BEFORE THE
UNITED STATES JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

	§	
IN RE WELLS FARGO PAYCHECK PROTECTION PLAN LITIGATION	§	**MDL DOCKET NO. 2954**
	§	
	§	
	§	

MEMORANDUM OF LAW
IN OPPOSITION TO MOTION FOR TRANSFER AND CENTRALIZATION

Guofeng Ma ("Ma"), plaintiff in the putative securities class action *Ma v. Wells Fargo & Company et al.*, 3:20-cv-03697 (N.D. Cal.) (the "Securities Class Action"), respectfully submits this memorandum of law in opposition to the motion of DNM Contracting Inc. ("DNM" or "Movant") to transfer the Securities Class Action to the United States Judicial Panel on Multidistrict Litigation ("MDL") for centralization of the actions in the Southern District of Texas for coordinated or consolidated pretrial proceedings (the "Motion").

I. PRELIMINARY STATEMENT

DNM's Motion seeks transfer into the MDL, for consolidation or coordination, of eight pending litigations (as enumerated in the Schedule of Actions filed with the Motion (Dkt. No. 1-2), the "Included Actions"), the only common element among which is that each concerns, in some respect, the participation of Wells Fargo & Co. ("WFC") and/or Wells Fargo Bank, N.A. ("Wells Fargo Bank" and, together with WFC, "Wells Fargo") in the Paycheck Protection Program ("PPP") recently enacted by Congress. Yet DNM's motion falls well short of the standard for transfer and consolidation. Consolidation is proper only where the movant has demonstrated that the cases at issue share common facts that are numerous or complex and that consolidation would serve "the convenience of parties and witnesses" and "promote the just and efficient conduct" of the actions. 28 U.S.C. § 1407; *In re Nat'l Credit Union Admin. Bd. Mortgage-Backed Sec. Litig.*, 996 F. Supp.

2d 1374, 1376 (J.P.M.L. 2014). Here, all that the Securities Class Action shares with the other Included Actions is that each includes allegations related in some way to Wells Fargo's participation in the PPP. This single and extremely general point of commonality plainly does not constitute a nexus of common facts that are either numerous or complex. *See*, *e.g.*, *In re Stirling Homex Corp. Sec. Litig.*, 442 F. Supp. 547, 549 (J.PM.L. 1977) (consolidation requires "common factual core" between actions). The claims in the Securities Class Action involve questions of fact and legal theories (*e.g.*, falsity, materiality, scienter, market efficiency, loss causation, and statutory damages under the Securities Exchange Act of 1934 (the "Exchange Act")) that are wholly distinct from those at issue in the other Included Actions, none of which concerns securities fraud. The putative class in the Securities Class Action consists of WFC shareholders, none of whom are implicated as parties or witnesses in the other Included Actions. Whether WFC and its top executives knowingly or recklessly made false and misleading statements concerning WFC's compliance with the requirements of the PPP is the factual core of the Securities Class Action, a core that is not shared with any of the other Included Actions. Moreover, the lack of the requisite common factual core clearly means that centralization would not make the proceedings any more convenient for the parties and witnesses, nor yield any efficiency gains with respect to the judiciary, the litigants, or their counsel.

For the reasons set forth below, Ma respectfully requests that the Panel deny DNM's Motion with respect to the Securities Class Action.

II. ARGUMENT

Transfer of an action for coordination or consolidated pretrial proceedings is only warranted if: (1) the actions share common questions of fact; (2) transfer would be for the convenience of the parties and witnesses; and (3) transfer would advance the just and efficient conduct of the litigation. 28 U.S.C. § 1407(a). All three criteria must be met for transfer to be proper. "[C]entralization under Section 1407 should be ***the last solution*** after considered review of all other options." *In re Best Buy Co., Inc. Cal Song Beverly Credit Card Act Litig.*, 804 F. Supp. 2d 1376, 1378 (J.P.M.L. 2011) (emphasis supplied). Here, all three criteria weigh against transfer of the Securities Class Action to the MDL.

A. The Securities Class Action Lacks Meaningful Factual and Legal Commonality with the Other Included Actions

There is no meaningful factual or legal commonality between the Securities Class Action and the other Included Actions. In its motion brief, DNM ***inaccurately*** asserts that the Securities Class Action "seeks certification of [a class] consisting of eligible PPP applicants who were harmed as a result of Defendants' illegal practices." Dkt. No. 1-1 at 5. ***DNM is wrong***. The Securities Class Action does ***not*** assert claims on behalf of eligible PPP applicants. Rather, it is on behalf of a putative class of ***investors*** who purchased or otherwise acquired WFC securities between April 5, 2020 and May 5, 2020 (the "Class Period") and alleges fraud claims arising under the Exchange Act—namely, that WFC and certain of its executives knowingly or recklessly made false or misleading statements during the Class Period concerning Wells Fargo's compliance with the requirements of the PPP. *See generally* Securities Class Action Dkt. No. 1. Considering Movant's wholly inaccurate description of the Securities Class Action, Ma respectfully submits that DNM's motion appears to rest on a fundamental misunderstanding of the class at issue and claims alleged in the Securities Class Action.

Of the seven other Included Actions:

- Five assert claims related to Wells Fargo Bank's alleged prioritization of certain customers for PPP loans;[1]

[1] *BSJA, Inc., et al. v. Wells Fargo & Co., et al.*, 2:20-cv-03588 (C.D. Cal.); *DNM Contracting, Inc. v. Wells Fargo Bank, N.A.*, 4:20-cv-01790 (S.D. Tex.); *Physical Therapy Specialists, P.C. v.*

- One action is brought by purported third-party "agents" claiming that they are owed fees by Wells Fargo Bank and other lenders in connection with assistance provided to PPP borrowers;[2] and

- One action challenges Wells Fargo Bank's requirement that PPP loan applications have a pre-existing business checking relationship with the bank.[3]

The following questions of fact that are central to the Securities Class Action are thus wholly irrelevant to the seven other Included Actions: (1) whether Defendants' statements of compliance with PPP requirements were false; (2) whether Defendants' statements were material; (3) whether Ma and other WFC investors relied on the foregoing statements; (4) whether the market for WFC securities was "efficient"; (5) whether Defendants made the false statements with scienter; (6) whether the false statements were the proximate cause of the losses incurred by Ma and other WFC investors; (7) whether Ma and other WFC investors suffered economic loss when WFC's stock price declined; and (8) calculation of WFC's statutory damages under the Exchange Act (which typically involves use of a regression analysis or "event study" unique to securities class actions).

All that the Included Actions have in common, then, is that each broadly pertains, in some respect, to Wells Fargo's PPP participation. Clearly "individual facts contained in these actions [] will predominate over any alleged common fact questions," *In re Abbott Labs., Inc., Similac Prods. Liab. Litig.*, 763 F. Supp. 2d 1376 (J.P.M.L. 2011), and the Included Actions thus lack the requisite meaningful "common factual core" for centralization to be appropriate. *Stirling Homex Corp.*, 442 F. Supp. at 549.

Wells Fargo Bank, N.A., 1:20-cv-01190 (D. Colo.); *Marselian v. Wells Fargo & Company, et al.*, 4:20-cv-03166 (N.D. Cal.); and *Karen's Custom Grooming LLC v. Wells Fargo & Company, et al.*, 3:20-cv-00956 (S.D. Cal.).

[2] *Full Compliance, LLC, et al. v. Amerant Bank, N.A., et al.*, 1:20-cv-22339 (S.D. Fla.).

[3] *Scherer, et al. v. Wells Fargo Bank, N.A.*, 4:20-cv-01295 (S.D. Tex.).

B. Transfer Would Neither be Convenient for the Parties and Witnesses in the Securities Class Action nor Promote its Just and Efficient Conduct

Even assuming *arguendo* that sufficient common factual questions existed to support centralization, Movant must still satisfy its burden with respect to the other two necessary criteria—namely, to demonstrate that centralization: (i) serves the convenience of the parties and witnesses; and (ii) promotes the just and efficient conduct of the Included Actions. *See*, *e.g.*, *In re Concrete Pipe*, 302 F. Supp. 244, 254 (J.P.M.L. 1969) ("[N]either the convenience of witnesses and the parties nor the just and efficient conduct of actions are served, *ipso facto*, by transfer just because there are common questions of fact in the civil actions involved."); *In re Joel Snider Litig.*, 2020 WL 1503250, at *1 (J.P.M.L. Mar. 27, 2020) (centralization not warranted despite "some factual overlap" where the actions were "already . . . proceeding in an orderly manner in the two districts in which they [were] pending").

DNM has failed to carry its burden with respect to either of these criteria. WFC's principal executive offices are located in San Francisco, California. With respect to convenience for parties and witnesses, then, centralization of the Included Actions in the Southern District of Texas carries no evident advantages whatsoever. Moreover, the significant factual differences between the Included Actions (as detailed above) necessarily mean that centralization will ***not*** prevent duplicative discovery or proceedings, prevent inconsistent trial readings, or promote judicial efficiency by preserving Court, party, or counsel resources. Rather, consolidation is more likely to promote ***inefficiency***, as any judge overseeing the multi-district litigation contemplated by DNM would need to address a multiplicity of case-specific factual and legal issues, as well as discovery. *See ERISA Litig.*, 273 F. Supp. 3d at 1371 ("These case-specific issues are likely to undermine the alleged efficiencies that could be gained from centralizing an already minimal number of actions.").

Compounding all of the foregoing inefficiencies is the fact that, unlike the other seven Included Actions, the Securities Class Action is governed by the Private Securities Litigation Reform Act of 1995 (“PSLRA”), including provisions governing the appointment of a Lead Plaintiff and Lead Counsel and imposing a mandatory stay of discovery pending resolution of a motion to dismiss. Pursuant to the PSLRA, any member of the putative class in the Securities Class Action may seek appointment as Lead Plaintiff for the class and approval of its selection of Lead Counsel on or before August 3, 2020. *See* 15 U.S.C. § 78u-4(a)(3)(A). Accordingly, until after the August 3, 2020 Lead Plaintiff motion deadline, it is unclear whether Ma will in fact ultimately be responsible for pursuing claims against WFC and the other Defendants on behalf of the WFC shareholder class in the Securities Class Action, or will in fact be succeeded by another class member who meets the PSLRA’s statutory “most adequate plaintiff” criteria. *See* 15 U.S.C. § 78u-4(a)(3)(B). In addition, the PSLRA imposes a mandatory stay of discovery pending resolution of a motion to dismiss the claims in the Securities Class Action. *See* 15 U.S.C. § 78u-4(b)(3)(B). With discovery effectively a non-issue in the Securities Class Action until a significantly later stage than in the other Included Actions, coordination of discovery across all of the Included Actions will thus, in the best-case scenario, yield little benefit in the Securities Class Action, and is more likely to add considerations unique the Securities Class Action to the administrative burden of a judge handling multiple discovery schedules involving a litany of different parties. That an entire specific statutory schema already exists, in the PSLRA, to govern the proceedings in the Securities Class Action only underscores the inappropriateness of centralizing the Securities Class Action with the other Included Actions.

* * * * *

Failure to satisfy any one of the foregoing three criteria would suffice to mandate denial of DNM's Motion. Having failed to meet its burden with respect to ***any*** of these criteria, DNM's motion obviously fails.

C. CONCLUSION

For the foregoing reasons, Ma respectfully requests that this Panel deny DNM's Motion to the extent it seeks transfer of the Securities Class Action for consolidation or coordination with the other Included Actions.

Dated: June 24, 2020

Respectfully submitted,

POMERANTZ LLP

/s/ Jeremy A. Lieberman

Jeremy A. Lieberman
600 Third Avenue, 20th Floor
New York, New York 10016
Telephone: (212) 661-1100
Facsimile: (917) 463-1044
jalieberman@pomlaw.com

Attorney for Guofeng Ma