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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DANNY LANE, BEVERLY LANE, and MERCEDES GUERRERO, individually, and for other persons similarly situated,

Plaintiffs,

vs.

WELLS FARGO BANK, N.A.,

Defendant.

CASE NO. 12-CV-4026 WHA

REPLY MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

Date: June 20, 2013
Time: 8:00 a.m. PST
Crtrm: 8, 19th Floor
Judge: Hon. William Alsup

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INTRODUCTION

The *Lane* Plaintiffs and Wells Fargo (collectively, "Respondents") have submitted 42 pages of briefing in opposition to Movants' Motion to Intervene, but never address (even once) the best interest of the class members. The reason is simple – intervention is plainly in the best interest of the class members. This is obvious because:

- More evidence to support the class members' claims (and request for class certification) is better than less evidence;
- Adding Wells Fargo Insurance ("WFI") as a defendant to the class members' kickback claims is better than not including WFI (since WFI directly received the kickbacks);
- Representation by counsel who have prevailed on a similar class certification motion and who successfully resolved similar claims, *see Hofstetter v. Chase Home Finance, LLC*, No. 3:10-cv-01313, 2011 WL 1225900 (N.D. Cal. Mar. 31, 2011), is more adequate than representation by counsel who lost a similar class certification motion and emboldened the current defendant by their defeat, *see Gordon v. Chase Home Finance, LLC*, No. 8:11-cv-02001, 2013 WL 436445 (M.D. Fla. Feb. 5, 2013); and
- Representation by counsel who "have been of assistance to the Court," *see Hofstetter*, Dkt No. 260 at 38, is better than representation by counsel who have made misrepresentations to the Court.[1]

The arguments that Respondents raise in opposition to intervention are hollow at best. For example, Respondents argue that a denial of class certification in this case would have "no negative impact on applicants[.]" *Wells Fargo Opp'n (ECF No. 121) at 15*; *see also Lane Pls' Opp'n at 15*. Yet, on the very first page of its brief, Wells Fargo cites the denial of class certification in two other cases – one involving Wells Fargo and the other involving the *Lane* Plaintiffs' counsel (Owings/Wagoner/Walker, or "OWW") – and attempts to cram those decisions down Movants' throats. Wells Fargo further argues that "applicants make no effort to identify any specific document or testimony that they seek to introduce." *Wells Fargo Opp'n at 15*. Yet,

[1] Movants identified four specific misrepresentations by counsel for the *Lane* Plaintiffs in the *Lane* Plaintiffs' motion for class certification. *See Movants' Memo (ECF No. 102) at 2-3* (citing *Lane Pls' Memo in Support of Class Certification at 23*). Counsel for the *Lane* Plaintiffs do not contest the inaccuracy of their earlier statements. Indeed, they confirm that their earlier representations were inaccurate. *See Lane Pls' Opp'n (ECF No. 123) at 6-7 & 9* (admitting that Plaintiff Morris asserts kickback claims); *id. at 7* (admitting that "[t]he *Morris* plaintiff filed a motion for class certification"); *id. at 8* (now arguing that there is "no ***significant*** overlap between this case and *Morris* or *McKenzie*") (emphasis added), where counsel previously had argued that *Morris* and *McKenzie* "do not overlap with this case in ***any*** manner," *Lane Pls' Memo in Support of Class Certification at 23* (emphasis added).

when Movants asked Wells Fargo whether it would allow Movants to share with this Court the evidence that Movants previously filed in *Morris* and *McKenzie* (which was designated "Confidential" by Wells Fargo), Wells Fargo flatly refused. *See Second Declaration of Kai Richter dated June 13, 2013 ("Second Richter Decl."), Ex. 1.* The *Lane* Plaintiffs argue that they and their counsel adequately represent Movants and the other class members. *See Lane Pls' Opp'n at 18-19.* Yet, when Movants and Wells Fargo both pointed out the *Lane* Plaintiffs' omission in failing to join WFI as a defendant, *see Movant's Memo at 2 & 21*; *Wells Fargo Memo in Opp'n to Class Certification (ECF No. 105) at 21 n.38*, the *Lane* Plaintiffs refused to correct the omission. *See Lane Pls' Opp'n at 2* ("Plaintiffs strongly disagree that WFI should be a party to this litigation"). Finally, Respondents object that the motion to intervene is "untimely" and would delay the proceedings. *Wells Fargo Opp'n at 7-13*; *Lane Pls' Opp'n at 16-18.* Yet, Wells Fargo states that it is willing to stay this case ***indefinitely*** pending class certification rulings in Movants' earlier-filed cases, *see Wells Fargo Opp'n at 6-7*, and OWW previously argued to this Court that their intervention motion in *Hofstetter* – which was filed ***after*** class certification and after the case had been resolved – was timely. *See Hofstetter, Dkt. No. 234, at 8-9.*

Given the significant issues at stake in this class action case, the proper course is to allow Movants to intervene, so the record can be quickly supplemented based on the evidence already in Movants' possession and more adequate counsel can be obtained. In *Gutierrez v. Wells Fargo Bank, N.A.*, No. 3:07-cv-05923 (N.D. Cal), this Court significantly postponed the ***trial date*** to allow for supplementation of the record and the addition of more adequate counsel. *See Second Richter Decl., Ex. 2.* Here, Movants only seek a brief delay (of 30 days or possibly even less) of the Court's pretrial ruling on class certification.[2] Accordingly, Movants respectfully request that this Court grant their Motion to Intervene.

[2] Although Wells Fargo argues that the delay would be longer, *see Wells Fargo Opp'n at 8-11*, it is mistaken for the reasons discussed below. *See infra* at 8-10. Movants already have pleaded their claims in their existing actions, Wells Fargo already has filed answers to those claims, and there already has been discovery on those claims. All that remains to be done is to incorporate the existing record into this action, and allow for supplementation of the class certification briefing. *See Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, No. C 04-04324, 2005 WL 6789301, at *7 (N.D. Cal. May 31, 2005) (Alsup, J.) ("[T]he Court orders that intervenors will join in common briefing and will be jointly represented at hearings.").

ARGUMENT

I. NEITHER THE *LANE* PLAINTIFFS NOR THE WELLS FARGO DEFENDANTS DISPUTE THAT INTERVENTION WOULD BE IN THE BEST INTEREST OF THE CLASS MEMBERS.

Neither the *Lane* Plaintiffs nor Wells Fargo dispute that intervention would be in the best interest of the class members. Nor could they. First, supplementation of the existing record in support of class certification and the class claims obviously is in the best interest of the class members. Wells Fargo knows this. That is why Wells Fargo refused to allow Movants to share their class certification motion papers and the evidence they gathered in their existing cases with this Court. *See Second Richter Decl. Ex. 2.*[3]

Second, including WFI as a defendant (as Movants wisely did in their earlier-filed actions) is in the best interest of the class members in this case. In opposition to class certification, Wells Fargo argued that the *Lane* Plaintiffs' unjust enrichment claim against Wells Fargo does not "make[] sense" because the commissions on force-placed insurance were paid to WFI, not Wells Fargo. *See ECF No. 105 at 21 n.38* ("Plaintiffs allege that QBE and ASIC wrongfully paid commissions to WFI. Hence, it is unclear why they are seeking restitution from Wells Fargo."). The addition of WFI as a defendant would take this defense off the table. Yet, counsel for the *Lane* Plaintiffs insist that they made the right decision in omitting to name WFI as a defendant.[4] The *post-hoc* rationalizations offered by the *Lane* Plaintiffs' counsel are untenable.

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[3] Of course, the *Lane* Plaintiffs have no idea what evidence Movants have gathered in support of class certification and the class claims because the *Lane* Plaintiffs are not currently privy to that evidence. It is therefore irresponsible for the *Lane* Plaintiffs' counsel to suggest that Movants would only "duplicate" what the *Lane* Plaintiffs already have done. *See Lane Pls' Opp'n at 2 n.4.* Movants clearly have done more than the *Lane* Plaintiffs, as they took many more depositions and submitted many more documents in support of their class certification motions than the *Lane* Plaintiffs. By way of example, the recent class certification motion in *McKenzie* is supported by 11 deposition transcripts and more than 30 documents produced by Wells Fargo or its insurance vendors (as well as numerous other documents). *See McKenzie*, Dkt. No. 143.

[4] The *Lane* Plaintiffs point out that "the ***majority*** of the commissions WFI collects are remitted to WFB in the form of 'soft dollar transactions.'" *Lane Pls' Opp'n at 19 n.25* (emphasis added). However, the "majority" of the commissions is not the same as "all" of the commissions. Moreover, the *Lane* Plaintiffs failed to present any evidence regarding Wells Fargo's soft dollars program in support of their class certification motion. They only did so on reply, after Wells Fargo and Movants pointed out their failure to name WFI as a defendant. The lone document that the *Lane* Plaintiffs submitted on reply pales to the "soft dollars" evidence that Movants submitted in their class certification motion papers. Both Plaintiff Morris and the McKenzie Plaintiffs devoted an entire section of their brief to Wells Fargo's "soft dollars" program.

The real reason that OWW did not seek to amend their complaint to add WFI as a party (as both Plaintiff *Morris* and the *McKenzie* Plaintiffs did) is that they obtained no discovery until after the amendment deadline had passed, and they did not want to risk delaying their class certification motion to dot their I's and cross their T's. This is yet another example of the *Lane* Plaintiffs' counsel sacrificing the interests of the class members in their attempt to leapfrog the *Lane* action ahead of Movants' actions.[5]

Third, for numerous reasons, including experience, resources, skills, knowledge of the applicable law, and the work performed investigating and prosecuting the claims in this matter, Movants' counsels are objectively more adequate to represent the interests of the class members than the *Lane* Plaintiffs' counsel. Movants' counsel previously won a contested class certification motion before this Court involving force-placed flood insurance. *See Hofstetter*, 2011 WL 1225900. OWW lost a contested class certification motion against the same defendant.

[5] In contrast to the *Lane* Plaintiffs, Plaintiff Morris filed a motion to amend her complaint to add WFI as a party on November 14, 2011. *See Morris*, Dkt. No. 42. That motion was granted by the *Morris* court on November 23, 2011. *See Morris*, Dkt. No. 44. Proving the adage that no good deed goes unpunished, a second round of motion to dismiss briefing then ensued, which was resolved by the *Morris* court's order on September 7, 2012 denying (in part) the motions to dismiss as to both Wells Fargo and WFI. *See Morris v. Wells Fargo Bank, N.A.*, 2012 WL 3929805 (W.D. Pa. Sept. 7, 2012). Less than two weeks later, on September 19, 2012, Plaintiff Morris filed her motion for class certification based on the extensive factual record developed in that case. *See Morris*, Dkt. No. 103. It is outrageous for OWW to argue that Plaintiff Morris' counsel "acquiesced to delaying the case." *Lane Pls' Opp'n at 7*. Plaintiff Morris was ready and able to move forward with class certification motion practice in mid-July 2012 – ***before the Lane Plaintiffs even filed their Complaint*** (on July 31, 2012) – but was unable to do so at that time because the *Morris* Court issued a Text Order on July 12, 2012 postponing class certification motion practice "until further order of the court." After the *Morris* court issued its order denying (in part) the motions to dismiss, Plaintiff Morris believed that this order constituted the green light for class certification motion practice, and filed her class certification motion accordingly. However, the *Morris* court elected to table the motion and directed Plaintiff Morris not to filed a renewed motion until a status conference was held. *See Morris*, Dkt. No. 110. Plaintiff Morris' counsel then contacted Wells Fargo's counsel to schedule a status conference but was repeatedly put off by Wells Fargo. *See Second Richter Decl.*, ¶ *8*. Eventually, both sides spoke with the *Morris* court's clerk on November 8, 2012, at which time Wells Fargo indicated that it did not want to participate in a status conference and intended to file more Rule 12 motions (restyled as motions for judgment on the pleadings), as well a motion for permission to file an interlocutory appeal from the Court's September 7, 2012 order on the motions to dismiss. *Id.* As a result, the Court elected not to schedule a status conference pending resolution of those motions (which are now fully briefed and awaiting a decision). *Id.* Any delays in the *Morris* action have been 100% attributable to Wells Fargo's dilatory conduct, and certainly have not been due to any action by Plaintiff Morris or her counsel. As for the *McKenzie* Plaintiffs, they also properly amended their complaint to add WFI as a party, *see McKenzie*, Dkt. No. 10, and filed their own class certification motion on May 31, 2013, which is pending. *See McKenzie*, Dkt. No. 139.

See Gordon, 2013 WL 436445. Movants' counsel already have been appointed class counsel or interim class counsel in three cases involving force-placed insurance ("FPI"). *See First Declaration of Kai Richter dated May 23, 2013 ("First Richter Decl."), ¶¶ 8, 10.* OWW do not cite any FPI cases in which they have been appointed class counsel. Movants' counsels have successfully resolved several FPI cases on a class-wide basis. *Second Richter Decl., ¶ 7.* OWW do not cite any FPI cases that they have successfully resolved. Movants' counsels have done groundbreaking work on numerous FPI cases, including the first-filed flood insurance cases in the country against Chase, Wells Fargo, Bank of America, Citibank, U.S. Bank, and RBS Citizens (a/k/a Citizens Bank). *First Richter Decl., ¶ 8-9, 11-12*; *Second Richter Decl., ¶¶ 4-5; see also Mckenzie,* Dkt No. 144 (Carson Declaration) at ¶ *8 n.1 &* ¶ *9.* By contrast, OWW have engaged in a pattern and practice of filing "me-too" actions on top of many of these existing FPI cases:

Bank	**First-Filed Flood Case & other notable cases**	**Lead Counsel**[6]	**Result**	**Later-Filed OWW Cases**	**Result**
Chase	*Hofstetter v. Chase* (filed 3/30/2010)	NK	Class cert granted & settlement approved		
				Gibson v. Chase (filed 6/10/2011)	Motion to dismiss granted
				Gordon v. Chase (filed 9/1/2011)	Class cert denied
				Herrick v. Chase (filed 3/28/2013)	Motion to dismiss pending
Wells Fargo	*Morris v. Wells Fargo* (filed 4/8/2011)	NK/BM	Motion to dismiss denied (in part) & class cert motion filed 9/19/12		
	McKenzie v. Wells Fargo (filed 10/7/2011)	NK/BM	Claims partially dismissed & class cert motion filed 5/31/13		
				Sayago v. Wells (filed 11/3/2011)	Motion to dismiss pending
				Cannon v. Wells (filed 3/19/2012)	Motion to dismiss denied (in part)
				Lane v. Wells (filed 7/31/2012)	Motion to dismiss denied (in part) & class cert pending
				Fladell v. Wells (filed 3/28/2012)	Motion to dismiss pending
BoA	*Berger v. BoA* (filed 9/17/2010)	NK[7]	Summary judgment denied		
	Lass v. BoA (filed 4/1/2011)	NK/BM	Dismissal reversed by First Circuit		

[6] "NK" refers to Nichols Kaster, PLLP. "BM" refers to Berger & Montague, P.C.

[7] NK is co-lead counsel with Shapiro Haber & Urmy, LLP ("SHU") on the *Berger* case.

	Skansgaard v. BoA (filed 5/17/2011)	NK/BM[8]	Motion to dismiss denied & class cert motion pending		
	Arnett v. BoA (filed 11/14/2011)	NK/BM	Motion for judgment on pleadings denied in part & class cert pending		
				Hall v. BoA (filed 7/24/12)	Motion to dismiss pending
Citibank	*Casey v. Citibank* (filed 5/17/2012)	NK/BM	Motion to dismiss denied		
				Popkin v. Citi (filed 3/28/13)	Motion to dismiss pending

Second Richter Decl. Ex. 4. Moreover, Movants' counsels have far greater resources with which to prosecute this case.[9]

Finally, Movants and their counsel are dedicated to protecting the interests of class members who have been force-placed with ***flood*** insurance. By contrast, counsel for the *Lane* Plaintiffs repeatedly minimize their flood insurance claims. *See, e.g., Lane Pls' Opp'n at 3* ("Force-placed flood insurance represents only ten to twelve percent of all force-placed insurance."). Thus, there is a risk that counsel for the *Lane* Plaintiffs will prioritize their hazard insurance claims over their flood insurance claims, to the detriment of Movants and other class members who have been victimized by Wells Fargo's force-placed flood insurance practices.

II. THE ARGUMENTS IN OPPOSITION TO INTERVENTION ARE MERITLESS.

A. The Motion to Intervene Is Not Time-Barred

Instead of focusing on the merits of Movants' Motion to Intervene (which is obviously in the best interest of the class members), Respondents principally direct their attention to the timing of the motion. *See Wells Fargo Opp'n at 7-13*; *Lane Pls' Opp'n at 16-18.* These timeliness arguments are repetitive of the arguments that Respondents previously raised – unsuccessfully – in opposition to Movants' request for an expedited hearing on the Motion to Intervene. *See ECF No. 111 at 3-5* (arguing that "Movants' Request to Intervene Is Untimely"); *ECF No. 113 at 1-3* (arguing that Movants "fail[ed] to move to intervene in a timely manner"). This Court did not accept these timeliness arguments when it set the hearing on the Motion to Intervene, *see ECF No. 116,* and it should not accept them now that the motion has been fully briefed.

[8] SHU is also lead counsel on the *Skansgaard* case. NK serves as co-counsel with these firms.

[9] NK and BM have nearly 100 attorneys between their two firms. OWW are much smaller firms.

1. Intervention Is Proper at This Stage

Movants cited numerous cases in their opening brief, in which intervention was allowed immediately prior to a ruling on class certification, or even after a class certification ruling already had been made. *See Movants' Memo at 17-18* (citing *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394-95 (1977); *Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C. Cir. 1981); *Beach v. Healthways, Inc.*, 264 F.R.D. 360, 365 (M.D. Tenn. 2010); *Sherman v. Griepentrog*, 775 F. Supp. 1383, 1386 (D. Nev. 1991)). Respondents do not distinguish this case law in their oppositions. Moreover, other courts have reached similar results. *See, e.g.*, *McKay v. Heyison*, 614 F.2d 899, 902, 907-08 (3d Cir. 1980) (remanding case to reconsider motion to intervene when motion had been submitted "before the district court had ruled on the plaintiffs' motion for class certification"); *Deutschman v. Beneficial Corp.*, 132 F.R.D. 359, 380 (D. Del. 1990) (finding intervention timely where intervenor "filed the motion to intervene prior to the completion of briefing on the class certification issue"); *Harvey v. Int'l Harvester Co.*, 56 F.R.D. 47, 48 (N.D. Cal. 1972) (simultaneously considering class certification and motion to intervene). Accordingly, Movants' motion is timely, and they should be allowed intervene in order to protect their interests and the interests of the other class members.[10]

[10] The case law cited by Respondents is distinguishable. For example, the *Lane* Plaintiffs rely heavily on the Ninth Circuit's opinion in *Smith v. Marsh*, 194 F.3d 1045 (9th Cir. 1999). *See Lane Pls' Opp'n at 16-17*. However, in that case, "the district court had already heard arguments and ruled on motions for class certification and summary judgment." *Mi Pueblo San Jose, Inc. v. City of Oakland*, No. C06-4094VRW, 2007 WL 578987, at *4 (N.D. Cal. Feb. 21, 2007) (distinguishing *Smith*). Here, the Court has not yet made any summary judgment or class certification rulings. "[A]lthough the court has ruled on . . . [Wells Fargo's] motion to dismiss, such rulings hardly constitute 'substantial engagement' with the issues of the case as contemplated by *Smith*." *Id.* Wells Fargo cites *Hanni v. Am. Airlines*, No. C 08-00732, 2010 WL 289297 (N.D. Cal. Jan. 10, 2010). *See Wells Fargo Opp'n at 8, 10 n.8, 13*. However, that case is distinguishable for similar reasons, as "the Court rule[d] on the parties' summary judgment motions and determine[d] class certification." *Hanni*, 2010 WL 289297, at *6. Both Respondents cite *Harris v. Vector Mktg. Corp.*, No. C-08 5198, 2010 WL 3743532 (N.D. Cal. Sept. 17, 2010). *See Lane Pls' Opp'n at 16-18*; *Wells Fargo Opp'n at 10 n.9, 13*. However, in that case, there also was an adjudicated summary judgment motion. *See Harris*, 2010 WL 3743532, at *1 ("Almost a year has passed after the Court's summary judgment order."). Moreover, the intervenors were represented by the same counsel as the named plaintiff, which is obviously not the situation presented here. Finally, Respondents also cite this Court's opinion in *Briggs v. United States*, No. C 07-05760, 2009 WL 1560005 (N.D. Cal. June 1, 2009) (Alsup, J.). *See Lane Pls' Opp'n at 17-18*; *Wells Fargo Opp'n at 9-11*. Once again, that case is distinguishable as this Court already had ruled on motions for summary judgment and for class certification. *See Briggs*, 2009 WL 156005, at *1.

Although Respondents argue that Movants theoretically could have sought to intervene sooner, *see Lane Pls' Opp'n at 17*; *Wells Fargo Opp'n at 11-13*, that does not change the fact that intervention is timely ***at this stage***. Moreover, Respondents' arguments in this regard ignore important context. As shown in the chart above, *see supra* at 5-6, OWW have a track record of filing "me-too" actions in this District and across the country on the heels of earlier actions filed by Movants' counsels. If Movants' counsels were required to intervene in each one of these "me-too" actions immediately after becoming aware of such actions, there would be little time left for litigating the claims on the merits in the first-filed actions. Needless to say, this would not be in the best interest of the class members.

Further, it was not at all clear until the *Lane* Plaintiffs filed their motion for class certification that they would seek to certify a nationwide class that included Movants as putative class members (much less that they would attempt to do so on such a thin record). Although Respondents emphasize that the *Lane* Plaintiffs asserted nationwide class allegations in their Complaint, *see Lane Pls' Opp'n at 17 n.23*; *Wells Fargo Opp'n at 12*, so too did the plaintiffs in *Sayago v. Wells Fargo Bank, N.A.*, No. 8:11-cv-2009 (M.D. Fla.), who are also represented by OWW. *See Sayago*, Dkt. No. 1. Notwithstanding the nationwide class allegations in the *Sayago* Complaint, OWW voluntarily narrowed the proposed class to Florida borrowers. *See First Richter Decl. Ex. 3* ("Plaintiffs seek to modify their Motion for Class Certification to limit the class definition to individuals who are residents of Florida or own property in Florida, rather than the national class…."). Accordingly, Movants assumed that OWW would adopt the same approach on behalf of their clients in the *Lane* Action as to the common law claims that overlap with *Morris* and *McKenzie*. As soon as it became clear from the *Lane* Plaintiffs' motion papers that they were, in fact, seeking certification of a nationwide class on those claims and sought to represent Movants as class members on those claims, Movants promptly sought to intervene.

2. Intervention Will Not Unduly Delay the Proceedings

Although Respondents argue that intervention would "cause delay," *Lane Pls' Opp'n at 17*; *Wells Fargo Opp'n at 8-10*, these fears are vastly overblown. As noted in Movants' opening

brief, Movants could file a supplemental memorandum in support of class certification in less than 30 days. *See Movants' Memo at 18.* Indeed, if the Court so orders, Movants could simply provide this Court with copies of their already-filed class certification motion papers. Under this Court's Local Rules, Wells Fargo would then have 14 days to respond, and Movants could submit replies 7 days thereafter or pursuant to whatever other schedule the Court may order. Any inconvenience from this modest delay would be vastly outweighed by the benefit to the class members. Simply put, it is more important for the issue of class certification to be decided properly on a full record, *i.e.*, to get the class certification question "right," than it is to decide the class certification question a few days sooner.[11]

This Court should reject Wells Fargo's scare tactics and suggestions of further delay. *See Wells Fargo Opp'n at 9.* Although Wells Fargo argues that Movants would "need to file an amended complaint," *id.*, Movants already have filed amended complaints in their actions that provide Wells Fargo with notice of their claims. *See First Richter Decl., Exs. 2 & 4.* Although Wells Fargo argues that it would be "entitled to challenge [Movants] complaint[s] by way of a motion to dismiss," *Wells Fargo Opp'n at 9*, Wells Fargo already has filed motions to dismiss Movants' amended complaints, and those motions to dismiss have been adjudicated. *See Morris*, 2012 WL 3929805; *McKenzie*, Dkt Nos. 72, 96. Although Wells Fargo argues that "permitting applicants to intervene here could raise thorny issues with respect to the binding effect of the court's rulings in those cases," *Wells Fargo Opp'n at 9 n. 7*, the rulings in *Morris*, *McKenzie*, and this case have been entirely consistent as to the kickback claims that are the subject of the pending motion for class certification, and the plaintiffs in all three cases assert viable claims for breach of contract, breach of the covenant of good faith and fair dealing, and unjust enrichment.[12]

[11] Any delay in this case would be far less than the delay that this Court allowed for purposes of supplementing the record in *Gutierrez*, where it postponed the trial date so that plaintiffs' counsel could supplement their expert report and bring in more capable counsel. *See Second Richter Decl. Ex. 2.*

[12] Contrary to Wells Fargo's assertions (*Wells Fargo Opp'n at 9 n.7*), the *Morris* court did ***not*** throw out Plaintiff Morris' allegations relating to breach of the implied covenant of good faith and fair dealing. Rather, it ruled that those allegations augmented Plaintiff Morris' breach of contract claim and could be pursued as part of that claim. *See Morris*, 2012 WL 3929805, at *8 ("[T]o the extent the breach of good faith claim contains allegations conceptually distinct from those in the breach of contract claim, they will be treated as being a part of and augmenting the

Finally, although Wells Fargo argues that it "would be entitled to engage in discovery to explore applicants' allegations and claims," *Wells Fargo Opp'n at 9*, it already has done so.[13] Thus, intervention will not require a new record to be developed with respect to Movants' claims; to the contrary, Movants seek to take the record that already has been developed in their cases and share it with this Court.[14]

3. Intervention Will Not Prejudice Respondents

Respondents' assertions of "prejudice" do not bear scrutiny. Indeed, the *Lane* Plaintiffs offer no explanation whatsoever for their bald assertion that intervention would "prejudice Plaintiffs' class certification motion." *Lane Pls' Opp'n at 17*. This assertion of prejudice is absurd, given that the main purpose of intervention in this case is to enhance the record and arguments in ***support*** of class certification. As for Wells Fargo, its stated concern is the alleged

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breach of contract claim."). Similarly, the *Morris* court did ***not*** rule that Plaintiff Morris could not pursue her unjust enrichment claim. Rather, it ruled that the unjust enrichment claim is properly asserted against WFI. *See Morris*, 2012 WL 3929805, at *8-10 ("Plaintiff [Morris] has stated an unjust enrichment claim against W.F. Insurance."). This only serves to underscore why intervention is necessary – counsel for the *Lane* Plaintiffs have not named WFI as a defendant and "disagree that WFI should be a party to this litigation." *Lane Pls' Opp'n at 2*.

[13] Plaintiff Morris has responded to written discovery requests from Wells Fargo and has had her deposition taken by Wells Fargo. *Second Richter Decl., ¶ 8.* Likewise, the plaintiffs that moved for class certification in *McKenzie* also have produced documents in response to Wells Fargo's discovery requests, and either have had their deposition taken or will have their deposition taken by June 21, 2013. *Id*. Plaintiff Biddix was deposed on May 29, 2012. *Id.* Plaintiff McKenzie is scheduled to be deposed on June 21, 2013. *Id.* Plaintiffs Ryan and Kibiloski have not moved for class certification in *McKenzie*, *see McKenzie*, Dkt. No. 139, and therefore do not seek to intervene in *Lane* for purposes of serving as class representatives.

[14] To the extent that there are any case management issues associated with Movants' participation in this action as intervenors, the Court has discretion to set the parameters of Movants' participation and can manage their participation appropriately. *See Ctr. for Biological Diversity*, 2005 WL 6789301, at *7 ("As a court may put conditions on permissive intervention, in the instant case, the Court orders that intervenors will join in common briefing and will be jointly represented at hearings and other court proceedings by a single counsel."); *Pac. Coast Fed'n of Fishermen's Ass'ns v. Gutierrez*, No. 1:06-CV-00245, 2008 WL 4104257 (E.D. Cal. Sept. 2, 2008) ("[T]he district court has the discretion to place conditions upon intervention, and has done so on several occasions in this and related cases. Applicants' participation can be appropriately constrained so that it will not result in additional delay. Applicants will not be permitted to relitigate issues or to duplicate briefing and/or testimony going forward."). The ability of a court to regulate intervention includes allowing intervention for a limited purpose, without requiring the litigation process to start over. *See Garcia v. Gordon Trucking, Inc.*, No. 1:10-CV-00324, 2011 WL 2746305, at *4 (E.D. Cal. July 14, 2011) (allowing named plaintiff in a rival putative class action against the same defendant and related to the same subject matter to intervene for limited purpose of contesting a motion); *Widjaja v. YUM! Brands, Inc.*, No. CV-F-09-1074, 2009 WL 3462040, at *8 (E.D. Cal. Oct. 22, 2009).

delay that purportedly would result if Movants are allowed to intervene. *See Wells Fargo Opp'n at 8-10.* However, as noted above, any such delay would be minimal. Moreover, it is difficult to fathom how such a short delay could possibly prejudice Wells Fargo, given that it does not object to an ***indefinite*** stay of the case pursuant to the first-filed rule. *See id. at 11.*

B. Movants Have a Protectable Interest as Putative Class Members

Wells Fargo does not challenge that Movants have a protectable interest in the outcome of this action (and the outcome of the pending class certification motion) as putative class members. Although the *Lane* Plaintiffs suggest that Movants and other putative class members "do not have a significant protectable interest," *Lane Pls' Opp'n at 13*, this lack of recognition of the interests of the putative class members only serves to highlight the inadequacy of the *Lane* Plaintiffs and their counsel. Movants have cited several cases, including United States Supreme Court precedent, which recognize that putative class members have a protectable interest for purposes of Rule 24(a). *See Movants' Memo at 18-20* (citing *Deposit Guar. Nat. Bank v. Roper*, 445 U.S. 326, 331 (1980); *In re Cmty. Bank of N. Virginia*, 418 F.3d 277, 314 (3d Cir. 2005); *Dickstein v. Able Telcom Holding Corp.*, 192 F.R.D. 331, 334 (N.D. Ga. 2000)). Other cases are in accord.[15] The *Lane* Plaintiffs do not cite a single class action case to the contrary. None of the cases cited in the relevant section of their brief were class actions. *See Lane Pls' Opp'n at 13-14.*

C. The Interests of Movants and the Class Members Are at Risk

It is absurd for the *Lane* Plaintiffs to argue that "this Court's decision on [the *Lane*] Plaintiffs Motion for Class Certification cannot impair Movants' interests." *See Lane Pls' Opp'n at 14.* In support of this proposition, the *Lane* Plaintiffs misleadingly cite a class action treatise out of context. *Id. at 15 n.22.* The relevant passage states, in full, as follows:

> In light of American Pipe, applications for intervention filed prior to the court's determination of the class should generally be held in abeyance until the court has ruled on the class. However, ***if it appears that the representation of the original representative plaintiff may potentially be inadequate, the court may permit intervention by another class member in order to bolster class representation***.

[15] *Garcia*, 2011 WL 2746305, at *3; *Widjaja*, 2009 WL 3462040, at *5-7; *Lane v. Bethlehem Steel Corp.*, 93 F.R.D. 611, 615 (D. Md. 1982) (recognizing the "interest of a putative class member in the class aspect of a case").

7 *Newberg on Class Actions* § 22:78 (4th ed.) (emphasis added) (footnotes omitted). It is less than candid for the *Lane* Plaintiffs to cite the first sentence without acknowledging the second, where the purpose of intervention here is precisely to "bolster class representation."

Although the *Lane* Plaintiffs and Wells Fargo argue that Movants still may pursue their own class certification motions if the *Lane* Plaintiffs' motion for class certification is denied, *see Lane Pls' Opp'n at 15*; *Wells Fargo Opp'n at 15*, this argument ignores the applicable standard for intervention as of right under Rule 24(a). *See Bethlehem Steel*, 93 F.R.D. at 615 ("[I]n order to intervene of right, a party need not prove that he would be bound in a res judicata sense by any judgment in the case. Where, as here, the disposition of a case would, ***as a practical matter***, impair the applicant's ability to protect his interest in the transaction, intervention may be allowed under Rule 24(a).") (emphasis added) (citation omitted). Denial of class certification in *Lane* would, as a practical matter, impair Movants' own efforts at class certification because Wells Fargo undoubtedly would attempt to use an adverse opinion against Movants. Indeed, Wells Fargo already is using two class certification decisions, including the decision on OWW's failed class certification motion in *Gordon*, as evidence that Movants' efforts at class certification are "an exercise in futility." *Wells Fargo Opp'n at 1*. Thus, Respondents "cannot seriously contend that the identified movants' interests as putative class members in the *Lane* case [a]re not significantly impaired" if class certification is denied. *Bethlehem Steel*, 93 F.R.D. at 615.

D. Movants and the Class Members Are Not Adequately Represented by the *Lane* Plaintiffs and Their Counsel

For the reasons set forth in Movants' opening brief and also discussed above, *see supra* at 3-6, Movants and the putative class members are not adequately represented by the *Lane* Plaintiffs and their counsel. Movants will not belabor the point. The record speaks for itself.

Although OWW argue that their adequacy as counsel is not properly before the Court, *see Lane Pls' Opp'n at 19*, this ignores the nature of this action. In a class action, both "the named plaintiffs ***and*** their counsel" must be adequate. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011,

1020 (9th Cir. 1998) (emphasis added). If counsel is not adequate, intervention is appropriate to ensure that the interests of the putative class members are adequately represented.[16]

Here, Movants' concerns run far deeper than simple "litigation strategy." *See Wells Fargo Opp'n at 14; Lane Pls' Opp'n at 19-20.* Rather, they go to the fundamental nature of the representation, including: (1) whether OWW have placed their interests as counsel ahead of the putative class members; (2) whether OWW favor the hazard insurance claims over the flood insurance claims; (3) whether OWW have omitted to join a necessary or material party (WFI); and (4) whether OWW "are incapable of conveying the substantive information [Intervenors] believe is necessary to protect their interests." *Pac. Coast Fed'n of Fishermen's Ass'ns*, 2008 WL 4104257, at *8 (E.D. Cal. Sept. 2, 2008). Accordingly, Movants are entitled to intervene as of right.

III. INTERVENTION IS ALSO APPROPRIATE IN THE COURT'S DISCRETION UNDER RULE 24(B)

Even if Movants were not entitled to intervene as of right under Rule 23(a) – which they clearly are – the Court has good reason to permit intervention under Rule 24(b) because "intervention will contribute to the equitable resolution of the case." *Ctr. for Biological Diversity*, 2005 WL 6789301, at *6; *accord*, *Ruderman v. Wash. Nat'l Ins. Co.*, 263 F.R.D. 670, 678 (S.D. Fla. 2010) ("[E]ven if Proposed Intervenors do not satisfy all four of the factors for intervention as a matter of right, the Court will permit Proposed Intervenors to intervene in this class action to bolster the representation offered by Plaintiffs."); *see also Widjaja*, 2009 WL 3462040, at *4-8 (permitting intervention under Rule 24(b) as well as Rule 24(a) where proposed intervenors had "already conducted significant discovery to establish class-wide practices ... and

[16] *See, e.g., In re Cmty. Bank of N. Virginia*, 418 F.3d 277, 315 (3d Cir. 2005) (remanding case for reconsideration of appellant's motion to intervene because class counsel had "failed to assert" viable claims and had conducted "no formal discovery"); *In re Vitamins Antitrust Litig.*, No. 99-197(TFH), 1999 WL 1335318, at *2 (D.D.C. Nov. 23, 1999) (noting that potential intervenors may intervene if they "prove that Class counsel are not adequately representing the interests of the Class"); *In re Ford Motor Co. Bronco II Products Liab. Litig.*, CIV. A. MDL-991, 1995 WL 15182, at *2 (E.D. La. Jan. 12, 1995) (allowing movants to intervene when they could show that the "alleged inadequate representation by class counsel impairs or impedes their ability to protect their interests"); *cf. Hofstetter v. Chase Home Fin., LLC*, No. 3:10-cv-01313, 2011 WL 5415073, at *3 (N.D. Cal. Nov. 8, 2011) (Alsup, J.) (denying a motion to intervene by filed by OWW because OWW had "failed to show that ***class counsel*** and the named plaintiffs" were inadequate) (emphasis added).

[we]re in the process of marshaling evidence in support of class certification"). Respondents do not contest that Movants' claims and the claims in this action involve "a common question of law or fact." *See* FED. R. CIV. P. 24(b). Although Respondents challenge the timeliness of the motion to intervene, *see Wells Fargo Opp'n at 16-17*; *Lane Pls' Opp'n at 21*, those timeliness arguments should be rejected for the reasons already discussed. *See supra* at 6-11. Moreover, even if there were questions as to timeliness, the Court should grant intervention in its discretion because Respondents will not suffer any prejudice and the class members will benefit. *See Ctr. for Biological Diversity*, 2005 WL 6789301, at *4 (["W]hile the Court is not able to resolve why applicant intervenors waited so long to bring this motion, it will not deny this motion to intervene based on delay in light of the failure by [Respondent] to show prejudice.").

IV. APPLICATION OF THE FIRST-FILED RULE IS NOT CONTESTED BY WELLS FARGO AND NOT SERIOUSLY CHALLENGED BY THE *LANE* PLAINTIFFS

Alternatively, pursuant to the first-to-file rule, this Court should stay any ruling on the *Lane* Plaintiffs' class certification motion (at least insofar as the motion relates to flood insurance) until after the issue of class certification is decided in *McKenzie* and *Morris*. Notably, "Wells Fargo is not opposed to staying this case pending decisions on class certification in *McKenzie* and *Morris*." *Wells Fargo Opp'n at 7.* Although the *Lane* Plaintiffs oppose such a stay, their arguments are unfounded.

All three requirements of the first-to-file rule are met here. The *Morris* and *McKenzie* actions were (1) filed before *Lane*, (2) involve overlapping defendants and putative class members, and (3) involve overlapping issues. *See Movants' Memo at 24.* Although the *Lane* Plaintiffs argue that the cases are not sufficiently similar because the *Lane* Plaintiffs seek to represent borrowers who were force-placed with hazard insurance as well as flood insurance, the fact remains that the *Lane* Plaintiffs' proposed nationwide class would completely absorb Movants' proposed force-placed flood insurance classes on their kickback claims. Moreover, the

Lane Plaintiffs themselves argue that "Wells Fargo's scheme does not differ by type of insurance (hazard vs. flood)." *Lane Pls' Opp'n at 8.*[17]

Rather than focusing on the relevant three-factor test, the *Lane* Plaintiffs raise a number of ancillary issues. None are pertinent here. Movants' motion is timely for the reasons previously discussed. *See supra* at 6-11.[18] Movants' position here is consistent with their position in the MDL, as they seek to intervene for the limited purpose of representing borrowers who were force-placed with flood insurance, not hazard insurance.[19] Finally, Movants can hardly be accused of "forum shopping" where application of the first-to-file rule would simply allow them to litigate their first-filed actions undisturbed by the *Lane* Paintiffs' "me-too" action.

CONCLUSION

For the foregoing reasons, Movants respectfully request that this Court grant their motion to intervene, or alternatively, defer ruling on the *Lane* Plaintiffs' class certification motion until after the issue of class certification is decided in the earlier-filed *Morris* and *McKenzie* Actions.

Dated: June 13, 2013

NICHOLS KASTER, LLP

By: s/ Matthew C. Helland
Matthew C. Helland

Counsel for Intervenors Desiree Morris, Clifford McKenzie, Daniel Biddix, David Kibiloski and Virginia Ryan

[17] The *Lane* Plaintiffs also argue that *McKenzie* should not be considered first-filed because the complaint in that case was eventually superseded by an amended complaint. However, "[i]n determining when a party filed an action for purposes of the first to file rule, courts focus on the date upon which the party filed its original, rather than its amended complaint." *Ward v. Follett Corp.*, 158 F.R.D. 645, 648 (N.D. Cal. 1994) (citations omitted).

[18] In support of their timeliness argument, the *Lane* Plaintiffs cite *Church of Scientology of Cal. v. U.S. Dep't of Army*, 611 F.2d 738 (9th Cir. 1979). However, that case is readily distinguishable: "[i]n *Church of Scientology*, the second-filed matter went all the way through judgment on the merits, appeal, and remand, before the Ninth Circuit was able to address the motion to dismiss under the first-to-file rule." *Intersearch Worldwide, Ltd. v. Intersearch Grp., Inc.*, 544 F. Supp. 2d 949, 963 (N.D. Cal. 2008).

[19] Movants do not oppose separating the flood insurance claims from the hazard insurance claims for purposes of class certification. Movants' participation as intervenors would help facilitate this if the the Court deems it appropriate. *See Harvey*, 56 F.R.D. at 48 ("[T]he presence of a number of representatives variously situated in the class might facilitate a sub-division of the class should that become necessary.").