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17 UNITED STATES DISTRICT COURT
18 NORTHERN DISTRICT OF CALIFORNIA
19 SAN FRANCISCO DIVISION

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

23 Plaintiffs,

24 v.

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

27 Defendants.

No. 15-cv-02159-VC

**PLAINTIFFS' SUPPLEMENTAL
BRIEFING IN RESPONSE TO COURT
INQUIRIES**

Judge: Hon. Vince Chhabria

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I. INTRODUCTION

Plaintiffs submit the following response to the Court’s May 16, 2017 Order Requesting Further Briefing on the proposed Wells Fargo Settlement (“Order”). Plaintiffs are committed to the Settlement process. We take the Court’s guidance seriously, and will seek any modifications that the Court believes are necessary. Our goal throughout this process has been to maximize the Class’s recovery and achieve a Settlement that serves the Class’s best interests.

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?

Plaintiffs’ estimate of the number of false accounts did not change between the opening brief and the Reply, and we regret the confusion our briefing caused. While negotiating the \$142 million proposed Settlement, Plaintiffs estimated the number of unauthorized accounts from 2002 to present to be 3.5 million. When Plaintiffs cited the roughly 2 million account figure in their opening brief, it was not a reference to the estimated total number of unauthorized accounts. Instead, it was a reference to the number of accounts identified by Wells Fargo’s independent consultant, PricewaterhouseCoopers (“PwC”), for a portion of the Class Period:

- It appeared in Plaintiffs’ discussion of what Wells Fargo had *publicly admitted*, Mot. 7—a discussion that did not purport to estimate the total number of unauthorized accounts.
- It appeared when Plaintiffs mentioned the number of potentially unauthorized accounts that the Consumer Financial Protection Bureau (“CFPB”)—relying on the work that had been performed up to that point by PwC—had identified from the 2011-2015 period. *Id.* at 15, 16; *see also id.* at 4. This number was certainly not intended to cover the entire 2002-2017 Class period.
- It appeared when Plaintiffs mentioned the number of potentially unauthorized accounts that Wells Fargo, in reliance on PwC, had identified. *Id.* at 19. Again, this was not meant to exhaust the universe of unauthorized accounts.

The Reply refers to the approximately 2 million accounts in the same way as the opening brief, to refer to the number of accounts that CFPB and PwC had identified. Reply 3. The Reply then goes on to

1 give an estimate of total unauthorized accounts of 3.5 million, while noting that it may well be an over-
2 inclusive number. *Id.* at 9.

3 With the opening brief, we filed the Declaration of James M. Parks, in which he provides an
4 estimate of the costs of administration. Parks Decl. ¶ 16, ECF 110. This estimate of costs was based on
5 the 3.5 million figure. If the Court so requests, we will provide the Court with Mr. Parks’s April 19, 2017
6 detailed estimate (which was not filed with his declaration) which specifically references the 3.5 million
7 number.
8

9 In short, Plaintiffs’ counsel did not learn new information between the opening brief and reply
10 about the number of potentially unauthorized accounts. When drafting the reply, and responding to
11 objections regarding the number of potentially unauthorized accounts, we realized that the additional
12 information would assist the Court in evaluating the fairness of the Settlement.
13

14 **2. Do the parties have the ability to estimate the number of people in the class, the number in**
15 **each settlement pool, the number capable of recovering for credit-related damages, the**
16 **number capable of recovering for fee-related damages, the number considered**
17 **“Automatically-Enrolled Claimants,” and the number considered “Consultant-Identified**
18 **Persons”?** **If so, what are these estimates, and how were they reached? If not, why not?**

19 Yes, Plaintiffs have the ability to estimate the number of people in the Class, as well as the number
20 of people in the other groups within the Class that the Court mentions. Plaintiffs will explain what those
21 estimates are and how they were reached.

22 *The number of people in the Class.* Plaintiffs estimate the number of people in the Class by
23 estimating the total number of unauthorized accounts and then dividing by the estimated number of
24 accounts per Class Member. Extrapolating from the analysis performed by PwC, Plaintiffs estimate as
25 many as 3.5 million unauthorized accounts.¹ This is an aggressive—i.e., a high—estimate, and may well

26 ¹ Plaintiffs have extrapolated from PwC’s analysis, which looked at the 2011-2015 period, to reach
27 estimates for the years 2010 and earlier, as well as for the years 2016 and 2017. In making these
28 estimates, however, Plaintiffs took into account that the proportion of total Wells Fargo accounts that
were unauthorized increased over time, likely peaking in 2012 and 2013, and then began tapering

1 be over-inclusive, but it is nevertheless the estimate that Plaintiffs have used. Wells Fargo has stated that
2 the PwC analysis very likely includes accounts that are not, in fact, unauthorized. Reply 17. Based also
3 on PwC's analysis, Wells Fargo estimates there is an average of 1.28 affected accounts per person. Thus,
4 extrapolating that figure out to the entire Class Period, Plaintiffs estimate the total number of Class
5 members at approximately 2.73 million (3.5 million accounts divided by 1.28).
6

7 *The number in each Net Settlement Pool.* To estimate this number, Plaintiffs have extrapolated
8 from the work performed by PwC, but have taken into account that both the total number of Wells Fargo
9 accounts *and* the proportion of them that were potentially unauthorized were lower during the 2002-2008
10 period than during much of the 2009-2017 period. *See supra* 2 n.1. The upper range of Plaintiffs' estimate
11 is that the total number of unauthorized accounts in Net Settlement Pool 1 (2009-2017) is approximately
12 2.95 million. Converting the number of accounts to the number of Class Members (again by dividing by
13 1.28) yields a potential pool size of 2.3 million Class Members in Pool 1. Plaintiffs estimate that the total
14 number of unauthorized accounts in Net Settlement Pool 2 (2002-2008) is approximately 530,000
15 accounts, and hence Plaintiffs estimate the number of Pool 2 Class Members is around 414,000.
16

17 *The number capable of recovering for credit-related damages.* Class Members with unauthorized
18 credit cards, lines of credit, and small business deposit accounts are eligible for credit-related damages
19 under the Settlement. Extrapolating from the work performed by PwC, Plaintiffs can give a rough estimate
20 of 1.3 to 1.4 million persons who are capable of recovering for credit-related damages. Note that this
21 estimate denotes the number of persons who are *capable* of recovering for credit-related damages, not
22 persons who *will* recover for those damages. Not all of these estimated 1.3 to 1.4 million persons took out
23 credit in the year following Wells Fargo's opening of an unauthorized account in their name; and if they
24

25 _____
26 thereafter. *See* Independent Directors of the Board of Wells Fargo & Company, Sales Practices
27 Investigation Report at 26–27, 33–34 (Apr. 10, 2017), *available at*
28 <https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/presentations/2017/board-report.pdf>. Plaintiffs also assumed that the creation of unauthorized accounts stopped almost entirely
after the scandal was made public in September 2016.

1 didn't take out credit during this period, then they likely did not incur credit damages due to the
2 unauthorized account. *See* Stockton Rebuttal Decl. ¶ 5. For this reason, the Settlement limits credit-related
3 damages to those persons who took out credit, *i.e.* borrowed a significant amount of money, within a year
4 of the unauthorized credit card or line of credit event.

5
6 *The number capable of recovering for fee-related damages.* As Plaintiffs noted in their Reply, the
7 CFPB, in reliance on PwC's data, found that only 99,000 out of 2.1 million accounts identified had been
8 charged fees at all. Extrapolating this proportion to the total number of accounts yields a total estimate of
9 165,000 accounts that are capable of recovering for fee-related damages. But, because all fees charged to
10 the 99,000 accounts that CFPB identified will be reimbursed through the Government Settlements, those
11 fees will not be—because they will not *need* to be—reimbursed through this proposed Class Action
12 Settlement. *See* Settlement Agreement ¶ 9.7.1.2. Hence, the total number of accounts capable of
13 recovering for fee-related damages under this Settlement is 66,000. Using the average number of 1.28
14 accounts per person produces an estimate of 51,563 people who can recover for fee-related damages under
15 the Settlement.
16

17 *The number considered "Automatically-Enrolled Claimants."* Plaintiffs are permitted to disclose
18 publicly that there are tens of thousands of Automatically-Enrolled Claimants.

19 *The number considered "Consultant-Identified Persons."* Currently, Plaintiffs' estimate of this
20 number stands at 1.64 million (2.1 million accounts divided by an average of 1.28 accounts per person
21 within this group). This number comes from PwC's analysis of the 2011-2015 period. PwC has not
22 completed its analysis of the 2009-2010 period. Wells Fargo has indicated that it will do so prior to the
23 deadline for issuing notice under the currently proposed schedule (100 days after preliminary approval).²
24 As a result, the number of Consultant-Identified Persons will increase by the time notice is issued.
25
26

27 ² As Plaintiffs have noted above, their estimate of 3.5 million total unauthorized accounts includes
28 projections for the period not yet completely analyzed by PwC, but is based on extrapolation from
available PwC data.

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

5 Given Wells Fargo's conduct, Plaintiffs agree that punitive damages are a very real possibility on
6 any claim for which they are available. Plaintiffs' position throughout this case has been that in the absence
7 of a class settlement, they would seek substantial punitive damages. There has never been any doubt about
8 that at any stage of the negotiations. In negotiating the \$142 million Settlement, and articulating Wells
9 Fargo's potential liability, Plaintiffs aimed high.

10 Before turning to how we assessed punitive damages and why, it is crucial to note that nothing in
11 this Settlement takes away a Class Member's opportunity to seek punitive damages for his or her potential
12 claims. They do not need to opt out to do this. Class Members who participate in the Settlement can also
13 pursue mediation under the Los Angeles City Attorney's settlement with Wells Fargo. *See Settlement*
14 *Agreement* ¶ 9.6 (obligations under that settlement are not diminished by this one); Press Release, Wells
15 Fargo & Co., *Wells Fargo Expands Class-Action Settlement for Retail Sales Practices to \$142 Million,*
16 *Adds Accounts as Early as May 2002* (Apr. 21, 2017), *available at*
17 https://www.wellsfargo.com/about/press/2017/class-action_0421.content ("In addition, if Wells Fargo is
18 unable to resolve issues directly, customers who believe they received a product or service they did not
19 want or authorize are offered a free mediation service with an independent third-party mediator."). Class
20 Members can also opt out of the Settlement and arbitrate against Wells Fargo individually. In fact, an
21 unlimited number of Class Members may opt out and the rest of the Class can still recover, because the
22 Settlement does not contain a so-called "blow up" provision, under which a class action settlement
23 terminates if enough class members opt out.
24

25 As to our assessment of the likelihood of a significant punitive damages recovery either in a class
26 judgment or individual arbitration, we emphasize that we have no intention of arguing against the
27 imposition of punitive damages. If the case were to proceed with litigation, we would vigorously seek
28

1 them on every claim possible. That is a different issue, however, from the role that punitive damages play
2 in evaluating the fairness of the Settlement. In that regard, we offer three observations.

3 a. The decisions from other federal courts suggest that punitive damages play a relatively
4 limited role, if any, in determining the fairness of a class action settlement.

5 Many courts suggest that punitive damages play, at most, a small role in determining whether a
6 proposed class action settlement is fair, adequate, and reasonable. Courts tend to conclude that “[p]unitive
7 damages are generally not appropriate in measuring the fairness of a proposed class action settlement.”
8 *Mangone v. First USA Bank*, 206 F.R.D. 222, 229 (S.D. Ill. 2001) (citing cases); *see also City of Detroit*
9 *v. Grinnell Corp.*, 495 F.2d 448, 458–59 (2d Cir. 1974) (declining to consider the availability of treble
10 damages in determining whether an antitrust class action was fair), *abrogated on other grounds by*
11 *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000); *In re Dennis Greenman Sec. Litig.*, 622
12 F. Supp. 1430, 1441 (S.D. Fla.1985) (stating that punitive damages “should not be superimposed as a
13 yardstick for measuring the adequacy of a settlement, lest the settlement negotiation process be derailed
14 before leaving the station”), *rev’d on other grounds*, 829 F.2d 1539 (11th Cir. 1987).

15
16 Just today, Judge Breyer, in granting final approval to the Volkswagen 3.0-liter settlement, rejected
17 an objection to that settlement that argued it should include “punitive compensation”:
18

19 This is essentially an objection to the size of the Settlement, but the objector does not
20 adequately take into that the Settlement provides Class Members with meaningful and
21 certain relief while avoiding the risks and delays involved in proceeding to trial. *See In re*
22 *High-Tech Employee Antitrust Litig.*, [No. 11-cv-02509-LHK], 2015 WL 5159441, at *4
23 [(N.D. Cal. Sept. 2, 2015)] (noting that an objector who sought punitive damages did not
24 “adequately take into account the risks and delays involved in proceeding to trial,” and
25 “ignore[d] that the Settlement provides the Class with a timely, certain, and meaningful
26 cash recovery”). Further, “[g]iven that any award of punitive damages is inherently
27 speculative and discretionary, courts regularly approve settlements that offer no or little
28 compensation representing the risk of a punitive damages award.” *In re Oil Spill by Oil*
Rig Deepwater Horizon, 295 F.R.D. 112, 155 (E.D. La. 2013).

26 Order Granting Final Approval of Class Action Settlement at 39, *In re Volkswagen “Clean Diesel” Mktg.,*
27 *Sales Practices, & Prods. Liab. Litig.*, No. 15-md-02672 (N.D. Cal. May 17, 2017), ECF No. 3229
28 (“Volkswagen Final Approval Order”); *see also Syed v. M-I LLC*, No. 14-CV-742-WBS (BAM), 2016

1 WL 310135, at *5 (E.D. Cal. Jan. 26, 2016) (approving settlement in FCRA case where class members
2 received \$16 each despite fact that if “class members pursued individual litigation, they could possibly
3 recover statutory damages between \$100 and \$1,000 and punitive damages”).

4
5 b. The government settlements have leveled substantial fines against Wells Fargo, serving
6 to punish and deter bad behavior.

7 Punitive damages are designed to punish and deter bad behavior by forcing the defendant to pay
8 more than the actual damages it inflicts on the plaintiff. Here, in addition to this Class Settlement, federal,
9 state, and local governments have taken enforcement actions against Wells Fargo for its actions. The
10 settlements in those cases resulted in Wells Fargo paying penalties of \$185 million. Settlement Agreement
11 ¶ 1.17. As a result, the purpose of potential punitive damages in the Class Action has to some degree
12 already been served by the substantial penalties imposed by the federal, state, and local government
13 actions. It is not our intention to suggest in any way that Wells Fargo should not be subjected to additional
14 penalties by any government entity that is still investigating Wells Fargo’s opening of unauthorized
15 accounts; rather, our point is only that government fines lessen the need for additional penalties in this
16 private Class Action Settlement. *See Volkswagen* Final Approval Order at 39 (holding that the settlement
17 was fair, adequate, and reasonable even though it contained no punitive damages in part because
18 Volkswagen had already been fined by the government).

19
20 c. Given the challenges involved in class certification—and the unlikelihood of class
21 members bringing a large number of individual arbitrations in which they seek punitive
22 damages—Plaintiffs’ counsel have appropriately accounted for the likelihood of a
23 significant aggregate punitive damages recovery.

24 Plaintiffs fully support the notion that punitive damages are appropriate. Yet, the challenges
25 Plaintiffs would face maintaining class certification through trial is a real-world obstacle to a classwide
26 punitive damages award. *See* Mot. 10–12; Stipanowich Decl. ¶¶ 30–35. Plaintiffs do not believe they have
27 understated the major challenges involved in succeeding in such a motion—and hence they believe they
28 have not understated the challenges involved in recovering punitive damages in a certified class action.

1 Because certifying a class action would present difficulties, the question then becomes whether
2 the potential to recover punitive damages on an *individual* basis would provide sufficient incentive for
3 large numbers of persons to go to arbitration on their own. If not, then in the absence of a classwide
4 settlement, individual recoveries of punitive damages will not be likely to add up to substantial aggregate
5 punitive damages. *Cf. Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (“The *realistic*
6 alternative to a class action is not 17 million individual suits, but zero individual suits . . .”).
7

8 It is questionable that punitive damages would, in fact, provide the same motivating force to
9 individual action as large actual damages. As other courts have observed, it is typically the size of *actual*
10 damages that motivate a layperson to litigate (or arbitrate). *See id.* (observing that “only a lunatic or a
11 fanatic” sues over a loss of thirty dollars); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir.
12 2013) (extending that statement to a case in which each class member sought “damages of a few hundred
13 dollars”); *see also Stillmock v. Weis Markets, Inc.*, 385 F. App’x 267, 274 (4th Cir. 2010) (“[T]here is no
14 reasoned basis to conclude that the fact that an individual plaintiff can recover attorney’s fees in addition
15 to statutory damages of up to \$1,000 will result in enforcement of FCRA by individual actions of a scale
16 comparable to the potential enforcement by way of class action.”).
17

18 This is certainly not to say that *some* persons will not assert individual claims that seek punitive
19 damages. In the main, however, it seems reasonable to assume that most laypersons with small actual
20 damages will not take the trouble to litigate or arbitrate their claims individually, even if the law makes
21 punitive damages available.
22

23 And, here, the majority of Class Members will have relatively small fee damages. Plaintiffs
24 estimate, based on PwC’s analysis, that a relatively small fraction of the estimated 2.73 million Class
25 Members were charged fees in connection with unauthorized accounts. *See supra* § 2. Thus, most Class
26 Members were not charged any fees at all on unauthorized accounts. Of those that *were* charged fees, the
27 average amount was \$25. *See Reply 3 & n.4.* Class Members with credit-related damages likely cannot
28

1 anticipate recoveries of more than a few hundred dollars. *See, e.g.*, Settlement Agreement, Ex. A-2, Long
2 Form Notice, at 12–13. This is because the adverse credit event here, a hard credit pull, has a relatively
3 modest impact on credit score, and thus on borrowing costs. *See* Credit Checks & Inquiries,
4 MYFICO.COM (last visited May 17, 2017), [http://www.myfico.com/credit-education/credit-](http://www.myfico.com/credit-education/credit-checks/credit-report-inquiries)
5 [checks/credit-report-inquiries](http://www.myfico.com/credit-education/credit-checks/credit-report-inquiries) (“In general, credit inquiries have a small impact on one’s FICO Scores.
6 For most people, one additional credit inquiry will take less than five points off their FICO Scores.”).

7
8 In the end, Plaintiffs deem substantial punitive damages unlikely not because an adjudicator would
9 be unlikely to award them on the merits, but rather because of the procedural barriers that may impede
10 classwide adjudication without a class settlement. And because the realistic alternative to classwide
11 adjudication is a much smaller number of individual arbitrations, the aggregate cost to Wells Fargo of
12 resolving those individual arbitrations might well be far smaller than the amount of the proposed Class
13 Action Settlement here. And this, in turn, could mean *less* deterrence—precisely the opposite of what
14 punitive damages are designed to promote.

15
16 With these observations in mind, we understand and agree with the Court’s focus on potential
17 punitive damages, and believe we have appropriately accounted for them in negotiations.

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

21 All Class Members with claims under the Fair Credit Reporting Act (FCRA) would be eligible for
22 punitive damages, so long as the Class can prove that Wells Fargo willfully violated the Act. *See* 15 U.S.C.
23 § 1681n(a)(2). Current Ninth Circuit case law and the structure of the statute suggest that actual damages
24 are not required to be eligible for punitive damages. The Ninth Circuit has held that under 15 U.S.C. §
25 1681n(a), statutory damages are available to a plaintiff without having to prove actual damages. *Bateman*
26 *v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 711 (9th Cir. 2010). It seems unlikely that there would be a
27 different rule for punitive damages, since the statute names “such amount of punitive damages as the court
28

1 may allow” as a remedy that is available *in addition to* statutory damages, so long as willfulness is proven.
2 15 U.S.C. § 1681n(a)(2).

3 Second, punitive damages are typically not available under common-law claims of the kind
4 asserted here—namely, claims for breach of contract or unjust enrichment. *See, e.g., KEMA, Inc. v.*
5 *Koperwhats*, 658 F. Supp. 2d 1022, 1035 (N.D. Cal. 2009).³

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

12 The Settlement seeks to provide full compensation to all Class Members who suffered actual
13 damages. That is why the Net Settlement Fund is applied first to fees, then to credit damages, with the
14 remainder allocated on a *pro rata* basis to Class Member on a per account basis. The PwC analysis shows
15 that actual fees charged to Class Members for unauthorized accounts are quite modest. Extrapolating the
16 data, and taking into account the fees reimbursement Wells Fargo must pay pursuant to the government
17 settlements, an aggressive estimate of the total amount of fees charged to Class Members is approximately
18 \$4.2 million. The Settlement will ensure repayment of these fees.

19 The Net Settlement Fund is then applied to compensate Class Members for credit damage. This is
20 an admittedly complex and difficult task, and one that requires a significant amount of individual
21 assessment. Basically, to compute credit damage, it is necessary to obtain detailed credit information from

22 ³ Punitive damages *are* available under a common-law conversion claim. In Plaintiffs’ considered view,
23 however, the most plausible common-law claims are breach of contract or unjust enrichment. In the
24 circumstances here, a conversion claim would allege that Wells Fargo committed conversion by taking
25 money from the Class’s authorized accounts to cover fees associated with unauthorized accounts. *E.g.,*
26 *Consol. Am. Compl.* ¶ 136, ECF No. 37. The weight of authority, however, suggests that such a claim
27 is risky, because a depositor’s money becomes the property of the bank, and thus cannot be converted
28 by the bank. When a bank misuses a depositor’s money, these cases suggest, the remedy lies in contract
law, not in tort. *See, e.g., Crocker-Citizens Nat’l Bank v. Control Metals Corp.*, 566 F.2d 631, 637 (9th
Cir. 1977) (California law); *In re HSBC Bank, USA, N.A., Debit Card Overdraft Fee Litig.*, 1 F. Supp.
3d 34, 53 (E.D.N.Y. 2014) (New York law); *Halla v. Norwest Bank Minn., N.A.*, 601 N.W.2d 449, 453-
454 (Minn. Ct. App. 1999) (Minnesota law).

1 the credit bureaus that enables—through expert analysis—a determination of the degree to which
2 unauthorized credit cards or lines of credit impact Class Members’ credit scores. Then, it is necessary to
3 identify Class Members who borrowed money or obtained credit within one year of the unauthorized
4 account. From this data, increased borrowing costs can be estimated—again, through expert analysis—
5 and a payment provided that compensates for those increased costs. Wells Fargo has agreed to pay the
6 cost of obtaining the information from the credit bureaus. Wells Fargo also has agreed to pay up to \$1
7 million for the cost of expert analysis necessary to calculate credit damage awards (this is in addition to
8 the \$142 million Settlement Amount). Based on the cost estimate provided by Plaintiffs’ expert, Ted
9 Stockton, Ph.D, this amount should be more than sufficient.
10

11 It is difficult to determine with great precision the total amount of Credit-Impact Damages. Class
12 Members with unauthorized credit cards or lines of credit, and who borrowed money within a year of the
13 unauthorized event are entitled to a Credit-Impact Damages payment. Plaintiffs’ expert, however, has
14 provided a range of possible figures, at the upper end of which is \$70 million, assuming that the total
15 percentage of Class Members claiming benefits under the Settlement is unusually high. We believe it is
16 unlikely that Credit Impact Damages will be significantly higher than \$70 million, and, depending on the
17 claim rate, may be lower.
18

19 Thus, Plaintiffs estimate total Compensatory Damages under the Settlement at \$74.2 million. This
20 is well under the total Settlement amount, even subtracting reasonable fees and administrative costs.
21

22 For these reasons, we believe the Settlement will be sufficient to provide complete compensation.
23 We understand the Court’s concern, however, and as discussed in the following answer, we have proposed
24 to Wells Fargo that a guarantee of full Compensatory Damages be added to the Settlement, as well as a
25 “back-end” opt-out so that class members can opt out after they know whether they will receive Credit
26 Impact Damages and if so, the amount.
27
28

1 **6. What will plaintiffs' counsel request if one of the settlement pools runs out of money for**
2 **compensatory damages?**

3 For the reasons explained above, we believe the Settlement figure is sufficient to cover Class
4 Members' full compensatory damages. Nonetheless, we appreciate the Court's concern, and have raised
5 two proposals with Wells Fargo in response.

6 Our first proposal is that Wells Fargo provide what we call a Compensatory Damages Guarantee:
7 if either Net Settlement Pool 1 or Net Settlement Pool 2 should unexpectedly be exhausted of funds
8 prior to full allocation of Compensatory Damages, Wells Fargo will fund the Pool with additional funds
9 sufficient to complete the full allocation of Compensatory Damages.
10

11 Our second proposal relates to the second opt-out opportunity described in the last paragraph of
12 our answer to this Court's Question 5. This device was a focal point of the 3.0-liter Settlement in
13 *Volkswagen*. In that case—where part of the relief hinged on government approval of a repair to the
14 affected vehicles—the need for the opt-out arose because at the time of the opt-out deadline, the parties
15 would not know whether the vehicles would be fixable or not. Therefore, a class member could remain
16 in the settlement through the first opt-out deadline, but wait and see whether his or her vehicle was
17 fixable before finally deciding whether to remain in the settlement. *See Volkswagen Final Approval*
18 *Order* at 40 (describing this provision in that settlement, which Judge Breyer approved).
19

20 A second opt-out opportunity would make sense here as well. It would give Class Members the
21 chance to learn the details of their settlement recovery before finally deciding whether or not to remain
22 in the Settlement.

23 In addition to what we and our economist expert believes to already be more than reasonable relief
24 for the Class, both of these tools would enhance the Settlement and provide safeguards for the Class.
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1 **7. Is there a way to alter the schedule in a way that allows the Court to scrutinize the experts’**
 2 **“credit loss” analysis, at least for the class members who submit claims on the early side,**
 3 **before final approval (perhaps by extending the period between the start of the claims filing**
 4 **process and the hearing on final approval)?**

5 Plaintiffs have no objection to altering the schedule to accommodate the Court’s scrutiny.
 6 Plaintiffs’ proposed schedule would alter the date for the final fairness hearing by setting it back by 60
 7 days. It would accordingly also adjust the dates that are connected in some way to the final fairness hearing
 8 (the motion for approval and attorney fees, the objection and opt-out deadline, and the reply deadline). In
 9 addition, the deadline to submit claim forms would be rescheduled so that it would continue to be after
 10 the final fairness hearing. The schedule would be as follows:

Date	Event
10 days after Settlement Agreement is filed	Defendants provide Class Action Fairness Act Notice to the Office of the Comptroller of the Currency
May 18, 2017	Preliminary Approval Hearing
60 days after Preliminary Approval Order	Wells Fargo will provide Settlement Administrator information regarding Automatically-Enrolled Claimants and Consultant-Identified Persons.
60-100 Days after Preliminary Approval Order	Settlement Administrator will issue notice on a rolling basis as information is received from Wells Fargo
180 Days after Preliminary Approval Order	Class Representatives to file Motion for Final Approval and/or Attorneys’ Fees
210 Days after Preliminary Approval Order	Objection and First Opt-Out Deadline
230 Days after Preliminary Approval Order	Class Representatives to file Reply on Final Approval and/or Attorneys’ Fees
240 Days after Preliminary Approval Order	Fairness Hearing
260 Days after Preliminary Approval Order	Second Opt-Out Deadline
270 Days after Preliminary Approval Order	Deadline to Submit Claim Form

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

5 Plaintiffs have no objection to these changes and would be willing to include them in a revised
6 Settlement Agreement.

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

10 Plaintiffs would have no objection to such a change and are willing to revise the proposed
11 Settlement Agreement accordingly.

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

16 Any possible claims by Class Members against officers, principals, directors, etc., will, in all
17 likelihood, be identical to those against Wells Fargo itself. Hence, the release of those persons has very
18 little effect on the scope of claims the class members are capable of asserting. Due to that fact, as a practical
19 matter, Plaintiffs’ assessment of the final settlement value has not been affected by this part of the release.
20 Plaintiffs have no objection to narrowing the release, provided it can be done without jeopardizing the
21 Settlement.

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

24 Plaintiffs’ expert has estimated that the total costs of this evaluation will not exceed \$1 million,
25 and Wells Fargo has committed to pay for the evaluation.

26 The Plaintiffs’ damages experts have estimated the cost based on the expected scope and kind of
27 their work. The experts will conduct independent credit impact research and will develop a matrix of credit
28 injury effects. They will also produce two databases for use in their process. One is the Claimant Database,
which will contain relevant data for each individual claimant. This data will be tested and compiled into

1 a searchable interface that is tied to the other database that will be used in the process, the Credit Effects
2 Database. This second Database is the result of the research and analytical work that developed the matrix
3 of credit injury effects. The experts will design, implement, and test that step that ties the two databases
4 together so as to produce Credit-Impact Damages.

5 Respectfully submitted,

6
7 DATED this 17th day of May, 2017.

8 KELLER ROHRBACK L.L.P.

9 By /s/ Derek W. Loeser

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Attorneys for Plaintiffs

1 **CERTIFICATE OF SERVICE**

2

3 I, Derek W. Loeser, hereby certify that on this 17th day of May, 2017, I electronically filed

4 **Plaintiffs' Supplemental Briefing in Response to Court Inquires** with the Clerk of the United States

5 District Court for the Northern District of California using the CM/ECF system, which shall send

6 electronic notification to all counsel of record.

7

8 */s/ Derek W. Loeser* _____

9 Derek W. Loeser

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