION

Intervenor Maxon moved the Court for a permanent injunction seeking three forms of relief. The Court denies the motion for the following reasons. The first form of relief sought by Maxon – enjoining ILG from obtaining possession of any portion of the funds on deposit with the Court – is moot in light of the Court's conclusion above to distribute those funds to members of the *Lofton* class. This action is not

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[98] April 29 Order, ¶¶ 9(d), 10.

[99] Apr. 24, 2015 Hr'g Tr. at 52:5-16; Apr. 29, 2015 Order, ¶ 9(e).

[100] Opposition to Maxon's Req. Present Oral Evidence, filed June 17, 2015; Objection to Intervenor's Req. Present Oral Evidence, filed Sept. 25, 2012.

[101] June 24, 2015 Hr'g Tr. at 116:16-117:5.

[102] *Id.* at 123:11-124:6.

[103] *See* footnote 37.

[104] June 24, 2015 Hr'g Tr. at 135:13-15.

[105] *Id.*at 135:17-18.

the appropriate forum for the second form of relief which Maxon seeks, namely enjoining ILG from taking any further action to: (a) induce its former clients to release any claims they may have against ILG or its attorneys; or (b) enforce the purported releases it previously obtained. The third form of relief sought by Maxon, an order distributing the Supplemental Settlement Funds to the ILG Clients only, was considered by the Court. However, as set forth above, the Court determined that the circumstances here presented require that the funds be distributed to all *Lofton* claimants.

C. SUMMERS MOTION TO VACATE THE JUDGMENT

Class member Linda Summers moved to "Vacate and Set Aside the Court's Order Granting Final Approval of Class Action Settlement and Entry of Judgment entered in this matter on July 27, 2011 as well as the individual releases and judgments affecting the 600 clients of Initiative Legal Group."[106] The motion was separately opposed by all of the parties in this action: class representative Dawn Lofton, defendant Wells Fargo, and intervenor Terri Maxon. The Court denies Ms. Summers' motion to vacate the judgment for the following three independently sufficient reasons: (1) the motion is untimely as judgment in this action was entered on July 27, 2011;[107] (2) there is no basis for this Court to exercise its jurisdiction to modify or vacate the judgment;[108] and (3) even if there were a basis for this Court to exercise its jurisdiction to vacate the judgment, vacating the judgment would require that the parties be returned to the position they were in before judgment was entered[109]—which would require the Court to claw back the funds long ago received by the class members (and the taxes paid to the state and federal governments)—which is unworkable and impossible to achieve. Ms. Summers' proposal that the judgment be vacated without the requirement that class members repay Wells Fargo would be inequitable.

D. SUMMERS MOTION TO INTERVENE

Linda Summers also brought a motion to intervene in this action. This motion too was separately opposed by all the parties in this action: class representative Dawn Lofton, defendant Wells Fargo, and intervenor Terri Maxon. The Court exercises its discretion and denies Ms. Summers' motion for the

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[106] Notice of Mot., filed May 20, 2015, 1.

[107] *County of Inyo v. City of Los Angeles*, 160 Cal.App.3d 1178, 1183-84 (1984).

[108] *Lofton*, 230 Cal.App.4th at 1061; *County of Inyo*, 160 Cal.App.3d at 1184.

[109] *Bulmash v. Davis*, 24 Cal.3d 691, 697 (1979) ("Once vacated, the status of the parties that existed prior to the judgment is restored and the situation then prevailing is the same as though the order of judgment had never been made.").

reasons that follow: (1) the motion is untimely;[110] and (2) the proposed intervention would unduly enlarge the issues before the Court, and is not necessary to the resolution of this matter.[111]

E. SPOTTS AND SEBRING MOTION TO INTERVENE

Class members Daniel Roberts Spotts and Thomas R. Sebring brought their own motion to intervene. That motion too was separately opposed by all parties in this action: class representative Dawn Lofton, defendant Wells Fargo Bank, and intervenor Terri Maxon. The Court exercises its discretion and denies Mr. Spotts' and Mr. Sebring's motion to intervene because: (1) the motion is untimely;[112] (2) the proposed intervention would unduly enlarge the issues before the Court, and is not necessary to the resolution of this matter;[113] and (3) this Court will not issue an advisory opinion on the effect of the release of claims in this action on the pending MDL action in Texas, *In re Wells Fargo Wage and Hour Employment Practices Litigation (No. III),* MDL Case No. 4:11-MD-2266 (S.D. Tex.).

F. OSC RE SUBCLASS CERTIFICATION

On June 1, 2015, this Court, on its own motion, issued an Order to Show Cause as to whether: (a) a subclass of the ILG Clients should be certified; (b) Chavez & Gertler LLP should be appointed class counsel for such a subclass; and (c) Terri Maxon should be appointed class representative of such a subclass. Having considered the parties' briefing on the issue, and in light of the conclusions reached herein, the Court will not certify a subclass of the ILG Clients.

G. MOTION FOR APPOINTMENT OF INTERIM CLASS COUNSEL

Chavez & Gertler LLP, counsel for intervenor Terri Maxon, moved the Court for an order appointing them "Interim Lead Counsel on behalf of the [ILG Clients.]"[114] Linda Summers and ILG opposed the motion, and the Court first held a hearing on the motion on May 29, 2015. The motion was continued to June 24, 2015. In light of the Court's decision to not certify a subclass of the ILG clients, the motion is denied.

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[110] *Northern Cal. Psychiatric Soc. v. City of Berkeley*, 178 Cal.App.3d 90, 109 (1986).
[111] *Fireman's Fund Ins. Co. v. Gerlach*, 56 Cal.App.3d 299, 303 (1976).
[112] *Northern Cal. Psychiatric Soc. v. City of Berkeley*, 178 Cal.App.3d 90, 109 (1986).
[113] *Fireman's Fund Ins. Co. v. Gerlach*, 56 Cal.App.3d 299, 303 (1976).
[114] Notice of Mot., filed May 8, 2015, 1.

H. OSC RE PRELIMINARY INJUNCTION

In conjunction with the temporary restraining order, Judge Kahn issued an order to show cause why a preliminary injunction should not issue. No preliminary injunction will issue. Given the conclusions reached above, there is no need for any further interim relief. Nothing remains of these post-judgment proceedings, with the following exceptions: resolution of Maxon's motion for attorneys' fees; determination of a method for distributing the remaining funds to the class; and implementation of that method of distribution.

I. MOTIONS TO DISQUALIFY

Attorneys Mark Yablonovich and Burke Huber appeared on behalf of a handful of class members in these post-judgment proceedings. Class representative Dawn Lofton and intervenor Terri Maxon each filed motions to disqualify Mr. Yablonovich and Mr. Huber from representing any class member in this action. After the motions were fully briefed, and less than an hour before the hearing on the motions, Mr. Huber and Mr. Yablonovich, gave notice to the moving parties of their intent to withdraw as attorneys of record in this action.[115] The motions were first heard on June 17, 2015, and continued to June 24. Substitution of attorney forms were later filed.[116] As Mr. Yablonovich and Mr. Huber have substituted out as counsel of record, the Court denies the motions to disqualify as moot. This denial is made without prejudice to the moving parties in the event Mr. Yablonovich or Mr. Huber attempt to re-insert themselves into these proceedings in the future.

V. Conclusion

For the foregoing reasons, the Court orders as follows:

1) The funds currently on deposit with the Court pursuant to the April 29, 2015 Order ($4,921,140.04 plus any accrued interest), plus those funds here ordered to be deposited with the Court by ILG no later than July 30, 2015 ($526,891, see number 2 below), less any award of attorneys' fees to counsel for intervenor Maxon, and less the costs of administering the following distribution, are to be distributed to those members to the *Lofton* Class who previously made claims, including the ILG Clients, on a *pro rata* basis in proportion to each class members' prior award in *Lofton*. Such distribution is to

[115] June 24, 2015 Hr'g Tr. at 13:6-9.

[116] Mr. Yablonovich filed his substitution form on June 19; Mr. Huber filed his substitution forms on June 18 and June 22.

happen by a date to be determined after the Court holds a hearing to determine the mechanics of such distribution, and after the Court has determined whether to award any fees to Maxon's counsel.

2) No later than July 30, 2015, Initiative Legal Group, APC, must deposit $526,891 with the San Francisco Superior Court. Counsel for ILG may call the Clerk of Department 305 for the specifics of the Superior Court account information to effectuate deposit with the Court. No later than August 7, 2015, counsel for ILG must file a declaration stating whether such a deposit has been made, and if so, obtain a receipt for the deposit and attach it to that declaration.

3) The Court will hold a hearing on July 31, 2015 at 9:30 a.m. to determine the mechanics of distributing the funds to class members. No later than July 27, 2015, Class Counsel, counsel for Wells Fargo, and counsel for intervenor Maxon shall jointly file: (1) a cost proposal from Rust Consulting (or any other qualified class action settlement administrator) for administering such distribution; and (2) a proposed letter to the recipients of the distribution, to accompany such distribution.

4) At the hearing on July 31, the Court will set a further hearing date on intervenor Maxon's motion for attorneys' fees.

5) Intervenor Maxon's motion for an injunction is denied.

6) Class member Linda Summers' motion to vacate the judgment is denied.

7) Class member Linda Summers' motion to intervene is denied.

8) Class members' Daniel Robert Spotts' and Thomas R. Sebring's motion to intervene is denied.

9) The Court will not certify a subclass of ILG Clients.

10) Chavez & Gertler's motion to be appointed interim lead counsel is denied.

11) No preliminary injunction will issue. The temporary restraining order is hereby dissolved.

12) Class representative Lofton's motion to disqualify attorneys Mark Yablonovich and Burke Huber is denied.

13) Intervenor Maxon's motion to disqualify attorneys Mark Yablonovich and Burke Huber is denied.

IT IS SO ORDERED.

Dated: July 16, 2015

Mary E. Wiss
Judge of the San Francisco Superior Court

Superior Court of California
County of San Francisco

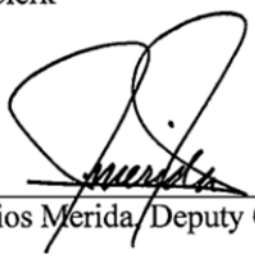
DAWN LOFTON, etc., et al., Plaintiffs vs. WELLS FARGO HOME MORTGAGE, etc., et al, Defendants	Case Number: CGC-11-509502 **CERTIFICATE OF ELECTRONIC SERVICE** (CCP 1010.6(6) & CRC 2.260(g))

I, Jose Rios Merida, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On July 16, 2015, I electronically served the ORDER (AFTER JUNE 24, 2015 HEARING): 1. DETERMINING THE STATUS AND DISPOSITION OF THE $4,921,140.04 ON DEPOSIT WITH THE COURT; 2. REQUIRING ILG TO DEPOSIT FURTHER FUNDS WITH THE COURT; 3. DENYING MOTION FOR PERMANENT INJUNCTION; 4. DENYING TWO (2) MOTIONS TO INTERVENE; 5. DENYING MOTION TO VACATE THE JUDGMENT; 6. RULING ON OSC RE SUBCLASS CERTIFICATION; 7. DENYING MOTION TO BE APPOINTED INTERIM LEAD COUNSEL; 8. RULING ON OSC RE PRELIMINARY INJUNCTION; AND 9. DENYING TWO (2) MOTIONS TO DISQUALIFY via File&ServeXpress® on the recipients designated on the Transaction Receipt located on the File&ServeXpress® website.

Dated: July 16, 2015

T. Michael Yuen, Clerk

By: 

Jose Rios Merida, Deputy Clerk

CERTIFICATE OF ELECTRONIC SERVICE