BEFORE THE
UNITED STATES JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

IN RE: WELLS FARGO PAYCHECK PROTECTION PROGRAM LITIGATION	MDL No. 2954

PLAINTIFF KAREN'S CUSTOM GROOMING LLC'S OPPOSITION TO PLAINTIFF DNM CONTRACTING, INC.'S MOTION FOR TRANSFER OF ACTIONS TO THE SOUTHERN DISTRICT OF TEXAS PURSUANT TO 28 U.S.C. §1407 FOR COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS

Pursuant to 28 U.S.C. §1407, Plaintiff in *Karen's Custom Grooming LLC v. Wells Fargo & Company, Wells Fargo Bank, N.A., et al.* Case No. 3:20-cv-956-LAB-BGS (S.D. Cal.) (the "*KCG Action*"), respectfully opposes Plaintiff DNM Contracting, Inc.'s ("DNM") motion, filed before the United States Judicial Panel on Multidistrict Litigation (the "Panel"), to transfer the eight below listed actions (or any current or future tag-along or related actions) (collectively the "Actions") to the Southern District of Texas (the "DNM Motion").

I. INTRODUCTION

Plaintiff in the *KCG Action*, Karen's Custom Grooming LLC ("KCG") submits that DNM's Motion should be denied, that it fails to meet the standards for imposing the relief requested, and that the Southern District of Texas is **not** a proper forum to which to transfer, whether for centralization or consolidation, the pre-trial litigation of the Actions. As set forth herein, KCG submits that the Southern District of California is the appropriate forum.

II. EFFORTS IN THE *KCG ACTION* TO COMPLY WITH THE PANEL'S JUNE 10, 2020 DIRECTIVE (ECF No. 4)

In ECF No. 4 ("Text Only Notice")[1], the Panel directed the parties to: ". . . address what steps they have taken to pursue alternatives to centralization (including, but not limited to, engaging in informal coordination of discovery and scheduling, and seeking Section 1404 transfer of one or more of the subject cases)."

The *KCG Action* names Wells Fargo & Company ("WFC") and Wells Fargo Bank, N.A. ("WFB") as defendants (including certain DOE defendants). Prior to the date of filing this opposition, KCG's counsel asked WFC and WFB's counsel ("Defendants' Counsel") for the position of WFC and WFB ("Defendants") on the DNM Motion, its position on a choice of district, and other related issues. *See* Declaration of Kathleen Herkenhoff in support of this opposition brief, filed concurrently herewith ("Herkenhoff Decl."). Until being served this morning via ECF notification with the brief (ECF No. 17) filed by Defendants in opposition to the DNM Motion (and in a call thereafter with one of Defendants' Counsel), KCG had not received information from Defendants' Counsel as to their clients' ultimate position on the DNM Motion. The only information that KCG had received prior to service of ECF No. 17 was Defendants' Counsel's agreement that no party to the *KCG Action* will file any §1404 transfer motions for a particular time period, and that each party agrees to continue WFC and WFB's time to respond to the operative complaint in the *KCG Action* (currently continued through August 4, 2020 pending the scheduled July 30, 2020 hearing on the DNM Motion). *See* Herkenhoff Decl, at Exhibits 1 and 2 (the "KCG Stipulations").[2]

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[1] As used herein, all references to "ECF No. ___" are to the electronic entries in the docket for MDL No. 2954. All emphasis is added and citations omitted, unless otherwise noted.

[2] The KCG Stipulations also alerted the Honorable Chief Judge Larry A. Burns of the Southern District of California that the DNM Motion has been filed with the Panel. It is not evident that the DNM Motion was served on the proposed various district courts presiding over the Actions.

As set forth in the KCG Stipulations, the parties in the *KCG Action* have discussed issues concerning the time schedule for responsive pleadings in certain of the other Actions vis-à-vis agreeing to a schedule in the *KCG Action* for WFC and WFB to respond to the operative complaint. *Id.* KCG's counsel also notified Defendants' Counsel that it will be issuing a document preservation letter. *See* Herkenhoff Decl. While KCG's counsel reserves its right to commence discovery in the *KCG Action*, given the import of ECF No. 4, KCG is, and remains, willing to confer with Defendants' Counsel (or counsel for other plaintiffs at an appropriate time) to consider and evaluate conservation of resources of all parties pending the outcome of the DNM Motion.

III. FACTUAL OVERVIEW OF THE ACTIONS

While all of the Actions relate in some manner to the events surrounding the participation and conduct of WFC and/or WFB in the Payroll Protection Program (the "PPP") that is part of Title I of the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") (Public Law 116-136), and each asserts relief on behalf of a proposed class or classes, there are key factual and legal differences between the Actions that Defendants view (*see* ECF No. 17) as roadblocks to transfer and consolidation. Plaintiff KCG takes the position that transfer and consolidation for some of the consumer actions (as identified below) may be appropriate, but not in the manner sought by the DNM Motion, which seeks transfer to the Southern District of Texas.

As demonstrated below, with regard to actions filed to redress wrongs perpetrated on consumers seeking PPP loans through Defendants, it is the *KCG Action* and potentially one other action (the *Marselian Action* as defined below) that have the broadest class definitions in that they both seek to certify a nationwide class on behalf of **businesses and individuals,** as well as a sub-class of such persons within the State of California.[3] As Defendants indicate, the *KCG Action*

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[3] ECF No. 17, Defendants' response in opposition to the DNM Motion, seeks to characterize the nature of the defined classes in the *KCG Action*. While KCG does not agree with the characterization of the classes in the *KCG Action*, nor the import of Defendants' comparison of those class allegations to those in the *Marselian Action*, Defendants' position does not impact the real issue herein, which is that the DNM Motion should be denied. Similarly, for purposes of this

contains a broad range of facts and claims asserting liability. *See* ECF No. 17 (describing the *KCG Action* as alleging a "multiplicity of purported wrongs.").

The Actions (based on the DNM Motion's Schedule of Actions and attachments thereto) are as follows:

DNM Contracting, Inc. v. Wells Fargo Bank, N.A., Civil Action No. 4:20-cv-01790 (S.D. Tex.) (the "*DNM Action*").

The *DNM Action* is a proposed consumer class action, naming WFB as a defendant, and is asserted only on behalf of a class of all WFB small business customers who utilized WFB for assistance with and processing of their PPP loans administered by the SBA (*i.e*. the Small Business Administration).[4] *See* ECF No. 1-4.

Scherer v. Wells Fargo Bank, N.A., Civil Action No. 4:20-cv-01295 (S.D. Tex.) (the "*Scherer Action*").

The *Scherer Action* is a proposed consumer class action, naming WFB as a defendant, and is asserted only on behalf of a class of: "(a) all individuals or entities who qualify for a loan under the PPP and (b) who were prevented from even applying for a PPP loan by Wells Fargo solely because they do not have a pre-existing business checking and/or debt relationship with Wells Fargo as of February 15, 2020." *See* ECF No. 1-5.

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response to the DNM Motion, KCG will not attempt to address issues asserted by Defendants about the naming of Wells Fargo & Company, any issues of mootness, or similar items. KCG reserves all rights, however, to address these issues, whether in reply, at any oral argument on the DNM Motion, or in the *KCG Action*.

[4] Each of the summary descriptions herein of the defined classes in the listed actions is simply intended to convey certain key facts about the defined classes, not all specific details. For the precise definition of each such class, the operative pleadings are on file with the Panel and where available, the "ECF No. ___" of such operative pleadings is provided for ease of reference. Similarly, where the subject action seeks relief based upon alleged misconduct directed to persons or entities seeking a PPP loan from the Defendants, based on a variety of statutory or common law counts, for ease of reference, these actions are referred to herein as a "consumer" class action.

BSJA, Inc., et al., v. Wells Fargo & Co., Wells Fargo Bank, N.A., et al. Civil Action No. 2:20-cv-03588 (C.D. Cal.) (the "*BSJA" Action*").

The BSJA Action is a consumer class action, naming both WFC and WFB as defendants, but is only asserted on behalf of a class of businesses in the State of California who applied for PPP loans. *See* ECF No. 1-6.

Karen's Custom Grooming LLC v. Wells Fargo & Company, Wells Fargo Bank, National Association, et al., Civil Action No. 3:20-cv-956-LAB-BGS (S.D. Cal.) (the "*KCG Action*").

The *KCG Action* is a consumer class action, naming both WFC and WFB (and various DOES) as defendants, and the action is asserted on behalf of a class of businesses and individuals (defined in the *KCG Action* as "Eligible Recipients"), both in the State of California and nationwide. *See* ECF No. 1-10.

Marselian (d/b/a Bistro Pazzo) v. Wells Fargo & Co., Wells Fargo Bank, N.A., et al., Civil Action No. 4:20-cv-03166-HSG (N.D. Cal.) (the "*Marselian Action*").

The *Marselian Action* is a consumer class action, naming both WFC and WFB as defendants, and is asserted on behalf of a class of both individuals and business, both in the State of California and nationwide. *See* ECF No. 1-9.

Physical Therapy Specialists, P.C. v. Wells Fargo Bank, N.A., Civil Action No. 1:20-cv-01190 (D. Colo.) (the "*Physical Therapy Action").*

The *Physical Therapy Action* is a consumer class action, naming WFB as a defendant, and is asserted only on behalf of account holders incorporated in, or having a principal place of business in, the State of Colorado. *See* ECF No. 1-7.

Ma v. Wells Fargo & Co., Charles W. Scharf, and John R. Shewsberry, Civil Action No. 3:20-cv-03697 (N.D. Cal.) (the "*Ma Action*").

The *Ma Action* is a securities class action pursuant to the Private Securities Litigation Reform Act of 1995, naming only WFC and certain individual defendants. *See* ECF No. 1-11.

Full Compliance, LLC, et al. v. Amerant Bank, N.A., et al., Civil Action No. 1:20-cv-22339 (S.D. Fla.) (the "*Full Compliance Action*").

The *Full Compliance Action* names WFB and a host of other banks as defendants, and it is not based on the same misconduct alleged in the above-described consumer class actions, such as the *KCG Action*. *See* ECF No. 1-8. The *Full Compliance Action* is filed on behalf of "agent[s]" who essentially "facilitated" other businesses in seeking PPP loans, and who now claim they are owed agent fees pursuant to the CARES Act and the PPP.[5]

BAM Navigation, LLC v. Wells Fargo & Co., Wells Fargo Bank, N.A., Civil Action No. 0:20-cv-01345-JTR-ECW (D. Minn.) (the "*BAM Navigation Action*").

The *BAM Navigation Action* is a consumer class action, naming WFC and WFB as defendants, and is asserted on behalf of specific persons or entities in the State of Minnesota who applied for a PPP loan via Defendants. *See* ECF No. 11-3. The *BAM Navigation Action* is not listed on the Schedule of Actions, but was filed thereafter.

IV. CONVENIENCE TO POTENTIAL WITNESSES AND OTHER FACTORS SUPPORT TRANSFER TO A DISTRICT COURT WITHIN CALIFORNIA

DNM cites cases from the Panel holding that differences such as those identified above as to the named defendants, or the defined classes, are not reasons to defeat centralization, and Defendants cite cases to the contrary (*see* ECF No. 17). However, the key issue – that neither factually address – remains the convenience of the witnesses and the location of documents. Cases cited by DNM, however, do highlight this as a key factor in reaching a decision on the appropriate transferee court. *See e.g. In re Radiation Incident at Washington*, 400 F. Supp. 1404, 1407 (J.P.M.L. 1975) (in finding the District of Columbia to be the most suitable transferee forum, the Panel noted that "many of the relevant documents and witnesses are located in the Washington, D.C. metropolitan area . . . ."); *In re Bank of N.Y. Mellon Corp. Foreign Exch. Transactions Litig.*, 857 F. Supp. 2d 1371, 1373 (J.P.M.L. 2012) (in selecting the Southern District of New York, the

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[5] ECF No. 16 indicates that the Panel has ordered that the *Full Compliance Action* is removed from the DNM Motion.

Panel noted that the defendant was headquartered in that district and that the subject operations occurred within the district); *In re Ford Motor Co. Speed Control Deactivation Switch Prods. Liab. Litig.*, 398 F. Supp. 2d 1365, 1367 (J.P.M.L. 2005) (ordering centralization in the Eastern District of Michigan because defendant's headquarters were located within the district and it was "likely" that it would be the source of "relevant documents and witnesses . . . ."). Indeed, in a recent Transfer Order issued by the Panel in *IN RE: Wells Fargo Auto Insurance Marketing and Sales Practices Litigation*, Transfer Order, MDL No. 2797 (J.P.M.L. Oct. 5, 2017) (the "WF Auto Insurance MDL Transfer Order"), the Panel ordered centralization in the Central District of California based on, among other factors, the "convenience of the parties and witnesses", particularly after a representation by Wells Fargo's counsel at the hearing that the "primary witnesses would be found in the Central District of California."

Neither DNM nor Defendants have addressed this issue (the convenience of witnesses or the location of documents) as to the respective transferee districts that they propose (Southern District of Texas or District of Colorado, respectively). As set forth above, in attempts to confer with WFC and WFB prior to filing this Opposition, Plaintiff KCG was not informed as to the position of these key defendants on where the majority of the documents or corporate witnesses would be located. *See* Herkenhoff Decl. Nor do the Defendants address this issue in ECF No. 17, nor was that position provided on the call KCG's counsel received after the filing of ECF No. 17. *Id.*

In the absence of any showing by either DNM or Defendants on the issue, in particular, of the convenience of witnesses or the location of Defendants' corporate documents, the rational conclusion is that a district court located in California should be preferred over courts in either Texas or Colorado, under any scenario, given that WFC and WFB each have principal offices in California.

As outlined above, the two cases that arguably have the broadest alleged relief for businesses and individuals seeking PPP Loans from WFC/WFB are the *KCG Action* and the *Marselian Action*, each of which have plaintiffs with counsel officed within the boundaries of the

Southern District of California, and with clients alleged to be operating in cities within the jurisdiction of the Southern District of California. ECF Nos. 1-9 and 1-10. While plaintiff in the *Marselian Action* filed in the Northern District of California, it is presumably because WFC and WFB maintain principal offices in San Francisco. *See* ECF No. 1-9. Often, however, this issue is not solely determinative, as seen by the Panel's decision in the above cited WF Auto Insurance MDL Transfer Order, and also by positions that even WFB has taken in other (albeit unrelated) class litigation in the past. *See* Herkenhoff Decl., at Exhibits 3 – 4 (proceedings where WFB sought to transfer a class case **from** the Northern District of California **to** the Southern District of California).

Accordingly, pending some affirmative declaration by Defendants submitted to the Panel (and served upon the parties to the Actions) as to the location of key corporate witnesses and documents that may be addressed at a hearing or in further briefing, a district court in California presumptively provides the best forum for litigation of the consumer class claims alleged in the Actions, if transfer is ordered. As to the three California district courts involved herein for the consumer class actions (Northern, Southern, and Central), the Southern District of California is the appropriate choice. Both the plaintiffs and counsel in the *KCG Action* and *Marselian Action* are based in San Diego, California, and the plaintiffs and counsel in the *BSJA Action* are in the Los Angeles area (closer to San Diego than San Francisco).

V. CONCLUSION

For the reasons set forth herein, Plaintiff KCG opposes the DNM Motion, and respectfully requests that the Panel deny the DNM Motion.[6]

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[6] In ECF No. 17, Defendants include the legend "Oral Argument Requested". KCG similarly requests oral argument if the Panel is not inclined to summarily deny the DNM Motion in full. Rule 11.1(c) of the Panel's Rules provides that the Panel shall not consider transfer when a party opposes a transfer motion without first holding a session for the presentation of oral argument, unless certain conditions are met as detailed in Rule 11.1(c)(i)-(ii).

If, however, the Panel is not inclined to deny the DNM Motion in full, Plaintiff KCG respectfully requests that the Panel order that all pending and future actions asserting related or similar claims filed outside the Southern District of California be transferred to the Southern District of California and assigned to Chief Judge Larry A. Burns, and that all related or similar actions be consolidated with the *KCG Action* for coordinated pre-trial proceedings. For reasons set forth herein, KCG's position is that the Southern District of California is the most appropriate District with a pending action that will afford the widest possible relief to the proposed classes, in a judicial forum that has handled many complex class actions involving WFB.[7] In addition, Chief Judge Burns of the Southern District of California, who presides over the *KCG Action*, has served as a district court judge since 2003 (and served as magistrate judge from 1997 to 2003), bringing a wealth of experience to overseeing the Actions.

Respectfully submitted,

Dated: June 24, 2020

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[7] If the Panel is not inclined to select a transferee district in California, KCG requests that the Panel establish a schedule that permits adequate time for the filing of cross-motions to transfer to a district other than the Southern District of Texas or the District of Colorado (as suggested in ECF No. 17).