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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA — SAN FRANCISCO DIVISION

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

Plaintiffs,

vs.

WELLS FARGO BANK, N.A.,

Defendants.

Case No. 3:12-cv-04026-WHA

WELLS FARGO BANK, N.A.'S OPPOSITION TO PROPOSED INTERVENORS DESIREE MORRIS, CLIFFORD MCKENZIE, DANIEL BIDDIX, DAVID KIBOLOWSKI, AND VIRGINIA RYAN'S MOTION TO INTERVENE

Date: June 20, 2013
Time: 8:00 a.m.
Crtrm.: 8

Action Filed: July 31, 2012
Trial Date: April 21, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

RULES

OTHER AUTHORITIES

I. INTRODUCTION

Defendant Wells Fargo Bank, N.A. ("Wells Fargo"), respectfully submits this opposition to the motion of plaintiffs in *Morris v. Wells Fargo Bank, N.A.*, No. 2:11-cv-00474 (W.D. Pa.), and *McKenzie et al. v. Wells Fargo Bank, N.A. et al.*, No. 3:11-cv-04965-JCS (N.D. Cal.) (collectively "applicants"), to intervene as named plaintiffs in this suit.

Applicants' motion is an exercise in futility. Applicants seek to intervene to avoid a denial of certification in this suit, which they fear will create adverse precedent in *McKenzie* and *Morris*. But that adverse precedent already exists. In January, the Southern District of Florida denied class certification in a suit against Wells Fargo alleging the exact same type of claims brought by plaintiffs in this case and by applicants in *Morris* and *McKenzie* – claims that commissions paid to Wells Fargo Insurance, Inc., a licensed insurance agent affiliate of Wells Fargo, in connection with lender-placed insurance were "kickbacks." *See Kunzelmann v. Wells Fargo Bank, N.A.*, No. 9:11-cv-81373-DMM, 2013 WL 139913, at * 13 (S.D. Fla. Jan. 10, 2013). Shortly thereafter, the Middle District of Florida denied class certification of substantially similar claims against Chase. *See Gordon v. Chase Home Fin., LLC*, No. 8:11-cv-2001-T-33EAJ, 2013 WL 436445, at *12 (M.D. Fla. Feb. 5, 2013). Applicants cannot put the genie back in the bottle.

Setting aside the futility of their motion, applicants motion fails because it is untimely. Though applicants were aware of this suit by October 2012 at the latest, they waited over *seven months* – and until *after* plaintiffs moved for certification – to seek to intervene. Applicants offer no cogent reason for their delay. To the contrary, their excuses are obviously pretextual.

Moreover, permitting intervention at this late stage would by highly prejudicial to Wells Fargo. Applicants assert that if the Court permits them to intervene, they can simply file a "supplemental" class certification brief, with new evidence, in thirty days. In essence, they propose that they be granted all the rights of a party without being saddled with any of the messy obligations, such as pleadings or discovery.

This proposal is "half baked" at best. In reality, granting applicants' motion would require substantial additional proceedings.

That is because applicants do not merely seek to intervene in this suit. Rather, they are attempting a hostile takeover. Applicants and their attorneys clearly cannot be counted on to work cooperatively with plaintiffs or their counsel. Indeed, their entire motion is based on the premise that plaintiffs' counsel is inadequate. Accordingly, if applicants are permitted to intervene, the first order of business will be figuring out which plaintiffs are in control of this suit and appointing interim class counsel. *See* FED. R. CIV. P. 23(g)(3).

That issue will be fiercely contested between these competing groups of plaintiffs' counsel. Whoever prevails would need to file new complaint, which would be followed by motion practice and discovery – including at least five additional depositions – culminating in a new motion for certification. This would be grossly prejudicial to Wells Fargo, which would be required to redo all of the work it did over the last seven months under the Court's schedule and oppose a brand new certification motion. It would also offer a huge unfair advantage to plaintiffs, who would be permitted to submit a new certification motion after reviewing all of the arguments Wells Fargo made in opposition to their first motion.

Moreover, the gist of applicants' motion is that plaintiffs are inadequate representatives and that applicants will better represent the interests of putative class members. But plaintiffs' adequacy is the same issue facing the Court on plaintiffs' motion for certification and will be decided as part of that motion. If applicants are right, they have nothing to fear. Assuming plaintiffs are inadequate, the Court will deny plaintiffs' class certification motion on that basis. Applicants would then be free to pursue certification in *McKenzie* and *Morris*. And a denial of certification on the narrow ground of inadequacy of representation would have no negative precedential effect on applicants' motions for certification.

In any event, applicants' motion is based primarily on their dissatisfaction with the speed at which plaintiffs have litigated this suit (at first too slow, and then later too fast) and the amount of discovery they have conducted. But it is well-established that such quibbles over litigation strategy do not support intervention. *See In re Charles Schwab Corp. Sec. Litig.*, No. C 08-01510 WHA, 2011 WL 633308, at *4 (N.D. Cal. Feb. 11, 2011) (citation omitted). Furthermore, applicants' argument is based on the premise that more discovery will necessarily lead to a better

result. But it is not at all clear that is the case. In fact, the plaintiffs in *Kunzelmann* did much of the same discovery applicants contend plaintiffs here should have done, to no avail. *See Kunzelmann*, 2013 WL 139913, at * 13.

This motion is the latest chapter in an ongoing "turf war" between counsel for applicants and plaintiffs. They are playing the same game. Applicants (unfairly) accuse plaintiffs of rushing their motion for class certification. But that is exactly what applicants themselves did in *Morris*, where the Court dismissed applicants' motion for class certification because they filed it before the court set a schedule for it, in contravention of the court's prior order. Similarly, while applicants scold plaintiffs' counsel for the "me-too" lawsuit they filed in 2011, they proudly announce in their motion that they have filed "approximately 20" such "me-too" suits across the country. *See* Mot. Intervene at 14.

For all these reasons and those set forth below, applicants have failed to establish any basis for intervention. However, Wells Fargo does not object to applicants' alternative proposal that the Court stay this action to permit the courts in *McKenzie* and *Morris* suits to decide the certification issue first. A stay would at least have the advantage of avoiding the mess that would be created by permitting applicants to intervene at this late date.

II. BACKGROUND

A. Procedural History of This Action in Brief.

The Lanes filed suit on July 31, 2012. *See* Dkt. No. 1. On November 30, 2013, the Court entered a case management order setting a window of March 7 through May 9, 2013, for plaintiffs to file a motion for class certification. *See* Dkt. No. 42 at ¶ 3.[1]

On November 30, 2013, Wells Fargo moved to dismiss the Lanes' complaint. *See* Dkt. No. 45.[2] The Court granted the motion in part, rejecting the Lanes' theory that Wells Fargo had

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[1] The Court also ordered the parties to complete initial disclosure by December 7, 2012, set a January 18, 2013 deadline to add new parties or amend pleadings, and set a April 21, 2014 jury trial. *See* Dkt. No. 42 at ¶¶ 1, 2, 12.

[2] QBE Americas, Inc. was named as a defendant in plaintiffs' original complaint. *See* Dkt. No. 1. On December 11, 2012, plaintiffs and QBE filed a stipulation to dismiss QBE, *see* Dkt. No. 50.

breached their mortgages by requiring plaintiffs to maintain insurance covering the replacement cost value of their property (the "excessive coverage" theory). *See* Dkt. No. 70 at 12-13.

On March 20, 2013, the Court granted the Lanes' motion for leave to amend, permitting them to add a claim under the Bank Holding Company Act ("BHCA") and plaintiff Mercedes Guerrero. *See* Dkt. No. 82. The Court denied Wells Fargo's subsequent motion to dismiss certain claims alleged in the amended complaint, *see* Dkt. No. 90, and Wells Fargo filed an answer on May 3, 2013, *see* Dkt. No. 91.

The parties have engaged in extensive discovery, including written discovery, the production by Wells Fargo of over 300,000 pages of documents,[3] and numerous depositions across the country. Plaintiffs have taken the depositions of Thomas Farrell, the Vice President of Wells Fargo's escrow department, in Minnesota, and the depositions of corporate representatives from insurers QBE Americas, Inc. and American Security Insurance Company in Washington, D.C. and Georgia. Wells Fargo took the Lanes' depositions in Arkansas and Ms. Guerrero's deposition in San Francisco.

This discovery has been conducted within limits set by the Court. On January 24, 2013, the Court held a hearing to address a dispute with respect to document requests. At that hearing, the Court instructed Wells Fargo

> You have to produce everything that deals with two things: The plaintiffs' case individually, and, then, secondly, those things that are needed to get at the class issues.
>
> **But you do not have to give class-wide discovery at this point**. If that's what plaintiffs are asking for, too bad for them.

[3] Among others documents, Wells Fargo has produced (1) Fannie Mae/ Freddie Mac, FHA, and VA form mortgages for all 50 states; (2) forms for promissory notes for loans made by Wells Fargo anywhere in the U.S.; (3) policies and procedures for lender-placed flood and hazard insurance and documents detailing changes to these policies and procedures; (4) a comprehensive set of contracts between Wells Fargo and Wells Fargo Insurance, Inc. and those insurance companies with which Wells Fargo contracted to provide LPI; (5) forms used for letters sent by Wells Fargo to borrowers regarding flood and hazard insurance requirements; and (6) plaintiffs' complete loan files and various correspondence and other documents specific to plaintiffs' loans. In addition, at plaintiffs' request Wells Fargo produced scores of thousands of pages of documents that Wells Fargo produced to plaintiff in the *Kunzelmann* case.

Dkt. No. 72 at 11 (emphasis added); *see also id.*at 25.

Subsequent to that hearing, Wells Fargo filed a letter-brief in which it argued that five of plaintiffs' document requests did not seek documents relevant to class certification. *See* Dkt. No. 73. The Court quashed four requests on the ground that they were overbroad and ordered limited production in response to the fifth. *See* Dkt. No. 75.

Pursuant to the Court's scheduling order, plaintiffs filed their motion for class certification on May 9, 2013. *See* Dkt. No. 92. Wells Fargo filed its opposition two weeks later on May 23, 2013. *See* Dkt. No. 105. On the same day, applicants filed their motion to intervene.

B. *Morris* and *McKenzie*

Applicants argue that the Court should permit them to intervene because they filed *Morris* and *McKenzie* first and have done more discovery than plaintiffs have. *See* Mot. Intervene at 1-2. However, whether a proposed intervenor has filed a similar suit or when he did so is not relevant to a motion to intervene. Nor is the amount of discovery that the proposed intervenor may have done in that other suit.

In any event, it is no clear how much of the documents or deposition transcripts in *McKenzie* or *Morris* – which applicants propose they be permitted to introduce in this action – would be relevant here. *Morris* and *McKenzie* are based primarily on the theory that Wells Fargo wrongly required borrowers to maintain flood insurance covering the replacement cost value of their homes.[4] Plaintiffs in this suit also initially alleged this same "excessive coverage" theory,

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[4] Ms. Morris's original complaint focused almost entirely on her excessive coverage theory. *See* Van Zandt Decl. Ex. A at ¶¶ 15-30. The same is true of Ms. Morris' first amended complaint, *see* Richter Decl. Ex. 2 at ¶¶ 16-33, which is the operative pleading. Although the first amended complaint mentions "kickbacks" briefly, *see id.* at ¶ 33, this unexplained allegation is buried underneath the plaintiffs' excessive coverage allegations. The complaint does not include any backdating allegations. The original complaint in *McKenzie* also focused almost entirely on the excessive coverage theory. *See* Van Zandt Decl. Ex. B at ¶¶ 18-25, 28. This remained the case through the plaintiffs' second amended complaint. *See* Van Zandt Decl. Ex. C at ¶¶ 1-6, 22-23. While these complaints included terse "kickback" and "backdating" allegations, the *McKenzie* court held that these allegations were too conclusory to state a claim. *See McKenzie v. Wells Fargo Home Mortg., Inc.*, No. C–11–04965 JCS, 2012 WL 5372120, at *21-22 (N.D. Cal. Oct. 30, 2012). It was not until the court in *McKenzie* dismissed the plaintiffs' excessive coverage theory, *see id.* at *13-20, and the plaintiffs filed their third amended complaint on November 29, 2012, that the plaintiffs made any real effort to allege facts supporting their kickback or backdating theories.

but the Court rejected it. *See* Dkt. No. 70 at 12-13. Hence, any discovery from *Morris* or *McKenzie* regarding this defunct theory would be irrelevant in this suit.

Furthermore, it does not appear that the courts in either *McKenzie* or *Morris* set limits on discovery, as this Court did in this suit. Hence, applicants apparently propose that the Court permit them to introduce documents and testimony that the Court in this case has ruled is out of bounds prior to a decision on certification. They do so without pointing to any specific document or testimony that they would like to introduce or explaining how it would bear on certification.

Furthermore, though applicants accuse plaintiffs of rushing to certification in this case, that is precisely what Ms. Morris attempted to do herself. In July 2012, the court in *Morris* continued the deadline for plaintiffs to move for class certification "until further order of the court." *See* Richter Decl. Ex. 1 at 13. On September 12, 2012, before any "further order," Ms. Morris filed a motion for class certification. *See id.* at Dkt. No. 103. Given that the Court had not yet reset a schedule for this motion, it denied the motion without prejudice "to renew as directed by the Court after it conducts a status conference with counsel." *See* Van Zandt Decl. Ex. D.[5]

III. ARGUMENT

A. Wells Fargo Does Not Oppose Applicants' Stay Request.

Applicants propose, as an alternative to intervention, that the Court stay proceedings in this suit to permit class certification to be decided first in the earlier-filed *Morris* and *McKenzie* suits. *See* Motion Intervene at 23-25. Applicants contend that the Court should do so because they filed their suits first, are better-represented and have developed a stronger factual record.

Wells Fargo takes no position on these arguments. Rather, it believes that it does not matter who moves for certification first because these suits are not amenable to classwide resolution. That is why two separate courts have recently denied certification of the claimsasserted by plaintiffs here and applicants in *McKenzie* and *Morris*. *See Kunzelmann v.*

[5] Applicants assert in their motion that no status conference was held because Wells Fargo "declined to participate." *See* Mot. Intervene at 5. That is not true. Applicants cite the declaration of Kai Richter for this dubious proposition. *See id.* (citing Richter Decl. ¶ 7). However, Mr. Richter asserts no such thing and his declaration does not support the proposition that Wells Fargo refused to engage in a status conference. It did not.

Wells Fargo Bank, N.A., No. 9:11-cv-81373-DMM, 2013 WL 139913, at * 13 (S.D. Fla. Jan. 10, 2013); *Gordon v. Chase Home Fin., LLC*, No. 8:11-cv-2001-T-33EAJ, 2013 WL 436445, at *12 (M.D. Fla. Feb. 5, 2013).

That being said, Well Fargo is not opposed to staying this case pending decisions on class certification in *McKenzie* and *Morris*, which would permit the courts in those earlier-filed actions to decide the issue of certification first, as applicants propose. This approach would avoid prejudice to Wells Fargo, which is opposing certification in those cases in any event (the *McKenzie* plaintiffs filed a motion for class certification on May 31), while also avoiding the difficulties and duplication of effort that would inevitably result from permitting applicants in this suit to intervene at this late date.

B. Applicants Are Not Entitled to Intervene.

An applicant seeking to intervene as of right must meet four requirements:

> (1) the applicant must timely move to intervene; (2) the applicant must have a significant protectable interest relating to the property or transaction that is the subject of the action; (3) the applicant must be situated such that the disposition of the action may impair or impede the party's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by existing parties.

Arakaki v. Cayetano, 324 F.3d 1078, 1083 (9th Cir. 2003) (citation omitted). An applicant for intervention must establish each of these elements. *See id.* at 1083; *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1308 (9th Cir. 1997). Failure to satisfy any element is fatal. *See Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 950 (9th Cir. 2009).

1. The Motion Is Untimely.

Courts consider three factors in determining whether a motion to intervene is timely: (1) the stage of the proceeding; (2) the prejudice to other parties; and (3) the reason for and length of the delay. *See Cal. Dep't of Toxic Substances Control v. Commercial Realty Projects, Inc.*, 309 F.3d 1113, 1120 (9th Cir. 2002). Each factor weighs against applicants' motion. The motion is untimely and should be denied for that reason alone. *See League of United Latin Am. Citizens*, 131 F.3d at 1302; *U.S. v. Washington*, 86 F.3d 1499, 1503 (9th Cir. 1996).

(a) Permitting Intervention Would Be Prejudicial.

First and foremost, granting applicants' motion would be grossly prejudicial to Wells Fargo.[6] As discussed, Wells Fargo has been litigating this case over the last seven months under the schedule the Court set in November 2012. In addition to extensive motion practice, the parties have engaged in wide-ranging discovery including the production by Wells Fargo of over 300,000 pages of documents and six depositions. *See supra* Part II.A. On May 9, 2013, in accordance with the Court's schedule, plaintiffs filed their motion. *See* Dkt. No. 92. Wells Fargo has now filed its opposition and the motion is scheduled to be heard on June 20.

Now, at the eleventh hour, applicants seek to intervene as additional named plaintiffs. Applicants argue that intervention will not prejudice Wells Fargo because, after they are added as plaintiffs, they will simply file a "supplemental" motion for certification. *See* Mot. Intervene at 18. Under this proposal, applicants would act as some sort of "super" amicus curiae that could submit not only additional briefing but also substantial new evidence. *See* Mot. Intervene at 1-2, 18. At the same time, applicants would be liberated from any of the unpleasant obligations that come with being a party to litigation or serving as a class representative, including filing a complaint and participating in discovery.

That is not how intervention works. *See Hanni v. Am. Airlines, Inc.*, No. C 08-00732 CW, 2010 WL 289297, at * 6 (N.D. Cal. Jan. 10, 2010) ("The purpose of intervention is to allow outsiders with an interest in a lawsuit to come in as a party, not to allow an outsider to side-step discovery rules in order to assert new claims and facts."). Rather, if the Court permits applicants to intervene, they would become parties to this action, with all attendant rights and obligations, *See League of United Latin Am. Citizens*, 131 F.3d at 1304.

But it is important to note that plaintiffs here do not merely seek to intervene. They are not seeking to litigate this suit *with* plaintiffs' counsel. They seek to displace them based on their opinion, and their perception of the Court's opinion, of plaintiffs' counsel. *See* Mot. Intervene at

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[6] *See Med. Advocates For Healthy Air v. Johnson*, No. C 06-0093 SBA, 2006 WL 1530094, at *3 (N.D. Cal. June 2, 2006) (prejudice to existing parties is the most important factor in determining timeliness).

3. Hence, if applicants are permitted to intervene, before the Court could address any other business, it would need to first decide who should be in charge of plaintiffs' suit. This would require the appointment of interim class counsel pursuant to Federal Rule of Civil Procedure 23(g)(3), which is designed to address such pre-certification rivalries between aspiring class counsel. *See* FED. R. CIV. P. 23(g)(3), cmt. to 2003 Amendments, subd. (g), para. (2)(A). Counsel for applicants and plaintiffs will surely wish to brief this issue.

Whoever emerges victorious from this fight would then need to file an amended complaint, adding factual allegations for applicants and possibly new legal theories. Wells Fargo would, of course, be entitled to challenge that complaint by way of a motion to dismiss if appropriate. *See Briggs v. United States*, No. C 07-05760 WHA, 2009 WL 1560005, at *2 (N.D. Cal. June 1, 2009) (recognizing that intervention would require a new round of dispositive motions and discovery).[7]

Next, Wells Fargo would be entitled to engage in discovery to explore applicants' allegations and claims, as well as their fitness to serve as class representatives. This would require, at the very least, the production of documents from the new plaintiffs and five additional depositions. At the end of all this, whoever is running plaintiffs' case would presumably file a new motion for class certification, and Wells Fargo would be obligated to file a new opposition in addition to the one it filed two weeks ago.

These sorts of difficulties have led other courts to deny intervention by putative class members prior to a decision on class certification. *See George v. Uponor, Inc.*, --- F.R.D. ---,

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[7] Though it is impossible to anticipate what motion Wells Fargo might file in response to applicants' complaint, it is worth noting that applicants own property in Pennsylvania, Texas and New Mexico. *See* Richter Decl. Ex. 2 at ¶ 9; Ex. 4 at ¶¶ 22-24. Hence, even assuming that applicants' allegations and claims are substantially similar to those asserted by plaintiffs, applicants' complaint would nonetheless raise new issues with respect to whether applicants' claims are viable under the laws of Pennsylvania, Texas and New Mexico. Furthermore, Wells Fargo has filed motions to dismiss in both *Morris* and *McKenzie*, which have been granted in part. Thus, permitting applicants to intervene here could raise thorny issues with respect to the binding effect of the court's rulings in those cases. For example, in *Morris* the court granted Wells Fargo's motion to dismiss Ms. Morris's claims for (1) breach of the implied covenant of good faith and fair dealing, and (2) unjust enrichment against Wells Fargo (but not against Wells Fargo Insurance, Inc.). *See Morris v. Wells Fargo Bank, N.A.*, No. 2:11cv474, 2012 WL 3929805, at *8-12 (W.D. Pa. Sept. 7, 2012). If Ms. Morris is permitted to intervene, Wells Fargo would be entitled to argue that any claims for unjust enrichment or breach of the implied covenant of good faith and fair dealing are barred under the doctrine of res judicata.

2013 WL 771833, at *3-4 (D. Minn. Feb. 28, 2013) (citing *Coburn v. DaimlerChrysler Servs. N. Am., LLC*, 218 F.R.D. 607, 610-11 (N.D. Ill. 2003) and *Siegel v. Lyons*, No. C-95-3588 DLJ, 1996 WL 634206, at *9 (N.D. Cal. Sept. 16, 1996)). Furthermore, as the court in *George* noted, a motion to intervene prior to certification is improper because it "raises the issue of plaintiffs' adequacy as representatives before the named parties have addressed the subject themselves." 2013 WL 771833, at *3.

Indeed, applicants' entire motion is based on the premise that plaintiffs are inadequate. But that is precisely the issue pending before the Court on plaintiffs' motion for class certification. Furthermore, if applicants are correct that plaintiffs are inadequate, the Court will deny certification. Applicants would then be free to pursue certification in *McKenzie* and *Morris*. And denial of certification on the narrow basis that plaintiffs are inadequate would have no negative precedential value for class certification in *McKenzie* or *Morris*.

In sum, it is not possible to simply permit applicants to file a "supplemental" brief with new evidence in thirty days, as they propose. To the contrary, permitting applicants to intervene would have the practical effect of requiring Wells Fargo and the Court to redo most of the work it has done in this case. This would be grossly prejudicial to Wells Fargo.[8] It would also require the Court to alter the scheduling order it set in November 2012 without any showing of good cause.[9]

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[8] *See League of United Latin Am. Citizens*, 131 F.3d at 1304 (affirming denial of motion to intervene where intervention would have "inevitable effect of prolonging the litigation to some degree); *Harris v. Vector Mktg. Corp.*, No. C-08-5198 EMC, 2010 WL 3743532, at * 5 (N.D. Cal. Sept. 17, 2010) (denying intervention in putative class action where intervention would require additional discovery that would delay motion for class certification); *Hanni*, 2010 WL 289297, at *6 (denying motion to intervene in putative class action where fact discovery for motion for certification had closed and intervention would require additional depositions); *Briggs v. United States*, No. C 07-05760 WHA, 2009 WL 1560005 (N.D. Cal. June 1, 2009) (denying motion to intervene where intervention would require additional discovery and new dispositive motions).

[9] *See Harris*, 2010 WL 3743532, at *2-5 (holding that Federal Rule of Civil Procedure 16 applied and that proposed intervener in putative class action was required to show "good cause" to intervene and alter scheduling order prior to motion for class certification); *Briggs*, 2009 WL 1560005, at *1-2 (holding that Rule 16 applied to motion to intervene and denying motion because proposed intervenor had failed to establish "good cause" for intervention). *Harris* and *Briggs* each involved cases in which the proposed intervenors were represented by the same counsel that represented the existing putative class representatives. However, the gist of the cases was that the intervenors, and the plaintiffs' counsel, had failed to diligently seek intervention. As discussed, counsel for applicants here has been aware of this suit since October 2012 and presumably was (footnote continued)

As discussed, Wells Fargo does not object to applicants' alternative proposal that the court stay this case pending decisions on class certification in *McKenzie* and *Morris*. Indeed, permitting intervention would have the same practical effect as a stay as it is unlikely that the Court and the parties could resolve all of the issues raised by intervention prior to a decision on class certification in *McKenzie*, in which the plaintiffs already filed their motion for class certification. As compared to intervention, staying this suit would carry the benefit of avoiding the additional discovery and motion practice that would be necessary if applicants are permitted to intervene as new parties at this late date.

(b) Applicants Offer No Cogent Reason for Their Delay.

"While the length of time that has passed since a suit was filed is not, in and itself, determinative of timeliness, [a] party seeking to intervene must act as soon as he knows ***or has reason to know*** that his interests might be adversely effected by the outcome of the litigation." *Cal. Dep't of Toxic Substances*, 309 F.3d at 1120 (citation and quotations marks omitted; emphasis in original).[10] Courts are reluctant to permit intervention where the applicant is aware of intervention but has unduly delayed in seeking to intervene. *See League of United Latin Am. Citizens*, 131 F.3d at 1304 (citing 7C A. WRIGHT, A. MILLER & M. K. KANE, FEDERAL PRACTICE AND PROCEDURE § 1920, at 488-91 (2d ed. 1986)).

By their own admission, applicants were on notice of this suit no later than October 2012, when they filed their unsuccessful motion to relate this suit and *McKenzie*. *See* Mot. Intervene at 8. Hence, applicants were aware at that time that the outcome of this litigation – including a decision on class certification – could adversely affect them. Yet, they waited over *seven months*,

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aware of the scheduling order shortly after it was entered. At least they do not allege otherwise. Hence, the same concerns that led this Court to hold that the proposed intervenors in *Harris* and *Briggs* were required to show good cause to alter the scheduling orders in those cases apply with equal force here.

[10] *See also U.S. v. Alisal*, 370 F.3d 915, 923 (9th Cir. 2004) (same); *Moore v. Verizon Commc'ns Inc.*, No. C 09-1823 SBA, 2013 WL 450365, at *5 (N.D. Cal. Feb. 5, 2013) (same: measuring delay from beginning of suit when it should have put intervenors on notice that suit may adversely affect their interests); *In re Charles Schwab Corp. Sec. Litig.*, 2011 WL 633308, at *3 (same; denying motion to intervene as untimely where intervenor knew for at least six months prior to filing motion that his interests may be adversely affected by the litigation).

and until after plaintiffs filed their motion for certification, to seek to intervene.

Applicants bizarrely assert that "there has been *no delay* in filing this motion." Mot. Intervene at 19 (emphasis added). That is so, they argue, because they moved to intervene "only" two weeks after plaintiffs filed their motion for certification. Applicants argue that before that time, "it was uncertain" (1) "which classes [plaintiffs] would seek to certify," and (2) the adequacy of [plaintiffs'] class certification motion…" *Id.*

As an initial matter, applicants get the standard wrong. An intervenor cannot wait on the sidelines until he is "certain" that an action will affect his interests. He must promptly intervene when he knows, or should reasonably know, "that his interests *might* be adversely effected by the outcome of the litigation." *Cal. Dep't of Toxic Substances*, 309 F.3d at 1120 (emphasis added); *see also In re Charles Schwab Corp. Sec. Litig.*, 2011 WL 633308, at *3 (same). Again, applicants knew that this suit might adversely affect their interests over seven months before they moved to intervene. They did not act promptly.

In any event, applicants' purported justifications do not withstand scrutiny. Plaintiffs' original complaint proposed a class of

> All persons in the United States with a loan serviced by Wells Fargo who, within the applicable statute of limitations through July 31, 2012, were charged for a force-placed flood or hazard insurance policy procured through Defendants.

Dkt. No. 1 ¶ 66. Plaintiffs' motion for class certification seeks certification of the following class:

> All persons in the United States with mortgages owned or serviced by Wells Fargo Bank, N.A., or an affiliate of Wells Fargo Bank, N.A., who were charged for force-placed insurance by Wells Fargo Bank, N.A., or an affiliate of Wells Fargo Bank, N.A., within the applicable statute of limitations.

Applicants' contention that they could not have known the class that plaintiffs would seek to represent prior to certification is simply not true.

Similarly, applicants' counsel has had run-ins with plaintiffs' counsel dating at least as far back as settlement proceedings in *Hoffstetter* in 2011, which, according to applicants, "rais[es] serious concerns regarding [plaintiffs' counsel's] ability to adequately represent the interest of the class members…." *See* Mot. Intervene at 12-13 n. 11. The notion that applicants were waiting to

review plaintiffs' motion for certification to determine if plaintiffs' attorneys or their attorneys would better protect their interests strains credulity.[11]

Furthermore, even if the Court were to credit applicants' argument that they needed to review plaintiffs' motion for class certification before deciding whether to intervene – which does not hold water – that would not explain why they waited two *additional* weeks to move to intervene. Of course, the real reason for this additional delay is readily apparent. By waiting until Wells Fargo's opposition was due to move to intervene, applicants avoided the possibility that the Court would continue briefing on plaintiffs' motion for class certification until it decided the motion to intervene. As a result, applicants have the advantage of reviewing Wells Fargo's opposition to class certification before they file any "supplemental" brief. Such gamesmanship should not be rewarded.

(c) This Suit Is Advanced.

Although this case was filed ten months ago, it "is no longer in the early stages of its life cycle." *Hanni*, 2010 WL 289297, at * 6 (denying motion to intervene brought concurrently with motion for class certification). To the contrary, the parties have engaged in substantial motion practice and discovery and have now fully briefed plaintiffs' motion for class certification. The advanced stage of the proceedings weighs heavily against intervention, particularly when coupled with applicants' failure to explain their delay in moving to intervene and the prejudice intervention would cause. *See Harris*, 2010 WL 3743532, at *5 (denying motion to intervene where motion was heard "just a few days" before plaintiff's motion for class certification was due); *Hanni*, 2010 WL 289297, at *6 (denying motion to intervene as untimely where it was heard at same time as plaintiffs' motion for class certification).

[11] It is worth noting that none of the actual applicants has submitted a declaration in support of this motion explaining why they believe intervention is appropriate, why they believe their interests are not adequately represented by plaintiffs, when they became aware that this was the case, or why they waited so long to seek to intervene. Rather, the declarations submitted in support of this motion come solely from applicants' counsel.

2. Applicants' Quibbles With Plaintiffs' Litigation Strategy Do Not Support Intervention.

Applicants raise several arguments directed towards plaintiffs' purported inability to adequately represent applicants' interests. But upon closer examination these arguments amount to little more than criticism of plaintiffs' litigation strategy. It is well-settled in this circuit that a difference in opinion over litigation strategy cannot support a motion to intervene. *See Perry*, 587 F.3d at 947, *Arakaki*, 324 F.3d at 1086; *League of United Latin Am. Citizens*, 131 F.3d at 1306; *Northwest Forest Resource v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996); *In re Charles Schwab Corp. Sec. Litig.*, 2011 WL 633308, at *4. Hence, applicants' arguments for intervention fail as a matter of law.

For example, applicants argue that plaintiffs recklessly rushed this litigation ahead of plaintiffs' suits. Mot. Intervene at 21. But the proper pace of litigation is clearly a matter of strategy about which reasonable minds may differ. *See, e.g., Drakes Bay Oyster Co. v. Salazar*, No. 12-cv-06134-YGR, 2013 WL 451813, at *6 (N.D. Cal. Feb. 5, 2013) (complaint as to alleged slow pace of litigation did not support intervention).

Furthermore, this criticism is completely unfounded. In filing their motion, plaintiffs simply followed the schedule the Court set seven months ago. In fact, rather than "rushing" their motion, plaintiffs filed it on the *last possible day* they could do so. *See* Dkt. No. 42 ¶ 3. That plaintiffs filed their motion within the schedule set by the Court could not possibly support intervention.

Applicants also argue that plaintiffs failed to develop a "complete record in support of class certification." *See* Mot. Intervene at 21. Specifically, they fault plaintiffs for not deposing more witnesses and for failing to obtain the "213,000 pages of documents and an extensive set of class data" produced in *Morris* and later in *McKenzie*. *See id.* at 2. However, plaintiffs *have* obtained over 300,000 pages of documents from Wells Fargo. *See id.* at 9. Furthermore, applicants ignore that the Court in this suit limited discovery to matters relevant to the named plaintiffs' claims or class certification. *See* Dkt. No. 72 at 11. Hence the "class data" produced in *Morris* is out of bounds, as would be many of the documents produced in that suit. And much if

not most of the discovery in *Morris* and *McKenzie* was directed towards the "excessive coverage" theory that is no longer part of this case and would not be relevant here.

Furthermore, applicants make no effort to identify any specific document or testimony they seek to introduce. Instead, they proceed under the facile assumption that more documents and testimony will necessarily be better. It is not at all clear that is the case. In *Kunzelmann* plaintiffs took extensive discovery, including taking multiple depositions. They also named Wells Fargo Insurance, Inc. ("WFI") as a defendant, as applicants argue that plaintiffs here should have done. *See Kunzelmann*, 2013 WL 139913, at *1. None of this mattered because the plaintiffs' claims – like plaintiffs' claims in this suit – simply are not amenable to classwide resolution. *See id.* at *13.[12]

3. Applicants' Interests May Be Protected Without the Prejudice and Disruption of Intervention.

As already discussed, applicants' motion is untimely and they have failed to meet their burden of showing why intervention is necessary. The court should deny applicants' motion for each of those independent reasons. Applicants' ability to protect their interests short of intervention weighs further against granting their motion.

As an initial matter, it is at least as likely as not that a decision on class certification in this case will have no negative impact on applicants. If the Court denies plaintiffs' motion for class certification, that ruling would have no binding effect on applicants. Similarly, if the Court certifies only the proposed California and/or Arkansas sub-classes, certification would have no impact on applicants, none of whom resides in or owns property in those states. If applicants are

[12] Wells Fargo will leave it to plaintiffs to respond to applicants' accusations that they made misrepresentations in their motion for class certification. Suffice to say, these accusations merely underscore that this motion is part of an ongoing "turf war" between counsel for plaintiffs and applicants. Indeed, it is clear that applicants' motion has little to do with applicants' representation and everything to do with applicants' counsel's efforts to secure their "place at the table" in this suit. Tellingly, none of the applicants have filed a declaration explaining why they believe their interests are not adequately represented or why they failed to intervene sooner. *Cf. In re Charles Schwab Corp. Sec. Litig.*, 2011 WL 633308, at *6 (denying intervention that "would not be in the best interests of the class but rather would only be in Attorney Pentz's bests interest.").

permitted to intervene, and "either scenario occurs," applicants "will have intervened by right without any right to do so," *George*, 2013 WL 771833, at *4, because either result would mean that applicants did not actually have any interest in this litigation. And, as discussed, if the Court denies certification on narrow grounds, such as that plaintiffs are not adequate or typical, that ruling would lack even any adverse precedential value with respect to class certification in *McKenzie* or *Morris*.

Furthermore, courts may deny intervention where an applicant has adequate alternative means to protect his interests. *See In re Charles Schwab Corp. Sec. Litig.*, 2011 WL 633308, at *5 (citation omitted). Plaintiffs seek certification under Rule 23(b)(3). Accordingly, if the Court certifies a class in this case, applicants would have the ability to opt out of the class and prosecute their claims individually. *See* FED. R. CIV. P. 23(c)(2)(B)(v). In addition, applicants would have a right to enter an appearance in this action should they feel the need to do so. *See* FED. R. CIV. P. 23(b)(2)(B)(iv). Given the alternative means that applicants have to protect their interests, there is no reason that the Court and the parties should be made to endure the disruption and prejudice that would result from intervention.

C. Permissive Intervention Is Not Warranted.

Applicants also move for permissive intervention under Federal Rule of Civil Procedure 24(b). A court may grant permissive intervention where the applicant shows: "(1) independent grounds for jurisdiction; (2) the motion is timely; *and* (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common." *See League of United Latin Am. Citizens*, 131 F.3d at 1308 (citation and quotation marks omitted; emphasis added). "The proposed intervenor bears the burden to demonstrate that it has satisfied the requirements for intervention." *Moore*, 2013 WL 450365, at * 16 (citation omitted).

Timeliness is judged even more strictly on a motion for permissive intervention that it is on a motion for intervention as of right. *See League of United Latin Am. Citizens*, 131 F.3d at 1308. Hence, a finding that an applicant's motion to intervene as of right is untimely also forecloses permissive intervention. *See Moore v. Verizon*, 2013 WL 450365, at * 16; *In re Charles Schwab*, 2011 WL 633308, at *5. For the reasons already discussed, applicants' motion to intervene as or

right is untimely . *See supra* Part II.B. Accordingly, applicants' motion for permissive intervention fails too.

Applicants contend that a party seeking permissive intervention need only show that he shares a common question of law or fact with the main action. *See* Mot. Intervene at 22. In so arguing, applicants ignore Ninth Circuit precedent holding that an applicant must also show that his motion is timely. Applicants' motion is not timely. Hence, it should be denied.

IV. CONCLUSION

Applicants' motion is futile because the adverse precedent they seek to avoid already exists. *See Kunzelmann v. Wells Fargo Bank, N.A.*, No. 9:11-cv-81373-DMM, 2013 WL 139913, at *13 (S.D. Fla. Jan. 10, 2013); *Gordon v. Chase Home Fin., LLC*, No. 8:11-cv-2001-T-33EAJ, 2013 WL 436445, at *12 (M.D. Fla. Feb. 5, 2013). It is also untimely, prejudicial and meritless. It should be denied. Wells Fargo does not oppose applicants' alternative proposal that the Court stay this action pending the resolution of applicants' class certification motions in the earlier-filed *Morris* suit or in *McKenzie*, in which applicants filed a motion for class certification on May 31.

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