

1 CHRIS BAKER, State Bar No. 181557
cbaker@bakerlp.com
2 DEBORAH SCHWARTZ, State Bar No. 208934
dschwartz@.bakerlp.com
3 **BAKER CURTIS & SCHWARTZ, P.C.**
4 44 Montgomery Street, Suite 3520
San Francisco, CA 94104
5 Telephone: (415) 433-1064
6 Fax: (415) 366-2525
Attorneys for Plaintiff

7 MARTIN D. BERN (State Bar No. 153203)
martin.bern@mto.com
8 MALCOLM A. HEINICKE (State Bar No. 194174)
malcolm.heinicke@mto.com
9 MARJA-LIISA OVERBECK (State Bar No. 261707)
mari.overbeck@mto.com
10 **MUNGER, TOLLES & OLSON LLP**
11 560 Mission Street
12 Twenty-Seventh Floor
San Francisco, California 94105-2907
13 Telephone: (415) 512-4000
14 Facsimile: (415) 512-4077
Attorneys for Defendants

15
16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION
18

19 ADRIAN MORRIS, on behalf of herself and
all others similarly situated,

20 Plaintiff,

21 vs.
22

23 FIDELITY INVESTMENTS, a legal entity of
an unknown form, FMR, LLC, a Delaware
24 limited Liability Company, FIDELITY
BROKERAGE SERVICES LLC, a Delaware
25 Limited Liability Company (collectively
26 "FIDELITY"),

27 Defendants.
28

Case No. 3:17-cv-06027

**STIPULATION AND ~~PROPOSED~~
ORDER CERTIFYING RULE 23 CLASS
AND CONDITIONALLY CERTIFYING
FLSA COLLECTIVE ACTION**

1 Plaintiff Adrian Morris (“Plaintiff”) and Defendants Fidelity Brokerage Services
2 LLC (“Fidelity Brokerage Services”) and FMR LLC, through their respective counsel of record,
3 stipulate as follows:

4 **WHEREAS**, the initial complaint in the above-captioned action was filed on
5 October 20, 2017, and, pursuant to a joint stipulation and Order of the Court (*see* ECF Nos. 32,
6 33), Plaintiff filed the First Amended Complaint (“FAC”) on February 21, 2018;

7 **WHEREAS**, Plaintiff’s FAC alleges Defendants failed to pay her earned overtime
8 wages by: (1) miscalculating her regular rate of pay with respect to her “bonus overtime;” (2)
9 failing to include student loan repayments in calculating her regular rate of pay for overtime
10 purposes; and (3) failing to include reimbursement of certain fitness-related expenses in
11 calculating her regular rate of pay for overtime purposes;

12 **WHEREAS**, Plaintiff’s FAC also alleges claims for wage statement violations,
13 both on a derivative basis and also arising from Defendants’ failure to include accurate
14 information about hours worked, pay periods at issue, and the hourly rate in effect for bonus
15 overtime payments.

16 **WHEREAS**, on the above bases and others, Plaintiff’s FAC asserts claims for
17 unpaid overtime on behalf a putative national collective action class under the Fair Labor
18 Standards Act (“FLSA”);

19 **WHEREAS**, on the above bases and others, Plaintiff’s FAC asserts claims for
20 unpaid overtime and wage statement violations under the California Labor Code and via
21 California Business and Professions Code section 17200 *et seq.* on behalf of a putative California
22 class under Rule 23 of the Federal Rules of Civil Procedure, as well as a claim for waiting time
23 penalties on behalf of a subclass of former employees who otherwise meet the definition of the
24 putative class;¹

25
26 _____
27 ¹ Plaintiff also asserts a representative claim under the Private Attorneys General Act (“PAGA”),
28 which is not relevant to this stipulation, and Fidelity Brokerage Services LLC and FMR LLC
reserve their right to contest these claims and the propriety of representative treatment for them.

1 **WHEREAS**, on April 6, 2018, Fidelity Brokerage Services LLC answered the
2 FAC, and FMR LLC filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of
3 Civil Procedure, seeking an order from the Court dismissing FMR LLC and Fidelity Investments
4 as named defendants on the grounds that (1) Plaintiff has not alleged sufficient facts averring that
5 FMR LLC was her employer under either federal or California law, and (2) Fidelity Investments is
6 not a legal entity and therefore cannot be sued;

7 **WHEREAS**, the Parties have produced documents and provided information and
8 data relevant to Plaintiff’s claims, the putative Rule 23 class, and the proposed FLSA collective
9 action class, both in response to discovery requests and pursuant to the Parties’ meet and confer
10 efforts;

11 **WHEREAS**, Defendant FMR LLC has stated in verified responses to
12 interrogatories that it did not and does not employ any non-exempt employees in California during
13 the time period relevant to Plaintiff’s allegations in this action;

14 **WHEREAS**, Defendant FMR LLC also has stated in verified responses to
15 interrogatories that the entity to which the trade name “Fidelity Investments” was registered has
16 now merged into FMR LLC;

17 **WHEREAS**, after the exchange of discovery and information and sharing of
18 analyses, Fidelity Brokerage Services LLC has agreed to stipulate to Rule 23 certification of the
19 class proposed below, subject to Court approval;

20 **WHEREAS**, Fidelity Brokerage Services LLC has also agreed to stipulate to
21 conditional certification of the FLSA collective class (“Collective”) proposed below, again subject
22 to Court approval;

23 **WHEREAS**, the deadline for Plaintiff to move for Rule 23 class and FLSA
24 conditional certification is June 7, 2018;

25 **WHEREAS**, through this Stipulation, and the declarations that accompany this
26 Stipulation, Plaintiff hereby seeks class and conditional certification with respect to the class and
27 collective identified below. If the Court deems this Stipulation insufficient, and upon direction of
28

1 maintains bonus compensation plans for other non-exempt employees, which do not provide for
2 bonuses paid as a percentage of earnings (collectively, the “Compensation Plans”).

3 5. Under these Compensation Plans, if or when Fidelity Brokerage Services pays non-
4 exempt employees a bonus, it also pays them additional compensation as an overtime premium for
5 hours worked during a specified time period (“bonus overtime adjustment”). When a bonus
6 overtime adjustment is paid, a date range and an amount earned is provided on the wage statement
7 along with information on other payments for the pay period at issue. The wage statements
8 reflecting the bonus overtime adjustment do not include information in the rate and hours columns
9 for the bonus overtime adjustment. An exemplar of the wage statement used by Fidelity
10 Brokerage is attached to the declaration of Adrian Morris as Exhibit A.

11 6. Under these Compensation Plans, Fidelity Brokerage Services uses the same
12 method of calculation of bonus overtime adjustments for all covered non-exempt employees.

13 7. Plaintiff contends Fidelity Brokerage Services’ method of calculation for paying
14 the bonus overtime adjustments violates California law.² Fidelity Brokerage Services disputes this
15 contention.

16 8. Fidelity Brokerage Services contends that even if it did incorrectly calculate the
17 bonus overtime adjustments for these non-exempt employees, the underlying decision to make a
18 bonus payment under the Compensation Plans is discretionary, and so Fidelity Brokerage Services
19 contends that it had and has no obligation to pay any overtime based on such bonus compensation.
20 Plaintiff disputes these contentions.

21 9. Plaintiff contends that the wage statements provided to her and the other current
22 and former California employees at issue in this case violate California law because, among other
23 things, they do not provide information required by Labor Code section 226 and certain
24 _____

25 ² Based on discovery and analysis, Plaintiff withdraws her FLSA claim based on the method of
26 calculation of overtime premiums for bonuses paid under the Compensation Plans and bonus
27 overtime adjustments in particular. While Plaintiff contends an argument could conceivably be
28 made that Fidelity Brokerage Services’ method of calculation of bonus overtime adjustments
violates federal law, the likelihood of success is so remote, and the potential damages are so small,
that Plaintiff does not consider it responsible to further pursue this claim.

1 information set forth in the wage statements for bonus overtime adjustments is inaccurate in any
2 event. Fidelity Brokerage Services disputes this contention.

3 10. From October 20, 2013 to the present, Fidelity Brokerage Services has employed
4 approximately 538 California-based non-exempt employees, including Plaintiff, who earned bonus
5 compensation pursuant to a Compensation Plan and who also received a bonus overtime
6 adjustment pursuant to Fidelity Brokerage Services' standard method of calculating this overtime.
7 These non-exempt employees also received wage statements similar in form to Plaintiff's wage
8 statements.

9 **Student Loan Repayments**

10 11. Fidelity Brokerage Services also maintains a "Step Ahead Student Loan Program"
11 through which it pays a portion of its employees' student loans. Plaintiff participated in this
12 student loan repayment program and also worked overtime during the time frame in which the
13 loan repayments were paid.

14 12. Fidelity Brokerage Services did not, and does not, include these student loan
15 repayments in calculating the regular rate of pay for overtime purposes for any of its non-exempt
16 employees, including Plaintiff.

17 13. Plaintiff contends that student loan repayments must be included in the regular rate
18 of pay when calculating overtime compensation under both federal and California law. Fidelity
19 Brokerage Services disputes this contention.

20 14. Plaintiff also contends that, when calculating overtime compensation based on the
21 student loan repayments, the applicable work period during which the student loan repayment is
22 earned is on a per month basis. Fidelity Brokerage Services, in addition to disputing that student
23 loan repayments must be included in the regular rate of pay when calculating overtime
24 compensation at all, also disputes that the applicable work period would be monthly, as opposed to
25 the work period in which the loan repayment is made.

26 15. Finally, Plaintiff contends that her wage statements are inaccurate on a derivative
27 basis because of the failure to include loan repayments in the regular rate of pay. Fidelity
28 Brokerage Services disputes this contention as well.

1 fitness reimbursements. Fidelity Brokerage Services has not made the payments sought by
2 Plaintiff to any of its other former employees, and, as explained above, Fidelity Brokerage
3 Services disputes these alleged additional wages are owed.

4 23. There are at least 180 members of the Rule 23 Class, as defined below, who are
5 now separated from Fidelity Brokerage Services.

6
7 **A. Plaintiff and Fidelity Brokerage Request that the Court Certify the Proposed**
8 **Class and Subclass Pursuant to Federal Rule of Civil Procedure 23**

9 Based on the facts and arguments set forth in this Stipulation, the Plaintiff and Fidelity
10 Brokerage Services agree to certification of the following Rule 23 class and subclass and FLSA
11 collective as follows:

12 **STIPULATED CLASS**

13 **The Rule 23 Class**

14 All former and current employees of Fidelity Brokerage Services
15 who, while employed by Fidelity Brokerage Services in California
16 at some point during the period from October 20, 2013 to the
17 present, satisfied the following two conditions: (1) Fidelity
18 Brokerage Services classified them as “non-exempt;” **and** (2)(a)
19 They were paid bonus compensation pursuant to a Compensation
20 Plan and were also paid a bonus overtime adjustment with respect to
21 that bonus compensation; **and/or** (b) They received student loan
22 repayments pursuant to Fidelity Brokerage’s Step Ahead Student
23 Loan Program and worked overtime during the month in which a
24 student loan repayment was made; **and/or** (c) They received fitness
25 reimbursements pursuant to Fidelity Brokerage Services’ Fitness
26 Reimbursement Program and worked overtime during the pay
27 period in which the fitness reimbursement was paid. (The “Rule 23
28 Class.”)

23 **The Former Employee Subclass**

24 All members of the Rule 23 Class whose employment with Fidelity
25 Brokerage Services terminated from October 20, 2014 to the present
26 (The “Former Employee Subclass” or “Subclass”).

27 **STIPULATED APPLICATION OF LAW TO FACTS**

28 1. The Rule 23(a) Requirements

1 24. Rule 23(a) sets forth four requirements for class certification: (1) the class is so
2 numerous that joinder of class members is impracticable (numerosity); (2) there are questions of
3 law or fact common to the class (commonality); (3) the claims or defenses of the class
4 representatives are typical of those of the class (typicality); and (4) the class representatives will
5 fairly and adequately protect the interests of the class (adequacy). Fed. R. Civ. Proc. 23(a); *Leyva*
6 *v. Medline Industries Inc.*, 716 F.3d 510, 512 (9th Cir. 2013).

7 25. Having met and conferred, and for purposes of preserving judicial and party
8 resources, Fidelity Brokerage Services and Plaintiff stipulate that the requirements of Rule 23(a)
9 are satisfied for the Rule 23 Class and Subclass proposed above. More specifically:

10 (a) **Numerosity.** Rule 23(a)(1) requires that the “the class is so numerous that
11 joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). Courts generally find that
12 numerosity is satisfied if the class includes forty or more members. *See Villalpando v. Exel Direct*
13 *Inc.*, 303 F.R.D. 588, 605-06 (N.D. Cal. 2014); *In re Facebook, Inc., PPC Adver. Litig.*, 282
14 F.R.D. 446, 452 (N.D. Cal. 2012). Numerosity is satisfied here because the Rule 23 Class consists
15 of at least 538 employees and the Subclass consists of at least 180 former employees.

16 (b) **Commonality.** Commonality demands that there be “questions of law or
17 fact common to the class.” Fed. R. Civ. P. 23(a)(2). To satisfy this requirement, the common
18 question “must be of such a nature that it is capable of class-wide resolution—which means that
19 determination of its truth or falsity will resolve an issue that is central to the validity of each of the
20 claims in one stroke.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Plaintiff and
21 Fidelity Brokerage Services stipulate that commonality is satisfied because the methodology
22 utilized by Fidelity Brokerage Services for calculating overtime with respect to bonuses, and with
23 respect to Student Loan Program and Fitness Reimbursement Program benefits, was applied to all
24 Fidelity Brokerage Services non-exempt employees in California who were eligible to (and did)
25 receive those bonuses or benefits. Fidelity Brokerage Services (1) utilized a common
26 methodology for adjusting non-exempt, bonus-eligible employee regular rates of pay for bonuses
27 (which methodology Plaintiff is challenging as allegedly being in violation of the California Labor
28 Code); (2) had a common practice concerning the treatment of regular rate calculations pertaining

1 to Student Loan Program payments; (3) had a common practice concerning the treatment of
2 regular rate calculations pertaining to fitness reimbursement payments and (4) had a common
3 practice on information included in wage statements. Additional questions common to the Rule
4 23 Class are whether the bonuses paid to Fidelity Brokerage Services non-exempt employees were
5 discretionary, whether they were production bonuses that rewarded employees for each hour of
6 work, or flat sum bonuses subject to the California Supreme Court’s analysis in *Alvarado v. Dart*
7 *Container Corp. of California*, 4 Cal. 5th 542 (2018). See *Dalchau v. Fastaff, LLC*, No. 17-CV-
8 01584-WHO, 2018 WL 1709925, at *7 (N.D. Cal. Apr. 9, 2018) (certifying class where all
9 employees who were “eligible to receive housing benefits” were subject to the “same policy of
10 having the value of housing benefits excluded from the regular rate used to calculate overtime.
11 Therefore, there exists at least one common question—whether Fastaff’s policy of excluding the
12 value of the housing benefits from the regular rate properly compensates class members pursuant
13 to California law.”). The Subclass will also present the common question of whether Fidelity
14 Brokerage Services’ conduct in failing to pay all wages allegedly owed at the time of separation
15 was willful. *Amaral v. Cintas Corp. No. 2*, 163 Cal.App.4th 1157, 1201 (2008) (“willful” under
16 Section 203 means the “employer has intentionally failed or refused to perform an act which was
17 required to be done” and need not be “based on deliberate evil purpose”); *Provine v. Office Depot,*
18 *Inc.*, Case No. C 11-00903 SI, 2012 WL 2711085 *9 (N.D. Cal. July 6, 2012) (certifying waiting
19 time penalty claims stemming from employer’s alleged miscalculation of the regular rate of pay).

20 (c) **Typicality.** Rule 23(a)(3) requires that the “claims or defenses of the
21 representative parties are typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3).
22 Representative claims are “typical” if they are “reasonably co-extensive with those of absent class
23 members; they need not be substantially identical.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011,
24 1020 (9th Cir. 1998). “The test of typicality is whether other members have the same or similar
25 injury, whether the action is based on conduct which is not unique to the named plaintiffs, and
26 whether other class members have been injured by the same course of conduct.” *Hanon v.*
27 *Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (internal quotation marks omitted).
28 Plaintiff and Fidelity Brokerage Services stipulate that typicality is satisfied because Plaintiff’s

1 alleged injury—i.e., overtime underpayment due to (1) a methodology that is allegedly incorrect
 2 under California law for calculating overtime adjustments based on bonuses, (2) the treatment of
 3 regular rate calculations pertaining to Student Loan Program payments; and (3) the treatment of
 4 regular rate calculations pertaining to fitness reimbursement payments—is the same alleged injury
 5 shared by all members of the Rule 23 Class proposed herein. Plaintiff’s alleged injury and alleged
 6 entitlement to statutory penalties with respect to Fidelity Brokerage Services’ wage statements is
 7 also the same injury and entitlement shared by all members of the Rule 23 Class. Moreover,
 8 Plaintiff is a former employee so her claims are also typical of the Subclass.

9 (d) **Adequacy.** To establish adequacy under Rule 23(a)(4), named plaintiffs
 10 must show that they “will fairly and adequately protect the interests of the class.” Fed. R. Civ. P.
 11 23(a)(4). “To determine whether named plaintiffs will adequately represent a class, courts must
 12 resolve two questions: (1) do the named plaintiffs and their counsel have any conflicts of interest
 13 with other class members and (2) will the named plaintiffs and their counsel prosecute the action
 14 vigorously on behalf of the class?” *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir.
 15 2011) (internal quotation marks omitted). Discovery in this matter has revealed no conflicts
 16 between the Plaintiff (or her counsel) and the Rule 23 Class and Subclass proposed herein, and
 17 Plaintiff has no interests that are antagonistic to those of the other proposed members of the Rule
 18 23 Class or Subclass. There is no dispute that Plaintiff’s counsel is able and experienced in the
 19 litigation of claims of this nature. Additional sworn testimony concerning the adequacy of
 20 Plaintiff and Plaintiff’s counsel is set forth in the declarations of Adrian Morris and Chris Baker
 21 filed in support of this Stipulation. The parties stipulate to the approval of Baker Curtis &
 22 Schwartz, P.C. as Class Counsel and Adrian Morris as the class representative.

23 2. The Rule 23(b) Requirements

24 26. Rule 23(b) sets forth three additional, but alternative, requirements, only one of
 25 which must be met: (1) that prosecution of separate actions risks either inconsistent adjudications
 26 which would establish incompatible standards of conduct for the defendant or would as a practical
 27 matter be dispositive of the interests of others; (2) that defendants have acted or refused to act on
 28 grounds generally applicable to the class; or (3) that there are common questions of law or fact

1 that predominate over any individual class member's questions and that a class action is superior
2 to other methods of adjudication. Fed. R. Civ. Proc. 23(b).

3 27. Fidelity Brokerage Services and Plaintiff, having met and conferred, and for
4 purposes of preserving judicial and party resources, stipulate that the requirements of Rule
5 23(b)(2) and (b)(3) are satisfied as to the Rule 23 Class and Subclass proposed herein.

6 28. F.R.C.P. 23(b)(2). As set forth above, Fidelity Brokerage Services has acted on
7 grounds generally applicable to the class with respect to: (1) the manner in which it calculates
8 overtime; (2) the information set forth in its wage statements; and (3) the failure to pay the
9 compensation at issue upon an employee's separation from Fidelity Brokerage Services' employ.
10 The proposed Rule 23 Class and Subclass thus satisfy the requirements of Rule 23(b)(2).

11 29. F.R.C.P. 23(b)(3). With respect to predominance under Rule 23(b)(3), courts
12 consider "whether the proposed classes are sufficiently cohesive to warrant adjudication by
13 representation." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997). This analysis
14 focuses on the relationship between common and individual issues, i.e., common questions must
15 predominate over any questions affecting only individual members. *Hanlon*, 150 F.3d at 1022.

16 (a) **Predominance.** Fidelity Brokerage Services and Plaintiff stipulate that the
17 following questions are questions of law common to the Rule 23 Class proposed herein that
18 predominate over any individual questions because these legal questions are susceptible to
19 generalized, class-wide proof: (1) whether Fidelity Brokerage Services' methodology for
20 calculating overtime pay on bonuses is compliant with the pertinent provisions of the California
21 Labor Code; (2) whether bonuses paid to the members of the proposed Rule 23 Class were
22 discretionary and whether they were "flat rate" or "production" bonuses as those terms are defined
23 in *Alvarado v. Dart Container Corp. of California*, 4 Cal. 5th 542 (2018); (3) whether Fidelity
24 Brokerage Services' practice concerning the treatment of regular rate calculations pertaining to
25 Student Loan Program payments and fitness reimbursement payments was compliant with the
26 pertinent provisions of the California Labor Code and, if not, what is the proper method for
27 calculating the regular rate of pay for overtime arising from those payments; and (4) whether
28 Fidelity Brokerage Services' wage statements complied with the California Labor Code. *See*

1 *Dalchau*, 2018 WL 1709925, at *10 (finding that the “question of whether [the defendant’s]
2 policy of excluding the value of the housing benefits from the regular rate properly compensates
3 class members pursuant to California law predominates over any individual questions.”); *see also*
4 *Adoma v. University of Phoenix, Inc.*, 270 F.R.D. 543, 552 (E.D. Cal. 2010) (class issues
5 predominate claim that defendants did not include the value of the tuition benefit in regular rate of
6 pay); *Alonzo v. Maximus, Inc.*, No. 2:08-CV-06755-JST (MANx), 2011 WL 2437444 at *12-13
7 (C.D. Cal. June 17, 2011) (overtime pay claim based on the alleged miscalculation of the regular
8 rate of pay certified under Rule 23(b)(3)); *Kempen v. Matheson Tri-Gas, Inc.*, No. 15-CV-00660-
9 HSG, 2016 WL 4073336, at *7 (N.D. Cal. Aug. 1, 2016) (certifying Rule 23 California classes
10 because “common questions about the uniform implementation of employment policies”
11 predominated over “individual questions”).

12 (b) **Superiority**. Certification under Rule 23(b)(3) requires a showing that
13 class treatment is “superior to other available methods for fairly and efficiently adjudicating the
14 controversy.” Fed. R. Civ. P. 23(b)(3). Factors relevant to this determination include: “(A) the
15 class members’ interests in individually controlling the prosecution or defense of separate actions;
16 (B) the extent and nature of any litigation concerning the controversy already begun by or against
17 class members; (C) the desirability or undesirability of concentrating the litigation of the claims in
18 the particular forum; and (D) the likely difficulties in managing a class action.” *Id.* “A
19 consideration of these factors requires the court to focus on the efficiency and economy elements
20 of the class action so that cases allowed under [Rule 23(b)(3)] are those that can be adjudicated
21 most profitably on a representative basis.” *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180,
22 1190 (9th Cir. 2001) (internal quotation marks omitted). Fidelity Brokerage Services and Plaintiff
23 stipulate that the following questions are questions of law common to the Rule 23 Class proposed
24 herein and that classwide resolution of these claims is superior to resolution on an individual basis
25 because these legal questions are susceptible to generalized, class-wide proof: (1) whether Fidelity
26 Brokerage Services’ methodology for calculating overtime pay on bonuses is compliant with the
27 pertinent provisions of the California Labor Code; (2) whether bonuses paid to the members of the
28 proposed Rule 23 Class were discretionary and whether they were “flat rate” or “production”

1 bonuses as those terms are defined in *Alvarado v. Dart Container Corp. of California*, 4 Cal. 5th
 2 542 (2018); (3) whether Fidelity Brokerage Services' practice concerning the treatment of regular
 3 rate calculations pertaining to Student Loan Program payments and fitness reimbursement
 4 payments was compliant with the pertinent provisions of the California Labor Code, and, if not,
 5 what is the proper method for calculating the regular rate of pay for overtime arising from those
 6 payments; and (4) whether Fidelity Brokerage Services' wage statements complied with California
 7 law. *See Provine*, 2012 WL 2711085, at *12 (finding that a class action is superior method of
 8 adjudication where "[a]ll of the prospective class claims revolve around a question of law common
 9 to all prospective members"). Plaintiff and Fidelity Brokerage Services further note that each
 10 class member's individual damages amount is likely to be relatively small. For example, Plaintiff,
 11 in her supplemental initial disclosures, preliminarily estimates her individual damages for unpaid
 12 overtime wages (not including statutory penalties and civil penalties under PAGA) at less than
 13 \$1,100 through July 23, 2017. This is another reason that class treatment of this case is superior.

14 **B. Plaintiff and Fidelity Brokerage Services Request that the Court Conditionally**
 15 **Certify the Proposed Collective Action Pursuant to 29 U.S.C. § 216(b)**

16 **STIPULATED COLLECTIVE**

17 30. Fidelity Brokerage Services and Plaintiff request that the Court conditionally
 18 certify the following FLSA collective:

19 All United States based former and current employees of Fidelity
 20 Brokerage Services from May 31, 2015 to the present, who satisfy
 21 the following two conditions: (1) Fidelity Brokerage Services
 22 classifies(d) them as "non-exempt;" **and** (2)(a) They received
 23 student loan repayments pursuant to Fidelity Brokerage's Step
 24 Ahead Student Loan Program and worked overtime during the
 25 month in which a student loan repayment was made; **and/or** (b)
 They received fitness reimbursements pursuant to Fidelity
 Brokerage Services' Fitness Reimbursement Program and worked
 overtime during the pay period in which the fitness reimbursement
 was paid. (The "FLSA Collective" or "Collective.")

26 **STIPULATED APPLICATION OF LAW TO FACTS**

27 1. The Conditional Certification Standard

28

1 31. The FLSA authorizes employees to bring a collective action on behalf of
 2 themselves “and other employees similarly situated.” 29 U.S.C. § 216(b). Although neither the
 3 FLSA nor the Ninth Circuit has defined “similarly situated,” courts in this circuit generally apply a
 4 “two-step approach to determine whether a collective action is proper, involving initial notice to
 5 prospective plaintiffs, followed by a final evaluation whether such plaintiffs are similarly
 6 situated.” *Leuthold v. Destination Am., Inc.*, 224 F.R.D. 462, 467 (N.D. Cal. 2004); *Benedict v.*
 7 *Hewlett-Packard Co.*, No. 13-CV-00119, 2014 WL 587135, at *5 (N.D. Cal. Feb. 13, 2014) (at
 8 step one, “courts require little more than substantial allegations, supported by declarations or
 9 discovery, that ‘the putative class members were together the victims of a single decision, policy,
 10 or plan.’”) (citation omitted); *Speer v. Cerner Corporation*, No. 14-0204-CV-W-FJG, 2016 WL
 11 1267809, at *8 (W.D. Mo., Mar. 30, 2016) (substantial allegations that employer used pay
 12 formulas that excluded forms of additional compensation when calculating the regular rate of pay
 13 are sufficient for the first stage of conditional certification proceedings).

14 2. Application of the Conditional Certification Standard

15 32. Fidelity Brokerage Services and Plaintiff stipulate that non-exempt Fidelity
 16 Brokerage Services employees who are members of the FLSA Collective defined above were
 17 subject to common practices concerning (1) the treatment of regular rate calculations pertaining to
 18 Student Loan Program payments for overtime purposes, and/or (2) the treatment of regular rate
 19 calculations pertaining to Fitness Reimbursement Program payments for overtime purposes.
 20 Fidelity Brokerage Services and Plaintiff therefore stipulate that Plaintiff and other members of
 21 the stipulated conditionally certified collective action are similarly situated for purposes of 29
 22 U.S.C. § 216(b).

23 **C. Notice to the Class and Collective**

24 33. Rule 23 Notice. To avoid the administration cost associated with multiple mailings
 25 and to preserve class resources, Plaintiff and Fidelity Brokerage Services stipulate to postpone
 26 notice procedures until after the Mandatory Settlement Conference with Magistrate Judge Spero
 27 on September 5, 2018. Following that conference, Plaintiff and Fidelity Brokerage Services will
 28 meet and confer and submit a proposed notice plan to the Court, either as part of a proposed

1 settlement, or if no settlement is reached, then pursuant to Rule 23(a)(2) of the Federal Rule of
2 Civil Procedure.

3 34. Opt-In Notice. To avoid the administration cost associated with multiple mailings
4 and to preserve class resources, Plaintiff and Fidelity Brokerage Services stipulate to postpone
5 notice procedures until after the Mandatory Settlement Conference with Magistrate Judge Spero
6 on September 5, 2018. Following that conference, Plaintiff and Fidelity Brokerage Services will
7 meet and confer and submit a proposed notice plan to the Court, either as part of a proposed
8 settlement, or if no settlement is reached, then pursuant to the FLSA and the pertinent *Hoffman-*
9 *LaRoche* standard.

10 **D. Status of Claims Against FMR LLC**

11 35. As noted above, FMR LLC states in verified discovery responses that it employs no
12 non-exempt employees in California. While Plaintiff contends that FMR LLC is either a single or
13 joint employer of Plaintiff and the non-exempt employees admittedly employed by Fidelity
14 Brokerage Services, neither Plaintiff nor the class will be entitled to a double recovery.
15 Accordingly, she believes it sufficient to seek damages and statutory penalties directly from
16 Fidelity Brokerage Services with respect to the non-PAGA Labor Code claims. Accordingly,
17 Plaintiff does not intend to seek, and this stipulation does not seek or provide for, certification of a
18 Rule 23 Class against Defendant FMR LLC.

19 36. Based on the information available to her and her counsel to date, Plaintiff is not
20 presently seeking conditional certification of her FLSA claims with respect to FMR LLC.
21 Plaintiff reserves the right to seek to obtain conditional certification with respect to FMR LLC on
22 the regular rate claims related student loan and fitness reimbursement at a later date. Fidelity
23 reserves its right to argue that any such effort would be untimely and also that Plaintiff cannot
24 establish the bases for conditional certification with respect to FMR LLC.

25 **E. Non-Approval of the Stipulation**

26 37. Plaintiff and Fidelity Brokerage Services and FMR LLC have stipulated to facts in
27 paragraphs 1-23 of this Stipulation, and the stipulation to these facts is not contingent on Court
28 approval. In addition, Plaintiff and Fidelity Brokerage Services have stipulated to class and

1 conditional certification as set forth in this Stipulation and subject to Court approval. If the Court
2 should for any reason not approve this Stipulation, then the Stipulated Class and the Stipulated
3 Application of Law to Facts set forth in paragraphs 24-36 of this Stipulation shall be binding on
4 neither party. These paragraphs shall also not be relied upon or referred to for purposes of judicial
5 estoppel or as a party admission as to the appropriateness of class or collective certification.
6 Instead, these paragraphs shall have not force or effect.

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DATED: May 24, 2018

Respectfully submitted,

MUNGER, TOLLES & OLSON LLP
MARTIN D. BERN
MALCOLM A. HEINICKE
MARJA-LIISA OVERBECK

By: Malcolm A. Heinicke
MALCOLM A. HEINICKE
Attorneys for Defendants Fidelity Brokerage Services
LLC and FMR LLC

DATED: May 24, 2018

Respectfully submitted,

BAKER CURTIS & SCHWARTZ, P.C.
CHRIS BAKER
DEBORAH SCHWARTZ

By: Chris Baker
CHRIS BAKER
Attorneys for Plaintiff Adrian Morris

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Pursuant to Local Rule 5-1(i), the filer attests that the concurrence in the filing of this document has been obtained from each of the above signatories.

By: Chris Baker
CHRIS BAKER

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~~PROPOSED~~ ORDER

For the reasons set forth in the attached stipulation, the Court hereby orders as follows:

Rule 23 Class. Pursuant to Fed. Rule Civ. Pro. 23, the Court hereby certifies the Rule 23 Class and the Former Employee Subclass as defined above and approves Baker Curtis & Schwartz, P.C. as Class Counsel and Adrian Morris as the Class Representative.

FLSA Collective. Pursuant to the FLSA and its pertinent procedures, the Court hereby conditionally certifies the FLSA Collective.

Plaintiff and Fidelity Brokerage Services are directed to provide a joint report to this Court no later than September 19, 2018 on the results of the Mandatory Settlement Conference with Magistrate Judge Spero and a proposal for addressing notice to the Rule 23 Class and the FLSA Collective.

IT IS SO ORDERED.

Date: June 1, 2018.


The Honorable William H. Alsup