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17 UNITED STATES DISTRICT COURT
18 NORTHERN DISTRICT OF CALIFORNIA
19

20 IN RE WELLS FARGO & COMPANY
21 SHAREHOLDER DERIVATIVE
22 LITIGATION

23 This Document Relates to:
24 ALL ACTIONS.
25

Lead Case No. 3:16-cv-05541-JST
**SUPPLEMENTAL BRIEF IN SUPPORT
OF PLAINTIFFS' MOTION FOR
PRELIMINARY APPROVAL OF
SETTLEMENT**

1 **I. INTRODUCTION**

2 In support of their Motion for Preliminary Approval of Settlement (Dkt. 270), and
3 pursuant to the Court’s Order Requesting Supplemental Briefing (Dkt. 271), Plaintiffs provide
4 further information regarding the potential range of recovery were Plaintiffs to prevail on the
5 claims being released under the proposed Settlement. The estimated amount of potential damages
6 at trial based on out-of-pocket injury is approximately \$1.1 billion. Including the claim for lost
7 income to Wells Fargo, the damages could be as much as \$3.5 billion. Thus, the \$320 million
8 settlement (comprised of \$240 million in cash and \$80 million in clawbacks and corporate
9 governance reforms) reflects a recovery of between 9.1 and 29.1 percent of the total potential
10 damages. The maximum amount of *recoverable* damages, however, is, as a practical matter,
11 effectively constrained by the Director and Officer (“D&O”) liability insurance policies available
12 to satisfy a derivative judgment against Defendants in this case—\$500 million. The \$240 million
13 cash portion of the Settlement represents 48 percent of the likely available recoverable damages.

14 **II. ARGUMENT**

15 In shareholder derivative actions, courts recognize two types of remedies: money damages
16 payable to the corporation and non-monetary forms of relief, such as corporate governance
17 reforms.¹ Deborah A. DeMott, *Shareholder Derivative Actions: Law & Practice* § 7:6, at 1117
18 (2018–2019). The computation of money damages “is governed by the general tort rule that the
19 defendant’s liability is for the full amount of loss or injury suffered by the corporation.” *Id.*; *see*
20 *also Strassburger v. Earley*, 752 A.2d 557, 579 (Del. Ch. 2000) (“The traditional measure of
21 damages is that which is utilized in connection with an award of compensatory damages, whose
22 purpose is to compensate a plaintiff for its proven, actual loss caused by the defendant’s wrongful
23 conduct.”).

24 Plaintiffs identified two categories of potential monetary damages resulting from the
25 alleged misconduct: (i) out-of-pocket costs incurred by Wells Fargo attributable to the Improper
26

27 ¹ As explained in the Motion, the Parties have agreed that the non-cash components of the
28 settlement—the clawback of compensation and corporate governance reforms—have a total value
to Wells Fargo of \$80 million. Dkt. 270 at 10–11.

1 Sales Practices, approximately \$1.1 billion; and (ii) actual and anticipated loss of income to the
2 Company, preliminarily estimated to be \$1.4 billion to \$2.4 billion.

3 Category 1: Out-of-Pocket Damages. The \$1.1 billion in out-of-pocket damages Plaintiffs
4 estimate that Wells Fargo suffered from the Improper Sales Practices is based on publicly
5 available information and information provided by Wells Fargo in the course of the litigation.
6 Those damages include the following: (i) \$529 million in civil and regulatory fines, penalties, and
7 payments (*i.e.*, including settlements with the Consumer Financial Protection Bureau, the Los
8 Angeles City Attorney, the Office of the Comptroller of Currency, and the Financial Industry
9 Regulatory Authority, and related class actions);² (ii) approximately \$443 million in costs
10 expended on associated investigations and litigation (*i.e.*, investigations and associated litigation
11 costs, including the Board’s Sales Practices Investigation); and (iii) approximately \$138 million
12 expended for remediation efforts (*i.e.*, the cost of refunds to customers affected by unauthorized
13 accounts, a 2018 public relations campaign titled “Re-Established 2018,” and increased bank
14 monitoring).³

15 Category 2: Loss of Income. Plaintiffs preliminarily assessed the loss of income
16 attributable to Improper Sales Practices at between \$1.4 billion and \$2.4 billion. This comprises
17 the impact of the Federal Reserve’s asset growth restrictions, implemented in its February 2018

18 ² *See, e.g.*, Consent Order, *In re Wells Fargo Bank, N.A.*, CFPB No. 2016-CFPB-0015 (Sept. 8,
19 2016) (\$100 million settlement with CFPB); Stipulated Final Judgment, *California v. Wells*
20 *Fargo & Co.*, No. BC580778 (Cal. Super. Ct. Sept. 13, 2016) (\$50 million settlement with Los
21 Angeles City Attorney); Consent Order, *In re Wells Fargo Bank, N.A.*, No. AA-EC-2016-66 (Sept.
22 6, 2016) (\$35 million penalty to OCC); Letter of Acceptance, Waiver and Consent, Financial
23 Industry Regulatory Authority, No. 2012034123501 (Dec. 18, 2014) (\$1.5 million penalty to
FINRA); *Hefler v. Wells Fargo & Co.*, No. 16-CV-05479-JST, 2018 WL 6619983, at *2 (N.D.
Cal. Dec. 18, 2018) (\$480 million settlement with class of shareholders, approximately \$200
million of which was paid directly by Wells Fargo); Order Granting Final Approval of Class
Action Settlement, *Jabbari v. Wells Fargo & Co.*, No. 3:15-cv-02159-VC (N.D. Cal. Jun. 14,
2018), ECF No. 271 (\$142 million settlement with class of consumers).

24 ³ *See, e.g.*, Cal. State Sen., Sen. Comm. on Banking & Finance, An Examination of Wells Fargo’s
25 Sales Practices & Management & Board Oversight: Background Paper (Nov. 22, 2016) (\$8
26 million in administration costs attributable to generation of unauthorized accounts); Press Release,
27 Wells Fargo & Co., Wells Fargo Reports Completion of Expanded Third-Party Review of Retail
28 Banking Accounts, Paving Way to Complete Remediation Effort (Aug. 31, 2017) (\$6.1 million in
refunds to consumers); Q3 2016 Wells Fargo & Co. Earnings Call, at 2 (FD (Fair Disclosure)
Wire Oct. 14, 2016) (\$50 million in costs for system and process enhancements, including
automated email notifications, application acknowledgments, multi-factor authentication, an
independent third-party mystery shopper program, and additional risk personnel).

1 consent order,⁴ and the loss of income due to lost business and reputational harm attributable to
2 the Improper Sales Practices. By its nature, this type of damage is difficult to quantify (especially
3 before the conclusion of fact and expert discovery), and Plaintiffs anticipated significant
4 challenges in establishing the existence and value of these damages at trial. Plaintiffs' estimate of
5 this second category of damages is thus a maximum figure that would have been vigorously
6 disputed, discounted and, inevitably, subjected to continued review as the proceedings advanced
7 to trial and possibly through the appeal process.

8 Estimated Recoverable Damages. Notwithstanding these potential estimated damages,
9 Plaintiffs also considered the amount of damages they "could have *recovered* if they ultimately
10 prevailed on the merits of their claims." See Dkt. 271 at 1–2 (citing *K.H. v. Sec'y of Dep't of*
11 *Homeland Sec.*, No. 15-CV-02740-JST, 2018 WL 3585142, at *5 (N.D. Cal. July 26, 2018))
12 (emphasis added). The amount of recoverable damages after trial is highly dependent on the
13 limits of the D&O insurance available to satisfy a judgment. Here, the policy limits of the
14 available D&O insurance is \$500 million.

15 Percentage of Available Recovery. Plaintiffs' recovery of \$240 million in cash, together
16 with the \$80 million in clawbacks and corporate governance reforms, reflects a significant
17 recovery of the total estimated recoverable damages. The cash recovery of \$240 million equates
18 to approximately 21.8 percent of the \$1.1 billion in out-of-pocket damages to the Company.⁵
19 Alternatively, the cash recovery of \$240 million represents 48 percent of the available D&O
20 insurance.⁶ These rates of recovery far exceed those typically found in shareholder class action
21 litigation. See Stefan Boettrich & Svetlana Starykh, NERA Economic Consulting, Recent Trends
22 in Securities Class Action Litigation: 2018 Full-Year Review 35 fig.27 (2019) (finding the

23 ⁴ In February 2018, the Federal Reserve prohibited Wells Fargo from growing its asset base until
24 it sufficiently improved its corporate governance and controls. See Dkt. 270 at 18. That
prohibition remains in place today.

25 ⁵ The cash recovery of \$240 million represents between 6.9 and 9.6 percent of the \$2.5 billion to
\$3.5 billion total maximum damages, inclusive of the more speculative loss of income.

26 ⁶ Including the value of clawback compensation and corporate governance reforms to which the
27 Parties agreed (\$80 million) for a total Settlement value of \$320 million, the Settlement equates to
64 percent of the available D&O insurance, approximately 29.1 percent of the \$1.1 billion in out-
28 of-pocket damages, and between 9.1 and 12.8 percent of the \$2.5 billion to \$3.5 billion in total
maximum damages, inclusive of the more speculative loss of income.

1 median ratio of settlement value to investor losses was 1.2 percent for investor losses of \$1.000–
 2 \$4.999 billion);⁷ Laarni T. Bulan et al., Cornerstone Research, Securities Class Action
 3 Settlements, 2018 Review & Analysis 6 fig.5 (2019) (finding that in cases with “simplified tiered
 4 damages” of over \$1 billion, the median settlement value was 2.0 percent of the “simplified tiered
 5 damages” for settlements in 2018);⁸ *see also Hefler v. Wells Fargo & Co.*, No. 16-CV-05479-JST,
 6 2018 WL 4207245, at *9 (N.D. Cal. Sept. 4, 2018) (approving settlement with “a greater than 15
 7 percent recovery”).⁹

8 **III. CONCLUSION**

9 The Settlement’s cash recovery of \$240 million, combined with the additional \$80 million
 10 in compensation clawbacks and corporate governance reforms, represents a significant percentage
 11 of the range of potential damages to Wells Fargo, and nearly half of the potential recoverable
 12 damages, as represented by available D&O insurance. As discussed above and in Plaintiffs’
 13 Motion for Preliminary Approval of Settlement, the Settlement falls well within the range of
 14 reasonableness regularly approved by courts in shareholder derivative actions.

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 16 Dated: April 2, 2019

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 25 ⁷ https://www.nera.com/content/dam/nera/publications/2019/PUB_Year_End_Trends_012819_Final.pdf (last visited Mar. 28, 2019).

26 ⁸ <https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Settlements-2018-Review-and-Analysis> (last visited Apr. 1, 2019).

27 ⁹ Plaintiffs refer to percentages of recovery in securities class action litigation because no similar
 28 analyses exist for comparably sized shareholder derivative recoveries.

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