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13 Wells Fargo Investments, LLC; Wells Fargo
Institutional Securities, LLC; Wells Fargo
14 Services, LLC and Wells Fargo Bank, N.A.

15 **UNITED STATES DISTRICT COURT**
16 **NORTHERN DISTRICT OF CALIFORNIA**

17
18 LINDELL VAN DYKE, AS TRUSTEE FOR
19 THE VAN DYKE FAMILY TRUST, and
SANDRA OLSEN, Individually And On Behalf
20 of All Others Similarly Situated,

21 Plaintiff,

22 vs.

23 WELLS FARGO & CO.; WELLS FARGO
INVESTMENTS, LLC; WELLS FARGO
24 INSTITUTIONAL SECURITIES, LLC; WELLS
FARGO SERVICES, LLC and WELLS FARGO
25 BANK, N.A.

26 Defendants.

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Lead Counsel for the Class

No.: CV 08 1962 (JSW)

**JOINT RULE 26(f) REPORT AND CASE
MANAGEMENT CONFERENCE
STATEMENT**

Date: October 23, 2009
Time: 9:00 a.m.
Place: Courtroom 11

Before the Hon. Jeffrey S. White

1 On October 2, 2009, Lead Plaintiffs Lindell Van Dyke, as Trustee for the Van Dyke Family
2 Trust, and Sandra Olsen (collectively “Plaintiffs”) and Defendants Wells Fargo & Co., Wells Fargo
3 Investments, LLC (“WFI”), Wells Fargo Institutional Securities, LLC (“WFIS”), Wells Fargo
4 Brokerage Services, LLC (“WFBS”) and Wells Fargo Bank, N.A. (collectively “Defendants” or
5 “Wells Fargo”), by and through their respective counsel of record, continued their good faith meet
6 and confer process for the purpose of discussing the issues addressed in Fed. R. Civ. P. 26(f) and
7 Civil L.R. 16-9.

8 Counsel respectfully submit the following joint report reflecting the matters on which they
9 agree and their respective views concerning the issues on which they disagree.

10 **1. Jurisdiction and Service.**

11 This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and
12 1337, and Section 27 of the Securities Exchange Act of 1934 (15 U.S.C. § 78aa), because the First
13 Amended Class Action Complaint (“Complaint”) asserts claims for violations of Section 10(b) and
14 20(a) of the Exchange Act, 15 U.S.C. § 78j(b) and 78t(a), and Rule 10b-5 promulgated thereunder
15 by the SEC (17 C.F.R. 240.10b-5).

16 The parties are unaware of any issues with respect to personal jurisdiction or venue. All
17 parties have been served and have appeared.

18 **2. Facts.**

19 **A. Plaintiffs’ Factual Contentions.**

20 This case stems from the collapse of the market for auction rate securities (“ARS”) on
21 February 13, 2008. ARS are long-term debt obligations that pay interest at rates established by
22 periodic auctions held every 7, 28, 35 or 49 days, depending on the terms of the security. Plaintiffs
23 allege that during the class period (April 14, 2003 through February 13, 2008), Wells Fargo sold
24 ARS to Plaintiffs and other investors as highly liquid and appropriate short-term investments. At
25 the same time, Wells Fargo was engaged in a scheme to defraud purchasers of ARS by making
26 omissions and misrepresentations of material fact about the risks, value and liquidity of ARS.
27 Wells Fargo pushed nearly \$4 billion of ARS onto Plaintiffs and other investors. This scheme
28

1 allowed Defendants to reap millions of dollars in sales commissions, underwriting fees and auction
2 management fees at the expense of investors.

3 Months after this action was filed, state securities regulators in Washington and California
4 sued WFI, WFIS and WFBS for, among other things, making omissions of material fact in the offer
5 and sale of ARS, and selling ARS by means of a manipulative, deceptive or other fraudulent
6 scheme, device or contrivance.¹ Consistent with the state regulators' allegations, Plaintiffs in this
7 action allege that Defendants falsely marketed ARS as liquid investments, while failing to disclose
8 that the apparent liquidity existed only because of broker-dealers' systematic intervention in the
9 ARS market in the absence of actual demand.

10 **B. Defendant's Factual Contentions.**

11 Plaintiffs' Complaint purports to allege primary violations of the federal securities laws by
12 defendants WFI, WFIS and WFBS, while pursuing secondary-liability claims against Wells Fargo
13 & Co. and Wells Fargo Bank, N.A. for control-person liability, arising from the unprecedented
14 collapse of the ARS markets. ARS are bonds or preferred stocks with interest rates or dividend
15 yields that are re-set through periodic "Dutch" auctions, generally held every 7, 28, 35, or 49 days.
16 ARS are typically auctioned at par value, with only the interest rates or dividend yields fluctuating
17 through the auctions.

18 Defendants, however, have filed a motion to dismiss because the Complaint fails to satisfy
19 the heightened pleading standards governing federal securities claims. Plaintiffs have alleged no
20 facts regarding any specific conduct by WFIS and WFBS, and further fail to allege any specific
21 misleading statements or omissions by WFI. Indeed, the Complaint fails to identify any specific
22 facts showing that any of the Defendants had the requisite intent to commit fraud. In fact, given
23 that Plaintiffs allege that the ARS market operated for twenty-three years without disruption, the
24 strongest inference that can be drawn from Plaintiffs' allegations is that, at the time Plaintiffs
25

26
27 ¹ California filed its complaint after Plaintiffs filed their First Amended Complaint. Accordingly,
28 the Complaint references the Washington action, but not the California action.

1 purchased ARS, Defendants had no intent to commit fraud but rather thought Plaintiffs' ARS would
2 continue to be safe, liquid investments.

3 The Complaint also suffers from substantive defects. While Plaintiffs allege that they relied
4 on the market price in purchasing ARS, the risks of ARS were known to the market for years prior
5 to Plaintiffs' purchases. Thus, under Plaintiffs' theory, the market would have already accounted
6 for this information, and the price could not have been inflated. Further, Plaintiffs themselves
7 allege that information about the safety and liquidity of ARS entered the marketplace in March
8 2005, when the Securities and Exchange Commission, the Financial Accounting Standards Board,
9 and the "Big Four" Accounting firms adopted positions that ARS were not cash equivalents but
10 long-term investments that depended on broker-dealers to provide liquidity. According to
11 Plaintiffs, however, the value of their ARS did not decline until February 2008—nearly three years
12 later. As such, Plaintiffs cannot show that their alleged loss resulted from the alleged
13 misstatements. Moreover, Plaintiffs do not even identify their alleged loss.

14 Accordingly, Defendants have filed a motion to dismiss and seek that the Complaint be
15 dismissed with prejudice.

16 3. Legal Issues.

17 Plaintiffs contend that the following legal issues are in dispute: (i) whether WFI, WFIS and
18 WFBS have violated Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder;
19 (ii) whether Wells Fargo & Co. and Wells Fargo Bank are liable as control persons of WFI, WFIS
20 and WFBS under Section 20(a) of the Exchange Act; (iii) whether Plaintiffs and class members
21 have been damaged and/or are entitled to declaratory, injunctive and/or equitable relief; and (iv)
22 whether this action is maintainable as a class action under Fed. R. Civ. P. 23.

23 Defendants contend that relevant legal issues at this stage of the proceedings include
24 whether Plaintiffs' Complaint sufficiently states any claims so as to survive Defendants' motion to
25 dismiss, which is set to be heard by this Court on October 23, 2009.

26 4. Motions.

27 a. Prior and Pending Motions. The Court appointed Lead Plaintiffs and Lead
28 Counsel in this matter on October 15, 2008. Motions for admission *pro hac vice* have been granted

1 for Defendants' counsel. There was also motion practice concerning a related case that has since
2 been voluntarily dismissed. Defendants filed a motion to dismiss on April 20, 2009. The motion to
3 dismiss is set to be heard by this Court on October 23, 2009. Defendants also filed an opposition to
4 the request for judicial notice Plaintiffs filed with their opposition to the motion to dismiss.

5 b. Anticipated Motions. The parties anticipate filing no further motions until
6 the Court issues a ruling on the motion to dismiss. Thereafter, Plaintiffs anticipate filing a motion
7 for class certification. If and when discovery is completed, the parties may also seek to file motions
8 for summary judgment. The parties will confer to schedule any such briefing at the appropriate
9 time.

10 **5. Amendment of Pleadings.**

11 The Complaint was filed on February 10, 2009. If the Court grants the pending motion to
12 dismiss in whole or in part, Plaintiffs propose that they be granted leave to amend to cure any
13 pleading deficiencies identified in the Court's order. Plaintiffs propose to file an amended
14 complaint, if necessary, 30 days after this Court's ruling on the motion to dismiss.

15 Defendants have requested that the Complaint be dismissed with prejudice.

16 **6. Evidence Preservation.**

17 Pursuant to Fed. R. Civ. P. 26(f)(2), the parties have met and conferred regarding the
18 preservation of discoverable information including electronically stored information ("ESI"). The
19 parties have discussed the scope of potentially relevant ESI and paper documents, and have agreed
20 to cease the destruction of potentially relevant documents, including emails, voicemails and other
21 electronically-recorded materials. Plaintiffs have been informed of their obligation to preserve all
22 relevant evidence and have advised that they have preserved and will continue to preserve
23 potentially relevant documents, including electronic evidence, in connection with this case.
24 Defendants have advised that they have preserved and will continue to preserve potentially relevant
25 ESI spanning at least the class period, and that they do not foresee any difficulties preserving ESI
26 potentially relevant to this litigation. The parties anticipate the continuation of their preservation
27 discussions to ensure that relevant information is preserved for the purposes of this litigation.
28

1 The parties have discussed a proposed protocol governing production of ESI and anticipate
2 continuing such discussions.

3 **7. Disclosures.**

4 Pursuant to the Private Securities Litigation Reform Act of 1995 (PSLRA), all discovery,
5 including the initial disclosures required by Fed. R. Civ. P. 26(a)(1), is currently stayed. *See* 15
6 U.S.C. § 78u-4(b)(3)(B). Accordingly, the parties have not yet made initial disclosures.

7 **8. Discovery.**

8 Pursuant to the PSLRA, all discovery is currently stayed. *See* 15 U.S.C. § 78u-4(b)(3)(B).
9 The parties have conferred and agree that meaningful discussions regarding the discovery plan
10 contemplated by Fed. R. Civ. P. 26(f)(3)—including discussions about discovery limitations,
11 phased discovery and completion of discovery—should be delayed until after this Court’s ruling on
12 Defendants’ motion to dismiss.

13 **9. Class Actions.**

14 Plaintiffs’ Statement: Plaintiffs provide the following information pursuant to Civil L.R.
15 16-9(b) and the Standing Order for All Judges of the Northern District of California regarding the
16 Contents of Joint Case Management Statements.

17 This action is maintainable as a class action under Fed. R. Civ. P. 23(a), 23(b)(1), (b)(2)
18 and/or (b)(3), and 23(c)(4).

19 This action is brought on behalf of the following class: all persons and entities that
20 purchased ARS from Defendants between April 14, 2003 and February 13, 2008, inclusive, and
21 were damaged thereby. Excluded from the class are Defendants; the subsidiaries and affiliates of
22 any Defendant; any person or entity who is a partner, officer, director, employee or controlling
23 person of any Defendant; members of Defendants’ immediate families and their legal
24 representatives, heirs, successors or assigns; and any entity in which any Defendant has or had a
25 controlling interest.

26 The following facts alleged in the Complaint demonstrate that this action is maintainable as
27 a class action under Fed. R. Civ. P. 23(a) and (b):

28 *Numerosity.* The members of the class are so numerous that joinder of all members is

1 impracticable. During the class period, Defendants sold almost \$4 billion of ARS to Plaintiffs and
2 other investors.

3 *Common Questions.* Numerous common questions of law and fact exist as to all members
4 of the class. All of the principal factual issues in dispute (Section 2 above) and disputed points of
5 law (Section 3 above) are common to all class members, and predominate over any questions
6 affecting Plaintiffs or other individual members of the class.

7 *Typicality.* Plaintiffs' claims are typical of the claims of the members of the class, as all
8 members of the class are similarly affected by Defendants' wrongful conduct in violation of federal
9 law. Plaintiffs purchased ARS from Defendants during the class period and suffered damages in
10 connection with those purchases upon the revelation of Defendants' allegedly fraudulent conduct.

11 *Adequacy.* Plaintiffs have no interests adverse or antagonistic to those of the class, and will
12 fairly and adequately protect the interests of the members of the class. Plaintiffs have also retained
13 counsel competent and experienced in class and securities litigation.

14 *Superiority.* Given the size of individual class members' claims, the expense and burden of
15 individual litigation make it economically infeasible and procedurally impracticable for class
16 members to seek redress individually for the wrongs done to them.

17 *Risk of Inconsistent Adjudications.* The prosecution of separate actions by individual class
18 members would create a risk of inconsistent or varying adjudication with respect to individual class
19 members, which would establish incompatible standards of conduct for Defendants.

20 *Injunctive/Declaratory Relief.* Defendants have acted or refused to act on grounds generally
21 applicable to the class, thereby making appropriate declaratory and injunctive relief with respect to
22 the member of the class as a whole.

23 Plaintiffs anticipate filing a motion for class certification after Defendants provide Plaintiffs
24 with the discovery necessary to support that motion. Plaintiffs will meet and confer with
25 Defendants on a schedule for undertaking that discovery, as well as a briefing and hearing schedule
26 on the motion for class certification.

1 Defendants' Statement: Defendants do not believe this case is maintainable as a class action
2 and intend to oppose any motion for class certification.

3 **10. Related Cases.**

4 The parties are not aware of any related cases or proceedings pending at this time.

5 **11. Relief.**

6 Plaintiffs seek the following relief in their Complaint: (a) a determination that this action is
7 a proper class action, certifying Plaintiffs as representatives of the class under Fed. R. Civ. P. 23
8 and appointing Plaintiffs' Lead Counsel as counsel for the class; (b) an order awarding damages,
9 including but not limited to rescission, other compensatory damages, consequential damages,
10 restitution and disgorgement of allegedly ill-gotten gains in favor of Plaintiffs and class members
11 against all Defendants, jointly and severally, for all damages sustained as a result of Defendants'
12 alleged wrongdoing, in an amount to be proven at trial, including interest thereon; (c) an order
13 awarding Plaintiffs and the class their reasonable costs and expenses incurred in this action,
14 including counsel fees and expert fees; (d) an order awarding Plaintiffs and the class pre-judgment
15 and post-judgment interest; (e) an order awarding extraordinary, equitable and/or injunctive relief as
16 permitted by law, equity and the relevant federal statutory provisions; and (f) any other and further
17 relief as the Court may deem just and proper.

18 Defendants deny Plaintiffs are entitled to any relief. Defendants have not asserted any
19 cross-claims.

20 **12. Settlement and ADR.**

21 In accordance with ADR L.R. 3-5, the parties have met and conferred regarding the ADR
22 process and have agreed on mediation as an ADR procedure. Pursuant to this Court's October 6,
23 2009 Order Selecting ADR process, the parties will meet and confer and submit a further stipulation
24 regarding ADR within 30 days of this Court's ruling on the motion to dismiss.

25 **13. Consent to Magistrate Judge for all Purposes.**

26 The parties do not consent to a magistrate judge for all purposes.

27 **14. Other References.**

28 The parties do not believe this case is suitable for other reference at this time.

1 substantially affected by the outcome of this proceeding: Wells Fargo Investments, LLC, is a
2 wholly-owned subsidiary of Wells Fargo Investment Group, Inc., which in turn is a wholly-owned
3 subsidiary of Wells Fargo & Company. Wells Fargo Institutional Securities, LLC and Wells Fargo
4 Brokerage Services, LLC are subsidiaries of Wells Fargo & Company. Wells Fargo & Company, a
5 publicly traded company, is the ultimate parent of Wells Fargo Bank, N.A.

6 **20. Other Matters.**

7 The parties do not have any additional matters to raise at this time.
8

9
10 DATED: October 16, 2009

REED SMITH LLP

11
12 By Heather B. Hoesterey
Heather B. Hoesterey

13
14 David C. Powell
15 Attorneys for Defendants Wells Fargo & Co.; Wells
16 Fargo Investments, LLC; Wells Fargo Institutional
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17
18 DATED: October 16, 2009

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28

