DAVID H. FRY (State Bar No. 189276)
david.fry@mto.com
MUNGER, TOLLES & OLSON LLP
560 Mission Street
Twenty-Seventh Floor
San Francisco, California 94105-2907
Telephone: (415) 512-4000
Facsimile: (415) 512-4077

ERIN J. COX (State Bar No. 267954)
erin.cox@mto.com
MUNGER, TOLLES & OLSON LLP
350 South Grand Avenue, 50th Floor
Los Angeles, California 90071-1560
Telephone: (213) 683-9100
Facsimile: (213) 683-3702

Attorneys for Defendants, WELLS FARGO & COMPANY and WELLS FARGO BANK, N.A.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

SHAHRIAR JABBARI and KAYLEE HEFFELFINGER, on behalf of themselves and all others similarly situated,

Plaintiff,

vs.

WELLS FARGO & COMPANY and WELLS FARGO BANK, N.A.,

Defendants.

Case No. 15-CV-02159 VC

DEFENDANTS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Judge: Hon. Vince Chhabria
Ctrm.: 4
Date: May 18, 2017
Time: 10:00 a.m.

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In response to the Court's Order dated May 16, 2017, Defendants Wells Fargo & Co. and Wells Fargo Bank, N.A. ("Defendants") submit this supplemental memorandum in support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement.

* * *

QUESTION 1: How did the estimated number of false accounts rise from 2.1 million in the opening brief to 3.5 million in the reply brief?

RESPONSE:

It is Defendants' understanding that the references to approximately 2 million accounts in Plaintiffs' briefs concerned the intentionally over-inclusive population of potentially unauthorized accounts identified by PricewaterhouseCoopers ("PWC") in its analysis (discussed below) of consumer and small business checking and savings accounts, unsecured credit cards and unsecured lines of credit for the period May 2011 through mid-2015,[1] while the 3.5 million figure is Plaintiffs' own estimate covering a broader timeframe.

QUESTION 2: Do the parties have the ability to estimate the number of people in the class, the number in each settlement pool, the number capable of recovering for credit-related damages, the number capable of recovering for fee-related damages, the number considered "Automatically-Enrolled Claimants," and the number considered "Consultant-Identified Persons"? If so, what are these estimates, and how were they reached? If not, why not?

RESPONSE:

It is possible to provide a reasonable ballpark for some of these numbers, but others are not possible to estimate other than in very broad terms at this juncture. Contrary to the characterizations some proposed intervenors give to the PWC analysis, that analysis does *not* identify unauthorized accounts. And, as outlined below, the nature of the inquiry and the relevant evidence do not lend themselves to a large-scale data analysis. Accordingly, any estimate of the

[1] The analysis of deposit accounts encompassed accounts opened between May 1, 2011 and July 31, 2015, the analysis of credit cards covered accounts opened between May 1, 2011 and September 30, 2015, and the line of credit analysis covered accounts opened between May 1, 2011 and December 31, 2014. For the sake of simplicity, this brief will refer to that analysis as covering May 2011 to mid-2015.

size of the class or of the pools without the aid of the claims process cannot be precise and must be informed by information, such as the PWC results, that is known to be over-inclusive.

PWC's Analysis Does Not Identify Unauthorized Accounts

Contrary to the characterizations it has repeatedly received in this case and elsewhere, the PWC analysis did not identify unauthorized accounts.[2] While true of all of the products, this fact may be easiest to understand in connection with credit cards. When someone receives a new credit card in the mail, it has a sticker on it with a toll-free number to call to activate the card—or the card can be activated online. PWC's analysis of credit cards identified customers who did not activate the card or use the card. There were a few additional criteria applied to filter out cards where some other factor suggested it was unlikely to be unauthorized, but no additional indicia of wrongdoing was required for the card to be included in the initial pool of potentially unauthorized cards—not calling the toll-free number was enough. But not calling the toll-free number or going online to activate the card is not inconsistent with behavior of customers who authorized the card; those customers may have applied for the card and then put it in a drawer for a rainy day or put it in their wallet in case their primary card was declined or any number of other reasons personal to each customer.

Given PWC's methodology for identifying credit card accounts, it is unsurprising that many authorized cards were included. PWC identified approximately 565,000 consumer credit cards through its methodology. Of those, 81,891—well over 10% of the identified population—have since been activated by the customer. Those cards would not have been included in PWC's results if the analysis were done today. The same is true of 2,612 small business credit cards that were among the roughly 58,000 identified by PWC.

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[2] Nor did the Consumer Financial Protection Bureau ("CFPB") find that Wells Fargo opened millions of unauthorized accounts. Rather, the CFPB concluded that Wells Fargo opened "hundreds of thousands of unauthorized deposit accounts" and "tens of thousands of credit cards for consumers without consumers' knowledge or consent." <http://files.consumerfinance.gov/f/documents/ 092016_cfpb_WFBconsentorder.pdf at ¶ 14>. Those numbers are well below the number of deposit and consumer credit card accounts identified by PWC—which were 1.5 million and 565,000, respectively. The CFPB was aware of the PWC analysis when it issued the Consent Order. *Id.* at ¶ 15.

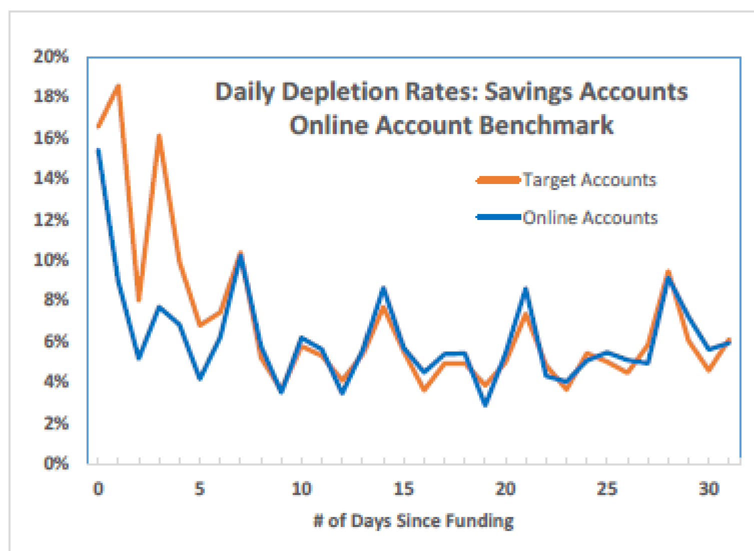
Moreover, last fall, Wells Fargo called over 165,000 of the PWC-identified credit card customers, specifically customers whose credit card account was still open but the card had not been activated. Bank representatives were able to speak with about 34,000 of the customers. The customers were first asked if they wished to keep the card open, and 46% said "Yes." The 54% who said they wanted to close the card were then asked if they applied for the card. Of the people asked that question, more than half said they *did* apply for the card. And another 15% of those people could not recall one way or the other whether they had applied for the card. Less than a third of the people who were asked this question (approximately 17% of the total number of PWC-identified credit card customers who Wells Fargo spoke with), said that they did not apply for the card.

PWC's analysis of line of credit accounts worked much the same way as the credit card methodology except it did not involve customers failing to call a toll-free number—accounts that were not used by the customer were included unless there was some other criterion on which they could be excluded. With a line of credit, lack of use is an even more attenuated indicator of lack of consent because oftentimes the customer obtains a line of credit specifically to provide a source of funds in case of an unexpected event—which may never come.

Unlike credit cards and lines of credit, the analysis of checking and savings accounts involved looking for specific transaction patterns in the account history that *could be* indicative of unauthorized activity. Specifically, the analysis identified accounts into which the minimum deposit amount had been deposited and then withdrawn within a limited period. This pattern had been identified as something bankers sometimes engaged in (with respect to both authorized and unauthorized accounts) in order to make it appear that the customer had funded the account. The consistency with which accounts were funded could affect the banker's performance evaluation or incentive compensation.

But the analysis of checking and savings accounts also did not, and could not, identify unauthorized accounts. Although bankers sometimes engaged in this pattern of deposit and withdrawal, legitimate customer transactions also display the same pattern. This fact is demonstrated by comparative bank data analyzed by PWC to determine one of the parameters for

identifying these accounts. Specifically, PWC identified a population of accounts that would not have been impacted by banker behavior—accounts opened online. No banker received sales credit or incentive compensation for accounts opened online, so they had no incentive to open unauthorized accounts using that tool. PWC identified online accounts with a single deposit and a single withdrawal of the same amount within 60 days and branch-opened accounts with the same transaction pattern, and then compared how much time elapsed between the deposit and the withdrawal in the two groups.[3] The chart below illustrates this analysis for savings accounts. For both the online accounts and the branch-opened ("Target") accounts with this transaction pattern, each point on the line represents the percentage of the accounts that were depleted (*i.e.*, experienced the withdrawal) within the specified number of days from the deposit. For example, 16.5% of the branch-opened accounts were depleted the same day the deposit occurred, 18.6% of those accounts were depleted one day later, 8% were depleted two days later, etc.



In PWC's analysis, this pattern was relevant to setting the identification criteria for the length of time between deposit and withdrawal. The divergence in the first seven days appears to be suggestive of unauthorized activity and is consistent with bankers seeking to quickly return the money before the customer might detect that it had been moved. For present purposes, the key fact illustrated by this chart is that some portion of customers quickly depleted the money they

[3] This analysis was done separately for checking and savings accounts.

initially deposited in their savings account. The blue line suggests, for instance, that 15.4% of the online accounts deplete on the same day as the account is funded, which means that the 16.5% depletion rate of the branch-opened accounts on the day of funding is accounted for *primarily* by customer behavior—not bankers. But because the depletion rate was higher in the branches, PWC set its criteria conservatively in favor of the customer, such that the criteria for "potentially unauthorized" accounts included all accounts that were depleted on the same day as account funding.

PWC's other "inclusion" criteria for identifying checking and savings accounts in its results similarly likely encompasses authorized accounts. PWC included accounts funded at the minimum deposit amount (with limited exceptions) as potentially unauthorized, but the minimum is also—naturally—the most common funding amount for all accounts at the bank. PWC also reviewed whether all of the money was withdrawn, but—as illustrated by the graph above—authorized accounts demonstrate that pattern as well.

In short, the PWC methodology did not identify unauthorized accounts. Some of the accounts identified by PWC are unauthorized and others are not, but the PWC analysis does not provide a means to distinguish the two.

Data Analysis Is Not Well-Suited to Resolving Questions of Consent

Not only did the PWC analysis not identify unauthorized accounts; it could not identify unauthorized accounts with any precision. In many instances, questions of consent cannot be resolved without looking at a range of evidence and making subjective judgments about it. The circumstances of the named plaintiffs in this case vividly illustrate these challenges.

First, a data analysis would not be determinative with respect to direct evidence of consent. In many different circumstances, signatures are key evidence of consent. Indeed, the traditional (but not exclusive) means of evidencing that someone has assented to a legal relationship is to obtain his or her signature. But the records of the named plaintiffs in this case show that the mere presence or absence of a signature on an account application is not sufficient to determine whether the account was authorized—the validity of the signatures must be evaluated and even then may not ultimately be determinative.

For instance, in her August 2015 declaration submitted in opposition to Defendants' motion to compel arbitration, Plaintiff Kaylee Heffelfinger said that she authorized only two accounts at Wells Fargo, both in March 2012, and did not authorize five others that were opened in her name. (Ex. A hereto at ¶¶ 3-4 [Heffelfinger Decl.].) The seven accounts were opened using four account applications. One application is from March 16, 2012, when Ms. Heffelfinger says she opened her two authorized accounts, and the signatures on that application closely resemble the signature on her declaration. (Ex. C.) But there is also an application dated January 2012 that contains signatures that are not similar to the declaration, (Ex. B), and an application from October 4, 2012 that has no signatures at all. (Ex. D.) Finally, the fourth application is dated March 6, 2013 and contains signatures that once again resemble the signature on Ms. Heffelfinger's declaration submitted in this case, (Ex. E), but recall that Ms. Heffelfinger says she did not authorize any accounts other than those opened a year earlier—in March 2012. Rounding out the evidence regarding signatures, Mr. Jabbari submitted a declaration in support of his opposition to Defendants' motion to compel arbitration in which he said that the application form for his *authorized* accounts had forged signatures. (Ex. F at ¶ 4.)

By themselves, these two plaintiffs demonstrate that looking to whether a signed application exists is not an effective way of determining whether a particular account was authorized—it is necessary to evaluate that signature. A particular signature may not be persuasive evidence of consent—as in Ms. Heffelfinger's January 2012 account application. Conversely, the absence of a signature (or even the presence of a forged signature) may not show that the account was unauthorized—as indicated by Mr. Jabbari's declaration.[4] And the signatures on Ms. Heffelfinger's March 2013 application—which at least give the impression of being genuine—illustrate that there may be a dispute about whether an account was authorized even when the application includes a seemingly valid signature.

[4] Assuming Mr. Jabbari's signature was forged on that application, the application presumably would have had no signature without the forgery—demonstrating that there can be an authorized account with no signature.

When there is a dispute as to whether a signature is genuine, or there is no signature, circumstantial evidence may play a significant role in determining whether the account was, in fact, authorized by the customer. For instance, Ms. Heffelfinger claims that she did not authorize the two accounts opened for her in October 2012, a checking account and a savings account, but the evidence shows that:

- The accounts were opened on October 4, 2012 (Ex. D) and Ms. Heffelfinger was in a Wells Fargo branch on October 4, 2012 making a deposit (Ex. G at 2 [account statement showing deposit in a branch or store on 10/4/12].
- Thirteen days after the accounts were opened, the banker who opened them (Jonathan Mitchell) called Ms. Heffelfinger "for follow up." (Ex. H. [customer notes from Wells Fargo "Store Vision Platform" computer system], Ex. D [account application showing Mitchell as banker who opened accounts])
- When Ms. Heffelfinger spoke to Mitchell, she told him she would be coming in to make a deposit that day (Ex. H), and she, in fact, made the initial deposit in the October 2012 checking account the following day (Ex. I at 2 [statement showing deposit in a store or branch on 10/28/12]).
- Ms. Heffelfinger actively used the October 2012 checking account – its statements show point of sale purchases at the same retailers where Ms. Heffelfinger spent money from her prior (admittedly authorized) account—and she used it frequently, with numerous such purchases each month. (*Compare* Ex. G at 2 [account statement for checking account opened March 2012 showing three charges to Club Hookah] to Ex. I at 2 [account statement for checking account opened October 2012 showing multiple charges, including one to Club Hookah].)
- Ms. Heffelfinger's efforts to disclaim knowledge of the account opened in October 2012 are refuted by a recorded telephone call:
    - In the Consolidated Amended Complaint, Ms. Heffelfinger says that, when a collection agency called her in 2014 regarding approximately $115 she owed, "she thought this was simply an error and did not investigate the matter further," but later "reviewed the account, it was not familiar to her, and she has no recollection of having opened this account or ever having received a statement for this account." (Ex. J at ¶ 68.)
    - Ms. Heffelfinger actually did know of that account – in fact, when she spoke to that collections person over the telephone in 2014, she said "I know I owe the 113" and "I just had a regular . . . checking account that I know I owe that 113 to." (Ex. K at 3:9-10, 4 5-6 [transcript of January 16, 2014 call])
    - On the taped call, Ms. Heffelfinger denied that she ever had a College Checking account (*id.* at 3:24-4:3), but the one checking account that she affirmatively says was authorized according to her declaration in this case was a College Checking account. (Ex. C.)

Particularly when viewed together, this kind of evidence is probative of whether or not Ms. Heffelfinger gave her consent for the October 2012 accounts and there is no way that a data analysis would be able to make the necessary judgment about the most plausible interpretation of these facts.

Second, as illustrated by the PWC analysis, similar transaction patterns may be present in both authorized and unauthorized accounts, limiting the effectiveness of data analysis of account activity. So, for instance, Ms. Heffelfinger opened a savings account in March 2012—one of the two accounts she affirmatively contends was authorized. There was no activity in that account and it was closed after two months. (*See* Exs. L-M [account statements].) But, of course, it is possible that an unauthorized account would be opened and have no activity and, in fact, Ms. Heffelfinger claims she had one of those as well, the October 2012 savings account. (*See* Ex. N at 3 [see activity summary for the account ending in 2341].) At the opposite end of the spectrum, Ms. Heffelfinger claims that accounts with significant transaction activity were unauthorized, such as the October 2012 checking account. (*See id.* at 2-3 [see activity summary for the account ending in 0021].) Mr. Jabbari likewise has accounts with significant transaction activity that he nonetheless says he did not authorize. (*See* Ex. O [both accounts].) As discussed above, the PWC analysis identified accounts that had some transaction activity that was consistent with banker misconduct, but customers engage in transactions that are indistinguishable from such impropriety. And, in any event, an analysis showing that an account had a potentially suspicious transaction pattern could not justify overlooking evidence of actual consent—such as an account application signed by the customer.

In short, while an estimate could be built on the results of the PWC analysis, as Plaintiffs have apparently done here, it is important to understand the limitations of that analysis and appreciate that the result would not be precise. This circumstance is quite different from a defective product case where the parties are being asked to identify the number of units sold.

Ballpark Estimates Are Possible For Consultant-Identified Persons and Automatically-Enrolled Claimants

Unlike the task of identifying class members, more meaningful estimates can be made of the number of Consultant-Identified Persons and Automatically-Enrolled Claimants, although those numbers have not yet been determined. The PWC analysis identified approximately 2.2 million accounts (the number of customers is somewhat lower) for the period May 2011 to mid-2015. The analysis period is being refined and expanded to cover the entire period January 2009 to September 2016. The number will therefore likely increase.

The population of Automatically-Enrolled Claimants has not yet been determined, but depending on how much duplication there is among different sources of relevant information, that number could be in the tens of thousands.

QUESTION 3 & QUESTION 4:

Question 3: If these cases went to trial, Wells Fargo would likely be required to pay punitive damages on any claims for which they are available. This seems true whether the claims were adjudicated on a classwide basis in court or on an individual basis in arbitration. Has counsel for the plaintiffs unduly discounted the likelihood of a significant punitive damages recovery?

Question 4: Which class members would be eligible to recover punitive damages? Would all class members with claims under the Fair Credit Reporting Act be eligible, or just those who suffered actual damages? What about the people with common-law claims?

RESPONSE:

The potential for a punitive damages recovery has been appropriately discounted in this settlement, taking into account which class members could theoretically assert a claim for punitive damages and the obstacles to proving entitlement to punitive damages, the cap that would apply to any award, and more generally the substantial risk that this case could not be litigated as a class action, even setting aside the fact that the named plaintiffs' claims have been ordered to arbitration.

First, the settlement appropriately accounts for the difficulty that Plaintiffs would have in establishing their entitlement to punitive damages. Plaintiffs' common law claim is one for conversion. While punitive damages can be available for conversion on a proper showing, Plaintiffs' conversion theory is fatally flawed as a legal matter and would not survive a motion to dismiss. *See, e.g.*, *Crocker-Citizens Nat'l Bank v. Control Metals Corp.*, 566 F.2d 631, 637 (9th Cir. 1977) (explaining that "when funds are deposited, title to those funds passes immediately to the bank," and "[s]ince the money thus becomes the literal property of the bank, it cannot be tortiously converted by the bank"); *Gutierrez v. Wells Fargo & Co.*, 622 F. Supp. 2d 946, 956 (N.D. Cal. 2009) (a "bank may not be sued for conversion of funds deposited with the bank."). With respect to the FCRA claim, to receive punitive damages Plaintiffs (irrespective of whether they have actual damages) would have to prove that Wells Fargo "willfully" violated the statute. 15 U.S.C. § 1681n(a). This requires proof that Wells Fargo "ran a risk of violating the law substantially greater than the risk associated with a reading [of the statute] that was merely careless," *Syed v. M-I, LLC*, 853 F.3d 492, 503 (9th Cir. 2017), a point that would be vigorously contested.[5] While factors such as the company's decentralized structure and historical self-perception as a retail organization focused on sales led to an ineffective response to sales practices issues, the company did not disregard them. Wells Fargo took steps to combat this behavior—prohibiting the conduct, instituting various measures to deter it, and (as has been widely-reported) terminating employees found to have engaged in it.

[5] *See Smith v. Sears, Roebuck & Co.*, 276 F. Supp. 2d 603, 612 (S.D. Miss. 2003) (granting summary judgment in absence of evidence that Sears recklessly failed to enact procedures to prevent its employees from violating the FCRA); *Graves v. Tubb*, 281 F. Supp. 2d 886, 892–93 (N.D. Miss. 2003) (dismissing FCRA claims against company due to lack of evidence that company did not take steps to prevent its employee's violations); *Kennedy v. Victoria's Secret Stores, Inc.*, 2004 WL 2186613, at *1, 3 (E.D. La. Sept. 28, 2004) (no FCRA violation where credit report "obtained for the purposes of using the information to extend credit" even though credit card had been opened by defendant's employee "surreptitiously and without [plaintiff's] permission"); *Merritt v. Experian*, 560 F. App'x 525 (6th Cir. 2014) (no FCRA violation by credit card issuer who obtained consumer's credit report for use in connection with allegedly fraudulent credit card application where accessing credit report was not knowingly unauthorized); *Stergiopoulos v. First Midwest Bancorp, Inc.*, 2004 WL 5550488, at *3 (N.D. Ill. June 23, 2004) ("a consumer's credit report may be pulled without her consent if that transaction is directly related to the extension of credit to the consumer").

Second, the settlement appropriately accounts for the considerable uncertainty in the amount of any punitive damage award and the likely constitutional limit on such damages, even if Plaintiffs were to persuade a fact-finder to award such damages. As the Supreme Court noted in *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), when the total class recovery in a class action is "substantial," the "constitutional outer limit" on the ratio of punitive-to-compensatory damages "may well be 1:1." *Id.* at 515 n.28; *see also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) ("When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.").[6]

Third, the settlement accounts for the substantial risk that Plaintiffs' claims could not be litigated on a classwide basis. As an initial matter, the arbitration clause in Wells Fargo's customer account agreements does not permit customer claims to go forward on a class-wide basis. The parties have already briefed the arbitration issues and those arguments will not be repeated here.

Were the Plaintiffs to somehow avoid the application of the arbitration clause and the case proceeded in litigation, Plaintiffs would be unable to demonstrate that common questions of law or fact predominate over any questions affecting only individual members, as required by Rule 23(b)(3).[7] One of "the main issues in [the] case"—whether each class member consented to the Wells Fargo products and services at issue—would "require the separate adjudication of each class member's individual claim," rendering a Rule 23(b)(3) action "inappropriate." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001). As described above in response to the Court's second question, individualized evidence regarding consent (or lack

[6] It is the overall class recovery, and not the size of individual awards, that determines whether the compensatory damages award is substantial and thus whether the lower due process limit applies. *Exxon*, 554 U.S. at 515 n.28. That is because the opportunity for a class action "facilitates suit" and thus addresses the same concern motivating punitive damages: "induc[ing] legal action when pure compensation may not be enough." *Id.*

[7] This is not an issue for the settlement class because the difficulties in trying the case on a class-wide basis do not arise in the settlement context. *In re Am. Int'l Group Sec. Litig.*, 689 F.3d 229, 240 (2d Cir. 2012) (settlement class permissible even though individual issues of reliance would predominate if the case were tried).

thereof) will be required for each and every class member. Courts have repeatedly held that the need for such individual inquiry and proof of consent defeats class certification. *See, e.g.*, *Selby v. LVNV Funding, LLC*, 2016 WL 6677928, at *11 (S.D. Cal. June 22, 2016) ("evidence demonstrates that individualized inquiries will be necessary to determine whether particular class members gave prior express consent" and "these individualized inquiries into the issue of prior express consent will overwhelm the issues common among the putative class members"); *NEI Contracting & Eng'g, Inc. v. Hanson Aggregates, Inc.*, 2016 WL 2610107, at *2 (S.D. Cal. May 6, 2016) ("whether class members consented to the recordings may require a detailed factual inquiry for each class member, likely resulting in varying responses to the consent issue and making class certification inappropriate."); *Aghdasi v. Mercury Ins. Grp.,* 2016 WL 5899301, at *2 (C.D. Cal. Jan. 12, 2016) ("As adjudication of the merits of these individualized arguments concerning consent would inevitably lead to individualized evidentiary hearings, … class certification is inappropriate under Rule 23(b)(3)."); *Martinez v. Adir Int'l LLC*, 2015 WL 12670519, at *5-6 (C.D. Cal. July 7, 2015) ("individualized proof with respect to consent will be required for each and every plaintiff, which defeats the purpose of class certification"); *In re Google Inc. Gmail Litig.*, 2014 WL 1102660, at *21 (N.D. Cal. Mar. 18, 2014) ("individualized questions with respect to consent . . . are likely to overwhelm any common issues"); *Torres v. Nutrisystem, Inc.*, 289 F.R.D. 587, 594–95 (C.D. Cal. 2013) ("issue of whether class members consented to the recordings would also require a detailed factual inquiry for each class member"; these "individual inquiries" were "central to the claims" and "will dominate the litigation"); *Vandervort v. Balboa Capital Corp.*, 287 F.R.D. 554, 558 (C.D. Cal. 2012) (class could not be certified because the "evidence reflects that whether a fax recipient did or did not consent to fax advertising requires an individual inquiry"). The same is true here. Wells Fargo opened tens of millions of accounts during the relevant time period, the vast majority of which were authorized. Determining which ones were not authorized requires drawing inferences from individualized evidence such as signatures, recorded telephone calls, account activity, and the testimony of the customer and banker involved.

Finally, while it is possible that if these cases were tried some individuals might obtain punitive damages for certain causes of action if they were able to prove those claims, the settlement appropriately discounts that possibility as a trade-off for the advantages of settlement, including greater speed and certainty in receiving compensation without the burdens, expenses, and risks associated with litigating these claims (individually or on a class basis).

QUESTION 5: Aside from the issue of punitive damages, there is an argument that any settlement that doesn't guarantee full compensation to all class members who suffered actual damages would be unacceptable. How can the Court be sure that all class members who suffered actual damages will be fully compensated for actual damages? This is a particular concern for people whose credit scores suffered as a result of Wells Fargo's conduct.

RESPONSE:

While it is not possible to guarantee that no claimant will recover less than his or her actual harm, the proposed allocation methodology goes to great lengths to ensure that compensation for out-of-pocket loss, particularly increased borrowing costs, is adequately addressed. The process by which credit score impact harm will be measured involves obtaining from the credit bureaus a "but for" calculation of the customer's credit score, as well as information concerning tradelines opened within 12 months following the opening of the Wells Fargo credit product. This will allow Plaintiffs' expert to take into account, for each such claimant, the impact on his or her personal credit score, rather than using an average or assumed impact. It will also permit Plaintiffs' expert to take into account the type and size of loans or other credit products that the claimant actually opened—so that claimants who borrowed more (those who obtained a mortgage, for instance) will receive compensation reflecting that fact.

Even with this tailored approach, however, there is information that cannot be known—specifically the loan pricing practices of the lenders with whom the claimants did business. If a hypothetical claimant had a five-point drop in his or her credit score, that may or may not have affected the interest rate on a subsequent auto loan. The answer would differ depending on the identity of the lender and when the loan was made. Similarly, the magnitude of any price impact

would depend on the lender's practices. There are potentially thousands of different permutations of these issues. The allocation methodology necessarily addresses those issues by making assumptions that will differ from the specific experience of a given claimant, but the methodology also minimizes the risk that someone who was actually harmed will not obtain a recovery.

Wells Fargo has already had the credit bureaus do some analysis (validated by Fair Isaac & Co.) regarding credit score impact. Specifically, this analysis looked at the impact of the credit inquiry and trade line associated with a portion of the Wells Fargo consumer credit cards identified in the PWC analysis described in the response to Question 2 above.[8] Due to legal limitations on obtaining credit information concerning particular customers, this analysis was anonymized. In other words, Wells Fargo provided identifying information concerning the customers to the credit bureaus, but the credit bureaus provided Wells Fargo only with data unconnected to particular customers. Nevertheless, the data provides some useful context for the credit impact issue.

- For 38% of the approximately 565,000 PWC-identified credit cards, the customer did not open a new tradeline in the 12 months following the opening of the credit card, so would not have experienced increased costs of borrowing stemming from the Wells Fargo card.
- Of the portion who opened a new tradeline in the 12-month window, 42% had either no credit score impact or an increase in their credit score as result of the Wells Fargo credit card.
- The median credit score impact among the analyzed population was a four point decline.
- Generally, people who had lower beginning credit scores were less likely to have a negative score impact. For individuals with FICO scores below 660, the opening of the PWC-identified account had—on average—a small positive impact on their credit.

Obviously, the impact for an individual customer may differ from the average. Accordingly, the settlement is structured to direct more recovery to those who were more likely to have been harmed. While that process is more complex than paying a set amount to every claimant, it should be more equitable. In order to defray the cost associated with that complexity,

[8] This analysis did not include individuals who subsequently activated the credit card account or advised Wells Fargo that they wished to keep the account open (14% of the total). The credit score impact also excluded individuals who had no credit score or a missing credit score at the time the Wells Fargo credit card was opened (4% of the total).

Wells Fargo is paying—separate from the settlement amount—the cost of the credit bureau analysis and up to $1 million in expert witness fees for Plaintiffs' expert to perform this analysis.

With respect to fees, Wells Fargo has refunded fees to the PWC-identified customers for the May 2011-mid-2015 period and will be refunding fees (*outside of the settlement*) to customers identified by PWC in its expanded analysis covering the period January 2009 to September 2016. The settlement itself provides that if a claimant indicates that he or she believes that fees were charged in connection with an unauthorized account, Wells Fargo will calculate fees incurred in unused accounts and paid by the customer and those fees will be reimbursed from the settlement. Data limitations do not permit conducting that type of calculation for accounts going back to 2002, so the settlement administrator will calculate the average fees reimbursed to claimants seeking fees in the 2009-2017 period and pay that average amount to customers seeking fees for accounts opened between 2002 and 2008.

Among the PWC-identified accounts for the May 2011-mid 2015 timeframe, approximately 14 of 15 accounts had no fees at all and the total remediation amount is $3.2 million, strongly suggesting that reimbursement of fees will not be a significant drain on the settlement fund.

QUESTION 6: What will the plaintiffs' counsel request if one of the settlement pools runs out of money for compensatory damages?

RESPONSE:

This question appears to be directed solely to Plaintiffs, but Wells Fargo would refer the Court to the response to Question 5, above, which provides information relevant to assessing the degree of credit impact harm that may be at issue.

QUESTION 7: Is there a way to alter the schedule in a way that allows the Court to scrutinize the experts' "credit loss" analysis, at least for the class members who submit claims on the early side, before final approval (perhaps by extending the period between the start of the claims filing process and the hearing on final approval)?

RESPONSE:

Wells Fargo has no objection to extending the period between the deadline for claim forms and the hearing on final approval in order to allow the Court the opportunity to assess the experts' analysis of credit impact harm by class members submitting claim forms. If the Court is intent on scrutinizing the analysis for only a subset of claimants, rather than waiting for the analysis covering all claimants, that is also feasible, though the parties will need to restructure the contemplated structure of the credit impact analysis in addition to extending the time period before the final approval. Much of the analysis that feeds into the calculation of credit impact damages is conducted by the credit bureaus; the credit bureaus will have the consent of class members submitting valid claim forms with requests for credit impact damages to run their credit histories for the purpose of this analysis. The arrangement with each of the credit bureaus, both in terms of timeline and pricing structure, is currently based on the assumption that each of the credit bureaus would run the analysis in one fell swoop for the full set of verified claimants submitting claims for credit impact damages. If the Court prefers to review the analysis of a subset of the claimants during the claims period rather than review the analysis for all claimants after the claims period closes, the parties will need to discuss with the credit bureaus the expected impact to the timeline and cost estimate.

QUESTION 8: The Court is tentatively inclined to reject the phrase "could have been asserted" in the release, as it seems to be unnecessary and may cause confusion. The Court is also tentatively of the view that the overdraft claims being asserted in MDL No. 2036 should be carved out of the release. Would these changes require the Court to reject the proposed settlement?

RESPONSE:

The Ninth Circuit has explained that "[a] settlement agreement may preclude a party from bringing a related claim in the future 'even though the claim was not presented and might not have been presentable in the class action,' [so long as] the released claim is 'based on the identical factual predicate as that underlying the claims in the settled class action.'" *Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010); *see also Wal-Mart Stores, Inc. v. Visa U.S.A.,*

1 *Inc.*, 396 F.3d 96, 107 (2d Cir. 2005) ("The law is well established in this Circuit and others that
2 class action releases may include claims not presented and even those which could not have been
3 presented as long as the released conduct arises out of the 'identical factual predicate' as the
4 settled conduct."). In line with this principle, the Ninth Circuit has "held that federal district
5 courts properly released claims not alleged in the underlying complaint where those claims
6 depended on the same set of facts as the claims that gave rise to the settlement." *Hesse,* 598 F.3d
7 at 590. It is important that the release expressly extend to claims that could have been asserted in
8 this action but were not in order to effectuate the parties' intent; the clarity that the Court seeks
9 for the release might be better achieved by adding a clause to explain that the release "covers only
10 those claims that are based on the identical factual predicate as that underlying the claims in the
11 Complaint[ ]," consistent with Ninth Circuit law. *In re Volkswagen "Clean Diesel" Marketing,*
12 *Sales Practices, and Products Liab. Litig.*, 2017 WL 672820, at *5 (N.D. Cal. Feb. 16, 2017).
13 Where a "release only covers claims that are asserted or could have been asserted based on the
14 allegations in the operative Complaint," "[s]uch a narrow release warrants preliminary approval."
15 *Walsh v. CorePower Yoga LLC,* 2017 WL 589199, at *10 (N.D. Cal. Feb. 14, 2017); *see also*
16 *Perkins v. Linkedin Corp.*, 2016 WL 613255, at *6 (N.D. Cal. Feb. 16, 2016) ("[I]n releasing
17 claims 'arising from or related to' the allegations in the Action, the Release is within the bounds
18 set by precedent in this District."); *Custom LED, LLC v. eBay, Inc.*, 2013 WL 6114379, at *4, *9
19 (N.D. Cal. Nov. 20, 2013) (approving class settlement release of claims "arising out of or relating
20 in any way to any of the legal, factual, or other allegations made in the Action, or any legal
21 theories that could have been raised on the allegations of the Action").
22 The claims asserted in MDL No. 2036 ("*Overdraft MDL*") do not require a carve-out from
23 the *Jabbari* release. As currently drafted, the *Overdraft MDL* complaints allege that the named
24 plaintiffs were "charged overdraft fees by Wells Fargo as a result of its practice of re-sequencing
25 debit card transactions from highest to lowest." *See, e.g.,* Compl. ¶ 26, *Garcia v. Wells Fargo*
26 *Bank, N.A.,* No. 09-cv-23685-JLK (S.D. Fla. filed Nov. 10, 2009). To the extent that the claims
27 in the *Overdraft MDL* remain focused on the posting order of debit charges as the causal link to
28 the class members' alleged damages, the *Jabbari* release will not operate to release any claims in

the *Overdraft MDL*, though any overdraft fees incurred in connection with an unauthorized account that are reimbursed to a customer submitting a claim form in the *Jabbari* settlement will naturally be offset from any damages otherwise available through the *Overdraft MDL.* The *Jabbari* complaint alleges that Wells Fargo has "withdrawn money from customers' authorized accounts to pay for the fees assessed by Wells Fargo on unauthorized accounts opened in customers' names," (Cons. Compl. (Dkt. No. 37) ¶ 11), and a class member submitting a claim form in the *Jabbari* settlement may be entitled to a repayment of those fees, as well as any overdraft fees incurred on the authorized account as a result of the withdrawal of funds. For customers with accounts previously flagged through the PWC analysis as potentially unauthorized, such fees (including any associated overdraft fees on authorized accounts), have been, or are being, repaid through a separate remediation process. If the *Overdraft MDL* plaintiffs were to amend their complaints to assert a claim based on the imposition of overdraft fees in authorized accounts as a result of fees assessed on unauthorized accounts, then the *Jabbari* settlement would, appropriately, operate to release those claims. A blanket carve out of the *Overdraft MDL* cases would not adequately guard against this potential.

The *Overdraft MDL* plaintiffs have made clear, both in conversation with Wells Fargo's counsel and filings in the *Overdraft MDL* case and this case, that they do not believe that under any circumstance there should be the possibility of offset of damages in the *Overdraft MDL* as a result of payments made through the *Jabbari* settlement. Such an offset is not a function of a release, but rather to prevent double payment by Wells Fargo for the same overdraft fee. The *Overdraft MDL* plaintiffs' position boils down to the assertion that certain overlapping class members should be guaranteed the opportunity for a double recovery from Wells Fargo for overdraft fees that were triggered by fees in unauthorized accounts. Wells Fargo would be willing to consider a limited carve-out of the claims *currently* asserted in the constituent cases in the *Overdraft MDL,* provided that Wells Fargo would reserve and retain all rights with respect to the extent to which payment through the PWC remediation or the *Jabbari* settlement should constitute an offset or credit against, or a reduction in the gross amount of, any clam asserted in any of the *Overdraft MDL* cases.

QUESTION 9: The Court is strongly inclined to reject the portion of the agreement which calls for an injunction following preliminary approval (or following final approval, for that matter). Does this require the Court to reject the proposed settlement?

RESPONSE:

To the extent the Court has concluded that an order enjoining parallel litigation is not necessary or appropriate, Wells Fargo would be prepared to go forward with the settlement and to make appropriate amendments to the documentation to reflect that change.

QUESTION 10: There may be an argument that officers, principals, directors, advisors, and/or affiliates should not be protected by the release language. What effect, if any, does the release of these parties have on the scope of claims the class members are capable of asserting, and how has this effect been reflected in the final settlement value?

RESPONSE:

While the complaint filed in this action does not specifically name Wells Fargo's officers, directors, principals, advisors, and affiliates as defendants in this lawsuit, a "class settlement may also release factually related claims against parties not named as defendants." *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 748 (9th Cir. 2006); *see also Wal-Mart Stores*, 396 F.3d at 109 ("class action settlements have in the past released claims against non-parties where, as here, the claims against the non-party being released were based on the same underlying factual predicate as the claims asserted against the parties to the action being settled."). "The weight of authority holds that a federal court may release not only those claims alleged in the complaint, but also a claim 'based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented *and might not have been presentable in the class action.*'" *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1287 (9th Cir. 1992) (emphasis in original). In *Class Plaintiffs,* for instance, the Ninth Circuit cited "the strong judicial policy in favor of settlements" to uphold a release of a non-party state government from claims that could not have been asserted in federal court, further noting that "where a particular type of relief potentially available to the class members is compromised in the settlement process, *it is mainly irrelevant whether or not that relief was specifically requested in the complaint*"

because the "breadth of negotiations is not necessarily strictly confined by the pleadings." *Id.* at 1288–89 (emphasis in original, citations omitted).

Courts' willingness to approve of class action releases that reach non-parties, including officers and directors of a defendant company, is simply an application of the principle that "[a] settlement agreement may preclude a party from bringing a related claim in the future even though the claim was not presented" so long as "the released claim is 'based on the identical factual predicate as that underlying the claims in the settled class action.'" *Hesse*, 598 F.3d at 590. Approving of such releases also recognizes the judiciary's interest in achieving settlement of disputes, and the unlikelihood that a defendant would agree to settle claims if class members could later assert claims based on an identical factual predicate against affiliated non-parties that would have the effect of re-opening the litigation. "Broad class action settlements are common, since defendants and their cohorts would otherwise face nearly limitless liability from related lawsuits in jurisdictions throughout the country." *Wal-Mart Stores,* 396 F.3d at 106–07. In *Wal-Mart*, the Second Circuit blessed such a release in a settlement agreement with credit card company defendants Visa and MasterCard that also released their member banks, non-parties to the antitrust tying case brought by merchants, observing that "[p]ractically speaking, '[c]lass action settlements simply will not occur if the parties cannot set definitive limits on defendants' liability.'" *Id.* at 106 (citation omitted). The omission of releases for persons such as officers, directors or advisors poses the risk that new claims will be filed that will entail litigation costs and, in some cases, potential indemnity exposure for Wells Fargo. Including these terms in the release is critical to providing Wells Fargo, or any corporate defendant, with an end to litigation and the elimination of exposure, which is the purpose of the settlement.

Plaintiffs' ability to release claims is limited, as with all class action releases, by the doctrines of the "identical factual predicate" and "adequacy of representation." *Id.* Consistent with the law in the Ninth Circuit, the *Wal-Mart* court noted that "class action settlements have in the past released claims against non-parties where, as here, the claims against the non-party being released were based on the same underlying factual predicate as the claims asserted against the parties to the action being settled." *Id.* at 108 (citation omitted). After determining that the

identical factual predicate doctrine permits the release of non-parties through a class settlement, the *Wal-Mart* court determined that "[t]he district court did not, therefore, err by finding that the non-party banks could be released from liability for conduct premised on the identical factual predicate of claims alleged in this action." *Id.* at 108. The Ninth Circuit, in *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, enforced the class action release approved by the *Wal-Mart* court in another class action brought by merchants against Visa and its member banks, finding that "the *Wal-Mart* release encompasses Plaintiffs' claims if they arise from an identical factual predicate as the claims asserted by the *Wal-Mart* class," irrespective of the fact that the member banks were not parties to the *Wal-Mart* litigation. 442 F.3d at 748. Inclusion of related non-parties in the scope of the release—but only to the extent that claims against these non-parties arise from an identical factual predicate as that underlying the claims asserted in the *Jabbari* action—allows the parties to reach a settlement agreement and while ensuring that the release is not overly broad and hews to the core allegations underlying this action.

QUESTION 11: What is the projected cost of the expert services used to evaluate credit-related damages, and how has that cost been calculated?

RESPONSE:

Plaintiffs have advised Wells Fargo that they anticipate the expert witness fees in connection with the credit impact damages analysis will be less than $1 million. Wells Fargo has agreed to pay those fees up to $1 million. Wells Fargo does not know how the $1 million was calculated. Wells Fargo has also agreed to pay the entire cost of the work required from the credit bureaus as part of the credit impact harm analysis.

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MUNGER, TOLLES & OLSON LLP

By: */s/ David H. Fry*
David H. Fry

Attorneys for Defendants,
Wells Fargo Bank, N.A. and Wells Fargo & Company