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13
 14 UNITED STATES DISTRICT COURT

15 NORTHERN DISTRICT OF CALIFORNIA - SAN FRANCISCO DIVISION

16 IN RE WELLS FARGO MORTGAGE-
 17 BACKED CERTIFICATES
 LITIGATION

Civil Action No. 09-cv-01376-SI

18 CONSOLIDATED CLASS ACTION
 19 ECF

20 PLAINTIFFS' OPPOSITION TO: (1) THE WELLS
 21 FARGO DEFENDANTS' AND INDIVIDUAL
 22 DEFENDANTS' MOTION TO DISMISS THE
 23 AMENDED COMPLAINT; AND (2) THE
 24 UNDERWRITER DEFENDANTS' MOTION TO
 25 DISMISS THE AMENDED COMPLAINT

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1 New Orleans Employees' Retirement System, Louisiana Sheriffs' Pension & Relief Fund,
 2 Government of Guam Retirement Fund, and Alameda County Employees' Retirement Association
 3 (collectively, "Lead Plaintiffs") and additional plaintiffs the Vermont Pension Investment Committee,
 4 the Public Employees' Retirement System of Mississippi, the Policemen's Annuity & Benefit Fund of
 5 the City of Chicago, the Southeastern Pennsylvania Transportation Authority and the Plumbers &
 6 Steamfitters Local 60 Pension Plan ("Additional Plaintiffs," together with Lead Plaintiffs, "Plaintiffs")
 7 submit this Memorandum of Law in Opposition to the separate motions to dismiss by:
 8 (1) the Wells Fargo Defendants and the Individual Defendants ("Wells Mot.") (Dkt. No. 214); and
 9 (2) the Underwriter Defendants ("Underwriter Mot.") (Dkt. No. 212).

10 I. INTRODUCTION

11 This is a securities class action involving the sale of over \$36 billion in mortgage pass-through
 12 certificates (the "Certificates") issued pursuant to offering documents that contained untrue statements
 13 and omitted material facts.¹ The Amended Complaint asserts claims for violations of Sections 11,
 14 12(a)(2) and 15 of the Securities Act of 1933 (the "Securities Act") against Wells Fargo Bank, N.A.
 15 ("Wells Fargo Bank"), Wells Fargo Asset Securities Corporation (the "Depositor"), the Underwriter
 16 Defendants, and the Individual Defendants.²

17 When granting in part and denying in part Defendants' prior motions to dismiss, the Court
 18 sustained Plaintiffs' allegations of untrue statements and omissions in the Offering Documents related
 19 to underwriting standards, ratings and appraisals. *In re Wells Fargo Mortgage Backed Certificates*
 20 *Litig.*, 2010 U.S. Dist. LEXIS 39825 (N.D. Cal. Apr. 22, 2010) ("April 22 Order"). Dkt. No. 198. The
 21 Court rejected Defendants' statute of limitations defense as "unpersuasive," and sustained Plaintiffs'
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23
 24 ¹ ¶1. "¶" refers to paragraph(s) in the Amended Consolidated Class Action Complaint For
 25 Violations Of §§ 11, 12(a)(2) And 15 Of The Securities Act of 1933 (the "Amended Complaint").
 Dkt. No. 203.

26 ² "Underwriter Defendants" refers to Bear, Stearns & Co. Inc., Goldman, Sachs & Co., Deutsche
 27 Bank Securities, Inc., UBS Securities, LLC, Credit Suisse Securities (USA), LLC, RBS Securities,
 28 Inc., Citigroup Global Markets, Inc., Banc of America Securities, LLC, and Merrill Lynch, Pierce,
 Fenner & Smith, Inc. "Individual Defendants" refers to David Moskowitz, Franklin Codel, Douglas K.
 Johnson, and Thomas Neary. "Wells Fargo Defendants" refers collectively to Wells Fargo Bank,
 N.A., Wells Fargo Asset Securities Corp., and the Individual Defendants.

1 Section 15 claims against the Wells Fargo Defendants. *Id.* at *23-24, *44-45. The Court also granted
2 Plaintiffs leave to amend to: (1) “designate additional named plaintiffs who purchased securities
3 through those offerings”; and (2) “allege facts properly giving rise to standing.” *Id.* at *20, 22.

4 Plaintiffs amended their claims in accordance with the April 22 Order. The Amended
5 Complaint re-alleges the sustained claims and omits the dismissed claims. It also adds the Additional
6 Plaintiffs, who purchased in ten offerings which the Lead Plaintiffs did not, and alleges facts giving
7 rise to standing for Plaintiffs’ Section 12(a)(2) claims. The Underwriter Defendants contend that the
8 claims asserted by the Additional Plaintiffs are time-barred. Underwriter Mot. at 5-6. This argument
9 is devoid of merit. Under *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974), the filing
10 of a class action suspends the applicable statute of limitations and repose for all putative class
11 members. Here, the initial complaint identifying claims now asserted in the Amended Complaint was
12 filed on March 27, 2009. Accordingly, under *American Pipe*, the applicable statute of limitations and
13 repose for the claims of all putative class members, including the Additional Plaintiffs, was suspended,
14 and the claims are timely.

15 Defendants further contend that Plaintiffs’ Section 12 claims should be dismissed because the
16 Amended Complaint does not include by rote the phrase “in the initial offering.” The Amended
17 Complaint, however, alleges facts giving rise to standing, including the dates the Certificates were
18 offered, the date the Plaintiffs purchased the Certificates, and that Plaintiffs acquired each security
19 directly from an Underwriter Defendant. Nothing more is required. *See Hertzberg v. Dignity*
20 *Partners, Inc.*, 191 F.3d 1076, 1081 (9th Cir. 1999) (finding that plaintiffs must have “purchased the
21 security directly from the issuer of the prospectus”).

22 Separate and apart from challenging the Additional Plaintiffs’ claims and the Section 12
23 claims, Defendants again move to dismiss the sustained claims. In so doing, they largely recycle
24 arguments that this Court previously considered and rejected, or they attempt to raise fallback
25 arguments that could have been, but were not, raised in their prior motions. Defendants contend, as
26 they did before, that ratings misstatements are “opinions,” despite the Court’s holding that Plaintiffs’
27 allegations are “sufficient to establish an actionable misstatement with respect to the rating process.”
28

1 April 22 Order, 2010 U.S. Dist. LEXIS 39825, at *43. Further, Defendants again attempt to argue that
2 the claims in the Amended Complaint are untimely as a matter of law. As this Court correctly found,
3 however, the statute of limitations defense is fact-intensive and is generally not appropriate for
4 consideration at the pleading stage. Moreover, no sufficient suspicion of a Securities Act claim
5 reasonably existed prior to May 20, 2008, when the Certificates that were initially rated “A” or higher
6 were first downgraded below investment-grade. The initial action here was timely filed on March 27,
7 2009 – well within one year of the May 20, 2008 downgrades.

8 The Wells Fargo Defendants’ motion is really a disguised motion for reconsideration that fails
9 to meet the requirements of Civil Local Rule 7-9. Under that rule, no party may file a motion for
10 reconsideration “without first obtaining leave of Court.” The Rule states that leave can only be
11 granted if a party cites “a material difference in fact or law” or a “manifest failure by the Court to
12 consider material facts or dispositive legal arguments.” It further states that requests for leave are
13 prohibited from repeating “any oral or written argument made by the applying party” and that “[a]ny
14 party who violates this restriction shall be subject to appropriate sanctions.” Defendants do not –
15 because they cannot – cite any material difference in law or fact nor a manifest failure to consider
16 material facts that would make re-challenging any of Plaintiffs’ allegations appropriate.

17 In short, the Amended Complaint states claims for Defendants’ violations of the Securities Act,
18 complies with this Court’s Order and precedent from the Supreme Court and the Ninth Circuit.
19 Defendants’ motions should be denied in their entirety, and they should be ordered to answer the
20 Amended Complaint within 20 days.

21 II. SUMMARY OF THE ACTION

22 Wells Fargo Bank, acting in coordination with the Underwriter Defendants and the rating
23 agencies, sold over \$36 billion of Certificates to investors in 27 different trusts pursuant to the
24 Offering Documents. ¶¶3, 43. The Certificates were sold primarily to institutional investors, such as
25 Plaintiffs here, who purchased the Certificates as purportedly safe, investment-grade securities. ¶50.
26 The Offering Documents contained untrue statements of material fact, or omitted to state material
27 facts necessary to make the statements therein not misleading, regarding: (1) the underwriting
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1 standards purportedly used in connection with the origination of the underlying mortgages; (2) the
2 maximum loan-to-value ratios used to qualify borrowers; (3) the appraisals of the properties
3 underlying the mortgages; and (4) the ratings of the Certificates. ¶¶5, 116.

4 The true facts which were omitted from the Offering Documents were:

- 5 • Wells Fargo Bank, its affiliates, and the additional originators had not followed the
6 stated underwriting standards when issuing loans to borrowers;
- 7 • The underlying mortgages were based on appraisals that overstated the value of the
8 underlying properties; and
- 9 • The credit ratings were based on outdated assumptions, relaxed ratings criteria, and
10 inaccurate loan information.

11 ¶6.

12 As a result, Plaintiffs and the Class purchased Certificates that were far riskier than
13 represented, were not of the “best quality,” or even “medium credit quality,” and were not equivalent
14 to other investments with the same credit ratings. ¶¶4, 7, 40. Virtually all of the Certificates have now
15 been downgraded below investment-grade. ¶118.

16 Traditionally, loan originators had financial incentive to use prudent underwriting practice to
17 ensure that the borrower had the ability to repay the note and that the underlying property was
18 sufficiently valuable to serve as collateral. ¶68. With the proliferation of securitizations, however,
19 this model gave way to the “originate to distribute” model. ¶69. Under the new model, loans were
20 pooled together, securitized and sold to investors in the form of mortgage-backed securities.
21 Securitization meant that the originators were no longer required to hold the loans they issued to
22 maturity, and the credit risk was instead transferred to investors. *Id.* Loan fees and sales revenue
23 became the originator’s primary profit mechanism, making the sheer quantity of loans more important
24 than the quality of the loans.

25 This model was highly lucrative for banks, including Wells Fargo Bank. Wells Fargo Bank
26 established a subsidiary, the Depositor, whose sole purpose was to securitize loans. ¶¶21-22, 71. To
27 complete the sale of the loans (and to transfer the risk), the Depositor needed to brand its Certificates
28 with the highest investment-grade ratings from rating agencies. The ratings assigned to the
Certificates purportedly addressed the “likelihood of the receipt by certificateholders of all

1 distributions of principal and interest to which such certificateholders are entitled.” ¶¶100-01. The
2 ratings also supposedly addressed “the structural, legal and issuer aspects associated with the
3 certificates, including the nature of the underlying mortgage loans and the credit quality of the credit
4 support provider, if any.” *Id.* The Offering Documents failed to disclose that the rating agencies used
5 outdated and unreliable models when rating the Certificates. ¶¶6, 110, 112-14. Further, as the result
6 of the systemic violations of the underwriting standards, the ratings were based on “inaccurate loan
7 information” related to borrower credit-worthiness, ability to repay, and the sufficiency of the
8 collateral. ¶¶6, 67, 72-81, 83-85. Accordingly, the Certificates’ ratings were unjustifiably high, and
9 the statements in the Offering Documents about the ratings and the ratings process were untrue and
10 omitted material facts. ¶¶4, 105.

11 The rating agencies maintained investment-grade ratings on all Certificates initially rated “A”
12 and higher until May 20, 2008. ¶104. They maintained investment-grade ratings on all Certificates
13 initially rated “AAA” until December 16, 2008. *Id.* The ratings on virtually all of the Certificates
14 have since been downgraded. ¶¶7, 118. The Certificates, therefore, are no longer marketable near the
15 prices paid by Plaintiffs and the Class. ¶7.

16 III. ARGUMENT

17 A. Plaintiffs Amended Their Claims In 18 Accordance With The Court’s Order

19 The April 22 Order sustained Plaintiffs’ Section 11 claims against the Wells Fargo Defendants
20 and the Underwriter Defendants related to each of the alleged untrue statements and omissions in
21 offerings in which Lead Plaintiffs purchased Certificates. As to underwriting misstatements, the Court
22 stated that “the Offering Documents were misleading as to the *extent* to which Wells Fargo and the
23 third-party originators deviated from their guidelines.” 2010 U.S. Dist. LEXIS 39825, at *38
24 (emphasis in original). As to the ratings misstatements, the Court found that “statements by
25 executives of Moody’s and Standard and Poor’s in which the executive admitted that they were aware
26 at the time the subject ratings were made that the agencies’ rating models were outdated . . . are
27 sufficient to establish an actionable misstatement with respect to the rating process.” *Id.* at *43. As to
28

1 the appraisal/loan-to-value misstatements, the Court found that Plaintiffs allegations that “Wells
2 Fargo’s practices permitted the pervasive and systematic use of inflated appraisals, affecting all types
3 of mortgages,” were sufficient to state a claim. *Id.* at *40-41.

4 The Court dismissed without prejudice claims arising from Certificates that the Lead Plaintiffs
5 had not purchased, as well as the Section 12(a)(2) claims. In so doing, the Court granted Plaintiffs
6 leave to amend to: (1) “designate additional named plaintiffs who purchased securities through those
7 offerings”; and (2) “allege facts properly giving rise to standing.” *Id.* at *20, 22.

8 Plaintiffs amended their complaint in accordance with the Court’s instructions. Plaintiffs
9 designated the five Additional Plaintiffs who purchased securities in ten offerings that the Lead
10 Plaintiffs did not purchase. In addition, rather than merely allege that Plaintiffs purchased “pursuant
11 or traceable” to the Offering Documents for purposes of Section 12, the Amended Complaint alleges
12 that Plaintiffs purchased directly from the Underwriter Defendants. Fed. R. Civ. P. 8 requires nothing
13 more in order for Plaintiffs to state actionable claims.

14 1. Under *American Pipe*, The Class Action Complaint Tolloed
15 The Statute Of Limitations For The Additional Plaintiffs

16 The Underwriter Defendants attempt to argue that the claims of the Additional Plaintiffs are
17 untimely. They are wrong. In *American Pipe*, the Supreme Court held that the filing of a class action
18 suspends the applicable statute of limitations and repose for all putative class members until a decision
19 on class certification is issued. 414 U.S. at 554; *see also Crown, Cork & Seal Co. v. Parker*, 462 U.S.
20 345, 349-50 (1983) (“The filing of a class action tolls the statute of limitations ‘as to all asserted
21 members of the class’”). The Supreme Court explained that, were the rule otherwise, “[p]otential class
22 members would be induced to file protective motions to intervene or to join in the event that a class
23 was later found unsuitable” which would defeat the “efficiency and economy of litigation” normally
24 associated with Rule 23 class actions. *Id.* at 553.

25 Here, the initial complaint was filed on March 27, 2009, and asserted the claims of the
26 Additional Plaintiffs. Accordingly, under *American Pipe*, the applicable statute of limitations and
27 repose for all claims of all putative class members, including the Additional Plaintiffs, was suspended
28

1 as of March 27, 2009.³ In its April 22, Order, the Court specifically afforded leave to amend to
2 “designate additional named plaintiffs who purchased securities through those offerings.” *Id.* at *20.

3 The Underwriter Defendants incorrectly contend that because the Lead Plaintiffs lacked
4 standing to assert claims on behalf of purchasers in the ten additional offerings those claims are now
5 time-barred. Underwriter Mot. at 6. As the court in *In re Flag Telecom Holdings, Ltd. Sec. Litig.*
6 explained: “[T]he failure to apply the *American Pipe* rule to cases where a class action complaint was
7 dismissed for lack of standing undermines the policies underlying Rule 23 and is inconsistent with the
8 Court’s reasoning in *American Pipe*.” 352 F. Supp. 2d 429, 455 (S.D.N.Y. 2005).

9 In *Flag Telecom*, the court dismissed the plaintiffs’ Section 12(a)(2) claims because “none of
10 the named plaintiffs purchased shares of Flag in the company’s IPO.” *Id.* at 454. Plaintiffs filed an
11 amended complaint naming an additional plaintiff who purchased in the IPO. *Id.* The court rejected
12 the same argument the Underwriter Defendants raise here:

13 Failure to apply the *American Pipe* rule would undermine the policies of
14 “efficiency and economy of litigation” which underlie Rule 23. . . . Rule
15 23 and the PSLRA tend to encourage investors who might otherwise
16 bring lawsuits to refrain from filing a complaint or intervening in an
17 action when those investors feel their interests are adequately protected in
18 a proposed class action that has already been filed. Indeed, an investor
19 such as [the new plaintiff] would probably have concluded that he had
little chance of becoming lead plaintiff after Loftin, who appears to have
invested a substantial amount of capital in Flag, filed his May 2002
Complaint. ***[The new plaintiff] should not be punished simply because
he failed to anticipate that plaintiff’s
§ 12(a)(2) claims would be dismissed because none of the named
plaintiffs in the action had standing to sue on those claims.***

20 *Id.* at 456.

21 Numerous other courts are in accord. See *Employers-Teamsters Local Nos. 175 & 505*
22 *Pension Trust Fund v. Anchor Capital Advisors*, 498 F.3d 920, 925 (9th Cir. 2007) (suggesting that
23 appellants could have filed a successor class action where “the appropriateness of a class action was
24

25 ³ “Because the complaint itself is the ultimate determinant of the putative class,” Defendants were on
26 notice that the putative class clearly included the ten offerings which the Additional Plaintiffs
27 purchased. *In re Issuer Plaintiff Initial Pub. Offering Antitrust Litig.*, 2002 WL 31132906, at *3
28 (S.D.N.Y. Sept. 25, 2002) (holding that statute of limitations was tolled under *American Pipe* where
the same underwriters were named as defendants in an earlier class action in which class certification
had not yet been decided).

1 never examined [and] instead the case was voluntarily dismissed before the class was certified”);
 2 *Schur v. Friedman & Shaftan, P.C.*, 123 F.R.D. 611, 613 (N.D. Cal. 1988) (denying motion to dismiss
 3 because prior class action filing tolled statute of limitations); *In re Enron Corp. Sec. Deriv. & ERISA*
 4 *Litig.*, 529 F. Supp. 2d 644, 709 (S.D. Tex. 2006) (Securities Act claims of a newly added plaintiff
 5 were tolled under *American Pipe*); *Cal. Pub. Employees’ Ret. Sys. v. Chubb Corp.*, 2002 WL
 6 33934282, at *27-30 (D.N.J. June 26, 2002) (finding that limitations period was tolled upon filing of
 7 original class action complaint which allowed proper class representatives to be substituted for
 8 standing purposes); *In re Initial Pub. Offering Sec. Litig.*, 214 F.R.D. 117, 123 n.9 (S.D.N.Y. 2002)
 9 (holding that the filing of the lead plaintiff’s action tolled the § 12(a)(2) claims). *See also McKowan*
 10 *Lowe & Co. v. Jasmine, Ltd.*, 295 F.3d 380, 384-89 (3d Cir. 2002) (tolling claims and permitting
 11 intervention of a class representative with standing).

12 Defendants rely heavily on *Korwek v. Hunt*, 827 F. 2d 874, 876-77 (2d Cir. 1987). In *Korwek*,
 13 however, plaintiffs re-filed their case after class certification was denied. *Id.* Indeed, *Korwek* “stands
 14 only for the proposition that once class certification is denied, putative class members may not rely on
 15 the *American Pipe* rule to commence a new, substantially identical class action because this would
 16 allow the putative class members to ‘argue and reargue the question of class certification by filing new
 17 but repetitive complaints.’” *Flag Telecom*, 352 F. Supp. 2d at 455 n.20. The court in *In re IndyMac*
 18 *Mortgage-Backed Sec. Litig.*, 2010 WL 2473243, at *4 (S.D.N.Y. June 21, 2010) (“IndyMac MBS”)
 19 recently rejected this exact argument and reliance on *Korwek*, finding that *American Pipe* tolling
 20 applied because where there is no definitive determination on class certification: “[t]he concerns about
 21 repose, inefficiency, and wasteful litigation expressed in *Korwek* ... are inapposite.” Here, for these
 22 same reasons – and especially where this Court explicitly granted leave to name additional plaintiffs –
 23 *American Pipe* tolling applies and the Additional Plaintiffs’ claims are timely.⁴

24 _____
 25 ⁴ *Robbin v. Fluor Corp.*, 835 F.2d 213, 214 (9th Cir. 1987), and *Palmer v. Stassinis*, 236 F.R.D. 460
 26 (N.D. Cal. 2006), which Defendants cite, are likewise inapposite as the courts’ decisions to deny
 27 tolling in both cases were made after the determination of class certification. Defendants also rely on
 28 *In re Crazy Eddie Sec. Litig.*, 747 F. Supp. 850, 856 (E.D.N.Y. 1990), where the court applied the rule
 in *Korwek* to a class action brought after a previous class action was dismissed for lack of standing.
 This case, however, was decided prior to the passage of the PSLRA and extension of *Korwek* in this
 manner has been criticized by other courts. *See, e.g., Flag Telecom*, 352 F. Supp. 2d at 455 n.20;

1 Defendants' reliance on *Pub. Employees' Ret. Sys. of Miss. v. Merrill Lynch & Co. Inc.*, 2010
 2 WL 2175875, at *2 (S.D.N.Y. June 1, 2010) ("Merrill MBS") is misplaced because this timing issue
 3 was never before the Court. The undersigned Lead Counsel in this action is also Lead Counsel in the
 4 *Merrill MBS* action and is very familiar with the issues and arguments asserted in that case. The court
 5 there was never presented with, and did not rule on, the application of *American Pipe*. Indeed, the
 6 issue simply was never raised because no additional plaintiff sought to bring claims.⁵

7 Finally, because the Additional Plaintiffs' claims were tolled, Defendants' relation back
 8 argument is a red herring. Underwriter Mot. at 8. The Amended Complaint asserts the same claims
 9 on behalf of "all persons or entities who purchased or otherwise acquired mortgage pass-through
 10 Certificates ... pursuant or traceable to" the exact registration statements and offerings identified in the
 11 original complaint. Defendants were on notice of the Additional Plaintiffs' claims when the action
 12 was timely filed on March 27, 2009. Accordingly, Defendants' relation back analysis is irrelevant.⁶

13 2. The Amended Complaint States
 14 Claims Under Section 12(a)(2)

15 Section 12 extends liability to any person who "offers or sells a security ... by means of a
 16 prospectus ... which includes an untrue statement of a material fact" 15 U.S.C. § 77R. The Ninth
 17 Circuit has found that because Section 12 contains the language "the person purchasing such security
 18 *from him*," plaintiffs must have "purchased the security directly from the issuer of the prospectus."
 19 *Hertzberg*, 191 F.3d at 1081 (emphasis in original). Defendants contend that Plaintiffs have failed to

20
 21
 22 *Chubb Corp.*, 2002 WL 33934282, at *30 (failure to apply *American Pipe* would undermine the
 efficiency and economy of litigation which underlies Rule 23 and the PSLRA).

23 ⁵ Defendants' other cases are also easily distinguished. For example, *Lierboe v. State Farm Mut.*
Auto. Ins. Co., 350 F.3d 1018 (9th Cir. 2003), is not a securities class action subject to the PSLRA and
 24 does not consider or discuss *American Pipe* tolling. Additionally, *Lierboe* was dismissed after the
 district court decided class certification, and the court never granted leave to amend to name additional
 25 plaintiffs. Similarly, *Walters v. Edgar*, 163 F.3d 430 (7th Cir. 1998), is a non-securities case that was
 previously certified as a class and is, therefore, factually inapposite.

26 ⁶ Defendants' relation back cases are factually distinguishable. See *In re Syntex Corp. Sec. Litig.*, 95
 F.3d 922, 925 (9th Cir. 1996) (the statute of limitations barred "extending the class period"); *Howard*
 27 *v. Hui*, 2001 U.S. Dist. LEXIS 15443, at *19-20 (N.D. Cal. Sept. 24, 2001) (the statute of limitations
 barred adding new insider trading claims never asserted in the original action). Unlike the Amended
 28 Complaint here, both *Syntex* and *Howard* added new claims that were never previously asserted.

1 properly plead a valid Section 12 claim because the Amended Complaint does not include by rote the
2 phrase “in the initial offering.” *See* Wells Mot. at 5-6. Defendants are wrong.

3 Nothing in the statutory language or *Hertzberg* requires plaintiffs to purchase “in the initial
4 offering” in order to have standing to assert Section 12(a)(2) claims. Rather, Plaintiffs need only to
5 allege they purchased the security directly from the issuer of the prospectus. *Id.* at 1081. Here, the
6 Amended Complaint clearly complies with this standard, alleging: (1) that the Underwriter Defendants
7 were engaged to sell the Certificates, ¶41, (2) the Underwriter Defendant who sold each security to
8 each Plaintiff, ¶¶15, 23-31, 43, 56; (3) the date the Plaintiff purchased the security, *id.*; (4) the
9 prospectus supplement date for each security, *id.*; (5) that Plaintiffs acquired the security “directly”
10 from the Underwriter Defendant, *id.*; and (6) that Plaintiffs purchased “pursuant to” rather than
11 “traceable to” the offerings at issue, ¶¶137-45. Moreover, even if Plaintiffs were required to plead that
12 they purchased in the initial offering, the prospectus supplement dates and the purchase dates make
13 clear which purchases were either in the initial offering, or directly from the Underwriter Defendant
14 soon thereafter, rather than in the secondary market.

15 Defendants’ cases do not support their position. For example, in *Hertzberg*, the court found
16 that anyone who purchased stock under the registration statement at issue could assert a Section 11
17 cause of action, regardless of when the purchase was made. 191 F.3d at 1081. Indeed, *Hertzberg* says
18 nothing requiring Section 12(a)(2) plaintiffs to have purchased “in the initial offering.” Likewise, in
19 *In re Levi Strauss & Co. Sec. Litig.*, 527 F. Supp. 2d 965, 981 (N.D. Cal. 2007), the plaintiffs argued –
20 unlike here – that Section 12(a)(2) liability should be extended to aftermarket purchasers who
21 purchased “traceable to” an offering. In fact, Plaintiffs specifically eliminated the “traceable to”
22 language from the Section 12(a)(2) count section in the Amended Complaint. Finally, Defendants rely
23 on *IndyMac MBS*, where the court **upheld** allegations similar to those in the Amended Complaint.
24 2010 WL 2473243, at *3 (finding Section 12(a)(2) allegations sufficient where plaintiffs alleged that
25 (1) they purchased “pursuant to” the relevant Offering Documents; (2) they purchased a specified
26 number of Certificates on specified dates (some of which corresponded to the initial offering dates) at
27
28

1 specified prices; (3) specific Underwriter Defendants were associated with each individual offering;
2 and (4) the Underwriter Defendants “promoted and sold” the Certificates for their own personal gain).

3 Plaintiffs’ Section 12(a)(2) allegations comply with the requirements of the Court’s April 22
4 Order, the Securities Act, Ninth Circuit law and Fed. R. Civ. P. 8. Defendants’ motions to dismiss
5 these claims should be denied.

6 3. Plaintiffs And The Class Suffered
7 Economic Loss For Purchases Of WFMBS
8 2006-AR16 And WFMBS 2007-13 Certificates

9 Defendants challenge Plaintiffs’ standing to represent purchasers of two Certificates on the
10 grounds that Plaintiffs have not adequately pled an economic loss. Wells Mot. at 11-12. With respect
11 to MissPERS, Defendants do not – and cannot – challenge MissPERS’ standing for the WFMBS
12 2007-AR4, WFMBS 2007-10, WFMBS 2006-3, WFMBS 2006-6, WFMBS 2006-AR10, WFMBS
13 2006-AR11, WFMBS 2006-AR17 and WFMBS 2006-AR2 offerings. ¶118. Likewise, Defendants do
14 not dispute that MissPERS suffered a net loss on its purchases of Certificates at issue in this litigation.
15 Rather, Defendants isolate the Wells Fargo Mortgage Backed Securities 2006-AR16 Trust (“WFMBS
16 2006-AR16”) and attempt to challenge MissPERS’ ability to represent investors on the grounds that
17 MissPERS purportedly realized a nominal gain.⁷ In truth, however, MissPERS sold part of its
18 WFMBS 2006-AR16 Certificates (\$1,410,000 in face value) at a loss. It is well established that
19 determination of damages is a question of fact not appropriate for resolution on the motion to dismiss.
20 *In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281, 351 n.80 (S.D.N.Y. 2003) (“The
21 determination of value [in a Section 11 case] is a fact-intensive inquiry.”). The fact that one investor
22 has different damages calculations from other Class members does not prevent it from serving as a
23 Class representative. *See, e.g., Tsirekidze v. Syntax-Brilliant Corp.*, 2009 WL 2151838, at *4 (D. Ariz.
24 July 17, 2009) (“[D]ifferences in the amount of damages, the size or manner of [stock] purchaser, the
25 nature of the purchaser, and even the specific document influencing the purchase will not render a
26 claim atypical in most securities cases”) (internal citations omitted). The WFMBS 2006-AR16

27 ⁷ Contrary to Defendants’ contention, MissPERS purchased its Certificates at a total price of
28 \$5,084,854.50 and sold at a total price of \$5,089,068, a difference of \$4,213.50, not \$421,350.

1 Certificates were originally rated Aaa and AAA by Moody's and Fitch, respectively, but have since
2 been severely downgraded, and are currently rated Caa2 and CCC. ¶118. The WFMBS 2006-AR16
3 Certificates are no longer marketable near the prices paid by MissPERS and the Class. ¶7.

4 Defendants next argue that SEPTA's claims related to the Wells Fargo Mortgage Backed
5 Securities 2007-13 Trust ("WFMBS 2007-13") should be dismissed for failure to plead an economic
6 loss. Wells Mot. at 12. This argument is premised on a faulty reading of SEPTA's Certification.
7 SEPTA's Certification includes a column titled "Shares," which lists the *face value* of SEPTA's
8 purchases in WFMBS 2007-13. Defendants mistakenly assert that this column indicates a purchase or
9 sale price, which leads them to (incorrectly) conclude that SEPTA received its entire investment back
10 upon its sale of WFMBS 2007-13 Certificates. To be clear, as shown in SEPTA's Supplemental
11 Certification, which is attached as Exhibit A to the Declaration of Matthew P. Jubenville In Support
12 Of Plaintiffs' Opposition To Defendants' Motions To Dismiss, when SEPTA sold the Certificates in
13 May 2009, it received only \$35,545 in proceeds, far less than the remaining \$122,252 face value.
14 SEPTA, therefore, incurred losses and Defendants' motion to dismiss as to WFMBS 2007-13 should
15 be denied.

16 B. Defendants' Contentions Against The
17 Sustained Claims Are Still Not Grounds For Dismissal

18 "To state a claim under Section 11, a plaintiff must plead: (1) that the registration statement at
19 issue contained a misstatement or omission; and (2) that the misstatement or omission was material."
20 April 22 Order, 2010 U.S. Dist. LEXIS 39825, at *34-35 (citing *Kaplan v. Rose*, 49 F.3d 1363, 1371
21 (9th Cir. 1994)). It is well-established that Sections 11 and 12(a)(2) are strict liability claims and do
22 not require Plaintiffs to plead scienter. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381-82
23 (1983) (stating that Section 11 imposes a "stringent standard of liability," that is "virtually absolute,
24 even for innocent misstatements."); *see also Randall v. Loftsgaarden*, 478 U.S. 647 (1986) (same as to
25 Section 12(a)(2)).

26 While the Amended Complaint asserts solely claims that the Court previously sustained,
27 Defendants now contend that Plaintiffs must plead facts related to Defendants' knowledge.
28

1 Defendants' argument is simply wrong. As discussed below, the Amended Complaint adequately
2 pleads claims under Sections 11 and 12(a)(2) of the Securities Act's strict liability standard by setting
3 forth the untrue statements of material fact and the material information omitted from the Offering
4 Documents.

5 1. As The Court Previously Found, The Amended Complaint Alleges
6 Untrue Statements And Omissions In The Offering Documents

7 a. Untrue Statements And Omissions
8 Related To Underwriting Standards

9 The Court's April 22 Order upheld Plaintiffs' claims of untrue statements relating to Wells
10 Fargo's stated underwriting standards, as well as the standards of other loan originators in the
11 securitized pools, finding that plaintiffs sufficiently alleged that "the Offering Documents were
12 misleading as to the *extent* to which Wells Fargo and the third-party originators deviated from their
13 guidelines." 2010 U.S. Dist. LEXIS 39825, at *37-38 (emphasis in original). The Amended
14 Complaint contains allegations that are identical to those that the Court already analyzed and
15 sustained.

16 Defendants' motion asserts an argument that they could have raised previously, but did not,
17 and that several courts have rejected.⁸ Defendants claim that Section 1111(a)(3) of SEC Regulation
18 AB ("Regulation AB") effectively imposes a scienter standard for pleading a violation of the
19 Securities Act for certain loans. Specifically, Defendants contend that because Section 1111(a)(3)
20 states that Defendants must disclose underwriting criteria and "to the extent known, any changes in
21 such criteria" and whether such criteria can be overridden, Plaintiffs must allege that Defendants had
22 knowledge of the other originators' deviations from the stated underwriting guidelines. Wells Mot. at

23 2. Defendants are wrong.

24 As an initial matter, Defendants do not – and cannot – contest the falsity of statements relating
25 to Wells Fargo's underwriting guidelines and those of its correspondent lenders. Wells Fargo and its

26 ⁸ Defendants' tactics – filing a second motion consisting of numerous arguments available to them at
27 the time of their earlier motion – serve only to unnecessarily delay this litigation. The allegations in
28 the Amended Complaint related to underwriting standards, ratings processes and appraisals are
substantively identical to those in the Consolidated Complaint and should not be the subject of
successive and piecemeal motions to dismiss.

1 correspondent lenders originated the vast majority of the mortgage loans in each of the offerings at
2 issue. Indeed, there are only four trusts to which a third-party originator – American Home Mortgage
3 Corporation (“American Home”) – contributed loans. ¶¶59, 84, 117. These are the only trusts which
4 Defendants’ Regulation AB argument even applies.⁹ As to these trusts, “Defendants [continue] to
5 misunderstand the nature of plaintiffs’ allegations.” April 22 Order, 2010 U.S. Dist. LEXIS 39825, at
6 *37. Plaintiffs’ allegations are not premised on undisclosed “changes” in the other originators’ (*i.e.*,
7 non-Wells Fargo or correspondent lender) underwriting criteria or the extent to which the other
8 originators’ underwriting criteria could be overridden. Rather, Plaintiffs’ allegations are based on the
9 systematic “disregard” for the stated (and unchanged) underwriting guidelines. Accordingly, Section
10 1111(a)(3) simply does not apply here.

11 Second, Section 11 imposes liability both for untrue statements and omissions. *See* 15 U.S.C.
12 § 77k(a) (liability exists when a registration statement “contained an untrue statement of a material
13 fact *or* omitted to state a material fact required to be stated therein *or* necessary to make the statements
14 therein not misleading” (emphasis added)). The duty to disclose found in Regulation AB does not
15 absolve defendants of liability for affirmative misstatements. Here, Defendants made affirmative
16 misstatements regarding American Home’s underwriting guidelines. The Amended Complaint details
17 how American Home greatly reduced and/or eliminated its underwriting standards in order to approve
18 as many mortgages as possible. Indeed, an e-mail from an American Home Senior Vice President of
19 Product and Sales Support to loan officers nationwide stated that American Home would make a loan
20 to virtually any borrower, regardless of the borrower’s ability to verify income, assets or even
21 employment. ¶85.

22 Numerous courts have recently held that the phrase “to the extent known” does not apply
23 where the claims are based on “affirmative misstatement[s].” *See, e.g., In re Lehman Bros. Sec. &*
24 *ERISA Litig.*, 684 F. Supp. 2d 485, 493-94 (S.D.N.Y. 2010) (“Lehman MBS”) (“Regulation AB
25 requires the truthful disclosure of the ‘underwriting criteria used to originate or purchase the pool
26

27 ⁹ American Home originated loans in the Wells Fargo Mortgage Backed Securities 2006-3, 2006-4,
28 2007-10, 2007-13 Trusts. ¶117. American Home originated no more than 20% of the mortgage loans
in any of these trusts.

1 assets,' and the complaint alleges that the loans were originated using criteria different than those
2 stated in the Offering Documents. As this claim relies on Section 11 of the Securities Act, and not
3 Section 10(b) of the Securities Exchange Act or Rule 10b-5, the Individual Defendants' knowledge is
4 immaterial."); *New Jersey Carpenters Vacation Fund v. The Royal Bank of Scotland Group, PLC*,
5 2010 WL 1172694, at *11 (S.D.N.Y. Mar. 26, 2010) ("Harborview MBS") (Regulation AB is
6 immaterial because plaintiffs alleged that defendants "affirmatively misstated the guidelines used – or
7 rather, disregarded – by the mortgage originators of the underlying loans"); *New Jersey Carpenters*
8 *Health Fund v. Residential Capital LLC*, 2010 WL 1257528, at *5 (S.D.N.Y. Mar. 26, 2010) ("RALI
9 MBS") ("Defendants' argument[s] that the information was disclosed and otherwise had no further
10 duty to disclose based on SEC Regulation AB, 17 C.F.R. § 229.1111, are not persuasive for essentially
11 the same reasons laid out in detail in [*Harborview MBS*]").

12 Defendants ignore these recent on-point decisions and instead rely on two cases that are
13 distinguishable. See Wells Mot. at 11 (citing *Landmen Partners Inc. v. Blackstone Group, L.P.*, 659 F.
14 Supp. 2d 532, 545 (S.D.N.Y. 2009), and *Garber v. Legg Mason, Inc.*, 537 F. Supp. 2d 597, 614
15 (S.D.N.Y. 2008)). First, the duty to disclose in Section 1111(a)(3) was not at issue in either *Landmen*
16 *Partners* or *Garber*. Rather, both cases involved claimed violations of Item 303 of Regulation S-K,
17 which requires the disclosure of any "known trends or uncertainties, etc." Second, both *Landmen*
18 *Partners* and *Garber* involved alleged omissions, *not* affirmative misstatements. See, *Harborview*
19 *MBS*, 2010 WL 1172694, at *11 (distinguishing *Landmen Partners* and *Garber* because they "focused
20 on what the registration statement *failed to disclose*).

21 Regulation AB does not apply to false statements about Wells Fargo's underwriting standards
22 or those of its correspondent lenders and also does not alter Section 11 liability for affirmative
23 misstatements in the Offering Documents that loans were originated "in conformity with" other
24 originators' standards. Defendants' contention, therefore, that Plaintiffs must plead Defendants'
25 knowledge should be rejected.

b. Untrue Statements And Omissions
Related To Ratings And The Ratings Process

In its April 22 Order, the Court held that Plaintiffs' allegations related to ratings and the ratings process stated a claim:

[P]laintiffs point to ... an SEC Summary Report ... [and] statements by executives of defendants Moody's and Standard & Poor's in which the executives admitted that they were aware at the time the subject ratings were made that the agencies' rating models were outdated ... ***In the Court's view, these allegations, particularly the statements from Moody's and S&P's executives, are sufficient to establish an actionable misstatement with respect to the rating process.***

2010 U.S. Dist. LEXIS 39825, at *42-43 (emphasis added).

Nevertheless – and despite the well-established precept that Sections 11 and 12(a)(2) do not require Plaintiffs to plead scienter – Defendants contend that ratings are “opinions” and that Plaintiffs must plead that the “opinions” are subjectively false – an assertion that was raised and rejected in the original motion to dismiss. Wells Mot. at 7-8 (relying on *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1095-96 (1991), and *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1162 (9th Cir. 2009)).

As an initial matter, Defendants' “subjective falsity standard” never applies to factual statements. See *In re Wash. Mut. Sec. Deriv. & ERISA Litig.*, 694 F. Supp. 2d 1192, 1223-24 (W.D. Wash. 2009) (finding that audit opinion stating that financial statements were presented “in conformity with accounting principles generally accepted in the United States of America” was an actionable statement of fact); see also *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1248, 1266 (N.D. Cal. 2000) (“purely factual assertions in the fairness opinion, such as Bear Stearns' statements that it reviewed certain materials during its due diligence inquiry, would be held to a negligence standard”). Here, statements in the Offering Documents that ratings addressed “the likelihood of the receipt ... of principal and interest” and “the nature of the underlying mortgage loans” are factual assertions that the Certificates' value and risk had been evaluated, and that the ratings accurately reflected the character of the underlying mortgage pools at the time.¹⁰ These statements bear no resemblance to the “fairness

¹⁰ ¶100. Defendants' contention that the First Amendment compels Plaintiffs to comply with their “subjective falsity” standard is baseless. Wells Mot. at 7 n.7. “[T]here is no automatic, blanket, absolute First Amendment protection for reports from the credit rating agencies ...” *In re Enron*

1 opinions” in *Rubke* and *Virginia Bankshares*, which stated that a particular transaction was within a
2 range of fairness from a financial point of view.

3 Moreover, even if the ratings were opinions – which they are not – statements of opinion are
4 actionable when (1) the speaker does not genuinely believe the statement; (2) there is no reasonable
5 basis for that belief; or (3) the speaker is aware of undisclosed facts tending to seriously undermine the
6 accuracy of the statement. *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1113-14 (9th Cir. 1989),
7 *cert. denied sub nom. Schneider v. Apple Computer, Inc.*, 496 U.S. 942 (1990). The Amended
8 Complaint amply alleges facts showing that Defendants could not have genuinely or reasonably
9 believed that the ratings, or the statements in the Offering Documents about them, were accurate. For
10 example: (1) as the result of the systemic violations of the underwriting standards, the ratings were
11 based on “inaccurate loan information” related to borrower credit-worthiness, ability to repay, and the
12 sufficiency of the collateral, ¶6; (2) a former managing director at S&P admitted that the models
13 which generated the ratings failed “to capture changes in performance of the new non-prime
14 products,” ¶112; (2) a former managing director at Moody’s stated that the rating agencies “did not
15 update their models or their thinking,” ¶114; (3) Defendants pre-determined the ratings, rather than
16 allowing the ratings to be a product of an evaluation of the underlying loan pools, ¶¶41, 102-03; and
17 (4) the Certificates’ value and ratings collapsed shortly after issuance. ¶¶7, 118.

18 The court in *Abu Dhabi Commercial Bank v. Morgan Stanley & Co.*, 651 F. Supp. 2d 155, 176
19 (S.D.N.Y. 2009), in response to the exact argument that Defendants make here, recently held that
20 ratings were actionable false statements because “plaintiffs have sufficiently pled that the Rating
21 Agencies did not genuinely or reasonably believe that the ratings they assigned...were accurate and
22 had a basis in fact.” *Id.* at *37. Here, the Amended Complaint details that neither the rating agencies,
23

24 *Corp. Sec., Deriv. & ERISA Litig.*, 511 F. Supp. 2d 742, 817 (S.D. Tex 2005). In fact, the “actual
25 malice” standard does not apply to ratings because they are only intended for use in offering
26 documents, rather than for general publication. *LaSalle Nat’l Bank v. Duff & Phelps Credit Rating*
27 *Co.*, 951 F. Supp. 1071, 1095-97 (S.D.N.Y. 1996). *See also In re Fitch, Inc.*, 330 F.3d 104, 108-10
28 (2d Cir. 2003) (“Unlike a business newspaper or magazine ... Fitch only ‘covers’ its own clients. We
believe this practice weighs against treating Fitch like a journalist.”). Here, the rating agencies
privately contracted with Defendants to assign the Certificate ratings and took an active role in the
offerings. They were clearly not journalists and the ratings are not “opinions” entitled to First
Amendment protection.

1 who admitted that they did not update their models or their thinking, nor the Wells Fargo Defendants,
 2 who provided the rating agencies with the inaccurate loan information, had a basis to genuinely or
 3 reasonably believe in the accuracy of the ratings.

4 c. Untrue Statements And Omissions
 5 Related To Appraisals and LTV Ratios

6 The Court's April 22 Order also held that Plaintiffs' allegations related to appraisals/LTV
 7 ratios were sufficient to state a claim:

8 Plaintiffs' allegations concerning the allegedly improper appraisal practices are
 9 *sufficiently specific to state a claim* with respect to the securities at issue in this case. In
 10 particular, plaintiffs have alleged that Wells Fargo's practices permitted the pervasive and
 11 systematic use of inflated appraisals, affecting all types of mortgages. *Plaintiff need not*
 12 *allege anything further in order to state a claim.*

11 2010 U.S. Dist. LEXIS 39825, at *40-41 (emphasis added).

12 Accurate real estate appraisals and the calculated LTV ratios and averages based on those
 13 appraisals, were essential to assessment of the price and risk of the offered Certificates. ¶¶45-50.
 14 Here, the Offering Documents contained statements that originators evaluated the adequacy of the
 15 mortgage property as collateral and that appraisals were conducted in conformity with USPAP. ¶¶88-
 16 90. In reality, appraisers industry-wide "experience[d] systemic problems of coercion" and were
 17 forced to inflate property valuations in order to avoid the "negative ramifications" that would result if
 18 they did not "cooperate, alter their appraisal, and provide a higher valuation." ¶95. According to the
 19 testimony of the Chair of the Appraisal Institute before the Senate Committee on Banking (¶94), some
 20 appraisers were "ordered to doctor their reports" or else they would never "see work from these parties
 21 again" and could be "placed on exclusionary or 'do-not-use' lists." *Id.* Additionally, 90% of
 22 appraisers reported that mortgage brokers and others pressured them to raise property valuations to
 23 make mortgage deals go through. ¶95.

24 A former Wells Fargo Home Mortgage underwriter/senior underwriter from January 2002
 25 through April 2006 confirms that representatives constantly pushed the appraisers to inflate the value
 26 of the real estate underlying the loans and if the appraisers didn't, "they don't come back to you." ¶93.
 27 In addition, a former underwriter from July 2005 through December 2006 explained that appraisals at
 28

1 Wells Fargo Home Mortgage were “very inflated” and that retail officers “always managed to get the
2 value they wanted.” ¶97. Indeed, Wells Fargo and RELS Valuation (an appraisal entity jointly owned
3 by an affiliate of Wells Fargo Bank) are the subject of investigation and litigation over the illegal
4 practice of pressuring and intimidating appraisers into using techniques that produce appraisals
5 meeting Wells Fargo’s objectives even when the use of such techniques is improper and violates
6 industry standards. ¶96.

7 In response to these damaging allegations, Defendants attempt to raise an argument they could
8 have raised in their prior motion, but did not. In particular, Defendants now claim that each appraisal
9 was an opinion and, therefore, Plaintiffs must plead that the speaker did not truly have the “opinion.”
10 Wells Mot. at 7 (citing *Virginia Bankshares*, 501 U.S. at 1095-96, and *Rubke*, 551 F.3d at 1162).
11 Defendants continue to misunderstand the nature of Plaintiffs’ allegations. Plaintiffs allege that the
12 Offering Documents’ statements that appraisals were generally conducted in conformity with USPAP
13 were untrue and omitted material information because, in truth, the appraisals were generally not
14 performed in conformity with USPAP, were not performed by truly “independent” appraisers, or both.
15 *Id.* As a result of this failure to follow stated guidelines, LTV ratios and other values derivative of
16 appraisal value were misstated.

17 Even assuming, *arguendo*, that appraisals are opinions and Plaintiffs are challenging each
18 individual appraisal – which they are not – the allegations in the Amended Complaint are sufficient to
19 allege actionable untrue statements and omissions. For example, the Amended Complaint details that
20 appraisers and individuals at Wells Fargo were aware of “do-not-use” lists and pressured appraisers to
21 “cooperate, alter their appraisal, and provide a higher valuation.” ¶¶94-95. These undisclosed facts
22 “tend[] to seriously undermine the accuracy of the statement[s]” in the Offering Documents that
23 appraisals were conducted in accordance with USPAP and originations were conducted to evaluate the
24 adequacy of the property as collateral. *See Apple Computer*, 886 F.2d 1109 at 1113-14. The
25 allegations in the Amended Complaint – which are identical to those this Court already sustained –
26 adequately allege actionable misstatements related to appraisals and LTV ratios.

2. Defendants Still Have Not Met Their Heavy Burden For The Statute Of Limitations Defense

The statute of limitations for Sections 11, 12(a)(2) and 15 claims is “one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence.” 15 U.S.C. § 77m. The Supreme Court, when dealing with a similar statute contained in the Securities Exchange Act of 1934, recently explained what is required to put a plaintiff on inquiry notice:

We conclude that the limitations period . . . begins to run once the plaintiff did discover or a reasonably diligent plaintiff would have “discover[ed] the facts constituting the violation” – whichever comes first. In determining the time at which the “discovery” of those “facts” occurred, terms such as “inquiry notice” and “storm warnings” may be useful to the extent that they identify a time when the facts would have prompted a reasonably diligent plaintiff to begin investigating. ***But the limitations period does not begin to run until the plaintiff thereafter discovers or a reasonably diligent plaintiff would have discovered “the facts constituting the violation,”***

Merck & Co., Inc. v. Reynolds, 130 S. Ct. 1784, 1798 (U.S. 2010) (emphasis added). Previously, this Court found Defendants’ statute of limitations defense “unpersuasive,” and *Merck* raises the standard which Defendants would have to meet. A court deciding defendants’ motions to dismiss in a recent mortgage-backed securities case explained:

Merck, if anything, favors the plaintiffs here. Indeed, in *Merck*, the Court rejected arguments of the defendants quite similar to the arguments made by defendants here and held, in effect, that even if a plaintiff had ‘inquiry notice’ sufficient to warrant beginning to investigate, a plaintiff would not be barred by the statute of limitations unless a reasonably diligent plaintiff similarly situated would have actually discovered the facts showing the violations alleged in the plaintiff’s complaint.

Merrill MBS, 2010 WL 2175875, at *2.

As this Court correctly held, the statute of limitations defense is fact-intensive and is generally not appropriate for consideration at the pleading stage. April 22 Order, 2010 U.S. Dist. LEXIS 39825, at **23, 26-27. Nevertheless, Defendants again contend that their wrongdoing was so obvious and their statements were so clearly false that Plaintiffs should have commenced suit much sooner.

First, Defendants’ assertions that Plaintiffs carry the burden is legally incorrect. In the Ninth Circuit, “***the defendant bears a considerable burden*** . . . that the plaintiff’s claim is time barred.” *Betz*

1 *v. Trainer Wortham & Co., Inc.*, 519 F.3d 863, 877 (9th Cir. 2008) (emphasis added). The Ninth
 2 Circuit’s finding in *Betz* was in the context of a summary judgment motion in a Section 10(b) case,
 3 and “[t]he burden must be at least as high on the pleadings.” *See In re Charles Schwab Corp. Sec.*
 4 *Litig.*, 257 F.R.D. 534, 557 (N.D. Cal. 2009) (applying *Betz* and declining to find that Section 11
 5 claims were untimely as a matter of law).

6 Defendants assert that Plaintiffs must plead additional details related to the circumstances of
 7 their discovery and facts demonstrating their diligence. Wells Mot. at 9-10. In support, Defendants
 8 ignore *Betz* and instead rely heavily on *Toombs v. Leone*, 777 F.2d 465 (9th Cir. 1985), and other
 9 cases decided long before the Ninth Circuit’s decision in *Betz* and the Supreme Court’s decision in
 10 *Merck*.¹¹ The Ninth Circuit and others, however, have criticized *Toombs*, stating that it “has incurred
 11 forceful, and we think justified, criticism.” *Johnson v. Aljian*, 490 F.3d 778, 782 n.13 (9th Cir. 2007).
 12 *See also Tregenza v. Great Am. Commc’ns Co.*, 12 F.3d 717, 719 (7th Cir. 1993) (“[t]o the extent that
 13 the rule [in *Toombs*] has persisted, it has done so by blind inertia” and that “[i]t is time that it was
 14 discarded”). The *Aljian* court noted that a rule like that announced in *Toombs* is inappropriate as the
 15 statute of limitations improperly “becomes transformed as an element of [the] claim.” *Id.* (finding that
 16 plaintiffs need not plead the statute of limitations as an element of a Section 10(b) claim).

17 Second, Defendants are factually wrong. The Amended Complaint alleges: (1) the date when
 18 Plaintiffs were first plausibly on notice; (2) the reason that date is significant; (3) and that despite the
 19 exercise of reasonable diligence, they could not have discovered their claims at an earlier time. ¶¶104,
 20 136, 145. Specifically, the Certificates maintained their investment-grade rating until at the earliest
 21 May 20, 2008, when Certificates that were initially rated “A” or higher were first downgraded below
 22 investment-grade. ¶104. Accordingly, no “sufficient suspicion” of a Securities Act claim on behalf of
 23 Wells Fargo investors reasonably existed prior to May 20, 2008. *Betz*, 519 F.3d at 876; *Charles*
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 11 Defendants also rely heavily on *Toombs*’ progeny. *See, e.g., In re Infonet Servs. Corp. Sec. Litig.*,
 310 F. Supp. 2d 1106, 1115 (C.D. Cal. 2003) (applying *Toombs* even though “Plaintiffs fail to address
 this argument”); *Erickson v. Kiddie*, 1986 WL 544, at *7 (N.D. Cal. Feb. 24, 1986) (erroneously
 applying fraud standard to § 12(2) claim, stating plaintiffs “failed to allege the reasons for not
 discovering the alleged *fraud* and the efforts they have made to discover it”) (emphasis added). As
 with *Toombs*, these district court decisions were decided well before *Betz* and *Charles Schwab*.

1 *Schwab.*, 257 F.R.D. at 556. The initial action was timely filed on March 27, 2009 – well within one
 2 year of the May 20, 2008 downgrades.

3 In addition to the Court’s April 22 Order, several courts have rejected arguments identical to
 4 Defendants’ contention here. *See, e.g., Harborview MBS*, 2010 WL 1172694, at *9 (“Plaintiffs point
 5 out that they could not have known that the originators’ disregard for underwriting guidelines
 6 specifically included the underwriting of the loans used for the Harborview Trusts until the
 7 Certificates were downgraded by the rating agencies after May 14, 2007”); *Merrill MBS*, 2010 WL
 8 2175875, at *2; *IndyMac MBS*, 2010 WL 2473243, at *5 (“the Court cannot conclude as a matter of
 9 law that the publicly available information was sufficiently specific to put the plaintiffs on actual or
 10 inquiry notice that a cause of action was probable.”).

11 IV. CONCLUSION

12 For the foregoing reasons, Plaintiffs respectfully submit that Defendants’ motions should be
 13 denied and that Defendants be ordered to answer the Amended Complaint within 20 days. In the event
 14 the Court decides to dismiss all or part of Plaintiffs’ allegations, Plaintiffs respectfully request leave to
 15 replead. Fed. R. Civ. P. 15(a) sets forth a policy in favor of granting leave to amend, stating that leave
 16 shall be freely given when justice so requires. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048,
 17 1052 (9th. Cir. 2003) (dismissal with prejudice and without leave to amend is not appropriate unless it
 18 is clear “that the complaint could not be saved by amendment.”).

19 DATED: July 16, 2010

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