

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

THEODORE KAGAN, JAMES AVEN,) Case No. 09-5337 SC
FRANCES LEVY, ELAINE SOFFA, JOSEPH)
SOFFA, and ALBERKRACK FAMILY) ORDER DENYING NAMED
LIMITED PARTNERSHIP, on behalf of) DEFENDANTS' MOTION TO
themselves and all others) DISMISS PLAINTIFFS' AMENDED
similarly situated,) COMPLAINT

Plaintiffs,

v.

WACHOVIA SECURITIES, LLC, a North
Carolina limited liability
company; WACHOVIA SECURITIES
FINANCIAL NETWORK, LLC, a
North Carolina limited liability
company; WACHOVIA CAPITAL MARKETS,
LLC, a North Carolina limited
liability company; WELLS
FARGO ADVISORS, LLC, a Delaware
limited liability company; WELLS
FARGO ADVISORS FINANCIAL NETWORK,
LLC, a Delaware limited liability
company; WELLS FARGO SECURITIES,
LLC, a Delaware limited liability
company; WELLS FARGO & COMPANY, a
Delaware corporation; and DOES 1
through 10, inclusive,

Defendants.

I. INTRODUCTION

Now before the Court is a Motion to Dismiss ("Motion") filed
by Defendants Wells Fargo Advisors LLC; Wells Fargo Advisors
Financial Network, LLC; Wells Fargo Securities, LLC; and Wells

1 Fargo & Company (collectively, "Named Defendants"). ECF No. 42.
2 Plaintiffs Theodore Kagan, James Aven, Frances Levy, Elaine Soffa,
3 Joseph Soffa, and the Alberkrack Family Limited Partnership
4 (collectively, "Plaintiffs") filed an Opposition. ECF No. 43.
5 Named Defendants submitted a Reply. ECF No. 44. Having considered
6 the papers submitted by all parties, and for the reasons stated
7 below, the Court DENIES the Motion.

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9 **II. BACKGROUND**

10 The following allegations are taken from Plaintiffs' Amended
11 Complaint. Plaintiffs are beneficial owners of securities issued
12 by Asia Pulp and Paper Company, Ltd. ("APP"). Docket No. 35 ("Am.
13 Compl.") ¶¶ 2-7. Defendants, or their predecessors in interest,
14 are brokerage firms and the nominee or record owners of the APP
15 securities. Id. ¶¶ 1, 8-15, 18, 23. While the nominee or record
16 owners appear on official corporate transfer records, the actual
17 interest in the stock is that of the beneficial owner. Id. ¶ 18.

18 On August 8, 2001, APP was sued in the Southern District of
19 New York for violations of securities law. Id. ¶ 19. On October
20 13, 2005, the District Court preliminarily approved a settlement in
21 the action. The District Court's order included the following
22 provision:

23 The Claims Administrator shall use reasonable
24 efforts to give notice to nominee owners such
25 as brokerage firms and other persons or
26 entities who purchased APP Instruments during
27 the Class Period as record owners but not as
28 beneficial owners. Such nominee purchasers are
directed, within seven (7) days of receipt of
the Notice, to either forward copies of the
Notice and Proof of Claim to their beneficial
owners, or to provide the Claims Administrator
with lists of the names and addresses of the

1 beneficial owners, and the Claims Administrator
2 is ordered to send the Notice and Proof of
3 Claim promptly to such identified beneficial
4 owners.

5 Id. ¶ 21. The Notice of Pendency of Class Action and Proposed
6 Settlement, dated November 30, 2005, contains a similar
7 requirement. Id. ¶ 22. Plaintiffs allege that Defendants, or
8 their predecessors in interest, failed to forward copies of the
9 Notice and Proof of Claim to the beneficial owners of APP
10 securities, and failed to provide the Claims Administrator with
11 lists of the names and addresses of the beneficial owners. Id.
12 ¶¶ 3, 24. Plaintiffs allege that if they had been notified, they
13 would have submitted claims and obtained a recovery. Id. ¶¶ 25-36.
14 Plaintiffs have filed a putative class-action lawsuit against
15 Defendants.

16 On July 7, 2010, the Court dismissed with leave to amend
17 Plaintiffs' claims for negligence, breach of contract, and breach
18 of the implied covenant of good faith and fair dealing. ECF No. 32
19 ("Order Granting in Part and Denying in Part Defs.' Mot. to
20 Dismiss"). Plaintiffs' Amended Complaint alleges negligence,
21 breach of fiduciary duty, and breach of contract. Am. Compl.
22 ¶¶ 47-62.

23 **III. LEGAL STANDARD**

24 A motion to dismiss under Federal Rule of Civil Procedure
25 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.
26 Block, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal can be based
27 on the lack of a cognizable legal theory or the absence of
28 sufficient facts alleged under a cognizable legal theory.

1 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.
2 1990). Allegations of material fact are taken as true and
3 construed in the light most favorable to the nonmoving party.
4 Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336, 337-38 (9th Cir.
5 1996). "When there are well-pleaded factual allegations, a court
6 should assume their veracity and then determine whether they
7 plausibly give rise to an entitlement to relief." Ashcroft v.
8 Iqbal, 129 S.Ct. 1937, 1950 (2009). A motion to dismiss should be
9 granted if the plaintiff fails to proffer "enough facts to . . .
10 nudge[] their claims across the line from conceivable to
11 plausible." Bell Atl. v. Twombly, 550 U.S. 544, 570 (2007).

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13 **IV. DISCUSSION**

14 In their Reply brief, Named Defendants withdraw their motion
15 to dismiss insofar as it sought dismissal of Plaintiffs' negligence
16 claim on statute of limitations grounds. Reply at 1 n.1.
17 Therefore the only issue for the Court to decide is whether the
18 Amended Complaint states a claim for breach of contract.

19 The Amended Complaint alleges that Plaintiffs and the putative
20 class members "entered into a contract with Defendants for
21 brokerage services." Am. Compl. ¶ 59. Plaintiffs allege that:

22 One of the terms of the brokerage services
23 agreement was that Defendants would provide
24 Plaintiffs and the Class with all relevant
25 information and communications they receive
26 pertaining to Plaintiffs' and the Class'
27 securities, including those held in Defendants'
28 name for the benefit of Plaintiffs and the
Class.

27 Id. ¶ 60. The Amended Complaint therefore alleges that a specific
28 term of the brokerage services agreement between Plaintiffs and

1 Defendants required Defendants to provide information pertaining to
2 securities to Plaintiffs, and that Defendants breached this
3 obligation by failing to notify Plaintiffs of the APP settlement.
4 Accepting these factual allegations as true, they are sufficient to
5 nudge Plaintiffs' breach of contract claim across the line from
6 conceivable to plausible. The Court DENIES the Named Defendants'
7 motion to dismiss the third cause of action in the Amended
8 Complaint.

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10 **V. CONCLUSION**

11 For the foregoing reasons, the Court DENIES the Named
12 Defendants' Motion to Dismiss.

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14 IT IS SO ORDERED.

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16 Dated: November 23, 2010

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UNITED STATES DISTRICT JUDGE

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