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 13 Retirement System, Louisiana Sheriffs' Pension and
 14 Relief Fund, and the Class, and for additional
 Plaintiffs Public Employees' Retirement System
 15 of Mississippi, and Vermont Pension Investment Committee*

16 UNITED STATES DISTRICT COURT

17 NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE DIVISION

18 IN RE WELLS FARGO MORTGAGE-
 19 BACKED CERTIFICATES LITIGATION

Case No. 09-CV-1376-LHK (PSG)

CONSOLIDATED CLASS ACTION
 ECF

**LEAD PLAINTIFFS' REPLY IN
 FURTHER SUPPORT OF MOTION
 FOR FINAL APPROVAL OF CLASS
 ACTION SETTLEMENT**

Date: October 27, 2011
 Time: 1:30 p.m.
 Courtroom: 4, 5th Floor
 Judge: Lucy H. Koh

1 The Court-appointed Lead Plaintiffs, the Alameda County Employees' Retirement Association,
2 Government of Guam Retirement Fund, New Orleans Employees' Retirement System and Louisiana
3 Sheriffs Pension and Relief Fund ("Lead Plaintiffs"), respectfully submit this Reply in further support
4 of final approval of the proposed Settlement, the Plan of Allocation, and the motion for attorneys' fees
5 and reimbursement of litigation expenses. *See* ECF Nos. 451, 452.

6 **I. PRELIMINARY STATEMENT**

7 As detailed in Lead Plaintiffs' opening papers, the \$125 million Settlement, plus accrued
8 interest, was achieved for the benefit of the Settlement Class after more than two years of extensive
9 litigation, document and deposition discovery and arm's-length settlement negotiations overseen by an
10 experienced and highly-respected mediator, the Honorable Layn R. Phillips (Ret.). Following an
11 extensive and Court-approved notice program – including the mailing of the Court-approved Class
12 Notice to over 9,000 potential Class Members and nominees – not a single Class Member objected to
13 the fairness, reasonableness and adequacy of the Settlement Amount, the Plan of Allocation, or the
14 request for attorneys' fees and reimbursement of litigation expenses.

15 The lone "objection" to the Settlement (the "Obj.," ECF No. 460) does not challenge the
16 fairness, reasonableness and adequacy of the Settlement. Rather, it was filed "in an abundance of
17 caution" solely seeking clarification that the Settlement's release language (the "Release") does not
18 compromise any hypothetical contract claims belonging to the Offerings' trusts (the "Trusts") based on
19 unidentified breaches of unidentified representations and warranties. *See* Obj. at 3-4. As the Objection
20 correctly notes, the Trusts are not members of the Settlement Class, and therefore, the Trusts are not
21 releasing any claims. Only members of the Settlement Class are releasing their Settled Claims.

22 As set forth below, the Release is consistent with language regularly approved by the Ninth
23 Circuit and courts in this District. The Release is expressly limited to claims "that were asserted, could
24 have been asserted, or that arise out of the same transactions or occurrences as the claims that were
25 asserted, in the Action." *See* Stipulation of Settlement (ECF No. 440, "Stip.") ¶1(II) (definition of
26 "Settled Claims"). In overruling similar objections to release provisions when an objector characterizes
27 a release as "vague," courts have observed that the addition of requested "clarifying" language is
28 "unnecessary and redundant [because it] is, after all, a given that the Release will only be applied

1 insofar as its application conforms to the law.” *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319,
 2 342 n.36 (S.D.N.Y. 2005). These courts have further overruled similar objections seeking an “advisory
 3 opinion” on whether a settlement’s release would release an objector’s hypothetical claims. Consistent
 4 with these authorities, the Court should overrule the Objection, which calls for an advisory opinion
 5 based on, as the Objection says, “potential” claims belonging to the Trusts.

6 **II. THE SETTLEMENT IS FAIR,
 7 REASONABLE AND ADEQUATE**

8 As detailed in Lead Plaintiffs’ opening papers, each of the factors considered by courts within
 9 the Ninth Circuit favors approval of the Settlement. *See* Mot. (ECF No. 451) at 10 (citing, *inter alia*,
 10 *In re Rambus Inc. Deriv. Litig.*, 2009 WL 166689, at *2 (N.D. Cal. Jan. 20, 2009)). The \$125 million
 11 cash Settlement provides a meaningful recovery for the Settlement Class and was reached at a time
 12 when the parties understood the strengths and weaknesses of their claims and defenses. *See* Mot. at 11-
 13 13; *see also* Stickney Decl. (ECF No. 453) ¶81. Prior to reaching the Settlement, Lead Counsel
 14 reviewed and analyzed a substantial volume of documents obtained through discovery; conducted
 15 depositions of Wells Fargo employees and defense experts; interviewed numerous witnesses; conferred
 16 with their own experts and consultants; and researched and briefed the core legal issues in the case. *See*
 17 Mot. at 16-17; *see also* Stickney Decl. ¶¶15-70. The Settlement was achieved only after the parties
 18 participated in multiple, arm’s-length mediation sessions and, after an impasse was reached, a
 19 mediator’s recommendation, which both parties ultimately accepted. *See* Mot. at 8-9; *see also* Phillips
 20 Decl. (ECF No. 453-1) ¶¶4-7; Stickney Decl. ¶76.

21 The Class Members’ response to the Settlement further confirms its fairness, reasonableness
 22 and adequacy. The Court-approved Class Notice was mailed beginning on August 9, 2011, to over
 23 9,000 potential Class Members, the Summary Notice was published in *The Investor’s Business Daily*,
 24 and the Settlement documents were posted on a website specifically created for this Settlement.¹ There
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26
 27 ¹ As explained in the October 20, 2011 Supplemental Declaration of Jennifer M. Keough Re Notice
 28 and Dissemination and Publication (“Keough Supp. Decl.”), ¶6, attached as Exhibit 1 hereto, Lead
 Counsel has become aware of two minor discrepancies in Table A to the Plan of Allocation, and
 submits a corrected Table A to be substituted in the Plan of Allocation. *See* Ex. C to Keough Supp.

1 are *no* objections to the fairness, reasonableness or adequacy of the Settlement. The only “objection”
 2 was made out of “an abundance of caution” and does not challenge the fairness or adequacy of the
 3 Settlement Amount, Plan of Allocation or request for attorneys’ fees or expenses. *See* Obj. at 4.

4 Consistent with Ninth Circuit law favoring the settlement of securities class actions, the
 5 Settlement should be approved as fair, reasonable, and adequate. *See* Mot. at 10; *see also Garner v.*
 6 *State Farm Mut. Auto. Ins. Co.*, 2010 WL 1687832, at *7 (N.D. Cal. Apr. 22, 2010) (“The law favors
 7 the compromise and settlement of class action suits.”).

8 **III. THE SETTLEMENT’S RELEASE COMPORTS WITH**
 9 **NINTH CIRCUIT LAW, AND THE OBJECTION**
 10 **PROVIDES NO BASIS TO REJECT THE SETTLEMENT**

11 The Settlement contains accepted release language that does not detract from the Settlement’s
 12 fairness, reasonableness, or adequacy. The Release applies only to Class Members (which the Trusts
 13 are not) and releases only their “Settled Claims,” which, pursuant to paragraph 1(II) of the Stipulation,
 14 are limited to claims “that were asserted, could have been asserted, or that arise out of the same
 15 transactions or occurrences as the claims that were asserted, in the Action.” *See* Stip. ¶1(II). Moreover,
 16 the scope of the Release is further limited to the “extent permitted by law or equity.”²

17 The Ninth Circuit and courts in this District have repeatedly approved class action settlements
 18 with similar releases. *See, e.g., Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1287 (9th Cir. 1992)
 19 (“The weight of authority holds that a federal court may release not only those claims alleged in the

20 _____
 21 Decl. As set forth in the Notice (¶51), the Court may modify the proposed Plan of Allocation without
 22 further notice to the Settlement Class.

23 ² *Id.* Courts, for example, deny attempts to enforce releases to the extent that they are impermissible.
 24 *See, e.g., Hesse v. Sprint Corp.*, 598 F.3d 581, 590 (9th Cir. 2010) (refusing to apply class action
 25 settlement release to claims that were not based on identical factual predicate as claims asserted in
 26 class action, and which were brought to remedy different injury); *In re Conseco Life Ins. Co. Cost of*
 27 *Ins. Litig.*, 2005 WL 5678842, at *7 (C.D. Cal. Apr. 26, 2005) (finding that a class action release in a
 28 prior case would not bar claims that were not based on the identical factual predicate as the class
 action claims); *see also In re Digital Music Antitrust Litig.*, 2011 WL 2848195, at *4 (S.D.N.Y.
 July 18, 2011) (holding that prior class action settlement release did not bar subsequent claims where
 the source of the subsequent claims was different from the source of previously alleged class action
 claims); *cf. Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001) (refusing to apply release in
 prior class action to bar claims in subsequent action), *vacated in part on other grounds*, 539 U.S. 111
 (2003).

1 complaint, but also a claim ‘based on the identical factual predicate as that underlying the claims in the
2 settled class action even though the claim was not presented and might not have been presentable in the
3 class action.’”) (emphasis omitted); *In re Connetics Corp. Sec. Litig.*, Case No. C 07-02940 SI (N.D.
4 Cal.) (Final Judgment and Order of Dismissal with Prejudice dated October 9, 2009), ECF No. 199
5 (approving similar release language); *In re Maxim Integrated Prods., Inc., Sec. Litig.*, Case No. C-08-
6 00832-JW (N.D. Cal.) (Final Judgment and Order of Dismissal With Prejudice dated Sept. 29, 2010),
7 ECF No. 294 (approving similar release language).³

8 A release, no matter how worded, only compromises claims that are based on the same
9 transactions or occurrences. As the Ninth Circuit explained in *Williams v. Boeing Co.*, “[w]hile
10 [Defendant] may have drafted the settlement agreement to include as broad a release as possible, the
11 release would have only been *enforceable* as to subsequent ‘claims relying upon a legal theory different
12 from that relied upon in the class action complaint, but depending upon the same set of facts.’” 517
13 F.3d 1120, 1134 (9th Cir. 2008) (emphasis in original); *see also WorldCom*, 388 F. Supp. 2d at 341-42
14 at n.36 (same).

15 Consistent with these authorities, courts reject objections, such as the one here, that “out of an
16 abundance of caution” seek “clarification” that a release does not extinguish their claims. As these

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18 ³ In *Connetics*, Judge Illston approved a class action release of “any and all claims and causes of action
19 of every nature and description, whether known or Unknown, fixed or contingent, whether arising
20 under federal, state, common or foreign law, that Lead Plaintiff or any other member of the Class (a)
21 asserted in the Litigation or (b) could have asserted in any forum, that arise out of, are based upon or in
22 any manner relate to the allegations, transactions, facts, matters or occurrences, statements,
23 representations or omissions involved, set forth, or referred to in the Complaint that relate to the
24 purchase or acquisition of the Company’s publicly traded securities during the Class Period or to the
25 adequacy of any disclosures during the Class Period or that could have been asserted in the Litigation.”
26 In *Maxim*, Judge Ware approved a class action release of “any and all claims, rights, causes of action,
27 liabilities or any other matters, whether known or Unknown, foreseen or unforeseen, whether arising
28 under federal, state, common or foreign law, that (a) Lead Plaintiffs or any other member of the Class
asserted in the Action or could have asserted in any forum, that arise out of, are based upon or relate in
any way to the allegations, transactions, facts, matters or occurrences, disclosures, representations or
omissions involved, set forth or referred to in the Action; or (b) relate in any way to any violation of
state, federal or any foreign jurisdiction’s securities or other laws, any misstatement, omission or
disclosure (including in financial statements), any breach of duty, any negligence or fraud, or any other
alleged wrongdoing or misconduct by the Released Parties relating in any way to the purchase or other
acquisition of shares of Maxim common stock by members of the Class during the Class Period.”

1 courts have explained, the addition of clarifying language that the settlement releases only “claims
2 ‘arising from the same facts,’ or similar formulations, would be unnecessary and redundant [because it]
3 is, after all, a given that the Release will only be applied insofar as its application conforms to the law.”
4 *WorldCom*, 388 F. Supp. 2d at 342 n.36; *see also Brent v. Midland Funding, LLC*, 2011 WL 3862363,
5 at *13 (N.D. Ohio Sept. 1, 2011) (“The fact that the release does not include language specifically
6 stating that it will only apply in cases sharing the same factual predicate as those released does *not*
7 render it overbroad, nor does the potential that [Defendant] may in some future case urge a broader
8 interpretation of the release.”) (emphasis added); *In re Global Crossing Sec. Litig.*, 2005 WL 1668532,
9 at *2-3 (S.D.N.Y. July 12, 2005) (finding objection ill-founded because the release could only extend to
10 claims that depended “on the very same set of facts”).

11 In addition, courts routinely reject objections that, as here, require the court to “render[] an
12 advisory opinion” whether “the release ... bar[s] any of [the objector’s] claims.” *See Cicero v.*
13 *DirecTV, Inc.*, 2010 WL 2991486, at *7-8 (C.D. Cal. July 27, 2010); *see also In re AOL Time Warner*
14 *ERISA Litig.*, 2006 WL 2789862, at *12 (S.D.N.Y. Sept. 27, 2006) (“The facts necessary for a
15 resolution of this question [whether the settlement releases the objector’s claims] are not before the
16 Court, nor does the Court have jurisdiction to formally dispose of the action.”); *Larson v. Sprint Nextel*
17 *Corp.*, 2010 WL 234934, at *15-16 (D.N.J. Jan. 15, 2010) (rejecting objection seeking to have court
18 declare release ineffective as to certain potential claims, explaining that “such matters are not presently
19 before this Court and, therefore, will not be addressed at this juncture”); *cf. Hillblom v. U.S.*, 896 F.2d
20 426, 431 (9th Cir. 1990) (holding action not ripe for review because seeks advisory opinion). These
21 courts have observed that whether a release extinguishes a particular claim requires a “fact-intensive
22 inquiry” that depends on the particulars of the allegations in the subsequent complaint. *See WorldCom*,
23 388 F. Supp. 2d at 342 n.36.

24 Here, the Objection seeks precisely such an advisory opinion as to whether the Release would
25 bar the Trusts’ hypothetical breach of contract claims based on unidentified representations and
26 warranties and unidentified breaches. These hypothetical breach of contract claims are only cursorily
27 described in the Objection, with no identification of what specific representations and warranties were
28 purportedly breached. The hypothetical claims have never been asserted in any action and may never

1 be asserted. Likewise, while the Objection indicates that holders of the certificates may “under certain
2 circumstances and after certain contractual prerequisites are met,” bring derivative claims (Obj. at 3),
3 missing are the conditions and prerequisites themselves and whether they have been satisfied.

4 The Court need not “clarify” the Release with an advisory opinion for such purely hypothetical
5 claims. *If* such claims are ever asserted and *if* a defendant attempts to invoke the Release, there will be
6 a factual record for the deciding court at that time. The Objection does not indicate how – given that
7 the Trusts are not members of the Settlement Class, that only Class Members are releasing their Settled
8 Claims, that substantial factual differences exist between the Trusts’ contract claims and the claims
9 asserted in this Action, and that the injuries are different – the Release could be enforceable against
10 their hypothetical claims.

11 Moreover, as discussed above, to the extent that a subsequent court were to find that the Release
12 somehow extends beyond what is permitted by law or equity – which it does not – it would not be
13 enforceable as to such claims, rendering any additional “clarifying” language “unnecessary and
14 redundant.” *WorldCom*, 388 F. Supp. 2d at 342 n.36. Accordingly, the Objection’s speculative
15 concerns about the impact on hypothetical claims belonging to the Trusts are premature and misplaced,
16 and the Objection should be overruled.

17 **IV. CONCLUSION**

18 Based on the foregoing and the entire record herein, the Court should approve the Settlement
19 and the Plan of Allocation as fair, reasonable and adequate and in the best interests of the Class. The
20 proposed Judgment, in the form agreed to by the parties, the proposed Order approving the Plan of
21 Allocation, and the proposed Order approving the request for attorneys’ fees and reimbursement of
22 expenses, are submitted concurrently with this Memorandum.

23 Dated: October 20, 2011

Respectfully submitted,

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