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7 Co-Lead Counsel for Certified Classes of Wells Fargo Bank, N.A. Customers in
In Re Checking Account Overdraft Litig., MDL 2036, No. 1:09-MD-02036-JLK (S.D. Fla.).
8

9 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA
10 **SAN FRANCISCO DIVISION**

11 SHAHRIAR JABBARI and KAYLEE) Case No. 3:15-cv-02159-VC
HEFFELFINGER, on behalf of themselves and)
all others similarly situated,)
12)
Plaintiffs,) OBJECTIONS OF PLAINTIFFS/CLASS
13) REPRESENTATIVES AND CERTIFIED
v.) CLASSES IN MDL 2036 TO
14) PRELIMINARY APPROVAL OF
WELLS FARGO & COMPANY AND WELLS) STIPULATION AND AGREEMENT OF
15 FARGO BANK, N.A.,) CLASS ACTION SETTLEMENT AND
Defendants.) RELEASE
16)
17)

18 Plaintiffs/class representatives from five certified class actions pending in Multidistrict
19 Litigation Proceeding No. 2036, *In re Checking Account Overdraft Litigation*, against Wells
20 Fargo, N.A.¹ and its affiliate, Wachovia Bank, N.A.,² before the Hon. James Lawrence King
21

22 ¹ Michael Dehn, Ivy Graham, Dolores Gutierrez, Marc Martinez, William Rucker, Ed Wickman,
23 Karen Wickman, Alex Zankich have been appointed class representatives against Wells Fargo
24 Bank, N.A. in *Martinez v. Wells Fargo Bank, N.A.*, No. 09-cv-23684-JLK (S.D. Fla.), No. 09-
25 cv-01072-GBW-ACT (D.N.M.); *Dolores Gutierrez v. Wells Fargo Bank, N.A.*, No. 09-cv-
23685-JLK (S.D. Fla.), No. 09-cv-01329-ST (D. Or.); and *Zankich v. Wells Fargo Bank, N.A.*,
No. 09-cv-23186-JLK (S.D. Fla.), No. C-08-1476-RSM (W.D. Wash.). See *In re Checking
Account Overdraft Litig.*, 307 F.R.D. 630, 655 (S.D. Fla. 2015).

1 (“the *Overdraft MDL*”), hereby file, through appointed class counsel, the following objections
2 to the Stipulation and Agreement of Class Action Settlement and Release (the “settlement”) in
3 this case, on behalf of themselves and members of the certified classes of Wells Fargo and
4 Wachovia customers in the *Overdraft MDL* whose claims may overlap and potentially could be
5 released by the proposed *Jabbari* class.

6 Prior to filing this objection, the undersigned counsel conferred with counsel for
7 Defendants Wells Fargo & Company and Wells Fargo Bank, N.A. (“Wells Fargo”) in this
8 matter in an effort to have Wells Fargo insert an exception into the broad proposed release in
9 the settlement for the claims of bank customers who are overlapping class members in the
10 certified *Overdraft MDL* classes, or to make a written representation to the Court that Wells
11 Fargo will not assert that the release in the settlement bars any pending claims or damages being
12 sought in the *Overdraft MDL*. Wells Fargo’s counsel refused those requests, necessitating this
13 objection.

14 **INTRODUCTION**

15 The proposed settlement is flawed because its proposed release is overbroad, and the
16 notice program presents an undue risk of overlapping *Overdraft MDL* class members potentially
17 releasing portions of their claims unwittingly. The Court should therefore deny the request for
18 preliminary approval.

19 First, the expansive nature of the release agreed to between the Named Plaintiffs and
20 Wells Fargo in this matter appears that it may compromise in part the claims of certified class
21 members in the *Overdraft MDL* against Wells Fargo Bank, N.A. and Wachovia Bank, N.A.

23 ² Murlee Damor, Angela Gonzalez, Charles Jones, Frances Knight Pinckney, Anthony Poulin,
24 Celia Spears, Robert Thornton have been appointed class representatives against Wachovia
25 Bank, N.A in *Garcia v. Wachovia Bank, N.A.*, No. 08-cv-22463-JLK (S.D. Fla.) and *Spears-*
Haymond v. Wachovia Bank, N.A., No. 09-cv-21680-JLK (S.D. Fla.), No. 08-cv-4610 (N.D.
Cal.). See *In re Checking Account Overdraft Litig.*, 307 F.R.D. 656, 683 (S.D. Fla. 2015).

1 pending before Judge King in the Southern District of Florida. The actions against Wells Fargo
2 in the *Overdraft MDL* have been pending since 2009, and have previously been certified to
3 proceed on behalf of classes of Wells Fargo customers. See *In re Checking Account Overdraft*
4 *Litig.*, 307 F.R.D. 630 (S.D. Fla. 2015); *In re Checking Account Overdraft Litig.*, 307 F.R.D.
5 656 (S.D. Fla. 2015).³ The proposed settlement in this case must not be allowed to undercut the
6 claims of the certified classes in the *Overdraft MDL*. The MDL Class Members should not be
7 threatened by a release aimed at resolving the claims of account-holders who were damaged by
8 Wells Fargo’s creation of fake bank accounts.

9 The proposed notice program compounds this problem. Its narrow reach and failure to
10 address the potential overlap of class members’ claims in the *Overdraft MDL* threatens that
11 Wells Fargo customers will not receive adequate information about their rights.

12 STANDARD OF REVIEW

13 This Court addressed the standard for reviewing class action settlements at the
14 preliminary approval stage in *Cotter v. Lyft, Inc.*, 193 F. Supp. 3d 1030, 1035-37 (N.D. Cal.
15 2016) (Chhabria, J.). After noting that the Ninth Circuit has not specified whether a different
16 standard of review should apply at the preliminary approval stage, this Court rejected the notion
17 that “scrutiny should be more lax” and criticized “one recent high-profile case” where the
18 district court concluded that the “bar to meet the ‘fair, reasonable and adequate’ standard is
19 lowered.” *Id.* at 1036 (citing *In re Nat’l Football League Players’ Concussion Injury Litig.*, 961
20 F. Supp. 2d 708, 714 (E.D. Pa. 2014)).

21 This Court concluded that “courts should review class action settlements just as
22 carefully at the initial stage as they do at the final stage.” *Cotter*, 193 F. Supp. 3d at 1037. “At
23 the initial stage, the inquiry should be whether the settlement is ‘fair, reasonable, and adequate,’
24

25 ³ Copies of these published class certification orders are attached as exhibits hereto.

1 based on any information the district court receives from the parties or can obtain through its
2 own research.” *Id.* If the parties fail to provide enough information to allow the court to
3 evaluate the strength of the claims, the risks of litigating those claims, and the value of the relief
4 each class member will receive, the court should deny the motion for preliminary approval. *Id.*
5 *See also Eddings v. D.S. Servs. of Am., Inc.*, 2016 WL 3390477 (N.D. Cal. May 20, 2016)
6 (Chhabria, J.) (denying preliminary approval).

7 ARGUMENT AND CITATION OF AUTHORITIES

8 **I. The Settlement’s Release Appears to Compromise in Part the Claims of Members** 9 **of Certified Classes in the Overdraft MDL.**

10 Preliminary approval is inappropriate here because the settlement in this case contains a
11 release that, if approved by the Court, appears to potentially compromise, at least in part, the
12 claims of certified class members in the *Overdraft MDL*.

13 Although this case concerns damages to account-holders from Wells Fargo’s creation of
14 fake bank accounts for its customers, the language of the release set forth in the settlement
15 agreement appears to be broad enough to encompass some of the *Overdraft MDL* class
16 members’ claims for damages. The proposed “Settlement Class” definition here consists of:

17 [A]ll Persons for whom Wells Fargo or Wells Fargo’s current or former
18 subsidiaries, affiliates, principals, officers, directors, or employees opened an
19 account in their name without consent, enrolled them in a product or service
without consent, or submitted an application for a product or service in their
name without consent during the period from May 1, 2002 to April 20, 2017,
inclusive, with the exception of [certain exclusions not material here].

20 Dkt. No. 100 at 14 (§ 2.51). Upon information and belief, some of the victims of this practice
21 were also customers of Wells Fargo with one or more accounts that were subject to overdraft
22 fees. Those customers of Wells Fargo whose accounts were subject to overdraft fees that are
23 part of the certified classes in the *Overdraft MDL* may have their claims jeopardized in the
24 *Overdraft MDL* given the expansive definition of released claims under this settlement. The
25 settlement agreement defines “Released Claims” as follows:

1 . . . to the fullest extent permitted by law or equity, *any and all claims and causes*
2 *of action of every nature and description*, whether known or Unknown, whether
3 arising under federal, state, common or foreign law, or any other law, rule, or
4 regulation, *that were asserted, could have been asserted, or that arise out of the*
5 *same transactions or occurrences as the claims that were asserted, in the Action,*
6 commensurate with the res judicata effect at the conclusion of the litigation.

7 *Id.* at 13 (§ 2.47) (emphasis added). Given that the settlement reaches back to 2002 and
8 encompasses at least 3.5 million customers, the proposed release also appears to extend to Wells
9 Fargo’s predecessor Wachovia Bank, since the settlement agreement defines “Released Parties”
10 as “Defendants and Defendants’ . . . past . . . direct or indirect, . . . subsidiaries, affiliates”
11 *Id.* at 14 (§ 2.48).

12 While we presume that the intent of the Named Plaintiffs and Wells Fargo in the release
13 at issue here is not to compromise any of the *Overdraft MDL* class members’ claims, since the
14 challenged business practices in the cases are quite distinct from one another, the settlement
15 class here nevertheless overlaps the *Overdraft MDL* classes temporally, and the release here
16 could reasonably be read to extend to a portion of the *Overdraft MDL* class members’ claims or
17 damages.

18 The definition of the certified class in the *Overdraft MDL* cases against Wells Fargo
19 (*Martinez, Gutierrez, and Zankich*) is:

20 All Wells Fargo customers in the United States, excluding the State of California
21 and Indiana, who had or have one or more consumer accounts and who, from
22 applicable statutes of limitation through August 13, 2010 (the “Class Period”),
23 incurred one or more overdraft fees as a result of Wells Fargo’s practice of
24 sequencing debit card transactions from highest to lowest, except for [former
25 Wachovia customers and certain immaterial exceptions].

26 *In re Checking Account Overdraft Litig.*, 307 F.R.D. at 655. The definition of the certified class
27 in the *Overdraft MDL* cases against Wachovia (*Garcia and Spears-Haymond*) is:

28 All Wachovia customers in the United States who had one or more consumer
29 accounts and who, from applicable statutes of limitation through August 13,
30 2010 (the “Class Period”), incurred an overdraft fee as a result of Wachovia’s
31 practice of sequencing debit card transactions from highest to lowest.

1 *In re Checking Account Overdraft Litig.*, 307 F.R.D. at 683.

2 The language in the release before this Court that could be argued to encompass certain
3 *Overdraft MDL* class members' claims concerns claims that "could have been asserted" in this
4 case, or "that arise out of the same transactions or occurrences as the claims that were asserted"
5 in this case. The settlement agreement provides for the payment of "Fee Damages" for "out-of-
6 pocket losses as a result of fees assessed by Wells Fargo in connection with a . . . deposit
7 account claimed to be unauthorized which was opened between January 1, 2009 and April 20,
8 2017[.]" *Jabbari* Dkt. No. 100 at 29 (§ 9.7.1.2). And in describing "certain fees associated
9 with the potentially unauthorized accounts," the settlement agreement specifically mentions
10 "payment of overdraft fees due to the potentially unauthorized movement of funds[.]" *Id.* at 5
11 (§ 1.18).

12 *Overdraft MDL* class members who incurred an overdraft fee(s) in an unauthorized
13 account, or in a legitimate account as a result of Wells Fargo (or Wachovia) drawing money
14 from that account to pay overdraft fees or other expenses generated by a companion
15 unauthorized account, would arguably be releasing their claims (and attendant damages) under
16 this release. These claims arguably "could have been asserted" in this case. Moreover, since
17 one of the claims asserted in the operative complaint is that Wells Fargo extracted money from
18 the plaintiffs' legitimate accounts to pay fees generated by the unauthorized accounts (*see*
19 *Jabbari* Dkt. 37, ¶¶ 3, 43, 96), it is not a stretch to believe that by releasing claims arising out of
20 "the same transactions or occurrences" as the claims asserted in this case, some of the *Overdraft*
21 *MDL* class members' claims could be argued to be released.

22 Simply put, preliminary approval of the settlement in this case should be rejected until
23 the Court can be certain that this settlement does not, and is not intended to, release the claims
24 being litigated on behalf of certified classes in the *Overdraft MDL* which have nothing to do
25 with the claims asserted in this case. *Cf. Smith v. Bayer Corp.*, 564 U.S. 299, 317 (2011) ("we

1 would expect federal courts to apply principles of comity to each other's class certification
2 decisions when addressing a common dispute”).

3
4 **II. The Settlement's Notice Program Compounds the Prejudice to *Overdraft MDL***
5 **Class Members.**

6 Aside from potentially releasing some of the claims of *Overdraft MDL* class members,
7 the proposed settlement contains a narrow notice program under which only a portion of the
8 putative class will receive direct notice of the claims they would be releasing. In particular,
9 because direct notice would be afforded only to Wells Fargo customers dating back to January
10 1, 2009, plus those individuals who affirmatively submitted complaints regarding unauthorized
11 account activity, members of the putative class who may have incurred overdraft fees between
12 May 1, 2002 and January 1, 2009 may not be apprised of their rights. That gap raises a
13 particular concern for members of the *Overdraft MDL* classes because that inadequately
14 addressed time period covers the majority of the *Overdraft MDL* class periods, which extend
15 backwards from August 2010.

16 The proposed Notice Program calls for direct notice, through a mailed postcard, only “to
17 the ‘Automatically-Enrolled Claimants’ and ‘Consultant-Identified Persons’[.]” Dkt. No. 100 at
18 23 (§ 8.2). Aside from the Automatically-Enrolled Claimants (those who have identified
19 themselves already by way of having lodged a complaint, *id.* at 6-7 (§ 2.3)), the settlement
20 otherwise limits direct notice to “Consultant-Identified Persons.” “Consultant-Identified
21 Persons” are those people “identified through the Consultant Analysis.” *Id.* at 8 (§ 2.12). The
22 “Consultant Analysis” appears only to extend to “encompass accounts opened between January
23 1, 2009 and September 30, 2016.” *Id.* at § 2.11. Yet the settlement class period is structured to
24 reach back almost seven years *before* the earliest part of that date range: ***back to May 1, 2002.***

25 As a result, for a substantial portion of the time period that this proposed class overlaps
with the *Overdraft MDL* classes, encompassed overlapping class members will not even receive

1 direct notice of the *Jabbari* settlement. And because Wells Fargo has refused to carve out
2 claims from the certified *Overdraft MDL* from the release in this case, those class members may
3 be placed in the untenable position of unwittingly releasing some of their claims, damages or
4 rights to restitution in the *Overdraft MDL*.

5 **CONCLUSION**

6 For the foregoing reasons, the Court should deny preliminary approval of the proposed
7 settlement.

8 DATED this 15th day of May, 2017.

9 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2017, I presented the foregoing to the Clerk of Court for filing and uploading to the CM/ECF system, which will provide notice upon the counsel of record listed below:

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