



1 Pursuant to CR 23 and LR 23(e), the parties request that the Court issue an Order (1)  
2 certifying a settlement class under CR 23(b)(3); (2) granting preliminary approval of the  
3 Settlement Agreement, a copy of which is attached; (3) approving the form of Notice to be  
4 mailed to each class member; and (4) setting a date for hearing objections, if any, to the  
5 proposed settlement and the parties' Motion for Final Approval of the Settlement Agreement.

## 6 II. STATEMENT OF FACTS

7 Named Plaintiff David Woods alleged that Defendant failed to pay overtime wages to  
8 Mr. Woods and similarly situated individuals working as Retail Mortgage Lending Account  
9 Executives, Job Code SM0009 ("Account Executives") at Bank of America in Washington in  
10 violation of Washington's Minimum Wage Act. He filed a complaint on December 9, 2005, on  
11 behalf of himself and all those similarly situated claiming that he and the employees he seeks to  
12 represent were improperly classified as exempt and were denied premium pay when they  
13 worked over 40 hours in a week. Named Plaintiff seeks to recover unpaid overtime wages. He  
14 contends that as many as approximately 230 Account Executives employed by Bank of  
15 America in Washington from December 9, 2002, to the date of the Court's preliminary  
16 approval of the Settlement Agreement, may have been adversely affected by Defendant's  
17 overtime payment practices. Defendant denies all of Named Plaintiff's allegations.

18 The parties consulted with each other, participated in mediation with Judge Terrence  
19 Carroll (Ret.), an experienced mediator, and engaged in subsequent negotiations in an attempt  
20 to settle the disputes underlying the action. Those negotiations have been successful. The  
21 parties agree to the entry of the proposed Settlement Agreement of Class Action Claims as a  
22 full settlement of this legal action, subject to the Court's final approval thereof. By entering  
23 into the proposed Settlement Agreement, Defendant continues to deny all allegations of failure  
to pay overtime.

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### III. STATEMENT OF ISSUES

A. Whether the Court should certify a class for purposes of implementing the proposed settlement under CR 23(b)(3).

B. Whether the Court should preliminarily approve the settlement and schedule a final settlement hearing pursuant to LR 23(e).

C. Whether the Court should approve use of the proposed Notice of Class Settlement.

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### IV. EVIDENCE RELIED UPON

This motion is based on the Settlement Agreement, the Declaration of Holly Hearn, and the Declaration of Mark Griffin.

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### V. AUTHORITY AND ARGUMENT

The parties agree that the monetary settlement should proceed as a Rule 23 class action in order that this settlement will constitute a full and complete adjudication of the parties' and class members' rights, liabilities, and obligations as set forth in the proposed Settlement Agreement.

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#### A. Certification of a Settlement Class Is Proper.

##### 1. The Requirements of CR 23(a) Are Met.

CR 23(a) provides that a class may be certified if four basic elements are shown:

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

CR 23(a).

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The parties seek the certification of a class consisting of those who, during the period December 9, 2002, through the date of the Court's preliminary approval of the Settlement Agreement, worked for Bank of America as Account Executives in Washington State and who

JOINT MOTION REQUESTING PRELIMINARY APPROVAL OF  
PROPOSED SETTLEMENT AGREEMENT & REQUESTING  
FAIRNESS HEARING - 3

SEA 1905992v5 4900000-740

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1 have not participated in the settlements in *Graham v. Bank of America, N.A.*, No. 04-cv-02951-  
2 FLN (D. Minn.) (*Graham* litigation) or *Franklin v. Bank of America, N.A.*, No. C-05-00519  
3 CRB (N.D. Cal) (*Franklin* litigation).

4       Regarding numerosity, the proposed settlement class consists of approximately 230  
5 members, which meets this requirement. As a general rule, courts have held that as few as 40  
6 members will suffice. *Miller v. Farmer Bros. Co.*, 115 Wn. App. 815, 821, 64 P.3d 49 (Wash.  
7 App. 2003); *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995).

8       With respect to commonality, the central question in this case—whether Account  
9 Executives were misclassified as exempt and are due overtime pay for all hours over 40 worked  
10 in a given work week pursuant to RCW 49.46.005 *et seq.*—is common to all class members, as  
11 the requested class includes only Account Executives employed by Bank of America in  
12 Washington State.

13       Named Plaintiff David Woods' claim is typical of the claims of class members. The  
14 typicality requirement is satisfied if the representative Plaintiff's claims arise "from the same  
15 event or course of conduct which gives rise to the claims of other class members and is based  
16 on the same legal theory." *Rodriguez v. Carlson*, 166 F.R.D. 465, 472 (E.D. Wash. 1996).  
17 Here, the claims of the Named Plaintiff—the sole Class Representative—are identical to those  
18 of putative class members. The alleged injuries all stem from the same alleged actions of Bank  
19 of America, and the nature of the damages putative class members could recover are identical  
20 to the potential damages of the Named Plaintiff.

21       Finally, adequacy of representation is usually satisfied if there is an absence of adversity  
22 in the interests of the named plaintiff and class members, and the named plaintiff has retained  
23 competent counsel. *See DeFunis v. Odegaard*, 84 Wn.2d 617, 622, 529 P.2d 438 (1974). Bank  
of America agrees that Named Plaintiff's counsel are competent and that there are no disabling  
conflicts in this case.

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**2. The Requirements of CR 23(b)(3) Are Met.**

The parties seek certification of a class, for settlement purposes only, under CR 23(b)(3), which provides that a class may be maintained when the “court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy under these circumstances.” CR 23(b)(3). Here, in the context of proposed settlement, both standards are met.

Under CR 23(b)(3), “when common questions represent a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is a clear justification for handling the dispute on a representative rather than an individual basis.” *Rodriguez*, 166 F.R.D. at 477. The predominance requirement of CR 23(b)(3) “is not a rigid test, but rather contemplates a review of many factors, the central question being whether ‘adjudication of the common issues in the particular suit has important and desirable advantages of judicial economy compared to all other issues, or when viewed by themselves.’” *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 254 (quoting 1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 4.25, at 4-86). The proposed settlement allows the Class members’ common *and* individual issues to be timely and efficiently resolved, without protracted litigation, thus satisfying the predominance requirement.

A class action must also be found to be “superior” to available alternative means for the fair, efficient and inclusive adjudication of the litigation. CR 23(b)(3). In the context of a proposed settlement, where issues of manageability are not present, there is not an issue as to “superiority.”

**B. Preliminary Approval and Proposed Settlement.**

Washington Civil Rule 23(e) states that “[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.”

1 Local Rule 23 for the Superior Court of King County mandates the following procedure  
2 to approve a class action settlement:

3 A motion for a settlement hearing must be made when any party seeks  
4 court approval of a proposal to compromise and settle a class action.  
5 The motion must be accompanied by all documents upon which the party  
6 will rely at the hearing, including copies of the settlement agreement,  
7 proposed notice to the class of the settlement hearing, and the proposed  
8 judgment. After considering the motion, the Court will enter an order  
granting or denying a settlement hearing. If it grants a settlement  
hearing, the order will include the time and place of the hearing, the  
notice thereof to be given to the class members, and other matters it  
deems necessary for the proper conduct of the hearing.

9 Here, the Settlement Agreement includes as attachments all of the documents required by this  
10 Local Rule, and the parties request that a settlement hearing be scheduled in late March, 2006.  
11 Paragraph 9 of the proposed Order Granting Preliminary Approval of Settlement Agreement  
12 (“Order”), submitted with this motion, includes a blank space for the date and time for such a  
13 hearing. Paragraphs 7, 10, and 12 include blank spaces for the Final Claims Filing Deadline  
14 and the Cut-Off Date. These deadlines can occur on the same date and should be at least  
15 fifteen days before the hearing date.

16 As discussed below, the parties respectfully submit that the standard for preliminary  
17 approval is met in this case.

18 **1. The Proposed Notice Satisfies CR 23(e) and Due Process.**

19 **a. Method of Giving Notice.**

20 Generally, a settlement notice must in substance be reasonably calculated, under all of  
21 the circumstances, to apprise interested parties of the terms of the settlement and the  
22 opportunity to present objections. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S.  
23 306, 314 (1950); *Mendoza v. United States*, 623 F.2d 1338, 1351 (9th Cir. 1980), *cert. denied sub*  
*nom. Sanchez v. Tucson Unified School Dist.*, 450 U.S. 912 (1981). In this case, notice of

1 settlement will go out by first class mail and the addresses to be used are reasonably current  
2 and come from Bank of America's recent employment records.

3 **b. Contents of the Notice.**

4 A CR 23(e) notice should (1) describe the nature of the pending action and the general  
5 terms of the settlement, and (2) inform class members that complete and detailed information is  
6 available from the court files, and that any class member may appear and be heard at the  
7 fairness hearing. *See Miller v. Republic Nat'l Life Ins. Co.*, 559 F.2d 426, 429-30 (5th Cir.  
8 1977); *In re Four Seasons Sec. Litig.*, 525 F.2d 500, 503 (10th Cir. 1975); *San Francisco NAACP*  
9 *v. San Francisco Unified Sch. Dist.*, 576 F. Supp. 34, 43 (N.D. Cal. 1983). The settlement notice  
10 need not include a copy of the settlement agreement. *See Handschu v. Special Servs. Div.*, 787  
11 F.2d 828, 833 (2d Cir. 1986); *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 122 (8th Cir.),  
cert. denied, 423 U.S. 864 (1975).

12 The proposed settlement notice meets these requirements. It is concisely written in  
13 plain English.

14 **2. The Notice Describes the Right to Object to the Settlement Agreement.**

15 The notice informs class members of their right to object in writing and to appear in  
16 person at the final hearing.

17 **C. The Settlement Agreement Meets Standards for Final Approval at the Settlement Hearing.**

18 The issue of final approval is not presently before the Court. It will come before the  
19 Court at the settlement hearing. As it bears on the question of preliminary approval, however,  
20 the parties will address the issue of final approval now.

21 The general principles favoring settlement of disputed claims apply to class actions.  
22 *See Pickett v. Holland America Line-Westours, Inc.*, 145 Wn.2d 178, 190, 35 P.3d 351 (2001);  
23 *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1229 (9th Cir. 1989) (quoting *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976)). There is an initial presumption of fairness

