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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA - SAN JOSE DIVISION

IN RE WELLS FARGO MORTGAGE-BACKED CERTIFICATES LITIGATION

Civil Action No. 09-cv-01376-LHK

CONSOLIDATED CLASS ACTION - ECF

NOTICE OF MOTION AND MOTION FOR CLASS CERTIFICATION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Judge: Hon. Lucy H. Koh
Date: May 19, 2011
Time: 2:00 p.m.
Courtroom: 4, 5th Floor

PUBLICLY FILED: REDACTED VERSION

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NOTICE OF MOTION

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that on May 19, 2011, at 2:00 p.m., or as soon thereafter as the matter may be heard in the Courtroom of the Honorable Lucy H. Koh, Alameda County Employees' Retirement Association, Government of Guam Retirement Fund, New Orleans Employees' Retirement System and Louisiana Sheriffs' Pension and Relief Fund (collectively, "Lead Plaintiffs") shall and hereby do move this Court, pursuant to Fed. R. Civ. P. 23, for an order certifying a class consisting of the following:

> All persons or entities who purchased or otherwise acquired Wells Fargo Mortgage-Backed Securities 2006-1, 2006-2, 2006-3, 2006-4, 2006-6, 2006-AR1, 2006-AR2, 2006-AR4, 2006-AR5, 2006-AR6, 2006-AR8, 2006-AR10, 2006-AR11, 2006-AR12, 2006-AR14, 2006-AR17 or 2007-11, and who were damaged thereby (the "Class"). Excluded from the Class are Defendants and their respective officers, affiliates and directors at all relevant times, members of their immediate families and their legal representatives, heirs, successors or assigns and any entity in which Defendants have or had a controlling interest.

In addition, Lead Plaintiffs will move the Court to designate them as the class representatives and to designate Bernstein Litowitz Berger & Grossmann LLP as counsel for the Class.

This motion is based on this Notice of Motion and Motion; the Memorandum of Points and Authorities in support thereof; the accompanying Declaration of David R. Stickney ("Stickney Decl.") and all exhibits attached thereto; the pleadings and records on file in this case, and such other matters and argument as the Court may consider in the hearing of this motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

By this Motion, the Lead Plaintiffs and proposed class representatives – Alameda County Employees' Retirement Association, Government of Guam Retirement Fund, New Orleans Employees' Retirement System and Louisiana Sheriffs' Pension and Relief Fund – move pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3) for the following: (i) to certify a class of all persons and entities that purchased or acquired one or more Wells Fargo Certificates and who were damaged thereby (the "Class");[1] and (ii) to appoint the Lead Plaintiffs as class representatives, with Bernstein Litowitz Berger & Grossmann LLP ("Bernstein Litowitz") as Class Counsel.

This securities action arises from Wells Fargo's sale of over $27.3 billion in mortgage pass-through certificates, issued pursuant to offering documents that contained untrue statements and omitted material facts. The Amended Complaint asserts claims for violations of Sections 11 and 15 of the Securities Act of 1933 (the "Securities Act") against Wells Fargo Bank, N.A. ("Wells Fargo Bank"), Wells Fargo Asset Securities Corporation (the "Depositor"), the Underwriter Defendants, and the Individual Defendants.[2]

Securities cases, such as this action, are ideally suited for class treatment due to the predominance of common issues of fact and the impracticability of bringing individual actions to address a common wrong. "[T]he law in the Ninth Circuit is very well established that the requirements of Rule 23 should be liberally construed in favor of class action cases brought under the federal securities laws." *In re THQ Inc. Sec. Litig.*, 2002 WL 1832145, at *2 (C.D. Cal. Mar. 22, 2002). This is particularly true where, as here, the claims arise under the Securities Act because the

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[1] The "Certificates" are Wells Fargo Mortgage-Backed Securities 2006-1, 2006-2, 2006-3, 2006-4, 2006-6, 2006-AR1, 2006-AR2, 2006-AR4, 2006-AR5, 2006-AR6, 2006-AR8, 2006-AR10, 2006-AR11, 2006-AR12, 2006-AR14, 2006-AR17 and 2007-11. Each Certificate is traceable to Wells Fargo Asset Securities Corporation's registration statements dated July 29, 2005, October 20, 2005, or September 27, 2006.

[2] "Underwriter Defendants" refers to Goldman, Sachs & Co., Bear, Stearns & Co. Inc., Deutsche Bank Securities, Inc., UBS Securities, LLC, Credit Suisse Securities (USA), LLC, RBS Securities, Inc., and Citigroup Global Markets, Inc. "Individual Defendants" refers to David Moskowitz, Franklin Codel, Douglas K. Johnson and Thomas Neary. The Individual Defendants signed one or more of the Registration Statements at issue here. (ECF No. 203 (the "Complaint" or "Compl.") ¶¶33-37.)

crucial question is whether there is a misrepresentation in the Offering Documents. Plaintiffs need not show scienter, reliance or loss causation.

Here, each Rule 23 requirement is easily satisfied. In this regard, Lead Plaintiffs submit the accompanying expert report of Joseph R. Mason, Ph.D. *See* Expert Report of Dr. Mason ("Mason Report"), Ex. 1.[3] Dr. Mason is the Hermann Moyse Jr./Louisiana Bankers Association Chair of Banking at the Ourso School of Business, Louisiana State University, a Fellow at the Wharton School, and Senior Consultant at Precision Economics, LLC. *Id.* ¶13. The Mason Report and additional material show that the number of Class members easily exceeds 3,200 investors. *Id.* ¶93; *see also* Stickney Decl. ¶¶18-20. Accordingly, joinder is clearly impractical. There are numerous common questions of law and fact, as each Offering is the product of the same Wells Fargo securitization factory; and the Offering Documents contain the same untrue statements and material omissions about underwriting practices. Lead Plaintiffs' claims are typical of all Class members; and Lead Plaintiffs and their counsel have and will fairly and adequately protect the interests of the Class.

Further, common questions of law and fact predominate over questions affecting individual members. The predominant questions of law and fact focus on Defendants' conduct and common misrepresentations in the Offering Documents. Indeed, as Defendants argued when attempting to transfer this action to the Southern District of New York, "***the primary evidentiary issues [in this action] will relate to the Defendants' conduct, not Plaintiff's actions.***"[4] The overarching issue remains whether the Offering Documents contained untrue statements or material omissions.

Certification will enable Lead Plaintiffs to prosecute the Class claims efficiently and effectively. This Action is similar to numerous securities cases that have been certified as class actions in this Circuit and elsewhere. Accordingly, Lead Plaintiffs respectfully request that the Court certify the proposed Class, appoint Lead Plaintiffs as the class representatives, and appoint Lead Counsel as counsel for the Class.

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[3] Throughout, "Ex." refers to exhibits to the Declaration Of David R. Stickney In Support Of Class Certification.

[4] Underwriter Defendants' Motion To Transfer, ECF No. 73-1, at 13; Joinder of Wells Fargo Defendants, ECF No. 89. Unless otherwise noted, all emphases are added and internal citations omitted.

II. FACTUAL BACKGROUND

A. Nature Of The Action

Wells Fargo Bank sold over $27.3 billion of Certificates to investors, such as Lead Plaintiffs here, in 17 offerings.[5] The Offering Documents contained untrue statements of material fact, or omitted to state material facts necessary to make the statements therein not misleading, regarding the underwriting standards purportedly used in connection with the origination of the underlying mortgages. Compl. ¶¶5, 62, 83, 115-17. The true facts, omitted from the Offering Documents, were that Wells Fargo Bank and the additional originators violated stated underwriting standards when issuing the loans. As a result, Lead Plaintiffs and the Class purchased Certificates that were far riskier than represented. *Id.* ¶¶4, 7, 40. Virtually all of the Certificates have now been downgraded to below investment-grade. *Id.* ¶118.

During the credit and housing boom, Wells Fargo was one of the nation's largest originators and securitizers of home loans, generating and selling an enormous volume of loans at breakneck pace.[6] Wells Fargo securitized and sold over $50 billion in mortgage loans in 2006 alone. *See* Wells Fargo 2007 Annual Report, Ex. 2, at 92. In 2007, Wells Fargo securitized and sold nearly $39 billion in mortgage loans. *Id.* From February 2006 through July 2007 – the 17-month period during which the certificates here were offered – Wells Fargo issued at least 54 separate offerings, or nearly one every 10 days. While the securitization factory was lucrative for Wells Fargo, the quality of the product was far lower than represented. To increase the volume of loans for securitization and sale, Wells Fargo sacrificed stated underwriting standards.

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[5] Compl. ¶¶3, 43. This action originally asserted claims relating to untrue statements and omissions in 54 offerings. Following the Court's order on the first motion to dismiss, the Amended Complaint asserted claims relating to 27 offerings. This Court's October 20 Order narrowed the scope of the case to 17 offerings. ECF No. 301.

[6] *See* Wells Fargo 2007 Annual Report, Ex. 2, at 92. During that time, Wells Fargo emphasized publicly that its "underwriting process is well controlled and appropriate for the needs of … investors who purchase the loans or securities collateralized by the loans." *Id.* at 54. This was particularly true, so they told investors, for their "prime" loans, which are mortgage loans considered to have low default risk because they are purportedly only provided to borrowers with the best credit rating and ability to repay. *Id.* at 54, 59 ("We offer a broad spectrum of first mortgage and junior lien loans that we consider mostly prime or near prime"; "Credit quality in Wells Fargo Financial's real estate-secured lending business has not experienced the level of credit degradation that many nonprime lenders have because of our disciplined underwriting practices."); *see also* Mason Report, at ¶¶39-40.

[redacted] the Financial Crisis Inquiry Commission ("FCIC") reported to Congress that, "[w]hen securitizers did kick loans out of the pools, some originators simply put them into new pools, presumably in hopes that those loans would not be captured in the next pool's sampling."[8] [redacted] a former Wells Fargo quality assurance and fraud analyst, who explained to the FCIC that "'hundreds and hundreds and hundreds of fraud cases' that she knew were identified within Wells Fargo's home equity loan division were not reported [and] at least half the loans she flagged for fraud were nevertheless funded, over her objections."[9] [redacted]

Each security in this case was issued pursuant to an identical process through the same parties. First, Defendant Wells Fargo Bank and its affiliates originated or purchased tens-of-thousands of home mortgage loans for Wells Fargo's securitization business. Compl. ¶¶3, 22, 55, 58; Mason Report, Ex. 1, at ¶¶31-35. [redacted]

[redacted]

[8] *See* 2011 FCIC Report, Ex. 6 at 168. The FCIC was established as part of the Fraud Enforcement and Recovery Act (Public Law 111-21) passed by Congress and signed by the President in May 2009. Its purpose is to "examine the causes, domestic and global, of the current financial and economic crisis in the United States."

[redacted]

[redacted] Finally, Wells Fargo securitized the loans and, together with the Underwriter Defendants, sold them to investors as securities reportedly backed by "Prime" loans. *See* Mason Report, Ex. 1, at ¶75. The Offering Documents for each security also contained virtually identical representations about the underwriting standards purportedly used for the underlying loans.[10] As Dr. Mason explains, "all of the offerings reportedly presented loan pools exhibiting similar characteristics and patterns that communicated consistency and homogeneity." *Id.* ¶82.

Each investor purchased securities for a particular tranche. The "tranche" supposedly reflects the "order" the investor gets paid. *Id.* ¶¶50-52, 54. In all cases, the tranches for each Offering were interrelated and uniformly affected by Wells Fargo's systematic departure from its underwriting standards. *Id.* ¶¶55, 69-86. As Dr. Mason further explains, "all the securities in an offering are interrelated and untrue statements and material omissions in the Offering Documents similarly affect the securities in each offering." *Id.* ¶6.

B. The Proposed Class Representatives

Lead Plaintiffs, like all proposed Class members, purchased or acquired one or more of the Certificates. *See* Transaction Records, Exs. 14-17. The Honorable Susan Illston, when appointing the Lead Plaintiffs, found that "like all plaintiffs in this action, [the Lead Plaintiffs] claim that they purchased Certificates based on alleged misrepresentations in the Offering Documents (typicality) and there appears to be no reason that their interests would conflict with those of the class." *See* Lead Plaintiff Order, ECF No. 124 at 12.

Lead Plaintiff Alameda County Employees' Retirement Association ("ACERA") is a defined benefit pension plan and provides lifetime benefits to members of the retirement system who meet

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[10] *Id.* ¶¶57-60, 83-85; *see also* Excerpted Offering Documents, Exs. 10-12. Complete copies of the Prospectuses and Prospectus Supplements have previously been filed with the Court. *See* ECF No. 164.

minimum age and length of service requirements. *See* Compl. ¶11. ACERA purchased Wells Fargo Mortgage Backed Securities 2007-11. *See* Trading Records, Ex. 14.

Lead Plaintiff New Orleans Employees' Retirement System ("New Orleans") is a defined benefit pension plan created under the laws of the State of Louisiana, and provides retirement, death, and disability benefits to all officers and employees of the City of New Orleans. *See* Compl. ¶14. New Orleans purchased Wells Fargo Mortgage-Backed Securities 2006-AR10, 2006-AR2, 2006-AR8, 2006-3, 2006-6, 2006-AR11, and 2006-AR17. *See* Trading Records, Ex. 15.

Lead Plaintiff Louisiana Sheriffs' Pension and Relief Fund ("Louisiana Sheriffs") is a pension and relief fund for sheriffs and deputies in all parishes throughout Louisiana. *See* Compl. ¶13. Louisiana Sheriffs purchased Wells Fargo Mortgage-Backed Securities 2006-4, 2006-1, 2006-AR2, 2006-2, 2006-AR4, 2006-AR5, 2006-AR6, 2006-AR10, 2006-AR12, and 2006-AR14. *See* Trading Records, Ex. 16.

Lead Plaintiff Government of Guam Retirement Fund ("Guam") is a defined benefit pension plan and provides annuities and other benefits to its members who complete a prescribed number of years in government service. *See* Compl. ¶12. Guam purchased Wells Fargo Mortgage-Backed Securities 2006-AR1, 2006-AR2, 2006-3, 2006-AR10, 2006-6, and 2006-AR17. *See* Trading Records, Ex. 17.

Lead Plaintiffs have supervised the progress of this litigation by, among other things, reviewing pleadings and communicating regularly with Lead Counsel regarding the status of the case and significant developments. Lead Plaintiffs are willing and committed to serve as representative parties on behalf of the Class, including providing testimony, if necessary, at deposition and trial. *See* Lead Plaintiffs' Certifications, Ex. 13 at ¶3. Each is informed of the mediation scheduled before the Honorable Layn R. Phillips (Ret.) for May 2011, and intends to continue to supervise the litigation as a whole.

III. ARGUMENT

The class certification analysis involves two steps. First, the proposed class must satisfy Rule 23(a)'s four prerequisites: (i) the class is so numerous that joinder of all members is impracticable; (ii) there are questions of law or fact common to the class; (iii) the claims or defenses of the

representative parties are typical; and (iv) the class representatives and their counsel will fairly and adequately protect the interests of the class. *In re Charles Schwab Corp. Sec. Litig.*, 264 F.R.D. 531, 536 (N.D. Cal. 2009). Second, the proposed class must satisfy Rule 23(b): (i) questions of law or fact common to class members must predominate over individualized ones; and (ii) the class action device must be superior to other available methods for efficiently resolving the controversy. *Id.*

"'A Rule 23 determination is wholly procedural and has nothing to do with whether a plaintiff will ultimately prevail on the substantive merits of its claim.'"[11] "[T]o qualify for class certification a plaintiff need not make a prima facie showing that he or she will prevail on the merits." *In re THQ*, 2002 WL 1832145, at *2. In other words, "[a] suit may be a proper class action, conforming to Rule 23, and still be dismissed for failure to state a cause of action." *In re Heritage Bond Litig.*, 2004 WL 1638201, at *6 (C.D. Cal. July 12, 2004). "[N]either the possibility that a plaintiff will be unable to prove his allegations, nor the possibility that the later course of the suit might unforeseeably prove the original decision to certify the class wrong, is a basis for declining to certify a class which apparently satisfies the Rule." *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975).

Although the moving party bears the burden on a motion for class certification, "[a]ll that is required is enough for the court to form a 'reasonable judgment' on each requirement" of Rule 23. *Heritage Bond*, 2004 WL 1638201, at *6. As courts in this District have explained, "[i]n reviewing a motion for class certification, a court generally is bound to take the substantive allegations of the complaint as true," with the court looking beyond the pleadings only "to determine whether the requirements of Rule 23 have been met." *In re UTStarCom, Inc., Sec. Litig.*, 2010 WL 1945737, at *3 (N.D. Cal. May 12, 2010).[12] Lead Plaintiffs have amply met their burden here.

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[11] *In re Portal Software, Inc. Sec. Litig.*, 2007 WL 1991529, at *2 (N.D Cal. June 30, 2007); *see also In re Genentech, Inc. Sec. Litig.*, 1990 WL 120641, at *3 (N.D. Cal. June 8, 1990) ("The issues in a class certification motion may be generally described as procedural in nature.").

[12] These principles were reinforced in *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010), which is currently being reviewed by the Supreme Court. *Dukes* confirmed that, while a district court may not "unquestioningly accept a plaintiff's arguments as to the necessary Rule 23 determinations," the court's focus remains on whether common questions exist and, "in some cases, the pleadings will be sufficient to render the certification decision." *Id.* at 587, 589; *see also Wang v. Chinese Daily News, Inc.*, 623 F.3d 743, 754 (9th Cir. 2010) (under *Dukes*, a district court "need not always look beyond the complaint"). The *Dukes* opinion confirmed that "district courts may *not* analyze any portion of the merits of a claim that do not overlap with the Rule 23 requirements" and that "the

A. Lead Plaintiffs' Claims Are Well Suited For Class Treatment

"The Ninth Circuit favors a liberal use of class actions to enforce federal securities laws." *Yamner v. Boich*, 1994 U.S. Dist. LEXIS 20849, at *6 (N.D. Cal. Sept. 15, 1994).[13] "'[I]t is well recognized that Rule 23 is to be liberally construed in a securities fraud context because class actions are particularly effective in serving as private policing weapons against corporate wrongdoing.'" *In re Cooper Cos. Inc. Sec. Litig.*, 254 F.R.D. 628, 642 (C.D. Cal. 2009) (citing cases). This liberal policy is also based on the practical reality that, given the resources necessary to prosecute securities actions and the risk of little-to-no recovery, "denial of class certification may prevent such suits from proceeding at all." *In re Scorpion Techs., Inc.*, 1994 WL 774029, at *3 (N.D. Cal. Aug. 10, 1994).

Courts have further recognized that Section 11 claims are, by their very nature, "***particularly well-suited*** to class treatment ... because Section 11 claims require only a material misstatement or omission in a Registration Statement to prove liability." *In re Bank One Sec. Litig./First Chicago S'holder Claims*, 2002 WL 989454, at *4 (N.D. Ill. May 14, 2002). As the Supreme Court has explained, "[Section] 11 places a relatively minimal burden on a plaintiff," with liability "virtually absolute, even for innocent misstatements." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381-83 (1983). The statute's aim is "not so much to compensate the defrauded purchaser as to promote enforcement of the Act and to deter negligence by providing a penalty for those who fail in their duties." *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276, 1288 (2d Cir. 1969). Reflecting this aim, Section 11 claims, unlike claims of fraud under common law or Section 10(b) of the Securities Exchange Act, do not require a showing of "scienter, reliance, or loss causation." *Rafton v. Rydex Series Funds*, 2011 WL 31114, at *6 (N.D. Cal. Jan. 5, 2011). Rather, "Section 11 of the Securities Act focuses on misstatements or omissions in registration statements." *Id.*

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purpose of the district court's inquiry at this stage remains focused on, for example, common questions of law or fact under Rule 23(a)(2), or predominance under Rule 23(b)(3), *not* the proof of answers to those questions or the likelihood of success on the merits." *Id.* at 590, 594. The standard announced was "*not* a new standard at all," with the majority not finding "a single case in our court that incorrectly relied on the 'no merits inquiry' language ... in certifying a class without examining necessary issues because they overlapped with the merits." *Id.* at 590.

[13] *Accord In re United Energy Corp. Solar Power Modules Tax Shelter Invs. Sec. Litig.*, 122 F.R.D. 251, 253 (C.D. Cal. 1988) ("In a securities case, the requirements of Rule 23 should be liberally construed in favor of class actions."); *In re Activision Sec. Litig.*, 621 F. Supp. 415, 428 (N.D. Cal. 1985) ("The Ninth Circuit takes a liberal view of class actions in securities litigation.").

As the Third Circuit recently observed, it is precisely because of its "formulaic nature," that "[Section] 11 leaves defendants with little room to maneuver" at the class certification stage. *In re Constar Int'l Inc. Sec, Litig.*, 585 F.3d 774, 785 (3rd Cir. 2009). Among other things, "a [Section] 11 case will never demand individualized proof as to an investor's reliance or knowledge." *Id.* at 784. For this reason, courts in this District and elsewhere have certified countless Section 11 class actions, with the Honorable Marilyn Patel of this District concluding that class certification is ***"the rule in this district"*** for Section 11 claims. *Activision*, 621 F. Supp. at 428 ("Certification of a plaintiff class is the rule in this district in cases such as the instant one where the securities fraud alleged concerns misrepresentations or omissions in offering materials issued prior to a public offering."). There is no reason to depart from this rule.

B. The Proposed Class Action Satisfies Rule 23(a)

Each of Rule 23(a)'s requirements is met here: (i) the class is so numerous that joinder of all members is impracticable; (ii) there are questions of law or fact common to the class; (iii) the claims or defenses of the representative parties are typical of those asserted by the absent class members; and (iv) the representative parties will fairly and adequately protect the interests of the class.

1. Numerosity: The Class Is Sufficiently Numerous That Joinder Is Impracticable

The "numerosity" requirement of Rule 23(a)(1) is satisfied if "the class is so numerous that joinder of all members is impracticable." For purposes of Rule 23(a)(1), "'impracticability' does not mean 'impossibility,' but only the difficulty or inconvenience of joining all members of the class." *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964). Such impracticability of joinder "is presumed where the plaintiff class contains forty or more members." *Cooper*, 254 F.R.D. at 634; *accord Barnes v. AT & T Pension Benefit Plan*, 270 F.R.D. 488, 493 (N.D. Cal. 2010) ("'As a general rule, classes numbering greater than forty individuals satisfy the numerosity requirement.'"). "To satisfy the numerosity requirement, plaintiffs need not establish the exact number of class members, but must merely demonstrate that it is sufficiently numerous." *Genentech*, 1990 WL 120641, at *3. Nor do Plaintiffs need to show that the putative class members will ultimately prevail on the merits. *Thomas v. Baca*, 231 F.R.D. 397, 400 (C.D. Cal. 2005) ("[A]rguments [that] do not

refute the estimates [of numerosity, but] attack the merits of the action ... are not relevant to the consideration of numerosity."). Instead, Lead Plaintiffs need only provide "[a] reasonable estimate of the limited number of purported class members." *Mazza v. Am. Honda Motor Co.*, 254 F.R.D. 610, 617 (C.D. Cal. 2008). In proffering such an estimate, "'federal trial courts are quite willing to accept common sense assumptions in order to support a finding of numerosity, often looking at the number of shares traded or transactions completed rather than seeking to determine directly the number of potential class members involved.'" *In re Verisign, Inc. Sec. Litig.*, 2005 U.S. Dist. LEXIS 10438, at *25-26 (N.D. Cal. Jan. 13, 2005); *see also In re Pilgrim Sec. Litig.*, 1996 WL 742448, at *4 (C.D. Cal. Jan. 23, 1996) ("Thousands of shares of the Pilgrim Trusts [holding mortgage-backed securities] were traded during the relevant period, and therefore at a minimum there are several hundred class members.").

Claims of the impracticability of joinder are strengthened by a showing that the "class is geographically dispersed and [the] class members are difficult to identify," thus creating difficulties in organizing a non-representative action. *In re Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346, 351 (N.D. Cal. 2005); *see also In re U.S. Fin. Sec. Litig.*, 69 F.R.D. 24, 34 (S.D. Cal. 1975) (finding that, when "plaintiffs cannot discover the identity of other [securities] holders" because they are registered in another's name, joinder of all class members is not only impracticable, it is "an impossibility").

Here, Lead Plaintiffs and the Class easily satisfy numerosity. The record to date reflects numerous individual and institutional investors in the 17 Offerings. The conservative number of distinct investors exceeds 3,200. *See* Mason Report, Ex. 1, at ¶93; *see also* Stickney Decl. ¶19, Exs. 18-20 (sample of trading data obtained from third-party banks).[14] At a minimum, each Offering has well over 50 distinct investors, with the majority of the Offerings having in excess of 150 distinct investors, and undoubtedly many more. *Id.* The investors include both institutions and individuals, with a wide range in the size of the transactions and some as low as 10,000 units and others in the hundreds of millions units. Mason Report, Ex. 1, at ¶95. In addition, the distinct investors are

[14] Given the voluminous nature of the transaction records, Lead Plaintiffs have not submitted the records from each transaction obtained. The material has been produced to Defendants and is available to the Court in electronic format upon request. *See* Stickney Decl. ¶19.

dispersed throughout the country. *Id.* Defendants themselves have acknowledged during these proceedings that numerous class members are "located across the country" and that the securities are often held by "registered holders" that will transact for numerous beneficial holders. Defs. Mot. To Transfer, ECF No. 73-1 at 13:13-14. Under such circumstances, joinder is plainly not practicable, and numerosity is satisfied.

2. Commonality: Common Questions Of Law And Fact Are Shared Among The Class

The "commonality" requirement of Rule 23(a)(2) is satisfied if "there are questions of law or fact which are common to the class." The requirement "has been construed permissively." *UTStarcom*, 2010 WL 1945737, at *4 (N.D. Cal. 2010). "All questions of fact and law need not be common to satisfy the rule." *In re Juniper Networks, Inc. Sec. Litig.*, 264 F.R.D. 584, 588 (N.D. Cal. 2009). Rather, the requirement of "[c]ommonality simply requires that there be at least ***one*** legal or factual issue common to the class." *Verisign*, 2005 U.S. Dist. LEXIS 10438, at *25-26. Given this low threshold, "the commonality prerequisite 'is easily met in most cases.'" *Id. at* *25-26.

To satisfy the commonality requirement, "[t]he existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon v. Chrysler Corp.,* 150 F.3d 1011, 1019 (9th Cir. 1998). In the context of securities class actions, a class asserting claims based on a common course of conduct satisfies the commonality requirement even where the class members are exposed to different misrepresentations at different times. *Id.* When certifying a Section 11 class composed of investors in ten different Trusts holding mortgage-backed securities, the Honorable David V. Kenyon in *In re Pilgrim Securities Litigation* held as follows:

> Plaintiffs' [Complaint] is based upon Defendants' alleged misrepresentations and omissions contained in registration statements and prospectuses about the contents of the Trusts' portfolios, their illiquidity, and sensitivity to interest rate increases. While the proposed class members may have been exposed to different representations, ***the common question of whether they were harmed by Defendants' alleged course of fraudulent conduct is sufficient*** to satisfy Rule 23(a)(2)'s commonality requirement.

1996 WL 742448, at *4 (C.D. Cal. 1996).

Consistent with these authorities, courts have found with little exception that classes asserting claims under Section 11 satisfy commonality. *See, e.g., Juniper Networks*, 264 F.R.D. at 588 (finding, in certifying Section 11 class, that common issues included "whether Defendants violated the federal securities laws" and "whether Defendants omitted or misrepresented material facts"); *McFarland v. Memorex Corp.*, 96 F.R.D. 357, 362 (N.D. Cal. 1982) (finding, in certifying Section 11 class, that "the presence of any misstatements or omissions in the registration statement is capable of litigation as a class question and does indeed present a common question of fact.... The defense of plaintiffs' knowledge is also a common question of fact, as is the issue of defendants' due diligence."); *see also Schaefer v. Overland Express Family of Funds*, 169 F.R.D. 124, 128 (S.D. Cal. 1996) (rejecting defendants' attempt in Section 11 case to "'split hairs' [to] argue that there are not common questions of law and fact").

Common questions of fact and law, each of which ***alone*** satisfies the commonality requirement, abound in this case, including the following:

1. Do the Offering Documents contain untrue statements or omissions about Wells Fargo's underwriting standards?
2. Are the misrepresentations and omissions material to a reasonable investor?
3. Does Wells Fargo Bank, N.A. "control" its subsidiary, the Depositor?
4. Are the challenged representations "forward-looking statements" that are protected by the PSLRA safe-harbor, as Defendants claim in their Answer?
5. Do the Offering Documents contain sufficient cautionary statements to render the misstatements and omissions non-actionable, as Defendants claim in their Answer?
6. Did the Underwriter Defendants perform adequate due diligence prior to selling the Certificates?
7. To what extent, if any, did market or other factors – as Defendants claim – cause the Class members' losses?

In addition, as further described in the Mason Report, all the securities in each offering are interrelated and all of the untrue statements and material omissions in the Offering Documents would similarly affect the securities in each offering. *See* Mason Report, Ex. 1, at ¶8. Rule 23(a)(2)'s requirement of a common question of law or fact is plainly satisfied.

3. Typicality: The Claims Of The Proposed Class Representatives Are Typical Of The Claims Of Other Members

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." "Like the commonality requirement, the typicality requirement is permissive: 'representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical.'" *UTStarcom,* 2010 WL 1945737, at *5. In the securities context, courts have cautioned that "the typicality requirement is not demanding," *Heritage Bond*, 2004 WL 1638201, at *4, and "is to be 'loosely construed,'" *Susser v. Castle Energy Corp.*, 1994 WL 247206, at *6 (C.D. Cal. Apr. 25, 1994).

"'Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought.'" *Verisign,* 2005 U.S. Dist. LEXIS 10438, at *25-26. "Courts have held that if the claims of the named plaintiffs and putative class members involve the same conduct by the defendant, typicality is established regardless of the factual differences." *Heritage Bond*, 2004 WL 1638201, at *7; *see also Pilgrim*, 1996 WL 742448, at *4 (finding class representatives typical where their claims "arise from the same course of conduct: Defendants' alleged misrepresentations and omissions regarding the Trusts [holding mortgage-backed securities] during the class period, and is based upon the same legal theories as the claims of the class members").

"In the securities context, the fact that the class representatives may have reviewed different documents from other members of the class or purchased different amounts of stock does not mean their claims are not typical of the class." *Heritage Bond*, 2004 WL 1638201, at *4 (certifying class of investors in 11 different bond offerings). Likewise, "differences in the amount of damage, the size or manner of [securities] purchased, the nature of the purchaser, and even the specific document influencing the purchase does not render a claim atypical in most securities cases." *Genentech*, 1990 WL 120641, at *4.

Such differences, in fact, have ***no*** bearing on the typicality analysis for class actions, like this one, predicated on Section 11 because it is immaterial whether a Section 11 plaintiff relied upon (or even read) the offering documents. The purpose of Section 11 is to promote care and deter negligence by issuers and underwriters when selling securities to the public. "Under Section 11, defendants are

liable, automatically, for any actual misstatements or omissions in the registration statement." *McFarland*, 96 F.R.D. at 362. As one court in this District explained in finding a Section 11 class representative typical of the absent class members:

> The first challenge presented by the defendants is that certain of the named plaintiffs did not rely upon the material misrepresentations allegedly made in Diasonics' Registration Statement and Prospectus when they purchased Diasonics stock.... ***The defendants' concern for the success of the silent majority of the class, while perhaps noble, is misplaced***. There is no requirement in the Ninth Circuit that a plaintiff's reliance must be established for ... a section 11 claim.

In re Diasonics Sec. Litig., 599 F. Supp. 447, 452 (N.D. Cal. 1984).

Typicality is easily established here. The nature of mortgage-backed securities, generally, and the Wells Fargo Offerings, specifically, is that each of the securities within an offering represents a claim on the cash flows of the underlying collateral. Mason Report, Ex. 1, at ¶¶4, 63-68. Thus, all cash flows to the different securities are based on the performance of the same underlying collateral. *Id.* And, to the extent there are untrue statements, and/or material omissions in the offering documents, all securities in the offerings will be adversely affected. *Id.* Lead Plaintiffs and the absent class members all assert the same claims under the Securities Act. They all base their claims on virtually identical misstatements and omissions in the Offering Documents and the same allegations of "control person" liability. All of their claims are predicated on the same wrongful course of conduct – namely, Wells Fargo's departure from its underwriting standards. Finally, Defendants assert the same defenses against both the Lead Plaintiffs and the absent class members, which further supports a finding of typicality.[15] Lead Plaintiffs plainly meet Rule 23(a)(3)'s "not demanding" requirement of typicality.

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[15] *See* ECF Nos. 314 (Answer of Wells Fargo Defendants) at 25; ECF No. 311 (Answer of Underwriter Defendants) at 28 n.6. Consideration of the defenses lodged against plaintiffs affects the "typicality" analysis only if the defenses are "'unique' in the truest sense." *In re First Capital Holdings Corp. Fin. Prods. Sec. Litig.*, 1993 WL 144861, at *9 (C.D. Cal. Feb. 26, 1993). In this case, there are no "unique" defenses. "The virtually absolute liability of § 11 largely ***eliminates*** class plaintiffs' vulnerability to unique defenses." *In re LILCO Sec. Litig.*, 111 F.R.D. 663, 673 (E.D.N.Y. 1986). Defendants here assert the ***same*** defenses against all plaintiffs and absent class members. As a result, Defendants' uniform defenses "affirm[], rather than negate[], a finding that the class representatives are typical of the class." *Pilgrim*, 1996 WL 742448, at *5; *see also Barnes*, 270 F.R.D. at 494 ("[T]he fact that [defendant] asserts all of the defenses against [the class representatives] and the class members supports a finding of typicality.").

4. Adequacy: The Proposed Class Representatives Will Fairly And Adequately Protect The Interests Of The Class

Rule 23(a)(4) requires that Lead Plaintiffs show that they "will fairly and adequately protect the interests of the class." To meet this requirement, it is sufficient that Lead Plaintiffs (i) are represented by competent counsel; and (ii) do not have any interests that conflict with, or are antagonistic to, those of the putative class members. *Genentech*, 1990 WL 120641, at *4. Both requirements are satisfied.

The first requirement, the competency of counsel, is the central focus of the "adequacy" inquiry for complex securities class actions. *See Shields v. Smith*, 1992 WL 295179, at *5 (N.D. Cal. Aug. 14, 1992) ("[T]he emphasis has been and should be placed on whether the representative's counsel is capable."). In this case, there is no doubt that Lead Plaintiffs' counsel is qualified and capable of prosecuting this action. Bernstein Litowitz has been prosecuting securities class actions for over 25 years and has a proven track record of success in complex cases such as this one. *See* Firm Resume, Ex. 21.

The second requirement is also met because Lead Plaintiffs' interests are sufficiently comparable with the other class members to satisfy Rule 23(a)(4). The "adequacy" requirement asks only whether "the representative's interests are comparable to those of the absent class members." *Schlagal v. Learning Tree, Int'l*, 1999 WL 672306, at *3 (C.D. Cal. Feb. 23, 1999). "'Only a conflict that goes to the very subject matter of the litigation will defeat a party's claim of representative status.'" *Id.* "[T]he mere potential for a conflict of interest is not sufficient to defeat class certification; the conflict must be actual, not hypothetical." *Meijer, Inc. v. Abbott Labs.*, 2008 WL 4065839, at *5 (N.D. Cal. Aug. 27, 2008).

In the context of securities class actions, courts have consistently found that class representatives that assert claims based on facts similar to those of the absent class members meet the "comparable interest" standard and satisfy Rule 23(a)(4). *See, e.g., Verisign*, 2005 U.S. Dist. LEXIS 10438, at *29 ("The Lead Plaintiffs' claims and the unnamed class members' claims do not conflict. They all arise out of the same set of facts – Defendants' alleged misrepresentations during the Class Period."); *In re Applied Micro Circuits Corp. Sec. Litig.*, 2003 U.S. Dist. LEXIS 14492, at *14 (S.D. Cal. July 10, 2003) ("The court finds that the interests of Lead Plaintiff is coextensive with the Class,

since they bring identical claims under the federal securities laws.").

Applying those standards here, Lead Plaintiffs are plainly "adequate" to represent the Class. They all purchased Wells Fargo Mortgage-Backed Securities pursuant or traceable to the Offering Documents. *See* Lead Plaintiffs' Certifications and Transaction Records, Exs. 13-17. Lead Plaintiffs seek to maximize recovery for themselves and the Class by demonstrating Wells Fargo's systematic departure from its underwriting standards. Additionally, there is no conflict between Lead Plaintiffs and any absent class member that would interfere with their ability to serve the interests of the Class.

Further demonstrating their adequacy, Lead Plaintiffs have been actively involved in this case and are committed to prosecute this action on behalf of the entire Class. Lead Plaintiffs reviewed and authorized the complaint in this action, applied for and were selected to serve as Lead Plaintiffs, and have supervised the progress of this litigation since its commencement. *See* Lead Plaintiffs' Certifications, Ex. 13 at ¶1. Lead Plaintiffs are willing and committed to serve as representative parties on behalf of the Class, including providing testimony, if necessary, at deposition and trial. *See id.* at ¶3. Since their appointment Lead Plaintiffs have received regular status reports from Lead Counsel, and have participated in document and written discovery in this case.

In short, Lead Plaintiffs are precisely the type of institutional investors Congress sought to empower when passing the Private Securities Litigation Reform Act of 1995 ("PSLRA"). Congress enacted the PSLRA in large part to encourage sophisticated institutional investors to take control of securities class actions and "increase the likelihood that parties with significant holdings in issuers, whose interests are more strongly aligned with the class of shareholders, will participate in the litigation and exercise control over the selection and actions of plaintiff's counsel." H.R. Conf. Rep. No. 104-369, at 32 (1995). Lead Plaintiffs, who have considerable interest in ensuring the Class attains a recovery, satisfy the adequacy requirement of Rule 23(a)(4).

C. The Proposed Class Action Satisfies Rule 23(b)(3)

Having met each of the four requirements of Rule 23(a), Lead Plaintiffs must also establish that this action is maintainable as a class action under one of the subsections of Rule 23(b). Here, Lead Plaintiffs seek certification under Rule 23(b)(3), which provides that an action is maintainable as a class action if "questions of law or fact common to class members predominate over any questions affecting

only individual members, [and] a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Lead Plaintiffs meet this burden.

1. Predominance: Common Questions Of Law And Fact Predominate

This action satisfies the requirement of Rule 23(b)(3) that common questions of fact and law predominate over individualized ones. To satisfy this requirement, common questions merely need to "predominate" – they do not need to be exclusive or dispositive. As the Ninth Circuit explained in *Harris*, the fact that individualized issues may exist does not defeat a showing of predominance:

> Rule 23(a)(3) 'does not require that all the members of the class be identically situated, if there are substantial questions either of law or fact common to all.' Rule 23(a)(3) is based on the assumption that the economy of time, effort, and expense which will result from a common trial of substantial common issues exceeds the additional burden which may be imposed upon the court and the parties by the necessity of also determining in the common litigation those issues which may be several.

329 F.2d at 914-15; *accord Blackie*, 524 F.2d at 902.[16] Predominance will exist where the class members "have more issues keeping them together than driving them apart." *Cooper*, 254 F.R.D. at 634 (explaining that "questions related to liability" have "primacy" over any theoretical defenses that "only affect certain members of the class").

"The Ninth Circuit has repeatedly found that common issues predominate in federal securities actions where the proposed class members have all been injured by the same alleged course of conduct." *In re First Capital Holdings Corp. Fin. Prods. Sec. Litig.*, 1993 WL 144861, at *6 (C.D. Cal. Feb. 23, 1993). This "course of conduct" test is met regardless of whether members of the class invested at different times, were exposed to different misrepresentations, or purchased pursuant to different offerings. As explained by the Ninth Circuit in *Blackie*:

> Confronted with a class of purchasers allegedly defrauded over a period of time by ***similar misrepresentations***, courts have taken the common sense approach that the class is united by a common interest in determining whether a defendant's course of conduct is in its ***broad outlines actionable***, which is ***not defeated by slight differences*** in class members' positions, and that the issue may profitably be tried in one suit.

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[16] *Accord Genentech*, 1990 WL 120641, at *5 ("The mere presence of potential individual issues does not defeat the predominance of common questions."); *In re Gap Stores Sec. Litig.*, 79 F.R.D. 283, 305 (N.D. Cal. 1978) ("Although common questions must predominate they need not be dispositive since Rule 23(c)(4) contemplates maintenance of a class with respect to particular issues.").

Blackie, 524 F.2d at 901; *accord Schneider v. Traweek*, 1990 WL 132716, at *13 (C.D. Cal. July 31, 1990) (certifying class of investors pursuant to eight sets of different offering materials because "[t]he overriding 'theme' in this case is that all of the various Defendants contributed somehow in preparing and distributing offering materials that [contained the misrepresentations]," despite substantial differences in the offering materials); *Heritage Bond*, 2004 WL 1638201, at *6 (finding predominance test satisfied for investors in 11 different bond offerings).

Courts and commentators alike have recognized that, for Section 11 claims, "[a] court can usually find that common factual and legal issues will predominate." J. William Hicks, 17 Civil Liabilities: Enforcement & Litigation Under the 1933 Act § 4:43 (citing cases). Because such claims focus on the contents of the Offering Documents – with no requirement to show reliance, materiality, knowledge, or causation – they are particularly suited for class treatment. As the Third Circuit explained in a careful discussion of the propriety and benefits of certification of a Section 11 class:

> The crucial questions are: '[W]as there a misrepresentation? And, if so, was it objectively material?' Since reliance is irrelevant in a § 11 case, ***a § 11 case will never demand individualized proof as to an investor's reliance or knowledge***.... Further, because a misrepresentation is material if a reasonable investor would have considered a fact important, the effect of a material misrepresentation is felt uniformly across the class of investors, regardless of whether the market is efficient. Since this is an objective standard, ***materiality is not determined ... by the 'mix of information' available to each individual plaintiff***.... We also note that, although loss causation is an affirmative defense in a § 11 case, ***this defense would not defeat predominance***.... Any affirmative defense on this ground would present a ***common*** issue-not an individual one.

Constar, 585 F.3d at 784.

Moreover, the federal securities laws protect sophisticated and unsophisticated investors alike. "[I]nasmuch as reliance is not an element of a Section 11 ... claim, a plaintiff's 'sophistication' regarding securities and investment practices is ***irrelevant.***'" *Funke v. Life Fin. Corp.*, 2003 WL 1787125, at *2 (S.D.N.Y. Apr. 3, 2003) *quoting Weiss v. Blech*, 1997 WL 458678, at *3 (S.D.N.Y. Aug. 11, 1997); *cf. Blackie*, 524 F.2d at 905 ("Differences in sophistication, etc., among purchasers have no bearing in the impersonal market fraud context.").

Courts in this Circuit find that the predominance requirement is easily satisfied for Section 11 claims. When certifying a Section 11 class composed of investors in eight partnerships based on eight different offerings, the Honorable Richard Gabois in *Schneider v. Traweek* found the predominance

requirement met because "the investors in [the offerings] are asserting common legal theories under the same federal statutory provisions as the rest of the proposed 'global' class, making resolution of all of the Plaintiffs' claims appropriate on a 'global' class-wide basis." 1990 WL 132716, at *13. Likewise, in certifying a Securities Act class, the Honorable William Alsup held in *In re Charles Schwab Corp. Sec. Litig.* that "[a] class limited to investors harmed by false statements in prospectuses does not pose excessive individual issues." 264 F.R.D. at 536.

As discussed above, there are a number of questions common to the members of the Class, and all of the class members have been injured by the same wrongful course of conduct. (*See infra* at § B.2) (listing seven examples of common questions of law and fact). The common legal and factual questions are at the core of the litigation and are focused on the actions of Defendants, not Plaintiffs. The central common question that predominates is whether the Offering Documents contain untrue statements or material omissions.

Defendants have admitted the predominance of common issues focus on Defendants and the alleged untrue statements and omissions in the Offering Documents. When seeking unsuccessfully to transfer this action to the Southern District of New York, Defendants made the following representations and arguments to the Court:

- "[T]he primary evidentiary issues [in this action] will relate to the Defendants' conduct, ***not Plaintiff's actions***" (Defs. Mot. To Transfer, ECF No. 73-1 at 13);
- "[P]laintiffs' allegations focus on defendants' conduct and ***do not appear to implicate involved questions of fact regarding plaintiffs' behavior***" (*Id.* at 9);
- "[T]he ***obvious*** testimonial evidence that would be proffered at a trial ***relates to the representations in the Offering Documents***, and how the Certificates were rated" (Defs. Reply Memo. Re Mot. To Transfer, ECF No. 57, 09-cv-01620-SI at 11); and
- "[T]he ***core issues*** in this action" are "the representations made in the Offering Documents" and "the operative facts [in this action] relate to the alleged representations made in the Offering Documents." (*Id.* at 13.)

As Defendants acknowledged, the "primary" and "core" issues in this action are common, with the overarching issue being whether the Offering Documents contained untrue statements or material omissions. To the extent that Wells Fargo systematically departed from its stated underwriting guidelines – as Lead Plaintiffs will demonstrate – there were untrue statements and/or material omissions in all the Offering Documents, with the securities within all of the Offerings adversely

affected. *See* Mason Report, Ex. 1, at ¶¶5-6, 55, 63-86. As such, common questions predominate over individual ones.[17]

2. Superiority: A Class Action Is Superior To Other Available Methods For Resolving This Dispute

The superiority prong of Rule 23(b)(3) requires courts to evaluate whether class resolution would be "superior to other available methods for fairly and efficiently adjudicating the controversy." "The United States Supreme Court, the Ninth Circuit and its district courts have repeatedly endorsed the class action procedure as the superior method of adjudicating claims under the federal securities laws." *Susser*, 1994 WL 247206, at *6; *see also Shields*, 1992 WL 295179, at *5 ("Myriads of courts have consistently endorsed the use of class procedures in resolving claims under the federal and state securities laws."). They have recognized that class actions are essential for securities claims "'because of their deterrent effect' ... in accomplishing the objectives of the securities law.'" *Scorpion Techs.*, 1994 WL 774029, at *4. They have further recognized that "[t]rying each plaintiff's case separately would be incredibly inefficient, burdensome, and costly," creating "a substantial danger of inconsistent findings and judgments." *Cooper*, 254 F.R.D. at 642 ("It makes no sense for the parties to conduct that

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[17] In *N.J. Carpenters Health Fund v. Residential Capital, LLC*, 2011 WL 147735 (S.D.N.Y Jan. 18, 2011), *petition for appellate review pending*, the district court found that an affirmative defense of knowledge predominated. This out-of-circuit decision is not persuasive for four reasons: First, the affirmative defense of actual knowledge only applies when the plaintiff actually knew of the untrue statement or omitted fact before the purchase. *See* 15 U.S.C. § 77k. Here, the Defendants ***deny*** the existence of any untrue statement and admit never disclosing the falsities in the Offering Documents to ***any*** member of the class. *See* Wells Fargo's Response to Requests For Admission, Ex. 9 at Nos. 60-62. Second, questions relating to Defendants' Section 11 knowledge defense raise common (not individualized) questions about what information was available in the market place. *See McFarland*, 96 F.R.D. at 362 ("The defense of plaintiffs' knowledge is also a ***common*** question of fact."); 5 Disclosure & Remedies Under the Sec. Laws § 3:46 ("The defense of plaintiffs' knowledge is a ***common question*** in a class action" brought pursuant to Section 11). Third, the defense of actual "knowledge" of an untrue statement cannot create individualized issues where, as here, the issuer has not issued a curative statement that specifically addressed the misstatements in the Offering Documents. *See, e.g.*, *Shields*, 1992 WL 295179, at *5 ("Class certification has been denied only where there were disclosures whose curative nature was not actually or reasonably disputed."); *In re Monster Worldwide, Inc. Sec. Litig.*, 251 F.R.D. 132, 137 (S.D.N.Y. 2008) (rejecting challenge to certification where "none of the public information regarding options backdating is so blatant and so directly addressed to Monster as to be facially sufficient"); *Lapin v. Goldman Sachs & Co.*, 254 F.R.D. 168, 184 (S.D.N.Y. 2008) (same). Finally, even assuming *arguendo* that there were a "potential need for individualized knowledge determinations in plaintiffs section 11 ... claims, common questions ***still*** predominate" in this case because, under Ninth Circuit law, "the issue underlying class certification is 'whether a defendant's course of conduct is in its broad outlines actionable, [not whether there are] slight differences in class members' positions.'" *In re DJ Orthopedics, Inc. Sec. Litig.*, 2003 U.S. Dist. LEXIS 21534, at *27 (S.D. Cal. Nov. 16, 2003) (citing *Blackie*, 524 F.2d at 906).

discovery and trial preparation more than once."). To avoid this "incredible inefficient, burdensome, and costly" result, courts have "generally found that ... securities fraud actions are usually best maintained as class actions" and satisfy the "superiority" requirement of Rule 23(b)(3). *Schaefer*, 169 F.R.D. at 130.

The "superiority" requirement asks "whether the objectives of the particular class action procedure will be achieved in the particular case [and] involves a comparative evaluation of alternative mechanisms of dispute resolution." *Hanlon*, 150 F.3d at 1023. In making this evaluation, Rule 23(b)(3) identifies four non-exclusive factors for courts to consider: (i) the interests of members of the class in bringing individual suits; (ii) the extent and nature of any litigation concerning the controversy already brought by class members; (iii) the desirability of concentrating the litigation of the claims in the particular forum; and (iv) the difficulties likely to be encountered in the management of the class action. Here, each of these factors favors class treatment.

There is no overwhelming interest by class members to proceed individually. No absent class member has brought an individual action based on any of the Offerings at issue, which alone "indicates that the class members have no great interest in controlling the prosecution of the litigation." *In re Revco Sec. Litig.*, 142 F.R.D. 659, 669 (N.D. Ohio 1992). There is little wonder why plaintiffs prefer to proceed as a class, rather than through individual actions. As the Ninth Circuit recognized in *Hanlon*, if individual plaintiffs attempt to pursue their claims individually, "[t]here would be less litigation or settlement leverage, significantly reduced resources and no greater prospect for recovery." 150 F.3d at 1023.

The investors in the Offerings include both institutions and individuals, with a wide range in the size of the transactions and some as low as 10,000 units. *See* Mason Report, Ex. 1, at ¶95. Although some absent class members ***may*** be able to fund individual lawsuits – a theoretical possibility present in virtually all securities class actions – there is no reason to believe that ***all*** or even most of the absent class members have sufficient resources or economic incentives to do so. *See In re Worlds of Wonder Sec. Litig.*, 1990 WL 61951, at *6 (N.D. Cal. Mar. 23, 1990) (rejecting challenge to superiority based on argument that "most of the ... investors are large institutions [that] can maintain independent law suits" because there was no evidence that "*all* the proposed Debenture subclass members can maintain

a class") (emphasis in original)). Indeed, this is not a case where liability is uncontested; rather, Defendants vehemently contest liability and argue that any decreases in the value of the securities at issue are attributable to market forces, not misstatements in the Offering Documents. *See* Defendants' Answers, ECF No. 311 at 30-31; ECF No. 314 at 28-29. For many, the potential recovery is too uncertain and small to justify the resources and time necessary to prosecute this action on an individual basis.

Moreover, even assuming *arguendo* that all of the members of the class had sufficient economic incentives to litigate their claims individually (which is not the case), proceeding as a class would still be superior to individual actions of greater than 3,200 investors. *See* Mason Report, Ex. 1, at ¶93. Courts have repeatedly held that "'[t]he existence of large individual claims that are sufficient for individual suits is no bar to a class'" particularly where, as here, "'the advantages of unitary adjudication exist to determine the defendant's liability.'" *Bd. of Trs. of the AFTRA Ret. Fund v. JPMorgan Chase Bank*, N.A., 269 F.R.D. 340, 355 (S.D.N.Y. 2010); *see also In re K-Dur Antitrust Litig.*, 2008 WL 2699390, at *20 (D.N.J. Apr. 14, 2008) ("As other courts have noted, Rule 23(b)(3) 'does not exclude from certification cases in which individual damages run high.'"); *Revco*, 142 F.R.D. 659 at 669 ("While members of the class may be capable of litigating separate actions, Rule 23 has no restrictions on wealth.").

There are no pending individual actions that would interfere with the efficient resolution of this class action. There are no known actions currently pending that involve these Offerings. The only known direct actions concerning Wells Fargo's Mortgage-Backed Securities – which were filed by the Charles Schwab Corporation – do not name any of the Offerings at issue here.[18]

It is desirable to concentrate this litigation in this forum. The conservative number of class members in this case exceeds 3,200, with the majority of the Offerings each having in excess of 150 investors, and undoubtedly many more. *See* Mason Report, Ex. 1, at ¶93; *see also* Stickney Decl. Exs. 18-20. These distinct investors are dispersed throughout the country, "from New York to California, Texas, Wisconsin, Wyoming, and Hawaii." *Id.*, at ¶95; *see also* Defs. Mot. To Transfer, ECF No. 73-1

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[18] The "Schwab Actions" refers to Charles Schwab Corporation's lawsuits against Banc of America Securities LLC and BNP Paribas Securities Corp. (Case Nos. 10-cv-4030-SI and 10-cv-3489-LHK).

at 13:13-14 (investors are "located across the country"). Under such circumstances, joinder is plainly not a practicable option, and given the geographical dispersion of class members, "[d]enying certification would be drastic because it would create the prospect of inefficient and costly multi-forum litigation that would not only be undesirable, but prejudicial to all parties-plaintiffs, defendants and witnesses-as well as the courts." *Heritage Bond*, 2004 WL 1638201, at *11.

This Court is unlikely to face unusual manageability difficulties with the class action. While manageability concerns may be considered in the "superiority" analysis, "[t]he more important considerations remain the predominance of common questions and superiority of the class action." *Newman v. CheckRite Cal., Inc.*, 1996 WL 1118092, at *9 (E.D. Cal. Aug. 2, 1996). Indeed, "denial of class certification because of conjured manageability problems is disfavored among both the courts and the legal commentators." *In re Sugar Industry Antitrust Litigation*, 1976 WL 1374, at *29 (N.D. Cal. May 21, 1976).

"District courts have consistently recognized that the common liability issues involved in securities fraud cases are ideally suited for resolution by way of a class action." *Cooper*, 254 F.R.D. at 641. Courts have further recognized that class actions predicated on Section 11 claims are relatively easy to manage because Section 11 includes a statutory formula for calculating damages and does not require a showing of scienter, reliance, or loss causation. *See, e.g.*, *In re Juniper Networks, Inc. Sec. Litig.*, 264 F.R.D. 584, 592 (N.D. Cal. 2009) ("[T]he Court does not see any particular management difficulties regarding this case proceeding as a class action."); *In re Charles Schwab Corp. Sec. Litig.*, 264 F.R.D. 531, 536 (N.D. Cal. 2009) (finding "far fewer ... manageability problems" because "[t]he instant Section 11 ... claims do not require proof of reliance").

To further ensure that this action is manageable, the Court may create subclasses, bifurcate the proceedings, or even decertify the class if manageability issues ultimately prove overwhelming. *See In re Ramtek Sec. Litig.*, 1991 WL 56067, at *4 (N.D. Cal. Feb. 4, 1991) ("The certification of a class is a preliminary ruling and is therefore subject to modification."). Although Lead Plaintiffs believe the Court need not do so at this juncture, the Court may address any perceived manageability concerns through the creation of subclasses for each Offering either at this time or in the future. *See, e.g.*, *Schneider*, 1990 WL 132716, at *16 (certifying a global class of investors in eight separate

partnerships, but noting that it may later create sub-classes pursuant to Rule 23(d)); *Pilgrim*, 1996 WL 742448, at *4 (certifying class of investors in ten different trusts without sub-classes); *In re Technical Equities Fed. Sec. Litig.*, 1988 U.S. Dist. LEXIS 15813 (N.D. Cal. Oct. 3, 1988) (certifying global class and five subclasses for common stock, debentures, notes, general and limited partnerships, and mortgage pool partnerships). Accordingly, the class action device is the superior method for adjudicating the claims of Lead Plaintiffs and the Class.

IV. CONCLUSION

For the foregoing reasons, this Action meets the requirements of the Fed. R. Civ. P. 23(a) and 23(b)(3). Lead Plaintiffs request entry of an Order certifying a class as follows, with Lead Plaintiffs as class representative and Bernstein Litowitz as class counsel:

> All persons or entities who purchased or otherwise acquired Wells Fargo Mortgage-Backed Securities 2006-1, 2006-2, 2006-3, 2006-4, 2006-6, 2006-AR1, 2006-AR2, 2006-AR4, 2006-AR5, 2006-AR6, 2006-AR8, 2006-AR10, 2006-AR11, 2006-AR12, 2006-AR14, 2006-AR17 or 2007-11, and who were damaged thereby (the "Class"). Excluded from the Class are Defendants and their respective officers, affiliates and directors at all relevant times, members of their immediate families and their legal representatives, heirs, successors or assigns and any entity in which Defendants have or had a controlling interest.

DATED: February 11, 2011

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