



Littler Mendelson, P.C.
650 California Street
20th Floor
San Francisco, CA 94108.2693

February 6, 2013

Lindbergh Porter, Jr.
415.399.8445 direct
415.433.1940 main
415.743.6541 fax
lporter@littler.com

Lyle W. Cayce
Clerk of Court
United States Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, Louisiana 70130-7700

Re: In Re Wells Fargo Wage and Hour Employment Practices Litigation, No. 12-20605;
On Petition for Writ of Mandamus from the United States District Court, Southern District
of Texas, Houston Division; Multi-District Litigation Case No. H-11-2266

Petitioner's Notice of Supplemental Authority

Dear Mr. Cayce:

Pursuant to FRAP 28(j), Petitioner Wells Fargo submits the following supplemental authority that was issued the same day as Wells Fargo's Reply Brief.

***Espenscheid v. DirectSat USA, LLC*, 2013 U.S. App. LEXIS 2409 (7th Cir. February 4, 2013)**

The plaintiffs sought overtime pay both as a "collective action" under the Fair Labor Standards Act ("FLSA") and as "class actions" under parallel state laws. The District Court initially certified a state law class under FRCP Rule 23(b)(3), and conditionally certified an FLSA collective action. Subsequently, the Court decertified all the classes.

In affirming the decertification, the Court, in an opinion by Circuit Judge Posner held in relevant part:

- "[D]espite the difference between a collective action and a class action and the absence from the collective-action section of the [FLSA] of the kind of detailed provisions found in Rule 23, there isn't a good reason to have different standards for the certification of the two different types of action, and the case law has largely merged the standards, though with some terminological differences." *Espenscheid*, at *2 [citations omitted].

This analysis supports Wells Fargo's position in this proceeding.

- "[T]he provisions of Rule 23 are intended to promote efficiency as well, and in that regard are as relevant to collective actions as class actions." *Id.* at *3-*4 [citations omitted].

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This analysis supports the position in Wells Fargo's Opening Brief at p. 28 that *Lusardi's* two-step method promotes inefficiency.

- "There would have been no problem [in certifying the class] had the plaintiffs been seeking just injunctive or declaratory relief, because then the only issue would have been whether DirectStat had acted unlawfully." *Espenscheid* at *6.

This analysis supports the position in Wells Fargo's Opening Brief at pp. 30-32 regarding certification differences between the ADEA and the FLSA.

- The Court notes the case management problems that arise absent sufficient uniformity among class members; finding certification inappropriate as "[n]o one thinks there was such uniformity." *Espenscheid*, at *9.

This analysis supports the position in Wells Fargo's Reply Brief at p. 6 that a court must determine whether the exemption issues can be decided on a uniform, class-wide basis.

Sincerely,

/s/ Lindbergh Porter
LITTLER MENDELSON
ATTORNEYS FOR DEFENDANTS/ PETITIONERS
WELLS FARGO BANK, N.A., et al.

PROOF OF SERVICE

I certify that on February 6, 2013 I served the following lead counsel of record with a copy of the foregoing letter via Federal Express:

Rhonda H. Wills
WILLS LAW FIRM
1776 Yorktown Street
Suite 600
Houston, Texas 77056

R. Paul Yetter
YETTER COLEMAN
2 Houston Center
909 Fannin Street
Suite 3600
Houston, Texas 77010

/s/ Lindbergh Porter

Lindbergh Porter

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