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

BRENT BALKEMA, as Trustee for the	)	Case No. 11-412 SC
Jesse J. Balkema Rev Trust, on	)	
behalf of himself and all others	)	ORDER DENYING DEFENDANTS'
similarly situated,	)	MOTION TO DISMISS AND
	)	GRANTING PLAINTIFF'S MOTION
Plaintiff,	)	<u>TO CONSOLIDATE</u>
	)	
v.	)	
	)	
WACHOVIA SECURITIES, LLC, a North	)	
Carolina limited liability	)	
company; WACHOVIA SECURITIES	)	
FINANCIAL NETWORK, LLC, a North	)	
Carolina limited liability	)	
company; WELLS FARGO ADVISORS,	)	
LLC, a Delaware limited liability	)	
company; and WELLS FARGO	)	
SECURITIES FINANCIAL NETWORK, LLC,	)	
a Delaware limited liability	)	
company,	)	
	)	
Defendants.	)	

**I. INTRODUCTION**

Before the Court is a Motion to Dismiss filed by Defendants Wells Fargo Advisors, LLC (sued under this name and under the name "Wachovia Securities, LLC") and Wells Fargo Advisors Financial Network, LLC (sued under this name and under the name "Wachovia Securities Financial Network, LLC") (collectively, "Defendants"). ECF No. 58 ("Mot."). Plaintiff Brent Balkema ("Plaintiff") filed an Opposition, and Defendants filed a Reply. ECF No. 68 ("Opp'n"),

1 69 ("Reply"). Also before the Court is Plaintiff's motion to  
2 consolidate this case with another action before this Court, Kagan  
3 v. Wachovia Securities, LLC, No. 09-5337 (N.D. Cal., filed Nov. 10,  
4 2009) ("Kagan"). ECF No. 66 ("Pl.'s Mot."). Defendants argue that  
5 their Motion to Dismiss, if granted, would render Plaintiff's  
6 Motion moot, but do not oppose Plaintiff's Motion in the event  
7 their Motion to Dismiss is denied. ECF No. 67. For the following  
8 reasons, the Court DENIES Defendants' Motion to Dismiss, GRANTS  
9 Plaintiff's Motion to Consolidate, and CONSOLIDATES this action  
10 with Kagan.

11  
12 **II. BACKGROUND**

13 As it must on a Federal Rule of Civil Procedure 12(b)(6)  
14 motion, the Court assumes the truth of the well-pleaded facts in  
15 Plaintiff's Complaint. Plaintiff maintained an account with  
16 "Wachovia Securities," which he claims is "a trade name that was  
17 owned at varying times by each of the four Defendants." ECF No. 1  
18 ("Compl.") ¶ 6. In 1998, Plaintiff purchased securities issued by  
19 Asia Pulp and Paper Company ("APP") through his account with  
20 Wachovia Securities. Id. ¶ 21. Plaintiff alleges that it is a  
21 custom in the industry that when a client buys securities through a  
22 brokerage firm, the firm holds the securities in its own name  
23 (referred to as "street name"), rather than in the client's name.  
24 Id. ¶ 22. Under this arrangement, the client is the beneficial  
25 owner of the securities and the broker is the record owner of the  
26 securities. Id. Plaintiff alleges that this practice serves "as  
27 an accommodation to the brokerage firm, in order to allow  
28 securities to be easily transferred between parties. By holding

1 the securities in street name, the brokerage firm can avoid delays  
2 associated with the transfer of ownership and quickly settle  
3 trades." Id. ¶ 23. Plaintiff alleges that under this arrangement,  
4 the broker has the responsibility to forward to the client  
5 "information related to that security, such as proxy statements or  
6 Class Action Notices." Id. ¶ 24.

7 In 2001, APP was sued in the Southern District of New York for  
8 violation of securities law. In Re Asia Pulp & Paper Sec. Lit.,  
9 No. 01-CV-7451 (filed Aug. 8, 2001) ("APP"). A settlement was  
10 reached around November 30, 2005; under the settlement, APP agreed  
11 to pay around \$46 million to investors who purchased certain APP  
12 securities during the period August 28, 1998 to April 4, 2001.  
13 Compl. ¶¶ 19, 20. Plaintiff alleges that because he purchased the  
14 APP securities through Wachovia Securities on September 11, 1998,  
15 he is a member of the settlement class. Id. ¶ 21.

16 Plaintiff alleges that the APP court ordered record owners,  
17 such as Defendants, to provide a copy of the notice of class action  
18 settlement to the beneficial owners. Id. ¶ 25. Plaintiff alleges  
19 that Defendants failed to provide such notice, and as a result,  
20 Plaintiff was denied the opportunity to benefit from the  
21 settlement. Id. ¶ 26. Plaintiff brings three causes of action  
22 against Defendants: breach of contract, negligence, and breach of  
23 fiduciary duty. See id. As to the breach of contract claim,  
24 Plaintiff alleges that "[b]y titling securities belonging to Named  
25 Plaintiff and Class Members in street name, Wachovia agrees to  
26 provide Named Plaintiff and Class Members with all relevant  
27 communications pertaining to those securities." Id. ¶ 28. In  
28 pleading its negligence claim, Plaintiff alleges that Defendants

1 were "under a duty to either forward the Notice to Named Plaintiff  
2 and Class Members" or provide their contact information to the  
3 settlement administrator, Analytics, Inc., and alleges that  
4 Defendants breached this duty. Id. ¶¶ 31-34. As to his breach of  
5 fiduciary duty claim, Plaintiff alleges that Defendants owed  
6 Plaintiff a fiduciary duty to forward communications concerning  
7 securities held in street name, and breached this duty by failing  
8 to forward the notice to Plaintiff. Id. ¶ 35-37.

9 Plaintiff filed suit in the District Court for the Southern  
10 District of Indiana on November 23, 2009. See Compl. On January  
11 25, 2011, Plaintiff filed a motion to transfer the case to the  
12 Northern District of California, citing Kagan, an earlier-filed  
13 action which Plaintiff claims to be a nearly identical suit "based  
14 upon the same facts which gave rise to Mr. Balkema's claim." ECF  
15 No. 41. at 1-2. Defendants did not oppose the Motion, and the  
16 district court in Indiana ordered the case transferred to this  
17 Court. ECF No. 42.

18 Now Defendants move to dismiss the action. Defendants admit  
19 that the arguments they raise in their Motion were made in a  
20 similar motion filed in Kagan and were subsequently rejected by the  
21 Court. They argue that whereas the Court applied California law in  
22 Kagan, Indiana law should apply to this action, and that under  
23 Indiana law, Plaintiff's Complaint is time-barred. Defendants  
24 additionally argue that Plaintiff's breach of fiduciary duty claim  
25 should be dismissed because "Plaintiff pleads no facts giving rise  
26 to a fiduciary relationship" and that the breach-of-contract claim  
27 should be dismissed because "Plaintiff does not plead sufficient  
28 factual detail concerning the alleged contract."

1 **III. LEGAL STANDARD**

2 A motion to dismiss under Federal Rule of Civil Procedure  
3 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.  
4 Block, 250 F.3d 729, 732 (9th Cir. 2001). Dismissal can be based  
5 on the lack of a cognizable legal theory or the absence of  
6 sufficient facts alleged under a cognizable legal theory.  
7 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.  
8 1990). "When there are well-pleaded factual allegations, a court  
9 should assume their veracity and then determine whether they  
10 plausibly give rise to an entitlement to relief." Ashcroft v.  
11 Iqbal, 129 S. Ct. 1937, 1950 (2009). However, "the tenet that a  
12 court must accept as true all of the allegations contained in a  
13 complaint is inapplicable to legal conclusions. Threadbare  
14 recitals of the elements of a cause of action, supported by mere  
15 conclusory statements, do not suffice." Iqbal, 129 S. Ct. at 1950  
16 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). The  
17 allegations made in a complaint must be both "sufficiently detailed  
18 to give fair notice to the opposing party of the nature of the  
19 claim so that the party may effectively defend against it" and  
20 sufficiently plausible such that "it is not unfair to require the  
21 opposing party to be subjected to the expense of discovery." Starr  
22 v. Baca, 633 F.3d 1191, 1204 (9th Cir. 2011).

23  
24 **IV. DISCUSSION**

25 Defendants admit that Plaintiff's Complaint is "substantively  
26 similar" to Kagan, and additionally admit that Kagan survived a  
27 motion to dismiss raising similar statute-of-limitations and Rule  
28 12(b)(6) arguments. Mot at. 1. Defendants argue that whereas the

1 Court's order denying the Kagan motion to dismiss applied  
2 California law, the Court should apply Indiana law to this action,  
3 citing Ferens v. John Deere Co., 494 U.S. 516, 519 (1990) (holding  
4 that when a case is transferred on a plaintiff's motion under 28  
5 U.S.C. § 1404(a), the transferee forum should apply the law of the  
6 transferor court). Defendants allege that under Indiana law,  
7 Plaintiff's claims are time-barred. Id. Plaintiff disputes that  
8 Indiana law applies, writing: "Named Plaintiff believes the Court  
9 will choose to apply either the law of California or the state  
10 specified in the choice of law provision, if any, contained in the  
11 parties' brokerage agreement, a copy of which will be obtained in  
12 discovery." Opp'n at 2 n.2. Plaintiff additionally alleges that  
13 even if the Court determines that Indiana law applies, Defendants'  
14 Motion should be denied. Id.

15 Plaintiff cites no law to challenge the applicability of  
16 Ferens. Nor does he cite any law to support his proposition that  
17 California enforces choice-of-law provisions in brokerage  
18 agreements. Therefore, for the purposes of ruling on this Motion,  
19 the Court assumes Indiana law, rather than California law, applies.

20 In Indiana, "[a] cause of action accrues, and the statute of  
21 limitations begins to run, when the plaintiff knew or in the  
22 exercise of ordinary diligence could have discovered that an injury  
23 had been sustained as a result of the tortious act of another."  
24 Del Vecchio v. Consecro, Inc., 788 N.E. 2d 446, 449 (Ind. Ct. App.  
25 2003). Defendants allege that Plaintiff had notice of the  
26 settlement by February 27, 2006, when notice of the settlement was  
27 published in the Wall Street Journal and the Financial Times. Mot.  
28 at 8. Defendants argue that Plaintiffs could have "discovered,"

1 through ordinary diligence, the alleged tortious conduct." Id.

2 Plaintiff argues that notice by publication alone is not  
3 enough to provide him with notice of the settlement; Plaintiff  
4 alleges that the APP court approved an "entire notice scheme,  
5 including the requirement that the brokerage firms holding the  
6 securities in street name make arrangements for beneficial owners  
7 to receive direct notice of the settlement." Opp'n at 5-6.

8 The Court agrees with Plaintiff. Plaintiff alleges that  
9 Defendants failed to provide Plaintiff with direct notice of the  
10 settlement, and this forms the basis of his claims. That it is  
11 unchallenged that notice of the settlement was published in the  
12 Wall Street Journal and the Financial Times does not establish that  
13 Plaintiff could have discovered a sustained injury as a result of  
14 Defendants. As such, the Court finds that the issue of when  
15 Plaintiff learned of the alleged injury is a factual matter not  
16 appropriate for determination on this Motion to Dismiss.

17 Defendants additionally argue that Plaintiff's breach of  
18 fiduciary duty claim fails because the Complaint pleads no facts  
19 giving rise to a fiduciary relationship. Mot. at 9. Defendants  
20 allege that "Indiana courts 'have never held' that a 'special  
21 fiduciary trust' exists between a broker and its client." Id.  
22 (quoting Dolatowski v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,  
23 808 N.E. 2d. 676, 681-82 (Ind. Ct. App. 2004)). Defendants allege  
24 that a fiduciary relationship between a broker and client exists  
25 "only in specific factual circumstances." Mot. at 9.

26 Plaintiff responds that he has pleaded sufficient facts to  
27 establish the existence of a fiduciary relationship based on the  
28 "simple proposition that one who holds title to property for the

1 benefit of another owes a fiduciary duty to the beneficial owner,  
2 as a trustee." Opp'n at 7.

3 The Court agrees with Plaintiff; Plaintiff has adequately  
4 pleaded a claim for breach of fiduciary duty given the allegation  
5 that as the record owner of Plaintiff's securities, Defendants held  
6 title to Plaintiff's securities for the benefit of Plaintiff.

7 Finally, Defendants argue that Plaintiff's breach of contract  
8 claim fails because Plaintiff does not plead sufficient factual  
9 detail concerning the alleged contract. Mot. at 10. Defendants  
10 argue that "Plaintiff's conclusory allegation of an implied  
11 contract . . . is not sufficient to state a claim for breach of  
12 contract." Id. Defendants claim that under Indiana law, to  
13 establish that an implied contract existed between the parties, a  
14 plaintiff "must show that the parties' actions evidenced a mutual  
15 agreement and an intent to promise." Id. (citing Ahuja v. Lynco  
16 Ltd. Med. Research, 675 N.E. 2d 704, 709 (Ind. Ct. App. 1996)).  
17 Defendants allege that to state a claim under Rule 12(b)(6),  
18 Plaintiff must plead (1) what promises defendant made to plaintiff,  
19 (2) how these promises were communicated, (3) what plaintiff  
20 promised in return, or (4) how these promises created an implied  
21 contract. Mot. at 10.

22 Plaintiff counters that he has properly pleaded "the grounds  
23 upon which the contract was formed, and the nature of the promises  
24 made." Opp'n at 9. In support, Plaintiff cites to his Complaint:  
25 "By titling securities belonging to Named Plaintiff and Class  
26 Members in street name, Wachovia agrees to provide Named Plaintiff  
27 and Class Members with all relevant communications pertaining to  
28 those securities." Compl. ¶ 28.

1 The Court agrees with Plaintiff. Plaintiff has identified a  
2 specific bargain between Plaintiff and Defendants giving rise to a  
3 claim for breach of an implied contract: Defendants titled  
4 Plaintiff's securities in street name "as an accommodation to the  
5 brokerage firm, in order to allow securities to be easily  
6 transferred between parties." Opp'n at 9. In exchange, Defendants  
7 agreed to provide Plaintiff with all relevant communications  
8 pertaining to these securities. As such, the Court finds  
9 Plaintiff's breach-of-contract claim to be adequately pleaded.

10

11 **V. CONCLUSION**

12 For the foregoing reasons, the Court DENIES the Motion to  
13 Dismiss brought by Defendants Wells Fargo Advisors, LLC (sued under  
14 this name and under the name "Wachovia Securities, LLC") and Wells  
15 Fargo Advisors Financial Network, LLC (sued under this name and  
16 under the name "Wachovia Securities Financial Network, LLC"). The  
17 Court GRANTS Plaintiff Brent Balkema's unopposed motion to  
18 consolidate, and CONSOLIDATES this action with Kagan v. Wachovia  
19 Securities, LLC, No. 09-5337 (N.D. Cal., filed Nov. 10, 2009),  
20 pursuant to Rule 42(a) of the Federal Rules of Civil Procedure.

21

22 IT IS SO ORDERED.

23

24 Dated: July 5, 2011

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UNITED STATES DISTRICT JUDGE

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